



The
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Institute

Briefing Paper 34

Britain prepares for BREXIT

The role of Public Consultation

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Rhion Jones

The Consultation Institute
Centre of Excellence
Baystrait House
15 Station Road
Biggleswade
Bedfordshire
SG19 8AL

Abstract

This paper has been written for policy-makers and officials working in the civil service. It will also be relevant to politicians, academics and public engagement professionals working in the public, private or voluntary/community sectors.

It considers how public and/or stakeholder consultation can work in the febrile policy environment that follows the UK's decision to leave the European Union. It argues that conventional methods of policy-making may not work in this changed environment and that the conventional model of consultation and the well-developed legal rules underpinning it may need to be modified under certain circumstances. It illustrates four scenarios where Ministers, Government departments, devolved administrations and other public bodies facing accelerated policy-making timelines might need to do something different. These are thought-starters and the Consultation Institute intends leading the debate on this important subject.

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About the Consultation Institute

The Consultation Institute is a not-for-profit, *best practice* membership body, founded in 2003 and focused on promoting high-quality public and stakeholder consultation in the public, private and voluntary sectors. It seeks to identify and disseminate thought leadership on public dialogue, engagement and participation in the UK and beyond

To discuss this paper and the other materials available, please contact
Remmert Keijzer on 01767 31850,
email remmertk@consultationinstitute.org
or visit the webpage www.consultationinstitute.org

Executive Summary

Government departments based in Whitehall, as well as in the devolved Administrations need to engage in rapid policy-making to support BREXIT-related initiatives. They have to cope with a ‘perfect storm’ of expectations and extraneous factors that will disrupt the processes that have developed in less stressful times.

This paper explores the reasons why public and stakeholder consultation practices in particular may need to be looked at. It highlights the rapidly-evolving law of consultation as an issue which needs to be taken into account and notes other aspects of current consultation practice that may not quite meet the urgency and the complexity of the Government’s forthcoming challenges on public engagement.

In short, if conventional consultation practices are followed, there are big risks – some of which can be minimised.

In seeking to identify ways to address this problem, the Consultation Institute makes suggestions for:

- Calls for Evidence & Consultation hearings
- Accelerated consultations
- Narrower consultations
- Participative consultations

None of these are mutually exclusive and the Government’s own Open Policy initiative and the Policy Hub have many of the tools and techniques already available.

Where the Government departs from the conventional consultation methodology, there should be independent verification that it is still following best practice. This will help deal with criticisms from disappointed stakeholders.

Finally, there is a suggestion that maybe those Departments most closely associated with BREXIt might announce a formal public engagement/consultation programme to help outline its approach to the forthcoming challenge.

Key Messages

- Preparing for BREXIT will dominate the policymaking agenda
- It affects Scotland, England and Wales as well as Whitehall departments
- Consultation is a given, but how to do it in this environment is the theme of this

Section One: Introduction - everything changes

Theresa May's new administration faces formidable policy-making challenges. It is widely accepted that the Whitehall machine may have been under-prepared for BREXIT, but with a new Government in place, there is no reason why the summer months cannot be used to good effect to prepare the UK (including its devolved administrations) for the negotiations that lie ahead.

It would be a mistake to see those forthcoming negotiations as the only or even the main driver of policy-making. Leaving the European Union affects virtually every aspect of public policy from higher education to air quality, from farming to broadcasting and copyright. Manifesto commitments from 2105 are now of limited value as policy anchors so in all Government departments, and also in Scotland, Wales and Northern Ireland, the legal and administrative implications of the Referendum are already being assessed.

This short paper addresses one specific question. It assumes that there is no great need to make the case for public consultation. It is now well-established as a key ingredient in policy-making, and Government departments are thoroughly familiar with the Cabinet Office Principles – even though the standard of consultations can vary. Widespread use of *Open Policy Making* techniques has made a big difference in some departments, but there are frequent debates as to *whether* and *when* a formal consultation is needed.

The problem is *how* to consult and how to ensure consultations are helpful and meaningful. This paper is brief – seeking to analyse the problem and suggest ways forward rather than provide a definitive solution. It forms part of on-going work the Consultation Institute will undertake over the summer. In **Section Two**, we attempt a brief overview of the policy-making landscape and how BREXIT immediately changes it. In **Section Three**, we identify the problems inherent in the conventional approach to consultation, and in **Section Four**, we outline some ideas of what can be done differently. In **Section Five**, we offer some conclusions and suggest some ways forward.

How can we conduct a
meaningful consultation in
the current **BREXIT**
environment?

Key Messages

- A perfect storm of new or aggravated factors
- They include, post-Referendum a greater appetite for involvement by parts of the public
- Policy topics due for review contain many 'wicked issues' which carry hold political

Section Two: what's different?

Policy-making happens all the time, but usually in a more organised way than outsiders realise. For one thing the political timetable creates its own priorities, and of course, Parliament can only process a certain quantity of legislation. No matter how much media focus there may be on the BREXIT department's negotiations-related agenda, what horrifies experienced officials is the sheer amount of indigenous UK legislation that may be need to be re-engineered from virtually every department of state over the coming years.

The traditional policy-making cycle would have been seriously stretched by the volume and complexity of what lies ahead, but new techniques, broadly called *agile policy making* provide greater flexibility, particularly in the use of digital options and using more ethnographic research. The old policy cycle has been accelerating for years. We are about to see it go into overdrive. Much of the traditional policy-making manual will have to be jettisoned for good.

All this is deeply troubling because undertaking policy-making in the old-fashioned cautious way was an attempt to limit risks and avoid mistakes. Anyone who has read King and Crewe's book *The Blunders of our Governments* will be alive to the dangers of exposing Ministers to serious career-damaging misfortunes or impacting key stakeholders heavily by accident. The next months and years will be particularly challenging because a perfect storm of factors make the policy-making process quite unlike anything that has taken place before.

Here is just a selection:

- There will be a strong emphasis on **healing the divisions** that have emerged in recent months. It will mean bending over backwards to seek consensual solutions wherever possible. Stakeholder interests will need to be accommodated as much as possible; others will need educating as to the harsh or benign implications of a new world order for their particular sectors or specialism
- For the negotiations themselves, the Labour and Liberal Democrat parties have already signalled that they feel a need for a **bi-partisan approach** on some key issues. This is probably sensible and would be welcomed by EU negotiators. Ditto the UK devolved administrations – and their political parties. All this means a degree of consultation – but how transparent can they be?

- We are suddenly living in an environment of considerable scepticism for **the culture of the 'experts'**. The Referendum result is believed by many to be a revolt against evidence with 'gut feel' determining people's choices more than facts or figures. The long-term mantra of *evidence-based policy-making* may be unfashionable for a time.
- Expectations have changed. Many who voted LEAVE are suddenly enthusiastic about the ability of direct democracy to deliver a policy outcome they favoured. Those on the REMAIN side will believe the opposite. Both will want **more involvement** as they regard previous political decision-making as having failed at one level or another. In short, more people will want more of a say about more issues. **... more people will want more of a say about more issues.**
- Policies will need to be developed so as to be simultaneously usable in the very short-term (BREXIT talks), the medium-term (UK legislation through Parliament) and long-term. This might mean a sequence of consultations as scope changes and the target audiences will be different. The **speed** with which early decisions have to be taken may significantly compromise the availability of wider options later on, so managing the knock-on effect will be difficult.
- Mistrust of the 'establishment' and of politics in general and an aggressive social media culture make it impossible to hide parts of the policy-making activity in quiet corners of the bureaucracy. Full transparency will be demanded more often than not.
- Central Government (and also Edinburgh, Cardiff and Belfast) has **limited capacity** for policy-making and will be stretched beyond what's available. Reports indicate that for trade talks, there will be immediate recruitment of specialists from the private sector and it is possible that management consultancies or Think Tanks will offer their services to manage specific policy-making initiatives. It will be tempting for the Government to accept, but it is a risk as there could be a public reaction; disappointed stakeholders who want alternative policies would lose no time in exposing bias or worse were there to be too much sub-contracting of this nature.

Policy clusters identified in HoC Briefing Paper 07213

4. Trade relations
5. Other economic impacts
6. Employment
7. Agriculture
8. Common Fisheries Policy
9. Environment
10. Energy & climate change
11. International development
12. Transport
13. Immigration
14. Human Rights
15. Social Security
16. Pensions
17. Health & medicines regulation
18. Higher education
19. Culture, copyright & broadcasting
20. Consumer policy
21. Foreign & defence policy

Finally, there is the range of policy-making topics, where much depends upon the way in which they are defined and clustered. Here big-time politics matter, as Cabinet Ministers may be appointed to lead on specific themes. Such are the overlaps and inter-dependencies of one department on another or one policy on another that it is impossible to canvass changes to one without considering the impact on the other. Think immigration control and university finances. Or think hospital staffing levels and employment protection regulations. Whilst this is always true, it is the scale and speed of policy reviews that will add complexity.

In February, the House of Commons Library published an authoritative paper called *Exiting the EU; impact in key UK policy areas*, and identified a range of topic areas. Beneath the top-level list (*left*) there lie a host of *wicked issues*, many of which smart politicians have avoided for years. In the aftermath of BREXIT, it will

be impossible to escape some of these, no matter what might be the political risks. Ministers will need luck as well as fine judgement!

Given this environment, some traditional practices will need to be modified – or even abandoned altogether; policy-making will need to adapt to highly accelerated process. Consultation is the one activity it will be impossible to forego completely. Demand for it will increase, and the cost of failing to take account of stakeholder or public views will never have been higher.

Section Three: the problems of current consultation practice

Key Messages

- The law of consultation is now complex
- Need to watch legitimate expectations as well as the Gunning Principles
- Large response numbers delay outcome announcements
- Many current practices and timescales may have to change

Public consultations have improved vastly in the years since the Consultation Institute was formed in 2003. There are, however still far too many rogue consultations, and the High Court has seen a large number of judicial reviews as public bodies have had to defend their actions. Gradually, the *Law of consultation* is being better understood and the most recent version of the Government consultation principles are written to be compatible with the common law rules that evolved since 1985.

There are two aspects of the law that can normally prove troublesome for Government departments. Firstly, the *doctrine of legitimate expectation* has been used extensively in the Courts to demand that public bodies undertake a proper consultation. Broadly it covers situations where a specific commitment had been made, but has also included occasions where the logic of a stakeholder relationship has made it unfair to make changes without consultation. Michael Gove, when Secretary of State for Education fell foul of this when cancelling the *Building Schools for the Future* programme. Moreover, if people are to be deprived of a benefit they currently enjoy, the Courts have ruled that they should be consulted first.

The second issue is a set of four rules known as the **Gunning Principles** and applied universally. They are deceptively straightforward but hundreds of public bodies – including Government departments make heavy weather of them every year. Observing them to the letter will pose a tremendous challenge for officials. This is why:

The Gunning Principles

- summarised

To be lawful a consultation needs to:

- | | |
|----------------------|---|
| Gunning One | Be when proposals are still at a formative stage |
| Gunning Two | Publish sufficient information so that <i>consultees</i> can give proposals ‘intelligent consideration’ |
| Gunning Three | Provide adequate time for <i>Consultees</i> to consider the proposals |
| Gunning Four | Ensure that consultation outputs are Conscientiously considered |

- **Gunning One** is all about *pre-determination*. Evidence that the *consultor* has already made up its mind can prove fatal for the legality of the consultation so great care will need to be taken to avoid policies looking as if they are a *fait accompli*.
- **Gunning Two** is difficult at the best of times as the degree of detail required can involve *consultors* in extensive effort. It also covers the requirement to satisfy the 2010 Equality Act as the impact of proposals need to be understood before a decision-maker has to prove it had 'due regard' to *the Public Sector Equality Duty*. Clearly resource levels will make it difficult to satisfy this rule.
- **Gunning Three** mentions time, but in reality it is about giving those with an interest in the subject the fullest possible opportunity to take part in the dialogue. So one can relax the traditional 12-week rule provided the opportunity is sufficient. Over-reliance on online consultation has, however already lost one Council a Judicial Review so technology cannot of itself solve this one
- **Gunning Four** may become the most demanding as it obliges the *consultor* to demonstrate how the consultation has influenced its thinking and its conclusions. When there are strongly competing viewpoints on matters of passionate belief, this will require careful handling.

The Government in Westminster – and those in the devolved administrations – publish large numbers of consultations every week. A number of these are technical in nature, origin and impact. But others affect people's lives. In general, they attract very small numbers of respondents, with exceptions for high-profile issues such as Gay Marriage, High-Speed Two or Airport runways. The Department of Media, Culture & Sport's consultation on the future of the BBC attracted 190,000 responses.

The task of analysis and interpretation of responses can take a long time, and until recently it could take months before the departments published the data. At times, they would wait until a Minister was prepared to announce a formal outcome, with very large intervals indeed between consultation and decision if the issue involved delicate negotiation with other departments or was subject to other events. Many decisions are repeatedly postponed or abandoned altogether. In the coming period with many parallel consultations running at once there will need to be some synchronisation of publishing outputs and outcomes – and inter-dependencies

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Consultations are an excellent way to understand who feels strongly about what aspects of policy. They are far less useful in recording how much support a particular point of view enjoys. As a result, the most useful part of consultation output for policy-makers is the *'qualitative'* analysis - understanding people's opinions and why they have formed them. Sadly, there is, in the media and elsewhere an unhealthy preoccupation with *'quantitative'* aspects because the world likes numbers, and it seems clean and tidy just to say that "57% of the respondents said Yes to Question 5 ...".

Knowing the views of the most articulate and motivated of the stakeholder base is useful, but policy-makers have a need to consider the views of a broader community of affected people. They also need to pay particular attention to *hard-to-reach* or *seldom-heard* (the better term) communities. Searching for more and more evidence is time-consuming and needs a budget. Many Government consultations have in recent years been done with little or no budget, and Ministers have been happy with small samples provided they can claim to have followed *best practice* and consulted. With far more uncertainties and Ministers themselves maybe with more open minds in the BREXIT environment, getting a reasonable level of participation may become important.

For this and other reasons, business-as-usual public consultations will become less prevalent. Of course there will be situations and policy areas largely unaffected by leaving the EU and the full-on conventional consultation model will need to be followed in each of these cases. Other public bodies including local government and the NHS will, in any case have no need to change its working practices and will continue to consult the public very much as it does so today.

For central Government and the devolved administrations however, there needs to be some other ways to consult in the coming months and years. Are there ways to do this?

Key Messages

- * Apart from avoiding formal consultation there are other strategies that departments can adopt
- * Accelerated and Narrower consultations are possible; also participatory models
- * Beware being seen to take short-cuts
- * Therefore seek independent QA for more flexible models
- * A BREXIT consultation programme?

Section Four: what can we do differently?

The law of consultation cannot be changed just because the Government faces the challenges of leaving the EU. Neither can we expect the public's appetite for involvement to evaporate in the wake of the Referendum. What therefore can be done?

A simple but problematic option is to '*engage*' fast and furiously but to avoid using the word '*consultation*'. There are occasions when this might indeed be appropriate, but only when the main aim is to build and develop relationships rather than to seek out views in order to influence or otherwise improve your policy proposals. Others have attempted this *sleight-of-hand* and lost Court cases. The use of the term '*consultation*' is not definitive. If the Judge believes that the process amounted to a dialogue in order to influence a policy or an activity, then it will apply the rules of consultation. In addition, it is extremely difficult for a politician to explain to opponents and the public why the department does not wish to hold a consultation. MPs do not, as a rule rise in the House of Commons to complain "*My constituents have not been engaged with!*" What we hear is "*My constituents have not been consulted*". In short, if a consultation is expected, then there will have to be one.

A wide variety of scenarios are likely in the coming months, and depending upon the circumstances, here are some of the alternative consultation/engagement models that Government departments or other relevant public bodies might consider:

Doing things differently

- Make better use of pre-consultation *Issues papers* to identify key stakeholders
- Adopt co-design techniques to streamline options development
- Reach out to affected groups or organisations
- Abandon the 12 week rule. Hold consultations for as little as is necessary to provide the required opportunity to participate
- Place the emphasis firmly on *qualitative* rather than *quantitative* data
- Build machinery for continuous dialogue with key stakeholders

1. Make Calls for Evidence in order to develop alternative options.

Best practice pre-consultation these days involves preparing Issues Papers describing the problems faced by the consultor and inviting people *to indicate what you would like us to consider when we develop options for consultation*. This can work well where there is a known stakeholder base as in many industrial or business activity sector. You can even ask them to register for participation in the consultation. Where you just ask for evidence – you have less need for a well-researched paper. Follow the model in use by Parliamentary Select Committees. Upon receipt of evidence, and if your issue requires maximum transparency, you might consider a **Consultation Hearing**. The Consultation Institute has been developing ideas for such mechanisms and a separate Briefing Paper is available detailing how these can work. The advantage of this method is that it can speed up the period preparing for a consultation paper. The downside is that you still need a consultation process to consider the choices you can make.

2. An accelerated consultation

This is about doing a consultation quicker. It will not be suitable for policy issues that are of widespread general interest but may work for specialised issues. Pre-registration by those wishing to take part is desirable and respondents must be able to make their responses online. Instead of the 12 weeks normally allowed, these consultations could normally last four weeks, but need to be structured so that no organisation or individual who could reasonably claim to be a key stakeholder is denied a realistic opportunity to take part. One version of this could include a deliberative process whereby a selected group of stakeholders are invited to a deliberative event (or process) to evaluate consultation responses and help the *consultor* move towards a decision. Fine judgement will be required as to the extent to which the full rigour of *Green Book* and *Magenta Book* Guidance can be followed. Current versions of both Manuals date back to 2011, but note that much of their most time-consuming process elements are pre-consultation. They also lean towards a preferred single option which is these days a more subject to legal challenge.

The main disadvantage of using an accelerated procedure is that opponents of the Government or just opponents of a particular policy choice will be deeply suspicious that the alterations to normal conventional consultations destroy its integrity. To combat such feelings, one approach is for the process to be certified as meeting agreed standards by an independent body. The Consultation Institute would expect to be active in providing such reassurance.

3. A 'narrower' consultation

Politicians will very frequently adopt a particular policy stance, and when this happens, it is difficult if officials then conduct a tick-box exercise pretending that there are serious options when the decision has already in effect been taken. This is classic *pre-determination* and a clear breach of **Gunning One**. It would be more honest to admit to the decisions and seek views as to their impact and the way in which they are implemented.

Of course the Minister would have to be able to defend against allegations that he or she should have consulted on the original decisions, but in the BREXIT context a distinction may well need to be drawn between those matters which may have been argued about inside Whitehall and even between political parties but are not to be put to a wider consultation, and those matters where politicians are still open to persuasion and to argument from a broader section of stakeholders or the public. Again to make this work, it might need an independent body to confirm that the basic integrity of the exercise was intact.

4. Consultation by active participation

Imagine the need to hammer out a policy position and to explore the extent to which a consensus might emerge. The traditional process of preparing, publishing and asking questions about a long impenetrable document, and waiting to see who self-selects and replies is too slow and cumbersome. Instead, ask who is interested and invite a group of people from a range of relevant backgrounds and representing those interests most likely to be affected by the policy area to attend Deliberative

Workshops or equivalent. The Government's own *Policy Lab* has an impressive set of tools but probably has only reached parts of the huge Government machine. Many of these methods need independent organisers and highly skilled facilitators but these people exist – they just need bringing together for defined pieces of work. It costs money but is one of the more reliable ways that policy-makers arrive at a well-informed conclusion.

The Government's own
Policy Lab has an
impressive range of tools

In short, there are alternatives to the conventional model of consultation. The challenge may lie in convincing organisations and groups with a big stake in these issues that its intentions and methods are honourable. On each and every occasion it is necessary to devise a consultation/engagement approach that will meet the Government Principles and also the legal principles referred to above. A simple set of Guidance could be developed and the Institute sees this paper as a step towards developing such a set of standards. But someone needs to indicate that these consultations meet *best practice* standards.

It will not be acceptable for Government to self-certify. In theory a respected body such as the National Audit Office might perform the function, but it has, in the past showed no appetite for such a role. We have no consultation ombudsman, (though the Consultation Institute believes there should be one). Maybe there could be a role for Parliament whose Constitutional Affairs Select Committee might certify that BREXIT-related consultation be given limited dispensation from the normal, conventional model.

The best way of reassuring sceptics who might accuse the BREXIT Government of sharp practice would be to ensure that it acted consistently and to the letter of current *best practice* in all those other routine issues where the complexities of leaving the EU do not impinge much and where a conventional consultation can be expected to work well. Is it possible that a formula could be developed whereby *This is BREXIT policy development issue and the special rules apply and whereby an independent body will ensure compliance with those rules.*

Maybe the Government departments most closely associated with BREXIT and its complications might get together to announce a programme of consultation. This would have the advantage of much-requested transparency as well as mapping out a timeline for short-term consultation (required for negotiations), medium-term (examining impacts and how to address them) and long-term (establishing policy directions for the future). There would be tangible benefits for Ministers in communicating to the public exactly where it expects to listen to external advice, and to consultees in knowing which consultations they might wish to focus upon.

**...BREXIT ... departments
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Section Five: conclusions and a way forward

Unless some actions such as those outlined in this paper are adopted, Government consultations will be judged according to existing expectations, and departments may struggle to find the time and resources to do them. Most likely, important dialogues with stakeholders may not occur properly as efforts are made to sidestep the process of consultation. Sooner or later, upset communities of interest will mount a legal challenge and cause even further delays.

This paper suggests that this is a risk to the Government's plans.

It has proposed a strategy to minimise the risk by being more flexible in the way it approaches public and stakeholder consultations in its policy-making.

Those departments most associated with or affected by BREXIT need to use the best available policy-making tools immediately. There is a wealth of professionally experienced consultation specialists available, but they do not all work in Communications departments. In this paper we have made just a few suggestions as to what could be done differently, but these specialist skills would almost certainly be needed.

The Consultation Institute is seeking partners with whom to work on developing and implementing the kind of consultations that the BREXIT environment demands. At the same time, it wants to trigger effective debates with experienced policy-makers to explore further what changes and improvements can be made to our decision-making process when these decisions are so vital for the future.

Rhion Jones is founder and Programme Director of the Consultation Institute and joint-author of 'The Art of Consultation' – the only book ever published on the subject of public consultation. He is a prolific writer on the subject, is much in demand as a keynote speaker and conducts Masterclasses for the Institute. The next book is entitled "The politics of consultation" – an appropriate subject for these times!

We acknowledge the practical help and suggestions by two of the Institute's Associates, Brian Parry and Nick Duffin. Both are actively involved providing Quality Assurance on contentious consultations in local Government, the NHS and other public bodies.