

Consultation: How can we safeguard the role and potential of the reasoned public voice?



Good consultation is integral to quality decision making. Broadening the range of people public authorities engage with, using the latest analytical techniques and taking an agile, iterative approach to implementation are key steps towards open policymaking.

Deliberative decision making is better decision making. The problem is that there is a temptation for consultation to be used as a means to qualify decisions taken by government which are effectively a 'done deal', sealed by self-certified experts or political pressures. Equally, too many of us fear that decision makers pay inadequate attention to what is being said. The result is poor quality and unpopular decisions which may have disproportionate impact among those affected. Even when consultation is regular, poor quality consultation is fuelling dwindling response rates due to pervasive community cynicism.

Those in power can stimulate involvement by connecting the right people, the right questions and providing the space for conversation. However, it is only when the public voice is fully exercised and conscientiously considered through formal dialogue that changes can be delivered with greater impact and with less disruption, with less waste and with fewer costs compared to rolling our ideas that don't work or that are simply intolerable.

Policy Message

- The 'right to be consulted' on key government decisions, including budgets, is fundamentally a human right. Other rights, such as the 'right for key arguments to be heard', can support good practice.
- Consultations must have integrity and Consultors must have honest intention in order to justify the validity of their purpose. Government should aim to embed a culture of consultation across a wide range of their responsibilities.
- The means of enforcing consultation practices are varied. The majority of governments choose to adopt non-binding standards. However, it is possible to create a hybrid mix of legal requirements and advisory guidance so that consultation with certain groups, on certain issues is assured;
- Even with the adoption of minimum standards, meaningful consultation requires great care and satisfactory process is not always achieved. For example, survey questions are often badly worded. Training and guidelines on conducting and evaluating consultation is therefore needed to build up the necessary capabilities;
- It is the fear of non-compliance, formalised by a means of redress such as judicial review (a procedure by which a court can review an administrative action by a public body) which is driving up consultation quality and standards;
- Consultors will need to be savvy to new tactics being used by lobbyists;
- Co-ordination mechanisms and guidance on *when* to consult can help reduce consultation fatigue.

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Routes to involvement

Public authorities elicit public opinion in a variety of ways. Consultation is a method for government to *actively* seek views on specific proposals whereas there are other methods for citizens to *actively ask* government to act on a wide range of issues, such as petitions.

For either method to be effective there must be transparency as well as adequate procedures for the public to be heard and for decision makers to make subsequent, conscientious decisions. By comparison, complaints tend to be about specific and individual matters which can require due regard for the privacy of those involved.

What is consultation?

There are many different definitions and interpretations of consultation and no one best practice model. Alone, 'consultation' does not define *who* is being consulted (the Consultee) and the intentions of the Consultor. Historically the failing of many consultations is that the definition is misinterpreted and subsequently the process fails to meet legitimate expectations. The framing a consultation, such as clarity of scope, is therefore vital for both Consultee and Consultor.

The Consultation Institute¹ has, since 2003 adopted the following definition: '*Consultation is the dynamic process of dialogue between individuals or groups, based upon a genuine exchange of views, with the objective of influencing decisions, policies or programmes of action.*'

Consultation can be both formal (i.e. commissioned by an appropriate authority) or informal (i.e. akin to market research). It may take the form of consultation with interested parties (stakeholders), the public or both and is not necessarily a legal requirement depending on its topic and the nature of national requirements and laws.

Formal consultations are typically one-off events, synchronised with the decision making process. Consultation may contain - but is not the same as public dialogue, which is a continual conversation often with a view to soliciting feedback on new policy ideas or existing policy implementation.

Increasingly, good practice dictates that pre-consultation is necessary. This is the forerunner to consultation whereby consultation options are formed collaboratively and initial evidence is gained to understand the issues that will need to be raised in the proceeding consultation. For speed and efficiency, pre-consultation is often conducted with expert representatives such as NGOs.

Consider that a traditional formal consultation consists of a number of policy option for which a Consultor is soliciting views. The Consultor should demonstrate that it has been fair in terms of option development and that any preferred option is declared. In other words, ensure that the questions Consultors *plan* to ask have been carefully formulated.

A good consultation has integrity. Consultors must have honest intention, be willing to listen and be prepared to be influenced.

¹ <http://www.consultationinstitute.org/> (UK)

What is defined as consultation activity?

The following range of activities can be described as ‘participatory initiatives’ (Leach et al 2005:37):

Type	Example
Traditional methods	Public meetings, consultation documents
Consumerist methods	Complaints, suggestion schemes, satisfaction surveys
Innovative-consultative	Citizens panels, referenda, interactive websites
Innovative -deliberative	Citizens juries, issue based or neighbourhood forums, visioning exercises

This paper focuses on best practice in traditional and innovative-consultative methods.

Citizen Panels

Citizen Panels are a representative sample of local citizens. Some governments (local and national) have established Citizen Panels as a cost-effective and quick method of conducting survey research. The advantage of a panel over traditional consultation is that authorities can gain broad-brush feedback on issues, quickly and with a high anticipated response rate.

However, panels fundamentally are not sources of representative data – they provide indicators from cross-sections of the public which are slightly more interested and slightly better informed than the public at large but which are not activists.

In the United Kingdom, over 70% of local authorities report to have a citizen panel² and in 1998 a national “People’s Panel” was established. The People’s Panel was a panel of 5000 UK citizens who were representative of the wider population according to key characteristics

The panel is maintained to provide a basis for survey research to act as a ‘sounding board’ for proposals. The panel is used more than once, probably on a regular planned basis, for different surveys. Citizen Panels have been used for a number of purposes, such as:-

- To track changes in views over time;
- As a cost effective and quick means of recruiting people to take part in more qualitative or deliberative research and consultation events;
- To target groups of people with particular characteristics for research;
- To get local people more involved, more informed about and potentially more positive towards local government and the local area;
- To form closer relationships with a large group of people;
- To act as a symbol of a local authority’s commitment to consultation;
- To help improve co-ordination of consultation activity within local authorities and with their partner organisations;
- To encourage partnership working;
- To improve services and decision making.

Establishing and maintaining a panel is not easy. There are issues of recruitment, panel health, non-random responsiveness and long term conditioning. Online panels can assist in the management of some of these issues.

² Study for ODPM, Birch (2002)

What does a consultation involve?

A 'best practice' public consultation will consist of the following elements:-

People	Process	Paperwork	Promotions
<ul style="list-style-type: none"> • A consultation body or project group with a dedicated project manager. • An audience, stakeholders and/or statutory Consultees. • Facilitators to run public events. • Optionally, independent evaluators – trained qualitative data professionals. • Quality assurance or compliance personnel. • Evaluators or legal support. • Comms support. 	<ul style="list-style-type: none"> • A grievance and complaints process. • Support services (a public help-line or email contact). • An updated, public facing FAQ. • Scrutiny in the form of key reviews (e.g. mid-consultation and closing date review) 	<ul style="list-style-type: none"> • A project plan. • A scoping document, mandate or statement of community consultation. • An equalities impact assessment. • An analysis plan for the data capture. • A consultation document including survey (including alternative formats and equality monitoring) • A public engagement strategy. • A report on the outcome of the consultation. 	<ul style="list-style-type: none"> • A dedicated website explaining the issues or containing the full set of related documents. • Letters or targeted communication to those who are affected. • Targeted communication for the consultation output and outcome.

What are the typical stages of consultation?

The stages of a typical consultation and their attributes are represented in the diagram below:-

Consultation stage	No consultation	Pre-consultation, agenda setting	Pre-consultation, option development	Formal consultation	Consideration	Feedback
Policy stage	Policy monitoring/evaluation	Agenda building	Policy formulation & reformulation	Policy proposals	Policy adoption	Policy implementation
Example activities	Insights from social media or public data	Public dialogue. Notification of forthcoming consultation.	Early intervention with key stakeholders. Awareness raising.	Surveys and facilitated workshops.	Meetings, hearings.	Awareness raising. Possible challenge
Example outputs	Intelligence reports (e.g. progress versus targets or goals).	Preferred options, Equalities impact assessments, Project plan. Stakeholder identification, Scoping document	Issues paper, Consultation documents (e.g. survey), Data analysis plan	Consultation output - evaluation report.	Consultation outcome - decisions, votes and referenda.	Ongoing discussions, discussing the outcome.
Example queries	What do the public think about current legislation? Who are the key influencers and where do they congregate?	How will the proposed changes affect certain groups? What difference will we make? What are the assumptions about the benefits?	Do we need new legislation for a given issue? What are the options? What are the likely issues?	What does the public think about the policy options? Are there any new policy ideas or alternative proposals?	Should we pass a new law? What proportion of resources should we allocate? What is the best option?	What are the public concerns? Are we accountable? Was the consultation fair?

Why consult?

International human rights law recognises a general right to political participation that extends beyond the right to vote in elections. When consulting, governments seek a comprehensive overview of differing interests, to make sure that its decisions are based on the best available information. More informed and engaged citizens assist decision-makers in a discovery process leading to better quality decisions and outcomes.

Hence consultation practices are widely accepted as effective tools for building public trust around key decisions, generating efficiency savings and accelerating public service reform. Formal consultation is a tried and tested method of enhancing representative democracy although emerging Co-creation and Co-delivery methods may yet yield equally valid results.

Underpinning effective consultation are two key assumptions. Firstly, that the public are perfectly capable of making sense of complex issues. Secondly that decision makers are not necessarily expert on the issues for which they are deciding or debating. Evidence suggests that this holds true for the vast majority of cases.

The advantages and disadvantages of consultation depend on your perspective. For example, when the views of the public are scattered across a range of options, the government is likely to find enough support for its position to be able to use consultation as “political cover” for taking whatever action it planned to take prior to the consultation. However, where there is a lack of public consensus, government can point to consultation as evidence of its willingness to address issues while also using it as a rationale for inaction.

At the most fundamental level, consultation provides an opportunity to educate the public and gain its support for policy action. Government must accept that public opinion may coalesce in opposition to the government’s preferred approaches.

What other rights should be considered, other than the right to be consulted?

Just as citizens should have the right to be heard, consultation is based on representative democracy and the consulting authority normally reserves the right to take a decision independently of what is being said.

A right to ‘hear the key arguments’, in the form of a public hearing or similar, is not widely adopted but particularly beneficial. Forcing decision makers to hear the various perspectives of an argument in a public forum is a compelling mechanism for ensuring decisions are taken conscientiously and that Consultees are given equal consideration.

What supporting elements are key to a successful consultation policy?

- Consistency. This can be achieved by introducing a single consultation standard with rules monitored by an independent body;
- A mechanism for redress for when Consultees are dissatisfied with the process. For example, an independent ombudsman;
- Independent analysis of feedback & freedom from bias – particularly for consultations of larger scale or controversy.

Who carries out consultations?

This varies depending on the type of consultation (e.g. public or stakeholder) and what is being consulted on (e.g. policy or legislation). Consultation may be instigated by an authority or individual, particularly politicians in their representative capacity. However, the latter may be less meaningful.

In the United Kingdom, the 'responsible authority' must manage *public* consultation although there is usually a central 'consultation and engagement' team who help orchestrate consultations alongside the relevant policy owners. Duties include promoting the consultation, organising public events and creating reports but some of these tasks might be outsourced to the private sector.

In South Africa, government actions with regard to consultation at the national level entail creating consultation bodies with *key stakeholders* that are attached to ministerial structures, with their permanent Secretariats. The Secretariat is a permanent administrative unit, a reallocation of duties or the creation of a specific post in order to establish a secretariat charged with preparing, organising and following up the activities of the consultation structure. It also helps with the expert studies and background materials.

Consultation bodies may take different forms and cover wide-ranging areas of responsibility depending on the needs, balance of power, political situation, wishes of the social partners, culture of social dialogue, and the like. They may be directly linked to a ministry or operate as an independent Committee/Council.

In this example, the South African Government may refrain from participating in the consultation but may have the benefit of the opinions, lending only its support by appointing a chairperson and providing a secretariat. The Government may participate fully in the consultation. The Government may also participate as an employer.

Parliamentary support units tend to run consultations on draft legislation unless there is a dedicated legislative affairs office.

What do Consultees expect?

Participants in public participation exercises tend to have a very simple basic expectation – to be heard and taken seriously. Consultees expect to be able to provide feedback in a written form or orally.

Evidence³ suggests that citizens are more likely to participate in 'big issues' but are unfamiliar with the limitations of responsibility of Consultors. They expect a joined-up approach to consultation - in other words, consultation in tandem with other agencies.

Citizens are most likely to participate in order to protect their own interests or by personal invitation. Most citizens are willing to complete questionnaires if they think it will make a difference - they have legitimate concerns over consultation costs and expect good communications.

³ Trends in public participation. <http://onlinelibrary.wiley.com/doi/10.1111/1467-9299.00264/epdf>

What values do good consultations have?

Good consultations are well designed, fair and follow a stringent process. For example, they should be devoid of dialogic manipulation such as loaded questions and imbalanced evaluation. The following table defining values for quality consultations:-

Value	Meaning
Integrity	Consultors must be willing to listen and be prepared to be influenced. The consultation should not reinforce a particular option (i.e. turn into a convincing process).
Accessibility	Consultees must have reasonable access to the consultation using appropriate methods for the intended audience (i.e. make provisions to include minorities).
Visibility	All who have a right to participate should be made reasonably aware of the consultation.
Transparency	Consultation submissions will be publicised unless specific exemptions apply.
Disclosure	Consultors must disclose all material information – that which makes a difference.
Fair Interpretation	There is objective assessment of the evidence.
Publicity	Participants have a right to receive feedback of the consultation output & outcome of the process. Post-consultation communications are essential.

In the United Kingdom there are some ‘acid tests’ for the legitimacy consultations:-

1. Consultations must take place when the proposal is still at a formative stage (i.e. the decision has not been taken);
2. Sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response (i.e. full disclosure of facts);
3. Adequate time must be given for consideration and response (i.e. the consultation must have sufficient duration and decision makers must be given adequate time to consider the fruits of the consultation);
4. The product of the consultation must be conscientiously taken into account (i.e. Summaries are accurate and decision makers have taken all evidence into account).

In Canada, guidelines for effective regulatory consultation have been issued with a series of checklists⁴.

⁴ <http://www.tbs-sct.gc.ca/rtrap-parfa/erc-cer/erc-cer-eng.pdf>

In Malaysia, government standardisation guidance⁵ extends to the description of consultation methods. Many independent standards and guidelines on methods are available, such as those from the Market Research Society⁶.

What can be legitimately consulted on?

Consultation is appropriate to almost any issue or plan which is at a formative stage. For example, where a decision has not yet been taken or is *still open to influence*. Consultation should not be conducted to validate existing positions.

Consultation can be applied to a range of topics such as draft legislation and rules, budgets, policy development and spatial planning. The Estonian 'Good Practice' guidelines⁷ go as far as to list the specific *documents* which should be open for participation:-

- Drafts of laws and their amendments;
- Drafts of the regulations and directives of the Government of the Republic;
- Drafts of Ministers' decrees;
- Documents, concepts, policies, development plans, and programs that are important to the country's development;
- Drafts of legislation of European Union institutions and other strategic documents (i.e. green and white books);
- Instruction and procedures for rendering public service;
- Conventions and international agreements, as well as the documents that are worked out within their framework, and that influence the society.

In the case of the European Commission, *stakeholder* consultations are carried out to support the preparation of:

- Policy communications/white papers;
- Legislative proposals;
- Spending programmes;
- Delegated acts and implementing acts with important impacts, i.e. subject to an impact assessment;
- Evaluations of existing policies or programmes.

Drawbacks of the provision for public participation in law-making

Legislative authorities often lack the resources and human capacity to initiate effective public participation. Legislation-making is frequently a drawn-out process and consultation can increase this timeframe, reducing the frequency of rulemaking and preventing urgency of passing.

⁵ <http://www.mpc.gov.my/>

⁶ <https://www.mrs.org.uk/standards/guidelines>

⁷ <https://riigikantselei.ee/en/supporting-government/engagement-practices>

Should we consult on budgets?

There is an important relationship between civic engagement and fiscal transparency. Citizens are more likely to trust government if they know that public funds are well managed but citizens understand poorly how fiscal problems affect their well-being. Budget literacy is therefore a requisite and good budget consultation will require that government provides full and open information on all public budgets.

Budget pressures are precursor to many other consultations (such as the closure of public facilities) and subsequently the validity of future consultations may be at stake if budget consultation has not taken place (i.e. decisions have already been taken). Budget consultation is particularly important during times of austerity when there is a choice gap.

Typical configuration

Budget consultations largely take the form of consultation on budget setting in relation to future *priorities* and are a method for people to suggest viable financial alternatives. Budget consultations are often supplemented by a pre-budget document with indicative fiscal allocations.

Budget consultation will typically involve asking citizens to choose service areas where public spending should be reduced or investment maintained. Typical calls for evidence include options around future tax rates and requests for retrospective views on a current budget. Similar to other forms of public consultation, the process is based on representative democracy and citizen views help inform decision makers who set the concluding budget.

Citizens have rare opportunities to consider *national* budget issues but there are many examples of such consultation at the national level (e.g. Malawi, Wales). At the local level, budget consultation is more widely adopted by government and budget consultations are common practice in many local authorities across Europe. Sometimes this is underpinned by law – for example, in Kenya, Counties are required to form a County Budget and Economic Forum (CBEF) to provide meaningful consultation over the budget process by county inhabitants⁸.

In addition to official efforts to engage citizens in national budgeting, non-governmental organisations and, on occasion, individuals can help to broaden the public debate about the budget and budget priorities.

Complications

Governments embarking on budget consultation should be aware that, compared to issues based consultation, it can be harder to explain why unpopular decisions are the right ones. Officials should decide how to respond if citizens misunderstand the issues, express unwise choices or fail to appreciate the consequences of their preferences. Those results may signal the need for greater public education about the issues, or they may demonstrate areas where decision makers are out of step with the electorate.

⁸ Kenyan Public Finance Management Act (137)

Online public engagement in budgeting

Budget office websites (such as www.performance-publique.gouv.fr in France and <http://www.budget.gov.au/2014-15/index.htm> in Australia) are a useful outlet for informing citizens about the budget and budget process. They can also act as a home for consultation, quizzes and raw budget data.

Some consultations make use of online simulation to force Consultees to balance the real, available budget (in the United Kingdom, a free online tool⁹ is provided to all local authorities). This can help citizens understand the trade-offs and impact of any adjustments or priority setting.

Participatory Budgeting

Participatory budgeting is a form of direct democracy which involves local people in making decisions on the priorities and spending for a *defined* public budget. This means engaging residents and community groups' representatives of all parts of the community to discuss and vote on them, as well as giving local people a role in the scrutiny and monitoring of the process. In other words, a process to include local people in the decision making process for allocating *part* of a public budget.

Participatory budgeting is defined by a number of characteristics:-

1. Public budgets are the object of the process, or at least part of it;
2. Citizen participation has a direct impact on the budget (it is not a consultation);
3. Citizens decide on the rules governing the process;
4. The process has a deliberative element;
5. A redistributive logic is embedded in the design of the process (e.g. poorest districts / areas get more money and vice-versa);
6. The process is institutionally designed to ensure that citizens can monitor public spending;
7. The process is repeated periodically (e.g. on a yearly basis);
8. The organisers must remain accountable for the decisions taken on whether or not to respond to and implement the proposals put forward as part of the procedure.

It should be noted that Participatory Budgeting is not a replacement for the consultative method which allows for consultation on the budget as a whole and where citizens can make proposals on any thematic area without financial restriction. Instead, participatory budgeting is a method that sits *alongside* formal budget consultation.

There are many successful examples of participatory budgeting from across the world, notably in Brazil and Germany. In some countries, participatory budgeting has yet to move beyond its predominant model of allocating small pots of money to voluntary and community groups but in others there is a move towards repeatedly distributing mainstream public budgets. Budget devolution is apparent at all levels - for example, PB is being used to allocated discretionary budgets which were previously held by individuals (e.g. elected representatives).

⁹ <http://www.local.gov.uk/research-youchoose-tool>

Deliberation should be seen as the key aspect of PB – beyond the vote – and deliberation should lead to consensus on decisions where possible or voting should be used to support deliberation. Voting rules are typically relaxed - young people are allowed to participate and there tends to be no requirement to be registered to vote (although citizens are normally required to prove that they live in the area).

A PB steering group should be citizen led, and mostly comprised of citizens who are representative of their community (preferably endorsed by the community itself) and should devise their own set of 'rules' or compact. Any conflicts of interest for any person involved in the PB process should be made public and absolutely clear.

Can you consult on regulations?

Yes. Consultations have also been run with the aim of simplifying standards. The following 'better regulation' principals are useful anchors for any given consultation in this domain:-

Necessity - is the regulation necessary? Can we reduce red tape in this area? Are the rules and the structures that govern this area still valid?

Effectiveness - is the regulation properly targeted? Is it going to be properly complied with and enforced?

Proportionality - are we satisfied that the advantages outweigh the disadvantages of the regulation? Is there a smarter way of achieving the same goal?

Transparency - have we consulted with stakeholders prior to regulating? Is the regulation in this area clear and accessible to all? Is there good back-up explanatory material?

Accountability - is it clear under the regulation precisely who is responsible to whom and for what? Is there an effective appeals process?

Consistency - will the regulation give rise to anomalies and inconsistencies, given the other regulations that are already in place in this area? Are we applying best practice developed in one area when regulating other areas?

The UK government launched a crowdsourcing experiment in 2011 to tackle the stock of unnecessary and over-complicated regulation (dubbed the 'red tape challenge'). Specifically, the public were asked for their views on whether to scrap, simplify or improve existing regulations.

In the period between 2011 and 2012, 227,000 visitors to the website produced 28,800 comments and over 950 private submissions were made. The response rate was approximately 6% of all visitors to the website (there was an average of two comments per visitor). The UK government claimed that as a direct result of this imperative they would be scrapping or amending over 3,000 regulations – saving business well over £850 million every single year.

In 2013, the European Commission sought stakeholders' views on a proposal to simplify certain procedures for notifying mergers under the EU Merger Regulation. The Commission published each response (30 in total) on its website for the purposes of transparency and a simplified procedure was later adopted.

When does consultation apply?

This depends on what is being consulted on and can differ between participatory law-making and general, thematic consultations. In some cases there are legal requirements for consultation, with certain groups, on certain issues. For example, in Canada, consultation is mandated when the government is “establishing priorities, developing policies and planning programs and services”.

In the United Kingdom there is only voluntary, blanket guidance for government departments and other public bodies for engaging stakeholders when developing policy or legislation. However, there are legal duties for certain government bodies to consult such as the NHS Act 2006 Section 14Z2 for health commissioning groups and the Planning Act 2008, which requires pre-application consultation on nationally significant infrastructure projects.

This has not always been the case, in 2011 the British government repealed a “Duty to Involve” (which originally came into force in April 2009) that required local councils to inform, consult and involve citizens in decision-making where appropriate and to ‘embed a culture of engagement and empowerment’.

Specific legal obligations may also be straddled by a number of non-specific statutory requirements such as:-

- The need to carry out environmental impact assessments;
- The need to carry out equality assessments;
- Freedom of Information and Data Protection Laws.

In the majority of jurisdictions, provisions for public participation in the *legislative* process are generally contained in Parliamentary rules. In South Africa, there is a constitutional duty to facilitate public participation at the national, provincial and municipal level and courts may strike down as invalid legislation which has been passed without properly observing these procedures.

Similarly, for consultation in general, there are two main types of process generally adopted by governments worldwide - those which are legally binding and those which are codes of conduct or standards orientated (minimum standards can contain guidance).

By example, legislation has been adopted in Switzerland, Bosnia and Herzegovina (rules of government) and Romania (law on transparency in the decision making process¹⁰). The Kenyan Constitution and Public Finance Management Act ensure that the public must be engaged in ‘budget and policy formation, planning and social service delivery priority setting’.

Codes and guidelines have been published in Austria (standards of public participation¹¹), Croatia (code of practice on consultation), Canada (communications policy¹²) and the United Kingdom (code or practice on consultation¹³).

The drawback of codes of conduct is that courts cannot review legislation for compatibility with the principals set out in them. This causes inconsistency of judicial review as well as a burden on courts.

¹⁰ <http://www.mdr.ro/en/transparenta/prezentare-general/-9092>

¹¹ <https://www.scribd.com/doc/69122661/Oebs-Standards-Engl-Finale-Web>

¹² <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12316>

¹³ <https://www.gov.uk/government/publications/consultation-principles-guidance>

Legal instruments

In Switzerland, the rules for formal consultation are set out in federal law¹⁴ and consultation procedures apply when drafting amendments to the Constitution or if a project is of major political, financial, economic, ecological, social or cultural significance or if its enforcement will to a substantial extent be the responsibility of bodies outside the Federal Administration. This puts the main responsibility for triggering a procedure with the Federal Council or Parliamentary Commission.

In The Netherlands, Local authorities are obligated by law (Article 150) to draft a Participation Regulation which contains a set of rules concerning the manner on how residents and stakeholders can get involved in local government policy. This Regulation outlines in great detail on how the local authorities need to consult its citizens and stakeholders.

Multilateral agreements

The most notable international example of a mandated consultation process is the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, or short “Aarhus Convention” (1998). This requires the parties of the Convention to guarantee rights of public participation in decision making. The Convention sets out minimum requirements for public participation in various aspects of environmental decision making.

In 2009 the European Parliament adopted a resolution on the perspectives of developing civil dialogue under the Treaty of Lisbon. The treaty is significant in that it calls on EU institutions to adopt binding guidelines concerning the appointment of civic society representatives and methods for organising consultation and their findings.

Similarly, According to Article 11 of the Treaty on European Unions, ‘the European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union’s actions are coherent and transparent’. Protocol no. 2 on the application of the principles of subsidiarity and proportionality annexed to the Treaty stipulates that ‘before proposing legislative acts, the Commission shall consult widely’.

To this extent, the EC has its own internal guidelines on stakeholder consultation¹⁵ in the guise of minimum standards. They provide advice and support on all aspects of carrying out consultations from the definition of the consultation's objectives to the evaluation of the consultation exercise.

More broadly, the Open Government Partnership¹⁶ contains a number of references to consultation within the remit of membership. In particular, members must consult in order to work with civil society groups to develop an OGP action plan and they must demonstrate a commitment to the principal of citizen engagement. Moreover, the IFC includes requirements for public consultation in their various performance Standards¹⁷ covering social and environmental policies.

¹⁴ http://www.admin.ch/ch/e/rs/172_061/index.html

¹⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:en:PDF>

¹⁶ <http://www.opengovpartnership.org/>

¹⁷ http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES

Who should be consulted?

For general consultations, standard practice is that anybody can participate, even if they have not been invited or have citizenship. However, there are international examples of statutory Consultees for certain types of consultation, such as environmental watchdogs for major planning applications.

There are typically few stipulations about who should be consulted, only that all who have a 'right to participate' should be made reasonably *aware* of a consultation. Consultors will often need to strike a balance between consulting those who are significantly affected by a proposal and consulting a wider group of people who will not be directly affected, but who will have a reasonable fear that they might be, or will have strong feelings about an issue. The matter of defining the 'public concerned' for a consultation is highly fractious as it is often a factor of the available resources.

Good practice dictates that key stakeholders should be identified and their participation monitored during the process to ensure that balanced and representative views are sought. Stakeholders can be identified by considering the following questions:-

Who is *directly impacted* by this decision?

- Whose daily/weekly lives will change as a result of this decision?
- Who cannot easily take steps to avoid being affected by this decision?
- Who will have to change their behaviour as a result of this decision?

Who is *indirectly impacted* by this decision?

- Whose daily/weekly lives will change because others have been directly impacted by this decision?
- Who will gain or lose because of changes resulting from this decision?

Who is *potentially impacted* by this decision?

- In particular circumstances, who will have a different experience as a result of this decision?
- Are there individuals or groups who will have to adjust their behaviour if particular conditions apply?

Whose *help is needed* to make the decision work?

- Are there vital individuals or groups in the delivery chain?
- Who will have the ability to frustrate implementation unless co-operating?
- Who understands the likely impact of this decision on other stakeholders?

Who *knows* about the subject?

- Who has studied the subject and published views on it?
- Who has detailed knowledge that those implementing the decision should also understand?
- Are there individuals or groups that will be listened to by others?

Who believes they have an *interest* in the subject?

- Are there organisations or individuals who think they have an interest?
- Has anyone been campaigning about this issue?
- Is there anyone publishing or broadcasting views on this subject?

How long should a consultation last?

There are many and varied view on when and for how long a consultation should be conducted and how early the public should be notified about a forthcoming consultation. The standard caveat for which most agree is to be considerate for the supporting conditions such as the complexity of the issue under consideration and proximity public holidays or potential interruptions.

In terms of the duration of a consultation, the 'EC Principles and Minimum Standards'¹⁸ highlight the importance to balance the need for adequate input and swift decision making. They prescribe a total of eight weeks for reception of responses in case of written consultation, and 20 working days' notice for working meetings.

The Croatian code proposes 15 days from the time of publication and the Estonian good practices recommend that consultations should 'generally last for a minimum of 4 weeks'.

Estonian Good Practices state that consultations generally should last for a minimum of 4 weeks and in Hungary a time period of *at least* 15 days is suggested. Romanian Law is more restrictive, suggesting that 10 days should be given to public comment. The UK Code on Consultation suggests a default position of 12 weeks with consultation responses being published within this timeframe.

The Consultation Institute¹⁹ suggests that the optimum duration for a meaningful consultation is three months (12 weeks) under normal conditions. This is supported by parallel research²⁰ on the lifespan of an online petition whereby 80% of supporting signatures are collected in less than 95 days, and 95% in less than 110.

The Consultation Institute recommends that 10 working days or two weeks in duration is the minimum threshold for small consultations. Moreover, that consultation deadlines have built-in flexibility and can be extended - or late submissions accepted under exceptional circumstances.

Notification	Duration	Conclusion
Minimum 20 days	Minimum 10 days	Maximum 100 days
Recommended 40 days	Recommended 100 days	Recommended 30 days

¹⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52002DC0704&from=EN>

¹⁹ <http://www.consultationinstitute.org/>

²⁰ <http://spartakan.wordpress.com/2011/02/03/the-100-day-lifespan-of-the-e-petition/>

When can consultation begin?

Generally speaking, consultation should start as early as possible. Consultations which occur late in the policymaking process leave little room for the community to influence the decisions being made. Delaying consultation therefore implies a certain level of power held by decision makers to unilaterally impose decisions without public consent.

Legislative context

Some of the adopted standards contain guidance on when a consultation can begin. For draft legislation this should be as early as possible in the drafting process at a point where effective and informed dialogue can be formed. The UK Code encourages the Government to undertake informal consultations to obtain initial evidence and gain understanding of issues that will need to be addressed in formal consultation process. Awareness should be raised before the process starts so that interested party can prepare for it.

In Slovakia, the legislative rule is for the public to review draft legal texts at the same time as state bodies but in the United Kingdom the public reading stage pilot was able to publish before it was announced in Parliament.

What are the merits of online consultation?

General

A number of governments deploy online consultation facilities. Foremost the purpose of these is to collect feedback in the most efficient and effective means but also to act as a way to collate consultations (past, present and future) into a single repository or portal. For example, the United Kingdom lists all government consultations in a central, searchable index²¹ and individual Ministries have their own consultation hubs²² which are able to solicit feedback and list consultations for which they have concern. In the United Kingdom, similar technology is deployed at the local government level for local consultations.

The Estonian (national) online consultation platform is called OSALE²³ and was introduced in 2011. Each consultation is initiated by responsible ministry or responsible agency. This agency also defines the consultation, and defines also the time period for the consultation.

The European Commission uses the “Your Voice in Europe²⁴” platform for managing online consultations and soliciting feedback via online survey. The weakness of existing online consultation platforms is that they have a tendency to encompass less dialogic methods of public engagement (e.g. text survey only) and are rarely implemented with back office functionality such as stakeholder databases, stakeholder tracking or qualitative data analysis capabilities.

A join-up approach to consultation management facilitated by technology is therefore desirable, not only does this approach prevent consultation fatigue for Consultees but it also helps Consultants.

It is seldom appropriate to use online consultation when it appears to be the only method available or affordable. The key principle should be that it should be used when it offers significant added value to the process of dialogue – either by reaching more *Consultees* or in eliciting more, more frequent or better responses from them.

There is some debate about the circumstances under which government can rely solely on feedback solicited by online consultation and guidance is therefore recommended.

At its best, online consultation provides an impressive range of benefits:

- It widens the appeal and strengthens the reach of public dialogues;
- It is a fast, and cheap way to obtain high volumes of contributions;
- For many people, it is the easiest and most convenient way to respond;
- It is an efficient way to disseminate information and explain the consultation narrative;
- It can link into a range of social media activities – well beyond consultation ;
- It can create spill-over engagement with non-digital channels.

²¹ https://www.gov.uk/government/publications?publication_filter_option=consultations

²² E.g. <https://consult.defra.gov.uk/>

²³ www.osale.ee

²⁴ http://ec.europa.eu/yourvoice/consultations/index_en.htm

But it can also create difficulties:

- It de-personalises the consultation, losing the benefits of face-to-face interactions;
- It limits the opportunity for true two-way dialogue; Consultees may fear it is a less serious form of consultation!
- Not everyone has easy access to online services; not everyone is comfortable using the Internet;
- It requires safeguards and appropriate controls.
- It requires additional effort and resources.

There are a number of scenarios when digital engagement may be *more useful* than face to face engagement. These include:-

- Where the anonymity of participants adds value to the conversation;
- Where participants are geographically disperse or are time-shifted;
- Where manual processes can't scale the way participants are demanding to engage;
- Where interactivity and rich media or sharing are critical facets and digital can be leveraged to invoke a more informed debate.

Online provision for public participation in law-making

Like formal consultation, the publication of texts for public comment are mandated in some countries whereas in others it is a voluntary process. Online platforms for collating comments on texts, including draft legislation are being used by a number of governments at both the national and regional level²⁵. There are even examples of Parliamentarians using free online tools to solicit their own feedback on new legislation²⁶. Conversely, the same tools are being used in a consultative way, such as to crowdsource feedback on existing or proposed policies such as the United Nation's International Telecommunications Union Youth Policy²⁷.

In China, all draft legislation has been openly available to public comment since 2009 using the website chinalaw.gov.cn. Over 100 laws have been published as well as over 400 departmental rules attracting over 100,000 comments. Unlike other such systems, the Chinese tend to respond to feedback as soon as it is posted – they also rely heavily on email as a means of communication with stakeholders in tandem with the website.

Some counties are still experimenting with this concept. In the United Kingdom, a recent online pilot has been running called the Public Reading Stage. A number of Bills have been through the system, the most recent was the Children and Families Bill which received its second reading in the Commons on 4th February 2013. The pilot public reading forum was open for 14 days and it attracted 1402 comments of which 1099 were published.

²⁵ <https://dc.mymadison.io/>

²⁶ <https://www.discuto.io/en/consultation/6240>

²⁷ <http://itu.mymadison.io/docs/pp14youth-statement-v1>

In 2011, Estonia introduced an “Electronic Coordination System for Draft Legislation²⁸”. This allows for matters to be submitted to the government for discussion and resolution and documents related to the European Union decision-making process can be coordinated, submitted and forwarded between authorities. The system allows everyone to keep track of the proceedings on draft documents, view dossiers of the documents and their contents. In addition, everyone with an Estonian ID card has an opportunity to comment on the draft legislation submitted for coordination.

The system allows the public to access every piece of draft law that has been submitted since February 2003. Readers can see who submitted the legislation, its status, and the changes made to it as it passed through the parliamentary process. Once an act becomes law, it is published in the online State Journal, another searchable database that acts as an open legal library.

Such facilities tend to have mixed reception among citizens and legislators alike, despite evidence that amendments are made as a result of the solicited feedback. For example, there is a distinct difference in the ability to comment on the merits of a bill compared to the technicalities of it and the language of law remains unfamiliar among the masses.

Similarly, apart from the obvious problem of timing, public feedback is often unsatisfyingly low in quality. This covers ill-informed comments, duplicates, comments irrelevant to the draft at hand, comments making general statements about different issues, or spoof and spam comments coming in through online platforms. Low participation rates are normal.

The design of the platform is therefore critical, a notable exemplar is the open source platform Madison²⁹.

What are the benefits of consulting with the private sector?

Businesses are a good source of ideas and insights, have different types of skills and experiences and are particularly good at understanding policy impact. However, public sector consultation can be hard. Governments’ vision of collaboration is not always clear to business people who can be cynical about their intentions and businesses need to set aside any vested interests.

Dialogue between the public and private sector has been going on for some decades, although the process is always at risk of being less receptive to the needs of small to medium sized enterprises in favour of larger, multinational businesses. Sectorial, industry-centered private sector dialogue can be particularly helpful in improving competitiveness and provide a highly valued platform for collaboration along the supply chain and across governments, businesses, and communities – or economy wide.

Industry champions and intermediaries (such as manufacturers’ associations) as central to the process. Public/Private consultation has resulted in a number of notable outcomes. For example, the Vietnam business forum resulted in a new Decree (105) of the Labor Code. Under the Decree, foreign employees may not exceed 3% of the existing number of labourers with a cap of 50. The Laos forum resulted in the elimination of weight limit restrictions for trucks.

²⁸ <http://eelnoud.valitsus.ee>

²⁹ <http://opengovfoundation.org/the-madison-project/>

Private sector stakeholder groups are often called task forces, ad-hoc advisory groups or sounding boards. They tend to conduct one or more of the following function with varying scope in terms of their breadth and complexity:-

- Identifying and mapping problems;
- Diagnosing the cause of problems;
- Developing new policy ideas and eliminating unsuitable proposals;
- Reviewing the effectiveness of existing policy;
- Reviewing the effectiveness of mechanisms for policy implementation;
- Suggesting new strategies or mechanisms for implementation
- Performance monitoring.

Groups tend to be focused on either 'purely business issues', 'public private issues' or 'purely public issues'. In the former, business people are involved as direct stakeholders of the issue under consideration and the outcome will be mainly felt by other businesses.

For public private issues, there is a clear public interest in the outcome but business will have a key role in implementing policy. In 'purely public issue' form, business insights are sought on issues with wide public concern.

Will interest groups be able to derail a consultation?

Lobbying, the oral or written communication with a public official to influence legislation, policy or administrative decisions, takes place at all tiers of government.

It is worth remembering that there is a whole industry whose business is influence. The lobbying profession is often a very well-established and honourable trade with a curious love-hate relationship with politicians and civil servants. The public view is quite jaundiced – and amounts to thinking that it is wrong for well-heeled commercial interests to seek influence, but probably tolerable for charities to do the same. All parties tend to agree that lobbying practices should be transparent.

In countries where consultation is well established, it can be observed that the practice of public persuasion has changed due to the growth of a consultation culture. Prior to this, successful lobbyists would cultivate specialist intelligence about *who* took *what* decision, the process to be followed, the stakeholders most likely to be considered, and the arguments likely to swing an issue.

However, the default position now is that every action of decision-makers is on the record and open to scrutiny. Influence may be *discreetly* deployed, but it is getting harder for it to be *secretly* deployed.

Creating a wide-ranging debate with open access to all who think they have a stake somewhat undermines the previous culture of targeting decision-makers and whispering in their ears. A good consultation opens the argument to everyone and may neutralise the benefit that people expect if they pay lobbyist fees to gain advantageous access.

Consultors will need to identify and learn how to handle very persuasive and impressive lobbyists working within the consultation processes. Consultors are therefore minded of the following influencing strategies adopted by lobbyists in response to a more consultative environment:-

Attempts at influencing the ‘scoping’ debate.

- *Contributing to the definition of the problem being addressed;*
- *Gatekeeping, adding weight to an argument about if an issue should go to consultation or not;*
- *Offer-up relevant ‘evidence’;*
- *Getting involved in defining the options.*

Contributing to the design of a consultation.

- *Suggesting dialogue methods;*
- *Offering help to prepare the consultation narrative;*
- *Recommending relevant stakeholders.*

Swaying the balance of consultation responses.

- *Encouraging others to respond by lowering barriers to participation, such as providing copycat text or starting parallel petitions;*

Creating challenges.

- *Scrutinising all relevant activities (using freedom of information requests if necessary);*
- *Campaigning for the client’s interests;*
- *Challenging a decision if it seems contrary to consultation responses.*

Other than applying appropriate rules, guidelines and registers for lobbyists, Consultors can adopt a number of strategies to mitigate the risks of lobbying including:-

- Assigning a project manager to orchestrate the process of consultation from beginning to end, reporting to a steering group made up of wider interests;
- Introducing a formal complaints mechanism related to scrutiny of *process* which permits the systematic review of complaints received.
- Avoiding formal consultation during election times;
- Briefing decision makers on their responsibilities such as making sure they are aware that they may not misuse ‘confidential information’, must disclose relevant private interests and avoid conflict of interest during the process.
- Ensuring that lobbyists’ understand that they must contact with public officials with integrity and honesty and provide reliable and accurate information. Disclosure is two-way!
- Commissioning independent analysis and synthesis of the consultation feedback;
- Being open about the option development process;
- Using independent agencies to carry out consultation activities;
- Deploying expert observers or invoking quality assurance mechanisms;
- Ring-fencing and signposting readers to contributions which are clearly organised or orchestrated from individual responses in the evaluation.

How do I know if I have consulted successfully?

Success tends to reflect satisfaction with the process. For example:-

- If the Consultor feels the particular process, practice, or method was successful;
- If positive feedback was received by participants on the method used;
- If Consultees continue to engage in decision making or other consultations after the initial consultation;
- If there is an abundance of responses to questions or discussions (NB, typical response rates in Western Europe are no greater than 1% of an affected population, even on salient issues);
- If decision makers felt that the output of the Consultation helped them make a decision, such as giving them fresh evidence, alternative options or insight on an issue.

Methods for evaluating consultation

Evaluations of engagement can range in approach from a mechanistic 'audit' approach, focusing on quantitative assessment of achievement against formal targets or goals, to approaches that are concerned with 'learning' from the experience, focusing on qualitative description and interpretation of more 'subjective' data (e.g. from interviews, stories, observation etc.) to explain why and how certain outcomes were achieved.

The audit approach can be summarised as asking questions such as:-

- have we done what we said we were going to do?
- have we met our targets (e.g. numbers of participants; reaching a representative sample of the population)?

The learning approach is more likely to ask questions such as:-

- were the methods and design appropriate to the objectives, and were the objectives the right ones?
- what have the impacts been (e.g. on the participants, participant satisfaction, policy outcomes, decision-making processes, etc)?
- what are the lessons for the future?

Quality assurance schemes

Apart from independently run quality assurance schemes³⁰, there are few means to compliance assess consultations other than using crude checklists which act as a gate for pursuing activity. High profile consultations can gain credibility by seeking assurance on the various elements, such as:-

- Processes (e.g. public meetings via observation);
- Documentation (e.g. sign-off against best practices);
- Risks (e.g. holding workshops to assess or simulate them).

It should be noted that better schemes run in tandem with the consultation (i.e. include an advisory component) rather than be reactionary at the end of it (i.e. by assessment).

³⁰ <http://www.consultationinstitute.org/recognition/quality-assurance/>

The IFC performance standards set out performance indicators and validation methods for ensuring “free, prior and informed” consultation. In this instance, it is suggested that evidence can be collected from a mix of project documentation and perception surveys.

The full determination of this for the aforementioned standard is based on the following criteria:-

Material consideration	Example validation method
<p>Company strategy, policy or principles of engagement</p> <p>Strategy, policy or principles for on-going engagement with explicit mention of project affect persons and/or communities.</p>	<p>Clients strategy, policy or principals or other supporting documents</p>
<p>Stakeholder identification and analysis</p> <p>Identification of all project affected communities, their disaggregation (numbers, locations) in terms of different levels of vulnerability to adverse project impacts and risks, and an analysis of the effect of adverse project impacts and risks on each group. This analysis should also look at communities and individuals that will benefit from the project.</p>	<p>Stakeholder analysis document.</p> <p>Clients planning documentation for community engagement (e.g. communications strategy, consultation plan, public consultation and disclosure plan, stakeholder engagement plan)</p>
<p>Community Engagement</p> <p>A process of consultation that is ongoing during the project planning process (including the process of environmental and social assessment), such that (a) the affected communities have been engaged in: (i) identifying potential impacts and risks (ii) assessing the consequence of these impacts and risks for their lives and (iii) providing input into the proposed mitigation measures, the sharing of development benefits and opportunities and implementation issues; and that (b) new impacts and risks that have come to light during the planning and assessment process have also been consulted upon.</p>	<p>Clients schedule and record of community engagement.</p> <p>Citizens record of discussions with recognised community representatives, respected key informants and legitimate representatives of sub-groups (e.g. women, minorities...).</p>
<p>Information disclosure</p> <p>Timely disclosure by the client of project information by the client to all project-affected communities about the purpose, nature and scale of the project; the duration of the proposed activities; and expected risks; impacts and development benefits that directly affect them. Disclosure should be in a form that is understandable and meaningful.</p>	<p>Clients’ material prepared for disclosure and consultation.</p> <p>Clients record of discussions with recognised community representatives; respected key informants; and legitimate representatives of sub-groups.</p>

Material consideration	Example validation method
<p>Consultation (free)</p> <p>Evidence from the community adversely affect by the project that the client or its representatives have not coerced, intimidated or unduly incentivized the affected population to be supportive of the project.</p> <p>(prior)</p> <p>Consultation with affected communities must be sufficiently early in the project planning process (i) to allow time for project information to be interpreted and comments and recommendations formulated and discussed; (ii) for the consultation to have a meaningful influence on the broad project design options (iii) for the consultation to have meaningful influence on the choice and design of the mitigation measures, the sharing of development benefits and opportunities, and project implementation.</p> <p>(informed)</p> <p>Consultation with affected communities on project operations and potential adverse impacts and risks, based on adequate and relevant disclosure of project information, and using methods of communication that are inclusive (i.e. accommodating various levels of vulnerability), culturally appropriate, and adapted to the communities’ language needs and decision making, such that member of these communities fully understand how the project will affect their lives.</p>	<p>Clients record of discussions with recognised community representatives; respected key informants; and legitimate representatives of sub-groups.</p>
<p>Informed Participation</p> <p>Evidence of the clients organized and iterative consultation, leading to the clients specific decisions to incorporate the views of the affected communities on matters that affect them direct, such as the avoidance or minimization or project impacts, proposed mitigation measures, the sharing of project benefits and opportunities, and implementation issues.</p>	<p>Clients schedule and record of community engagement</p> <p>The clients’ documentation of measures taken to avoid or minimise risks to and adverse impacts on affected communities in response to community feedback during consultation.</p> <p>Drafts of Action Plan.</p>

Material consideration	Example validation method
<p>Vulnerable groups – consultation and mitigation</p> <p>Evidence that individuals or groups particularly vulnerable to adverse project impacts and risks have been party to effective, prior, free and informed consultation as well as informed participation, and evidence that the potential impacts and specific or exacerbated risks to them will be mitigated to the satisfaction of these parties.</p>	<p>Stakeholder analysis.</p> <p>Socio-economic baseline data.</p> <p>Clients record of community engagement, including record of discussions with legitimate representatives of vulnerable groups.</p> <p>Clients’ documentation of measures taken to avoid or minimise risks to and adverse impacts of vulnerable groups in response to feedback received during the consultation.</p> <p>Drafts of action plan.</p>
<p>Grievance mechanism – structure, procedure and application.</p> <p>An effective grievance mechanism procedure, that is fully functioning (i) throughout the process of environmental and social assessment and (ii) that is suitable for the operational phase of the project to receive and address the affected communities’ concerns about the clients social and environmental performance. The mechanism should be culturally appropriate, readily accessible to all segments of the affected communities, and available to affected communities at no cost and without retribution.</p>	<p>Clients’ organisation structure and responsibilities, and procedures for managing grievances.</p> <p>Clients’ record of grievances received about the project and addressed, including expressions in support of dissent.</p> <p>Clients record of discussions with recognised community representatives, respected key informants, and legitimate representation of subgroups.</p>
<p>Feedback to affected communities</p> <p>Documentation that the client provided the results of the consultation to the project affected communities, and either (i) demonstrated how the comments and recommendations made by the project affected communities have been accommodated in the project design, mitigation measures, and/or sharing development benefits and opportunities; or (ii) provide a rationale why these comments and recommendations have not be accommodated.</p>	<p>Clients record of community engagement;</p>