

The perils of voluntary consultation (Binder and others v Secretary of State for Work and Pensions)

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Public Law analysis: Four disabled adults judicially reviewed the alleged failure of the Secretary of State for Work and Pensions (SSWP) to consult lawfully, via its UK Disability Survey (the Survey), before publishing a National Disability Strategy document (the Strategy). They sought a declaration that the Strategy was unlawful. Mr Justice Griffiths found that there was no legal duty upon the SSWP to consult but that she had voluntarily engaged in consultation (applying the Gunning principles) and had failed to do so lawfully. However, he found that the SSWP had not breached the public sector equality duty (PSED) contained in section 149(1) of the Equality Act 2010. Written by Jonathan Lewis, barrister at Henderson Chambers.

Binder and others v Secretary of State for Work and Pensions [\[2022\] EWHC 105 \(Admin\)](#)

What are the practical implications of this case?

Whether a public body has embarked on consultation is a matter of substance and not form. If, without using the term, a decision-maker embarks on an exercise that is in substance consultation then it will be regarded as a consultation in the *Gunning/Coughlan* sense. In this case, while the SSWP maintained that the Survey was merely listening and was a 'insight gathering phase', Griffiths J found it to be a consultation (at para [60]). He did so through a forensic analysis of the contemporaneous documentation, and statements made by the SSWP and Disability Unit (DU) (paras [61]–[66]).

Public bodies which engage in any form of evidence gathering or process in which they seek the views of the public have to be very careful in the way that they characterise and conduct that process so as to avoid inadvertently conducting what would be regarded, in public law, as a consultation. Public bodies that are content voluntarily conduct a consultation would do well to heed the words of Lord Woolf MR in *Coughlan*, that the obligation of the consulting authority 'is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response' (cited by Griffiths J at para [71]).

What was the background?

In 2019, the Conservative Party announced its intention to publish a 'National Strategy for Disabled People'. Work on the Strategy was co-ordinated by the DU. In January 2020, the DU wrote to the Disability Charities Consortium setting out key themes that it would discuss with them. Twelve meetings were held between the two. A variety of other groups were also selected to participate in several other engagement sessions, working groups, roundtables, and joint roadshows. In April 2020, the DU issued a press release which stated that 'The strategy will build on evidence and data, and critically on insights from the lived experience of disabled people' and that the DU would 'undertake a full and appropriate programme of stakeholder engagement'. In December 2020, the DU published a blog post, which stated that 'We are continuing to listen to stakeholders to find the right areas to build a strategy that makes a real difference to the lives of disabled people'. None of this engagement elicited views on detailed policy proposals, because no such proposals had been finalised or agreed within government.

The Survey was published in January 2021 and was open for four weeks for responses. It was in a multiple choice format but also had four open questions (with word limits). It did not outline the proposed content of the Strategy and it did not allow comment on any specific policy proposals. The SSWP maintained that she was not seeking to elicit views on detailed policy proposals but to gather information.

The Survey was accompanied by a press release which indicated that views received would ‘inform the development of’ the Strategy. The DU also published a press release stating that it was launching an online survey to gather views as ‘a part of our ongoing consultation and marks the start of our insight gathering’. The Survey itself was placed on the DU’s website, in a section entitled the ‘Consultation Hub’. In July 2021, the Strategy was published.

There was no statutory obligation upon the SSWP to consult. Further, no promise to consult had been made nor was there a legitimate expectation based on any representation or assurances that there would be consultation. Nor was there any established practice of consultation.

What did the court decide?

Griffiths J identified four broad questions that he had to determine (at para [9]): (i) whether the SSWP was under a duty to consult on the basis that failure to do so gave rise to ‘conspicuous unfairness’ and/or was irrational (ii) if not, whether she voluntarily embarked upon a consultation giving rise to various duties (iii) if and insofar as any consultation duties existed, whether the Survey discharged those duties; and (iv) in conducting the Survey, whether she breach the PSED?

He set out the following general principles (at paras [44]–[45]). The common law does not impose any general duty on decision makers to consult before they take decisions (*R (AD) v Hackney London Borough Council* [2019] EWHC 943 (Admin) at para [87]). There is no common law duty to consult persons who may be affected by a measure before it is adopted: *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 at para [35]. Nor should a duty to consult be constructed on the basis of a general assessment of what might be called fairness: *R (MP) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1634 at para [36]. Such a duty does not arise simply because it would be good idea or sensible to consult. Most often it arises because it is created by statute.

Griffiths J relied upon the summary in *R (Plantagenet Alliance) Ltd v Secretary of State for Justice* [2014] EWHC 1662 (Admin) (at para [98]) of the principles governing when a legal duty to consult arises. As relevant to this case: (i) the common law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation, or as to the continuance of a policy to consult; (ii) there are four main circumstances where a duty to consult may arise, the last being ‘where, in exceptional cases, a failure to consult would lead to conspicuous unfairness’; (iii) the courts should not add a burden of consultation which the democratically elected body decided not to impose; (iv) the doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions; and (v) even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise.

Griffiths J held that, given ‘the preliminary and general nature of the Strategy’, consultation was not legally required to avoid conspicuous unfairness or irrationality—the Strategy did not immediately make any changes to law or detailed policy (at para [48]).

In turning to the second question, Griffiths J relied (at para [55]) upon Lord Woolf MR’s statement in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 at para [108]:

‘...whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly’

This dicta itself was based upon *R v Brent London Borough Council, ex parte Gunning* [1985] Lexis Citation 944. On the basis of a forensic analysis of the contemporaneous documentation and events (described above), he found that the SSWP had embarked upon consultation (at para [60]).

The same common law duty of procedural fairness will inform the manner in which such a voluntary consultation should be conducted as would be the case where the duty was statutory (at para [68], relying upon *R (Moseley)* at para [23] and *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577 at para [78]). In *Gunning*, it was held that this duty entails the following basic requirements: (i) consultation must be at a time when proposals are still at a formative stage; (ii) the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response; (iii) adequate time must be given for consideration and response; and (iv) the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

Griffiths J found that the SSWP had breached her duties in that she had not given sufficient reasons for any proposal to permit of an informed response (at para [74])—she had not informed stakeholders what she was proposing to include in the Strategy (at para [75]). This made it impossible meaningfully

to respond in the Survey to those proposals before they were finalised and published in the Strategy. He found that the multiple choice format, and the word limit on free-form responses did not allow for a proper response even to the issues canvassed in the Survey (at para [76]).

Case details

- Court: Administrative Court
- Judge: Mr Justice Griffiths
- Date of judgment: 25 January 2022

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