



The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173

Fax +44 (0)20 7329 2190

DX 98936 – Cheapside 2

DavidH@citysolicitors.org.uk

www.citysolicitors.org.uk

David Hobart
Chief Executive

The Chairman
Secondary Legislation Scrutiny Committee
House of Lords
London SW1A 0PW

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Dear Chairman,

I am the Chief Executive of the City of London Law Society. The Society promotes the work of the City of London law firms and their 17000 solicitors; the work of our 58 member firms amounts to more than 1% of UK GDP. The Society has 19 volunteer committees, each of which specialises in a particular area of law. Consequently, the Society and its committees engage with, and advise on, the issues raised across almost the full breadth of government's public policy proposals and consultations.

Thank you for the opportunity to comment on the Government's new approach to consultation, in advance of the oral evidence session of the House of Lords Secondary Legislation Scrutiny Committee on 11 December 2012.

The new Consultation Principles were launched on 17 July 2012 under cover of a Written Ministerial Statement by Oliver Letwin MP, which he introduced as follows:

'The Civil Service Reform Plan commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.'

As a result the government is improving the way it consults by adopting a more proportionate and targeted approach. The new approach to consultation is based on making the type and scale of engagement proportional to the potential impacts of the proposal. The emphasis is on understanding the effects of a proposal and ensuring real engagement rather than following the same bureaucratic process.

This guidance therefore replaces the Code of Practice on Consultation issued in July 2008.....'

Four points are notable about the adoption of the new Consultation Principles.

First, the catalyst. Neither the Civil Service Reform Plan, nor its companion document, the Context for the Civil Service Reform Plan, discusses the topic of consultations. Both documents are wholly silent on the substance of the issue. But it is clear that the Government's (and Prime Minister's) desire for a 'pacier' and more responsive policy process has been translated crudely into a corresponding desire for a 'pacier' consultation process. This translation might have some merit if anyone had correlated either the length, or contribution, of past consultations with the outcome of their corresponding policy decisions. In part, this is unsurprising, because it would be exceptional for the duration of even a 12-week consultation to be a critical factor in the duration of the wider decision-making and implementation process. Anyway, no attempt at such a correlation is apparent.

Second, the proportionate approach. Proportionality cuts both ways. It is undeniable that a further long consultation process would be disproportionate to a minor and well-informed policy proposal. Similarly, a short consultation would be disproportionate to a complex and vital issue. But the disproportionality here in insisting on a 'pacier' consultation process is the disproportionate attention paid to the consultation process, in comparison to the attention paid to the other components of the policy process. Frankly, there is no point in trimming one, four or twelve weeks off the consultation if that merely leads to greater uncertainty, or creates additional headroom for prevarication, elsewhere in the policy process. There is a clear (and risible) illustration of this false economy in the new Consultation Principles: 'for a new and contentious policy, such as a new policy on nuclear energy, the full 12 weeks may still be appropriate'. Set against the cacophony of several cans being kicked down the road, does anyone still believe that a 4- or 12-week duration of a public consultation is material to the length of today's major policy changes and their implementation?

Third, a comment about the 'new approach and real engagement' in the public consultation preceding the launch of these Consultation Principles: what consultation? To simply substitute the Consultation Principles for the previous Code of Conduct, with no consultation, suggests either that there is no change worthy of public consultation, or that there has already been sufficient real engagement for policy makers to know the views of the stakeholders. But even a simple comparison of the old and new positions casts doubt on these propositions.

The 2008 BIS Code of Conduct, founded on BERR's 2007 public consultation, was itself the third and final iteration of the Code since 2000. In the absence of any public debate or consultation since 2007, it is not unreasonable to believe that the majority of those organisations and individuals who wish, or at least are willing, to contribute to the public policy debate, still support the outcome of the 2008 Code that 'consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible'. Specifically, the 2008 Code expected that 'if a consultation exercise is to take place over a period when consultees are less able to respond, e.g., over the summer or Christmas break, or if the policy under consideration is particularly complex, consideration should be given to the feasibility of allowing a longer period for the consultation'. If, as I suggest above, there is no discernible correlation between the length of a consultation and the length of the eventual policy decision and implementation, i.e., that 'pacier' consultations do not lead to faster policy outcomes, it is difficult to understand why the new Consultation Guidelines have deleted any mention of consultations over the summer and Christmas period; clearly, consultees since 2008 are no more able to respond at these times, and officials are no more able to learn from the responses. It is difficult to avoid the conclusion that Government is more interested in reducing the burden of handling public responses than it is in learning what the responses have to offer.

Fourth, there is a further feature of the Consultation Guidelines that marks a fundamental change in the Government's attitude to consultations (and which should have been reason enough to prompt further consultation). The 2007 consultation opined that 'consultations should only happen at a stage when there are still elements of policy to influence', to which the then-Government agreed in the 2008 Code by saying 'clearly there is no point in consulting when everything is already settled'. Contrast that with the penultimate paragraph of today's Guidelines, which positively discourage any public engagement ahead of collective agreement in policy making. Policy making is to be the preserve of Westminster, Whitehall and experts, but increasingly immune to public influence.

In conclusion, I believe the pendulum has swung too far against public consultations; crucially, for no obviously good reason. Well-managed public consultations are spend-to-save measures that improve public policy decision-making. In the case of the City of London law firms, our work provides Government with free, world class, legal advice that Government could not otherwise get. I accept entirely that the process of consultations represents a significant burden for a smaller Civil Service, and that badly managed consultations can result in poorer and slower decision-making. But that is no argument for not seeking to manage public consultations in such a way that they are parallel activities to the critical path of policy-making, rather than sitting uncomfortably on the critical path. Above all, 'pacier' consultations will not lead to better decision-making.

Yours faithfully

David Hobart
