

# Public Participation in Environmental Matters in the UK/England & Wales

A Guidance Note

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## 1. Introduction

Public participation is the engagement by individuals and NGOs with the decision-making structures in society and includes, for example: voting; campaigning; and (as will be addressed in this note) taking part in consultations. Effective public participation can improve the quality of governance and gives those likely to be affected by decisions the right to be involved in the decision-making process – poorly facilitated public participation can have the opposite effect of disenfranchising affected persons and preventing the transfer of helpful information to the decision-making authority.

This guidance note serves as an introduction to the obligations which fall on the government and public authorities regarding when they must seek public participation and what such public participation must involve, as well as steps to be taken if the participation has not been properly facilitated. A more detailed guidance note on this topic can be found [here](#).

The obligations concerning public participation arise principally out of the Aarhus Convention,<sup>1</sup> but also from domestic legislation, case law and governmental consultation principles.

## 2. What is the Aarhus Convention and what are its requirements?

The Convention establishes rights for individuals and civil society organisations, and imposes obligations on public authorities, in relation to the environment. As the Convention is an international treaty, only those parts of it which have been implemented into domestic legislation are directly enforceable. Notwithstanding the fact that the Convention is not fully enforceable under UK law, public authorities can always be reminded of the UK's international obligations, which can be an influential tactic.

Each signatory country is required to guarantee the three procedural 'pillars' of the Convention, namely:

- Access to information (the 'first pillar');
- Public participation in decision-making (the 'second pillar'); and
- Access to justice in environmental matters (the 'third pillar').

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<sup>1</sup> Its full title 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' (the "**Convention**"). The Convention was ratified by the UK in February 2005.

### 3. What are the public participation requirements under the ‘second pillar’ of the Aarhus Convention?

Articles 6 to 8 of the Convention require public authorities to facilitate public participation in relation to three different types of decision-making concerning the environment.<sup>2</sup> Public authorities must enable:

- The public affected and environmental NGOs to comment on proposals for specific activities listed in Annex 1 to the Convention (e.g. oil and gas refineries, chemicals factories and waste management facilities), or any activity not listed which may have a significant effect on the environment. Public authorities must consider those comments in making their decisions and provide information about their decisions and reasons for making them (Article 6);
- The public to comment on proposals for plans, programmes and policies affecting the environment. Public authorities must consider those comments in their decision-making (Article 7); and
- The public to comment on legislation likely to have a significant effect on the environment. The comments from the public should be considered, so far as possible, in making environmental legislation (Article 8).

### 4. What are the other requirements for consultation in the UK?

If there is domestic legislation implementing a Convention requirement, the participation requirements may be set out in that legislation. If there is no requirement in legislation, a public authority may be under an implied duty to consult (if, for example, there has been a previous promise to do so).

All consultations must be conducted fairly and case law has established some guiding principles,<sup>3</sup> to determine whether a consultation is fair. These are:

- The consultation must occur at a time when the proposals are still at a formative stage;
- Adequate information must be given to enable consultees to respond properly;
- Adequate time must be allowed for consideration and response; and

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<sup>2</sup> The text of the Convention can be found here, [cep43e.pdf \(unece.org\)](https://www.unece.org/ceesd/transparency/Convention%20on%20Access%20to%20Information%20on%20Environmental%20Matters.pdf).

<sup>3</sup> Sometimes referred to as either the Sedley or Gunning principles, so called because the principles were first proposed in 1985 by Stephen Sedley QC, as part of his legal arguments in the case of *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168. The principles were adopted by the judge in that case and have been applied/endorsed since that time, notably by the Supreme Court in *R. (on the application of Moseley) v Haringey LBC* [2014] UKSC 56.

- The product of consultation must be conscientiously taken into account in making the decision.

These are not hard and fast rules and a consultation may be fair even though not all these requirements are met – each case will turn on its facts. However, they are a useful guide and cover broadly the same ground as the Convention public participation requirements.

In addition, there are Cabinet Office Consultation principles, that were revised in 2018.<sup>4</sup> This is guidance for government departments when conducting consultations, so whilst it is not legally binding it nevertheless sets out desired standards. The Principles provide, for example, that:

- The content of the consultation should be clear and precise, have a purpose, be informative and available online (Principles A, B and C); and
- The consultation should take account of the full range of people affected by the policy and the consultation should be targeted effectively (Principles F and G).

These are not hard and fast rules and a consultation may be fair even though not all these requirements are met – each case will turn on its facts. However, they are a useful guide and cover broadly the same ground as the Convention public participation requirements.

In respect of consultations in Northern Ireland, there are additional obligations imposed on public authorities by Section 75 of the Northern Ireland Act 1998. Section 75 imposes an ‘Equality of Opportunity’ duty and a ‘Good Relations’ duty on public authorities when carrying out their functions – these duties have implications for how consultations must be run.<sup>5</sup>

## **5. In what ways are the Aarhus Convention public participation requirements relevant to a consultation relating to the environment?**

The Convention may be relevant in two ways, namely:

- To support proposals made in consultation responses on measures that may have a significant effect on the environment, for public participation in environmental-decision making processes; and

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691383/Consultation\\_Principles\\_1\\_.pdf#:~:text=Do%20not%20consult%20for%20the%20sake%20of%20it.,on%20which%20you%20already%20have%20a%20final%20view.](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles_1_.pdf#:~:text=Do%20not%20consult%20for%20the%20sake%20of%20it.,on%20which%20you%20already%20have%20a%20final%20view.)

<sup>5</sup> <https://www.equalityni.org/Employers-Service-Providers/Public-Authorities/Section75/Section-75/PublicConsultation/Consultation-principles.>

- When responding to a consultation that relates to a decision on a permission covered by Article 6, or a plan, programme or policy within Article 7 or draft rules (which may be regulations or other legislation) within the scope of Article 8.

The following questions may help to determine whether a consultation has been carried out fairly:

- Is the consultation occurring at a formative stage? Can responses to the consultation influence the decision-making or does it appear that the decision has already been made?
- Do you have enough information to respond properly to the consultation? The Cabinet Office guidance requires that the content of the consultation should be clear and precise, have a purpose, be informative and available online.
- When must you respond to the consultation? Is it reasonable to expect consultees to consider the information and to give a proper response in the time given?
- Who has been consulted? Are there individuals or groups who should have been included in the exercise but appear to have been left out?

## **6. What can you do if you consider a consultation is deficient?**

- If you consider that the consultation is deficient, you should raise your concerns with the public authority through the email or telephone contact details provided in the consultation. You should also download a copy of the consultation as it will be removed from the public authority website when the deadline for responding has passed.
- Where you think that there is a duty to consult and an authority has made a decision without consultation, you should check if there is a legal duty to consult, either in legislation or because there is an implied duty.
- It may be possible (subject to certain conditions being fulfilled) to bring judicial review proceedings where an authority proceeds with a flawed consultation or fails to carry out a consultation.
- Where a Convention right or obligation has not been implemented through domestic legislation it is not directly enforceable in the UK and it is not possible to bring an action in a domestic court relying only on that right or obligation. However, there is a mechanism for making a complaint to the Aarhus Convention Compliance Committee about any UK failure to comply with the Convention requirements.

*If it is not possible to raise compliance with the Convention in domestic legal proceedings, it may be possible to highlight the UK Government's non-compliance with its international obligations through publicising this and to bring pressure on the Government for full implementation.*

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