How to Succeed in the Senior Civil Service

Module 6 - Consultation

6.1 Introduction

Senior decision makers are seldom pleased when they are asked to undertake a lengthy consultation process.

> There is nothing a government hates more than to be well-informed; for it makes the process of arriving at decisions much more complicated and difficult. - *John Maynard Keynes*

Ministers in particular, and their political advisers, all too often have unwarranted confidence in their ability to make sensible, speedy decisions, and their ability to change the public's behaviour. They are also often over-optimistic about what their organisations can achieve. It doesn't help that social media, and the mainstream media that feed on it, cause decision-making to be made under ridiculous pressure.

It can therefore be very difficult to persuade ministers that research and consultation makes sense. But it can be worth quoting or paraphrasing the military doctrine that *'The first duty of a commander is reconnaissance.'* The best laid schemes will certainly go badly awry unless supported by strong and open-minded consultation processes.

More generally, Henry Ford pointed out that "If I had asked people what they wanted, they would have said faster horses". This is not to say that the public's views should not be sought or that consultation is inappropriate but politicians are supposed to say what they want to achieve. Civil servants help them get there, consulting as to means.

Machiavelli put it this way:

> Princes should consult the many about what they might do, and consult the few about what they are resolved to do.

Ministers should therefore not spend much, if any, time consulting about minor decisions nor is there normally any question of their entering into anything like a formal consultation process about the most far-reaching of decisions such as whether to go to war. They will of course get lots of strong informal advice anyway.

But that leaves a lot of decisions which must be taken only after a thorough consultation process. And there is a fair amount of settled law in this area.

6.2 The Law

It is important to remember that most consultations are required by law and must be carried out to a high standard. A legal duty to consult may arise:

(i) where there is a statutory duty;
(ii) where a promise to consult has been made;
(iii) where there is an established practice of consultation and
(iv) where it would be conspicuously unfair not to.

Consultation processes in practice have two main functions.

The first is to help the consulting authority decide what to do by ensuring that, before it makes a decision, it has access to facts and arguments from a wide range of sources. The process therefore needs to encompass all reasonable options (usually including either 'no change' or uncontroversial improvements) and it needs to be carried out with an open mind, well before the authority reaches a provisional or 'minded to' decision.

The second main function of a legally compliant consultation is to ensure that the reasons for the eventual decision are both sound and clear to third parties.

An authority's decision will be successfully challenged (via judicial review) if:

- the authority took into account factors that ought not to have been taken into account, or
- the authority failed to take into account factors that ought to have been taken into account, or
- the decision was so unreasonable that no reasonable authority would ever consider imposing it.

The authority's consultation process and eventual decision document therefore need to demonstrate that the above challenges cannot be sustained. In particular:

- authorities must clearly describe any facts and assumptions (including expert's assumptions) which they have taken into account, so that these can if necessary be challenged, and
- authorities cannot rely upon computer models and spreadsheets. Judges are sceptical of such 'black boxes' and always need to be persuaded of the logic and sense of assertions based on such models.

Consultation processes were considered by the Supreme Court in *R v. LB Haringey*. The court confirmed the four 'Gunning' principles that must apply in order for a consultation to be considered fair:

- that it take place when the proposal is still at a formative stage;
- that sufficient reasons for the proposal be put forward to allow for intelligent consideration and response;
- that adequate time be given for that consideration and response; and
- that responses be conscientiously taken into account.

Decision letters and documents must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues. Reasons can be briefly stated, the degree of detail required depending entirely on the nature of the issues needing to be decided.

The reasons need refer only to the main issues in the dispute, not to every material consideration. Decision letters must be read in a straightforward manner recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A legal challenge will only succeed if the party aggrieved can satisfy the court that they have genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

6.3 How to Consult Effectively

There are lots of different ways to consult and you should not simply duplicate what someone else has done before you. In particular, don't limit yourself to written communications. Discussion groups, large formal meetings, informal meetings with individuals and the Internet all have a part to play. And even when preparing formal written consultation, there are a number of choices. Have a look at the detailed advice that is available on consultation procedures, and also look at a range of previous consultation documents and choose a format which best suits your needs.

Above all, remember that you are in policy-formulation or policy-implementation mode, so there is no need to be defensive. Indeed, you should positively encourage respondents

to point out your mistakes and possible pitfalls. Good decision making depends on allowing or even encouraging dissent up to the point when your organisation has taken its decision. If your process is effective, and you take the responses seriously, you will find that you then avoid a very large number of traps that you would not have spotted by yourself.

You should therefore encourage those who seem to be able to take a wider view. Cultivate those who say unexpected things or comment candidly upon their organisation. Such people shine unaccustomed light on issues and can be invaluable contributors to the policy making process.

6.4 Experts

Do not make the mistake of thinking that experts' opinions are necessarily correct. Much science is beyond doubt, but much some softer scientific opinion, such as medicine and economics, may be distinctly flaky. The better doctors, for instance, will tell you that:

- Medical facts (things we know to be true) have a half life of five years.
- Yesterday's heresy is today's orthodoxy and tomorrow's fallacy.

Equally, though, senior professionals can be very reluctant to accept that their 'tried and tested' way of doing things might be wrong - or at least sub-optimal. It took far too long, for instance, for convoys to be introduced in the First World War, because of opposition from the Admiralty. There were many reasons for this opposition, including an unwillingness to accept that the arguments of 'amateurs' might be soundly based. And also, in his book *On the Psychology of Military Incompetence*, Norman Dixon suggested that the hostility towards convoys in the naval establishment were in part caused by a (sub-conscious) perception of convoys as effeminate, due to warships having to care for civilian merchant ships. Convoy duty also exposed the escorting warships to the sometimes hazardous conditions of the North Atlantic, with only rare occurrences of visible achievement (i.e. fending off a submarine assault).

It is nevertheless always tempting, and often sensible, to accept the consensus view of numerous experts when trying to predict future behaviour. But a consensus view can sometimes be little more than a best guess - somewhere between upper and lower bounds of expert and/or model's predictions. So you may need to think hard about predictions that lie somewhat outside the consensus. What if that upper bound prediction turns out to be close to what happen? Will you be prepared, or will you be caught napping because you relied too much on the consensus?

There will almost certainly be academics who have thought hard about your policy area. Their advice should not be accepted uncritically, of course. They may have their own political or other agenda, and may be deeply unsympathetic to the constraints on your organisation's ability to pursue particular paths. But they will know a lot of detail, and they will understand both sides of the policy debates. So get to know them as soon as you can, and listen careful to what they have to say.

But don't worry if you can't understand their academic writing. There is a certain academic style which is required in order to impress their senior colleagues, but it is

pretty well incomprehensible to the rest of us. The good news is that the best academics will always be delighted to explain quite complex arguments in a simple straightforward way, if asked nicely. If they can't, or won't, then it is generally pretty safe to ignore them.

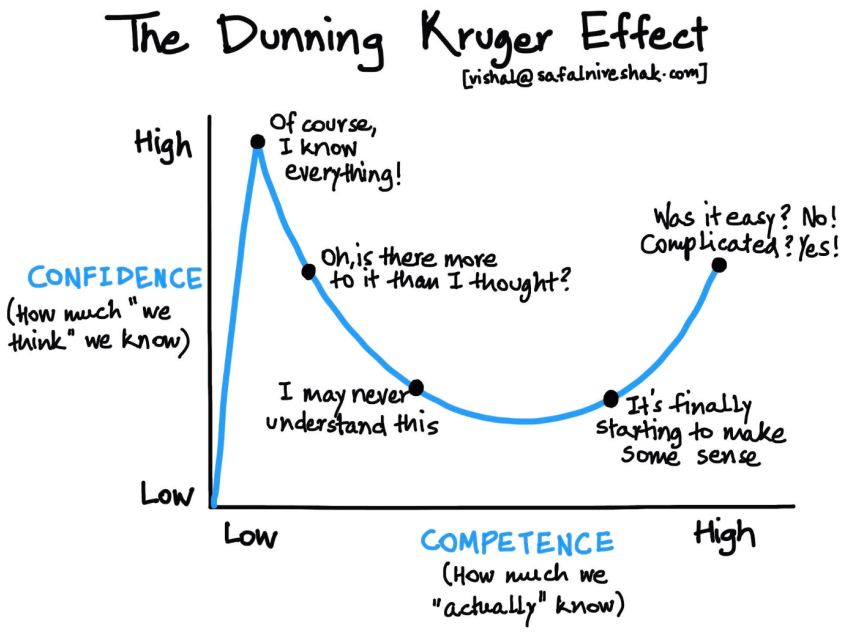
Take care, though, that you do not mistake the cautiousness of experts as lack of understanding. As Bertrand Russell said:-

> "The whole problem with the world is that fools and fanatics are so certain of themselves, yet wiser people so full of doubts."

There is also the Dunning-Kruger Effect which may be summarised as follows:

> The more you know, the less confident you're likely to be. Because experts know just how much they don't know, they tend to underestimate their ability; but it's easy to be over-confident when you have only a simple idea of how things are.

This diagram summarises the effect rather nicely:



6.5 Non-Experts May Be Over-Confident

It follows from the above that boardrooms, universities, the media and many other places are full of people who have enormous self-confidence - and often a wide and influential network of supporters. That doesn't mean that they know what they are talking about, especially if pontificating about technical subjects, economics and management. Stick to your guns if you know better - though take care to consider how best to speak truth to power, if that is necessary.

> (Newly appointed Vice-President Lyndon Johnson was awed by his first encounter with the assembled brains of the Kennedy Round Table, only to be brought down to earth by an adviser's comment that he would feel a lot better if just one of them had run for Sheriff once – or knew some Vietnamese.)

6.6 The 'Valley of Death' between Policy and Delivery

Jon Thompson, the much respected Head of HM Revenue and Customs, used the above dramatic phrase, and made some telling points when talking about the need to consult your own 'front line' whether inside or outside the department. They will have strong views about practicality, resources and communication. Ignore them at your peril.

He stressed that translating policy into delivery is one of the most complex challenges in government. And he argued that a solid understanding of delivery also empowers civil service leaders to 'speak truth to power', and to advise Ministers on the timescales, costs and technical aspects of delivering their policies.

As Charles Dillow says, implementation *is* policy:-

> Policy-making is not like writing newspaper columns. It's all about the hard yards and grunt work of grinding through the detail. A failure of implementation is therefore often a sign that the detail hasn't been thought through, which means the policy itself is badly conceived. Reality is complex, messy and hard to control or change. Failing to see this is not simply a matter of not grasping detail; it is to fundamentally misunderstand the world. If you are surprised that pigs don't fly, it's because you had mistaken ideas about the nature of pigs. Bad implementation is at least sometimes a big clue that the policy was itself bad.

6.7 Consulting Organisations Outside Government

It is equally important to consult 'on the ground' when seeking the views of businesses and other organisations outside government. Head offices seldom have a good feel for the reality of life outside the corporate bubble.

> Deutsche Bank asked 2.4 million customers and their branch managers and their junior branch staff, to rate branch performance. There was a very high correlation between the junior staff's perception and that of their customers, while there was almost no correlation with the branch managers' perceptions and the customers'.

Gill Kernick commented as follows, in the context of Grenfell Tower:

> "For the last 10 years I have worked predominantly in high hazard industries looking at how you create safe cultures … and specifically how to prevent major accidents – low probability, high consequence events. The key to change is creating a connection between the most senior levels of the organisation and the front line. … In the case of housing, because of the complexity of the world we live in, it is the tacit knowledge of residents that is critical to keeping people safe. They have the experience of living in the building, they know what the issues are, and they probably know how to solve them."

If it is difficult to access the views of front line staff then the views of small firms in the sector might be very revealing.

6.8 Consulting the Public

It is in practice not easy to consult the general public. It is seldom the case that those responding to the consultation are in any way representative of the wider population. And the effort required can seem disproportionate to the benefit - but it is never disproportionate if it concerns their safety or welfare.

Probably the most important thing is that you should not be dismissive of, or even worse nervous of talking to, the general public. The lives of policy-makers and decision-makers are often very different to those of the people that will be affected by their decisions. Boundaries need to be crossed in consultations and this can take courage on both sides. The Grenfell Tower tragedy showed that you should trust people, listen to their leadership, and then either help them or get out of their way.

There was, in the early 2020s, a distressing trend for officials to hide behind webinars. It is more demanding, but much better in so many ways, if there are upset people in the room so that difficult questions can be answered. If they can't then maybe the proposal under consultation needs to be re-evaluated.

In the same vein, Peter Wells tells the delicious story of talking with a senior official at the launch of a UK government technology initiative. They were really keen on engaging the public. He asked what the plan was. They gestured out of a Whitehall window across St James's Park and said "We'll run some events at the Royal Societies".

You can start by ensuring that the consultation documents are written from their perspective and are available in multiple formats and languages. There was much justified criticism when the 2023 consultation on the closure of railway ticket offices was not available in print, let alone large print or as audio or British Sign Language. It was therefore inaccessible to the disabled and elderly - those most likely to be affected.

Then give consultees enough time - 13 weeks minimum - to learn about and assimilate the content of your consultation document. It can easily take this long for representative organisations to forward the document to their members, wait for replies, and then consolidate them - especially around holiday periods.

Make sure you have offered a response format that makes it easy for everyone to contribute. It can often be effective to use trusted intermediaries who might organise ‘citizens assemblies’ or who might train and pay local residents to run local consultation sessions and summarise responses to feed into the process.

Above all, talk to those who may be unhappy with your policies**.** They often have a good reason, which you need to bear in mind whether or not you can change the policy, or its detail, as a result. And don’t hesitate to let your decision maker have a short note of what you have learned. It might just make him or her think twice.

Be careful to frame your consultation questions in a neutral way.

But you should also - when consulting communities - make it clear from the outset that they have a voice - an important voice - but not a veto. Remember Henry Ford's quote (6.1 above). It is for politicians to take the lead when aiming to change behaviour - to combat climate change, for instance. Consultation should help them find the best way to do so, and ways that are politically acceptable.

It is seldom, if ever, helpful to ask questions such as 'do you agree or disagree' which imply that your favourite option will not happen merely because sufficient numbers object. Arguments do not become any stronger as a result of being repeated by lots of respondents. Equally, one serious problem unearthed through consultation can be more than enough to kill a proposal, however many other respondents think it is a great idea.

Not all responses to consultation should be treated equally. I particularly enjoyed an American chemical company's response to a consultation about a chemical skill in which the company argued that West Virginians could safely absorb more poison than other Americans because they are fatter than other Americans, and they don't drink as much water as their out-of-state cousins (preferring to drink beer instead) so even if their water is more toxic they will be drinking less of it.

6.9 Research

Because it has to incorporate hard facts and detailed analysis, expert evidence and advice will (if you are not careful) arrive too late to make a significant difference. Research results and other expert input should therefore be timed so as to arrive when it might be welcomed.

Research etc. must take into account local circumstances. One size seldom fits all. New York knife crime, for instance, was mainly restricted to certain parts of the city. Its successful anti-knife crime initiatives may not therefore translate to London where knife crime is more thinly spread across large parts of the city.

6.10 Regulatory Decision Making

Regulators and other officials who are implementing specific laws need to consult those likely to be affected by their decisions - and indeed others who may have advice and information which might help them reach fair and sensible decisions. Some regulators face regular legal challenge and have developed robust processes to ensure that their consultations are effective but without taking too long. There is much to be said from following their template. The terminology varies from institution to institution but -

1. The formal process begins with the publication of *an Issues Statement* defining the decision that is to be made, and listing the main matters to be taken into account in reaching that decision
2. At around the same time, there is *a call for relevant advice and information.*
3. Once a likely decision emerges, there is a 'minded to' document - which regulators often call *Provisional Findings*. It explains in some detail why the decision-maker is minded to make the decision in prospect. It should if necessary include an impact statement.
4. A *final decision* document, again with detail, is then published a little later, usually confirming the provisional decision, but sometimes not, if important new information or argument has come to light. These should be as short and focussed as possible.

Central government used to follow a similar process involving the publication of 'Green' and 'White Papers'. It would be a very good thing if these could be used more often.

An Example from History

It is arguable that the Spanish Armada failed in its mission because Philip II of Spain was pretty sure of himself and didn't feel the need to consult. He never, for instance, brought in officers around a table to pick through any problems with the plan. Had he done so in this case, they might very well have asked: "How is a fleet of 130 ships going to get to the Netherlands at exactly the right moment to meet the troops? How are they going to anchor long enough off the coast of Dunkirk for those troops to get abroad aboard?" And though Santa Cruz and Palmer both submitted written objections that just wasn't the same as the king having to listen to them.[1]

END

[1] Interview with Geoffrey Parker in BBC History Magazine