



**Scottish  
Civil Justice  
Council**

## **THE CONSULTATION PROCESS**

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**Version 1.1**

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## Purpose

1. This paper provides guidance on each stage of the process for delivery of a fair consultation process.

## Background

2. The aim when consulting users is to secure good quality feedback from respondents that can both inform the development of the Councils policy positions and assist with the successful implementation of each proposed change.

### The vires to consult:

3. The Council holds a broad power to “consult such persons as it considers appropriate”. That statutory power arises via section 3 (2) (c) of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 ([ASP 2013/3](#)) which came into force from 28 May 2013:

#### Section 3 (Powers of the Council)

*(1)The Council may take such action as it considers necessary or desirable in pursuance of its functions.*

*(2)In particular, the Council may:*

- (a) have regard to proposals for legislative reform which may affect the civil justice system,*
- (b) have regard to the criminal justice system and its effects on the civil justice system,*
- (c) consult such persons as it considers appropriate,***
- (d) co-operate with, and seek the assistance and advice of, such persons as it considers appropriate,*
- (e) make proposals for research into the civil justice system,*
- (f) provide advice and make recommendations to the Scottish Ministers on the development of, and changes to, the civil justice system, and*
- (g) publish any recommendation it makes.*

### Definitions:

4. For the purposes of this paper a ‘consultation’ is defined as follows:

Term	Meaning
consultation	<i>a time-limited exercise that provides an opportunity for all those who wish to express their opinions on a proposed area of work to do so in a way that can inform and enhance that work.</i>

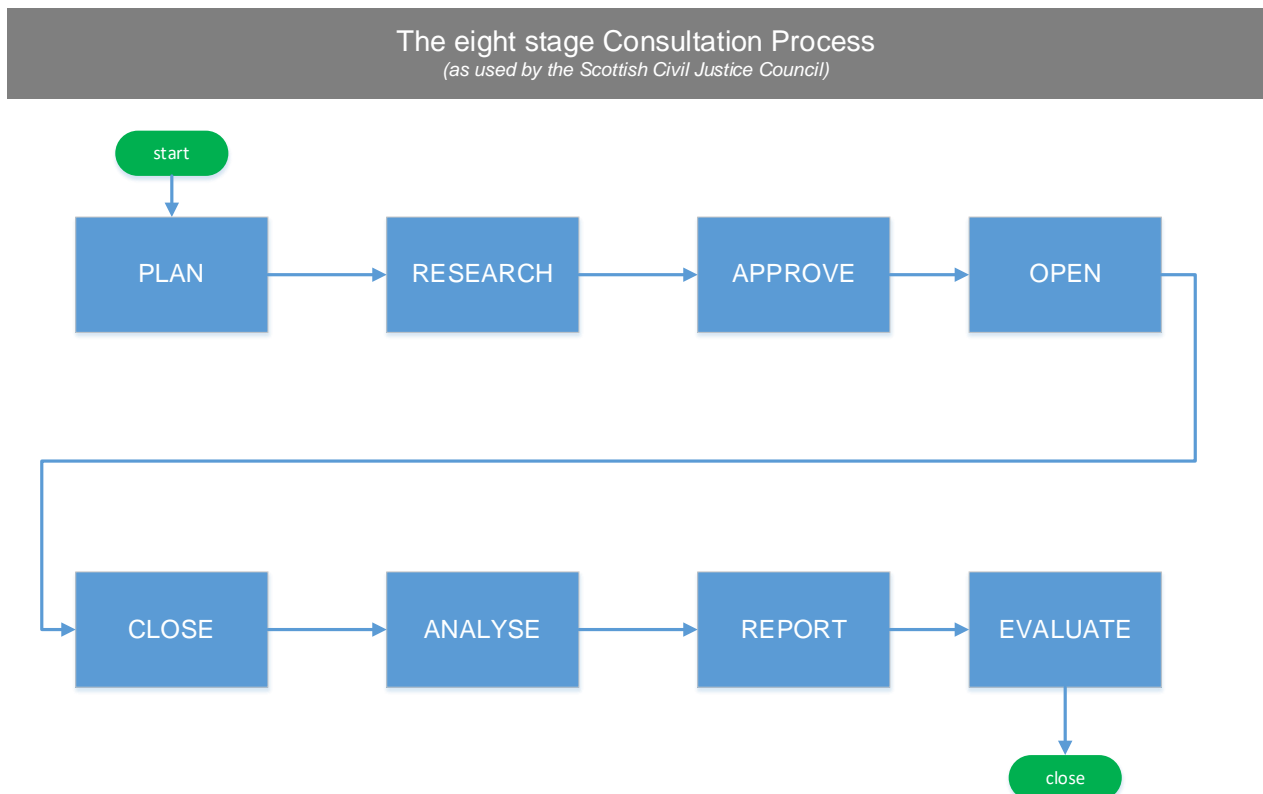
### Running a fair consultation:

5. Any consultation exercise is a time and resource intensive process that can place a considerable burden on respondents. To recognise the level of effort that can go into providing a well-informed response the Council aims to a) ensure that the consultation process used is fair and b) that the outcomes sought can add real value to the policy area under consideration.
6. In practice each consultation does carry a risk of legal challenge if the process used is perceived as unfair. The Council is mindful of the legal requirements for running a fair consultation, as summarised via the Gunning Principles:
  - Consult when proposals are at a formative stage;

- Give enough information for intelligent consideration;
  - Give adequate time for responses; and
  - Explain how you will take account of responses.
7. To complement the Gunning Principles, the UK Government added its own 2018 statement which set out eleven [consultation principles](#):
- Consultations should be clear and concise;
  - Consultations should have a purpose;
  - Consultations should be informative;
  - Consultations are only part of a process of engagement;
  - Consultations should last for a proportionate amount of time;
  - Consultations should be targeted;
  - Consultations should take account of the groups being consulted;
  - Consultations should be agreed before publication;
  - Consultations should facilitate scrutiny;
  - Responses to consultations should be published in a timely fashion; and
  - Consultation exercises should avoid election periods.

The Councils approach:

8. The Council supports the consultation principles as stated above. This paper narrates an eight-stage process as the methodology to deliver on those principles:



9. The visible outcomes from the use of this process are the 3 reports published online as part of each Public Consultation exercise:
- The CONSULTATION paper:
  - The CONSULTATION ANALYSIS paper:
  - The CONSULTATION RESPONSE paper:

## STAGE 1 – PLAN

10. The key principles used when planning a consultation are:
- The views of end users will be of greatest use to the Council when they are sought as early as possible in the policy cycle; and
  - Where the Council already holds a firm policy position it can be inappropriate to put respondents through the burden of a consultation.
11. In practice that means that before starting any consultation there is a need to consider:
- Why the Council is consulting;
  - Whose views need to be sought to help inform the Council;
  - What new perspective those respondents might add to what is already known; and
  - Whether there might be any unknown legal barriers to making a proposed rule.

### Identifying the category of consultation

12. A consultation will usually fall into one of three categories:
- *TECHNICAL* – the majority of the Councils proposed rule changes will usually generate a very limited number of responses from those legal professionals and officials who have a high level of understanding of the specific issue being consulted on. The complexity of the legal language that is being used within technical rules can be essential for legal certainty but off-putting for the general public.
  - *GENERAL* – some rule changes may generate a much wider audience of people with a very general interest in a policy topic, but varying degrees of expertise in that subject. The use of straightforward terminology is required when targeting the views of the general public. Complex legal language is ideally restricted to the accompanying draft rules that are targeted at the legal profession and officials.
  - *MASS* – on rare occasions, the Council may want to canvas opinion on a very general area of policy that effects the civil justice system as a whole, as a precursor to initiating any work at all on the development of potential new rules. That allows legal professionals and officials to respond, as well as interested members of the public who may be unaccustomed to involvement in the policymaking process. Any mass consultation does need to be kept very clear, succinct and simply worded.

### Choosing the channel for consulting

13. There is a choice to be made between 3 available channels when consulting:
- *INTERNAL CONSULTATION (via Committee members)* – the majority of rule changes will be Technical Consultations. The broad range of members on the Council and its Committees provides an established channel for engagement when the views sought are highly technical or consequential in nature. For information handling; standing orders apply with members deciding whether the papers are marked private or public.
  - *TARGETED CONSULTATION (via selected stakeholders)* – for some Technical Consultations, and General Consultations, the views sought may be specific to one area of specialist expertise but the Council may wish to access the lived experience of a

greater number of the judiciary, practitioners and officials than can be accessed through the existing Committees. For information handling: any papers would be uploaded to the Councils website for transparency but as the selected consultees are emailed directly there would be no accompanying press releases made.

- *PUBLIC CONSULTATION (via all potential stakeholders)* – for the wider General Consultations, and all Mass Consultations, the policy topic may generate a much wider level of public interest as it affects civil society more generally. The list of potential consultees will reflect that. For information handling; the Council will publish the consultation paper, the individual responses, and the analysis of responses. Accompanying press releases are used to attract the widest possible interest.

#### Choosing what is to be consulted on

14. The choices made around WHAT is being consulted on will also influence WHEN it is best for that consultation to take place within the policy cycle:

*CONSULT EARLY ON POLICY ONLY* – seeking early feedback on the policy options can help to define a more settled policy position prior to the Council instructing work on the preparation of draft rules.

*CONSULT LATER ON POLICY AND DRAFT RULES* – instructing preparation of the draft rules and then seeking feedback on their workability is the option that can better support implementation. The downside is that the potential for respondents to influence the overall direction of travel will be lower by that point of the policy cycle.

15. More time will need to be allocated within the annual Work Programme when choosing the latter option.

#### Choosing the duration

16. A standard 12-week period is to be used so that key justice stakeholders have sufficient time to work through their own internal meeting structures in order to provide a considered organisational view.
17. By exception, if there is a justified need for urgency the Council may ask policy officers within key organisations to respond quickly with initial views only. For information handling purposes those papers would need to remain private to support speedy responses.

#### Securing the budget

18. A small number of consultations each year can be accommodated within the secretariats existing resources. The Council will need to secure appropriate funding if a planned consultation was to include the outsourcing of the analysis of responses because of a) the complexity of the policy topic or b) the need to provide an independent view.

#### Avoiding joint consultations

19. To support judicial independence all consultations should proceed as stand-alone exercises run by the Council:

- As an independent judicially led public body the Councils statutory function is to consult on proposed changes and then propose the rules in draft; and
  - Those proposed draft rules are then subject to consideration and approval by the Court of Session itself before they can be enacted and take legal effect.
20. The question of running a joint consultation with the Scottish Government or other public bodies may occasionally arise. Whilst that approach might help to minimise the resource burden placed on respondents it does have the potential undermine the independence of the Council due to the perception the Council is not operating at arms-length from government. In the development of this paper Council members have taken the view that maintaining judicial independence should take precedence. Any requests made to run a joint consultation should be rejected.

## STAGE 2 – RESEARCH

21. The principles are:
- To provide sufficient information to support intelligent consideration by respondents.
22. Those consulted must be able to a) understand the policy issues arising and b) give an informed response without having to invest a disproportionate amount of their own time.
23. In practice the supporting papers for a consultation should be:
- Written concisely in plain English so that they are easy to understand; and
  - Kept to a reasonable length, so that the time for “reading in” is not disproportionate.

### Impact assessments

24. The preparation of impact assessments is a matter for the secretariats discretion:
- *Where policy is at an early stage* - the consultation itself will be seeking the further information required to assess likely impacts.
  - *Where policy is at a later stage* - providing the detailed impact assessments with the consultation will minimise the burden on respondents; and will help to avoid the need for respondents to comment on matters already known and understood.
25. All Public Consultations run by the Council should include the following (if relevant):
- Equalities Impact Assessment (EQIA).
  - Business and Regulatory Impact Assessment (BRIA).
26. Consultations on some specific policy topics may warrant the addition of:
- Childs Rights and Wellbeing Impact Assessments.
  - Data Protection Impact assessments (DPIA).
  - Highlands and Islands Impact Assessments.
  - Human Rights Impact Assessments.

### Choosing the right questions

27. Asking the right questions in the right way is key to any good consultation. Well-structured questions will focus respondents on the specific areas most likely to inform policymaking, and greatly simplify the workload for the analysis of responses:
- Careful use of open questions can help respondents to not go too far off topic; and

- When using closed questions respondents should be asked for reasons.

### STAGE 3 – APPROVE

28. The principle that applies when seeking approval is:
- To provide a 'reasonableness check' to ensure that a consultation is being run fairly.
29. The secretariat will:
- Prepare appropriate papers for the members of the Council (or a Committee) to approve via either a formal meeting, or by correspondence.
30. The members of the Council (or a Committee) will be asked to:
- Consider and agree that the proposed method of consultation is fair; and
  - Confirm that the content of the supporting papers, and the consultation questions asked, are appropriate relative to the stated policy objectives.
31. The Scottish Ministers may (optionally) be asked to:
- Provide clearance of any comments that might overlap with statements of Government Policy or the planned timings for commencement regulations etc.

### STAGE 4 – OPEN

32. The principles are:
- To clearly communicate the policy objectives to the target audience.
  - To provide sufficient time for people to provide a considered response.
33. The secretariat will:
- Identify the target audience and prepare a list of planned consultees;
  - Decide a reasonable duration and specify the opening date and closing date;
  - Supply a Respondent Information Form to support the publication of responses and enable the effective analysis of those responses;
  - Prepare accompanying news releases (where appropriate);
  - Prepare media lines (to anticipate responses to potential enquiries);
  - Publish the consultation and its supporting papers;
  - Reinforce the standard redirections for anyone seeking an individualised response;
  - Consider how to capture any missing voices; and
  - Monitor for any views expressed external to the process e.g. media coverage.

#### Initiating a consultation

34. The mode of initiation will be:

Type of consultation	Initiate by
Internal Consultation - via Council or Committee	Tabling a paper
Targeted Consultation - via specific stakeholders	Emailing the targeted stakeholders Uploading the papers to the website
Public Consultation	Emailing the listed consultees Issuing a news release to the general public Uploading the papers to the website

35. The introductory section for each Consultation Paper should:
- Indicate that the consultation is open for 12 weeks (*or other duration by exception*);
  - Specify the closing date set for receiving written responses;
  - Direct consultees to send their responses by email to the generic SCJC mailbox at [scjc@scotcourts.gov.uk](mailto:scjc@scotcourts.gov.uk) along with a completed Respondent Information Form;
  - Convey standard statements on “how your response will be handled” with regard to the permissions required for sharing and the handling of any FOI requests received;
  - Narrate the reasons why a particular mode of consultation has been chosen;
  - Indicate who is being consulted; and
  - Invite feedback from anyone who has a view on how the consultation is being run.
36. Other engagement mechanisms that may occasionally be included as part of a consultation exercise are:
- The use of roadshows / workshops / focus groups; and
  - The use of questionnaires / surveys.

#### Extending the Duration of a Consultation

37. With any time-bound consultation (targeted or public) the Council may not have time to accept late responses and if so a statement to that effect would need to be included within the consultation paper when issued. Where other interested parties are motivated to respond in time then the secretariat will usually accept their feedback.
38. Where a respondent makes a reasonable request for more time during a consultation that would normally be granted to enable the widest possible feedback. That said, the secretariat has the discretion to either:
- Accept or reject individual requests for late submission; or
  - Issue a general extension to the closing date for all respondents.

### STAGE 5 – CLOSE

39. The principles are:
- To receive and track the individual responses accurately.

#### Logging the Responses

40. On receipt of each email response, the secretariat will:
- Number, log and file each valid response received;
  - Identify the category of response;
  - Identify the permissions from the Respondent Information Form; and
  - Scan for offensive language, defamatory content, or data protection issues.
41. Some respondents may promote campaign style responses in order to influence the qualitative analysis of responses. Those responses will have a flag added when logged, given the added potential for bias. The secretariat has the discretion to include or exclude campaign responses within the counts used within the Consultation Analysis.
42. Some respondents may seek individualised responses. That is a misuse of the consultation process. Individualised responses will not be made.

#### Categorising the Responses



43. The principle is to use standard descriptors:

- To assess the nature of the responses received across multiple consultations; and
- To assign the most meaningful descriptor from the following categories:

	Notes	RESPONSES FROM ORGANISATIONS and REPRESENTATIONAL BODIES	RESPONSES FROM INDIVIDUALS
Judiciary		Senators of the College of Justice Sheriffs Principal Sheriffs and Summary Sheriffs Association	judge
Practitioners	1 2	Faculty of Advocates Law Society of Scotland Society of Solicitor Advocates Scottish Law Agents Society Other representative bodies Firms of solicitors Firms of advocates	advocate solicitor
Officials	3	Scottish Courts and Tribunals Service (SCTS) Scottish Legal Aid Board (SLAB) Officials within the Scottish Government Officials within Local Authorities other service providers user groups	clerk of court
Organisations	4	local authorities advice providers consumer bodies other public bodies academics media	
Other		General public	individual

Notes:

1. ADVOCATES – includes advocates chambers, as well as the representative bodies for advocates
2. SOLICITORS - includes firms or groups of solicitors, as well as the representative bodies for solicitors
3. GOVERNMENT – the government undertakes its own consultations on the policy positions of the Scottish Ministers, so the Council would not normally expect to receive formal responses from the government. The views of government lawyers commenting as practitioners would be counted under the 'Officials within the Scottish Government' category.
4. LOCAL AUTHORITY - the 'local authority' category only applies if a response reflects policy positions agreed by a Local Authority. The views of officials within a local authority would be counted under the 'Official's within Local Authorities' category.

### Publication of the Responses

44. For Public Consultations the secretariat will:

- Upload moderated responses to the SCJC website (*in line with the permissions given within each Respondent Information Form*).
- Upload confidential responses to the members area of the SCJC website (*to ensure all respondent views are taken into account by Council members*)

45. Individual responses will ideally be uploaded within 4 weeks of a consultation closing.

## STAGE 6 – ANALYSE

46. The principles are:

- To analyse feedback in a neutral and balanced manner; and
- To summarise the points made so that they usefully inform policy development.

### The potential for bias

47. With any consultation exercise there is a strong potential for bias as respondents are self-selecting whether they wish to respond or not. That bias can often result in strong and often polarised views in the responses received.
48. The Council does recognise that the Consultation Analysis of those views will not necessarily be representative of the views of the wider population of court users.

### Resourcing the analysis

49. The standard practice will be:
  - for the secretariat to undertake the analysis of consultation responses
50. By exception, the Council may choose to outsource that analysis:
  - *To a subject matter expert* - where the subject matter requires specialist expertise that is not available within the secretariat; or
  - *To an independent research consultancy* – where a) there is a significant volume of responses and b) an independent view would strengthen the finalised policy position.
51. If that analysis is to be outsourced, the procurement process and confirmation of the funding will add further time into the timetable for that consultation.

## STAGE 7 – REPORT

52. The principle is:
  - Respondents will expect to see how their views are taken into account.
53. The Council aims to be open and transparent:
  - *The individual responses* – in line with the permissions given the publishable responses will be uploaded to the consultations page of the website, ideally within **2 weeks** of closing;
  - *The Consultation Analysis report* - summarising the questions posed by the Council and how people chose to respond will be published online, ideally within **6 weeks** of closing; and
  - *The Consultation Response report* - conveying what that feedback has meant for policymaking along with the next steps to be taken by the Council will be published online, ideally within **12 weeks** of closing.

## STAGE 8 – EVALUATE

54. The principles are:
  - To ensure that any lessons learned are captured and fed back into best practice.
55. Subject to the availability of resources, the secretariat will:
  - Maintain an issues log for any matters arising during a consultation; and

- By exception initiate a Post Consultation Review within 6 months if a matter arising warrants a clarification to the consultation process set out within this document. Typical questions in such a review would include:
  - Did the consultation reach its target audience?
  - Did the responses help or hinder policy making?
  - What lessons can be learned from what went well (or not so well)?

## BIBLIOGRAPHY

### Guidance:

#### Consultation Good Practice Guidance (*live webpage, SG*)

<https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2019/12/foi-201900009119/documents/foi-201900009119---information-released/foi-201900009119---information-released/govscot%3Adocument/FOI-201900009119%2B-%2BInformation%2BReleased.pdf>

#### Code of Practice on Consultation (*Jul 2008, HM Government*)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/100807/file47158.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/100807/file47158.pdf)

#### Consultation Principles (*Oct 2013, HM Government*)

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