



BEST PRACTICE CONSULTATION

July 2014

Introduction

Of the 10 principles for Australian Government policy makers in the *Australian Government Guide to Regulation*, two are related to consultation:

5. Policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals.
6. Policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens.

A genuine consultation process ensures that you have considered the real-world impact of your policy options. This is likely to lead to better outcomes and greater acceptance in the community, particularly among any stakeholders who may be adversely affected by the policy.

Question 5 of the seven Regulation Impact Statement (RIS) questions in the *Guide to Regulation* asks; ‘Who will you consult about these options and how will you consult them?’

In the consultation section of the RIS, you must:

- explain the purpose and objectives of consultation
- outline a plan for conducting consultation
- explain who should be consulted—and who does *not* need to be consulted
- outline a strategy for the most efficient and meaningful consultation
- summarise the major topics to be covered and what issues might be raised.

This guidance note provides additional detail on the application of the whole-of-government consultation principles outlined in the *Guide to Regulation*, as well as the role of the Office of Best Practice Regulation (OBPR) in encouraging best practice consultation processes.

Best practice consultation and the RIS process

A RIS is required to demonstrate that appropriate consultation has been undertaken. It will not be considered adequate at Final Assessment if no consultation has taken place, including consultation with other policy makers.

Consultation plays an important role in ensuring that every practical and viable policy alternative has been considered. Stakeholders and those closest to a problem can sometimes suggest useful ways to solve it. Your RIS should therefore reflect the feedback received on all genuine and viable options.

Consultation is particularly important in helping agencies to quantify the regulatory burden of proposed regulatory measures on businesses, community organisations or individuals. The burden should be estimated before a Final Assessment of the RIS is undertaken.

There are four consultation options that you can take when developing the RIS: *full public*, *targeted*, *confidential* or *post-decision*. Full public consultation is the appropriate level of consultation for all proposals unless you make a compelling case for a limited form of consultation (such as a need for confidential consultation because of market sensitivity).

Be aware of the effort required from individuals and businesses to participate in consultations. You should take advantage of the synergies possible with joint consultation with other agencies. Australian Government agencies should also engage with state and local governments to benefit from shared experiences.

Each portfolio has a Deregulation Unit, which should be the first point of contact when you are considering your consultation process (including your choice of consultation option). The Deregulation Units are well placed to advise you of policy development processes within your portfolio and in other portfolios that may be targeting the same stakeholders as your proposed policy.

Each portfolio has also established a Ministerial Advisory Council. The councils consist of business, community organisations and other stakeholders, and can provide a broader consultation mechanism on policy matters.

Online technology can increase your engagement with individuals and enhance collaboration in policy making. Information is available in the Australian Government's Web Guide (Web 2.0) outlining the various tools available for low-cost and wide scale online consultation. Web 2.0 can supplement consultations with online engagement and participation.

The Australian Government's Business Consultation website (www.consultation.business.gov.au) makes it easier for agencies to post consultation information and for stakeholders to supply feedback.

Application of consultation processes

Continuous

Consultation with key stakeholders should be continuous and should start as early as possible. It should continue through all stages of the regulatory cycle, including when detailed design features are being finalised. This will help you to identify and understand potential problems. For example, consultation before submitting the RIS for Early Assessment may help to define the problem, objectives and options, and to quantify the associated regulatory burden, thereby improving the quality of the RIS. Broad-based consultation will also help to identify the risks of regulatory capture, which occurs if the regulator ends up acting in ways that benefit the industry that it is supposed to be regulating, rather than the public.

Agencies responsible for providing policy advice to the Government should also consult the relevant regulators to ensure that regulations can be administered in a manner that is consistent with the Government's intent. Regulators should consult key stakeholders to understand the potential impacts of regulation on their operations.

Broad-based

You must consider the scope of the proposed regulatory changes and consult widely to ensure that consultation captures the diversity of stakeholders affected by the changes.

Relevant individuals and groups may include:

- the general public
- businesses, consumers, unions, environmental groups and other interest groups
- state, territory and local governments
- Australian Government departments, agencies, statutory authorities and boards.

It may be appropriate for you to distinguish between stakeholders within these main groups where the impacts of options are likely to differ. For example, the views of businesses may vary depending on their size, nature of operations or location.

For consultation with business stakeholders, a good starting point may be industry associations and small business groups. However, they might not represent all stakeholders in a particular sector. Furthermore, large industry associations with diverse memberships might not have a consistent view on all aspects of a regulatory proposal. You should consider the best way to engage individual stakeholders in the consultation.

For community stakeholders, such as consumers, environmental groups and other interest groups, peak bodies may also be a starting point. However, these bodies might not represent all relevant stakeholders, so individual stakeholders should be included in the consultation where appropriate (some agencies already have mechanisms to consult individuals). Online consultations can assist engagement with the community through the use of social media tools, such as social networking sites or blogs. A combination of methods of consultation may be the best strategy to ensure effective consultation with individuals.

As stated in Principle 6 of the *Guide to Regulation*, policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens. You should consult relevant Australian, state/territory and local government agencies and regulators to identify the scope and efficacy of the current regulatory regime. This will provide an important evidence base for determining whether the regime is sufficient before seeking new regulation. It will also identify any overlapping regulatory functions and give you the opportunity to streamline regulation or avoid creating a cumulative regulatory burden. Intergovernmental consultation can also identify innovative approaches to regulation, which may help you minimise the burden.

Policy departments need to consult closely with their regulators or service delivery agencies to ensure the effective and efficient implementation of regulatory proposals. The regulators and service delivery agencies usually have valuable information, including customer data and technical and implementation information, which can help to inform your calculation of regulatory costings.

Targeted consultation can be consistent with this principle, as long as it is broadly enough based within the target stakeholder group.

Accessible

Consultation should ensure that your stakeholders can readily contribute to policy development.

You should inform stakeholders of proposed consultation by the most appropriate means. The Australian Government Business Consultation website (www.consultation.business.gov.au) will automatically notify businesses and government agencies of consultations in areas where they have registered an interest. The website is a cost-effective way of alerting stakeholders to potential regulation.

Information provided to stakeholders should be easy for them to comprehend. It should be in an easily understandable format, use plain language and clarify the key issues, particularly if the proposed regulation addresses complex subject matter. Written consultation documents should include summaries to allow those consulted to quickly assess whether the material is relevant to them and whether they need to read further. Even a relatively simple step, such as publishing relevant information or issues papers on the website of the agency sponsoring the proposal, will make the process more accessible.

You should consider a range of strategies to assist stakeholders who are expected to be significantly affected, but who do not have the resources or capability to participate in the consultation process.

Consultation can take a variety of forms other than written consultation, such as stakeholder or public meetings, working groups, focus groups, surveys or web forums (such as blogs or wikis). The appropriateness of each approach will depend on the issues under consideration, the nature of the groups being consulted and the time available.

You should be able to respond promptly to queries from stakeholders. The use of social media, inbound calling numbers or face-to-face meetings can make this easier.

Not burdensome

It is important that consultations be conducted early, when the policy objectives and different approaches to regulation are still under consideration.

Remember that many people you wish to consult have full-time jobs or business commitments. This is especially so for small business proprietors. It is important not to make unreasonable demands of people you wish to consult or assume that they have unlimited time to devote to your consultation process.

Timeframes for consultation should be realistic to allow stakeholders enough time to provide a considered response. Avoid holiday periods and the end of the financial year, particularly where stakeholders are small businesses and individuals. The time required will depend on the specifics of the proposal (for example, the diversity of interested parties or the complexity of the issue). However, if it is necessary to consider a proposal promptly, some limitations on the timing and length of consultation may be unavoidable.

Be aware of the burden that the whole government may be placing on stakeholder groups. If your stakeholders are the subject of frequent consultation efforts, try consulting jointly with other agencies to minimise the burden on them.

Transparent

Involving your stakeholders from the earliest possible stage in the policy development process will promote transparent and comprehensive participation.

You should explain the objectives of the consultation and the context for it. Be careful to explain when and how the final decision will be made. To avoid creating unrealistic expectations, clearly state any aspects of the proposal that have already been finalised and will not be subject to change. For example, if a decision to regulate has already been made, stakeholders should be made aware that their views are sought mainly on regulatory design and implementation, not on the merits of the policy.

Being clear about the areas of policy on which views are sought will also increase the usefulness of responses. For example, explicitly stating any assumptions made about those likely to be affected by the proposed action or identifying particular areas where input would be valuable will encourage respondents to address those issues.

Make your stakeholders aware that policy development is guided by a regulation policy framework and that the consultations take place within that framework. Agencies should accommodate those stakeholders who want their contributions to remain confidential.

Information or issues papers—such as draft assessments of compliance costs or draft regulation impact statements, white papers, green papers (policy options papers) or exposure drafts of legislation—as well as submissions to government inquiries should, wherever possible and appropriate, also be made available to stakeholders to enable them to make informed comments on proposals and proposed legislation. Ideally, relevant documentation should be posted online to increase accessibility and opportunities for reuse.

It is best to use a discussion paper or white paper process before embarking on substantial reform to ensure that only necessary legislation and regulations are drafted. Legislation should usually undergo an exposure draft process.

You should also show stakeholders how you have taken consultation responses into consideration. Welcome feedback and respond to it, even if you do not adopt it. Dissenting views need not be accommodated, as long as they are dealt with respectfully. The RIS is a good means of providing information on consultation responses.

Consistent and flexible

Consistent consultation procedures can make it easier for stakeholders to participate. They can also permit better coordination of regulatory quality initiatives across a wide range of policy areas. Where ministers have made a commitment to a particular course of action, consultation can improve the design of the proposal and help ensure that it minimises the compliance burden on business and costs to the community.

Public consultation for some proposals may be inappropriate (for example, where there is a need for Cabinet confidentiality, such as for national security or commercial-in-confidence matters). In some cases, an alternative may be to consult stakeholders in confidence. However, in other instances it may not be possible to consult even on a restricted basis (for example, for new initiatives to deal with tax avoidance), although it may still be possible to undertake restricted ‘early options’ consultation with specialists outside government.

OBPR can advise on the level of consultation appropriate to particular circumstances (for example, if there is a simpler way to consult). It is important to consult the office early during policy development so that enough time is available for the appropriate consultation process to be put in place.

Subject to evaluation and review

Policy agencies should evaluate their consultation processes and continue to examine ways of making them more effective. For example, better use of information technology can improve the cost effectiveness and timeliness of consultation.

Evaluating the effectiveness of consultation processes can include examining the number and types of responses, determining whether some methods were more successful than others, finding out whether the chosen methods promoted accessibility, particularly among individuals, and understanding how consultation responses clarified the options and affected the final decision.

OBPR strongly encourages agencies to publish their consultation protocols on their websites.

Not rushed

A common complaint from stakeholders is the lack of time to provide feedback when asked for it. Involving stakeholders, such as standing consultative bodies, in determining timelines can be an important part of building and securing a positive relationship. While longer periods of consultation might seem more appealing for stakeholders, the Government's aim is effective consultation and 'real listening'. Agencies should provide realistic timeframes for participants to contribute. Where small businesses are potentially affected, they should be given enough time to consider the issue and respond, including time for representative bodies to contact their members.

The length of consultation rounds depends on the nature and impact of the proposal, the objective of each round, the number of rounds, the form of consultation and who is being consulted. For example, where stakeholders are being asked to consider the whole proposal and there has been little previous consultation, a longer round is appropriate. Similarly, a longer round is appropriate where those with limited resources, such as individuals and small businesses, are being consulted.

Depending on the significance of the proposal, between 30 to 60 days is usually appropriate for effective consultation. Longer consultation periods may be necessary when they fall around holiday periods.

Meaningful consultation with stakeholders throughout the policy development process should be documented in the RIS as a consultation statement. The statement should demonstrate to the decision maker that sound consultation practices were followed and, when the RIS is made public, show the Government's commitment to its principles for policy makers.

A means rather than an end

Consultation should be used as a way to improve decisions, not as a substitute for making decisions.

However, to limit the possibility that stakeholders are 'overconsulted' or consulted for consultation's sake, additional consultation is not required as a part of the RIS if other legislative requirements to consult have been met and are appropriate for the magnitude of the proposal.

Consultation options

There are four consultation options: full public, targeted, confidential and post-decision. Full public consultation is the appropriate level for all proposals unless there are compelling reasons for limiting consultation (such as market sensitivity).

Full public consultation

Full public consultation should be:

- with all affected parties
- transparent and open to the public.

Targeted consultation

Targeted consultation should be:

- with parties most directly affected by the proposal
- made publicly available.

Confidential consultation

Confidential consultation should be:

- with all affected parties, as far as is possible given the confidentiality concern
- done discreetly, such as through a commercial-in-confidence process
- done on a case-by-case basis (that is, not open to the public for a certain period).

Post-decision

Post-decision consultation should:

- take place after an initial policy decision is made and announced publicly, but before it is implemented
- not be undertaken unless it can be demonstrated that extreme confidentiality is needed and that consultation before the decision would undermine the effectiveness of the policy
- focus on the implementation of the policy, including timeframes and planned reviews.

Consultation strategy

Good planning is essential to successful consultation. A consultation plan should ideally cover the whole policy making process and identify the objective of consultations, relevant target groups, appropriate forms of consultation and consultation times. However, consistent with the Government's requirements for regulatory impact analysis, consultation should remain proportionate to the potential impacts of the proposal. While the quantity of consultation is important, the emphasis should be on achieving high-quality consultation.

Publishing a consultation plan provides information to stakeholders about future consultation opportunities. This improves the transparency of policy development and gives stakeholders early warning so they can contribute more effectively to the process.

Consultation plans should cover the following points.

What is the objective of each consultation round?

Depending on the significance of the proposal and the consultation objectives, multiple rounds of consultation may be appropriate. In developing a consultation plan, clearly identify the objectives of each round of consultation. For example, is the aim to gather new ideas (brainstorming), collect evidence and factual data, validate assumptions or clarify the possible impacts of the proposal on the wider community?

Depending on the objectives, consultation can be on different elements of the impact assessment, such as the nature of the perceived problem, the Government's objectives, the options to address the problem, a comparison of the impacts of the policy options, or on the entire proposal.

Identifying the objectives of consultation will help determine who should be consulted, how and when.

Who will be consulted in each round?

You should ensure that the diverse stakeholders affected by the proposal are consulted. Proactively identify relevant interested parties and those the proposal will be likely to affect. Consultation is also an opportunity to seek input and involvement from those who can make a meaningful contribution to the decision making process. Business and community organisations, consultative bodies and the portfolio Ministerial Advisory Council may be able to help in identifying individuals, target groups and those with technical knowledge or subject matter expertise.

In what form will consultation occur in each round?

Your choice of the form of consultation will largely depend on the issues under consideration, who needs to be consulted, and the available time and resources. Increasingly, stakeholder groups are looking to participate through electronic means, such as email or web-based forums.

While written consultation is a common form, informal consultation with stakeholders potentially affected by the proposal should be conducted before any written consultation period. This should result in a more informed consultation exercise and ensure that stakeholders are engaged early and have a better understanding of the proposal.

Information, issues, white or green papers may help to engage stakeholders early, while the RIS may focus stakeholder attention on the objectives of later consultation rounds.

Ongoing consultation during policy development can be assisted by establishing web-based forums, such as blogs or wikis. Depending on the nature of the information you are seeking, such a forum could be open to the general public, or 'closed' to include only people meeting predetermined requirements.

Online consultation reinforces and complements traditional consultation methods and provides more ways to seek feedback from and engage with the public. It may be used as part of formal submissions or policy development processes, or integrated into business-as-usual activities as another way of gathering feedback and engaging with the public online.

Online consultations can cover a broad range of activities, such as the submissions stage of a formal inquiry or an agency seeking input as it develops policy. In its simplest and least interactive form, an online consultation can take the form of a website offering a discussion paper and requesting public submissions through email, online forms or other means.

Online consultations can also provide greater interactivity and engagement with the public by using social media tools, such as social networking sites, agency-run tools such as blogs, or both.

The development and take-up of Web 2.0 tools by Australians gives public servants an opportunity to increase transparency and accountability in consultation and decision making. The Australian Government can now use this opportunity to engage in conversations with a wider number of individuals and businesses than ever before.

Social media includes a number of tools, each of which has its own uses:

- Blogs can be used to tell the public or stakeholder groups about agency activities and give readers the opportunity to provide comments.
- Wikis are best for collaborative document writing; examples include Wikipedia and govdex, the Australian Government collaborative workspace.
- Discussion forums may be appropriate when more in-depth consultation is required.
- Microblogs are best for short public announcements and drawing attention to new information on agency websites; the most well-known example is Twitter.
- Social networking sites may be useful in raising public awareness of government services or initiatives and engaging with relevant pre-existing online communities; Facebook is probably the most well known.

More information on the use of online consultation can be found in the Australian Government's Web Guide (<http://webguide.gov.au/web-2-0/online-consultation/>).

When will each round of consultation commence?

The timing of consultations should be determined on a case-by-case basis, but they should start as early as possible in order to maximise their impact on policy development.

Consultation should also be seen as a recurring need in policy development, rather than as a one-off event.

Where a green paper is required, it should be released relatively early in during policy development, before a preferred option is 'locked in'. An exposure draft of the regulation should be released closer to finalisation, but still allow time for stakeholders to provide feedback about the details and for their views to be addressed.

Exposure drafts

Consulting on and analysing implementation options is an important part of policy development. Before finalising the policy, test the details of complex regulations with relevant businesses. Release exposure drafts of complex regulations for significant matters to allow businesses and other stakeholders to provide more detailed comments and advice on how the regulation will work in practice.

Exposure drafts allow you to verify that stakeholders clearly understand how the law will apply to them, and their legal rights and obligations. Stakeholders may also be able to identify how aspects of the proposed laws can be simplified.

OBPR assessment

You can submit your RIS to OBPR for formal assessment at two different points during its development—the Early Assessment and Final Assessment stages.

OBPR will advise on what it considers the best practice consultation approach early during policy development—usually at the Preliminary Assessment stage. However, it is ultimately up to you to decide which consultation method(s) will be used for the proposal. In assessing whether the consultation aspects of your RIS meet best practice, OBPR asks these questions:

- Does your RIS explain the purpose and objectives of consultation (before the final decision)?
- Does it have an appropriate plan for consulting those affected by the policy (before the final decision)?
- Does it demonstrate that the views of affected stakeholder groups have been considered?

In answering the last question, OBPR pays particular attention to whether or not options suggested during consultation have been included or discussed in the RIS.

For the Final Assessment, OBPR assesses whether you have transparently described the consultation process throughout the development of the RIS, and whether the consultation was appropriate at each stage. OBPR makes this assessment with reference to Table 1.

If your RIS has not been the subject of either full or targeted consultation before a final decision on the matter, that may lead to a finding of non-compliance.

OBPR uses a range of methods (described in the *User Guide to the Australian Government Guide to Regulation* guidance note) to assist agencies to produce RISs that meet best practice, which includes using the appropriate type of consultation and conducting it competently and transparently.

Table 1: OBPR assessments of consultation

Consultation type	When is it appropriate
Full public consultation	<ul style="list-style-type: none">• When transparency and public accountability of decision making is the most important priority.• When the integrity of the decision process will not be compromised by early public scrutiny.
Targeted consultation	<ul style="list-style-type: none">• When an affected group of stakeholders is in a small or well-defined geographical area or business sector.• When consultation should be contained so that effort is not wasted in involving unaffected parties.
Confidential consultation	<ul style="list-style-type: none">• When the sensitivity of the issue requires that you gauge public sentiment or inform affected entities discreetly, without needlessly triggering widespread concern, anger or confusion among affected households or businesses.

Consultation type	When is it appropriate
Post-decision consultation	<ul style="list-style-type: none"> • When the decision is highly market sensitive and some could gain unfair advantage from being consulted. • When public debate is strongly polarised and consultation is likely to generate conflict or compromise good decision making. • When an issue has already attracted significant and prolonged public debate and consultation serves no useful policy purpose. • When open public consultation could compromise the confidentiality of Cabinet deliberations.