



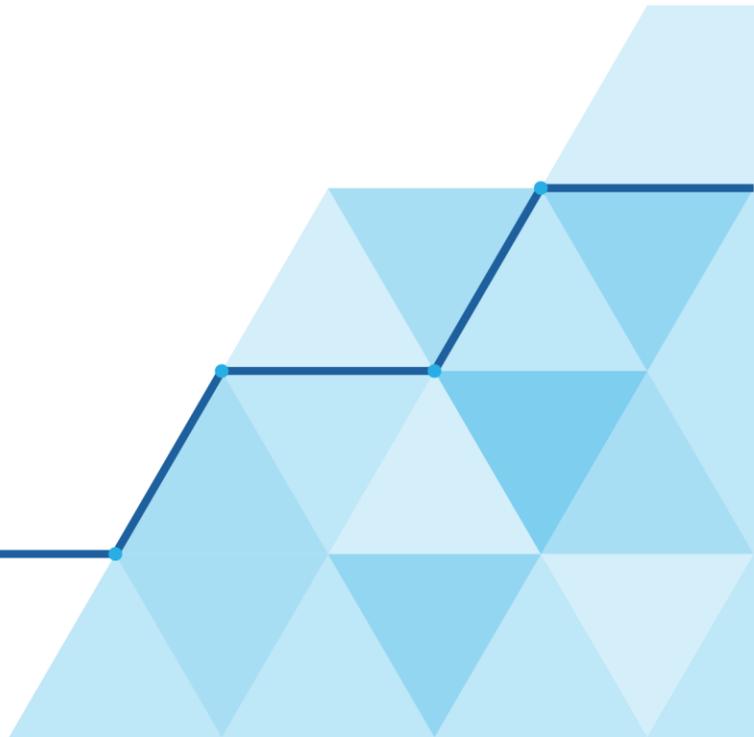
Ministry
of Justice

Civil Legal Aid

**Consultation on the proposed transfer of
the assessment of all civil legal aid bills
of costs to the Legal Aid Agency**

This consultation begins on 10 February 2021

This consultation ends on 10 April 2021





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of Justice

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Consultation on the proposed transfer of the assessment of all civil legal aid bills of costs to the Legal Aid Agency

A consultation produced by the Ministry of Justice.

About this consultation

- To:** This consultation is aimed at anyone with an interest in the provision of publicly funded civil legal services in England and Wales, including, but not limited to, members of the legal profession and their representative bodies.
- Duration:** From [10/02/21] to [10/04/21]
- Enquiries (including requests for the paper in an alternative format) to:** Civil Legal Aid Policy
Ministry of Justice
102 Petty France
London SW1H 9AJ
Email: civil.legalaid@justice.gov.uk
- How to respond:** Please send your response by 10 April 2021 to:
Email: civil.legalaid@justice.gov.uk
- Response paper:** A response to this consultation exercise is due to be published by [10/08/21] at: <https://consult.justice.gov.uk/>

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Introduction

1. This paper sets out for consultation the proposal for the transfer of the assessment of all civil and family legal aid bills of costs, other than those involving a detailed inter partes assessment¹, from Her Majesty's Courts and Tribunals Service (HMCTS) to the Legal Aid Agency (LAA).
2. The government believes this change will provide benefits to legal aid providers, HMCTS, and the LAA.
3. The consultation is aimed at anyone with an interest in the provision of publicly funded civil legal services in England and Wales, including, but not limited to, members of the legal profession and their professional representative bodies, members of the judiciary, and legal services regulators.
4. A Welsh language consultation paper is available upon request.
5. This paper contains a series of questions which seek views on our proposals for reform. We also invite respondents to provide evidence that could help us to consider the potential impact on individuals with protected characteristics, in line with our responsibilities under the Equality Act.
6. Copies of this consultation paper are being sent to:
 - The Law Society of England and Wales
 - The Bar Council
 - The Legal Aid Practitioners Group
 - All members of the Legal Aid Agency Civil Contracts Consultative Group
7. This list is not exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the proposals set out in this paper.

¹ These are cases where costs have been ordered to be paid by the other side. This may be because the case has lost at trial but will normally because of a settlement on that basis. Where the costs are not fixed, and are disputed between the parties, the court will make a determination as to the amount payable.

8. Details of how to respond are set out on pages 18-19. The deadline for responses is 10 April 2021. The government will consider the responses to this consultation and intends to publish a response in due course.

Background

9. Civil bills² are categorised as either 'Assessed bills' or 'bills subject to detailed assessment'³. This consultation is only about bills subject to detailed assessment, where there is no inter partes element.
10. Assessed bills are submitted by legal aid providers direct to the LAA, via its online case management system. These bills detail the legally aided work undertaken by the provider and are submitted with supporting evidence, for example invoices, receipts or court orders. Upon receipt, these bills are then assessed by an LAA caseworker, who assesses the bill based on the information and evidence provided. This assessment determines how much the provider gets paid from the legal aid fund. This process ensures a speedy payment to the provider. The LAA conduct internal audits, which are independently verified by the National Audit Office (NAO).
11. A bill will usually be subject to the detailed assessment process if it is a claim exceeding £2,500 but less than £25,000 and legal proceedings have been issued by the courts. A bill may be subject to detailed assessment where there are inter partes costs in dispute or where there are no inter partes costs, but legal aid costs are to be assessed.
12. This proposal relates to bills which are subject to detailed assessment where no inter partes assessment is required. No change is proposed to inter partes bill assessments of disputed costs, which will remain under the jurisdiction of HMCTS and the Courts will continue to consider both the legal aid and the inter partes elements of these claims together as part of the assessment process. For the purpose of this consultation these bills will be referred to as Court Assessed Claims.

Court Assessed Claims

13. Generally, Court Assessed Claims are submitted direct to the courts (although as set out in paragraph 21 changes were made to this process in July 2020 and currently, these bills may be assessed by either the LAA or HMCTS).
14. Court Assessed Claims are received by the courts as paper documents (bill and evidence) and are then assessed by a district judge, a specialist cost judge or HMCTS casework staff. Following receipt, the judge or caseworker assesses how much the provider should be paid and then certifies this. The paper documents are then sent

² 'Civil bills' will refer to both civil and family bills.

³ 'Bill subject to assessment' are commonly known as 'taxed bills'.

back to the provider. Upon receipt, the provider either sends the paper documents to the LAA for validation and checking, or uploads the details of the bill, together with the sealed certificate and supporting evidence into the LAA's online case management system. Upon receipt of the court assessed bill, an LAA caseworker checks to validate evidence and to ensure that the bill and certificate are aligned as well as checking that the work being claimed is in scope of the legal aid certificate, the correct rates are being claimed, and the work allowed by HMCTS is in line with LAA cost assessment guidance. Once that process is complete, the LAA caseworker approves payment to the provider.

15. There were approximately 21,000 closed Court Assessed Claims in 2019/20. The total value of the cases these claims related to was £161M. The cost of a HMCTS Judge or other HMCTS staff assessing the taxed bill is a chargeable item (to the LAA) and is billed at £200 per family case and £220 per non-family case. This is then incorporated into the provider's final bill. This cost the LAA approximately £3.7M 2019/20.
16. The government has considered previously whether the assessment of Court Assessed Claims should be moved to the LAA given that the agency is accountable to Parliament for the expenditure of the legal aid fund. Additionally, LAA operational process would ensure that claims would be paid more quickly and both legal aid providers and the LAA would benefit from the ability to work electronically. The LAA has previously discussed proposals to move the assessment to the LAA with representative bodies and, in 2010, the Legal Services Commission introduced the necessary changes to the legal aid Standard Civil Contract to enable the transfer, however the existing position was retained through the associated costs assessment guidance. The transfer was most recently considered in 2017, when the proposed transfer did not progress due to the pressure it would have on legal aid fund expenditure due to faster processing, as the evidence indicated that the LAA are able to assess claims much quicker than HMCTS.

Impact of Covid-19

17. The Covid-19 pandemic has impacted the ability of HMCTS to continue to quickly assess claims sent to them – during March and April 2020 there was a noticeable 77% reduction in the number of Court Assessed Claims going to the LAA for payment. In discussions with the MoJ and the LAA, some legal aid practitioners expressed concerns about the impact that this would have on their immediate cashflow. Some providers suggested that the LAA should temporarily take over from HMCTS in assessing these claims.
18. In order to address these concerns, the LAA and HMCTS mutually agreed that the LAA would assess these bills where there was no inter partes assessment required. From July 2020 providers had the option to submit these bills to HMCTS or the LAA,

depending on their preference. From 17 August 2020, providers were required to submit their bills to the LAA.

19. Currently, the position is that providers may choose whether to seek assessment from HMCTs or LAA for their Court Assessed claims.

The proposals

20. The pandemic and its impact has highlighted the anomalies within the system on an area that the LAA is accountable to parliament for. This proposal strengthens cashflow for legal aid providers and frees up resource for HMCTS. The pandemic has reduced Legal Aid Fund spend making this change affordable.
21. In July 2020 we proposed that the assessment of all Court Assessed Claims would be conducted by the LAA and legal aid providers had the option to send these claims to the LAA or HMCTS. From 17 August 2020, it was made mandatory to submit Court Assessed Claims to the LAA. Currently the position is that providers can choose whether to send their bills to the LAA or HMCTS. To date, this transfer has made no discernible impact on appeals where providers have disagreed with the proposed payments, and the LAA has remained well within its published target for processing claims – which is for 90 percent of complete and accurate bills to be paid within twenty working days, suggesting that the current arrangement of the LAA assessing these claims is working effectively in ensuring legal aid providers are being paid as swiftly as possible.
22. We are now seeking views on whether the transfer of Court Assessed Claims from HMCTS to LAA should be made on a permanent basis.

LAA Assessment Process

23. The majority of claims to the LAA are made electronically using the Client and Cost Management System (CCMS). Details of the claim are entered or uploaded to the system, along with relevant supporting documentation. These claims are received in date order and go into a queue where appropriately trained LAA staff consider each claim. Claims are either authorised as claimed, rejected or assessed. Where claims are authorised, the provider will usually receive payment within 2-3 weeks of submission. Rejected claims are returned to the legal aid provider for amendment, then resubmitted to the LAA by the provider, who start their validation process again (or can be challenged by the 'Civil Claim Fix' process⁴). The undisputed costs in assessed claims are paid upfront (in line with a claim that is authorised as claimed), the disputed costs only can then be appealed separately to an independent caseworker and, if necessary, an Independent Cost Assessor (ICA). In these cases, only the items in dispute, rather than the whole claim are considered on appeal. It is this process that would be adopted

⁴ Legal Aid Providers are entitled to a review of any rejected civil claims using LAA's 'Civil Claim Fix' team. More details on the process can be found at chapter 16.3 of the LAA's Electronic Civil Finance Handbook.

for Court Assessed Claims should the proposed transfer of this work to the LAA go ahead.

24. The LAA process contains fewer administrative steps than the HMCTS process which, as set out in paragraph 14, requires documentation to move from the legal aid provider to HMCTS, then back to the legal aid provider, before sending on to LAA which adds additional time. Assessed bills received by the LAA direct are subject to a robust assessment process and are subject to a quality control process that they must pass through before being submitted for payment.

Predicted benefits of transfer

25. The LAA is accountable to parliament for this expenditure and this proposal provides greater certainty for legal aid providers by ensuring they are paid more quickly for their legal aid work. The government also believes that the change will bring other benefits for legal aid providers, HMCTS, and the LAA.

Legal Aid Providers

26. A key benefit to legal aid providers is a reduction in the end-to-end time for payments to providers. The HMCTS process takes on average around fifteen weeks for Court Assessed Claims to be paid. The LAA process is quicker, as outlined in paragraph 23. The LAA process is electronic and providers have benefited from working electronically with the LAA via the CCMS system. We consider that the transfer of the assessment of these bills to the LAA will see legal aid providers continue to benefit from faster processing and payment. This will bring significant immediate cashflow benefits for legal aid providers.
27. In addition, the ability to use CCMS to upload bills for assessment will help to reduce the number of bills which are rejected and help to ensure correct rate submissions for legal aid providers. It also increases the resilience of the process – one of the reasons HMCTS were not able to assess bills quickly during the pandemic was the limited availability for these bills to be assessed by staff working remotely, which is not a problem for the LAA due to the agency's digital provision.

LAA

28. The LAA are responsible for any errors made in HMCTS' assessments. As a result, the LAA already invests significant resource in checking bills which have been assessed by HMCTS to ensure payments made are within the pre-agreed scope and costs limitations of the legal aid certificate, and work carried out by instructed experts, are evidenced correctly and claimed at the correct codified rates. These checks are made on top of the existing quality control process which enables a senior caseworker to carry out a quality control assessment on any bill before it is authorised for payment.

This provides additional assurance on top of the assessment process they go through.²⁹ The transfer will reduce legal aid spend as the costs of detailed assessment will no longer be paid to HMCTS. The LAA already invests substantial resource, as outlined in paragraph 15, in undertaking further assurance on those claims assessed by HMCTS, therefore there will be no need for additional resource to process the work.

29. The transfer will reduce legal aid spend as the costs of detailed assessment will no longer be paid to HMCTS. The LAA already invests substantial resource, as outlined in paragraph 15, in undertaking further assurance on those claims assessed by HMCTS, therefore there will be no need for additional resource to process the work.

HMCTS

30. For HMCTS the transfer will realise administrative savings. HMCTS staff undertaking this work are spread across multiple local courts. This change will not result in a direct reduction in HMCTS staff, however it will mean that this staff resource will, the short term, help with Covid recovery and in the longer term can be deployed on other HMCTS priority work. Most of the resource previously used by HMCTS to assess these claims was redeployed following the original transfer in July and if they were to be moved back this will have a negative impact on court recovery.
31. Likewise, if the assessment of these bills is transferred permanently to the LAA any savings in judicial time could also be deployed on other work.

Concerns raised by legal aid providers

32. Legal aid providers have previously raised concerns in relation to the proposed transfer of assessed bills. The key issues are summarised below:
33. Concerns have been raised about the capacity and capability of LAA staff to assess high value claims. The LAA already checks claims over £25,000 and spends a significant amount of time checking Court Assessed Claims. Work has been ongoing to continue to upskill the casework team. The LAA has a vigorous process to ensure caseworkers are given a comprehensive training package. Once caseworkers have completed their training, they have to go through a sign off process before they can start assessing any claims. There is ongoing mentoring and support which supplements the quality assurance process mentioned above. Additionally, there is LAA audit activity, which is independently verified by the NAO.
34. Monetary value is not always indicative of complexity and caseworkers will have had considerable experience assessing complex claims, including claims for enhanced costs, in bills for under £2,500.

35. The LAA has offered access to their training materials and has made them available to legal aid providers. The LAA has committed to working with legal aid providers and representative bodies on any issues that arise because of the proposed transfer. The Civil Contracts Consultative Group (CCCG) is an example of one of the forums where issues can be raised. The LAA are committed to continual training of all their staff to ensure they get assessments right first time.
36. The cost assessment of the proposed transferred claims will be conducted on the same basis as currently done by the courts. All such assessments of Legal Aid are carried out on the standard basis irrespective of the assessing authority. HMCTS and the LAA apply the same contractual and regulatory provisions when assessing work and will have reference to the same guidance (the Cost Assessment Guidance).
37. All assessments will also have an automatic right of appeal. This is a two-stage process with appeals first considered by an independent caseworker and then by a suitably qualified independent cost assessor. All independent cost assessors are independent of the LAA and members of the legal profession who have experience in conducting legal aid work. The LAA has recently run a recruitment campaign to seek to increase the pool of independent cost assessors by opening the opportunity to costs lawyers. This is something all representative bodies have supported. All appeals are conducted in accordance with the Funding and Cost Appeal Review Panel Arrangements. If the proposed transfer takes place it is this process for appeals which will be adopted for these claims.⁵

Conclusion

38. Overall, the government believes that the transfer of the assessment of all Court Assessed Claims to the LAA on a permanent basis realises a number of benefits for the LAA, HMCTS, and legal aid providers. It reduces the burden on HMCTS at a time when freeing up resource for court recovery is of paramount importance, ensures the LAA have the appropriate level of assurance over the legal aid fund, and ensures that legal aid providers get paid as quickly as possible following assessment with resulting benefits to their cashflow. The LAA works entirely digitally which gives the organisation increased resilience, ensuring providers will continue to be paid swiftly even if a situation as similarly unprecedented as the pandemic occurs again in the future. Therefore, the government believes that making this change permanent is proportionate in the longer-term, and that there are appropriate safeguards in place (such as an automatic right of appeal) to ensure legal aid providers can be confident in the LAA's ability to successfully deal with this work.

⁵ The LAA Appeals process is set out at paragraphs 6.71-6.81 of the General Civil Contract

Question One: Do you agree with our proposal to transfer the assessment of all Court Assessed Claims (as defined in paragraph 12 of this document) to the LAA? Please provide reasons for your view.

Equalities Impacts

39. This Equalities Statement considers the likely equality impacts on legal aid providers from the proposals set out in this consultation.

40. For each proposal we have, as far as possible, on the basis of the latest available evidence, indicated what the likely equalities impacts are in this Equality Statement. We have invited stakeholder feedback on each of these proposals and their impacts in the consultation and have also asked a specific equalities question.

Equality duties

41. Section 149 of the Equality Act 2010 requires Ministers and the Department, when exercising their functions, to have 'due regard' to the need to:

- eliminate discrimination, harassment and victimisation and other conduct prohibited by the Act;
- advance equality of opportunity between people who share a protected characteristic and those who do not; and,
- foster good relations between people who share a protected characteristic and those who do not.

42. Paying 'due regard' needs to be considered against the nine 'protected characteristics' under the 2010 Act. The nine protected characteristics are race, sex, disability, sexual orientation, religion and belief, age, marriage and civil partnership, gender reassignment, pregnancy and maternity.

43. This is an ongoing duty, and we have made an initial assessment of the impact of our proposals on people with protected characteristics and we will continue to monitor the impacts.

Methodology to determine discrimination potential

44. Adhering to guidance published by the Equality and Human Rights Commission (EHRC), our approach to assessing the potential for particular disadvantage resulting from the proposals has been to identify the individuals whom the proposals would impact (the 'pool'), and then draw comparisons between the potential impacts of the proposals on those who share particular protected characteristics, with those who do not share those characteristics.

45. Guidance from the EHRC states that the pool to be considered at risk of potential indirect discrimination should be defined as those people who may be affected by the policy (adversely or otherwise) and that this pool should not be defined too widely.

The pool of affected individuals

46. The pool of individuals affected by the proposals are all civil legal aid providers in England and Wales delivering Licensed Work. Legal aid recipients also have a right to contribute as they may be impacted by the proposals.

Available data

47. Civil legal aid services in England and Wales are delivered through various providers. We have limited availability of information on the protected characteristics of these legal aid providers. In January and February 2015, the LAA carried out an online survey to learn about the providers doing legal aid work⁶. The information gathered through this survey indicated that in the positions of managerial control, there was an overrepresentation of males, when compared to the general population, as well as an over representation within the age group 40-59.

48. Below we have highlighted the equalities considerations, impacts and mitigations of the proposals in this consultation. In accordance with our legal duties, we will continue to consider the equalities impacts as we continue to develop these proposals, and we will publish an updated equalities assessment alongside our consultation response.

49. We also welcome the views of respondents to the consultation on the likely equalities impacts of these proposals. The Government acknowledges that there are gaps in the data collected about the protected characteristics of those who provide publicly funded legal services. We would welcome any empirical data that respondents can provide covering this.

Equalities Analysis

Eliminating unlawful discrimination

Direct discrimination

50. Our assessment is that this proposal will not be directly discriminatory within the meaning of the 2010 Act. The primary policy intention is to ensure that legal aid providers are paid as quickly as possible for their work, and the proposal will not treat anyone differently because of a protected characteristic.

⁶ <https://www.gov.uk/government/statistics/legal-aid-statistics-january-to-march-2015>

Indirect discrimination

51. Our initial assessment is that this proposal will not be indirectly discriminatory within the meaning of the 2010 Act.
52. The data outlined above indicates that males may be over represented within legal aid providers, when compared to the general population, meaning that males may benefit more from this proposal than females.
53. Even though certain protected groups are over represented in the group affected by this proposal, our policy proposal would not be indirectly discriminatory because it is not likely to result in any disadvantage for clients and providers with protected characteristics. We think that any benefits that are witnessed disproportionately by a specific group as a result of this proposal are justified as a proportionate means to achieve the primary policy aim of ensuring civil legal aid providers are paid as quickly as possible.

Advancing Equality of Opportunity

54. Consideration has been given to how this proposal impacts on the duty to advance equality of opportunity.
55. As indicated above, the proposal is aimed at ensuring civil legal aid providers are paid for their work as quickly as possible. As outlined above, data indicates that males are likely to be over represented amongst legal aid providers when compared to the general population.
56. We think that any benefits that are witnessed disproportionately as a result of this proposal are justified as part of a proportionate means to achieve the policy aim.

Eliminating unlawful discrimination in relation to disability and duty to make reasonable adjustments

57. We recognise that clients with disabilities are likely to use civil legal aid services and will continue to ensure that reasonable adjustments are made by providers.

Fostering Good Relations

58. Consideration has been given to this objective that indicates it is unlikely to be of particular relevance to the proposal.

Harassment and Victimisation

59. We do not consider there to be a risk of harassment or victimisation as a result of this proposal.

Monitoring and Evaluation

60. Going forward, we will continue to monitor the equalities impacts of this proposal. We will update this equalities statement as necessary and publish the revised version alongside our consultation response.
61. Any final decision will include the evidence of impact from the Equality Statement. We will continue to pay 'due regard' to the Public Sector Equality Duty as the proposal is implemented and will consider the most effective ways of monitoring equalities impacts.
62. We would also welcome the views of respondents to the consultation on the likely equalities impacts of this proposal.

Question Two. From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence that support your views.

Question Three. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please provide data and reasons.

Family Test

63. The Family Test is an internal government challenge to departments to consider the impacts of their policies on promoting strong and stable families. We would welcome information and views of respondents on the impact these proposals may have on families.

Question Four. What do you consider to be the impacts on families of these proposals? Are there any mitigations the government should consider? Please give data and reasons.

Questionnaire

Question One. Do you agree with our proposal to transfer the assessment of all Court Assessed Bills to the LAA? Please give reasons for your view.

Question Two. From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence that support your views.

Question Three. What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the government should consider? Please give data and reasons.

Question Four. What do you consider to be the impacts on families of these proposals? Are there any mitigations the government should consider? Please give data and reasons.

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 10 April 2021 to:

Email: civil.legalaid@justice.gov.uk

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Ministry of Justice at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address.

Alternative format versions of this publication can be requested from civil.legalaid@justice.gov.uk.

Publication of response

A paper summarising the responses to this consultation will be published within three months' time by 10 July 2021.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

By responding to this consultation, you acknowledge that your response, along with your name/corporate identity will be made public when the Department publishes a response to the consultation in accordance with the access to information regimes (these are primarily the Freedom of information Act 2000(FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

Government considers it important in the interests of transparency that the public can see who has responded to Government consultations and what their views are. Further, the Department may choose not to remove your name/details from your response at a later date, for example, if you change your mind or seek to be 'forgotten' under data protection legislation, if Department considers that it remains in the public interest for those details to be publicly available. If you do not wish your name/corporate identity to be made public in this way then you are advised to provide a response in an anonymous fashion (for example 'local business owner', 'member of public'). Alternatively, you may choose not to respond.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf



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