

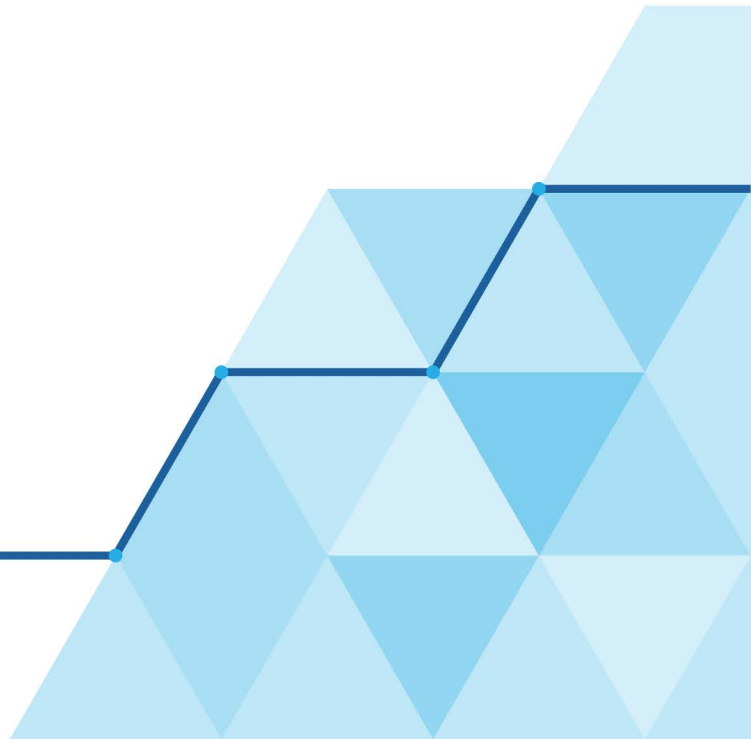


Ministry
of Justice

Implementing the Nationality and Borders Act 2022 – amendments to tribunal fees

This consultation begins on
23 November 2022

This consultation ends on
4 January 2023





Ministry
of Justice

Implementing the Nationality and Borders Act 2022 – amendments to tribunal fees

**A consultation produced by the
Ministry of Justice. It is also available at
<https://consult.justice.gov.uk/>**

About this consultation

To: Immigration and asylum appellants, legal professionals, the judiciary, and voluntary organisations with an interest in immigration and asylum claims.

Duration: From 23/11/2022 to 04/01/2023

Enquiries (including requests for the paper in an alternative format) to: Fees Policy Team
Ministry of Justice
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London SW1H 9AJ
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How to respond: Please send your response by 04/01/2023 to:

Fees Policy Team
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Executive summary

This consultation considers a number of changes to the fees structure in force in the Immigration and Asylum Chambers of the First-tier and Upper Tribunal. These changes are intended to support some upcoming reforms to the operation of the Immigration and Asylum Chamber, following the passage of the Nationality and Borders Act 2022.

The Nationality and Borders Act 2022 (NABA) puts in place a number of legislative changes to support the Government's New Plan for Immigration programme. This programme has three main objectives:

- To increase the fairness of the system to better protect and support those in need of asylum;
- To deter illegal entry into the UK, breaking the business model of people smuggling networks and protecting the lives of those they endanger; and
- To remove more easily those with no right to be in the UK.

Within the changes resulting from the introduction of the Nationality and Borders Act 2022 are the introduction of an accelerated detained appeals (ADA)

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route, an age assessment statutory appeal right in the Immigration and Asylum Chambers and expedited appeals that can take place in the Upper Tribunal.

To support these new changes, this consultation proposes making two minor reforms to the fees structure that operates in the IAC. These changes are to:

- Introduce a fee exemption for the accelerated detained appeals (ADA) process; and
- Introduce identical appeal fees in the Upper Tribunal as in the First-tier Tribunal, so that the same fee is payable by those who have an expedited appeal in the Upper Tribunal.

The consultation also considers what fees should be payable for age assessment appeals. It proposes that the fees that are currently payable for immigration and asylum matters in the First-Tier Tribunal should also apply to this new appeal type.

This consultation runs for six weeks and closes on 4 January 2023. We look forward to hearing the views of those with an interest in these changes. Subject to the outcome of this consultation, our intention is to bring forward these changes to accompany the

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commencement of the relevant provisions in
the NABA.

Introduction

1. This paper sets out for consultation a number of changes to the fees charged in the Immigration and Asylum Chambers of the First-tier and Upper Tribunals. These changes are to coincide with the implementation of reforms passed in the Nationality and Borders Act 2022 which are due to commence in 2023. The consultation is aimed at those with an interest in the operation of the Immigration and Asylum Chamber across the UK.
2. A Welsh language consultation paper is available at: <https://www.gov.uk/government/consultations/implementing-the-nationality-and-borders-act-2022-amendments-to-tribunal-fees>.

Background: Fees in the Immigration and Asylum Chamber

Fees in the First-Tier Tribunal

3. The Immigration and Asylum Chamber of the First-Tier Tribunal (“the FtTIAC”) handles appeals against decisions made by the Home Office relating to claims for permission to stay in the UK,

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deportation from the UK and refusing entry clearance to the UK. It also handles applications for immigration bail from people being held by the Home Office on immigration matters. The FtTIAC received 39,000 applications in 2021/22, of which 7,000 related to asylum and protection, 13,000 to human rights and 19,000 to free movement rights for EEA nationals.

4. Fees have been in place in the FtTIAC since 2011, under the power in section 42 of the Tribunals, Courts and Enforcement Act 2007. The fees are set out in the First-tier Tribunal (Immigration and Asylum Chamber) Fees Order 2011. The Government's objectives with charging fees in the IAC is similar to its aims across all courts and tribunals, namely to:
 - a. Make sure that users contribute to the costs of the service, where they can afford to do so, reducing the overall costs to the general taxpayer;
 - b. Improve the efficiency and effectiveness of the tribunal; and
 - c. Protect access to the tribunal for those who need it.

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5. Under the current arrangements in the FtTIAC, a fee is charged when a person makes an application to appeal an immigration or asylum decision of the Home Secretary. The fee charged depends on whether the appellant is seeking a decision from the tribunal following attendance at an oral hearing or consideration of the appeal on the papers without attendance. The fees are currently £80 for a decision on the papers and £140 for an oral hearing.
6. However, fees should never act as a barrier to people accessing the tribunal. The Lord Chancellor has a statutory and constitutional duty to ensure that access to justice is not denied. A number of safeguards are in place in legislation to ensure this. These safeguards can be categorised in three ways:
 - a. **Due to the type of case:** Some application types are exempt from fees due to the nature of the appeal – this includes appeals relating to deprivation of citizenship or revocation of protection status. In asylum cases, the payment of the fee may be deferred in order to not delay a decision being made on the individual's protection status.

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- b. **Due to personal circumstances of the appellant:** Fees are also not payable on some occasions on account of the personal circumstances of the appellant – this includes if they are in receipt of legal aid or asylum support, or if they are a child who is supported by a local authority (or are the parent of such a child). Appeal fees are also not payable in a small number of instances where the individual is excepted from the requirement to pay a fee for the original application – these instances typically relate to the protection of the individual’s Convention rights as set out in Human Rights Act 1998.¹
- c. **Due to financial circumstances of the appellant:** Lastly, the MoJ’s Help with Fees scheme exists to support access to justice for court and tribunal users who would otherwise have difficulty paying a court or tribunal fee. These users can be awarded a full or partial remission of their court fee, depending on their financial circumstances. The Lord Chancellor also has the power to remit fees where

¹ Set out in Immigration and Nationality (Fees) Regulations 2018

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exceptional circumstances exist which justify a remission. This generally applies where the applicant's exceptional personal or financial circumstances mean they cannot pay the fee. The Help with Fees scheme operates for immigration and asylum appeals brought from within the United Kingdom.

Upper Tribunal

7. The Upper Tribunal (the “UTIAC”) is responsible for handling onward appeals from decisions made by the FtTIAC in immigration cases. It also handles applications for judicial review of decisions made by public authorities where they relate to immigration, asylum and human rights issues. In 2020/21, the UTIAC received c. 2,400 appeals against decisions made by the FtTIAC and c.1,900 judicial reviews.²
8. The Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011 sets out the fees to be charged in the Upper Tribunal. Compared to the First-Tier, fewer fees are charged in the Upper Tribunal.

² <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2022>

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While fees are payable for immigration judicial reviews, no fees are payable for permission to appeal decisions made by the First-Tier Tribunal, or for the substantive appeal where permission is granted. For judicial review cases where fees are payable, the Help with Fees remission scheme is available to support those who may need help to afford their fee.

9. Across both tiers, the Ministry received fee income (net of remissions) from the Immigration and Asylum Chamber in 2021/22 of £5m, compared to a cost of running the tribunal of £108m.³ The Government therefore recovers approximately 5% of its costs in the Immigration and Asylum Chamber from its users. The remainder is covered by general taxation.

New Plan for Immigration

10. The New Plan for Immigration (NPI) sets out to ensure a firm, fair and compassionate reform of the UK's immigration system. It aims to do so via end-to-end reforms to enable genuine claims to be

³ Immigration and Asylum Tribunal expenditure figure includes shared overheads

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decided more quickly, tackling the extent to which people can frustrate removals through sequential or unmeritorious claims, appeals or legal action, while maintaining fairness, ensuring access to justice and upholding the rule of law.

11. The Ministry of Justice is responsible for a number of NPI measures, of which introducing i) age assessment appeals, ii) accelerated detained appeals and iii) expedited appeals in the Upper Tribunal are priorities for implementing the Nationality and Borders Act 2022 (NABA). These measures have been designed to provide efficient access to justice as part of the reforms in the NPI.
12. The following chapter sets out the detail of these three measures, and our proposals for tribunal fees and exemptions.

The proposals

Age assessments

13. The NABA introduces a new appeal right for age-disputed persons subject to immigration control. Where an age assessment has been conducted under section 50 or 51 of NABA by a designated person, it may be appealed to the First-tier Tribunal.
14. Currently, age assessments can only be disputed through judicial review in the Administrative Court and Upper Tribunal. The fee to apply for permission to appeal in the Upper Tribunal is £154, and if permission is granted, then the fee for the hearing itself is £770. There are typically 50–100 judicial reviews per year relating to age assessments in immigration and asylum matters. As the parameters for appeals are broader than those for judicial review, the volume of age assessment appeals in the FtTIAC is expected to be higher than the volume of judicial reviews that have been coming through to UTIAC.

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15. We have considered what fee should be charged for this new appeal route available in the First-tier Tribunal. Since the decision has been made to provide a statutory appeal, we consider that it would not be appropriate to charge the appellant the fees currently in place for judicial reviews. Instead, age assessment appeals will be appeals against decisions relating to “immigration or asylum matters” for which appeal fees are currently payable under the First-tier Tribunal (Immigration and Asylum) Fees Order. Accordingly, we propose that the fees system in place in the First-tier Tribunal should apply, meaning a fee of £80 is payable if the applicant consents to a decision being made on the papers, and £140 if they wish to have an oral hearing.
16. This would be in line with the general position on fees in the First-tier Tribunal – namely to seek a contribution from users of courts and tribunals to the cost of the services they apply for. Fees are charged for all immigration or asylum matters with which the Tribunal deals, unless an exemption applies. We do not see a convincing reason why age assessment appeals should have a specific exemption.

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17. Since fees for appeals in the First-tier Tribunal are lower than those for judicial review in the Upper Tribunal, it will be less expensive for a person to appeal an age assessment decision under the new regime than it is now. Furthermore, the safeguards that apply in the First-tier Tribunal (set out in para 6) will apply to support appellants with their fees – whereas they do not all apply for judicial reviews.
18. We have considered whether the safeguards that currently exist to support people to bring their appeal to the tribunal (para 6) are sufficient for age assessment appeals. Our view is that they are. Furthermore, the Nationality and Borders Act 2022 provides for age assessment appeals to be within the scope of the civil legal aid scheme in place in England and Wales. This means that applicants who pass the legal aid means test in England and Wales will be eligible for free legal representation, and consequently exempt from paying a fee.

Question 1: Noting that these are lower than the fees which are currently payable to bring a judicial review of an age assessment, do you agree that First-tier tribunal fees should be charged for age assessment appeals? Do you agree that existing safeguards are sufficient to ensure access to the tribunal for these cases?

Accelerated detained appeals (ADA)

19. The NABA requires the Tribunal Procedure Committee to make rules for an accelerated route for certain immigration and asylum appeals made from detention which are considered likely to be suitable for a quick decision. Where a Home Office decision has been certified as suitable for an ADA appeal, the appellant must lodge their appeal within 5 working days. The First-tier Tribunal must decide the appeal and give notice of that decision within 25 working days of the appeal being lodged. Any applications for permission to appeal to the Upper Tribunal must be determined within 20 working days of the applicant being given notice of the First-tier Tribunal's decision. The types of appeal which may be eligible for the

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ADA route as well as other restrictions, will be set out in secondary legislation and guidance.

20. Appeals would normally attract a fee of £80 if the applicant consents to a decision being made on the papers, and £140 if they wish for a decision to be made following an oral hearing. No distinction is made in the Fees Order about whether the appellant is detained, either in an Immigration Removal Centre (IRC) or a Foreign National Offender (FNO) prison. Where appellants are currently detained in an IRC and are subject to HMCTS' administrative Detained Immigration Appeals procedure, fees are typically waived under the Lord Chancellor's exceptional power to remit fees due to the practical and procedural difficulties for these individuals to pay the fee.
21. The nature of the ADA process will bring similar logistical challenges. Appellants will be required to prepare their case and lodge their appeal within 5 days of receiving the Home Office decision. We recognise the risk that in such a scenario, a requirement to access funds and pay the fees for an appeal may prove a barrier to an appellant's ability to meet these expedited timings, and

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therefore their ability to bring a case altogether. As a result, we conclude that there is a strong argument to exempt fees for those subject to the ADA process to ensure that access to the tribunal is maintained.

22. When considering whether an appeal should be subject to the ADA process, an assessment will be made on a case-by-case basis.

Question 2: Do you agree that there should be a fee exemption for ADA appeals to the First-tier or Upper Tribunal?

Expedited appeals in the Upper Tribunal

23. The NABA introduces a new appeal route for certain refused protection claims and human rights claims (through a new section 82A of the Nationality, Immigration and Asylum Act 2002). This provides a right of appeal direct to the Upper Tribunal under an expedited procedure and from which there is no right of onward appeal. A refused claim will only be certified for an expedited appeal where the claim was made while a Priority Removal Notice was in place and where the

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human rights claim, or protection claim was made “late”, i.e. after the deadline specified in that notice, without good reason. There is also provision in the NABA to ensure that appeals which are related to an expedited appeal (being those made after an expedited appeal is ongoing or were on foot when an expedited appeal was certified) will also be heard in the UTIAC.

24. At the moment, fees are charged in the FtTIAC for appeals against decisions made by the Home Office, subject to the additional provisions of the Fees Order which provide for exemptions and remissions. However, there are no such fees for appeals in the Upper Tribunal. This reflects the fact that appeals against decisions made by the Home Office are currently lodged only in the First-tier Tribunal, not the Upper Tribunal. This will not be the case once the expedited appeal route is implemented at which time substantive appeals may be lodged and heard in both the Upper and the First-tier Tribunal. The venue of the appeal is dependent on the actions of the appellant, since the expedited appeal is certified only where the claim was made “late” without good reason. We do not think there is a justifiable reason for a

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difference in fee treatment between appeals from a Home Office decision, based on the Tribunal in which it is heard.

25. Our proposition is therefore to apply the FtTIAC fees structure to expedited appeals in the Upper Tribunal. The policy intention is to ensure equal treatment of appellants regardless of which Tribunal they must appeal to. This recognises that the substance of the appeal being made in either tier is the same, the costs to administer them will be similar, and therefore no difference in fee is justified. The changes we will make are:
- a. **Fees:** We will introduce fees to be payable for appeals against a Home Office decision lodged in the Upper Tribunal. This will mean expedited appeals and certain related appeals. The same fee values (£80 without a hearing; £140 if a hearing is requested) will apply as in the First-Tier Tribunal.
 - b. **Safeguards:** We propose introducing the safeguards of exemptions and remissions that are in place in the First-tier tribunal into the Upper Tribunal. These are summarised in paragraph 6 of this consultation.

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c. **Cost awards:** Should the above proposals be implemented, we would look to ask the Tribunal Procedure Committee to consider making the same cost rules in the Upper Tribunal as in the First-tier Tribunal. In the First-tier Tribunal, where an appeal is allowed, the Tribunal may order the respondent to pay by way of costs any fees the appellant may have paid or been required to pay.

26. These first two changes would be given effect by amending the Upper Tribunal (Immigration and Asylum Chamber) (Judicial Review) (England and Wales) Fees Order 2011 using a statutory instrument. The third change would be for the Tribunal Procedure Committee to consider.
27. By ensuring that the same fees system applies in both the Upper and First-Tier Tribunals, we do not believe that any appellants will be disadvantaged by this change. Where an appellant goes through the new expedited appeal process and applies to the Upper Tribunal, they would pay the same fees as if they had appealed to the First-tier Tribunal. The number of appellants who are required to appeal to the Upper-tier Tribunal is likely to be

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low. These appellants may make use of any applicable exemptions or remissions which may support them in paying their fee and lodging their application.

Question 3: Do you agree that the same fees structure that applies to appeals of Home Office decisions in the First-Tier Tribunal should apply to expedited appeals to the Upper Tribunal?

Impact Assessment, Equalities and Welsh Language

Impact assessment

28. The proposals in this document seek to replicate existing fees for the new appeal routes. This means appellants would be subject to the same fees as if they brought their appeal under the current system before NABA is implemented. For age assessment appeals, appellants would be better off under the proposed scheme than under the current system, where they are required to pay higher Judicial Review fees to challenge an age assessment decision. We do not expect that the appellants impacted by the proposals will be negatively affected by the changes. Therefore, the impact of the changes proposed in this document are not expected to be significant. On this basis, an impact assessment has not been conducted to accompany this consultation.

Equalities

29. Under the Equality Act 2010, the Government is required, as part of policy development, to consider the equalities impact of our proposal. In summary, public authorities subject to the equality duty must have regard to the following when exercising their functions:
- a. eliminate discrimination, harassment and victimisation and other conduct prohibited by the Act;
 - b. advance equality of opportunity between people who share a protected characteristic and those who do not;
 - c. foster good relations between people who share a protected characteristic and those who do not.
30. For the purposes of the equality assessment the relevant protected characteristics under the Equality Act are: race; sex; disability; sexual orientation; religion and belief; age; marriage and civil partnership; gender reassignment; pregnancy and maternity.
31. Our assessment is that the planned changes to the fee structure are not directly discriminatory

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within the meaning of the Act, as they will apply to all parties affected and are not considered to result in people being treated less favourably because of their protected characteristic. For similar reasons, we do not believe that individuals with protected characteristics would be particularly disadvantaged by these plans, and if there is any unexpected impact, the remissions and exemptions that are in place in the Fees Orders should mitigate this impact.

Welsh Language Impact Test

32. This proposal, if implemented, would also impact those who speak the Welsh language. This proposal includes changes to fees which also impacts users of the courts who speak the Welsh language, although should not impair their understanding of the fees disproportionately.
33. A Welsh version of this document can be found at: <https://www.gov.uk/government/consultations/implementing-the-nationality-and-borders-act-2022-amendments-to-tribunal-fees>.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

Question 1: Noting that these are lower than the fees which are currently payable to bring a judicial review of an age assessment, do you agree that First-tier tribunal fees should be charged for age assessment appeals? Do you agree that existing safeguards are sufficient to ensure access to the tribunal for these cases?

Question 2: Do you agree that there should be a fee exemption for ADA appeals to the First-tier or Upper Tribunal?

Question 3: Do you agree that the same fees structure that applies to appeals of Home Office decisions in the First-Tier Tribunal should apply to expedited appeals to the Upper Tribunal?

Question 4: Do you consider these proposals will have a disproportionate impact on individuals with protected characteristics? Are there any potential

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modifications we should consider to mitigate this impact?

Thank you for participating in this consultation exercise.

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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)

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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 4 January 2023 to:

Fees Policy

Ministry of Justice
102 Petty France
London SW1H 9AJ

Email: mojfeespolicy@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 and it is also available online at <https://consult.justice.gov.uk/>.

Alternative format versions of this publication can be requested by emailing MoJ Fees Policy at mojfeespolicy@justice.gov.uk.

Publication of response

A paper summarising the responses to this consultation will be published in due course.

The response paper will be available on-line at <https://consult.justice.gov.uk/>.

Representative groups

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

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed 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).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with

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which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

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

OGL

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