

## General Note

### Consultation

1 Modern legislation abounds with duties to consult, principally duties for Ministers or other authorities to consult interested persons before making subordinate legislation or exercising other powers.

2 A duty to consult falls far short of a duty to comply with the consultees' wishes; but it is also far from an empty duty. In essence it imposes flexible but demanding procedural requirements: to communicate fully; to allow proper time to respond; and to consider carefully any responses received.

“The common law duty of consultation is well-established: consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168 ; *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, [108].” (*R. (on the application of Compton) v Wiltshire Primary Care Trust* [2009] EWHC 1824 (Admin) at para.104.)

3 “The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice ... without communication and the consequent opportunity of responding, there can be no consultation.” (*Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms* [1972] 1 W.L.R. 190 per Donaldson J.)

4 For a searching analysis of what amounts to satisfactory consultation as a matter of administrative law in the context of modern Government, see *R. (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin). In that case a Government decision was declared unlawful as a result of being based on a “procedurally unfair” consultation. (See also *R. (on the application of Breckland DC) v Boundary Committee* [2008] EWHC 2929 (Admin).)

See also *Devon CC v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin):

“Where, as here, for the purposes of the consultation process, the decision-maker does in fact set out his crucial criteria and precisely how he will use them in his decision-making, this would, as intended, affect what topics were covered by consultees, in what depth or with what focus, and would affect what is omitted. Where criteria and their precise role are expressly stated, a fair and lawful statutory consultation may prevent departure from criteria and their stated significance, without further consultation enabling representations to be made on that changed basis. ...

“I accept the contention ... that a flawed consultation exercise is not always so procedurally unfair as to be unlawful; *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] Env LR 29, Sullivan J. He said, para 63, that for a consultation process to be held unlawful

on the grounds of unfairness would require the court to find that something had gone ‘clearly and radically’ wrong, as Mr Drabble had submitted to him. Valuable though that contrast is, I have a reservation about treating that contrast between something going merely wrong, which would not suffice to show an unfair and unlawful consultation process, and something going ‘clearly and radically’ wrong, which would suffice to show such an error, as the litmus test. Not all cases could readily be fitted into one or other category, as if they were the only two categories of error available to be considered, with no unexcluded middle. That phrase should not become the substitute for the true test which is whether the consultation process was so unfair that it was unlawful. A judge is well placed to make that judgment.”

5 Legislation sometimes confers a power to consult, rather than a duty. This is rarely, if ever, necessary as a matter of law, and is included either for merely presentational purposes or as a hook for some other provision, such as a requirement to publish the results of any consultation carried out.

6 Where a power is to be exercised shortly after its commencement, but there is a statutory requirement to consult before exercising it, the question sometimes arises whether the consultation can be carried out before the power comes into force. As a general rule, [section 13 of the Interpretation Act 1978](#) (anticipatory exercise of powers) will not provide an answer. In most cases, however, common sense will suggest that if the law is that a power may not be exercised unless consultation has been carried out, the timing of the consultation is irrelevant, provided that the consultees were expressly made aware that their views were being sought in connection with the proposed exercise of the power. Despite this, however, in some cases the drafter has thought it advisable to include express permission for pre-commencement consultation — see, for example, the [Health and Social Care Act 2008 s.20\(9\)](#).

7 There may be processes that are similar to consultation but fall short of it (or exceed it). See, for example:

“The very use of different terms, involvement and consultation, only made sense if something less than consultation would be appropriate in certain circumstances. The two concepts of involvement and consultation reflected the different stages at which the obligation might be triggered.” (*R. (on the application of Compton) v Wiltshire Primary Care Trust* [2009] EWHC 1824 (Admin) at para.106 (citing *R. (on the application of Fudge) v South West SHA* [2007] EWCA Civ 803).)

8 “The requirement that consultation must be at a time when proposals are at a formative stage can be expressed as a requirement that the decision maker has not pre-determined the issue upon which he goes out to consultation, i.e. that he has an open mind. That said, and as Mr Garnham QC submitted in the course of argument, to have an open mind does not mean an empty mind.” (*Royal Brompton and Harefield NHS Foundation Trust v Joint Committee of Primary Care Trusts* [2011] EWHC 2986 (Admin).)

9 The Government routinely accepts, for parliamentary purposes, that a duty to consult includes a duty to have regard to views — see, for example, the following passage of the speech of Lord Whitty at the Committee Stage in the House of Lords of the Bill for the [Greater London Authority Act 1999](#):

“This amendment does not add to the normal understanding, long established and

commonplace in both statute and the courts, that to consult means to ask someone his views and to have regard to them. That is well established in what is intended here. If the noble Baroness is happy with that, I too am happy. Were we to pursue this, we would have long hours amending large chunks of other legislation to make it clear. This is established practice and it is the intention in this case.” ([Hansard, HL vol.602, col.946 \(June 23, 1999\).](#))

It follows that the occasional phrase such as, “must ... consult the Treasury and have regard to any advice which the Treasury may give” ([para.11\(4\) of Sch.1 to the Local Democracy, Economic Development and Construction Act 2009](#)) is attributable simply to drafting that fails to reflect the meaning of “consult” and therefore does not comply with proper legislative practice.

- 10 Consultation may be carried out under a statutory obligation or in accordance with arrangements established purely administratively. The principles that apply to consultation required by legislation also apply to consultation undertaken for other reasons in the course of the performance of publicly accountable functions:

“The defendant accepts that even though there was no statutory requirement to consult in the present case, the consultation process which it did undertake must meet the requirements of a ‘proper’ consultation, as encapsulated in the [R v North and East Devon Health Authority ex parte Coughlan \[2001\] QB 213](#), see per Lord Woolf MR at paragraph 108:

‘It is common ground that whether or not the consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage. It must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response. Adequate time must be given for this purpose and the product of consultation must be conscientiously taken into account when the ultimate decision is taken; [R v Brent London Borough Council ex parte Gunning \[1985\] 84 LGR 168.](#)’

“When applying those principles, it is important to bear in mind that one of the principal purposes, it not the principal purpose, of any consultation exercise is to enable consultees to identify and draw to the attention of the decision maker relevant factors which the decision maker may, either by accident or design, have overlooked when deciding upon a preferred option for consultation. The Coughlan principles do not require as their starting point an omniscient decision maker who will have correctly identified each and every relevant factor at the outset; there would be little point in having a consultation if that were to be the underlying assumption. If a consultation document makes it clear that a decision maker has not considered a particular factor, ‘factor X’, when deciding upon a preferred option, and a consultee contends that factor X should have been taken into account, and in response to that representation the decision maker agrees that factor X should be considered, then that is an example not of a flawed consultation process, but of a consultation process that has done the job that it was intended to do.” ([JL Anor, R \(On the Application Of\) v Arun District Council \[2011\] EWHC 939 \(Admin\)](#)).

- 11 For the principles applying to non-statutory consultation see further [Vale of Glamorgan Council v Lord Chancellor \[2011\] EWHC 1532 \(Admin\)](#) and [R. \(on the application of Green\) v Gloucestershire CC \[2011\] EWHC 2687 \(Admin\)](#).

- 12 “37 There is no real dispute as to the relevant law applicable in this case. It can be

summarised as follows:

- (1) Even though the Lord Chancellor was under no express statutory duty to consult, once consultation was undertaken it had to be conducted fairly: see [R v North and East Devon Health Authority, ex-parte Coughlan \[2001\] QB 213](#) and [R \(Capenhurst and others\) v Leicester City Council \[2004\] EWHC 2124 \(Admin\)](#) at [44].
- (2) The content of the duty of consultation is now well-established. Firstly, consultation must be undertaken at a time when proposals are still at a formative stage. Secondly, sufficient reasons must be provided for particular proposals so as to permit those consulted to give intelligent consideration and make an intelligent response. Thirdly, adequate time must be given to allow responses to be made. Finally, the responses to consultation must be conscientiously taken into account when the ultimate decision is taken: see [R v Brent London Borough Council, ex-parte Gunning \(1985\) 84 LGR 168](#), approved in the Coughlan case at [108].
- (3) As Simon Brown LJ pointed out in [R v Devon County Council, ex-parte Baker \[1995\] 1 All ER 73](#), 88:

‘The precise demands of consultation ... vary according to the circumstances ... Underlying what is required must be the concept of fairness ...’

In that context it is important to emphasise that the question is not whether the consultation exercise might have been improved upon. Sullivan J as he then was put the matter succinctly in [R \(Greenpeace\) v Secretary of State for Trade & Industry \[2007\] EWHC 311 \(Admin\)](#) at [63]:

‘... The conclusion that a consultation exercise was unlawful on the ground of unfairness will be based on the finding by the court not merely that something went wrong but that something went “clearly and radically” wrong.’

- (4) As far as the second of the requirements in ex-parte Gunning (enabling intelligent consideration and an intelligent response) is concerned, ‘it is important that any consultee should be aware of the basis on which a proposal put forward for ... consultation has been considered and will thereafter be considered...’: per Silber J in the Capenhurst case at [46]. Silber J also stated that this means that the person consulted should be informed or be aware of what criterion would be adopted by the decision-maker and what factors would be considered decisive or of substantial importance by the decision-maker in making his decision at the end of the consultation process.
- (5) There is no obligation for a decision maker carrying out a consultation to disclose all material relied upon for his decision: [Edwards v Environmental Agency \[2006\] EWCA Civ. 877](#), at [103]. We discuss the general position in relation to matters that emerge during the consultation later in this judgment: see [46].” ([R. \(on the application of Robin Murray & Co\) v Lord Chancellor \[2011\] EWHC 1528 \(Admin\)](#).)

13 For recent illustrative application of the authorities and principles on consultation see [R. \(on the application of Copson\) v Dorset Healthcare University NHS Foundation Trust \[2013\] EWHC 732 \(Admin\)](#).

14

“27. In considering the authorities cited by the parties I have paid particular attention to and given weight to those which consider a challenge to the consultation process. From the authorities the following principles can be identified:

- i) The issue for the court is whether the consultation process was ‘so unfair it was unlawful’ – Devon County Council;
- ii) Lawful consultation requires that: i) it is undertaken at a time when proposals are still at a formative stage; ii) it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; iii) adequate time must be given for this purpose; iv) the product of the consultation must be conscientiously taken into account when the ultimate decision is taken;
- iii) Disclosure of every submission or all of the advice received is not required. Save for the need for confidentiality, those who have a potential interest in the subject matter should be given an opportunity to deal with adverse information that is credible, relevant and significant to the decision to be made. The degree of significance of the information is a material factor;
- iv) The fact that the information in question comes from an independent expert or from the consultee is relevant but it is a combination of factors including fairness, the crucial nature of the advice, the lack of good reason for non disclosure and the impact upon consultees which are to be considered upon the issue of fairness;
- v) What fairness requires is dependent on the context of the decision; within that the court will accord weight and respect to the view of the decision-maker;
- vi) If the person making the decision has access to information but chooses not to consider it, that of itself, does not justify non-disclosure; it will be for the court to consider the reason for non-disclosure;
- vii) A consultation process which demonstrates a high degree of disclosure and transparency serves to underline the nature and importance of the exercise being carried out; thus, non-disclosure, even in the context of such a process, can limit the ability of a consultee to make an intelligent response to something that is central to the appraisal process;
- viii) The more intrusive the decision the more likely it is to attract a higher level of procedural fairness;
- ix) If fairness requires the release of information the court should be slow to allow

administrative considerations to stand in the way of its release.” (*R. (on the application of Save our Surgery Ltd) v Joint Committee of Primary Care Trusts [2013] EWHC 439 (Admin).*)

15 The Cabinet Office has issued non-statutory guidance on the principles to be applied by Government Departments when undertaking consultations - <https://www.gov.uk/government/publications/consultation-principles-guidance>. The guidance does not have the force of law; but since it amounts to a statement by the Government of best practice, in judicial reviews challenging consultation by Government, while the courts would not accept compliance with the guidance as a guarantee of lawfulness, they might be inclined to accept non-compliance as prima facie evidence of unlawfulness.

16 “As I see it, statutory consultation is ordinarily designed to be needed, and is required, at the formative stage of the relevant process (see for example *Coughlan v North and East Devon Health Authority [2001] QB 213*). That is consistent here with the width of the language of s.3 . The fact that the Council may withdraw from its procurement proposals at any subsequent stage is, in my view, nothing to the point under this head of the argument: on the contrary, one of the whole purposes of consultation is to enable an authority, properly informed through the process of consultation by representations of residents of the Borough and other "stakeholders", to decide whether or not to pursue or withdraw from a particular policy or strategic decision.” (*R. (on the application of Nash) v Barnet LBC [2013] EWCA Civ 1004.*)

17 “No authority was cited to me in support of the principle that there is a general legal duty to act fairly and therefore to consult unless the legislation excludes that duty. In my judgment that submission states the matter too broadly. Absent legitimate expectation, or a statutory requirement to consult, the presumption of procedural fairness appears to apply (a) whenever the exercise of a power adversely affects an individual's rights protected by common law or created by statute (b) to more general interests such as the interest in pursuing a livelihood and in personal reputation [see De Smith para 7-001; Chapter 7 Section 4]. As I have stated, no authority was cited to me to support.

“52. In those circumstances I reject the Claimant's claim on Ground 2 based on any legitimate expectation of consultation.” *R. (on the application of Miller Homes Ltd) v Leeds City Council [2014] EWHC 82 (Admin).*)