

**Consultation: One aspect of procedural
propriety in administrative decision-making**

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Introduction

Last year when asked to provide an update on administrative law, particularly arising in an environmental and planning context, I focused on recent administrative law decisions involving grounds of review falling under the broad categories of review of irrationality and illegality.¹ This year, in providing another update on administrative law, I wish to focus on decisions falling under the rubric of procedural impropriety. I have selected one aspect of procedural fairness, namely consultation by an administrative decision-maker about a particular decision or issue, as there have been a spate of cases on this aspect in the last couple of years in the United Kingdom.² As I did last time, I will set the recent decisions in a context of the principles established from prior cases.

Two questions need to be addressed. First, when does a duty to consult about a particular decision or issue arise? Secondly, what is the content of the duty to consult when it does arise?

Existence of a duty to consult

A duty to consult can arise in essentially three ways: first, there might be a statutory requirement to consult; secondly, a legitimate expectation of consultation might arise; and thirdly, the decision-maker might have assumed a duty to consult.

Statutory duty to consult

The statute reposing power to make a decision, including to make a subordinate instrument or to grant an approval, may require consultation as a procedural pre-condition to the exercise of the power.

An example in New South Wales of such a procedural requirement for consultation has been in the process of preparation and making of a regional environmental plan.³ Section 45 of the *Environmental Planning and Assessment Act 1979* required the Director of Planning to ensure that consultations were held with, amongst others, each local council whose area or part area is situated in the region to which the draft plan applied. In *Leichhardt Municipal Council v Minister for Planning* (1992) 78 LGERA 306, the Court of Appeal of New South Wales held that consultation in accordance with s 45 was a pre-condition to the validity of a regional environmental plan and accordingly a regional plan that has been made without adequate consultation was not validly made (at 340).

Another example of a statutory requirement for consultation was involved in the English case of *R (on the application of Parents for Legal Action Ltd) v Northumberland County Council* [2006] ELR 397, [2006] EWHC 1081 (Admin). The relevant statute required a local education authority, before publishing a proposal in relation to establishing or altering community or foundation schools, to consult with such persons as appear appropriate to them, having regard to any guidance given from time to time by the Secretary of State.⁴

¹ Preston B J, "Administrative Law in an Environmental Context: An Update" (2007) 15 AJ Admin L 11.

² I acknowledge the inspiration for this topic and the assistance I have received from the article by Dove I, "Planning Law Update" [2007] JPL 105.

³ I say "has been" because the New South Wales Parliament has just passed the *Environmental Planning and Assessment Amendment Act 2008* which has abolished regional environmental plans.

⁴ Section 28(5) of the *School Standards and Framework Act 1998* (UK) quoted in *R (on application of Parents for Legal Action Ltd) v Northumberland City Council* [2006] EWHC 1081 (Admin) at [20].

Legitimate expectation of consultation

A duty to consult may arise by reason of the principles relating to legitimate (or reasonable) expectation. As Laws LJ summarised in *R (on the application of Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]:

“Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is a good reason not to do so”.⁵

In *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33, the representations of a previous government gave rise to a legitimate expectation requiring consultation as part of the process of making a regional environmental plan for the redevelopment of the old Sydney Showground as a film studio. However, there was a change of government and the new government abandoned the proposal for a regional environmental plan and instead chose to make a different instrument, a State Environmental Planning Policy. There was no statutory requirement for consultation in respect of the making of a State Environment Planning Policy. That decision to change to a State Environment Planning Policy was a policy decision open to the new government. It could not be fettered by previous representations about making a regional environmental plan. The decision involved an abandonment of the consultative process established by the previous government. The new government made no representations requiring consultation and was held not bound by the previous government’s representations involving the preparation of a different type of instrument (at 41, 49, 53).

The claimant was also unsuccessful in *R (on the application of Tinn) v Secretary of State for Transport* [2006] EWHC 193 (Admin), in establishing a legitimate expectation to be consulted. The case concerned the construction of a road bypass for a town and the route that the bypass should take. The Department of Transport had published technical reports that suggested that the precise alignment would be the subject of further consultation. The Secretary of State had announced that “the next step for the scheme is for the Highways Agency to have a public consultation leading to the announcement of a preferred route” (at [21]). Nevertheless, the Administrative Court (Bean J) concluded that none of this material gave rise to a legitimate expectation either that the Secretary of State would consult on more than one route or that the preferred planned route in every last detail would be the subject of or included in the consultation (at [22]).

So too in *R (on the application of Niazi) v Secretary of State for the Home Department* [2007] EWHC 1495 (Admin), the claimants failed to establish a legitimate expectation of being consulted. The Secretary of State for the Home Department has decided to withdraw, without prior notice or consultation, a discretionary ex gratia scheme under which compensation was paid to persons who had suffered miscarriages of justice, and to reduce costs of the solicitors acting for claimants under a statutory scheme. The claimants were persons who had suffered miscarriages of justice and solicitors who specialised in acting for such claimants. Each of the claimants was in a position to make a claim under the discretionary scheme.

The Divisional Court (May LJ, Gray J) held that the ex gratia scheme was entirely discretionary and it was open to the Secretary of State to withdraw it. Although the government had issued a Code of Practice on Consultation, which contained a Foreword by the Prime Minister stating that effective consultation is a key part of the policy making process, the Code did not have legal force and it did not constitute any form of government promise or undertaking that policy changes would never be made without consultation.

⁵ See also *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 401, 407, 412, 419-420.

Rather, the Code prescribed how generally public consultation should be conducted if there was to be public consultation (at [23], [24]).

More generally, it was not possible to spell out from the ministerial statement or past practice relating to the discretionary scheme any representation or promise that it would continue indefinitely or for a defined period. There was no such representation or promise that the scheme would not be withdrawn without notice or public consultation (at [26]). There was no established practice of consultation with anyone, let alone with unidentified future potential claimants under the discretionary scheme (at [29]). Accordingly, the claimants could not claim they had a legitimate expectation that the scheme would not be withdrawn without notice or consultation (at [38]).

The claimant was successful, however, in the recent case of *R (on the application of Greenpeace Ltd) v Secretary for State for Trade and Industry* [2007] Env LR 29; [2007] JPL 1314; [2007] EWHC 311. Greenpeace challenged the Government's decision to support new nuclear power stations as part of the UK's future energy mix. This was seen as an about face from the government's previously expressed policy view, expressed in the 2003 *Energy White Paper: Our Energy Future – Creating a Low Carbon Economy*, that it had decided against the building of new nuclear power stations and instead opted to concentrate its efforts on encouraging the development of renewable energy sources.

Greenpeace challenged the decision on grounds that included that it had a legitimate expectation that there would be consultation before the government changed its policy. This legitimate expectation was founded in part on the explicit statement in the 2003 White Paper that "Before any decision to proceed with the building of new nuclear power stations, there will need to be the fullest public consultation and the publication of a further white paper setting out the Government's proposals" (at [9]). That clear promise was sufficient to enliven a legitimate expectation of consultation (at [54]). The consultation that occurred was not adequate.

Duty to consult assumed by decision-maker

Irrespective of whether there is a statutory duty to consult or a legitimate expectation of consultation has been raised, if a decision-maker has determined that it is going to undertake consultation as part of the process of exercising a power, the consultation must be undertaken properly, as will be discussed below. The voluntary undertaking of such consultation has been said to be "a very desirable part of the ordinary processes of government".⁶

The legal requirements of consultation

Summary of requirements

Once a duty to consult arises, the consultation must be undertaken properly. The requirements for proper consultation were summarised by Lord Woolf MR in *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213⁷ to be fourfold:

⁶ *McInnes v Minister of Transport* [2001] 3 NZLR 11 at 14 [10].

⁷ The actual decision in *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, that there could be a legitimate expectation of a benefit that is substantial and not just procedural, was not followed in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 (see at 10 [28], 21 [65]-25 [77], 37 [118]-[119], 48 [148]). See also *McWilliam v Civil Aviation Safety Authority* (2004) 142 FCR 74 at 83 [34] and *Rush v Commissioner of Police* (2006) 150 FCR 165 at 186-187 [82]. However, the summary of the four requirements for consultation, if it does occur, to be proper, is not dependant on this finding.

“It is common ground that, whether or not 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” (at 258 [108]).⁸

Consultation to be undertaken at formative stage

The first requirement is intended to ensure that the consultation is not futile, by the decision-maker already having pre-determined the outcome of the exercise of the power. This requirement has implications when consultation is undertaken as a staged process where various options are eliminated after each stage of consultation. A decision-maker needs to be careful not to preclude, by a decision at one stage, outcomes or detail that might be required at a later stage of consultation. Recent English cases illustrate this difficulty.

In *Sardar v Watford Borough Council* [2006] EWHC 1590 (Admin), a local council exercised a statutory power to delimit the number of hackney carriage licences within the borough. The power to do so could only be exercised if the local authority was satisfied that there was significant demand for such services, which was unmet. On 5 September 2005, the local council in the case decided to delimit the number of licences. It then embarked on a consultation process with the purpose of informing the local council at its meeting of 20 October 2005 where the issue of delimiting the number of licences was to be discussed.

The contention of the claimants was that the local authority had already determined in principle to delimit the number of licences and the consultation exercise was futile as it would never influence the decision in principle which had already been made. The Administrative Court agreed. Wilkie J accepted that the local council had conscientiously taken into account the product of the consultation in its determination of 20 October 2005 to delimit the number of licences. However, the problem was that:

“...the conscientious consideration of the consultation was applied, in effect, to the question whether to reverse a decision which had already been made rather than taking a decision untrammelled by any prior decision. In my judgment, the requirement that the decision taking process, where consultation is required, has to be both substantively fair and have the appearance of fairness, is of such importance that, even though what was done after 5 September was done professionally and in accordance with the requisite standards, there must remain a residual feeling that the decision to delimit has not been taken in a fair way. On the crucial issue of principle the sequence has been – decision first, consultation later. It is a different matter to decide to reverse a previous decision rather than to take one in the first place and, in my judgment, the consultation exercise and its fruits went, on the issue of principle, to inform a decision of the first type rather than one of the second” (at [33]).

Similarly, in *R (on the application of Parents for Legal Action Ltd) v Northumberland County Council* [2006] ELR 397; [2006] EWHC 1081 (Admin), the consultation process miscarried. The local education authority wished to change the system of state education in Northumberland from a three-tier system (first schools (ages 4-9), middle schools (ages 9-13) and high schools (ages 13-19)) to a two tier system ((primary schools (ages 4-11) and

⁸ See also *R v Brent London Borough Council; Ex parte Gunning* (1985) 84 LGR 168 at 189.

secondary schools (ages 11-19)). The local education authority adopted a staged consultation process. The first two stages related to whether or not, in principle, a two-tier system ought to be adopted. There was no consultation of the implications for specific schools or school partnerships. After completing the first two stages of consultation, on 19 April 2005, the local education authority decided to adopt the two tier system.

At the third stage of consultation, the local education authority consulted about the potential role individual schools and school partnerships might have in delivering the two-tier system. The claimant (an organisation of parents opposing the plans) brought a challenge on the basis that the third stage of consultation had proceeded solely on the assumption that the two-tier system would be adopted and failed to consider whether or not individual schools might have a role to play in a three-tier system.

The Administrative Court agreed that the consultation process had miscarried. Under the relevant statute, the local education authority was required to carry out consultation meeting the requirements of the Ministerial guidance. Those requirements necessitated consultation in relation to each school. By the local education authority taking the structural decision after the first two stages of consultation to adopt the two-tier system, but without reference to individual schools, it prevented itself from complying with its statutory obligation to consult on individual school closures and alteration (at [30]-[33], [35]).

Munby J held:

“...the Stage 2 [the third stage] consultations – the *only* consultations relating to specific school partnerships and specific schools – are taking place at a time when the proposals are in truth no longer at a formative stage. The proposals are no longer at a formative stage because the defendant’s decision on 19 April 2005 is being treated by it as precluding any public discussion during Stage 2 of anything other than two-tier models. The consequence...is that consultees have been denied *any* opportunity – let alone any meaningful opportunity – to express their views as to whether [any particular school] should be part of a two-tier system or remain as part of a three-tier system...the consultation process has been operated in such a way that objectors have never been given a real opportunity to present their case against closure of particular middle schools. For this reason, in my judgment, neither the consultation process taken as a whole, nor the Stage 2 consultation on its own, is adequate (at [36]).”

Provision of sufficient reasons and material

The second requirement for proper consultation is the provision of sufficient reasons and material to the consultees to enable an intelligent consideration of the proposed decision or issue and therefore a proper informed response.

R v Brent Local Borough Council; Ex parte Gunning (1985) 84 LGR 168 was another case involving decisions of a local education authority to close and amalgamate certain local schools. In July 1983, after proper public consultation, the local education authority made certain proposals regarding future education in the area. In December of that year, after a political change, further reports were ordered. A brief consultative document was prepared which contained little information and copies were sent to parents barely three weeks before the deadline for written representations. The local education authority then made new proposals materially different from the original proposals. The High Court held that the decisions were *ultra vires* by reason of the authority not acting according to the proper procedural requirements. The parents had a right to proper consultation. This right was not

met. The consultative document was wholly inadequate and the time for consultation was unreasonable (at 190-191, 192).

In *Leichhardt Municipal Council v Minister for Planning* (1992) 78 LGERA 306, the Minister had made a regional environmental plan (cognate with a State Environmental Planning Policy) which rezoned and allowed development on land in the Leichhardt local government area, contrary to the wishes of the local council. A step in the statutory process of making a regional environmental plan was consultation with the local council. The Director of Planning sent a letter to the local council purporting to consult on the draft regional environmental plan. The letter was dated 18 October 1991 but was not sent until 21 October 1991. It gave the local council until 8 November 1991 to respond. The letter did not refer to the Minister's intention, by the State Environmental Planning Policy and regional environmental plan, to constitute himself (rather than the local council) as consent authority for development in the area concerned and did not state what the substance and effect of the policy and plan were going to be.

The local council, by letter dated 30 October 1991, invited the Director to attend the council's next meeting on 19 November 1991 in order to clarify matters. In particular, the letter said that "it is impossible to comment on the proposals for the draft [regional environmental plan], without first sighting the criteria in the State policy. Council would also appreciate your advice as to what you intend to include in the [regional environmental plan]...".

The Court of Appeal of New South Wales held that the consultation was inadequate. Sheller JA (with whom Priestley and Meagher JJA agreed) referred (at 336) first, to *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13 at 17, where Bucknill LJ said that consultation:

"means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice and, on the other hand, a sufficient opportunity must be given to the local authority to tender that advice."

and, secondly, to *Port Louis Corporation v Attorney General of Mauritius* [1965] AC 1111 at 1124, where Lord Porter said that proper consultation with the local authority concerning alterations of the boundaries of a town requires "that the local authority must know what is proposed before they can be expected to give their views" and "be given a reasonable opportunity to state their views...The requirement of consultation is never to be treated perfunctorily or as a mere formality".

Sheller JA held that the consultation in the *Leichhardt* case required that the questions asked by the local council, be addressed either at a meeting or in correspondence:

"In this case proper consultation pursuant to s 45 required that the Council know what was proposed before it was expected to give its views and that the Council be given a reasonable opportunity to state its views. I see nothing unreasonable in the questions raised by the Council. When they were not dealt with the process of consultation broke down. Accordingly, contrary to the requirements of s 45, the Director did not ensure that consultations were held with the Council. This conclusion is confirmed by the short time given..." (at 338).

The requirement that, in order for consultation to be proper, sufficient material be provided to the consultee and a reasonable opportunity given to respond, can also extend to new material that emerges after consultation has occurred with a particular consultee.

In *R (on the application of Edwards) v Environment Agency* [2007] EnvLR 9; [2007] JPL 82; [2006] EWCA Civ 877, the claimant (a local resident) successfully challenged the grant by

the Environment Agency of a Pollution Prevention and Control permit to burn shredded and chipped tyres as a partial substitute fuel in cement kilns. Although the requisite statutory notice and advertisement requirements were complied with prior to the grant of the permit, the claimant argued that the Environment Agency had failed to disclose sufficient information on the impact of particulates emitted from the proposed installation. The Environment Agency had commissioned its Air Quality Monitoring and Assessment Unit (AQMAU) to review information provided by the proponent and to provide advice in respect of emissions from the main stack and low level dust. The AQMAU required further data, which the Agency obtained from the applicant. This led to the AQMAU furnishing two internal reports on the emission of dust from the stack. However, the Environment Agency did not place either of the internal reports into the public domain.

The Court of Appeal held that the internal reports had been potentially material to the Environment Agency's decision and to the members of the public who were trying to influence it. The failure to disclose the internal reports involved a breach of the Environment Agency's common law duty of fairness (at [106]). Auld LJ (with whom Rix LJ and Maurice Kay LJ agreed) summarised the principles governing disclosure of new material in a consultation process as follows:

"[103] In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, for the reasons given by Lord Diplock in *Bushell*, require a decision-maker to disclose its own thought processes for criticism before reaching its decision. However, if, as in *United Stated Tobacco* (see per Taylor L.J., as he then was, at 370-371, and at 376, per Morland J.), and in *Interbrew* (see per Moses J. at pp.33-35 of the transcript), a decision-maker, in the course of decision-making, becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it. See also the remarks of Schiemann J. in *R. v Shropshire Health Authority, Ex p. Duffus* [1990] 1 Med L.R. 119, at 223 as to the changing scene that a consultation process may engender and the consideration by Silber J. in *R. (on the application of Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640, at 39-44, of the possible need, depending on the circumstances, for further consultation on matters and issues that the initial consultation may have thrown up."

In *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] Env LR 29; [2007] JPL 1314; [2007] EWHC 311, the Secretary of State issued a consultation paper in January 2006 seeking views on the medium and long-term energy policy in the UK including the use of nuclear power. However, that consultation paper lacked material on two critical aspects: the economics of new nuclear power stations and the disposal of nuclear waste. Information on those issues emerged after the consultation period had concluded. The new information was not put into the public domain and consultees had no opportunity to deal with the new information before a decision was made. Sullivan J, sitting in the Administrative Court, held:

"[116] For the reasons set out above, the consultation exercise was very seriously flawed. Adopting the test put forward by Mr Drabble, 'something has gone clearly and radically wrong.' The purpose of the 2006 Consultation Document as part of the process of 'the fullest public consultation' was unclear. It gave every appearance of being an issues paper, which was to be followed by a consultation paper containing proposals on which the public would be able to make informed comment. As an issues paper it was perfectly adequate. As the consultation paper on an issue of such importance and complexity it was

manifestly inadequate. It contained no proposals as such, and even if it had, the information given to consultees was wholly insufficient to enable them to make 'an intelligent response'. The 2006 Consultation Document contained no information of any substance on the two issues which had been identified in the 2003 White Paper as being of critical importance: the economics of new nuclear build and the disposal of nuclear waste. When dealing with the issue of waste, the information given in the 2006 Consultation Document was not merely wholly inadequate, it was also seriously misleading as to CoRWM's position on new nuclear waste.

[117] On both the economics and the waste issues all, or virtually all, the information of any substance (the cost-benefit analysis and supporting reports, and CoRWM's draft and then final recommendations) emerged only after the consultation period had concluded. Elementary fairness required that consultees, who had been given so little information hitherto, should be given a proper opportunity to respond to the substantial amount of new material before any 'in principle' decision as to the role of new nuclear build was taken. There could be no proper consultation, let alone 'the fullest public consultation' as promised in the 2003 White Paper, if the substance of these two issues was not consulted upon before a decision was made. There was therefore procedural unfairness, and a breach of the claimant's legitimate expectation that there would be 'the fullest public consultation' before a decision was taken to support new nuclear build."

Adequate time to respond

The third requirement for proper consultation is that adequate time must be given to allow the consultees to give intelligent consideration and an intelligent response.⁹ As noted above, in *Leichhardt Municipal Council v Minister for Planning* (1992) 78 LGERA 306, a critical factor in the Court of Appeal holding that the consultation was not proper was the short time afforded to the Council to respond to the Director of Planning's consultation letter (at 338).

Conscientious taking into account of the product of consultation

The fourth requirement is that the product of consultation must be conscientiously taken into account when the ultimate decision is made. It would render futile the process of consultation if the decision-maker could ignore, or pay mere lip service to, the product of consultation.

In *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 the Court of Appeal of New Zealand cited the summary given by the trial judge as correctly distilling the appropriate requirements for consultation. That summary included noting that:

"Consultation must be allowed sufficient time, and genuine effort must be made. It is to be a reality, not a charade...To 'consult' is not merely to tell or present. Nor, at the other extreme, is it to agree...Consultation is an intermediate situation involving meaningful discussion... 'Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done'.

⁹ See *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213 at 258 [108]; *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13 at 17 and *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 at 675.

Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses. It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh” (at 675).

This requirement of conscientious taking into account the product of consultation does not require negotiation; the process of consultation is different from negotiation. Negotiation implies a process which has its object arriving at agreement. There is no such requirement in consultation.¹⁰ Furthermore, the decision-maker is not required to agree with the product of consultation.

Conclusion

Consultation is a means of improving access to information and public participation in decision-making. It can enhance the quality of decisions, contribute to public awareness of issues addressed, provide the public opportunity to express its concerns and enable public authorities to take due account of such concerns¹¹. As such, consultation is an aspect of the procedural propriety of administrative decision-making. Courts, in enforcing duties to consult, where they arise, exercise a truly supervisory jurisdiction. Enforcing a duty to consult does not interfere with the substance or merits of a decision, only the process by which it was reached. This lies within the proper province of judicial review.¹²

¹⁰ *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 at 676.

¹¹ As recognised in the Preamble of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) cited in *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EnvLR 29; [2007] JPL 1314; [2007] EWHC 311 at [49].

¹² *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.