

The Duty to Consult

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A. Introduction

1. Consultation by decision makers is important for a number of reasons. It ought to lead to better decision making, by ensuring that the decision maker receives all of the relevant information. It may avoid a sense of injustice on the part of the person who is subject to the decision. It might also advance the democratic principle of public participation in decision making. These points were made by Lord Wilson (at [28]) and Lord Reed (at [38]) in *R (Moseley) v. Haringey London Borough Council* [2014] 1 WLR 3947.
2. The process of consultation might go awry in a number of ways. Decision makers may fail to consult when they were under a duty to do so. They may run the consultation exercise unfairly. This paper outlines the key principles applicable to consultation, identifies some problem areas and highlights recent case law.
3. The talk is structured as follows:
 - (i) When does a duty to consult arise?
 - (ii) What does consultation require?
 - (iii) When is the duty to consult breached?
 - (iv) Some common issues/problems.
 - (v) Procedural issues.

B. When does a duty to consult arise?

(i) In law

4. There is no general duty to consult at common law. As Haddon-Cave J observed in *R (Harrow Community Support Unit) v. Secretary of State for Defence* [2012] EWHC 1921 (Admin) at [29], if there was such a duty, “*the business of government would grind to a halt*”.
5. There are four main circumstances in which a duty to consult may arise (summarised by the Divisional Court in *R (Plantagenet Alliance Ltd) v. Secretary of State for Justice* [2014]

EWHC 1662 (Admin); [2015] LGR 172 at [98]). Absent these four factors, there will be no obligation on a public body to consult.

6. First, the duty may arise where there is a statutory duty to consult. Some legislative provisions expressly require a public body to consult on something before making a decision. Where this is so, the consultation must be in accordance with those requirements, as well as in accordance with the *Gunning* principles (unless contradicted by the legislation itself).
7. Second, the duty may arise where there has been a promise to consult.
8. Third, the duty may arise where there is an established practice of consultation, namely where the decision maker has consulted in similar situations before.
9. Fourth, the duty arises where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. In *R (Bhatt Murphy) v. The Independent Assessor* [2008] EWCA Civ 755 Laws LJ stated that a duty to consult would arise “where the decision maker’s proposed action would be so unfair as to amount to an abuse of power, by reason of the way it has earlier conducted itself” (at [42]). A claimant must show that a decision maker “has established a policy distinctly and substantially affecting a specific person or group” (at [49]). As noted by Mostyn J in *R (L) v. Warwickshire County Council* [2015] EWHC 203 (Admin) not only must the case be exceptional, but the unfairness must be of a very high level – it must be conspicuous (at [17]).
10. Perhaps unsurprisingly, then, there is only one example of a duty to consult being imposed via this route: the decision in *R (Luton Borough Council) v. Secretary of State for Education* [2011] EWHC 217 (Admin) in which Holman J stated that the past relationship of the local authorities and the DfE was akin to a partnership: at [91]-[96].
11. Most recently, in *R (Brooke Energy Ltd) v. Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 2012 (Admin) the Divisional Court (Flaux LJ and Holgate J) held that no duty of consultation arose in respect of the decision to amend

the Renewable Heat Incentive Scheme, under which tariffs were payable at differing levels in respect of the generation of renewable heat energy, to make it less favourable.

12. The Court rejected the argument that the setting up of the scheme amounted to relevant “*past conduct*”. The scheme was voluntary, there was no certainty that a particular plant would benefit from the scheme until it was built and accredited, and no relationship between the organisation and the Secretary of State arose until the plant was accredited. The Court noted that the question was whether the impact of the decision maker’s past conduct was “*pressing and focussed*”, and not whether the relationship itself is “*pressing and focused*” (at [66]). Setting up a voluntary scheme could not by itself amount to “*past conduct*” that is “*pressing and focused*” (at [67]). Some prior relationship was necessary (at [68]).

13. An interesting, but as yet unconsidered question, is whether the decision of the Supreme Court in *R (Gallaher Group Ltd) v. Competition and Markets Authority* [2019] AC 96 affects the content of the fourth type of duty. *Gallaher* was not a consultation case, but Lord Carnwath (with whom all other Justices agreed) stated that notions like “*conspicuous unfairness*” and “*abuse of power*” are not, and should not be regarded as, “*free-standing principles of administrative law*”, but are to be understood as expressions whose judicial deployment merely serves to emphasise the “*extreme*” nature of the impugned administrative conduct [40]-[41]. He stated that the words add nothing to the ordinary principles of judicial review, such as legitimate expectation and rationality. At least arguably, therefore, following *Gallaher*, the fourth type of duty will arise only where not consulting would be irrational, by reason of the way the public body has earlier conducted itself.

(ii) Voluntary consultation

14. Where a decision maker conducts a consultation exercise voluntarily (i.e. where the decision maker is under no duty to engage in consultation but decides to do so), the consultation exercise must be carried out properly and in compliance with the *Gunning* principles set out below: see *R v. North East Devon Health Authority, ex p. Coughlan* [2001] QB 213 at [108].

15. Sometimes decision makers will embark on “*listening*” or “*engagement*” exercises. When will these amount to a voluntary consultation and need to be carried out in accordance with the *Gunning* principles?
16. Simler J considered this question in *R (FDA, PCSU and Prospect) v. Minister for the Cabinet Office* [2018] EWHC 2746 (Admin). The Judge held that the question of whether a public body has embarked on consultation for these purposes is a matter of substance and not form. If, without using the term, a decision maker embarks on an exercise that is in substance consultation, then it will need to be carried out lawfully (as per the principles below) (at [99]).
17. On the particular facts, Simler J held that the process was not in substance a consultation. She noted that communication and engagement was not the same as “*consultation*”, that “*ad hoc and informal meetings*” did not alone suffice and that what took place was in truth “*an exchange of information on some issues*” (at [102]). Neither did it matter that the word “*consultation*” was used from time to time.

C. What does consultation require?

(i) Overview

18. The short answer is that will depend on the context. The touchstone is “*fairness*”, but as Lord Wilson remarked in *Moseley*, “*fairness is a protean concept*” (at [24]). Where the duty to consult derives from statute, its content will vary depending on the particular provision in question, the particular context and the purpose for which the consultation is being carried out: *Moseley*, per Lord Reed at [36].
19. Nevertheless, the Courts have developed guiding principles. The basic requirements are those set out in *R v. Brent London Borough Council, ex p. Gunning* (1985) 84 LGR 168. These were approved by the Supreme Court in *Moseley* at [25]:
 - (i) Consultation must be 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 response;
 - (iii) Adequate time must be given for this purpose; and

- (iv) The product of consultation must be conscientiously taken into account when the ultimate decision is taken.
20. In *Moseley* Lord Wilson highlighted three other factors that may be relevant to the duty to consult.
- (i) The identity of the particular consultees may influence the degree of specificity required in the consultation [26].
 - (ii) The demands of fairness are likely to be higher when an authority contemplates depriving someone of an existing benefit or advantage (at [26]).
 - (iii) It may be permissible to test the fairness of the consultation in question by comparing it with a consultation carried out by another body in respect of the same or a similar issue (at [30]).

(ii) Formative stage

21. The requirement that the consultation takes place at a formative stage requires the decision maker to have an open mind on the issue of principle involved. The decision maker must not actually or apparently predetermine the issue. In *R (Spurrier) v. Secretary for State for Transport* [2019] EWHC 1070 (Admin); [2020] PTSR 240 the Divisional Court noted that it was important to distinguish between actual or apparent pre-determination on the one hand, and pre-disposition on the other. The latter is not unlawful¹. The Divisional Court stated: “[A]s is so often the case in policy-making, the policy-maker does not have to be – and, usually, is patently not – detached or disinterested as between the possible policy options” (at [510]); see also *R (Sardar) v. Watford Borough Council* [2006] EWHC 1590 (Admin) per Wilkie J at [29]).
22. A decision maker is permitted to present his preferred options in the consultation document, provided it is clear what the other options are: see *R (Royal Brompton and Harefield NHS Foundation Trust) v. Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 at [10].

¹ The Court of Appeal handed down judgment in this case subsequently, [2020] EWCA Civ 214, but the predetermination point was not run on appeal.

(iii) Sufficient reasons for the proposal

23. In *R (Electronic Collar Manufacturers Association) v. Secretary of State for the Environment, Food and Rural Affairs* [2019] EWHC 2813 (Admin) (“**the ECMA Case**”) Morris J summarised the requirements as follows (at [141]-[142]).
24. First, the general obligation is to let those with a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a great deal) to enable them to make an intelligent response. The obligation, although it might be quite onerous, goes no further than this (see *Coughlan* at [112]).
25. Second, the presentation of the information must be fair. Thus it must be complete, not misleading and must not involve failure to disclose relevant information: see *Royal Brompton* at [10]. In *R (Law Society) v. Lord Chancellor* [2018] EWHC 2094 (Admin) the Divisional Court held that whether non-disclosure made the consultation process so unfair as to be unlawful will depend upon the nature and potential impact of the proposal, the importance of the information to the justification for the proposal and for the decision ultimately taken, whether there was a good reason for not disclosing the information and whether the consultees were prejudiced by the non-disclosure, by depriving them of the opportunity of making representations which it would have been material for the decision-maker to take into account (at [71]-[74]).
26. A recent example of a court finding a consultation exercise to be inadequate was the decision of Steyn J in *R (British Blind and Shutter Association) v. Secretary of State for Housing, Communities and Local Government* [2019] EWHC 3162 (Admin). The Secretary of State consulted on an amendment to the Building Regulations which had the practical effect of banning the use of external shutters, awning and blinds on relevant buildings over 18 metres high. The consultation was announced as concerning the banning of combustible cladding. The consultation paper was entitled “*Banning the use of combustible materials in the external walls of high-rise buildings*”.

27. The Association was a statutory consultee. A relevant officer of the Association saw the consultation, but did not respond as they did not consider it to be relevant to the products made by members of the Association.
28. Steyn J held, first, that the effect of the amendment of the Building Regulations was that it deprived the Association's members of a right to sell a product which were effectively banned. The requirements of fairness were somewhat higher in that context than when the claimant is a bare applicant for a future benefit. The focus of the publicity around the consultation was on the proposal to ban combustible cladding. Nothing in the title of the consultation document, description of the scope of the consultation or explanation of the background indicated that it was proposed to cover the devices produced by the Association [75]. Further, second, the consultation did not make it clear that products such as external shutters, blinds and awnings were within the scope of the proposed ban. There was no reference to them [76]. The Judge accepted the Association's evidence that it (and its members) were taken by surprise when they discovered that the ban covered products sold by them [77]. As such, the consultation failed to comply with the requirement to let those who have a potential interest in the subject matter know in clear terms what the proposal and the consultation was so unfair as to be unlawful.

(iv) Adequate time to respond

29. Whether the time for responding to proposals is adequate will depend on the context and the nature of the consultation exercise. Relevant factors include: the size of the group to be consulted, the capability and resources of the consultees, the urgency, the method of consultation and the complexity of the issues.
30. The cases show that context is everything here. For example, in *Gunning* a 3 week period of consultation on school closures was "*woefully inadequate*", but in *R v. Secretary of State for Education, ex p. M* [1998] ELR 162 a ten day consultation period on a closure of a school was found to be adequate given closure had been on the cards for some time.

(v) Taking the responses into account

31. The product of consultation must be conscientiously considered by the decision maker. This does not require the decision maker to read every response, but if a summary of those responses is created, it must be a fair, neutral and must not omit material points.
32. The decision in *R (Kohler) v. Mayor's Office for Policing and Crime* [2018] EWHC 1881 (Admin) provides an example of a failure properly to summarise the product of consultation for the decision maker. The defendant had consulted on closing 37 police stations in London. A large number of responses to the consultation exercise had been received. The summary of responses created for the decision maker was inadequate, and did not refer to a proposal by the Merton Liberal Democrats that it was premature to close Wimbledon police station and a decision should be postponed pending an evaluation of new technology. This proposal was not discussed at the decision meeting. As such, this aspect of the consultation responses was not before the decision maker at all. The Divisional Court held the failure by the decision maker to consider that proposal amounted to an error of law.

D. When is the duty to consult breached?

33. The test is one of "*clear unfairness*", i.e. whether the consultation process as a whole was so unfair as to be unlawful, i.e. where something has gone clearly and radically wrong (see the *ECMA Case* at [27(6)] and the authorities cited there).
34. A court will not lightly find that a consultation process is unfair—unless there is a statutory specification as to the matters that are to be consulted upon. It is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation. These decisions are subject to review by a court on conventional judicial review principles.
35. Aspects of unfairness must be reviewed both individually and in aggregate. An individual aspect of unfairness may seem trivial on its own, but may acquire greater significance when seen with other aspects of unfairness: *Royal Brompton* at [12].

36. Some cases suggest that the unfairness must give rise to substantial prejudice on the part of the claimant: see *R (Plant) v Lambeth London Borough Council* [2017] PTSR 453 (at [85]-[87]). It may be that this is better understood as an observation that an error in a consultation process will not be unfair unless that error had some material effect on the outcome.

E. Some common issues/problems

(i) Overview

37. This section sets out some of the common issues or problems that may arise in the course of a consultation exercise.

(ii) Consulting on proposals which a public body does not wish to pursue

38. Until the decision of the Supreme Court in *Moseley*, the courts allowed a decision maker a wide degree of discretion as to the options on which to consult.
39. In *Moseley* the Supreme Court decided that a statutory consultation in relation to a council tax reduction scheme could only be fair if the consultees were made aware of other ways of absorbing the shortfall in funding and why the council had rejected them, so that the consultation document itself should have contained a brief outline of the alternative options and the reasons for their rejection.
40. Identifying the ratio in *Moseley* did not prove to be easy:
- (i) Lord Wilson (with whom Lord Kerr agreed), emphasised that the consultation had proceeded on a misleading basis as the consultation document presented the proposed reduction in council tax support as if it were the inevitable consequence of the Government's funding cuts and disguised the choice made by Haringey (see [17], [19], [21] and [22]). Lord Wilson concluded that "*sometimes*", "*particularly when statute does not limit the subject of the requisite consultation to the preferred option*" fairness will require that interested persons be consulted not only on the preferred option but also on arguable but disregarded options [31].
 - (ii) Lord Reed stated that he was, generally, in agreement with Lord Wilson but "*would prefer to express my analysis of the relevant law in a way which lays less emphasis upon the common law duty to act fairly, and more upon the statutory context and purpose*

of the particular duty of consultation with which we are concerned” [34]. Lord Reed emphasised that the case concerned a statutory duty of consultation [36]. The purpose of this particular statutory duty to consult was to “*ensure public participation in the local authority’s decision-making process*” [38]. A duty to consult did not invariably require the provision of information about options which have been rejected [40].

- (iii) Lady Hale and Lord Clarke agreed that the appeal should be disposed of as indicated by Lord Wilson and Lord Reed [44]: “*[t]here appears to us to be very little between them as to the correct approach. We agree with Lord Reed that the court must have regard to the statutory context and that, as he puts it. In the particular statutory context, the duty of the local authority was to ensure public participation in the decision-making process... In these circumstances we can we think safely agree with both judgments.*”

41. There was much subsequent debate as to the ratio of *Moseley*: did it establish an inviolable rule that alternative options should be consulted upon in every consultation?
42. Subsequent cases found that it did not: see in particular, *R (Robson) v. Salford City Council* [2015] EWCA Civ 6 at [35], and *R (Langton) v. Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 2190 (Admin) at [109] where Cranston J described *Moseley* as an exceptional case, and accepted the submission that the duty to make reference to discarded alternatives had only arisen there because of exceptional circumstances.
43. Morris J in the *ECMA* case summarised the state of the law post *Moseley* in the following five propositions [149]:
- (i) There is no hard and fast rule that a consultation document must refer to discarded alternative options.
 - (ii) In considering whether it should so refer, it is necessary to identify the purpose of the particular consultation, which in turn is to be identified from the statutory context of the particular duty.
 - (iii) If the purpose of the particular consultation is general public participation in a wide-ranging consultation, then there might be a duty to make some reference to

discarded alternatives. This will particularly be the case where general public cannot be expected to be familiar with the issues.

- (iv) If the purpose of the consultation is narrower, and to protect particular persons likely to be affected by the proposal, then there may not be a duty even to refer to discarded alternatives. This is more likely to be the case where the consultees can be expected to be aware of the alternatives.
- (v) It is relevant to consider whether the failure to refer to discarded alternatives has caused prejudice to consultees, whether those alternatives would have been obvious to consultees and whether it was obvious why the decision-maker had not referred to the alternatives.

(iii) Changing the proposal mid-process or providing new options

- 44. There is no general obligation on a decision maker to undertake a further consultation exercise in relation to any changes to its proposal that arise out of the consultation exercise (see, for example, *R (Smith) v. East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) at [57]). But if a decision maker fundamentally changes its proposal mid-process or is minded to proceed in a way not consulted upon, then basic fairness may require it to reconsult or to consult again on the changed proposal.
- 45. What amounts to a fundamental change will be fact sensitive, but the courts have required there to be a “*fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt*” such that it would be unfair for the decision-maker to proceed with without having given consultees a further opportunity to make representations about the proposal as changed (*Smith* at [45]).

(iv) Allegations that insufficient evidence has been provided

- 46. In general, however, courts tend to be unimpressed by complaints of insufficiency of information, unless the consultee raised the point in the course of the consultation exercise and the decision maker refused to provide the requested information. Compare, for example *R (Eisai Ltd) v. National Institute for Clinical Excellence* [2008] EWCA Civ 438 (unfair not to have provided a fully executable version of the key spreadsheet which consultees had asked for in the process) and *R (Easyjet Airline Company) v. Civil Aviation*

Authority [2009] EWCA Civ 1361 (not unfair to provide data which EasyJet had not asked for at the relevant time).

F. Procedural issues

(i) When to issue proceedings?

47. Consultation claims can raise particular difficulties of timing. Sometimes a claimant will consider the consultation exercise to be legally flawed from the outset because of the manner in which it is being conducted (e.g. a statutory notice of consultation was flawed). Where this is the case, it may be appropriate to bring a challenge to the consultation exercise itself (i.e. prior to any decision being reached following the consultation).
48. But in most cases, it is likely to be premature to challenge the consultation itself as the flaw may be cured or the decision be one favourable to the objector. Challenges are therefore to the legality of the decision made in reliance on the consultation.

(ii) Specific standing issues

49. That an individual or body has not participated in a consultation exercise may not mean that they lack standing to bring a claim for judicial review. For example, in *R (Capenhurst) v. Leicester City Council* [2004] EWHC 2124 (Admin) it was common ground that service users had standing to complain about the failure to consult adequately with the voluntary organisations that provided them with services, prior to terminating the funding of those organisations [18].

50. Similarly, in *R (Edwards) v. Environment Agency* [2004] EWHC 736 (Admin) Keith J found the claimant to have standing as a resident of the town in which the proposed cement works were to be located, notwithstanding that he had not participated in the consultation exercise relating to the grant of the permit for the works. Keith J said: “*You do not have to be active in a campaign yourself to have an interest in its outcome. If the consultation exercise ends with a decision which affects your interests, you are no less affected by that decision simply because you took no part in its exercise but left it to others to do so*” [16].

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