Consultation, the Public Sector Equality Duty and Changes to Services

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Introduction

1. This paper analyses three recent cases on consultation and the public sector equality duty, and two concerning consultation only, against a background summary of the key legal principles in these areas.

2. "Consultation" is the term generally applied to the process by which a decision-maker seeks the views of the public, or a section of the public, on a proposal that may have a general impact, before it decides whether to implement that proposal. It differs from the process by which an individual or a small number of individuals are afforded a fair opportunity to make representations in relation to a decision that may have a direct impact on them personally. There is no general public law duty to consult.

3. The public sector equality duty ("PSED") is different: it applies to all decisions made by public authorities, whether those decisions have individual or general effect. However, there is considerable overlap with consultation and, in many cases, consultation will be integral to a public authority's discharge of its equality duty. Where relevant information is not readily available, the equality duty includes a “duty of inquiry” which may include consultation with appropriate groups.2

Consultation – general principles

4. There are four main circumstances in which a duty to consult will arise:
   a. Where consultation is required by statute;

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1 We thank Jonathan Auburn and Victoria Butler-Cole for their help in the preparation of this paper.
2 See R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) at [89]
b. Where there has been a promise to consult;

c. Where there is an established practice of consultation; and

d. Where failure to consult would lead to “conspicuous unfairness”.³

5. If a consultation is embarked upon, whether or not there was a duty to consult, it must be “fair”.⁴ The specific requirements of any particular consultation will necessarily depend on the subject matter. In some circumstances, a public meeting may suffice whilst in others a relatively lengthy process, with detailed written consultation documents and responses, will be required.

6. Unless a particular procedure is prescribed by statute, the decision maker will have fairly wide discretion as to the mode of consultation, but certain basic principles must be adhered to in all cases:

   a. Consultation must be undertaken at a time when proposals are still at a formative stage;

   b. It must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;

   c. Adequate time must be given for this purpose; and

   d. The product of consultation must be conscientiously taken into account when the ultimate decision is taken.

7. These are known as the “Gunning principles”.⁵

Public sector equality duty – general principles

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³ R (Harrow Community Support Ltd) v Secretary of State for Defence [2012] EWHC 1921 (Admin) at [29]
⁴ R (Edwards) v Environment Agency [2006] EWCA Civ 877, per Auld LJ at [90]
⁵ R v Brent LBC, ex p. Gunning (1985) 84 LGR 168
8. Section 149 of the Equality Act 2010 introduced a single unified equality duty, superseding and expanding upon previous statutory duties in respect of race, sex and disability. It provides that:

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

9. “Protected characteristics” are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The “functions” of a public authority are, essentially, everything that they do, so the requirement to have “due regard” applies equally to all decisions.

10. In recent years there has been a significant increase in the number of judicial review claims based on equality duties, although it seems that the number may now have plateaued.

11. The PSED cannot compel a particular outcome; the requirement is to have “due regard” to the equality goals. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

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6 Race Relations Act 1976, s. 71(1)
7 Sex Discrimination Act 1975, s. 76A
8 Disability Discrimination Act 1995, s. 49A
9 s. 149(7)
10 See Hickman, Too hot, too cold or just right? The development of the public sector equality duties in administrative law, (2013) PL 325-344
11 Hurley & Moore at [77]
12. In the “post office closures” case\textsuperscript{12}, Aikens LJ “tentatively” put forward the following general principles:

   a. Decision makers must be aware of their duty to have due regard to the identified goals;
   b. The duty must be fulfilled before and at the time that a particular policy is being considered. It involves a “conscious approach and state of mind”.
   c. The duty must be exercised “in substance, with rigour and with an open mind”. It is not a question of “ticking boxes”.
   d. The duty is a non-delegable.
   e. The duty is a continuing one.
   f. It is good practice to keep an adequate record showing that the relevant matters had been considered.

13. These general principles have been applied in subsequent cases, but the extent to which they are relevant to day-to-day operational decision-making is questionable.\textsuperscript{13} The cases considered below all relate to macro policy decisions.

**R (Bracking) v Secretary of State for Work and Pensions**\textsuperscript{14}

14. This was a challenge to the government's decision to close the Independent Living Fund. The appellants, who were disabled recipients of the fund, alleged that the consultation had been unlawful and that there had been a failure to comply with the PSED.

15. The decision of the Court of Appeal is important for two reasons:

   a. It provides useful guidance on the scope of information that should be provided to consultees as part of a consultation process; and
   b. It emphasises the heavy burden that the PSED places on local authorities and the need to evidence “due regard”.

\textsuperscript{12} R (Brown) v Secretary of State for Work and Pensions [2008] EWHC (Admin) 3158
\textsuperscript{13} For detailed discussion of the application of these principles to operational decisions and the scope of the duty more generally, see Hickman op. cit.
\textsuperscript{14} [2013] EWCA Civ 1345
16. As to the consultation, the appellants argued that the consultation had been unlawful in part because the costs of the fund closure had not been revealed to the consultees. McCombe LJ dismissed this ground on the basis that the omission did not detract from the ability of consultees to explain how the closure of the fund would impact on them. The consultees had no special insight or experience as to the relevance of costs of the proposed closure of the fund and the Minister was fully entitled to conclude that she would not be assisted by any views they may express on that subject.

17. This aspect of the Court of Appeal's judgment has potential relevance to a wide range of decisions involving financial considerations and cost cutting: in many cases where service users are consulted as to the impact that proposals will have on them it may not be necessary also to seek their views on financial considerations.

18. As to the public sector equality duty, McCombe held that:

“The 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude.” [59]

19. Much of the Secretary of State's case was based on inference in light of the subject matter of the decision, and there was simply not the evidence to demonstrate to the court that a focused regard was had to the potentially very grave impact of the proposals upon disabled persons. Further, there was nothing to identify a focus upon the precise provisions of the Act, including the specific duty to promote equality of opportunity.

20. Significantly, in relation to the precise provisions, Elias LJ made specific reference to the UN Convention on the Rights of Persons with Disabilities which, he held, “ought to inform the scope of the PSED with respect of the disabled”. He referred, in

15 per McCombe LJ at [61]
16 per McCombe LJ at [66]; Elias LJ at [75]
particular, to Article 19 which requires states to take effective and appropriate measures to facilitate the right for the disabled to live in the community, a duty which would require where appropriate the promotion of independent living.

**Hunt v North Somerset Council**\(^{17}\)

21. In a another judgment, handed down on the same day as the decision in *Bracking*, a differently constituted Court of Appeal considered the PSED in the context of local authority budgets, and the specific statutory duties under section 507B of the Education Act 1996. *Hunt v North Somerset Council* is an important decision for all local authority lawyers to consider as it highlights the importance of placing full information before council members where they are the ultimate decision-makers.

22. The local authority had proposed to reduce its spending on youth services by around £365,000 for the financial year 2012/13. It published the proposal on its website and in its own monthly magazine; and it held meetings with representatives of local youth clubs.

23. It also updated its equality impact assessments (EIAs), one of which applied solely to the impact of budget reduction proposals in relation to services for children and young persons. However, only summaries of the EIAs were put before council members in advance of the meeting at which a final decision was made to approve the cuts (they were told how to access the full EIAs in an appendix to the document that they received, but they were not directed to consider them).

24. The appellant was a 22 year old with ADHD, learning difficulties and behavioural problems, as such he was a “qualifying young person” within the meaning of section 507B of the 1996 Act; the Court of Appeal proceeded on the assumption that the budget proposals engaged the local authority’s statutory obligation under section 507B(9) to “take steps to ascertain the views of qualifying young persons in [its] area”. It held that there was “no sufficient evidence” to conclude that the authority had taken the required steps.\(^{18}\)

\(^{17}\) [2013] EWCA Civ 1320
\(^{18}\) [74]
25. As to the equality duty, the Court of Appeal crucially rejected the argument (accepted at first instance) that it could be inferred that council members had considered the full EIAs:

[83] ...We have no difficulty, nor was the contrary suggested, in accepting that if council members are provided with a particular set of materials for the purpose of a meeting, they can, absent positive evidence to the contrary effect, be taken to have read all such materials and also to have read any additional materials to which they were expressly referred and to which they were told they needed to have regard for the purposes of the meeting. If, for example, they had been told that a key document was too bulky and expensive to copy and circulate, but was available at a given website address, and they were further told in appropriate terms that this document was required reading for the purposes of the meeting, we consider that they must be taken to have accessed and read it.

[84] In the present case, however, we do not interpret the language of Appendix 6 as indicating to the Council members any need or requirement to read the EIAs themselves. Whilst they were told how to access the EIAs, they were not told, either expressly or impliedly, that they must or should consider them before the meeting...

26. The failure of the decision-makers to consider the full EIAs breached the PSED.

27. However, it is also significant to note that the Court of Appeal refused to grant any relief. The decision could not be quashed without also quashing the council’s decision to approve the entire revenue budget for 2012/2013. It was too late to unwind what had already been done and to grant relief in these circumstances would be “detrimental to good administration”. The council was awarded half its costs of defending the claim.

R (D) v Worcestershire

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19 [94]
20 [2013] EWCA Civ 1483
21 [2013] EWHC 2490 (Admin)
28. In R (D) v Worcestershire, the local authority was successful in resisting a challenge to its decision to introduce a policy, aimed at reducing costs of adult social care, whereby the usual maximum expenditure for non-residential care packages was to be determined by reference to the cost of residential care.

29. The claimant argued that the consultation process was defective in that it failed to provide consultees with sufficient information as to the consequences of the proposal for service users. Hickinbottom J held that:

"where information presented on a consultation is inaccurate, that will only lead to a successful challenge if it is (a) material (when taken alone or together with any other aspects of procedural unfairness in the consultation exercise); and (b) the unfairness shown is clear such that no proper consultation could be said to have taken place because “something [has] gone clearly and radically wrong” (R (Royal Brompton and Harefields NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472)"

30. The claimant's submission on consultation was premised on the assumption that the proposed changes would lead to around 50% of service users having either to accept care that did not meet their needs or to enter residential care. On the evidence before him, Hickinbottom J did not accept that this submission was correct. He noted that it was not the council’s intention that any service user be required to go into residential care and held that, “in failing to indicate that the policy would or might result in service users being put to choose between residential care with full support, or home care with less support than is required to meet his or her eligible needs, the consultation was not deficient at all, and certainly was not ‘radically wrong’”.

31. The claimant's second ground was that the authority had failed to comply with the PSED. Hickinbottom J noted that this ground was particularly challenging for the claimant because:

   a. The Claimant has the burden of showing that the relevant public authority has failed to comply with its PSED.
b. The Policy, which the Cabinet determined should be adopted, was specifically in respect of the provision of services to persons with a relevant protected characteristic (i.e. disability), and the relevant protected characteristic was the reason for the provision of services to them. Whilst it did not necessarily follow that the Cabinet had due regard to the need to advance equality of opportunity, the subject matter of the Cabinet's decision made the claimant's contention that the Cabinet failed to have due regard “rather less plausible”.

c. Whether an authority has complied with its PSED is fact-specific, and this was not a case where the PSED was simply ignored. The council commissioned and EIA and set up an EIA working group. The authority's equality and diversity manager asserted that due regard was had had been had to the PSED throughout the process.

d. Although it was conceded on behalf of the local authority that the EIA “could have been fuller”, an EIA is not a statutory requirement – it is merely a tool whereby decision-makers might inform their efforts to comply with their PSED – and it is thus wrong to subject it to minute forensic or exegetical analysis.

32. On the facts, the claimant’s specific criticisms in relation to the PSED were dismissed and, in many ways, this was a case that turned on its facts. However, the general observations made by Hickinbottom are worthy of note. The emphasis on the burden of proof and the inferences that can be drawn from the subject-matter of a decision must be treated with some caution in light of the decisions of the Court of Appeal referred to above. Whilst there is no doubt that, as a matter of general principle, the burden always rests on a claimant to make out his case, the courts seem increasingly to require (at least in relation to macro policy decisions) public authorities to prove, though contemporaneous written-evidence, that “due regard” was had to the PSED: a prudent decision-makers would be well advised to ensure that equality considerations are fully and contemporaneously documented in relation to all significant policy decisions.
R (Save our Surgery Limited) v Joint Committee of Primary Care Trusts and others\(^2\)

33. This was a challenge brought by a company formed for the purposes of litigation with the benefit of a Protective Costs Order of the largest consultation every carried out by the NHS which concerned the national arrangements for paediatric cardiac surgery. The challenge was successful and it ultimately led to the abandonment of a ten year process of reconfiguration of children's health services. The case acts as a terrible warning to public authorities embarking on consultation as to the risks of getting it wrong.

34. The claimant submitted that the consultation was flawed because:

   a. there had been a failure to disclose the sub-scores of the different NHS units that were said to be key to understanding the material differences between the centres considered when deciding on how to reconfigure services, and this failure deprived consultees of the opportunity to make intelligent and informed responses which would have had a significant influence on the outcome of the consultation process;

   b. there had been a failure to take into account material considerations: a failure to inquire into the nature of the material differences relied upon.

35. The defendant submitted that since the overall scores were disclosed it was not necessary or appropriate to disclose the sub-scores. There was a detailed report which identified areas of strength and weakness which provided sufficient information to consultees to enable them to comment intelligently on the proposals for reconfiguration of the service.

36. Nicola Davies J had careful regard to the decision in \(R\) (\(Eisai\)) v National Institute for Health and Clinical Excellence and Others\(^2\) where it was held:

\begin{quote}
26. The mere fact that information is “significant” does not mean that fairness necessarily requires its disclosure to consultees ... nevertheless the degree of significance of the undisclosed material is obviously a highly material factor.
\end{quote}

\(^2\) [2013] EWHC 439 (Admin) and [2013] EWHC 4222 (Admin)
\(^3\) [2008] EWCA Civ 438
27. What fairness requires depends on the context and the particular circumstances ...

...

30. The fact that the material in question comes from independent experts is plainly relevant to the overall assessment, but it was a combination of factors – including the requirement of a high degree of fairness ...

...

65. ... I do not think that either the additional time or cost to NICE should weigh heavily in the balance in deciding whether fairness requires release of the [material]. If fairness otherwise requires release of the [material], the court should in my view be very slow to allow administrative consideration of this kind to stand in the way of its release.

66. ... It is true that there is already a remarkable degree of disclosure and transparency in the consultation process; but that cuts both ways, because it also serves to underline the nature and importance of the exercise being carried out.

37. Nicola Davies J extracted a number of principles from the authorities which included the following at paragraph 27:

(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 is a material factor.

...

(v) What fairness requires is dependent upon 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;

...

(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.

38. Applying these principles to the NHS consultation process, Nicola Davies J held that fairness did require disclosure of the sub-scores in the circumstances of that consultation and so it was unlawfully flawed. The Judge was particularly concerned that the defendant had refused a specific earlier request for disclosure of the sub-scores. While the Judge found the consultation exercise to be otherwise thorough and good, she also considered that it was so important to children and their families, and the information contained in the sub-scores to be so important to the decision, that they required disclosure.

39. The defendants advanced potent arguments as to why, despite this flaw in the consultation, there should not be any relief beyond a declaration, given the need to make significant changes in paediatric cardiac services without delay. These arguments did not carry the day, and Nicola Davies J held as follows:

Undisputed is the compelling and urgent clinical case for the reform of existing paediatric congenital cardiac services. That said, the findings by the court that the consultation process and the decision-making process were flawed go beyond the technical and are based upon fundamental unfairness ... The fact that the defendant is a responsible public body is not of itself sufficient to deprive the claimant of the relief sought, nor is the fact of a review by the IRP and subsequently a decision of the Secretary of State.

R (LH and CM) v Shropshire Council24

40. In this case, which might be viewed as at the other end of the spectrum from the Save our Surgery case, the Court came to a different conclusion about the fairness of a consultation exercise. It concerned a local authority’s decision to close a day centre which provided services to learning disabled adults in the context of a county-wide reconfiguration of day services in pursuit of both the personalisation agenda and the need to cut costs.

24 [2013] EWHC 4222(Admin)
41. The two claimants complained that there had not been specific consultation with them or their families about the closure of the centre that they used. The defendant said that such consultation was neither necessary nor practicable given the ambit of the decisions that were being taken about day services across the whole county.

42. HHJ Sycamore QC, sitting as a Deputy High Court Judge, extracted the following principles from the authorities:

... where there is no statutory duty to consult but the public authority chooses to do so, the nature and extent of the consultation is a matter for it ... provided that the notification and consultation satisfy the principles set out above, it appears to me that the council must have a comparatively wide discretion as to how the process is carried out. The council cannot be in breach of duty unless the extent of the consultation process was such as to be outside the ordinary ambit of its discretion ... the duty does not extent to consulting on what is not viable ... In considering whether a procedure is unfair it must be judged in the light of practical realities ... consultations in respect of changes in health or social services provisions should not be technical or legalistic ...

43. HHJ Sycamore QC concluded thus:

26. ... First, this was about the council’s consultation in respect of delivery of day centres generally in the County, and reconfiguration. It has to be distinguished from the type of proposal which would result in the withdrawal of services entirely. It is clear from an analysis of the feedback from the various consultation events at which the defendant engaged with relevant groups that there was no misapprehension about the fact that some day centres would close and that members of the public expressed their views about those proposals, to which the defendant had regard when making its decision. The nature and scope of the consultation, a matter for the defendant, was in my judgment, appropriate against the background of both the subject matter and those affected.

... 28. There was no justification to involve those users in a more detailed and, necessarily, costly consultation that other users. In summary, against a
background in which a need for modernization of service provision had been identified and an extensive consultation with all users as to potential closure of day centres had been undertaken, there cannot be said to have been any legitimate expectation of further individual consultation in respect of each individual day centre as to its future. Such a consultation in any event would have been disproportionate and inappropriate.

44. The first claimant has been granted permission to appeal this decision on the grounds in relation to the Judge's holdings as to the consultation: that it was not sufficient for there to be general consultation as to the future of day services in the county and that those who attended a particular day centre that was to be closed were entitled to be consulted specifically on the future of that centre. The Court of Appeal's decision could be significant for the future of local authority consultations concerning service changes and particularly reductions in the future.

28 January 2014