

The Consultation Process in Utility Regulation

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Legal Requirement

The decision making processes by which the Regulator carry out its functions in the Caribbean are hearings and consultations. This paper deals with the consultation process.

Typically the functions of a Regulator are Rate & Tariff setting, Research and Review, Establishing Quality of Service Standards, Granting Licences, Hear Complaints, Conduct Studies of Efficiency, Encourage Competition, Monitor Compliance, and other functions provided for in the specific enabling legislation of the Utility Regulator in the Caribbean (the Regulator).

The Regulator’s duty to consult when carrying out its functions is firstly a statutory duty under the Regulator’s enabling legislation.

Secondly as a public body the Regulator’s decision making process must be open, fair and accord with the principles of natural justice. It should be noted that the court in recent Judicial Review cases have equated natural justice with “a duty to act fairly”.^{F1}

^{F1}. *Council of the Civil Service Unions v. Minister for the Civil Service* [1985] AC 375

According to the Oxford Dictionary to consult is to “Have deliberations with persons; seek information or advice from persons and take into consideration feelings and interest”

Wade and Forsyth in their book on Administrative Law states:

“Procedural safeguards, which are so often imposed for the benefit of persons affected by the exercise of administrative powers, are normally regarded as mandatory, so that it is fatal to disregard them. Where there is a statutory duty to consult persons affected, this must genuinely be done, and reasonable opportunity for comment must be given.”^{F1}

The nature of the obligation to consult may be summarized in the following quote from Webster J. in the case of *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities*^{F2}

“...the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the

^{F1}. H.W.R. Wade & C.F Forsyth, *Administrative Law* 8th ed. page 229

See also *Port Louis Corporation v. A.-G. of Mauritius* [1965] AC 1111

^{F2}. [1986] 1. W.L.R 1 *Queen Bench Division*

consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party.”

A distinction must be made between mandatory obligation to consult and discretionary consultation, the latter being a flexible process which need not conform with strict procedural requirements, the former is mandated by legislation and case law which if the procedural requirements are not adhered to, the consultation process can be challenged by an action for Judicial Review.

It should be noted that where there is no duty to consult but the Regulator consults anyway this could develop into a legitimate expectation as in the case of *Council of the Civil Service Unions v. Minister for Civil Service*.^{F1}

In this regard De Smith, Woolf & Jowell's^{F2} had this to say:

“Where the claim to procedural fairness is based upon a legitimate expectation, and especially upon an expectation, induced by the decision-maker, of a hearing or other procedural safeguard, then the procedures

^{F1}. [1986] 1. W.L.R 1 *Queen Bench Division*

See Dr. Albert Fiadjoe, Commonwealth Caribbean Public Law 2nd ed. page 263

^{F2}. *Principles of Judicial Review, Sweet & Maxwell 1999, page 286*

should normally be granted as a supplement to the statutory scheme. In such cases the decision-maker's claim that the statutory scheme is exclusive will be difficult to justify in opposition to an express or implied representation on his part that additional procedures would be granted." ^{FI}

The Regulator's enabling legislation while mandating consultation does not always provide procedures for implementation. The courts have considered the nature of the obligation to consult, but have not laid out any ironclad procedure for consultation either, treating each case on its own merits because what may be essential in one context may be irrelevant or harmful in another.

The courts however, have identified certain principles and procedural requirements of consultation and the Regulator's duty to act fairly as follows:

-The Regulator must consult in carrying out its functions where the law requires;

-All stakeholders must be consulted as specified by the enabling legislation;

-Enough and clear information on the purpose and the subject of the consultation must be provided to the consumers and other stakeholders so

Fl. See also Wiseman v. Borneman [1971] AC 29

that they are adequately informed and able to make intelligent and useful contributions and responses;

-Adequate notice must be given when consulting, the notice must be received by the stakeholder to be valid, and the notice must indicate what is proposed and supply sufficient information;

-Allow adequate time for consultation and reasonable timeline for receipt and response of views;

-Approach consultation with an open mind and be ready to change;

-provide an effective and appropriate avenue for stakeholders and public participation;

-Consultation includes listening to what stakeholders have to say and considering the responses, real dialoguing must be genuine and not a sham;

-Consultation is not to be equated with “negotiation” because negotiation implies a process that has as its objective arriving at an agreement and consultation may occur without those consulted agreeing with the outcome.

A consultation process which seeks principally to inform decision-making is different from one that seeks to promote consensus through an interactive process where issues are progressively narrowed, and compromise and trade-offs promoted among key participants. The Regulator must fulfill its mandate and cannot delegate its functions and decision making to the Stakeholders.

Stakeholders' Participation

The Regulator has a mandatory duty to consult all stakeholders and typically the stakeholders are consumers & consumer /committees, utility providers, shareholders, government, trade unions and the general public.

The Regulator's enabling legislation in the Caribbean typically provides for the appointment of Consumer Advocates and or Committees and such appointments are important to the consultation process.

If the rationale of economic regulation is to regulate the utility provided to ensure that the Consumer receives quality service at a reasonable price while ensuring that the Utility Provider receives a reasonable return on investment, the stakeholders participation in the regulatory process is of vital importance if the Regulator is to obtain a balanced view and make a reasoned decision, thereby fulfilling its mandate.

However, utility regulation is complex and multidisciplinary and while the Utility Provider can purchase the necessary expertise, the ordinary Consumer cannot do so. It is therefore incumbent on the Regulator and Consumer Advocates and Committees to ensure that the Consumers are

adequately informed and that they express their views in particular during the conduct of a consultation.

Communication

Regulatory communication is a key factor in the conduct of consultation because consultation is a two-way communications process that provides opportunities for information exchange and for the stakeholders consulted to influence the making of a decision by the Regulator.

Communications may be:

- the disseminating of information to create awareness of the issues on the consultation subject;
- to elicit views from stakeholders;
- to interact, two-way between the Regulator and the stakeholders;
- to convey the Regulator's point of view and its decision when made.

Consultation Framework

In consequence a framework for utility regulatory conduct of consultation in the Caribbean is imperative. The consultation framework should focus not only on the policy guidelines but on the legal requirements, the processes and the procedures for consultation in respect of each of the Regulator's function which mandates that the Regulator arrives at its decision only after consultation with the stakeholders.

Almost all the Regulators in the Caribbean have established a Consultation Policy Document (by a consultation process which is not mandatory) and this document is in most cases on their respective website.

Each consultation is different from the other and each consultation process will be assessed on its own merits. Therefore a consultation plan is necessary for each new consultation whether on rate setting or establishing quality of service standards or carrying out any other function of the Regulator where the decision must be reached after consultation.

The selected consultation tools and processes must reflect the purpose of the consultation. Application for rate review is a proposal from the Utility Provider while establishing quality of service standards is a proposal from the Regulator. Therefore approaches to the consultation process on these functions may be different and the Regulator should set out the process that will be followed in conducting consultation on any of its given functions.

The consultation process and indeed the hearing process should ensure that stakeholders and all relevant parties are able to contribute effectively to the regulatory process. In short the Regulator must decide what, when, how and with whom to communicate.

Consultation and Communications plan, process and procedure

It follows that the Regulator must conduct consultation in a transparent manner and should have *a consultation and communications plan* in order to develop the consultation process and procedure and this would require answers to the following questions by each Regulator:

- Who will be consulted?
- What subject requires consultation?
- When will consultation start and end?
- Where will the consultation take place?
- How will the consultation be conducted?

How will consultations be conducted and determining the communication tools are choices each Regulator must make from a spectrum of communication methods some of which are:

- formal and informal hearings,
- public open house meetings, town hall meetings, seminars, workshops,
- roundtable-multi-stakeholder meetings/workshops, focus groups,
- consumer education,
- individual communications,
- research and surveys,
- receiving stakeholders feedback,
- responding to stakeholders on feedback received,
- media and electronic communications,
- wrap –up sessions/meeting of the consultation process,
- funding to facilitate participation by consumers,
- Communication before, during and after the consultation processes.

The extent to which all or some of these tools and methods are used would depend on the subject that is being consulted on.

The Regulator is an adjudicator of various interests which in most cases are competing and the Regulator should expect conflicting points of view which must be given due consideration.

It must be demonstrated that the Regulator is unbiased, reasonable, open, fair, firm and free from stakeholder capture in the conduct of consultation. Therefore the Regulator must provide information and be prepared to make public, explanation why proposals are rejected, all responses received in the consultation process and must also be prepared to explain and justify principles, methodologies, processes and regulatory decisions to stakeholder's subject only to claims for non-disclosure of confidential information if considered appropriate.

The principle therefore is that if the stakeholders and the public whose rights are affected by the work of the Regulator is fully apprised, is genuinely consulted and is given a fair hearing before a decision is taken then there ought not to be any threat of judicial reviews.

The challenge for the Regulator is to conduct consultation for the purpose of arriving at a decision and to satisfy all the stakeholders in so doing, failing which, to act fairly and satisfy the procedural requirements of consultation.

“Consultation Case Study”

R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities [1986] 1. W.L.R 1

Facts

The Minister was required by s. 36(1) of the Social Security and Housing Benefits Act 1982 (U.K) (the Act) to consult with concerned organizations of the housing authorities before making regulations constituting the housing benefits scheme.

The Minister sought views from concerned organization including the Association of Metropolitan Authorities (the Applicant) on proposed amendments to the 1982 regulations.

The consultation letter requesting a response by the 30th November was written on the 16 November 1984 and received by the Applicant on 22nd of November.

The Applicant complained on the shortness of time and asked for an extension so that its advisers could be consulted.

On 4th December the Minister wrote to the Applicant seeking its views on further proposed amendments. No drafts of the proposals was forwarded and no mention was made of a material feature which required local

authorities to investigate whether housing benefits claimants had created joint tenancies so as to gain from the housing benefits scheme. A response was requested by the 12th December.

The Applicant answered the first letter on the 7th December and sent brief comments about the second letter on 13th December.

The Housing Benefits Amendment (No. 4) Order Regulations 1984 were made on 17th December and came into effect on 19th December.

Issue

The Applicant sought a Declaration that the Minister had not exercised his duty to consult under s. 36(1) of the Act and an Order of Certiorari to quash the Regulations because of the failure to consult.

Decision

In the words of Webster J: "...There is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation, of which consultation is a precondition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice.

In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the

consulting party. Sufficient in that context does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposal, or their implication for the consulted party, being aspect material to the implementation of the proposal as to which the Secretary of State may not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer...

In the present case, looking at the 'whole scope and purpose' of the Act of 1982, one matter which stands out is that its day- to- day administration is in the hands of the local housing authorities...It is common ground that in them resides the direct expertise necessary to administer schemes made under the Act on a day to day basis. For these reasons if no other, I conclude that the obligation laid on the Secretary of State to consult organizations representative of those authorities is mandatory, not directory.

The last question of principle to be decided before turning to the facts is the test to be applied to the facts as I find them for the purpose of judicial review... to what extent is it for the Secretary of State, not the courts, to judge how much consultation is necessary and how long is to be given for it? The answer to that question may qualify the word 'sufficient' in the requirements of consultation which I have set out above...

The first point to note is that the power to make the regulations is conferred on the Secretary of State and that his is the duty to consult. Save for those consulted, no one else is involved in the making of the regulations.

Secondly both the form or substance of new regulations and the time allowed for consulting, before making them, may well depend in whole or in part on matters of a political nature, as to the force and implications of which it would be reasonable to expect the Secretary of State, rather than the court, to be the best judge.

Thirdly issues may well be raised after the making of the regulations as to the detailed merits of one or other reason for making them, or as to the precise degree of urgency required in their making, issues which have been raised on this application. Those issues cannot be said to be wholly irrelevant to a challenge to the vires of the regulations, and Mr. Beloff has not submitted that they are irrelevant; but at the same time it would seem to me to be inherently improbable that the question of the vires of the regulations should depend upon precise findings of fact on issues such as those.

In my view, therefore, the court, when considering the question whether the consultation required by section 36 (1) was in substance carried out, should have regard not so much to the actual facts which preceded the making of the regulations as to the material before the Secretary of State when he made the regulations, that material including facts or information as it appeared or must have appeared to him acting in good faith, and any judgments made or opinions expressed to him before the making of the regulations about the making of those facts which appeared or could have appeared to him to be reasonable. The department's good faith is not challenged on this application.

The effect of treating as material the facts as they appear to the Secretary of State and not necessarily as they were, is to give certain flexibility to the notions of sufficiency, sufficient information, sufficient time and

sufficiently informed and considered information and advice in my homespun attempt to define proper consultation. Thus it can have the effect that what would be sufficient information or time in one case might be more or less than sufficient in another, depending on the relative degrees of urgency and the nature of the proposed regulation.

There is no degree of urgency, however, which absolves the Secretary of State from the obligation to consult at all...

Having decided that the provisions of section 36(1) are mandatory and that they were not complied with before the regulations were made, I now have to consider the relief which I should give to the association.

They ask me to quash the regulations. I do not think that I should do so.

I acknowledge, with respect, that in the ordinary case a decision- I emphasize the word 'decision'- made ultra vires is likely to be set aside in accordance with the dictum of Lord Diplock in *Grunwick Processing Laboratories Ltd. Advisory, Conciliation and Arbitration Service* [1978] AC 655, 695, where he said:

My Lords, where a statutory authority has acted ultra vires any person who would be affected by its act if it were valid is normally entitled ex debito justitiae to have it set aside...

But whereas the case is that of a ministerial departmental decision, which adversely affect the rights of one person or class of persons, and which can be struck down without, usually, more than individual or local implications, in this case the association seeks to strike down regulations which have become part of the public law of the land. Although I have been shown and have found no authority to support the proposition, I suspect that it is not necessarily to be regarded as the normal practice, where delegated legislation is held to be ultra vires, to revoke the

instrument but that inclination would be the other way, in the absence of special circumstances making it desirable to revoke that instrument. But in principle I treat the matter as one of pure discretion and so treating it decline to revoke the instrument for the following reasons, no particular significance being attached to the order in which I state them.

Although six organizations were and are habitually consulted in this context, only one of them has applied for revocation of the instrument and that one applies only on the ground that it was not properly consulted. It makes no formal complaint that the other organizations were not consulted. Although the Association complains about the substance of the regulations, it is apparent that its principal complaint throughout is, and has been, the absence of consultation and it and other organizations were able to express some, albeit in a sense piecemeal, views about the proposal which apparently the department took into account before making the regulations, but without, be it noted, any effort whatsoever on the November or December amendments.

The regulations have been in force for about six months and, although their implementation creates difficulties for some at least of the housing authorities who have to administer them, those authorities must by now have adopted themselves as best they can to those difficulties. If however, the regulations were to be revoked all applicants who had been refused benefits because of the new regulations would be entitled to make fresh claims, and all authorities would be required to consider each such claim... I can see no reason whatsoever, however, for refusing the association the declaration for which they ask...Declaration accordingly. Application for order of certiorari refused.”

Comment

In this case the legal requirements for consultation were not complied with and the Judge so declared that Secretary of State had not discharged his duty to consult before making the regulations. Ordinarily where there is a breach of statutory duty the decision is set aside by the courts.

However the learned Judge in this case refused to set aside the regulations and made the distinction between an 'ordinary' decision and a decision which is made by delegated or subsidiary legislation.

This decision might be considered good law for the Caribbean Regulator who arrives at its decision through the consultation process and whose decision is embodied in subsidiary legislation as for example the Regulated Industries Commission of Trinidad and Tobago (RIC) decisions in respect of quality of service standards.

For Discussion

So does consultation operate more as a source of legitimization of the Regulator's decision, rather than control of the Regulator's decision and who regulates the Regulator in these circumstances?

Rita Persaud-Kong, Attorney-at-Law
Secretary General, OOCUR
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