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ADVISING IN CONSULTATION

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1. As the Times obituary (19th July 2007) explained, the legacy of Jonathan Brock QC's included "Brockian Ultracricket" immortalised by his university friend Douglas Adams in the pages of The Hitchhiker's Guide to the Galaxy. No public law advocate could hope for such cult status, reflected through the pages of the Law Reports. But Stephen Sedley QC's advocacy bagged it through the "Sedley requirements": the standards of proper consultation applied by the Courts (*R v Barnet LBC, ex p B* [1994] ELR 357, 372G, referring to *R v Brent LBC, ex p Gunning* (1985) 84 LGR 168). In advising clients in administrative law cases, on the important issues arising out of the need for due consultation (*R (Corner House) v SS Trade &* [2005] EWCA Civ 192 [2005] 1 WLR 2600 at [137]-[140]), lawyers continue gratefully to draw on this straightforward and principled template. So do public authorities, when formulating Codes of Practice on consultation, such as the important Cabinet Office Guide.

The Sedley Requirements

2. There are four Sedley requirements. First, that consultation must be at a time when proposals are still at a formative stage. This means a public authority cannot wait until it has identified a definite solution (*R v North & East Devon HA, ex p Pow* (1998) 1 CCLR 280). It must embark on the consultation process prepared to change course if persuaded to do so (*R v Barnet LBC, ex p B* [1994] ELR 357, 375C). It cannot make the decision in principle and then consult (*R (Sardar) v Watford* BC [2006] EWHC 1590 (Admin)). Nor can it start by excluding an option and so denying any real opportunity to present a case on it (*R (Medway Council) v SS Transport* [2002] EWHC 2516 (Admin) at [32]). Salami tactics are impermissible: as by consulting first on what model of decision to adopt, and only later consulting on the impact for those affected, thus preventing informed and integrated response (*R (Parents for Legal Action Ltd) v Northumberland CC* [2006] EWHC 1081 (Admin) [2006] LGR 646).

3. Secondly, the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. The reasons given must be the true reasons, not incorrect or misleading (*R (Madden) v Bury MBC* [2002] EWHC 1882 (Admin) (2002) 5 CCLR 622 at [58]). Consultees should be told the criteria intended to be adopted and what substantially important factors were intended to be considered (*R (Capenhurst) v Leicester CC* [2004] EWHC 2124 (Admin) at [46]). Fairness may also require that relevant documentary advice not be withheld from a consultee (*R v SS Health, ex p US Tobacco* [1992] 1 QB 353; *R (Edwards) v Environment Agency* [2006] EWCA Civ 877). It is not necessary to set out the arguments against the proposal (*R (Beale) v Camden LBC* [2004] EWHC 6 (Admin) [2004] LGR 291).

4. Thirdly, adequate time must be given for consideration and response. Adequate time should be given even in a case of urgency (*R (Westminster CC) v Mayor of London* [2002] EWHC 2440 (Admin) [2003] LGR 611 at [27]). The public authority cannot wait until the matter is so urgent that consultation is said to be impracticable (*Pow*). A few weeks may suffice, but a few days is unlikely to do so (*R v SS Education, ex p NUT* 14th July 2000 unrep.).

5. Fourthly, the product of consultation must be conscientiously taken into account in finalising any proposals. But that does not mean there must be an independent external evaluation (*Parents for Legal Action*) or a particular type of fresh assessment of needs (*Bishop*). The decision-maker may be permitted an appropriate 'political' predisposition (*Westminster* at [27]).

6. In order to seek to apply these requirements, there is no substitute for using the wealth of case-law in the field. Not as a rigid framework of precedent, for it is no such thing. Rather, as a readily available series of working examples acting as reliable pointers of common sense principles. Here as everywhere, the cases are a guide but not a cage.

7. Alongside the Sedley Requirements, various topics arise for further consideration. Here are three.

The trigger

8. A first topic concerns identifying the circumstances which trigger a duty of consultation. As important as knowing what standards must be followed

where a consultation duty has arisen, is knowing in what circumstances such a duty comes to arise. No rigid classification can assist. But the principal indicators include these. (1) The statutory scheme may impose a consultation duty (*R (Morris) v Trafford Healthcare NHS Trust* [2006] EWHC 2334 (Admin)), as may a relevant consensual arrangement (*R (Prison Officers Association) v SSHD* [2003] EWHC 2662 (Admin)). (2) There may be a procedural legitimate expectation of consultation, as arising from a promise (*R (Montpeliers & Trevors Association) v City of Westminster* [2005] EWHC 16 (Admin) [2006] LGR 304) or practice (*R v Birmingham CC, ex p Dredger* (1994) 6 Admin LR 553). (3) Consultation may be required as a matter of basic fairness or due process (*R (Carton) v Coventry City Council* [2001] ACD 445). (4) The impact of a proposed decision on person(s) affected may give rise to a right to be consulted (*R (Sporting Options Plc) v Horserace Betting Levy Board* [2003] EWHC 1943 (Admin)), as surely may the importance of the subject-matter. (5) Consultation may be contra-indicated by the particular nature or status of the subject matter, as in general with a statutory instrument (*R (BAPIO Action Ltd) v* SSHD [2007] EWHC 199 (Admin)) or economic policy *(R (Liverpool CC) v SS Health* [2003] EWHC 1975 (Admin)). (6) Consultation may be unnecessary if relevant views can be taken as being engaged through an alternative mechanism such as an external review (*R (Legal Remedy UK Ltd) v SS Health* [2007] EWHC 1252 (Admin)). (7) A public authority which chooses to consult must do so properly (*R (British Waterways Borad) v First SS* [2006] EWHC 1019 (Admin)): a professed badge of public law virtue must not be a fake.

Reconsultation

9. A second topic concerns identifying the need for further or re- consultation. In the conscientious consideration of the product of consultation, so as to finalise any proposals, circumstances may arise which call for a further transparent opportunity for stakeholders to comment on newly emergent thinking. There is in general no duty to consult further on an amended proposal whose emergence reflects the consultation process (*R v Islington LBC, ex p East* [1996] ELR 74, 88G), but it can be unfair not to allow further representations on a newly emergent live issue (*R (Elmbridge BC) v SS Environment* [2002] Env LR 1). It is helpful to ask whether there is a fundamental difference between proposals which were consulted on and those now envisaged for adoption (*R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) (2003) 6 CCLR 251 at [45]). Put another way: ask whether the matter ultimately

pursued was the foreseeable and fair outcome of the consultation or whether it is unfair to present it as having been the subject of consultation (*R (Wandsworth LBC) v SS Transport* [2005] EWHC 20 (Admin)).

The Government Lawyer

10. A third and final topic concerns the self-policing nature of public law standards. The public law Courts will scrutinise and, where appropriate, compel the proper discharge of the requirements of the law. But, as ever, public law is ultimately a partnership between judiciary and executive. Standards such as "conscientious consideration", with thinking still at a "formative stage", are ultimately internal to the decision-maker. They may be reflected (or betrayed) by external documentation. They may come to be asserted in documents including witness statement evidence before the Court. They may be promised, as an alternative to a mandatory order of the Court (*Morris*). It would be easy to cheat. The judge is not an invigilator of public authorities, making decisions under examination conditions. A judge granting judicial review can quash the decision (*Monpeliers*), and can even declare what form consultation should take (*Parents for Legal Action*), but it can neither turn back the clock nor wipe the decision-maker's mental hard disk. In these days of petitions on the Downing Street website, consultation can so easily be window-dressing. Consultation is not packaging. Listening is in the mind.

11. Here, as so often, the overarching responsibility must lie with those lawyers – in-house or independent – who assist public authorities with the proper presentation of their position in Court and their decision-making out of Court. This is important. It is well recognised that in criminal law prosecuting counsel have an important autonomous role of fairness and balance so as to *"act as a minister of justice"*: *R v H* [2004] UKHL 3 [2004] 2 AC 134 at [13]. Advising on consultation duties calls for similar high standards. The adviser must always make clear that consultation is never about 'going through the motions', and genuine open-mindness is essential. The client who says *"yes but I can reach the same decision, can't I?"* needs firm corrective guidance to secure the proper mindset.

12. The guiding principles, which the interests of justice require, are surely these:
    (1) Lawyers assisting a public authority in a decision-making context should take proactive steps to satisfy themselves that the appropriate

public law standards are being, will be, and have been genuinely adhered to.

(2) In a litigation context (whether claim or pre-claim correspondence) the discharge of public law standards should be investigated, including any internal document which might shed light on the position. No assertion of public law propriety should be advanced without first discharging that duty of due diligence, and never inconsistently with internal documentation remaining undisclosed.

(3) It is never the role of the lawyer, through the drafting of a decision document or witness evidence, to initiate by putting into the mouth of the decision-maker such a description of the decision-making process as would successfully resist the claim.

13. Come to think of it, if this is the right and principled approach for Government lawyers, it is surely warranted generally and not just when advising in relation to standards of proper consultation.

* This is a paper for the ALBA Summer Conference at St John's College Cambridge, 28th July 2007.