附錄五：在報告期內的詳細民情資料（法庭案件）

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Standing Committee of the National People's Congress
Chairman Zhang Dejiang

# The Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in 2017 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in 2016 Alternative Report

## I. Preamble

On 15 July 2014, the Chief Executive of the Hong Kong Special Administrative Region submitted to you the "Report on whether there is a need to amend the methods for selecting the Chief Executive of the Hong Kong Special Administrative Region in 2017 and for forming the Legislative Council of the Hong Kong Special Administrative Region in 2016," summarizing the results of the Government's public consultation in the first half of this year.

2. The Report is biased, misleading, and unhelpful towards the forming of a consensus within the society on constitutional reform. As members of the pan-democratic camp, and having the mandate as elected members of the Legislative Council, we have the responsibility to co-author this Alternative Report, so as to present to you the true picture of the views of the Hong Kong people, including the current situation in Hong Kong, the people's strong demands for genuine universal suffrage without pre-screening, and the reasons why pan-democrats advocate for the "Three Tracks Nomination Proposal". In sum, we believe that in order for there to be effective governance and social harmony in Hong Kong, the methods for selecting the Chief Executive in 2017 and for forming the Legislative Council in 2016 must accord with the principle of "genuine universal suffrage without pre-screening."

3. Democracy is a universal value. The spirit of democracy is that "the people can be masters of themselves," from which the principles of "Freedom" and "Equality" are derived. Among political systems, democracy is the most capable of embodying these values and principles.

4. Preeminent democratic theorist Robert Dahl[1] points out that a key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, the indispensable conditions of which are inclusive civil participation and open competition among political leaders, with competition being the more important of the two. The Chinese Communist Party already had a deep understanding of democracy in the 1940s. Speaking on the rise and fall of political parties, Mao Zedong confidently declared to the people, "We have found a solution to this problem: 'Democracy', that is to say, supervision by the people. As long as the people have oversight of the government, the government will not slacken in its efforts. When everyone takes responsibility, there will be no danger that things will return to how they were when the leader is gone." Applying this to the situation today, the premise behind numerous voices in Hong Kong calling for the inclusion of civil nomination in the Chief Executive election over the past year is also that there should be a fair and open competition, that the people can have oversight of the government by means of democratic elections.

5. We understand that the Central Government sees universal suffrage differently from the Hong Kong people, mainly on the issues of "Love China, Love Hong Kong" and "national security".

6. On "Love China, Love Hong Kong," although the pan-democratic camp has been strongly critical of local politics and policies, and has criticized the Central Government, the starting point is always that of tough love. As Mr. Deng Xiaoping said to a delegation of compatriots from Hong Kong and Macau on 3 October 1984, "As long as we take the standpoint of nationality and maintain the Great Harmony of the nation, regardless of political views, we, including those critical of the Chinese Communist Party, must all unite."[2]

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[1] Robert Dahl, Polyarchy: Participation and Opposition, New Haven: Yale University Press, 1971.
[2] *Selected Works of Deng Xiaoping*, p. 76.

Pan-democrats, whether moderate or radical, are all in agreement with the view above, which is also similar to what Deng said to a delegation of Hong Kong businessmen on 22-23 June of the same year, "Respect your own nationality, sincerely support the Motherland's resumption of the exercise of sovereignty over Hong Kong, and refrain from doing any harm to the prosperity and stability of Hong Kong."[3]

7. On 7 August 2014, speaking on the occasion of the inaugural meeting of the preparatory committee for the celebration of the 65th anniversary of the establishment of People's Republic of China, Director of the Liaison Office Zhang Xiaoming said that universal suffrage in Hong Kong should be viewed from the perspective of national security and quoted Deng's direction to members of the Hong Kong Basic Law Drafting Committee on 16 April 1987 that they have to stop some people from 'turning Hong Kong into a base for anti-Mainland operations under the guise of "democracy".' Hong Kong people understand that the Central Government's concern over national security stems from a century of national humiliation and the United States' current strategy of containment against the rise of China. In spite of that, the Central Government does not need to view national security and universal suffrage as being in opposition of one another. In fact, only when there is genuine universal suffrage can Hong Kong resolve the deep-rooted contradictions within its society, and can Hong Kong be prosperous and stable; this will in turn be in the advantage of national security.

8. Under globalization, increased interactions between countries, though in different ways and to varying degrees, are inescapable. Nonetheless, history has proven that the Korean War, the Great Famine, the Cultural Revolution, the June 4 Incident or even the disintegration of Eastern Europe has not endangered national security, and China is now on the rise. There is really no need to be overly worried.

9. We are convinced that as long as the Central Government allows Hong Kong to realize "One Country, Two Systems" and implement genuine universal suffrage with fair and open competition in line with international

[3] Ibid, p. 66.

standards, not only will the image of the Central Government be greatly improved among the Hong Kong people, thereby engendering a stronger sense of belonging to Hong Kong and to the country, China will also win the respect and praise of critics all around the world and improve its standing among the international community as a genuine superpower that is responsible and keeps promises, rather than one that only elicits fear.

10. The current quagmire over constitutional reform originates from mutual distrust among the different parties. We are willing to communicate through open dialogue and to offer suggestions for the Central Government so as to see genuine universal suffrage implemented. We sincerely invite you or any Central Government officials responsible for Hong Kong constitutional affairs for a meeting.

## II. Hong Kong's Path to Democracy

### Opportunities for universal suffrage missed twice

11. Since the establishment of the HKSAR in 1997, the Hong Kong people have used various methods to voice out their strong demand for universal suffrage over the past 17 years. The NPCSC made an interpretation of the Basic Law a second time on Article 7 of Annex I and Article 3 of Annex II on 6 April 2004. On 26 April 2004, the "Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008" was adopted,[4] formally rejecting the constitutional reform timetable for universal suffrage to be implemented for the 2007 Chief Executive election and in 2008 Legislative Council election.

[4] "Decision of the Standing Committee of the National People's Congress on Issues Relating to the Methods for Selecting the Chief Executive of the Hong Kong Special Administrative Region in the Year 2007 and for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2008." http://www.basiclaw.gov.hk/tc/basiclawtext/images/basiclawtext_doc19.pdf

12 The NPCSC issued another decision on 29 December 2007, once again denying universal suffrage for the Chief Executive and Legislative Council election in 2012. The explanation of the decision nevertheless made the promise for "universal suffrage to be implemented for the Chief Executive election no later than 2017, with universal suffrage for the Legislative Council election to follow later." Hong Kong people's hopes for universal suffrage were dashed again.

**Social discourse and movements on the two election methods in 2016/17**

13. Discussion on the next round of constitutional reform began immediately after the Chief Executive and principal officials in the current SAR Government were appointed on 1 July 2012. Associate Professor at the University of Hong Kong Mr. Benny Tai Yiu-Ting wrote a piece in the Hong Kong Economic Journal on 16 January 2013, titled "Civil disobedience's deadliest weapon",[5] in which he advocated for Occupy Central as a last resort for the fight for genuine universal suffrage in 2017. On 27 March of the same year, Tai joined with Reverend Chu Yiu-ming and Professor Chan Kin-Man of the Chinese University of Hong Kong and published the manifesto for the "Occupy Central with Love and Peace" (OCLP) movement, with the following as its goals and convictions:

- The electoral system of Hong Kong must satisfy the international standards in relation to universal suffrage. They consist of the political rights to equal number of vote, equal weight for each vote and no unreasonable restrictions on the right to stand for election.
- The concrete proposal of the electoral system of Hong Kong should be decided by means of a democratic process, which should consist of deliberation and authorization by citizens.
- Any act of the civil disobedience, which aims to fight for realizing a democratic universal and equal suffrage in Hong Kong though illegal, has to be absolutely non-violent.[6]

[5] "The Most Deadly Weapon of Civil Disobedience", Benny Tai Yiu-ting, 16 Jan 2013, Hong Kong Economic Journal.
http://www.hkej.com/template/dailynews/jsp/detail.jsp?dnews_id=3609&cat_id=6&title_id=571297
[6] "Occupy Central with Love and Peace" Manifesto.
http://oclp.hk/index.php?route=occupy/book_detail&book_id=10

14. At around the same time, 26 pan-democratic legislators, 12 political parties and organizations formed the "Alliance for True Democracy", and in January 2014 recommended the "Three Tracks Nomination Proposal" for the 2017 Chief Executive election. In March of the same year, the Alliance announced its recommendation for the Legislative Council election method, including a one-off transitional arrangement in 2016, in preparation for the 2020 Legislative Council to consist completely of directly elected seats.

15. OCLP held a civil referendum on 22-29 June 2014, with 792,808 Hong Kong citizens going to voting booths in person or voting via electronic devices. They chose the Alliance for True Democracy's "Three Tracks Nomination Proposal" (333,962 votes/42.1%) to be the proposal OCLP submits to the Government. What is also noteworthy is that 696,092 voters have made it very clear that if the Government's proposal for constitutional reform does not comply with international standards, whereby voters do not have a real choice, the Legislative Council should veto the proposal.[7]

**The SAR Government's public consultation for the 2016/17 constitutional reform**

16. On 4 December 2013, the HKSAR Government announced a five-month public consultation on "The Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016" lasting until 3 May 2014. At the same time, political parties, scholars and civil organizations actively voiced their demands for genuine universal suffrage by various means. Aside from the Civil Referendum, there were also:

- On 1 January 2014, the Civil Human Rights Front and the Alliance for True Democracy co-organized a protest, with "Immediate implementation of genuine universal suffrage; Civil nomination without pre-screening" as its theme and about 30,000 participants. On the same day, OCLP held a civil referendum in which 62,000 voted, with 90% voting for improving the representativeness of the Chief Executive Nominating Committee, no

[7] "6.22 Civil Referendum" results, the HKU Public Opinion Programme. http://hkupop.hku.hk/chinese/release/release1164.html

pre-screening mechanism during the nomination phase, and the inclusion of civil nomination elements;

- Pan-democratic political parties went on a hunger strike for universal suffrage in March, calling on citizens to sign the OCLP covenant and supporting the fight for the "Three Tracks Nomination Proposal";
- Members of the Legislative Council were invited to visit Shanghai in April, and 10 pan-democratic legislators met with 3 Central Government officials to discuss constitutional reform;
- Over 510,000 people marched during the 1 July 2014 Protest, demanding implementation of genuine universal suffrage.

## III. Current problems with governance in Hong Kong

17. Ever since the establishment of the SAR government, Hong Kong has undergone multiple governance crises, mainly stemming from the disjoint between the political system and social development. The political system is biased towards the pro-establishment camp: Pro-establishment individuals monopolize the Election Committee, playing the role of "kingmaker" in the medium- and long-term during the Chief Executive elections; also, half of the Legislative Council seats are elected by Functional Constituencies and through split voting, which allows for a small number of bodies with vested interests to exert a disproportionate amount of influence. Government policies are biased in their favour, and the unfair and unreasonable political system is hindering the public from expressing their views on policies. With grievances mounting day-by-day, the Government's credibility and acceptability is going down the drain.

18. Under the current system, with the Chief Executive not being elected into office by the people, his popularity is always low. Since Leung Chun-ying assumed the office of the Chief Executive two years ago, his popularity has been exceptionally low as compared to the previous two Chief Executives, Tung Chee-Hwa and Donald Tsang. With the West Kowloon conflict of interests, gang-related activities, illegal structures, as well as contradictions in his governing practices, such as rejecting HKTV's application for a free TV

license; all these have brought public trust to a new low, further worsening the already dysfunctional SAR Government.

19. According to HKUPOP opinion poll, Leung Chun-ying's score fell consistently ever since he assumed office. Support scores fell from 53.8 in late July 2012 to 46.1 in early July 2014, during which it was as low as 40.[8] If a general election of the Chief Executive were to be held tomorrow, when asked whether they would support Leung Chun-ying, his popularity fell from the highest 56% when he first assumed office (early May 2012) to the most recent 26.2% (late July 2014).[9] This is the lowest score ever among the three Chief Executives.

20. The political system defects and personal qualities of the Chief Executive directly affect the composition of the ruling coalition. The past two and current Chief Executives all appointed pro-establishment personnel to become members of the Executive Council, forming the "ruling coalition", but as neither the Chief Executive nor the ruling coalition have a mandate from the people and as Government operations have been lax, public policies and bills introduced often fail to answer the society's demands.

21. Before and after Leung Chun-ying assumed office, the pro-establishment members started to attack and dig up dirt on each other; the pro-establishment camp is unable to cooperate even among themselves in Legislative Council and District Councils; the Government have no sure-votes in the Legislative Council, and also lacks public support. All this has made policy-making extremely difficult. In the first year of Leung Chun-ying's office, the "legislative success rate" was only 45.83%, meaning that over half of the bills were unable to be passed on schedule in 2012/13, which is even lower than the average. Many of the Government's plans and bills were

[8] The HKU Public Opinion Programme, the graph of the Rating of Chief Executive Leung Chun-ying. http://hkupop.hku.hk/english/popexpress/ce2012/cy/poll/cy_poll_chart.html

[9] The HKU Public Opinion Programme, the table showing the votes for and against Leung Chun-ying in a hypothetical Chief Executive election. http://hkupop.hku.hk/english/popexpress/ce2012/vote/poll/datatables.html

withheld or delayed,[10] demonstrating the adverse consequences of a poor Executive-Legislative relationship.

22. In 2002, the first Chief Executive Tung Chee Hwa established the principal officials accountability system, which originally intended to establish a governing team with a common conviction to improve the HKSAR's governance capabilities through politically appointed main officials. Principal officials ought to utilize their individual strengths to make suggestions, and to effectively promote their policies. Yet, all three Chief Executives have been nepotistic, failing to attract capable individuals into the governing team; Not only do principal officials lack a common political philosophy, they come from various sectors, many of which are irrelevant, and their abilities are uneven, thus becoming the stumbling block of the whole governing body. In the past two years, many principal officials and Executive Council members have resigned owing to trust issues, personal conflict of interest and other reasons respectively, setting a Hong Kong record.[11]

23. Ineffective governance and long-standing contradictions between public policies and the wishes of the Hong Kong people have on numerous occasions driven them to go out on the streets to protest, including the 100,000 people surrounding the Government Headquarters to demand that the highly biased National Education curriculum be retracted, the 120,000 people protesting against the Government's unreasonable decision to reject

[10] In the 16 years since the transfer of sovereignty over Hong Kong from the United Kingdom to China, the average legislative success rate is 55.60%, "Review of the Governance Performance of the HKSAR Government 2014", p. 13, SynergyNet. http://www.synergynet.org.hk/file/governance_report_2014.pdf

[11] Former Secretary for Development Mak Chai-kwong defrauded the housing allowance scheme , and stepped down 12 days after his appointment; Members of the Executive Council, Barry Cheung Chun-yuen and Franklin Lam Fan-Keung resigned in May and August 2013 respectively, due to the former's involvement in the HKMEx financial scandal and the latter's purchase of housing before the implementation of the stamp duty; the political assistant of the Secretary for Development, Henry Ho, resigned in August due to his failure to declare his interests in the North East New Territories Development Project; in April 2013, Information Co-ordinator June Teng Wai-kwen resigned due to health reasons; the political assistant of the Secretary for Labour and Welfare, Zandra Mok, as well as the political assistant to the Chief Secretary, Carmen Cheung, resigned to take care of her children and her mother in August and September 2013 respectively; in November of the same year, the Undersecretary to the Financial Services and Treasury Julia Leung Fung-Yee resigned owing to personal reasons.

HKTV's application for a free TV license, and most recently, the rushed passing of research funding for the NE New Territories development resulting in Hong Kong people needing to surround the Legislative Council building; the list goes on. These are all reflections of mounting grievances, which are now on the verge of eruption.

## IV. Public Consultation for the Constitutional Development in 2016/17

24. If genuine universal suffrage can be achieved in 2017, it would be an opportunity to solve the political deadlock, placate social unrest, and make right what is wrong.

25. After the five-month constitutional development public consultation period ended on 3 May 2014, Chief Secretary for Administration and member of the Task Force on Constitutional Development Carrie Lam submitted the Consultation Report to the Legislative Council on 15 July; on the same day, Chief Executive Leung Chun-ying submitted another report to you for the NPCSC to decide whether there is a need to make amendments to the two electoral methods for the 2016 and 2017 elections, which is the first step of the "five-step procedure for constitutional reform".

26. Many believe that the government's public consultation work is not thorough enough, and that generally speaking, the Report is biased towards the pro-establishment camp, diminishing the viewpoints of the pan-democratic organizations and their supporters.

27. The Task Force on Constitutional Development was biased in the way it carried out the consultation. In the 45 meetings with the political parties and 182 meetings with the groups from different sectors during the consultation period, most of them were with pro-establishment political parties or groups with pro-establishment affiliations; the meeting arrangements with the Task Force were partial towards the Pro-Establishment camp. Further, the Government selectively quotes the results of opinion polls, having quoted from 5 institutions on 33 occasions, but with most of them

coming from 3 non-academic institutions which not only have close ties with the pro-establishment camp, but have also failed to disclose completely the details of this and past opinion polls, and with no means for the public to monitor the quality of their opinion polls. The Consultation Report also quotes out of context, such as when it selectively quotes the part where the Hong Kong Bar Association says civil nomination does not comply with the Basic Law, but ignores its recommendation that 'the rationale and underlying objective of such a proposal—namely to ensure maximum participation of the general electorate in the nomination process—is perfectly capable of being accommodated within the concept of the "nomination committee" in the Basic Law.'

28. Additionally, the Report also diminished the opinions of pan-democratic Legislative Council members. Pan-democratic Legislative Council members represent several hundred thousand voters, and are important stakeholders and a crucial part of the Legislative Council. The Alliance for True Democracy, which is composed of these Legislative Council members, advocates that the possibility of direct election of all Legislative Council members in 2016 should not be eliminated. Functional constituency seats should be reduced to a minimum, and corporate votes and split voting should be abolished. However, the Report claims that "it is generally agreed that there is no need to amend Annex II to the Basic Law regarding the method of forming the Legislative Council in 2016," which is completely contrary to the wishes of the people. In sum, the report the Chief Executive submitted to you hugely exaggerates the views of the pro-establishment camp and disparages all opposing views. [The Consultation Report does not fully reflect the wishes of the people; for details, please refer to Appendix I]

29. We believe that the Government deliberately used the so-called public consultation to fabricate public opinion, in an attempt to have the constitutional development framework tailor-made. The Consultation Report displays contempt for the wishes of the Hong Kong people to bring about civil nomination, which were expressed through the Civil Referendum and the July 1 march. It also attempts to give the final word on the issue and to give the nomination committee the power of political pre-screening, thereby

deciding the result of the Chief Executive election and treating every single vote of the voters as a mere rubber stamp. It would be misleading if the Chief Executive Leung Chun-ying leads the Central People's Government to believe that Hong Kong citizens are only seeking "one person, one vote" as a matter of formality, and not caring whether they can make a real choice; it may even result in the Central Government making erroneous judgments about the public opinion in Hong Kong and making mistakes in its decisions.

30. Starting from the fight for direct elections in the Colonial era, the pan-democratic camp, like the rest of the Hong Kong people, has been ardently expecting the implementation of universal suffrage. Nevertheless, the Hong Kong people also demand that universal suffrage complies with the international standards, that is to say, the principles of universality and equality, and disagree with the Nominating Committee pre-screening candidates.[12] We seek only genuine universal suffrage, so as to protect the votes of voters from manipulations by groups with vested interests and from becoming mere rubber stamps for what is in reality a small-circle election among the privileged.

31. The NPCSC promised that universal suffrage will be implemented in the 2020 Legislative Council election at the earliest, and the 2016 election will be the last one before then. The election methods cannot remain unchanged, for there would otherwise be no sincerity in the progress towards universal suffrage in accordance with the principle of gradual and orderly progress at all.

[12] The CUHK Hong Kong Institute of Asia-Pacific Studies carried out an opinion poll from 11-20 March 2014 about the citizens' views about the 2017 Constitutional Development proposal:
Q4 "Do you agree to let the nomination committee screen the 2017 Chief Executive candidates?"
Agree: 39.3%
Disagree: 53.5%

## V. A Real Choice

32. The Hong Kong people generally agree that the implementation of genuine universal suffrage in accordance with the Basic Law and the relevant provisions is to the advantage of the long-term peace and stability of Hong Kong.

Genuine universal suffrage should accord with the following legal principles:

- All Hong Kong residents shall be equal before the law (Article 25 of the Basic Law);
- Every Hong Kong permanent resident shall have the right to vote and the right to stand for election in accordance with the law (Article 26 of the Basic Law);
- Every Hong Kong permanent resident shall have the right and opportunity, without unreasonable restrictions, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage, guaranteeing the free expression of the will of the electors (Article 25(b) of the International Covenant for the Civil and Political Rights as applied to Hong Kong by Article 39 of the Basic Law and Article 21 of the Hong Kong Bill of Rights).[13]

33. Although the Government has pointed out that there was a reservation in respect of Article 25(b) of the International Covenant on Civil and Political Rights ("ICCPR"), the SAR Government has reaffirmed on numerous occasions that even though the basis for the implementation of universal suffrage in Hong Kong is the Basic Law rather than the ICCPR, the future universal suffrage models must comply with the principles of universality and equality.[14]

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[13] "Finding the Right Path to Universal Suffrage: What the Government is NOT telling you", HK2020 – Civic Party, Para. 2.02. http://www.2017.hk/consultation-paper-english.pdf

[14] With reference to the "Green Paper on Constitutional Development", paragraph 2.29, http://www.cmab.gov.hk/doc/issues/GPCD-e.pdf; 2 December 2012, The speech of the Secretary of the Constitutional and Mainland Affairs Bureau about the motion on "Roadmap of universal suffrage" http://www.info.gov.hk/gia/general/200912/02/P200912020316.htm; and 14 July 2010, the reply by the Secretary for Constitutional and Mainland Affairs, Mr Stephen Lam, to the LCQ5 http://www.info.gov.hk/gia/general/201007/14/P201007140208.htm

34. The UN Human Rights Committee of the International Covenant on Civil and Political Rights has put forth at least three requirements:

- Every voter should have an equal number of votes;
- The value of each and every vote should be equal;
- Citizens' eligibility to stand for election should not be limited by unreasonable restrictions.[15]

35. As such, in accordance with the Basic Law and the relevant provisions, the right of permanent residents of the Hong Kong Special Administrative Region to be elected must be protected. In implementing universal suffrage, there must be genuine free choice on the part of the voters, to the exclusion of all electoral systems that have the practical effect of political pre-screening.

**2017 Chief Executive Election**

36. In order to accord with the principle of "universality and equality", the function of the Nominating Committee must not include pre-screening. That is to say, the rules governing Nominating Committee and its work, as well as the Nominating Committee itself, shall refrain from depriving any person's right to be elected. Voters shall have a "free choice of candidates."[16]

37. The Alliance for True Democracy's "Three Tracks Nomination Proposal", which has since become the constitutional reform proposal submitted by the Occupy Central movement to the Government, consists of the following:

Any person interested in running for the Chief Executive can be nominated as a candidate through any one of the following procedures:

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[15] As stated in the UN "International Covenant on Civil and Political Rights" Human Rights Committee "General Comment No. 25".

[16] The Hong Kong Bar Association "Consultation Document on Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016" Paragraph 9 of the Executive Summary of the Submission.
http://hkba.org/whatsnew/press-release/1a-HKBA-ConstDev%20ExeSum%20(English)%20final.pdf

- Civil Nomination: A nominee having received the signed endorsement of 1% of the registered voters shall be endorsed by the Nominating Committee;
- Political Party Nomination: Any political party or political group having received 5% or more of the total valid votes in the last Legislative Council direct election can independently or jointly nominate one person as nominee. The nominee shall be endorsed by the Nominating Committee;
- Nomination by the Nominating Committee: Members of the Nominating Committee shall conduct direct nominations.

38. In addition to the "Three Tracks Nomination Proposal", the Alliance for True Democracy has made the following recommendations for reform of the method for selecting the Chief Executive:

- The Nominating Committee has the power to refuse to endorse any potential candidacies for reasons provided by express provisions of the law, but it shall not refuse to endorse any potential candidacies based on conditions that amount to political censorship such as "Love China, Love Hong Kong" and "confrontations with the Central Government."
- The election shall employ the two-round, run-off system by universal suffrage. A candidate is elected as Chief Executive by winning more than 50% of the valid votes in the first round. If no candidate wins more than 50% of the valid votes in the first round, a second round shall be held between the two highest-placed candidates, in which the candidate with the greater number of valid votes shall be elected as Chief Executive.

39. The Alliance for True Democracy's "Three Tracks Nomination Proposal" won in the civil referendum with over 790,000 participants, has public support and is broadly representative. It is an inclusive proposal to which the Government should pay more attention in that while the element of civil nomination guards against political pre-screening, the proposal also affirms the power and role of the Nominating Committee.

**2016 Legislative Council Election**

40. Universal suffrage for Legislative Council elections, that is, the complete abolition of Functional Constituencies, is a consensus within the society in Hong Kong. According to the Decision of the NPCSC on 29 December 2007, if the selection for the Chief Executive in 2017 is by universal suffrage, then there can be universal suffrage for the Legislative Council election in 2020.

41. In order to achieve the goal of implementing full universal suffrage for the 2020 Legislative Council election, amending the 2016 method for forming the Legislative Council is an important step. The current ratio of Geographical Constituencies seats and Functional Constituencies seats in the Legislative Council is 35:35. If Annex II of the Basic Law is not amended for 2016 such that there is no transitional reform such as by increasing the proportion of directly elected seats, then there would need to be a once-and-for-all change for 2020, greatly increasing the difficulties.

42. During the public consultation for constitutional reform, much of the focus of the society fell on the method for selecting the Chief Executive by universal suffrage. You would have been misled if the report of the Chief Executive C Y Leung leads you to conclude that the Hong Kong people have no demands and no opinions on the method for forming the Legislative Council.

## VI. Conclusion

43. Since the establishment of the SAR Government, Hong Kong people's demands for universal suffrage have twice been in vain. Distortions in the political system have led to Hong Kong being on the verge of being torn apart. Hong Kong's path to democracy has long been stalled, and it contrasts sharply with Hong Kong people's strong demands for universal suffrage. The promise for the implementation of universal suffrage for the 2017 Chief Executive election originally brought hope to the Hong Kong people, but the

Central Government must not make the mistake of thinking that Hong Kong people have only been fighting for a ballot in hand; the universal suffrage Hong Kong people has always longed for is genuine universal suffrage whereby citizens have a real choice and are able to fairly participate to a high degree. Nevertheless, the SAR Government public consultation report has failed to reflect these wishes of the Hong Kong people.

44. Hong Kong people are generally supportive of One Country Two Systems, Hong Kong people ruling Hong Kong with a high degree of autonomy. The Central Government should have trust in Hong Kong voters, having accumulated more than twenty years of experience in democratic elections, to make a wise and informed choice and select a Chief Executive favourable to the long-term peace and stability of Hong Kong and the country. For the Central Government to let voters have a real choice and freely vote for a political leader by means of one person, one vote will strengthen Hong Kong people's sense of identity and belonging to the Hong Kong SAR and to the country, while also resolving deep-rooted contradictions within the society. Indeed, this is the best method for protecting national security and maintaining Hong Kong's long-term prosperity and stability.

45. To attain effective governance and social harmony, we recommend that Annex I of the Basic Law be amended so that the method for selecting the Chief Executive in 2017 would accord with the principle of genuine universal suffrage without pre-screening; and also, that Annex II of the Basic Law be amended so that in the method for forming the Legislative Council in 2016, the proportion of directly elected seats would be increased and split voting abolished

Pan-democratic Members of the Legislative Council

August 2014

## [Appendix I: The Voices which the Report on the Public Consultation on the Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016 is Unable to Reflect]

### (1) The Task Force on Constitutional Development is biased towards the pro-establishment camp

As seen in the list of political parties/group consulted from the Report's appendix, the pro-establishment camp was consulted many more times than the pan-democratic camp.

Within the consultation period, the Task Force on Constitutional Development attended a total of 45 Legislative Council meetings and consultation events with different political parties/Legislative Council members. After deducting the 12 Legislative Council meetings and the group meetings with all the Legislative Council members, the members of the Task Force only met with the pan-democratic camp 12 times, while it met with the pro-establishment camp 21 times.[17] The Task Force attended 182 consultation events hosted by different sectors and groups; excluding the 21 District Council meetings (including one meeting with the Chairmen of the 18 District Councils) and the 8 district promotion events, by roughly calculation, the members of the Task Force met for less than 5 times with the Pan-Democratic groups, but met with groups with obvious pan-establishment backgrounds or stance for nearly 100 times, treating them with partiality.[18]

There are also clear political biases in the Task Force's choices of political organizations to meet with. For example, apart from meeting with the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB),

[17] "Report on the Public Consultation on the Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016" Appendix I.
[18] "Report on the Public Consultation on the Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016" Appendix II.

two of its branches were also consulted; none of the other political parties received the same treatment.[19]

**(2) Quoting opinion polls with partiality**

The Report quoted the results of opinion polls from 5 institutions, of which only 2 are academic institutions. The Report quoted a total of 33 opinion poll questions, and those from the academic institutions were only quoted 14 times which is less than half of the total amount.[20]

The rest of the quoted opinion polls originated from the Hong Kong Chinese People's Political Consultative Conference (Provincial) Members Association (HKCPPCC), the Hong Kong Public Opinion Research Centre (HKPORC) and the Hong Kong Research Association (HKRA).[21] The HKCPPCC is strongly pro-establishment; The HKPORC belongs to a wholly-owned subsidiary institution of the One Country Two Systems Research Institute, whose Executive Director is Cheung Chi-kong, a member of the Executive Council. Among the reported past opinion polls, most of them were commissioned by the DAB. The past opinion polls undertaken by these two institutions cannot be found on the internet.

[19] Also, "Dr Philemon CHOI Yuen-wan and other individuals of the community" had two opportunities to exchange views; this is in stark contrast with the experience of the organization Hong Kong 2020 led by former Chief Secretary Anson Chan, which designed a mild proposal which complies with the Basic Law and did not include civil nomination. Yet, when she wrote to the Chief Secretary of Administration in March this year to submit her recommendation and request to meet with the Task Force, and later to meet with the Deputy Minister of the Constitutional and Mainland Affairs Bureau, she did not receive any reply. Further, about 80 individuals from the financial sector who supported "Occupy Central with Love and Peace" hosted an event on 23 April 2014, publishing a 10-point statement which delineated the wants of Hong Kong citizens, and urged the government to implement genuine universal suffrage that complies with the international standard. However, the Task Force refused to send any representatives to the event. On the other hand, the Task Force sent representatives to pro-government organizations, including the Hong Kong SME Forum and the constitutional development promotion events hosted by the Chai Wan Kai Fong Welfare Association.

[20] The HKU Public Opinion Programme (its reports known as the HKUPOP) was quoted on 9 occasions, one of which was commissioned by MingPao; the remaining 8 times were commissioned by the Alliance for True Democracy. The Hong Kong Institute of Asia-Pacific Studies was quoted 5 times.

[21] The HKCPPCC was quoted 6 times; the Public Opinion Survey Centre was quoted 8 times (all of which was commissioned by the DAB); the Hong Kong Research Association was quoted 5 times.

As for the HKRA, although it has a website to record all its past opinion polls, its website has not been updated for years. The results and statistical approaches of recent opinion polls were not uploaded to the internet, making it impossible for citizens to monitor the quality of its opinion polls. The credibility of the opinion polls done by these 3 institutions is lacking; yet, they were quoted multiple times by the Government in the Report, and were used to support conclusions that are in line with the Pro-establishment, bringing the fairness of the Report into question.

The Report also distorted the original meaning of the questions when it quoted them. For example, the Report mentions that 'there are more people who consider that…the post of the CE should be held by a person who "loves the country and loves Hong Kong".'[22] This conclusion stems from the results of opinion polls carried out by the HKCPPCC, HKPORC and the HKRA. However, the results of the HKUPOP quoted by the Report show that the percentage of those who agree and those who do not agree is more or less equal, and the wording of the HKUPOP question is rather different from the conclusion the Report arrived at.[23] Also, the opinion poll question of the HKPORC is "Should a person who confronts the Central People's Government (Beijing) be allowed to be a candidate of the CE election?" and "Do you support a person who confronts the Central People's Government (Beijing) to hold the post of the CE?" This is totally irrelevant to the conclusion of "Love Country, Love Hong Kong."

Apart from distorting opinion polls, the data in the Report submitted to you by the Chief Executive is hugely exaggerated, claiming that 'the public generally agrees that the post of the CE should be held by a person who "loves the country and loves Hong Kong"' and identifies it as the "mainstream opinion", fabricating public opinion.

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[22] "Report on the Public Consultation on the Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016" Paragraph 3.11.

[23] The question of the HKUPOP is "Do you agree that the NC should sieve CE candidates according to political standards such as 'love the country and ove Hong Kong', 'not confronting the Central Authorities', etc.?" 38% of the respondents agree, around 36% disagree, at the 95% confidence interval, the proportion of positive and negative results is similar.

**(3) Quoting out of context**

Before the Government published its Report, the Hong Kong Bar Association (HKBA) already publicly warned the Government not to quote its submission out of context. Unfortunately, the Report selectively quoted the part where the HKBA says that civil nomination does not comply with the Basic Law, but ignores its view that 'the rationale and underlying objective of such a proposal—namely to ensure maximum participation of the general electorate in the nomination process—is perfectly capable of being accommodated within the concept of the "nomination committee" in the Basic Law.'

Further, while the Report emphasized that the Nominating Committee would be formed with reference to the current provisions, it completely disregarded one point which the HKBA reiterates: "Since the nominating committee's function is limited to nomination, it is neither its function nor its purpose to determine the result of the Chief Executive election."[24]

**(4) Diminishing the opinions of the pan-democratic camp**

The Government claims that it received over 100,000 submissions during the consultation period, however, instead of quantifying the data in the Report, there was only a large amount of descriptions such as "mainstream opinion", "there are more people who consider", and "quite a number of views", which are all quantifiers without objective standards. For example, 790,000 citizens participated in the "Occupy Central with Love and Peace" Civil Referendum in June, and over 510,000 people took to the streets on July 1 to fight for genuine universal suffrage; yet the Government merely uses "some organizations and individuals" to describe them[25], unfairly disparaging the public opinion.

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[24] Consultation Document on Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016, 11 July 2014.

[25] The Report by the Chief Executive to the NPCSC, Paragraph 11(vii), 'some organizations and individuals on nomination thresholds and nominating procedures, including proposals introducing "civic nomination", "party nomination", etc. outside of the NC'.

The Legislative Council is now composed of 70 members, with the Geographical Constituencies and the Functional Constituencies each making up half of the seats. In the 2012 Legislative Council election, the pan-democratic members won 766,227 (Geographical Constituencies) and 892,011 votes (Functional Constituencies [807,480 votes came from the District Council (Second)]) respectively, which is more than the votes won by the pro-establishment members (Geographical Constituencies: 641,746 and Functional Constituencies: 535,377 [523,339 votes came from the District Council (Second)]). The pan-democrats represent several hundred thousands of Hong Kong citizens, and it is unacceptable for their opinions to be diminished as "individual organizations" or "some" opinions.

The Report claimed that "it is generally agreed that there is no need to amend Annex II to the Basic Law regarding the method of forming the Legislative Council in 2016"[26]. The NPCSC promised to have full universal suffrage in 2020 at the earliest, and therefore the election method must be amended in the preceding Legislative Council election in 2016 to serve as a transitional arrangement, otherwise it would be difficult to smoothly achieve full universal suffrage in 2020 in accordance with the principle of gradual and orderly progress. The Alliance for True Democracy recommends that the number of seats in the Functional Constituency should be gradually reduced in 2016 and that corporate votes and the split voting system be abolished.[27]

The pan-democrats comprise over one-third of the seats in the Legislative Council, representing nearly 800,000 voters; also, the pan-democrats occupy more directly elected seats than the pro-establishment camp. The pan-democrats and their supporters are very important stakeholders, and yet their opinions to improve the 2016 Legislative Council Election method are completely ignored in the Government Report, which is an attempt to sail under false colours.

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[26] "Report on the Public Consultation on the Methods for Selecting the Chief Executive in 2017 and for Forming the Legislative Council in 2016" Paragraph 4.34; the Report by the Chief Executive to NPCSC, Paragraph 11(x).

[27] "The Alliance for True Democracy" Proposal for Legislative Council Elections: http://www.atd.hk/wp-content/Election_Plans/ATD_LegCo_Election_Plan_ENG_v2.pdf

**(5) Exaggerating the pro-establishment views when quantifying opinions**

In the Report, the Government repeatedly exaggerated the pro-establishment views, and diminished those of the pan-democrats. The Report the Chief Executive submitted to you is even more severely distorted.

With regards to the method for selecting the Chief Executive in 2017, the Report takes the pro-establishment view that "the NC has a substantive power which cannot be undermined or bypassed" as the mainstream opinion, but the proposal of the pan-democrats that 'apart from the NC, "civic nomination", "party nomination", etc. should also be accepted as other pathways to nominate CE candidates' is merely reduced to the view of some organizations and individuals. In sum, the report the Chief Executive Leung Chun-ying submitted to you severely exaggerates the views of the pro-establishment camp while diminishing those in opposition, is greatly distorted, and is entirely inconsistent with the facts.

HCAL36/2004

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 36 OF 2004

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BETWEEN

| | |
|---|---|
| LAM YUET MEI (林月媚) | Applicant |
| and | |
| PERMANENT SECRETARY FOR EDUCATION AND MANPOWER OF THE EDUCATION AND MANPOWER BUREAU (教育統籌局常任秘書長) | Respondent |

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Before : Hon Chu J in Court

Date of Hearing : 12, 16 & 17 July 2004

Date of Judgment : 9 August 2004

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**J U D G M E N T**

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1. In these proceedings, the applicant applies to judicial review two decisions of the Permanent Secretary for Education and Manpower ("the Permanent Secretary") as follows:

(1) The decision made in July 2002 removing the name of Kin Tak Public School (建德公立學校) ("the School") from the

Primary One Admission ("POA") School List for the 2003/04 school year thereby terminating the School's right to recruit primary one students.

(2) The decision made on 10 December 2003 to cease to provide grants to the School with effect from 1 September 2004.

2. The applicant challenges the first decision on the ground that there had been no or no proper consultation before it was made. As for the second decision, the challenge is made under the doctrine of substantive legitimate expectation.

## *I. THE BACKGROUND*

### *(1) The School*

3. The School is a rural school situated at Lin Tong Mei Village (蓮塘尾村) in Sheung Shui, New Territories. According to the applicant, it is some 6 km from the town centre of Sheung Shui, being separated by a golf course. The no. 77K bus (operating at 20 minutes interval) and no.57K mini bus (operating at 30 minutes interval) pass by the village. It takes 10 minutes to travel from the village to the town centre by car.

4. The School was built in 1938. It is a government aided primary school. In the 1960s and 1970s, it operated 12 primary classes with about 560 students. In the 1980s, with changes in the general demographic structure of Hong Kong and that of Northern New Territories in particular, the number of students in the School had declined. In 1989, it became a whole day school with six primary classes.

5. Owing to insufficient number of student intake, the School had in the school years 1998/99, 1999/00, 2000/01 and 20001/02 operated a semi-class (i.e. a class of half the size of a full class) of primary one. In the school year of 2001/02, with the approval of the then Education Department, it operated a combined class for its primary one and primary two students.

6. In the school year of 2002/03, it did not have any primary one class because there was insufficient number of student intake and no government grant was allocated for operating primary one class. Since then, it has become a school not running a full curriculum.

7. In the school year of 2003/04, the School also did not operate any primary one class. There was no primary two class. There was one combined class for primary three and primary four, one class of primary five and one class of primary six. With the graduation of the 17 primary six students in July 2004, the School presently has 18 students. In the coming school year of 2004/05, ten of them will be in primary six, three in primary five and five in primary four.

*(2) The applicant*

8. The applicant is the mother of three children. Her eldest daughter is a student in the School, studying primary 3 in the school year of 2003/04. Her second daughter started primary one in the school year of 2002/03. Her youngest son is due to start primary one in the school year of 2004/05.

9. The applicant's family lives near the School. It takes five minutes to walk from their home to the School. According to the applicant, as a result of the School not able to operate primary one class in 2002/03, her second daughter had to enrol with another rural school in another village and have experienced difficulties with regard to the travelling arrangement. The applicant wishes to have her son enrol with the School in the school year 2004/05.

*(3) The Primary One Admission (POA) system*

10. Since 1983, the POA system has been in place to process centrally the admission of children to primary one in government and aided primary schools in Hong Kong. The POA system is operated by the Education and Manpower Bureau ("EMB") (formerly the Education Department).

11. Under the system, there are two stages of admission, the Discretionary Places ("DP") stage and the Central Allocation ("CA") stage. The government and aided schools participating in the POA system are grouped under different school nets based on their geographical location. At the DP stage, parents can apply to only one of the participating schools and admission is based upon prescribed POA procedure and criteria. At the CA stage, those students who have not been admitted to the school of their choice during the DP stage, will be allocated to a school in the school net to which they belong, based upon the parents' choice and the random number allocated to the students.

12. Based on the number of students admitted by a school during the DP stage and the result of computer analysis of the choices made by parents at CA stage, the EMB will work out the total number of students to be allocated to each primary school, and in turn the number of primary one classes that the school is allowed to operate. If a school cannot admit sufficient number of students in the POA exercise, it will not be granted aid to operate any primary one class in the coming school year. The EMB will then arrange for the students that the school has admitted at the DP stage to transfer to other schools. Prior to January 2003, schools adopting activity approach had to have no less than 16 students in order to be allowed to operate primary one class. In January 2003, the number was raised to 23 students.

13. In July or August each year, the EMB will compile the POA School List for the coming school year to be distributed to kindergartens and primary schools participating in the POA exercise. The List will give information about the primary schools to which parents can apply for primary one admission for their children.

14. The compilation of the POA School List is carried out annually. Decisions on the schools to be included on the List are made on an annual basis. Prior to the POA for 2004/05, whether a school with no primary one class in the current school year is to be included in the School List and to participate in the coming POA exercise is a matter to be decided by the relevant Chief School Development Officer. According to the respondent, the practice is for the District Education Officer or School Development Officer to orally inform the supervisor or principal of the school concerned of the EMB's intention to exclude the school from the

POA School List and the POA exercise for the coming school year. Any objections raised will be considered. Otherwise, if no objection is received, the EMB would proceed as intended, and no written notification will be given.

15. For schools that have been excluded from the POA School List and POA exercise for a particular school year, the EMB may allow them to be put back onto the List if there are changes in the circumstances. Admittedly however, this is unlikely to happen to schools that had been excluded on account of low student intake. Indeed, in the example of school allowed to be restored to the School List cited by the respondent, the school was withdrawn from the POA School List not because of low student intake, but because of management problem.

16. If there is no change in circumstances and if the school does not request to be restored to the School List, a school that has been excluded from the POA School List and POA exercise for one year will continue to be excluded for the following year. And if the state of affairs remains unchanged, the school concerned will come to a cessation in a few years' time with the graduation of its last batch of students.

*(4) The Consolidation Policy*

17. In April 2003, the EMB submitted to the Legislative Council a discussion paper proposing consolidation of high-cost and under-utilized aided primary schools. In May and June 2003, the paper was discussed at meetings of the Panel on Education. During this period, the EMB also conducted consultations with various representative bodies and school

sponsoring bodies. The Alliance of Parents of Rural Schools was among the bodies consulted and had made representations on the consultation paper at one of the meetings of the Panel of Education. Eventually, the EMB decided to implement the Consolidation Policy proposed in the paper, but with modifications, in the school year 2004/05.

18. Much has been said by way of affirmation as to the background and reasons for the Consolidation Policy. For the purpose of these proceedings, it is not necessary to go into the details. In summary, there are two main reasons leading to the formulation of the Policy. Firstly, as a result of a declining trend in the population in the 6-11 age group, there are surplus primary school places. Schools that are situated in remote areas and/or are less popular, including rural schools, therefore experience under-enrolment. Secondly, in view of the government-wide target to restore the fiscal balance by the financial year of 2008/09, the envelope allocation for all government departments and bureaus, including the EMB, has to be cut by up to 11% over five years from the year 2004/05. As such, it is considered reasonable to close down by phases those under-enrolled and high costs primary schools.

19. It is estimated that under the Consolidation Policy, a total of 120 government and aided schools will be closed down in the coming few years. The total recurrent expenditure of these schools for the financial year 2003/04 is $1,032 million, representing about 10% of the total recurrent expenditure on or subvention to government and aided schools. It is the respondent's case that the savings thus achieved can be used for other worthwhile and more cost-effective educational measures.

20. The Consolidation Policy has several components. For the propose of these proceedings, it is only necessary to note those relating to schools operating combined class(es), which is said to be educationally undesirable. Under the Consolidation Policy and within a particular school net, if there is an adequate supply of school places, then schools operating combined class(es) will not be allocated any primary one class in the year 2003/04. Schools operating combined classes will be closed down within one to three years from 2003/04 depending on whether it was operating primary one class in 2003/04 and the total enrolment or number of operating classes. For schools operating combined class(es), if it is not operating primary one class in 2003/04 (Year N), and if it has two classes or the present enrolment is less than 49, then it will be closed down in the year N + 1, i.e. 2004/05.

21. As a result of implementing the Consolidation Policy, 14 aided primary schools became immediately affected in that grants to them will cease with effect from 1 September 2004. Five of these schools agreed to closure. Of the remaining nine that did not agree to closure, one school was given special consideration to continue receiving grants in 2004/05. The other eight schools, of which the School is one, had received formal notification of cessation of grant by way of a letter dated 10 December 2003.

## *II. EVENTS LEADING TO THE APPLICATION*

22. In the POA exercise for 2002/03, the School had insufficient students for the operation of primary one class. By a letter dated 13 May 2002, the School was notified by the then Education Department that it

would not operate any primary one class in the school year of 2002/03. The School did not express any objection to it.

23. On 28 May 2003, the supervisor of the School had a meeting with the officers of the Education Department to discuss the dispute in the school management committee. In the meeting, the supervisor said he preferred not appointing any new principal if the dispute was not resolved. At that point, the School Development Officer pointed out that though the School would operate for four more years at the most (i.e. the School would not operate primary one class in 2002/03, and it would not be included in the POA School List for 2003/04), the interests of the students should be taken care of. To this, the supervisor was recorded in the minutes to have responded that he would rather let the school close, as it could only exist for four years, than to let the three school managers "黑箱作業". It is the respondent's case that the supervisor did not show objection on the occasion and thereafter, and the Education Department was led to believe that the School agreed to or had no objection to being excluded from the POA School List for 2003/04.

24. The supervisor, Mr Sung, however stated that the Education Department officers mentioned to him in a casual manner that the School would have no primary one class in 2002/03 and the subsequent years, so the School would operate at most for four more years. He said he did not pay much attention to the conversation as he was in a depressed mood, being unhappy over the dispute with the other school managers. According to Mr Sung, he had said that if it was decided that the School should not operate primary class in future, a written explanation should be given to the School. He could not recall having uttered the response

recorded in the minutes, but if he had, he said it must be a slip of tongue and he would not have meant what was said.

25. Mr Sung also refers to an earlier occasion on 18 May 2002 when nine candidates were interviewed for the post of school principal. All of them were asked by the selection panel to offer proposals for recruiting primary one students. The School Development Officer of the Education Department was also present throughout the interview, but she had not corrected the panel that the School would not be allowed to operate primary one class in future. The Officer explained that it was because she was merely acting as an observer, adding also that Mr Sung had subsequently at the 28 May 2002 meeting been alerted to the Department's intention.

26. On 4 July 2002, it was decided that the School would be excluded from the POA School List for 2003/04. The POA 2003 School List was compiled in July 2002 and made available to kindergartens and participating primary schools in August 2002. In September 2002, the new principal of the School, Mr Fong, became aware that the School was not included in the POA 2003 School List. The former principal had retired in August 2002. It is the respondent's case that the former principal had before his retirement been informed that the School would be excluded from the POA School List. The supervisor however maintains that neither he nor the school managers had any knowledge of this.

27. On 16 September 2002, Mr Fong wrote to the Secretary for Education and Manpower ("SEM") complaining, inter alia, that the School had no knowledge that it was not allowed to recruit primary one students.

At about the same time, a number of rural schools had raised objections to being excluded from the POA 2003 School List. On 18 September 2002, a meeting between representatives of 16 rural schools, including that of the School, and the SEM was arranged by Legislative Councillor The Hon. Mr Cheung Man Kwong. It was agreed at the meeting that these schools would make representations individually to the Education Department for considerations.

28. By a letter dated 19 September 2002 ("the 19-9-02 Letter"), Mr Fong on behalf of the School wrote to the Education Department requesting for the School to be put back onto the POA School List and to be allowed to recruit primary one students. By a letter dated 27 September 2002 ("the 27-9-02 Letter") from the Director of Education, the School's request was refused. I shall return to deal with these 2 letters in details in the context of the challenge to the second decision.

29. By another letter dated 25 November 2002, the School reiterated its request to be restored to the POA School List and participate in the recruitment of primary one students for 2003/04. By a letter dated 9 December 2002, the Director of Education refused the request.

30. In February 2003, by virtue of the Education Reorganization (Miscellaneous Amendments) Ordinance 2003, the Permanent Secretary and the EMB took over the duties of the Director of Education and the Education Department respectively.

31. By a letter dated 23 April 2003, the EMB informed the School that it would operate one combined class for primary three and primary

four, and one class of primary five and one class of primary six for the school year 2003/04.

32. On 6 August 2003, the EMB issued a circular to all government and aided primary schools informing them that, in view of the large surplus of primary one school places, schools that did not operate primary one classes in 2003/04 would not participate in the POA 2004 exercise and would not operate primary class in 2004/05.

33. On 6 October 2003, two EMB officers held a meeting with Mr Fong and Mr Sung to discuss the closure of the School under the Consolidation Policy. During the meeting, both Mr Fong and Mr Sung did not agree to the closure of the School in 2004/05 and insisted to continue operating the School until all the current students have graduated from it.

34. On 2 November 2003, the EMB officers met with Mr Fong and two other school managers. The parents of all the students (except one) were also present. The absent parent had also sent in written representation. At the meeting, the Chief School Development Officer (North) stated that the EMB would formally give notice of the cessation of grant to the School with effect from September 2004, and the School had to consider whether to cease operation. Mr Fong, the school managers and all the parents present requested the EMB to allow the School to continue operation until the last class of students had graduated.

35. By a letter dated 10 December 2003, the SEM gave notice to the School that the EMB would cease to provide grants to the School as from 1 September 2004.

*III. THE APPLICATION*

36. On 9 March 2004, the applicant applied for leave to judicial review. As a result of the applicant's application for legal aid, the proceedings were stayed. The applicant was eventually granted legal aid. Leave to judicial review was granted on 4 May 2004. On 11 May 2004, the applicant filed the Notice of Motion. On 14 May 2004, the EMB (who was then named as the respondent) applied to set aside the leave granted in relation to the first decision challenged. After a contested hearing, the application was dismissed by a decision handed down on 9 June 2004. The Form 86A was in the meantime amended by naming the Permanent Secretary as the respondent.

37. In the Amended Form 86A, the applicant asks for the following relief:

(1) To restore the right of the School to recruit primary one students.

(2) To quash the decision to cease providing grants to the School.

(3) To allow all the existing students to continue their studies with the School until their graduation.

38. In respect of the last relief, Mr Kwok in his submissions clarifies that the applicant is seeking a declaration that the grants to the School should continue until all the existing students have left the School,

whether upon graduation or upon their securing alternative school placements.

## *IV. THE CHALLENGE TO THE FIRST DECISION*

### *(1) Reasons for the first decision*

39. The first decision challenged by the applicant is that made on 4 July 2002 to exclude the School from the POA School List for 2003/04. The decision was undertaken by the Chief School Development Officer (North). She gave the following reasons for the decision:

(1) Since 1998, the School had a continuous low intake of primary one students. Between 1998/99 and 2001/02, the School was only approved to operate half a class of primary one.

(2) There was a continuous decline in the demand for primary one school places in the school net to which the School belong.

(3) The School was operating combined classes.

(4) There was very little chance that the School would be able to recruit sufficient number of students in the POA exercise to qualify for the operation of primary one class.

(5) To allow the School to participate in the POA exercise would give a false hope to the parents that the School would operate primary one class. If the total parent choices were insufficient to enable the School to operate primary one class, students who had chosen the School in the DP stage would have to be transferred to other schools.

(6) The School was not operating a full curriculum since it had no primary one class in 2002/03.

(7) The supervisor of the School had raised no objection at the meeting on 28 May 2002 when it was mentioned that the School would not participate in the POA 2003 exercise.

*(2) The applicant's arguments*

40. The applicant challenges the first decision on only one ground; namely, there was no or no proper consultation before the decision was made to exclude the School from the POA 2003 School List. It is submitted that the School had not been given proper and adequate prior notice to enable it to make representation. It is pointed out exclusion from the POA School List is a matter that carries grave consequences for schools in that it will impact upon their ability to survive. Despite that, there was throughout no written communication. The quality of communication is thus said to be a poor one. The oral communication to the former principal, whom the Education Department officers knew was about to retire, serves no purpose since he had no practical interest in the matter. The communication to the supervisor was equally unsatisfactory in that the 28 May 2002 meeting was to deal with a wholly unrelated issue.

*(3) The respondent's arguments*

41. For the respondent, it is argued that it was entirely reasonable for the Education Department to have proceeded in the way it did since it was given to understand that the School agreed to or had no objection to being excluded from the POA School List. It is also said that there was

nothing unfair in the process in that the School had no legal right to operate primary one class in 2003/04, that the School could not have expected to be allowed to recruit students for 2003/04 when it did not have primary one class in 2002/03, and that the School had been informed of the Education Department's intention in May 2002, but had not requested to be put on the School List. It is pointed out that the applicant, being a parent, can have no expectation of being consulted on the matter. It is further submitted that subsequent to July 2002, there had been genuine opportunity for the School to make representations such that the process as a whole satisfies the requirement of fairness and the ultimate decision made is a fair one. Finally, it is also submitted that no relief should be granted since it will serve no useful or practical purpose.

*(4) The issues*

42. Broadly speaking, the challenge to the first decision involves three issues:

(1) Whether there had been proper consultation before the first decision was made;

(2) Whether the decision process as a whole satisfies the requirements of fairness; and

(3) Whether the court should exercise its discretion to grant the relief sought.

*(5) No or no proper consultations*

43. There can be no doubt that the exclusion of a school from the POA School List and in turn the POA exercise is a matter of great

importance to any primary school that has been participating in the POA exercise. To say the least, it means that the government will not provide the school with funds to operate primary one class in the relevant school year. More likely than not, the school will then not have a primary one class, hence not a full curriculum, thereby becoming less popular with and attractive to parents. Although the decision to exclude a school from the POA School List and the POA exercise is made on an annual basis, it carries far-reaching implications for the school concerned because it puts the ability of the school to continue operation in the long term at risk.

44. In the case of the School, which had for some years had difficulties in recruiting primary one students, the consequences and implications of being excluded from the POA School List and the POA exercise is even more serious. As in the case of other government and aided primary schools, the POA exercise is the major occasion and opportunity to recruit primary one students. The severity of the decision is not in any way lessened by the fact that the School had not been operating primary one class in the year 2002/03. While the School was not operating a full curriculum thereby adversely affecting its popularity, the decision effectively confirms the cessation of the School in time.

45. Indeed, I do not understand the respondent to be disputing that the decision to exclude the School from the POA School List and the POA exercise has an impact on the continued operation of the School and is therefore an important one for the School as a whole. It is therefore understandable that the School and the applicant, being one of the parents, would take exception with the way in which the initial intention and the eventual decision of the Education Department were communicated; hence

the complaint that there had been no proper consultation before the decision was made in July 2002.

46. The respondent's evidence shows that the outgoing principal of the School was informed by telephone of the Education Department's intention to exclude the School from the POA 2003 School List, and that he had shown no objection. It is not clear from the evidence whether the School Development Officer was calling to consult the principal's views or she was asking the principal to relate the message to the school management, including the supervisor, the school managers and the sponsoring body, and to gather their views. All she said in the affirmation is that she was conveying a notification of the Department's intention. Assuming that the call was to seek the views of the principal, it must nevertheless be plain to the responsible officers that on such an important matter, it is insufficient to consult only the principal, quite apart from the fact that the principal was about to retire.

47. As to the 28 May 2002 meeting with the supervisor, it is not set up to deal with the exclusion of the School from the POA School List and the POA exercise. It was by chance that the matter came to be mentioned. The matter was not brought up for the purpose of informing the supervisor of the intention and/or seeking his views on it. It is unfortunate that the Education Department should attach so much weight to the response of the supervisor on the occasion and was led to believe that the School agreed or did not object to its being excluded from the POA School List and the POA exercise for 2003/04. On the assumption that Mr Sung did utter the response that he would rather let the school close, it must be plain that it was an emotive remark made at a time when

he was upset about the school management. It must be doubtful whether this could be taken as an indication of the supervisor agreeing to or having no objection to the School being excluded from participating in the POA.

48. It is correct that the School had made no representation to the Education Department on the matter in the period from May to September 2002. The question is whether this can be taken to be an indication that the School agreed or did not object to the exclusion. It is the applicant's case that the School management was unaware of the telephone conversation with the outgoing principal. As noted above, the evidence does not show that the outgoing principal had been asked to relate the Department's intention to the school management. The evidence also does not show that the school managers and/or the school sponsoring body had been informed of the intended exclusion. On the respondent's evidence, this was mentioned to the supervisor at the 28 May 2002 meeting. But given that he was having a dispute with the school managers, it could not be assumed or expected that he would pass on the information to the school managers. In my view, the Department could only confidently act on the silence of the School in the period leading up to the making of the decision as an indication of no objection if it had reasonable grounds for believing that the message had or would have been properly communicated to the School management authority, and not just to Mr Sung.

49. The evidence shows that it has been the practice of the Department/ Bureau to communicate orally the intention to exclude a school from the POA School List, and not to give any formal notification of the eventual decision if no objection is put up. I do not propose to

make any general observation on the propriety of the practice having regard to the importance of the intended decision to the schools concerned. However, the adoption and reliance of this practice in the present case is obviously inapt in view of the management problem within the School, a matter known to the officers of the Department at the time. For the reasons set out in the preceding paragraphs, the Department could not be reasonably certain that the school management was fully aware of the intention to exclude the School from the POA School List. Further, the fact that the School did not make any representation in May and June 2002 should not have been taken as an indication that the School agreed to or did not object to the exclusion.

50. For any consultation to be proper, it must be undertaken at a time when proposals are still at a formative stage; sufficient reasons for the proposal must be given to allow those consulted to give intelligent consideration and response; adequate time must be given for consideration and response; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v. Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168, cited in *R v. North and East Devon HA, Ex p Coughlan* [2001] QB 213 at 258.

51. I am of the view that, to the extent that the School is affected by and has a legitimate interest in the decision to exclude it from the POA 2003 School List and the POA exercise, the School ought in the interests of fairness to have been consulted. This is consistent with the practice of the Department/ Bureau to communicate an intended exclusion and to consider any objections made before finalizing the compilation of the POA School List. In the present case, however, the steps taken by the

Education Department before the decision was made in July 2002 to exclude the School from the POA 2003 School List hardly met the criteria formulated in *R v. Brent London Borough Council, Ex p Gunning*. The School had not been afforded a proper opportunity to take a considered view and to make representations before the decision was taken.

*(6) The requirements of fairness*

52. Notwithstanding this, I consider that the applicant's challenge to the first decision cannot succeed for the reasons appearing below.

53. Firstly, Mr Yu SC submits, and I agree, that in considering whether the requirements of fairness have been met in this case, the Court should consider whether the overall procedure is a fair one and in the light of the purposes and objectives of consultation.

54. The applicant's challenge to the first decision falls within the broad ground of procedural impropriety. The underlying concept is the duty of a decision maker to act fairly when it has to make a decision that will affect the rights of individuals. The requirements of justice will vary depending on the character of the decision-making body, the nature of the decision and the statutory or other framework in which it operates: *Lloyd v. McMahon* [1987] AC 625, 702.

55. In the context of the requirement to consult and hear representations, it has been pointed out by Lord Mustill in *R v. Home Secretary ex parte Doody* [1994] AC 531 at 560 that:

> "Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both."

56. In *R v. London Borough of Barnet ex parte B* [1994] 1 FLR 592, the applicants applied to judicial review the decision of the local council to close a nursery school which they were attending. The parents of the children attending the school were not informed of the proposal to close the school before the council made the decision and communicated it to them. After the decision was communicated, the council proposed to and did conduct 3 stages of consultation. Eventually the council confirmed its earlier decision despite the parents' objections. In dealing with the applicants' complaint that there was no or no adequate consultation, Auld J (at 606D-E) was of the view that the question of whether the council behaved unfairly in failing to consult or to consult adequately before it made the decision in the first place, is superseded by the question whether its later conduct, including the subsequent consultation, was unfair. He stated that: "Where the court is concerned with the procedures and decision of one body, … the test, … , is whether the ultimate decision is a fair one reached by fair methods".

57. It is not in dispute that in the 18 September 2002 meeting, the Secretary for Education and Manpower had agreed to receive and consider representations from schools including the School. Thereafter, the School did through the principal make written representations on the matter. It is also not in dispute that the Education Department had duly considered the representations made, as reflected in the reasons given for

maintaining the July decision to exclude the School from the POA School List and the POA exercise.

58. When approaching the first decision on the broad consideration of fairness, the court should also have regard to the conduct of the Department since September 2002 and leading to the decision in December 2002 to maintain the July 2002 decision. The School was afforded an opportunity to make representations to the Department on and to draw to its attention, information about the School and its students, and the perceived impact of the decision upon the School and parents and students living in the village. Although in the end it decided to maintain its earlier decision, the Department had been prepared to re-consider its decision. I agree with Mr Yu SC that this was a round of genuine and fair consultation.

59. Mr Kwok does not quarrel with this. He however points out that by the time this was done, the decision had been made and implemented, and the consultation served no useful purpose. While I accept that it would have been much better if the consultation took place before the July decision was made, I will not go so far as saying that the consultation carried out in September had no utility. It was open to the School to, and it did, make representations with a view to persuading the Department to change the July 2002 decision. Although by then the DP stage of the POA exercise had been launched, the CA stage had yet to commence. If, after considering the representations made, the Department were persuaded to vary the July decision, the School would still be able to participate in the CA stage with an amendment to the POA School List.

60. In the circumstances, having regard to the process as a whole, it cannot be said that the requirements of fairness has not been attained.

*(7) Futility of the relief sought*

61. Secondly, the grant of remedy in a judicial review application is discretion. The court will not grant relief if it serves no practical or useful purpose: see Fordham, *Judicial Review Handbook*, 3rd edition (2001) para. 4.5 at pp.89-91. The School, being a school operating combined classes, will not be given grants to operate primary one class under the Consolidation Policy introduced after mid-2003. It has thus become academic whether the decision to exclude the School from the POA School List is vitiated. At the same time, the applicant is now only asking that government aids to the School should be continued until the existing students have graduated or secured alternative school placements. Whether the decision to exclude the School from the POA School List should be quashed has therefore ceased to have any practical purpose. In the premises, the remedy of judicial review ought not, as a matter of discretion, to be granted.

62. Accordingly, the challenge to the first decision fails.

*V. THE CHALLENGE TO THE SECOND DECISION*

*(1) The Permanent Secretary's decision*

63. The second decision challenged was that made on 10 December 2003 to cease to provide grants to the School with effect from 1 September 2004. The decision was undertaken by the Permanent Secretary personally. In her affirmation, the Permanent Secretary explained, in general, that before making the decision to apply the Consolidation Policy, she had carefully considered the views expressed during the meetings with the school managers, parents and heads of the affected schools held in October and November 2003, and the interests of the students *vis-à-vis* those of the school managers, teachers and principals. In the case of the School, the EMB officer had reported to her the views of the School and the parents received at the meetings on 6 October and 2 November 2003. She did not find the reasons given to be convincing enough to justify exceptional treatment. She therefore decided that the Consolidation Policy should apply to the School.

*(2) The 19-9-02 Letter and the 27-9-02 Letter*

64. The applicant's challenge to the second decision is based on the 27-9-02 Letter from the then Director of Education. The letter was written at a time when the School was seeking to have the School put back to the POA School List. It was written in reply to the 19-9-02 Letter from the principal. In a bid to restore the School to the POA School List, the principal made four main points in the 19-9-02 Letter about the location of the School, the importance of the School to its students and the children in the district and the adverse effect on the students and parents. The relevant part of the letter states as follows:

"一．本校所服務之地區地理環境偏僻，交通不便

本校所服務之地區四面環山，與上水市中心相隔一高爾夫球場，距離約 6 公里，步行往上水，起碼 1 小時。交通不便，班次疏落，77K 巴士(元朗往祥華邨)20 分鐘一班、57K 專綫小巴(蕉徑往上水廣場)30 分鐘一班，即使無須候車順利上車，車程亦需時約 10 分鐘。

二．本校是地區內唯一的小學

目前全校人數 64 人，其中 52 人居住本校附近的村落，即使是其他區域的學生，他們之前也曾居住在學校附近村落，祇因遷居上樓所致。

由數字分析可見本校所服務的學生 80%是區內兒童，若將本校與其他收取跨境學生的學校相提並論，可謂謬矣。

三．違反教育政策

根據本校調查結果顯示現時就讀本校的學生，其弟或妹處於適齡報讀 03/04 年度 1 年級的約有六七人，若不許我校收取一年級學生，豈不是要手足分離，違反教育署製訂的教育政策：「安排兄妹同讀一校」。

至今本校已收得兩份報讀一年級的報名表，可見本校確有其需要。

四．無端挑起家長情緒不滿

與本校距離最接近的小學是彩圍邨的學校，兩校之間相距約 4 公里。若本校結束，所有家長便須負擔無端額外支出，如保姆車費、午餐費；安排人手接送子女，擔憂子女放學後的街頭活動等，對家庭經濟、家庭生活、人手安排等造成沉重負擔和不便。須知居住本地區的家庭之一般收入微薄且不穩定，若因此而引來對抗，豈不是陷教育署、特區政府於不義。”

65. In the 27-9-02 Letter, the Director of Education gave four reasons for refusing the School’s request for special consideration. In substance, the reasons dealt with the four points raised in the 19-9-02 Letter on a point-by-point basis as follows:

“1. 貴校所處位置附近的交通尚算方便，學生可乘搭公共交通工具上學。

2. 現就讀貴校的學生大部份居住學校附近，本署同意他們應繼續在貴校升讀。但依據過往數字，報讀貴校小一年級的學生近年極少，這顯示了學生來源不足以支持貴校開辦小一班級。

3. 本署預計在 2003/04 學年區內各年級學位均供應充裕。對於家長要求安排兄弟 / 姊妹同讀一校以方便照顧，本署定會盡力協助，以解決家長的困難。

4. 若有家庭由於入學問題引起經濟、家庭生活或人手安排等困難。請你通知家長致電 2639 4842 北區學校發展組呂麥玉琼女士聯絡，以便提供適當協助。”

*(3) The applicant's case*

66. The applicant's case is based on the first sentence in point 2 of the 27-9-02 Letter, namely, "現就讀貴校的學生大部份居住學校附近，本署同意他們應繼續在貴校升讀。". Translated into English, it says: "The majority of the students now studying with your school live in the vicinity of the school, the Department agrees that they should continue to further their studies with your school".

67. The applicant contends that by this statement, the Director of Education had represented and promised the students and parents of the School that the existing students could continue their study with the School until they graduate. It is argued that this creates a legitimate expectation on the part of the students and their parents that the School will continue to receive grants for its operation until the existing students graduate. In her affirmation leading the application, the applicant states that she, the School and the other parents all genuinely believe that the Department agrees and allows the existing students to continue studying in the School until they

graduate (本人，建德學校及其他家長都真誠相信該局同意及容許我們現正在建德學校就讀的學生，可以在建德學校繼續升讀，直至畢業。).

68. The applicant complains that the Permanent Secretary did not take their legitimate expectation, being a relevant consideration, into account when she made the decision to cease grants to the School effective from 1 September 2004. On this basis, the applicant says that the decision should be quashed and seeks a declaration that the School should continue to be provided with grants until all its existing students graduate or secure alternative primary school places.

*(4) The respondent's arguments*

69. For the respondent, it is argued that the 27-9-02 Letter did not give rise to a clear and unambiguous promise when considered in the context and having regard to the conduct of the applicant. Even if there was a clear and unambiguous promise, the applicant has not made out a case of reliance on the promise as would entitle her to relief. It is further submitted that the case does not involve any question of fundamental human rights, so that in view of the consultations that had been undertaken and the alternatives available to the applicant's daughter, there is no abuse of power that merits the court's intervention.

*(5) The doctrine of substantive legitimate expectation*

70. In *R v. North and East Devon HA, Ex p Coughlan* para. 57 at 241-2, Lord Woolf MR, handing down the judgment of the Court of Appeal, considers there are at least three possible outcomes where an

applicant makes a challenge on breach of legitimate expectation as follows:

(1) The court may decide that the authority is only required to bear in mind its previous policy or representation, giving it the weight it thinks right, but no more, before deciding whether to change course. In such a case, the court may only review the decision on *Wednesbury* ground.

(2) The court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. The court will in such a case require the opportunity of consultation be given unless there is an overriding reason for resiling from it, in which case the court will judge the adequacy of the reason given, taking into account the requirements of fairness.

(3) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, the court will in a proper case decided whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.

71. It is the third situation of substantive legitimate expectation that the applicant relies upon. In *Ng Siu Tung & Others v. Director of Immigration* (2002) 5 HKCFA 1, the Court of Final Appeal held that the doctrine of substantive legitimate expectation is part of the administrative law of Hong Kong. In the judgment of the majority (paras.91-99 at pp.41-43), the following general points about the doctrine were made:

(1) Generally speaking, a legitimate expectation arises as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority.

(2) Although it is essential that the government and the relevant government agency remain free to change its policy, the

adoption of a new policy does not relieve a decision-maker from his duty to take account of a legitimate expectation.

(3) The doctrine as developed comprises four aspects:

(i) The law requires that a legitimate expectation arising from a promise or representation be properly taken into account in the decision-making process so long as to do so falls within the power, statutory or otherwise, of the decision-maker.

(ii) Unless there are reasons recognised by law for not giving effect to legitimate expectations, then effect should be given to them. Fairness also requires that, if effect is not given to the expectation, then the decision-maker should express its reasons so that they may be tested by the court when the decision is challenged.

(iii) Even if the decision involves the making of a political choice by reference to policy considerations, the decision-maker must make the choice in the light of the legitimate expectation of the parties

(iv) If the court does not follow the requirement in (iii) above, the decision will be vitiated by reason of failure to take account of a relevant consideration. It is only in exceptional case that the court will be satisfied that the failure to do so has not affected the decision. But once the court is satisfied that this was the case, the decision will not be quashed.

72. As to what may give rise to a legitimate expectation, the Court of Final Appeal held that (paras.101-104 at pp.43-45):

(1) It is not necessary that the representation should be express. In appropriate cases, a legitimate expectation can be based on an implied representation.

(2) To support a legitimate expectation, the representation must be clear and unambiguous.

(3) Where a representation is reasonably susceptible of competing constructions, the correct approach is to accept the

interpretation applied by the public authority, subject to the application of the *Wednesbury* unreasonableness test.

(4) To be legitimate, the expectation must be reasonable in the light of the official conduct which is said to have given rise to the expectation. This depends on the conduct of the public authority, what it had committed itself to as well as what the applicant factually expected and what he is entitled to expect.

73. Bokhary PJ (para.360 at p.108) further observes that:

"As a proposition of general application, a representation must be unambiguous and unqualified if it is to give rise to a legitimate expectation. But where representations are addressed to a wide audience including some quite unsophisticated persons, the courts should not be astute to find ambiguity or qualification. With fairness as the touchstone, the courts should look at the real impact of the representation."

74. The words used have to be understood in the context in which the representation was expressed and the circumstances leading to the making of the representation: *R v. Gaming Board of Great Britain, ex p. Kingsley* (16.10.1995) LexisNexis Transcript.

75. An expectation will not be regarded as reasonable or legitimate if the applicant could have foreseen that the subject matter of the representation was likely to alter, or that it would not have been respected by the relevant agency, or that the applicant knew that the representor did not intend his statements to create an expectation: *Craig, Administrative Law* 5th ed. (2003) p.651; see also *R v. Gaming Board of Great Britain, ex p. Kingsley, op cit*.

76. On the question of detrimental reliance, the authorities referred to by counsel suggest that detrimental reliance will normally be required in order for an applicant to show that it would be unlawful to go back on a representation, but it is not a condition precedent to the enforcement of a legitimate expectation: *R. v. Secretary of State for Education and Employment, ex parte Begbie* [2000] 1WLR 1115, *R v. The London Borough of Newham, and Manik Bibi and Ataya Al-Nashed* [2002] 1WLR 237, paras.28-31. It has been pointed out that it is very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation: *Begbie* at 1123H. It is, however, recognized that there may be cases where there is reliance, without measurable detriment, and it may still be unfair to thwart a legitimate expectation in such circumstances: *Bibi* para.31.

77. In *Ng Siu Tung*, the majority of the Court of Final Appeal did not find it necessary to resolve whether detrimental reliance was required to ground a legitimate expectation since the representations in question were found to be calculated to induce reliance and it was to be assumed that they had this effect (para.110 at p.46).

78. Bokhary PJ in his partially dissenting judgment made the following points relating to an applicant's knowledge of the representation and the requirement of detrimental reliance (paras.355-360 at pp.106-108):

(1) If a person is in a class to which a representation is directed, the fact that he was unaware of it until after the decision disappointing it was made ought not to deprive him of the benefit of the representation. Legitimate expectation in this context does not depend upon the knowledge and state of mind of the individual concerned. A person is not to be

denied enforcement of a legitimate expectation of his class merely because he only learned of it after the decision was made.

(2) The case for enforcing a legitimate expectation is particularly strong where a person has altered his position in reliance on that legitimate expectation so that he would suffer detriment if the expectation is not fulfilled. But detrimental reliance is not generally essential.

(3) There will be exceptional situations in which detrimental reliance is required in order to succeed on legitimate expectation grounds. Thus in the exceptional case of *R v. Secretary for State for Education and Employment, ex p B (A Minor)* [2000] 1 WLR 1115, a quick correction by an executive of a misrepresentation of its policy, made inadvertently, was held not to amount to an abuse of power.

*(6) The issues*

79. It must be noted at the outset that these proceedings do not involve any challenge to the Consolidation Policy. The applicant has not made such a challenge. The merits or demerits of the rationale underlying the Policy is not a matter for the court, whose role in judicial review proceedings is supervisory. The court is only concerned with the process whereby the decision to apply the Policy came to be made. Its task is to ensure that the power to apply policy was not abused by unfairly frustrating the individual's legitimate expectations. In this regard, there are three broad issues that the court has to consider in the present case:

(1) Whether there is a clear and unambiguous representation giving rise to a legitimate expectation;

(2) Whether the applicant is required to show she has relied on the representation to her detriment, and if so, whether she has made out a case of detrimental reliance; and

(3) Whether there is unfairness and abuse of power that merits the court's intervention.

*(7) Clear and unambiguous representation*

80. As the authorities had established, when considering whether there has been a clear and unambiguous representation capable of giving rise to a legitimate expectation, both the words used and the context in which they came to be expressed have to be considered. It is therefore necessary to examine the context and circumstances in which the words now relied upon by the applicant came to be made.

81. The 27-9-02 Letter was written in reply to the request to have the School restored to the POA School List. As noted above, it deals with the four points articulated in the 19-9-02 Letter on a point-by-point basis. Two things were said under point 2 by the principal in his letter. The first is that the School is the only primary school in the district where it is situated, and the second is that, unlike other schools that recruit students from across the border, 80% of the students in the School come from the district. In reply to this, point 2 of the 27-9-02 Letter says three things. It firstly acknowledges that the majority of the students of the School live in the nearby areas of the School. It then goes on to say that the Department agrees that the existing students should continue to further their studies with the School. Thirdly, it says that past statistics shows that the School does not have sufficient intake of students to enable it to operate primary one class. The crux of this part of the applicant's application turns on the second statement.

82. Plainly, the short point that the Department was making under point 2 of the 27-9-02 Letter is that the School had not been able to recruit sufficient number of primary one students. One may think that the point could have been made without saying that the Department agrees that the existing students should continue to further their studies with the School. In my view, the statement is not superfluous and is not made thoughtlessly. Under the policy and practice associated with the POA system applicable at the time, schools that had not been allowed to operate primary one class would be excluded from the POA School List and the POA exercise if they had no objections or if the objections were not upheld. As analyzed above, unless there were changes in circumstances, schools excluded from the POA exercise would cease operation in a few years' time with the graduation of their last class of students. Some of the rural schools that were also objecting to being excluded from the POA School List 2003/04 in about the same period had made specific reference to this scenario. It can be seen from the correspondence exhibited by the respondent that these schools had argued in very strong language that their exclusion from the POA School List implied the cessation of their operations, to which they strenuously opposed.

83. Clearly, the statement that the Department agrees that the existing students should continue their studies with the School is a reference to the above practice or policy, which was in place before the adoption of the Consolidation Policy. But for the subsequent implementation of the Consolidation Policy, the School would have continued to operate, though it would have no new classes and would in time cease operation when the last class of existing students graduate. This is directly relevant to the principal's point that the School is the only

school serving the district and 80% of its students came from the district. The Department was affirming the School's role *vis-à-vis* the students coming from its district and confirming that the role and its existing students would not be affected by the School's exclusion from the School List.

84. It is argued that the 27-9-02 Letter was to communicate and explain a confirmation of the first decision, there was no conscious decision to give a promise and the words used do not constitute a promise. It is true that in the 19-9-02 Letter, the School did not seek a promise that its existing students could continue their studies with the School until they graduate. It is also the case that the 27-9-02 Letter was written in connection with the decision to exclude the School from the POA School List. But it would not be right to view the first decision and the 27-9-02 Letter in isolation. More importantly, when read in the context and against the relevant circumstances, it becomes clear that in stating that the Department agrees that the existing students should continue their studies with the School, the Department was addressing the needs of the students in the district served by the School and the School's role *vis-à-vis* them. It was not an unwittingly made statement. Neither was it a mere expression of agreeing with the sentiments expressed by the principal that most of the students live near the School. The Department was making a conscious statement confirming that the students could continue their studies with the School, unaffected by the decision to exclude the School from the POA School List. The Department was committing itself to the practice or policy then in use, namely, the School could not participate in the POA exercise and would have no primary one class, and would cease operation upon the graduation of the last class of students.

85. It is also argued that the words used were not unequivocal: the statement may mean that the existing students could continue in the following school year of 2003/04; it may also mean that they could continue until there is a change of policy. I do not agree. It is apt to recall the point Bokhary PJ made in *Ng Siu Tung* that the court should not be astute to find ambiguity in the case of an unsophisticated audience, and should look at the impact of the representation. To a reasonable parent or student of the School, the words "繼續在貴校升讀" naturally mean continue studying with the School until graduation. He would not find the meaning unequivocal, and certainly not in the sense contended by the respondent. Further, there is no ambiguity when the words were read in context and considered in the light of the practice or policy associated with the POA system that was in place at the time, and as mentioned above.

86. It is further argued that the 27-9-02 Letter does not contain an express promise that the Department would not cease providing grants to the School, and that it would be unfair to hold that such a promise had been given if no one had thought of giving any commitment about the giving of grants. In my view, the provision of grants must always be a matter within the considerations of the Department. After all, the School is an aided school. The decision to exclude the School from the POA School List is also closely related to the issue of whether the School should be given grants to operate primary one class. In agreeing that the students should continue their studies with the School, the Department by necessary implication must also be confirming that grants would be made available to the School for it to continue operation. There is no unfairness in holding the Department had so committed itself.

87. In summary, I am of the view that the Department had by the 27-9-02 Letter made a clear and unambiguous representation that the existing students of the School could continue their studies with the School until they graduate, and had made a binding assurance to the students and parents that the School would be given grants to continue operation until its existing students graduate.

*(8) Detrimental reliance*

88. As noted above, it would appear from the authorities that detrimental reliance is an important aspect of the law on legitimate expectation, and will normally be required in order to show that it would be unlawful for a public authority to go back on its representation. This has been explained on the basis that "if the individual has suffered no hardship, there is no reason based on legal certainty to hold the agency to its representation": *Craig* at p.652.

89. In the present case, the 27-9-02 Letter was not addressed to the applicant. The evidence filed does not show when it came to the attention of the applicant. At the meeting with the representatives from the EMB to discuss the cessation of grants to the School, although the parents had requested that the existing students be allowed to continue their studies with the School, no one had made any reference to the 27-9-02 Letter. On the facts, the Department had not made the representation to the applicant.

90. In *R v. Ministry of Defence, ex parte Walker* [2000] 1WLR 806, the applicant, who sustained severe injury when stationed in Bosnia

as part of the United Nations Peace-keeping Force, applied to judicial review the decision of the ministry rejecting his claim for compensation under the Criminal Injuries Compensation (Overseas) Scheme. He sought to rely on a letter circulated within the ministry in which it was stated that the aim of the scheme was to provide compensation for members of the armed forces and their dependants who were victims of crimes of violence while serving overseas, as giving rise to a legitimate expectation that he would be compensated under the scheme. His appeal against the dismissal of the application was dismissed by the House of Lords on the ground that he was unaware of the policy of the ministry in administering the scheme, the only legitimate expectation he could have was that the ministry would apply whatever its policy was at the relevant time. Both Lord Slynn of Hadley (at 813D) and Lord Hoffmann (at 816A) pointed out that the applicant had not seen the letter in question and the ministry had made no express representation to him that he could be paid compensation under the scheme, or that he had relied on any representation as to compensation in going to Bosnia that would entitle him to say that his legitimate expectation had been frustrated.

91. For the respondent, it is therefore contended that if the applicant knew nothing about the 27-9-02 Letter before the second decision was made, there was no reliance on it and no detriment suffered, such that there can be no unfairness or abuse of power to go back on the representation in the letter.

92. The applicant, on the other hand, argues that the second decision in implementing the Consolidation Policy represents a departure from an established policy, in which case reliance is not essential. The

applicant draws support from the judgment of the English Court of Appeal in *Bibi* (para.30) in which a passage from *Craig* (at p. 652) was cited with approval. It says as follows:

> "Where an agency seeks to depart from an established policy in relation to a particular person detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such." (emphasis added)

93. In making this argument, the applicant is advancing a case different from that stated in the Amended Form 86A and the supporting affirmation. The applicant appears to be saying that she expects the EMB would apply the policy applicable before the introduction of the Consolidation Policy. This is different from the representation that the existing students of the School could continue studying with the School until they graduate.

94. Quite apart this, I am of the view that the exception given by *Craig* does not assist the applicant. The emphasis of the example given by *Craig* is consistency and equality of treatment by public authority, so that if an authority decides to treat an individual differently by departing from an established policy, then detrimental reliance should not be required.

95. In the present case, although the Consolidation Policy represents a change of government policy in providing grants to government and aided primary schools, the Permanent Secretary, in deciding to apply the Consolidation Policy to the School, was not seeking

to depart from an existing or established policy in relation to the School in particular.

96. As said in *Bibi* (para.31), "the significance of reliance and of consequential detriment is factual, not legal". In *Begbie* (at 1124C), Peter Gibson LJ, citing from *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5th ed. (1995), p.574 para.13-030, also observed that detrimental reliance is relevant as providing evidence of the existence or extent of an expectation.

97. The 27-9-02 Letter and the representation in it was addressed specifically to the School, not to the applicant or the parents in general. The evidence does not show that the applicant was aware of it or its contents, or had relied on it to her detriment. In the circumstances, it cannot be said that she has derived any understanding from the representation or that she has been led to believe that the EMB would be bound by the representation in the letter. There is therefore no factual basis for any expectation to arise.

98. Mr Kwok has argued that it would be difficult for the applicant, being an unsophisticated and less resourceful parent, to show any concrete detriment. It is pointed out that she and her daughter have not much choice other than attending the School. As observed in *Bibi* (paras.53-55), the fact that a person has not changed his position after a promise was made does not mean that he has not relied on the promise. It may be because he lacks any means of escape. Had it been shown that the applicant knew of the 27-9-02 Letter and had the legitimacy of the expectation been proved, I would be inclined to agree that this is a case

where the absence of concrete detriment should not have defeated an expectation legitimately held.

*(9) Unfairness and abuse of power*

99. It would follow from my conclusion that no expectation exists factually that it is not necessary to resolve the issue of unfairness and abuse of power. I wish only to deal briefly with two points.

100. The first is in relation to the respondent's argument that even if the applicant has a legitimate expectation, it had not been unfairly frustrated and there was no abuse of power having regard to the consultations that had taken place before the second decision was made, that no fundamental human rights were involved and the uncertainties over the continued operation of the School in the light of the small number of remaining students and teachers.

101. I accept that before the second decision was made, the principal, supervisor, school managers and the parents, including the applicant, had an opportunity to and did express their views on the cessation of grants. I also accept that the present case does not involve questions of fundamental human rights in the sense that the applicant's daughter is not being denied free and proper primary education. This of course does not mean that the right to attend a school of one's own choice is a trivial matter. There is thus considerable force in the argument that even if the second decision was made in disregard of an expectation justifiably held, it is in the circumstances not so unfair as to amount to an abuse of power.

102. The second point concerns the court's discretion to grant relief. The applicant is now asking for a declaration in a limited form. In my view, even if the applicant were successful in her challenge to the second decision, the more appropriate relief is to remit the matter for reconsideration by the Permanent Secretary in the light of the applicant's legitimate expectation. This is because the enforcement of the legitimate expectation is contingent upon a number of matters such as the number of students and teachers who will be remaining with the School, the time needed for the remaining students to find suitable alternative school placed, and whether it is viable from an educational perspective to continue the operation of the School. The weighing of these considerations falls within the remit of the Permanent Secretary.

## *VI. CONCLUSION*

103. For the reasons set out above, the applicant's application for judicial review is dismissed. Applying the normal practice of costs follows event, I also make an order *nisi* that the applicant pays the respondent the costs of this application, to be taxed if not agreed.

(C Chu)

Judge of the Court of First Instance
High Court

Mr Kwok Sui Hay instructed by Messrs Hastings & Co. for the applicant.

Mr Benjamin Yu SC and Miss Grace Chow instructed by the Department of Justice for the respondent.

A5003

**Michaelmas Term**
**[2014] UKSC 56**
*On appeal from: [2013] EWCA Civ 116*

# JUDGMENT

# R (on the application of Moseley (in substitution of Stirling Deceased)) (AP) (Appellant)
***v***
# London Borough of Haringey (Respondent)

**before**

**Lady Hale, Deputy President**
**Lord Kerr**
**Lord Clarke**
**Lord Wilson**
**Lord Reed**

## JUDGMENT GIVEN ON

## 29 October 2014

**Heard on 19 June 2014**

| *Appellant* | *Respondent* |
| --- | --- |
| Ian Wise QC<br>Jamie Burton<br>Samuel Jacobs<br>(Instructed by Irwin Mitchell LLP) | Clive Sheldon QC<br>Heather Emmerson<br><br>(Instructed by Legal Services, The London Borough of Haringey) |

**LORD WILSON (with whom Lord Kerr agrees)**

*Introduction*

1. When Parliament requires a local authority to consult interested persons before making a decision which would potentially affect all of its inhabitants, what are the ingredients of the requisite consultation?

2. Until 1 April 2013 there was a scheme in England for the payment of Council Tax Benefit ("CTB") for the relief, in whole or in part, of certain persons from their annual obligation to pay council tax. The scheme was made by the Department for Work and Pensions and the duty of local authorities was only to operate it. From 1 April 2013, however, local authorities were required to operate a new scheme, entitled a Council Tax Reduction Scheme ("CTRS"), which they were required to have made for themselves. Before making a CTRS, local authorities were required to consult interested persons on a draft of it. Between August and November 2012 the London Borough of Haringey ("Haringey") purported to consult interested persons on its draft CTRS, following which it made the scheme in substantial accordance with its draft.

3. In these proceedings two single mothers, who were resident in Haringey and who until 1 April 2013 had been in receipt of what I will describe as full CTB (by which I mean at a level which had relieved them entirely of their obligation to pay council tax), applied for judicial review of the lawfulness of the consultation which Haringey had purported to conduct in relation to its draft CTRS. The women asked the court to quash the decision which on 17 January 2013 Haringey had made in the light of the consultation; and my reference in paragraph 8 below to the "default scheme" will explain why the quashing of the decision would have been very much in their interests. On 7 February 2013 Underhill J dismissed their application: [2013] EWHC 252 (Admin); [2013] ACD 62. The judge had allowed them to be anonymised as "M" and "S". The latter appealed to the Court of Appeal, which ruled that she was not entitled to anonymity and should be referred to by name, Ms Stirling. On 12 February 2013, with astonishing alacrity referable no doubt to the deadline of 1 April 2013, the court heard the appeal. On 22 February 2013, by a judgment of Sullivan LJ with which Sir Terence Etherton, the Chancellor of the High Court, agreed, and by a judgment of Pitchford LJ in which he disagreed with one aspect of the reasoning of Sullivan LJ but concurred in the proposed result, the court dismissed her appeal: [2013] EWCA Civ 116; [2013] PTSR 1285. Ms Stirling appealed to this court

against the dismissal of her appeal but unfortunately she became ill and unable to give instructions, with the result that, by consent, the court substituted Ms Moseley as the appellant; and since then, sadly, Ms Stirling has died. Like the other two women, Ms Moseley is a single mother, resident in Haringey, who until 1 April 2013 had been in receipt of full CTB.

*The Surrounding Facts*

4. For the period prior to 1 April 2013 a means-tested scheme set by central government identified those entitled to CTB. Local authorities were obliged to apply it to residents in their area. Although reference is conveniently made to payment of CTB, it was not, in the usual sense of that word, paid to those entitled to it. Instead it provided them with a credit, in whole or in part, against what they would otherwise owe to their local authority in respect of council tax. Central government reimbursed local authorities, pound for pound, for what they forewent as a result of being obliged to grant the benefit.

5. In the final year in which it was payable, namely the year to 1 April 2013, about 36,000 households in Haringey, namely about one third of all of its households, were entitled to CTB. Of those, 25,560 were entitled to full CTB.

6. In its Spending Review back in 2010 central government announced that, as part of its programme for reduction of the national deficit, it would from April 2013 transfer to each local authority the responsibility for making, as well as for operating, a scheme for providing relief from council tax; and that in 2013-2014 the reimbursement by central government to each local authority in respect of whatever it provided by way of relief from council tax would be fixed at about 90% of the amount which the government would have paid to it in that regard in 2012-2013.

7. Section 33(1)(e) of the Welfare Reform Act 2012 duly abolished CTB with effect from 1 April 2013. Section 13(A)(2) of the Local Government Finance Act 1992 ("the 1992 Act"), as substituted by section 10(1) of the Local Government Finance Act 2012 ("the 2012 Act"), duly obliged each local authority to make a CTRS for those whom it considered to be in financial need.

8. Schedule 1A to the 1992 Act ["the schedule"], which was added by Paragraph 1 of Schedule 4(1) to the 2012 Act and given effect by section 13A(3) of that Act, made provisions about a CTRS. Paragraph 2 of the schedule, together with regulations made under subparagraph 8 of it, specified requirements for

a scheme, including that pensioners who would have been entitled to CTB should be granted relief at the same level. Paragraph 3 of the schedule, entitled "Preparation of a scheme", provided:

> "(1) Before making a scheme, the authority must (in the following order)-
>
> (a) consult any major precepting authority which has power to issue a precept to it,
>
> (b) publish a draft scheme in such manner as it thinks fit, and
>
> (c) consult such other persons as it considers are likely to have an interest in the operation of the scheme.
>
> (2) …
>
> (3) Having made a scheme, the authority must publish it in such manner as the authority thinks fit.
>
> (4) The Secretary of State may make regulations about the procedure for preparing a scheme."

The title of the paragraph puts beyond doubt that the procedure for preparing a scheme, which can be the subject of regulations under subparagraph (4), includes the procedure for the consultation required by subparagraph (1)(c). In the event, however, no such regulations were made. Paragraph 4 of the schedule required the Secretary of State to prescribe a "default scheme" so as to provide for relief from council tax in and after 2013-2014 for households in the area of any local authority which had failed to make a scheme by 31 January 2013. The default scheme, set out in the Council Tax Reduction Schemes (Default Scheme) (England) Regulations, SI 2012/2886, provided that, notwithstanding the reduction in reimbursement by central government, a local authority should grant relief against council tax after 1 April 2013 at the same level as had previously been granted by way of CTB. Paragraph 5 of the schedule provides that, for each year subsequent to 2013-2014, a local authority must consider whether to revise its CTRS and that, if it resolves to do so, it should again comply with the provisions for preparation of a scheme in paragraph 3.

9. Mr Ellicott, Head of Revenues, Benefits and Customer Services in Haringey, was the main author of a report for consideration by Haringey's Cabinet on 10 July 2012. In it he identified the need for Haringey to make a CTRS by 31 January 2013. He explained that reimbursement by central government to Haringey in respect of relief from council tax was to be reduced by about 10% in 2013-2014 but that, were Haringey's CTRS to provide relief at a level equivalent to CTB, the shortfall would rise to about 17-18%, mainly because of the trend in Haringey for an annual increase in the number of households

eligible for relief. In his introduction to the report Councillor Goldberg, Haringey's Cabinet Member for Finance, wrote:

> "Needless to say it is my belief that this represents one of the most appalling policies of the government and it is not insignificant that the unemployed will now be facing the prospect of having to pay 20% local taxation levels, which they last were subjected to paying under the Poll Tax."

There was nothing wrong with Councillor Goldberg's expression of indignation. But it did betray an assumption that the shortfall would have to be reflected by provisions in the CTRS which reduced the level of relief below the level previously provided by way of CTB rather than that Haringey should absorb it in other ways. It is true that in the body of the report Mr Ellicott proceeded to refer to the option of absorbing the cost and then rejected it on the ground that it would require a reduction in services. He also identified, and rejected, options for exempting each of four classes of claimant for relief from any reduction below its existing level. In the end he recommended that Haringey's CTRS should provide that the shortfall be met by a percentage reduction in the amount of CTB payable to all claimants other than, of course, to pensioners; and that, because pensioners would not be meeting their share, the percentage reduction for other claimants would have to rise to between 18% and 22%. Those who were then in receipt of full CTB, other than pensioners, would therefore, for example, be required to pay between 18% and 22% of their council tax liability.

10. On 10 July 2012 Haringey's Cabinet approved the recommendation in Mr Ellicott's report. Haringey thereupon proceeded to prepare its draft scheme. Pursuant to paragraph 3(1)(a) of the schedule, it consulted the Greater London Authority, which has power to issue a precept to local authorities in London for a contribution to the cost of funding the Metropolitan Police and fire and transport services. Then, on 29 August 2012, Haringey published its draft scheme pursuant to paragraph 3(1)(b) and purported to embark on the consultation required of it by paragraph 3(1)(c).

11. In that the terms by which it conducted its consultation are at the centre of this appeal, Haringey's consultation exercise deserves separate consideration in the next section of this judgment.

12. Haringey's consultation exercise was expressed to continue until 19 November 2012. Meanwhile, however, on 16 October 2012 a government minister announced the introduction of a "Transitional Grant Scheme"

("TGS"). The scheme, set out in a circular published two days later, was that central government would make a grant, not likely to be extended beyond 2013-2014, to each local authority which introduced a CTRS for that year in accordance with three criteria. Of these the most important was that those currently in receipt of full CTB should pay no more than 8.5% of their council tax liability. An annex to the circular revealed that the grant referable to Haringey would be £706,021. Haringey concluded, however, that the grant would not cover the difference between a recovery from those currently in receipt of full CTB of 8.5% of their liability, on the one hand, and of 18-22% of their liability, on the other; and that the scheme would therefore leave Haringey with an unacceptable net shortfall in its receipts of council tax. So it resolved not to amend its draft CTRS so as to comply with the TGS criteria and not to bring the TGS to the attention of those likely to be interested in the operation of its CTRS by means of any enlarged consultation exercise.

13. Haringey's full Council met on 17 January 2013. Before it was a report substantially drafted by Mr Ellicott. Annexed to the report was an elaborate analysis of the responses to Haringey's consultation exercise, including numerous quotations from them, often in vivid language. It was suggested in the report:

(a) that the effect of the default CTRS would be to leave Haringey with a shortfall of £3.846m;
(b) that adoption of a CTRS which complied with the TGS criteria would leave Haringey with a net shortfall of £1.489m;
(c) that in the light, among other things, of responses to the consultation exercise, it would be appropriate for the disabled to join pensioners as the two groups exempt from reduction in support below current CTB levels; and
(d) that, in the light of (c) above and of clarification by central government of the precise amount to be paid by it in respect of council tax reduction in 2013-2014, Haringey's CTRS should provide for a reduction of relief below current CTB levels of 19.8% across the board other than for those two groups; and that, subject to difficulties of collection, such a reduction would render Haringey not out of pocket as a result of the move from CTB to a CTRS.

14. The full Council adopted the suggestion in the report. Thus it was that, prior to 31 January 2013, Haringey made a CTRS which provided for a reduction of relief in 2013-14, below the 2012-2013 CTB level, of 19.8% other than for pensioners and the disabled. Its CTRS came into operation on 1 April 2013 (and has not been revised for 2014-2015).

15. Of the 326 local authorities in England, about 25% allowed the default CTRS to take effect in 2013-2014; they thus entirely absorbed the shortfall in central government's funding by means other than the reduction of relief from council tax below the current level of CTB. About 33% of them adopted a CTRS which complied with the TGS criteria; they thus partially absorbed the shortfall by means other than such a reduction. The remaining 42%, like Haringey, adopted a CTRS which entirely translated the shortfall into an increase in liability for council tax above the amount, if any, which in 2012-2013 recipients of CTB were liable to pay; and they thus had no need to absorb the shortfall by other means.

*The Consultation*

16. Haringey's statutory obligation, set out in paragraph 3(1)(c) of the schedule, was to consult "such… persons as it considers are likely to have an interest in the operation of the scheme". One could argue that even those residents who *were not* entitled to CTB had a financial interest in the operation of the scheme, namely that it should indeed come into operation rather than that a scheme which addressed the shortfall in other ways, likely to be prejudicial to them, should do so. But those who most obviously had an interest in the operation of the scheme were those who would be adversely affected by it, namely those who *were* entitled to CTB, other than any group proposed to be excluded from the scheme, being (at the time of the consultation exercise) only the pensioners. It is agreed that, in this regard, Haringey directed its consultation in accordance with paragraph 3(1)(c). For, while it posted a consultation document online and invited all residents to respond to it, Haringey delivered hard copies by hand to each of its 36,000 households entitled to CTB, together with a covering letter signed by Mr Ellicott.

17. In the covering letter Mr Ellicott explained that he was writing it because the recipient was receiving CTB and that the government was abolishing CTB and requiring local authorities to replace it with a CTRS. He continued:

> "At present the Government gives us the money we need to fund Council Tax Benefit in Haringey. We will receive much less money for the new scheme and once we factor in the increasing number of people claiming benefit and the cost of protecting our pensioners, we estimate the shortfall could be as much as £5.7m.
>
> **This means that the introduction of a local Council Tax Reduction Scheme in Haringey will directly affect the**

> **assistance provided to anyone below pensionable age that currently involves council tax benefit.**
>
> The attached booklet provides all the information you need to understand the changes the Government are making. It sets out the proposed Council Tax Reduction Scheme and explains how this is likely to affect you. Please read this information carefully.
>
> We want to know what you think of these proposals before reaching a final decision about the scheme we adopt. Once you have looked at the information please complete the attached questionnaire and return it in the FREEPOST envelope by 19th November 2012. Be heard – have your say.**"**

For present purposes the importance of Mr Ellicott's letter surrounds the paragraph of it which he chose to print in bold. Note its opening words, namely "This means that…". Mr Ellicott was there stating that the shortfall in government funding **meant** that Haringey's CTRS would provide less relief against council tax than recipients of the letter, other than pensioners, were receiving by way of CTB. But the shortfall did not necessarily have that consequence. Why was Mr Ellicott not there recognising that at least there were other options, albeit not favoured by Haringey, for meeting the shortfall? Note also Mr Ellicott's use of the indefinite article, in his reference to "the introduction of a local [CTRS] in Haringey". It suggests that *any* CTRS introduced in Haringey, not just the scheme proposed, would need to meet the shortfall by a reduction from existing levels of CTB.

18. The "booklet" attached to Mr Ellicott's letter was the consultation document, comprising in part the provision of information and in part the questionnaire. So I turn to see whether the information reasonably dispelled the impression given in the letter that the shortfall had inevitably to be met by a reduction of relief against council tax below CTB levels.

19. The document was entitled "The Government is abolishing Council Tax Benefit". It referred to the reduction in government funding and proceeded as follows:

> "Early estimates suggest that the cut will leave Haringey with an actual shortfall in funding of around 20%. *This means* Haringey claimants will lose on average approximately £1 in

> every £5 of support they currently receive in [CTB]. " [Italics supplied]

There is no doubt that Haringey's proposed scheme meant that its claimants would suffer a loss of that order. But the reduction in government funding did not inevitably have that effect. Then, under the subheading "What's changing?", Haringey, adopting almost the same terms as those in Mr Ellicott's letter, said:

> "At present the Government gives us the money we need to fund [CTB] in Haringey. From next April we must implement a new [CTRS]. We'll receive much less money for the new scheme and once we factor in the increasing number of people claiming benefit and the cost of protecting our pensioners, we estimate the shortfall could be as much as £5.7m next year and this could rise in later years.
>
> Although pensioners will move on to the new [CTRS], they will receive the same amount of support they would have received under the current [CTB] regulations.
>
> *That means* that the introduction of a local [CTRS] in Haringey will directly affect the assistance provided to everyone below pensionable age that currently receives [CTB]." [Italics supplied]

In the consultation document there was no reference to options for meeting the shortfall other than by a reduction in relief from council tax, namely to the options of raising council tax or of reducing the funding of Haringey's services or of applying its deployable reserves of capital (which amounted to £76.8m in March 2012); and it follows that there was no explanation of why Haringey was not proposing to adopt any of those three options.

20. In the document Haringey thereupon set out its proposals. It stated its belief that the fairest way in which to apply the government cut was to reduce all relief to working age claimants by about 20% from CTB levels. It added:

> "We also have to decide if certain groups should be protected from any changes we make and continue to get the same level of support as they do now. Doing this would mean that other claimants would get even less support."

21. Then followed Haringey's questionnaire. There were five main questions. The first was:

> **"To what extent do you agree we should apply the Government's reduction in funding equally to all recipients of working age?**
>
> This means that every household of working age will have to pay something towards their council tax bill."

I consider, contrary to Haringey's contention, that the reader of the first question was in effect presented with an assumption that the shortfall in government funding would be met by a reduction in the relief from council tax afforded to recipients of working age, rather than that it should be met in other ways so that the level of their relief might be preserved. The gist of the first question was in my view whether, upon that assumption, all such recipients should suffer the reduction in equal proportions. The fifth question, again cast upon that assumption, presented the alternative possibility as follows:

> "Should some groups of people continue to get the same support as now even if doing this would mean that other claimants would get less support?"

A reader who answered "Yes" to the fifth question was then offered a box in which to identify the groups whom he or she considered should be protected. The second, third and fourth questions related to other, less significant, departures from CTB rules proposed in Haringey's draft CTRS. Following the five main questions there was a second box, above which Haringey wrote:

> "Please use the space below to make any other comments about our draft Council Tax Reduction Scheme."

22. In response to its consultation exercise Haringey received 1251 completed questionnaires and 36 letters and emails. Of those who completed the questionnaire, 43% agreed or strongly agreed with the first question and 44% disagreed or strongly disagreed with it. Suggestions were made in at least ten of the responses that Haringey should meet the shortfall by cutting services

and in at least 11 of them that it should meet it by increasing council tax. One of the 36 letters and emails was an email sent to Haringey by The Reverend Paul Nicolson, a prominent anti-poverty campaigner, on 29 October 2012. He wrote:

> "I write to oppose your proposals on the grounds that the 25,560 households who now pay no council tax will not be able to pay 20%, or around £300 pa, from April 2013…[B]enefits are paid… to our poorest fellow citizens to provide the necessities of life; they are already inadequate…"

On 6 November 2012 Haringey responded:

> "We have asked for comments around protecting groups in addition to Pensioners, however protecting additional groups will have an impact on the remaining recipients who will have to pay a higher amount to cover the shortfall. Your email below is unclear as to which group you are suggesting we protect and how we then make up the shortfall."

In his response dated 7 November 2012 The Rev. Nicolson observed:

> "I am aware that central government has cut its council tax benefit grant to… Haringey and all other councils by 10%. Other councils are absorbing the cut and continuing [to] implement the current CT benefit scheme. Why cannot Haringey do the same? There is no consultation taking place about that central issue."

On 10 December 2012, following the end of the consultation, The Rev. Nicolson wrote a letter of protest to the Leader of Haringey Council, which ended as follows:

> "I am shocked that no alternative to hitting the fragile incomes of the poorest residents of Haringey … was included in the recent consultation."

*The Law*

23. A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council, ex parte Baker* [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.

24. Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2013] UKSC 61, [2013] 3 WLR 1020, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement "is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested" (para 67). Second, it avoids "the sense of injustice which the person who is the subject of the decision will otherwise feel" (para 68). Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not "Yes or no, should we close this particular care home, this particular school etc?" It was "Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?"

25. In *R v Brent London Borough Council, ex p Gunning,* (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said at p 189:

> "Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third,… that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

Clearly Hodgson J accepted Mr Sedley's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in the *Baker* case, cited above (see pp 91 and 87), and then in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at para 108. In the *Coughlan* case, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated at para 112:

> "It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have 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 good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472, 126 BMLR 134, at para 9, "a prescription for fairness".

26. Two further general points emerge from the authorities. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting. Thus, for example, local authorities who were consulted about the government's proposed designation of Stevenage as a "new town" (*Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496 at p 501) would be likely to be able to respond satisfactorily to a presentation of less specificity than would members of the public, particularly perhaps the economically disadvantaged. Second, in the words of Simon Brown LJ in the *Baker* case, at p 91, "the demands of fairness are likely to be somewhat higher

when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit".

27. 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 upon the preferred option but also upon arguable yet discarded alternative options. For example, in *R (Medway Council and others) v Secretary of State for Transport* [2002] EWHC 2516 (Admin), [2003] JPL 583, the court held that, in consulting about an increase in airport capacity in South East England, the government had acted unlawfully in consulting upon possible development only at Heathrow, Stansted and the Thames estuary and not also at Gatwick; and see also *R (Montpeliers and Trevors Association) v Westminster City Council* [2005] EWHC 16 (Admin), [2006] LGR 304, at para 29.

28. But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options. In *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435 Gateshead, confronted by a falling birth rate and therefore an inability to sustain a viable sixth form in all its secondary schools, decided to set up sixth form colleges instead. Local parents failed to establish that Gateshead's prior consultation had been unlawful. The Court of Appeal held that Gateshead had made clear what the other options were: see pp 455, 456 and 462. In the *Royal Brompton* case, cited above, the defendant, an advisory body, was minded to advise that only two London hospitals should provide paediatric cardiac surgical services, namely Guys and Great Ormond Street. In the Court of Appeal the Royal Brompton Hospital failed to establish that the defendant's exercise in consultation upon its prospective advice was unlawful. In its judgment delivered by Arden LJ, the court, at para 10, cited the *Gateshead* case as authority for the proposition that "a decision-maker may properly decide to present his preferred options in the consultation document, provided it is clear what the other options are". It held, at para 95, that the defendant had made clear to those consulted that they were at liberty to press the case for the Royal Brompton.

*Application of the law to the facts*

29. Paragraph 3(1)(c) of the schedule imposed on Haringey the requirement to consult. The requirement was to consult "such other persons as it considers are likely to have an interest in the operation of the scheme". So the subject of the consultation was Haringey's preferred scheme and not any other discarded scheme. It is, however, at this point in the analysis that the division

of opinion arose in the Court of Appeal. Sullivan LJ, with whom Sir Terence Etherton agreed, concluded, at para 18, that:

> "In this statutory context fairness does not require the Council in the consultation process to mention other options which it has decided not to incorporate into its published draft scheme; much less does fairness require that the consultation document contain an explanation as to why those options were not incorporated in the draft scheme."

Pitchford LJ, by contrast, agreed with Underhill J who, at para 27, had concluded that:

> "consulting about a proposal does inevitably involve inviting and considering views about possible alternatives."

It is clear to me that the latter conclusion is correct. It is substantially in accordance with the decisions in the *Gateshead* and the *Royal Brompton* cases referred to in para 28 above. Those whom Haringey was primarily consulting were the most economically disadvantaged of its residents. Their income was already at a basic level and the effect of Haringey's proposed scheme would be to reduce it even below that level and thus in all likelihood to cause real hardship, while sparing its more prosperous residents from making any contribution to the shortfall in government funding. Fairness demanded that in the consultation document brief reference should be made to other ways of absorbing the shortfall and to the reasons why (unlike 58% of local authorities in England: see para 15 above) Haringey had concluded that they were unacceptable. The protest of The Rev. Nicolson in his letter dated 10 December 2012 was well-directed.

30. It would not have been onerous for Haringey to make brief reference to other ways of absorbing the shortfall. The CTRS proposed by Birmingham City Council was, like that proposed by Haringey, for the shortfall to be met by a reduction in council tax support, although Birmingham favoured sparing households with children aged under six and therefore reducing support more severely for the remainder. In its consultation document dated September 2012 Birmingham nevertheless wrote:

> "We could decide to provide support at the same level as Council Tax Benefit, but this would mean

- raising Council Tax in the region of 4.4%;
- reducing Council services and using the compensatory savings to fund Council Tax Support; or
- a combination of [the two].

…

[But] we already have to plan the Council's finances on the basis that there may be a rise in Council Tax of around 1.9% and that all service areas will have to make savings this year."

Part of Birmingham's first question was:

"if you… think the Council should make an additional contribution from its own finances to the [CTRS], how do you think this should be funded? In particular, should the Council increase Council Tax, or cut other Council services, or both?"

Birmingham's presentation was fair.

31. Underhill J and Pitchford LJ nevertheless proceeded to conclude, as did Sullivan LJ and Sir Terence Etherton on the assumption that they were wrong to discern an absence of need to refer to other options, that Haringey's consultation exercise had been lawful because the other options would have been reasonably obvious to those consulted. It is clear that no conclusion to that effect can be drawn from the fact that, from the 36,000 households to which a hard copy of the consultation document was delivered, there were at least ten responses that services should be cut and at least 11 responses that council tax should be increased. On the contrary the apparently infinitesimal number of such responses arguably runs the other way. Assuming, however, that Underhill J and the Court of Appeal were entitled to conclude that the other options would have been reasonably obvious to those consulted, two matters arise. The first is to question whether it would also have been reasonably obvious to them why Haringey was minded to reject the other options. I speak as one who, even after a survey of the evidence filed by Haringey in these proceedings, remains unclear why it was minded to reject the other options. Perhaps the driver of its approach was political. At all events I cannot imagine that an affirmative answer can be given to that question. The second matter is the need to link the assumed knowledge of those consulted with the terms of Haringey's presentation to them in the consultation document and the covering letter. With respect to them,

Underhill J and the Court of Appeal gave insufficient attention to the terms both of the document and of the letter, which, as I have demonstrated in paras 17 to 21 above, represented, as being an accomplished fact, that the shortfall in government funding would be met by a reduction in council tax support and that the only question was how, within that parameter, the burden should be distributed. This limited approach to the relevant question was entirely consistent with Mr Ellicott's report in July 2012 (see para 9 above) and, Haringey's response dated 6 November 2012 to The Rev. Nicolson (see para 22 above). Haringey's message to those consulted was therefore that other options were irrelevant and in such circumstances I cannot agree that their assumed knowledge of them saves Haringey's consultation exercise from a verdict that it was unfair and therefore unlawful.

32. A separate ground of Ms Moseley's appeal relates to the TGS. The contention, rejected by Underhill J and the Court of Appeal, is that, following the announcement of the TGS on 16 October 2012, Haringey, even though not minded to propose a scheme in accordance with it, acted unlawfully in failing to enlarge its consultation exercise so as to refer to it. But adoption of a scheme in accordance with the TGS would have left Haringey with a net shortfall in its receipts of council tax and have therefore required its absorption in other ways. Granted that reference should in any event have been made to other ways in Haringey's consultation exercise, the TGS did not add any substantially different dimension to the relevant possibilities. In the light also of the practical consideration that the announcement of the TGS was made on a date when Haringey's consultation exercise was less than five weeks short of completion, I also consider that it was not unlawful for Haringey to fail to refer to the TGS. In its argument on this ground, however, Haringey makes an illuminating concession, namely that, had it known of the TGS when it commenced its consultation exercise, it would have referred to it. The need for brief reference to other discarded options which would have required absorption of the shortfall in ways other than by reduction of council tax support is indeed the basis of my earlier conclusion.

33. In addition to the declaration to which in my view she is entitled, Ms Moseley aspires, albeit with little apparent enthusiasm, to persuade the court to order Haringey to undertake a fresh consultation exercise, in accordance with the terms of its judgments, in relation to its CTRS for the forthcoming year 2015-2016. Paragraph 5(5) of the schedule requires it to comply with paragraph 3, including therefore to undertake the consultation exercise mandated by paragraph 3(1)(c), only if it is minded to revise its CTRS. It is unclear whether it is so minded but, if so, no doubt it will undertake its exercise in accordance with the terms of this court's judgments. The proposed mandatory order would therefore have practical effect only in the event that Haringey was not minded to revise its CTRS. My conclusion is that it would not be

proportionate to order Haringey to undertake a fresh consultation exercise in relation to a CTRS which will have been in operation for two years and which it is not minded to revise.

**LORD REED**

34. I am 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.

35. The common law imposes a general duty of procedural fairness upon public authorities exercising a wide range of functions which affect the interests of individuals, but the content of that duty varies almost infinitely depending upon the circumstances. There is however no general common law duty to consult persons who may be affected by a measure before it is adopted. The reasons for the absence of such a duty were explained by Sedley LJ in *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139; [2008] ACD 20, paras 43-47. A duty of consultation will however exist in circumstances where there is a legitimate expectation of such consultation, usually arising from an interest which is held to be sufficient to found such an expectation, or from some promise or practice of consultation. The general approach of the common law is illustrated by the cases of *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73 and *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, cited by Lord Wilson, with which the *BAPIO* case might be contrasted.

36. This case is not concerned with a situation of that kind. It is concerned with a statutory duty of consultation. Such duties vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out. The duty may, for example, arise before or after a proposal has been decided upon; it may be obligatory or may be at the discretion of the public authority; it may be restricted to particular consultees or may involve the general public; the identity of the consultees may be prescribed or may be left to the discretion of the public authority; the consultation may take the form of seeking views in writing, or holding public meetings; and so on and so forth. The content of a duty to consult can therefore vary greatly from one statutory context to another: "the nature and the object of consultation must be related to the circumstances which call for it" (*Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111, 1124). A mechanistic approach to the requirements of consultation should therefore be avoided.

37. Depending on the circumstances, issues of fairness may be relevant to the explication of a duty to consult. But the present case is not in my opinion concerned with circumstances in which a duty of fairness is owed, and the problem with the consultation is not that it was "unfair" as that term is normally used in administrative law. In the present context, the local authority is discharging an important function in relation to local government finance, which affects its residents generally. The statutory obligation is, "before making a scheme", to consult any major precepting authority, to publish a draft scheme, and, critically, to "consult such other persons as it considers are likely to have an interest in the operation of the scheme". All residents of the local authority's area could reasonably be regarded as "likely to have an interest in the operation of the scheme", and it is on that basis that Haringey proceeded.

38. Such wide-ranging consultation, in respect of the exercise of a local authority's exercise of a general power in relation to finance, is far removed in context and scope from the situations in which the common law has recognised a duty of procedural fairness. The purpose of public consultation in that context is in my opinion not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, as the common law seeks to do. The purpose of this particular statutory duty to consult must, in my opinion, be to ensure public participation in the local authority's decision-making process.

39. In order for the consultation to achieve that objective, it must fulfil certain minimum requirements. Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority's adoption of the draft scheme. That follows, in this context, from the general obligation to let consultees know "what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response": *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 112, per Lord Woolf MR.

40. That is not to say that a duty to consult invariably requires the provision of information about options which have been rejected. The matter may be made clear, one way or the other, by the terms of the relevant statutory provisions, as it was in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472; [2012] 126 BMLR 134. To the extent that the issue is left open by the relevant statutory provisions, the question will generally be whether, in the particular context,

the provision of such information is necessary in order for the consultees to express meaningful views on the proposal. The case of *Vale of Glamorgan Council v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1532 (Admin) is an example of a case where such information was not considered necessary, having regard to the nature and purpose of that particular consultation exercise, which concerned the proposed closure of a specific court. In the present case, on the other hand, it is difficult to see how ordinary members of the public could express an intelligent view on the proposed scheme, so as to participate in a meaningful way in the decision-making process, unless they had an idea of how the loss of income by the local authority might otherwise be replaced or absorbed.

41. Nor does a requirement to provide information about other options mean that there must be a detailed discussion of the alternatives or of the reasons for their rejection. The consultation required in the present context is in respect of the draft scheme, not the rejected alternatives; and it is important, not least in the context of a public consultation exercise, that the consultation documents should be clear and understandable, and therefore should not be unduly complex or lengthy. Nevertheless, enough must be said about realistic alternatives, and the reasons for the local authority's preferred choice, to enable the consultees to make an intelligent response in respect of the scheme on which their views are sought.

42. As Lord Wilson has explained, those requirements were not met in this case. 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 thereby disguised the choice made by Haringey itself. It misleadingly implied that there were no possible alternatives to that choice. In reality, therefore, there was no consultation on the fundamental basis of the scheme.

43. I therefore concur in the order proposed by Lord Wilson.

## LADY HALE AND LORD CLARKE

44. We agree that the appeal should be disposed of as indicated by Lord Wilson and Lord Reed. There 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. It seems to us that in order to do so it must act

fairly by taking the specific steps set out by Lord Reed in his para 39. In these circumstances we can we think safely agree with both judgments.

## Consultation Principles

This guidance sets out the principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation. It replaces the Code of Practice on Consultation issued in July 2008. It is not a 'how to' guide but aims to help policy makers make the right judgments about when, with whom and how to consult. The governing principle is proportionality of the type and scale of consultation to the potential impacts of the proposal or decision being taken, and thought should be given to achieving real engagement rather than merely following bureaucratic process. Consultation forms part of wider engagement and decisions on whether and how to consult should in part depend on the wider scheme of engagement.

Policy makers should bear in mind the Civil Service Reform principles of open policy making throughout the process and not just at set points of consultation, and should use real discussion with affected parties and experts as well as the expertise of civil service learning to make well informed decisions. Modern communications technologies enable policy makers to engage in such discussions more quickly and in a more targeted way than before, and mean that the traditional written consultation is not always the best way of getting those who know most and care most about a particular issue to engage in fruitful dialogue.

## Subjects of consultation

There may be a number of reasons to consult: to garner views and preferences, to understand possible unintended consequences of a policy or to get views on implementation. Increasing the level of transparency and increasing engagement with interested parties improves the quality of policy making by bringing to bear expertise and alternative perspectives, and identifying unintended effects and practical problems. The objectives of any consultation should be clear, and will depend to a great extent on the type of issue and the stage in the policy-making process – from gathering new ideas to testing options.

There may be circumstances where formal consultation is not appropriate, for example, where the measure is necessary to deal with a court judgment or where adequate consultation has taken place at an earlier stage for minor or technical amendments to regulation or existing policy frameworks. However, longer and more detailed consultation will be needed in situations where smaller, more vulnerable organisations such as small charities could be affected. The principles of the Compact between government and the voluntary and community sector must continue to be respected[1].

## Timing of consultation

Engagement should begin early in policy development when the policy is still under consideration and views can genuinely be taken into account. There are several stages of policy development, and it may be appropriate to engage in different ways at different stages. As part of this, there can be different reasons for, and types of consultation, some radically different from simply inviting response to a document. Every effort should be made

[1] "Where it is appropriate, and enables meaningful engagement, conduct 12-week formal written consultations, with clear explanations and rationale for shorter time-frames or a more informal approach." The Compact (Cabinet Office 2010) para 2.4)

to make available the Government's evidence base at an early stage to enable contestability and challenge.

Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response and where the consultation spans all or part of a holiday period[2] policy makers should consider what if any impact there may be and take appropriate mitigating action. The amount of time required will depend on the nature and impact of the proposal (for example, the diversity of interested parties or the complexity of the issue, or even external events), and might typically vary between two and 12 weeks. The timing and length of a consultation should be decided on a case-by-case basis; there is no set formula for establishing the right length. In some cases there will be no requirement for consultation, depending on the issue and whether interested groups have already been engaged in the policy making process. For a new and contentious policy, 12 weeks or more may still be appropriate. When deciding on the timescale for a given consultation the capacity of the groups being consulted to respond should be taken into consideration.

### Making information useful and accessible

Policy makers should be able to demonstrate that they have considered who needs to be consulted and ensure that the consultation captures the full range of stakeholders affected. In particular, if the policy will affect hard to reach or vulnerable groups, policy makers should take the necessary actions to engage effectively with these groups. Information should be disseminated and presented in a way likely to be accessible and useful to the stakeholders with a substantial interest in the subject matter. The choice of the form of consultation will largely depend on: the issues under consideration, who needs to be consulted, and the available time and resources.

Information provided to stakeholders should be easy to comprehend – it should be in an easily understandable format, use plain language and clarify the key issues, particularly where the consultation deals with complex subject matter. Consideration should be given to more informal forms of consultation that may be appropriate – for example, email or web-based forums, public meetings, working groups, focus groups, and surveys – rather than always reverting to a written consultation. Policy-makers should avoid disproportionate cost to the Government or the stakeholders concerned.

### Transparency and feedback

The purpose of the consultation process should be clearly stated as should the stage of the development that the policy has reached. Also, to avoid creating unrealistic expectations, it should be apparent what aspects of the policy being consulted on are open to change and what decisions have already been taken. Being clear about the areas of policy on which views are sought will increase the usefulness of responses.

Sufficient information should be made available to stakeholders to enable them to make informed comments. Relevant documentation should be posted online to enhance accessibility and opportunities for reuse. To ensure transparency and consistency of approach, all consultations should be housed on the Government's single web platform (GOV.UK).

[2] Holiday period assumptions: Easter = 5 Working Days (1 Week); Summer (August) = 22 Working Days (4.2 Weeks); Christmas = 6 Working Days (1.1 Week)

To encourage active participation, policy makers should explain what responses they have received and how these have been used in formulating the policy. The number of responses received should also be indicated. Consultation responses should usually be published within 12 weeks of the consultation closing. Where Departments do not publish a response within 12 weeks, they should provide a brief statement on why they have not done so. Departments should make clear at least in broad terms what future plans (if any) they have for engagement.

### Practical considerations

Consultation exercises should not generally be launched during local or national election periods. If exceptional circumstances make a consultation absolutely essential (for example, for safeguarding public health), departments should seek advice from the Propriety and Ethics team in the Cabinet Office.

Departments should be clear how they have come to the decision to consult in a particular way, and senior officials and ministers should be sighted on the considerations taken into account in order to enable them to ensure the quality of consultations.

Departments should seek collective ministerial agreement before any public engagement that might be seen as committing the Government to a particular approach. Ministers are obliged to seek the views of colleagues early in the policy making process and the documents supporting formal consultations should be cleared collectively with ministerial colleagues. If departments are intending to use more informal methods of consultation, they should think about at what point, and with what supporting documentation, collective agreement should be sought. The Cabinet Secretariat will be able to advise on particular cases.

This guidance does not have legal force and does not prevail over statutory or mandatory requirements[3].

[3] Some laws impose requirements for the Government to consult certain groups on certain issues. This guidance is subject to any such legal requirement. Care must also be taken to comply with any other legal requirements which may affect a consultation exercise such as confidentiality or equality.

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# Background Document on Public Consultation

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# 1. PUBLIC CONSULTATION: CORE ELEMENTS

## What is Public Consultation?

1. Public consultation is one of the key regulatory tools employed to improve transparency, efficiency and effectiveness of regulation besides other tools such as Regulatory Impact Analysis (RIA), regulatory alternatives and improved accountability arrangements. There are three related forms of interaction with interested members of the public. In practice, these three forms of interaction are often mingled with public consultation programmes, complementing and overlapping each other:

- **Notification.** It involves the communication of information on regulatory decisions to the public, and it is a key building block of the rule of law. It is a one-way process of communication in which the public plays a passive consumer role of government information. Notification does not, itself, constitute consultation, but can be a first step. In this view, prior notification allows stakeholders the time to prepare themselves for upcoming consultations.

- **Consultation.** It involves actively seeking the opinions of interested and affected groups. It is a two-way flow of information, which may occur at any stage of regulatory development, from problem identification to evaluation of existing regulation. It may be a one-stage process or, as it is increasingly the case, a continuing dialogue. Consultation is increasingly concerned with the objective of gathering information to facilitate the drafting of higher quality regulation.

- **Participation.** It is the active involvement of interest groups in the formulation of regulatory objectives, policies and approaches, or in the drafting of regulatory texts. Participation is usually meant to facilitate implementation and improve compliance, consensus, and political support. Governments are likely to offer stakeholders a role in regulatory development, implementation and/or enforcement in circumstances in which they wish to increase the sense of "ownership" of, or commitment to, the regulations beyond what is likely to be achieved via a purely consultative approach.

## Why is public consultation important?

2. As the *OECD-APEC Integrated Checklist on Regulatory Reform* highlights regulations should be developed in an open and transparent fashion, with appropriate and well publicized procedures for effective and timely inputs from interested national and foreign parties, such as affected business, trade unions, wider interest groups such as consumer or environmental organisations, or other levels of government. Consultation improves the quality of rules and programmes and also improves compliance and reduces enforcement costs for both governments and citizens subject to rules.

3. Public consultation increases the information available to governments on which policy decisions can be based. The use of other policy tools, particularly RIA, and the weighing of alternative policy tools, has meant that consultation has been increasingly needed for collecting empirical information for analytical purposes, measuring expectations and identifying non-evident policy alternatives when taking a policy decision.

4. Regulation and its reforms affect all the participants in civil society, and therefore, in order to better assess the impacts and minimise costs, all the parts involved should be able to participate somehow in the regulatory processes. That is where public consultation has become one of the best tools to improve quality in regulation.

5. Consultation increases the level of transparency and it may help to improve regulatory quality by:

- Bringing into the discussion the expertise, perspectives, and ideas for alternative actions of those directly affected;
- Helping regulators to balance opposing interests;
- Identifying unintended effects and practical problems. Using pre-notification it is possible to foresee more easily the consequences of some planned policies, becoming one of the most productive ways to identify administrative burdens;
- Providing a quality check on the administration's assessment of costs and benefits;
- Identifying interactions between regulations from various parts of government;

6. Consultation processes can also enhance voluntary compliance for two reasons: first because changes are announced in a timely manner and there is time to adjust to changes, and second because the sense of legitimacy and shared ownership that gives consultation motivate affected parties to comply.

7. Consultation can also have some impact if it is used for amending legislation. Changing legislation using public consultation is more difficult and time-consuming than when amending less formal government policy documents.

## 2. TOOLS USED FOR PUBLIC CONSULTATION

8. Basically there are five instruments or different ways to perform public consultation, depending on who is to be consulted, how formal the process is, and the communication means used.

### *Informal consultation*

9. Informal consultation includes all forms of discretionary, ad hoc, and unstandardised contacts between regulators and interest groups. It takes many forms, from phone-calls to letters to informal meetings, and occurs at all stages of the regulatory process. The key purpose is to collect information from interested parties. Informal consultation is carried out in virtually all OECD countries, but its acceptability varies tremendously. This approach can be less cumbersome and more flexible than more standardised forms of consultation; hence, they can have important advantages in terms of speed and the participation of a wider range of interests.

**Box 1. Informal consultation.**

In the **United Kingdom**, regulatory bodies have traditionally had close and informal contacts with major interests, particularly businesses, and informal consultation is seen as a norm of the regulatory process, prior to formal consultation in line with the code of practice on written consultation. The same tradition of informal contacts exists in **France**. In **Japan**, informal consultation is crucial in shaping consensus around the final product. In **Canada**, the government has encouraged regulators to consult informally prior to formal consultation. By contrast, informal consultation is viewed more suspiciously in the **United States** as a violation of norms of openness and equal access, and in many cases it is a violation of the administrative procedure act requiring equal access for all interested parties.

10. The disadvantage of informal procedures is their limited transparency and accountability. Access by interest groups to informal consultations is entirely at the regulator's discretion. Informal consultation resembles "lobbying", but in informal consultation it is the regulatory agency that plays the active role in establishing the contact. The line between these two activities, however, is potentially difficult to draw.

***Circulation of regulatory proposals for public comment***

11. This form of public consultation is a relatively inexpensive way to solicit views from the public and it is likely to induce affected parties to provide information. Furthermore, it is fairly flexible in terms of the timing, scope and form of responses. That is why it is among the most widely used form of consultation.

12. This procedure differs from informal consultation in that the circulation process is generally more systematic, structured, and routine, and may have some basis in law, policy statements or instructions. It can be used at all stages of the regulatory process – but is usually used to present concrete regulatory proposals for consultation. Responses are usually in written form, but regulators may also accept oral statements, and may supplement those by inviting interested groups to hearings.

13. Regulators generally retain much discretion over access and process but, in practice, important proposals are circulated widely and systematically. Countries have begun to explore the possibilities for improving access and timeliness of consultation that are provided by information technology. The Internet is increasingly being used for this purpose.

14. The negative side of this procedure is again the discretion of the regulator deciding who will be included in the consultation. Important groups will not usually be neglected, as this is likely to create difficulties for the regulatory proposal when it reaches the cabinet or parliament. However, less organised groups are in weaker positions in this respect.

***Public notice-and-comment***

15. Public notice-and-comment is more open and inclusive than the circulation-for-comment process, and it is usually more structured and formal. The public notice element means all interested parties have the opportunity to become aware of the regulatory proposal and are thus able to comment. There is usually a standard set of background information, including a draft of the regulatory proposal, discussion of policy objectives and the problem being addressed and, often an impact assessment of the proposal and, perhaps, of alternative solutions. This information – and particularly the RIA elements – can greatly increase the ability of the general public to participate effectively in the process, although most countries find that participation remains at a quite low level for all but a few controversial proposals.

**Box 2. Notice-and-comment in the OECD countries**

Notice-and-comment has a long history in some OECD countries, and its use has become much more widespread in recent years. It was first adopted for lower-level regulations in the **United States** in 1946. The practice was subsequently adopted in **Canada** in 1986 – called "pre-publication" – and in **Portugal** in 1991. By 1998, 19 OECD countries were using public notice-and-comment at least in some situations. **Japan** adopted notice-and-comment requirements for all new regulatory proposals (and revisions to existing rules) in April 1999. In other countries such as

**Hungary**, the process is proceeding on an ad hoc basis, with individual Ministries deciding their own policies.

Procedures vary widely. In the **United States** and **Portugal**, the procedure is prescribed by law and judicially reviewed, while **Canada** has adopted the procedure through a policy directive that has no legal force. The **United States** model is the most procedurally rigid: comments are registered in a formal record of the rule-making and regulators are not permitted to rely on factual information which is not contained in this public record. United States' policymakers may accept or reject comments at their discretion, but those who ignore major comments risk having the regulation overturned in court. In **Denmark**, by contrast, notice-and-comment arrangements are also widely used in the preparation of "substantially important" lower level rules, but there is no standardised, formal, and systematic set of requirements.

However, many countries have found that levels of participation have in practice been low. This can be particularly so when the mechanism is first introduced, because familiarity is lacking. Established groups may prefer to keep their special relations with government officials than to participate in more open processes. Participation is also dependent on the ease of response and the expected results of participation, including the effectiveness of the notice process, the amount of time allowed for comment, the quality and nature of the information provided to interested parties and the attitudes and responsiveness of regulators in their interactions with participants in the comment process.

16. Public notice-and-comment is used both for laws and lower level rules. In many countries, it is regarded as particularly important in respect to lower level rules because it provides some scrutiny to regulatory processes inside ministries which do not benefit from the open law-making processes applying to legislation debated in parliaments.

**Box 3. Best practices for notice-and-comment in the United States**

The 1946 Administrative Procedure Act (APA) established a legal right for citizens to participate in rule-making activities of the federal government, based on the principle of open access to all. It sets out the basic rule-making process to be followed by all agencies of the United States' government. The path from proposed to final rule affords ample opportunity for participation by affected parties. At a minimum, the APA requires that in issuing a substantive rule (as distinguished from a procedural rule or statement of policy), an agency must:

i) Publish a notice of proposed rule-making in the Federal Register. This notice must set forth the text or the substance of the proposed rule, the legal authority for the rule-making proceeding, and applicable times and places for public participation. Published proposals also routinely include information on appropriate contacts within regulatory agencies.

ii) Provide all interested persons – nationals and non-nationals alike – an opportunity to participate in the rule-making by providing written data, views, or arguments on a proposed rule. This public comment process serves a number of purposes, including giving interested persons an opportunity to provide the agency with information that will enhance the agency's knowledge of the subject matter of the rule-making. The public comment process also provides interested persons with the opportunity to challenge the factual assumptions on which the agency is proceeding, and to show in what respect such assumptions may be in error.

iii) Publish a notice of final rule-making at least thirty days before the effective date of the rule. This notice must include a statement of the basis and purpose of the rule and respond to all substantive comments received. Exceptions to the thirty-day rule are provided for in the APA if the rule makes an exemption or relieves a restriction, or if the agency concerned makes and publishes a finding that an earlier effective date is required "for good cause". In general, however, exceptions to the APA are limited and must be justified.

The American system of notice-and-comment has resulted in an extremely open and accessible regulatory process at the federal level that is consistent with international good practices for transparency. The theory of this process is that it is open to all citizens, rather than being based on representative groups. This distinguishes the method from those used in more corporatist models of consultation, and also from informal methods that leave regulators considerable discretion regarding whom to consult. Its effect is to increase the quality and legitimacy of policy by ensuring that special interests do not have undue influence.

### *Public hearings*

17. A hearing is a public meeting on a particular regulatory proposal at which interested parties and groups can comment in person. Regulatory policymakers may also ask interest groups to submit written information and data at the meeting. A hearing is seldom an independent procedure; rather, it usually supplements other consultation procedures. According to preliminary results from the most recent OECD survey on regulatory quality indicators, 13 OECD countries used public meetings as a form of consultation by 2005, but there were significant differences in their use vis-à-vis procedures and other aspects of the consultation process.

**Box 4. Public hearings.**

In the **United States** a hearing is attached to the notice-and-comment procedure as needed. Hearings tend to be formal in character, with limited opportunity for dialogue or debate among participants. Experimentation with "online" hearings has begun. In **Germany**, a regulatory agency circulating a proposal for comment may arrange a hearing instead of inviting written comments, or may do both. In **Finland**, where hearings are a relatively new approach, a hearing is usually arranged instead of, or combined with, the invitation of written comments. In **Canada**, hearings are a formal part of the development of all primary regulatory law – conducted by committees in Parliament. Regulatory departments also often hold public consultation meetings, particularly on major regulatory or secondary legislation proposals.

18. Hearings are usually discretionary and ad hoc unless connected to other consultation processes (for example, notice-and-comment). They are, in principle, open to the general public, but effective access depends on how widely invitations are circulated, the location and timing of the hearing, and the size of the room. Public meetings provide face-to-face contact in which dialogue can take place between regulators and wide range of affected parties and between interest groups themselves.

19. A key disadvantage is that they are likely to be a single event, which might be inaccessible to some interest groups, and thus require more co-ordination and planning to ensure sufficient access. In addition, the simultaneous presence of many groups and individuals with widely differing views can render a discussion of particularly complex or emotional issues impossible, limiting the ability of this strategy to generate empirical information.

### *Advisory bodies*

20. Besides informal consultation and circulation-for-comment, the use of advisory bodies is the most widespread approach to public consultation among the OECD countries. Some 21 countries use advisory bodies in some form during the regulatory process. Advisory bodies are involved at all stages of the regulatory process, but are most commonly used quite early in the process in order to assist in defining positions and options.

21. Depending on their status, authority, and position in the decision process, they can give participating parties great influence on final decisions, or they can be one of many information sources. Regulatory development – drafting and reviewing proposals, or evaluating existing regulations – is rarely the only, or even the primary, task of advisory bodies. Some permanent bodies, for instance, may have broad mandates related to policy planning in areas such as social welfare or health care. There are many different types of advisory bodies under many titles – councils, committees, commissions, and working parties. Their common features are that they have a defined mandate or task within the regulatory process (either providing expertise or seeking consensus) and that they include members from outside the government administration.

**Box 5. Examples of advisory bodies**

Their relationships to regulatory bodies can vary from reacting to a regulator's proposals (such as the **Netherlands'** Social and Economic Council, or **Germany's** expert advisory commissions) to acting as a rule-making body, in which advice is only one of several regulatory functions (such as the **United Kingdoms'** Health and Safety Commission). Advisory bodies may themselves carry out extensive consultation processes involving hearings or other methods. For example, in **Germany**, the mandate of the Deregulation Commission stated that it "may hear experts from research institutions, the business community and associations, and administration if it deems this necessary". In **Mexico**, businesses and other interested parties now participate in an advisory committee to the Federal Regulatory Improvement Council (COFEMER), through a dozen or more ad hoc consultation groups organised to review existing formalities and new regulations. **Korea**, too, has greatly expanded its use of consultative committees in recent years. This has coincided with a massive rise in the number of non-governmental organisations (NGOs), and hence the diversity of views to be incorporated into policy decisions. Committees are generally used as means of improving regulatory quality by assuring the flow of expert advice and information to regulators, but are also important in increasing the perceived legitimacy of laws.

22. There two main different kinds of advisory bodies: first, the bodies seeking consensus are interest groups where they negotiate processes, and secondly, technical advisory groups are formed by experts and their aim is to find information for regulators. The first kind tends to have a permanent mandate while the technical bodies are often *ad hoc* groups to work in concrete issues.

**Box 6. The shift in the Netherlands to more transparent consultation**

A core principle in the Dutch process is that of "separation of advice and consultation", which reflects the twin purposes of consultation in obtaining both expertise and consent. There are two formal and distinct consultation structures. The "advisory" function is served by a wide range of ad hoc advisory bodies, created by individual laws.

Membership is based solely on expertise, although in practice direct interests are also represented. "Consultation" is served through a network of advisory bodies created under the Industrial Organisation Act of 1950. Here, the tripartite principle is the underlying factor determining representation. The chief consultative body under the Act is the Social and Economic Council (SER), composed of 15 members representing employers' interests, 15 representing employees and 15 independent experts appointed by the Crown on the advice of the government.

These bodies were historically used within the corporatist system to introduce checks and balances into decisions, to increase the social legitimacy of legislation, and to improve the level of "voluntary" compliance, including a smooth and rapid implementation of new legislation, once agreed. In recent years, however, these structures have been criticised as unsuited to contemporary realities. They are regarded as dampening policy responsiveness, limiting the role of Parliament by locking in "consensus" solutions at an early stage, and as promoting excessive regulatory complexity by trying to balance inconsistent objectives. In addition, the separation of "advice and consultation" has been compromised in practice, while the corporatist and cartel-like structures established under the Industrial Organisation Act are increasingly seen as inconsistent with EU competition principles.

The Dutch Government responded to the criticisms with major reforms. The number of advisory boards was drastically reduced over a number of years, from 491 in 1976 to 161 in 1991 and 108 in 1993. The remainder were abolished in 1997 and replaced with a single advisory body for each Ministry. This reform aims to more clearly separate advice and consultation, and to refocus these bodies on major policy issues rather than details. The ministries are concerned that too many consultative groups have been re-established following the abolition, but they believe that the change has, nonetheless, improved the situation.

## 3. GOOD PRACTICES FOR PUBLIC CONSULTATION IN OECD COUNTRIES

23. In OECD member countries, after identifying important areas of low quality regulation, the first attempts to improve laws and regulations were focused on advocating specific regulatory reforms and scrapping burdensome regulations. Increasingly, however, it was recognised that *ad hoc* approaches to reform were insufficient. Thus, the reform agenda began to broaden to include the adoption of a range of explicit overarching policies, disciplines and tools (OECD: 2002).

24. According to preliminary results from the most recent OECD survey on regulatory quality indicators, 27 Member countries had implemented public consultation with affected parties from a government wide perspective. This represents three more countries than in 2000. Consultation is the most common regulatory tool used among OECD countries.

25. Some of the challenges related to consultation procedures that OECD countries face refer to data collection and transparency in communicating the views of consulted parties. Data collection is inherently expensive, and to make it really effective, the quality of the information and its collection must be efficiently and carefully managed and addressed. A process to monitor the quality of the consultation process should be institutionalised; however, only 5 countries had done so by 2005, according to preliminary results from the most recent OECD survey on regulatory quality indicators. Some other aspects which should be improved in OECD countries are a deficient publication of participants' views and inclusion of consultation results in RIA.

26. Some governments realised that they could share tasks with other parties directly affected by regulation. In many OECD countries, the public has been taking on new roles in the development, implementation, and revision of regulations. Changes in the nature of civil society and the relationships between government and population have been pushing governments toward more extensive use of consultation. Better educated and informed citizens are demanding more information from governments, and thus, creating pressure for more open consultative mechanisms, with better information and more effective opportunities for participation and dialogue. At the same time, advances in information technology are enhancing governments' abilities to meet these demands, as well as the abilities of civil society groups to organise to pursue and promote their goals.

**Box 7. Initiatives in Queensland to improve consultations and information dissemination on regulations.**

"Queensland Regulations: Have Your Say" is a regulatory communications system that acts as early warning device for impending regulatory activity by the Government. It has been introduced to assist business and the community to become involved early in the consultation process by clear public disclosure of the Government's regulatory intentions. The system is an interactive Web-based system which enables Government agencies to place information about regulatory proposals on the Department of State Development's Web site (www.sd.qld.gov.au/qldregulations). It also enables interested parties to respond through the system direct to an agency's proposal.

In addition, a one-stop-shop referral service, the Business Referral Service, has been implemented to provide business with access to detailed information and advice on government regulations, particularly compliance matters. The Business Referral Service enables business owners and operators, with complex compliance queries, direct access to relevant experts within Government. The service is incorporated in the Department's Smart Licence suite of services.

27. In order to include all interested parties, consultation procedures should not be complex and costly. Consultation should reduce the risk of capture by well financed groups of interest or with a deep legislative

knowledge. Therefore, regulators could increase the use of plain, accessible language as well as offering RIA to help explain the effects of regulation to all the affected parties.

28. Consultation systems should be designed according to each country's context, legitimised by the inclusion of all groups of interest and by transparent procedures, while fighting to improve information quality and spreading the use of the new information technologies. Regulators should ask themselves: '*Have all interested parties had the opportunity to present their views?'*. Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses and trade unions, other interest groups, or other levels of government (OECD: 2002).

29. To ensure that consultation improves all regulation, these processes should be used for primary legislation as well as for other lower levels of regulation. Flexibility is important to cope with varying circumstances. In some cases even tailored opportunities for dialogue must be established for further interactions with stakeholders that are harder to reach or less able to participate.

Department of Justice Canada
Ministère de la Justice Canada

DEPARTMENT OF JUSTICE

# POLICY STATEMENT AND GUIDELINES FOR PUBLIC PARTICIPATION



Canada

**"The Government of Canada has recognized that the legitimacy of public institutions, the quality of public policy, and the responsiveness of public services will require new and better mechanisms for engaging citizens and civil society in governance."**

***"A challenge of all governments is to find a way to find innovative ways to put citizens at the centre of the governing process, to engage youth in public enterprise, and to give voice to those who find themselves on the margins."***

**The Right Honourable Jean Chrétien,**
**Speech before the Progressive Governance for the 21st Century Conference, Berlin, June 2000**

DEPARTMENT OF JUSTICE

# POLICY STATEMENT AND GUIDELINES FOR PUBLIC PARTICIPATION


## Summary

The Policy Statement and Guidelines for Public Participation provides a policy tool for all Department of Justice managers and officials to frame the Department's public participation activities. The Policy Statement outlines a commitment on the part of the Department of Justice to involve Canadians in the development of legislation, policies, programs and services through adequately resourced processes that are transparent, accessible, accountable, supported by factual information, and are inclusive of Canada's diversity.

In recognition of the varied nature of issues addressed by the Department, these policy commitments are meant to apply to areas where public input will make the greatest contribution to the policy development process. The Policy assigns various roles and responsibilities for making decisions with regard to which issues are to be addressed through public participation processes and for ensuring that the Policy's commitments are applied as outlined and assigned.

Department of Justice
**POLICY AND GUIDELINES FOR PUBLIC PARTICIPATION**

**POLICY STATEMENT**

The Department of Justice Canada is committed to involving individual Canadians and their intermediary organizations in the development, design and evaluation of public policies, programs, legislation and services.

The Department of Justice Canada is committed to undertaking public participation processes that are transparent, accessible, accountable, supported by factual information and inclusive of the broad diversity of Canada. The Department is further committed to reporting back to Canadians on how their views have been considered in the decision-making process.

The Department of Justice Canada is committed to providing resources adequate for effective public participation functions, expanding opportunities for departmental officials to enrich their knowledge and expertise in public participation and supporting the development of new public participation techniques and technologies.

The Department of Justice is committed to promoting a consultative culture across all Sectors, Branches and Divisions of the Department by ensuring adherence to departmental guidelines

**SCOPE**

The Policy Statement and Guidelines on Public Participation endeavour to frame Justice Canada's public participation activities and supports the strategic direction of Serving Canadians, through a commitment "to make the justice system relevant and accessible to the needs of Canadians."[1] The Department already provides a broad number of opportunities for Canadians to become involved in the public policy process, not all of which call for or require consultation or engagement, such as communications activities that are an

[1] Department of Justice, Strategic Plan 2001-2005, pp. 3-4.

integral part of increasing the participation of citizens in decision-making.[2] Rather than a broad commitment to public participation on every issue, the Policy Statement supports participation activities only where the issues and timelines are such that public input will make a contribution to the policy development process. Where it is determined that public participation will form a part of the policy making process, the Department commits to ensuring that these activities are open, meaningful, timely and properly resourced consistent with the stated strategic direction of Serving Canadians. Determining the policy areas that will include a public participation component is the responsibility of the appropriate departmental authority.

At a minimum the Department must ensure the transparency of its policy development process through the timely provision of information (including accountability through reporting to citizens on results).

Justice Canada's policy guidelines and principles, although primarily concerned with formal public participation activities, also apply to the informal discussions and exchanges between Justice Canada officials and individuals affiliated with organizations active in the justice sector and individual Canadians.

## AUTHORITY

This policy is issued under the authority of the Deputy Minister, Department of Justice.

## APPLICATION

The policy statement and guidelines apply to all sectors of the Department of Justice Canada and should be followed in all public participation processes, whether they are targeted to citizens[3], stakeholders or the voluntary sector.

The policy statement and guidelines supplement the federal government's Policy Statement and Guidelines on Consulting and Engaging Canadians[4] published under the authority of the Treasury Board Secretariat (TBS).
While this policy statement is primarily concerned with the Department's practices in involving Canadians in the public policy process, it also recognizes

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[2] Communications activities are the responsibility of the Communications and Executive Services Branch. Government-wide, these activities are governed by the government communications policy, Treasury Board Secretariat, (1995), Guide IX: Communications, (http://www.tbs-sct.gc.ca/pubs_pol/opepubs/tb_o/siglist_e.html)

[3] The term *citizen* is used throughout in a non-exclusionary fashion to mean all persons, normally resident of Canada, and not just those having the legal status of possessing citizenship

[4] Treasury Board Secretariat, (2001), Policy Statement and Guidelines on Consulting and Engaging Canadians (Working Draft).

the role of both Parliament and stakeholder groups and voluntary associations in communicating the views of Canadians on public policy.

Given the evolving nature of public participation practices, this policy statement and associated guidance documents will be regularly updated to reflect changes to the government-wide policy statement and guidelines as well as ongoing developments in the area public participation.

## RELEVANT POLICIES AND GUIDELINES

The Policy Statement and Guidelines is a key element to ensure the realization of the objective established in the Department of Justice Strategic Plan 2001-2005. In addition, the Policy Statement supplements the Treasury Board Secretariat's policies on consultation and engagement and:

- Policies and guidelines applicable to the legislative and regulatory development process;
- Relevant federal Acts and Statutes such as the *Access to Information Act, Official Languages Act* and the *Privacy Act*;
- the Treasury Board Secretariat's *Government Communications Policy*[5] and the *Client Consultation Policy*[6]*;* and
- other current or future Acts, Statutes, policies, guidelines or directives of application to the Department or the whole of the federal government.

## JUSTICE CANADA'S VISION OF PUBLIC PARTICIPATION

The Department of Justice is responsible for ensuring that Canada is a just and law-abiding society with an accessible, efficient and fair system of justice whose policies and programs that reaches deep into all communities. This unique responsibility to Canadian society and government is included in the elements of the Strategic Plan that address the building of the Department's policy development capacity and the role of public participation as a contributor to this process.

This integration of public participation into the policy process is vital to the success of departmental and governmental initiatives, especially now that Canada is a more diverse, educated and informed society. The Department also recognizes that public participation is an important tool for sharing information about justice policy issues that affect Canadians.

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[5] Treasury Board Secretariat, (1995), Guide IX: Communications, (http://www.tbs-sct.gc.ca/pubs_pol/opepubs/tb_o/siglist_e.html)

[6] Treasury Board Secretariat (1995), Guide I: Client Consultation, (http://www.tbs-sct.gc.ca/pubs_pol/opepubs/tb_o/siglist_e.html)

The results of public participation processes provide the information needed to develop strategies and action on issues of concern to the Department, justice and non-justice stakeholders and, ultimately, to provide the Minister of Justice and Cabinet with an important decision-making tool on matters pertaining to justice issues.

Justice Canada is committed to working with many different organizations in the non-governmental, voluntary and private sector and seeks to encourage the participation of all Canadians and stakeholders in its policy development and operational activities especially where these affect Canadians and the evolution of their justice system.[7] Public participation mechanisms enable Justice Canada to identify and cope with emerging new areas of law and policy, track new ideas and identify emerging trends in law and policy, as well as define questions and options. In addition, public participation enables the Department to better understand how the Department's mission and activities impact on Canadians, consistent with the strategic direction of Serving Canadians.

The Department of Justice recognizes that meaningful public participation cannot be a one-time process and requires the development of an ongoing relationship between the Department of Justice, Canadians and the many justice and non-justice sector stakeholders. The Department also commits to adequately resource its public participation activities to ensure that these are tailored to the purpose and desired outcomes, the participants involved, and the time available.

As a strategic policy development tool, public participation processes are best suited when applied to the entire policy cycle from problem identification to option selection and, in some cases, implementation. As such, public participation is best used where the issues and timeframes permit the early inclusion of citizens in the policy development process – preceding, where possible, the selection of options and decisions concerning plans for action.

Public participation involves a two-way communication process, in which all parties listen and contribute views, information and ideas, in a process of critical reflection and dialogue. Both provide opportunities for genuine listening, respectful of all views and opinions.

These statements and guidelines supplement the Government of Canada's Policy Statement that are part of its continuing commitment to involve citizens in government decision-making. The Government of Canada's policy and guidelines apply to all federal departments and agencies

As outlined in the Department's Strategic Plan, the Department is committed to participatory processes based upon openness, trust, integrity, mutual respect,

[7] Department of Justice, Strategic Plan 2001-2005, p. 4.

transparency, inclusiveness and co-operation thus providing the Department with a direct link to the ideas and concerns of Canadians. Mutual trust and understanding, built up over time through a continuing process of involvement, discussion, decision and follow-through (feedback), are the cornerstones of successful public participation processes.

## CONTEXT AND PUBLIC ENVIRONMENT[8]

The Department of Justice has a long history of successfully consulting citizens on its policy, program and legislative initiatives, the context in which participatory processes are organized has changed significantly in the past decade. Democracy in its many forms, including voting, participating in intermediary organizations (also termed stakeholder groups and voluntary associations), and communicating with elected representatives, Ministers and government officials, remains the principal means by which Canadians participate in the development of policies, programs and legislation. However, in recent years various forces have fundamentally transformed Canada's social, cultural and economic landscape. As Canada's population becomes more diverse, reflecting its multicultural make-up, and also better educated, informed and equipped to participate in shaping the policies that affect them, governments need to adapt their means of involving Canadians in the policy-making process.

Canadians want to engage in the process of discussing the values that underlie policy options and the tradeoffs and choices that must be made by decision-makers, without wishing to impose their views on the leaders they have elected to represent them. Citizens, stakeholders, and interest groups are increasingly unwilling to accept the devolution of public responsibilities to lower levels of government and/or individual citizens without the concomitant devolution of responsibility for defining and advancing public policy issues to those same levels.

While Canadians acknowledge that traditional stakeholder groups, such as the institutional and professional bodies, industry and business associations, as well as the voluntary sector have roles to play, they also believe that citizens can also participate in the process as individuals – independently from these groups.

The federal government has responded by committing itself to enhancing the opportunities for input on the part of the general public, interest groups and stakeholders. This commitment was noted in two recent Speeches from the Throne that emphasized the need to instil a stronger consultative culture across the federal government. A critical part of this new focus is the Social Union Framework Agreement (SUFA). The SUFA calls on the federal government and

[8] Adapted from Treasury Board Secretariat (2001), Policy Statement on Consulting and Engaging Canadians (Working Draft).

provincial governments to “ensure appropriate opportunities for Canadians to have meaningful input into social priorities and reviewing outcomes.”

It is possible to conclude that the current trend towards greater interactive involvement of citizens in policy making is both unavoidable, and highly desirable. Indeed, where citizens are fully engaged in the policy process, their sense of empowerment is increased, their capacity to act as democratic citizens is enhanced, and the policy options available to government actively reflect the emotive and factual motivations of their constituents. The result: better citizens and better policy.

Public participation is, however, not a “free for all” or a panacea. Public participation efforts must be responsive to the needs of the public, consulting agency and the subject of the public participation. It is critical, therefore, to recognize that each public participation process requires a flexible approach which is appropriate to those needs. One size does not fit all.

## DEFINITIONS[9]

**Public participation** has several facets and dimensions ranging from public information and education through to partnerships. In terms of the departmental commitment, public participation primarily refers to processes of public consultation and citizen engagement.

**Consultation** refers to processes through which governments seek the views of individuals or groups on policies, programs or services that affect them directly or in which they have a significant interest. Consultation can occur at various points in the policy development process and can be used to help frame an issue, identify or assess options and evaluate existing policies. Consultation includes processes such as public meetings, advisory committees, polling and focus groups.

**Citizen engagement** refers to processes through which governments seek to encourage deliberation, reflection and learning on issues at preliminary stages of a policy process, often when the focus is more on the values and principles that will frame the way an issue is considered. Citizen engagement approaches include study circles, deliberative polling, citizen juries, and public dialogue.

Citizen engagement differs qualitatively from consultation in a number of ways, including: an emphasis on in-depth deliberation and dialogue, the focus on

[9] Drawn from Treasury Board Secretariat (2001), Policy Statement on Consulting and Engaging Canadians (Working Draft).

finding common ground, greater time commitments and its potential to build civic capacity. In this regard, citizen engagement processes should be used selectively.

Many public participation processes will involve elements of both consultation as well as citizen engagement mechanisms.

Operationally, public participation requires the allocation of financial and staff resources adequate to fulfil the commitments outlined in this policy statement.

## ROLES AND RESPONSIBILITIES[10]

Building a culture of public participation in the Department of Justice is a shared responsibility. Within this context, a variety of players have a direct or catalytic role in supporting and implementing this policy statement and guidelines:

The **Minister of Justice and Attorney General of Canada** often in consultation with Members of Parliament and Senators, provides leadership by setting policy direction, fostering and participating in public participation initiatives and in considering the outcomes of these processes when making decisions. As a member of Cabinet and Member of Parliament, the Minister of Justice and Attorney General of Canada uses the results of public participation processes to make decisions on policy and legislative directions affecting the justice sector.

The **Deputy Minister** is responsible for ensuring that public participation is an integral part of the design, delivery, and evaluation of public policies, programs, and services. The Deputy is accountable to the Minister and the Clerk of the Privy Council for the effective implementation of such processes in the department as reflected in the establishment of clear lines of responsibility and accountability; the allocation of adequate resources; provision of training and professional development; and, given the increasingly cross-cutting nature of public policy issues, providing support to horizontal processes. The Deputy Minister is also responsible for ensuring that the outcomes of departmental public participation processes are integrated into the decision-making processes, and that these processes are evaluated.

[10] Adapted from Treasury Board Secretariat (2001), Policy Statement on Consulting and Engaging Canadians (Working Draft).

**Sector, Branch and Divisional Heads** have a key responsibility for determining which issues require public participation processes, as well as a responsibility for the planning, undertaking, and evaluating public participation initiatives. They are further responsible for ensuring collaboration in this area, both within the Department and, where required, between federal departments and agencies and other levels of government.

In promoting a consultative culture in the department, Sector, Branch and Divisional Heads must ensure that public participation skills are considered in staffing and performance evaluations.
In addition, the following have a particular functional responsibility to support and assist the Department's public participation activities:

**Consultations Unit, Intergovernmental and External Relations Division** is responsible for assisting departmental public participation processes through the provision of advice and support for the development of consultation plans and strategies and logistical support. The Unit is also responsible for ensuring that adequate training opportunities are available for departmental officials and for maintaining a database of key justice sector stakeholders and contacts.

**Regional Office Heads** (including the regional offices of the National Crime Prevention Centre) may be called to assist in the execution of public participation initiatives in the regions, and when appropriate, suggest how collaboration could be achieved with other levels of government within their region.

**Communications and Executive Services Branch** is responsible for the provision of communications support for departmental public participation activities that include strategic communications advice and planning, the development of public information materials, and environmental scanning and analysis.

**Evaluation Division** is responsible for carrying out independent assessments of the Department's public participation processes and providing advice and assistance to managers on self-evaluations, performance measures and results reporting relating to these public participation activities. The Division is also responsible for ensuring adherence to the Treasury Board's guidelines for evaluating public participation processes.

Other Sectors or Divisions may assume particular roles and responsibilities at particular times.

Government-wide, the **Privy Council Office (PCO)** and the **Treasury Board Secretariat (TBS)** and **Canadian Centre for Management Development (CCMD)** have been given particular responsibilities to promote and support a consultative culture across the federal government and in the public service.

## PUBLIC PARTICIPATION GUIDELINES[11]

Operational considerations

*Costs to participants:*

In planning public participation processes, it is important to be aware that individuals or groups may incur costs arising from their participation. In selecting the appropriate method of participation, these costs must be weighed against the intended purpose and outcome. Where relevant to achieving the goals and objectives of the public participation, Justice Canada will consider whether cost to participants is an impediment to participation. In such circumstances, the Department may make provisions to defray some or all of these costs, subject to the relevant Treasury Board Secretariat guidelines.

*Providing time for stakeholder participation:*

In planning public participation processes it is important to recognize the resource constraints which affect citizen or stakeholder representatives ability to reply to departmental requests for input. As a consequence, participants are to be given sufficient time to adequately consider, internally consult, and respond to the consultation within time frames which strike a reasonable balance between the Department's needs or exigent circumstances to get something accomplished expeditiously and the need for participants to be involved in a meaningful way.

*Sharing knowledge and Information:*

Unequal access to information, or inaccurate assumptions about the knowledge base of participants can negatively impact on the effectiveness of a public participation exercise. As a result, Justice Canada shall endeavour to provide complete and factual background information material to all participants equally.

In recognition of the above noted operational considerations the Department of Justice shall ensure, wherever possible, that the following guidelines are respected:

### Approval and Planning:

[11] These guidelines supplement the relevant Treasury Board Secretariat guidelines and policies. For additional information, please refer to the Department of Justice Public Participation Guide.

1. All formal public participation activities shall require the approval of the relevant departmental authority;

2. Policy plans and Memoranda to Cabinet should, where relevant, include a section addressing what public participation activities are envisaged and, if any, a summary plan included;

3. Public participation plans shall be submitted for comment and approval by the relevant departmental authority;

**General Operational Guidelines:**

1. Ensure that public participation activities are inclusive of the broad spectrum of Canadians and not limited to traditional justice sector stakeholders;

2. Provide to participants a clear context for which public participation is undertaken and decisions will be made. Ensure that participants are informed of existing or potential linkages with other policy initiatives, issues or public participation activities;

3. Ensure that financial and staff resources correspond to the nature and scope of the public participation. Where resources are limited this should be communicated;

4. Ensure that sufficient staff resources are available to carry out the process and trained adequately for this task;

5. Ensure that clear and reasonable timelines are established for participant input and comment and that these timelines are communicated;

6. Ensure that the public participation device used is appropriate to the nature of the issue, the target groups affected and the staff and resources available;

7. Ensure that feedback to participants is built into the process and that participants have opportunities to bring forward additional comment or input as a result of this feedback;

8. Ensure that an evaluation framework is developed and built into the public participation plan;

9. Ensure that participants, affected groups, and stakeholders are informed of the results of the policy process and how their input was used in devising the policy;

10. Ensure that public participation processes adhere to the relevant legislation, regulations, policies or guidelines affecting the rights and responsibilities of individual Canadians, departmental or other officials, or other participants.

**PRINCIPLES**[12]

Public participation processes undertaken by the Department of Justice should respect the following guiding principles:

Commitment: all Sectors, Branches and Divisions share in Justice Canada's commitment to the process of public participation and its integration into the policy-making process;

Clarity: Justice Canada shall ensure that a clear mutual understanding of the objectives, purpose and process of participation and feedback exists and that the parameters of the public participation activity are established in advance and communicated to participants;

Trust: Justice Canada shall ensure that open lines of communication and working relationships are established and respected;

Inclusiveness: Justice Canada shall ensure that the participation of the broadest possible range of groups or individuals who have an interest in or who may be affected by a government decision is encouraged;

Accessibility: Justice Canada shall ensure that appropriate measures to ensure that all Canadians, regardless of their linguistic, regional, ethno-cultural or socio-economic background or physical capabilities, are able to participate;

Mutual respect: Justice Canada shall ensure that departmental officials and stakeholders share joint responsibility and commitment to ensuring respect for the legitimacy and views of all participants;

Responsibility: Justice Canada shall ensure that the Department and participants share in the responsibility for ensuring that

[12] Adapted from Treasury Board Secretariat (2001), Policy Statement on Consulting and Engaging Canadians (Working Draft).

public participation processes are held in good faith and that adequate resources and time are allocated to the process;

Accountability: Justice Canada shall ensure that feedback on the outcomes of public participation processes is provided to participants and demonstrate how these outcomes have been considered in the policy-making process;

Co-operation: Justice Canada shall ensure that provincial and territorial governments, as well as other federal departments and agencies, are involved where relevant and practicable, consistent with the principles set out in the Social Union Framework Agreement.

## CABINET DIRECTIVE ON LAW-MAKING

In March 1999, Cabinet issued a directive on law-making in relation to consultations where draft legislation itself would be part of the consultation documents. This directive outlines the process to be used to obtain authority to consult on what is otherwise considered to be a Cabinet confidence (i. e. a bill before tabling). If a draft bill is intended to be used in consultation before it is tabled in Parliament, the MC should state that intention and ask for Cabinet's agreement. In the case of a draft bill involving changes to the machinery of government, the approval to consult should generally be sought in a letter to the Prime Minister from the sponsoring Minister.

## PUBLIC PARTICIPATION WITH OTHER DEPARTMENTS AND GOVERNMENTS

Where possible, Justice Canada will make every effort to co-ordinate with other federal departments and agencies and, to the extent feasible, with provincial and territorial governments, to address the major issues that impact on Canada's system of justice through:

1. Joint public participation when topics are related;

2. Planning public participation activities so that individuals and organizations affected or interested in justice issues are not forced to address several requests for participation during the same time period;

3. Ensure that, wherever possible, Justice Canada's Public Participation Policy and Guidelines are applied to joint processes.

As a joint partner in a public participation process, or as a participant, Justice Canada will ensure that adherence to the basic principles of commitment, clarity, trust, inclusiveness, accessibility, mutual respect, responsibility, accountability, and co-operation are maintained.

## PUBLIC PARTICIPATION WITH THE SOLICITOR GENERAL[13]

The Department of Justice has at different times been involved in the public participation activities of most federal departments and agencies. It is, however, with the Department of the Solicitor General that these activities have mostly been undertaken. As a result of their respective mandates the two departments share many of the issues of interest. For this reason, it is expeditious to work in partnership to develop a policy to engage Canadians so that duplication and overlap is avoided and to ensure the best use of resources.

The Department of the Solicitor General is responsible for protecting Canadians and helping to maintain Canada as a peaceful and safe society. The Department's role encompasses policing and law enforcement, national security, corrections and conditional release.

In all public participation exercises jointly conducted with the Department of the Solicitor General of Canada, Justice Canada will ensure that adherence to the basic principles of commitment, clarity, trust, inclusiveness, accessibility, mutual respect, responsibility, accountability and co-operation are maintained.

When the Department of Justice engages in joint exercises with the Department of the Solicitor General, the conflicting departmental positions on policy will be made clear to participants to enable them to make informed decisions. The aim of the process will not be to choose one course of action over another, but to simply find common ground and suggest a workable solution.

In practical terms, communication between the Department of Justice and the Department of the Solicitor General will be ongoing. It must also be recognized that there will be instances when one department or the other will have issues for public participation which are of no interest to the other.

[13] Including the Agencies reporting to the Solicitor General of Canada: Royal Canadian Mounted Police; Correctional Services of Canada; Parole Board and, Canadian Security and Intelligence Service.