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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY KATHY GRAY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE DEPARTMENT OF HEALTH

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Richard McLean (instructed by Brentnall Legal Limited) for the Applicant
Gordon Anthony (instructed by the Departmental Solicitor's Office) for the proposed Respondent

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SCOFFIELD J

Introduction

[1] By these proceedings the applicant seeks to challenge a consultation published by the Department of Health ("the Department") in relation to a forthcoming Public Health Bill. The consultation process ran from 5 July 2024 to 14 October 2024.

[2] The applicant contends that the public law principles relating to lawful consultation have not been complied with. The core of the applicant's challenge is that the Department did not provide sufficient information in the course of the consultation to permit the public to make a properly informed response. A range of other complaints have been made in the applicant's affidavit, including that the consultation was overly complex and was not made accessible to a range of vulnerable groups.

[3] Mr McLean appeared for the applicant; and Mr Anthony appeared for the proposed respondent. I am grateful to both counsel for their helpful written and oral submissions.

Factual background

[4] As noted above, the applicant's challenge relates to a consultation document issued on 5 July 2024, entitled 'Policy underpinning the Public Health Bill (Northern Ireland): A Consultation Document', and the associated consultation process. The applicant contends that the consultation document is difficult to understand and to engage with. She says that she first heard about the consultation on 31 August 2024. She has outlined in her affidavit evidence a number of concerns she has about the consultation process. Other than indicating that she is concerned, there is no explanation in her affidavit evidence as to her particular role or interest in the subject matter of these proceedings or how, in particular, she or her family may be affected by the subject matter of the consultation.

The public health review from 2013 to 2016

[5] The impugned process follows on from a review of the Public Health Act (Northern Ireland) 1967 ("the 1967 Act"). That review commenced in 2013 when the Permanent Secretary of the Department's predecessor department wrote to the Northern Ireland Law Commission (NILC) in response to an invitation to identify legislation in need of reform or consideration. The Department had been aware for a number of years that the 1967 Act had not been updated in any significant respect, whilst new threats to public health continued to emerge. In other jurisdictions and internationally, public health legislation had been updated to enable governments and public authorities to respond effectively to a wide range of incidents and emergencies involving not only infectious diseases but also chemical and radiological contamination. The Department noted that concerns had been expressed by a number of authorities with responsibility for dealing with incidents that the 1967 Act "remained unclear on certain points and that existing powers could be inadequate to deal with potential public health emergency scenarios" (as noted in the introduction to the 2016 final report, mentioned below).

[6] It was agreed in October 2013 that the NILC would review the 1967 Act to determine to what extent it was still fit for purpose. However, following a decision in September 2014 to effectively close the NILC by March 2015, the Department itself took on responsibility for the completion of the review, which was then undertaken by a Working Group in the Department overseen by a Steering Group chaired by the Chief Medical Officer.

[7] There was a 'final report' published in March 2016, following a consultation process which had run from 29 September until 18 December 2015 ("the 2015 consultation"). (The report was the end product of the detailed review of the 1967 Act which was undertaken at that time but was never intended to be 'final' in the sense of being the ultimate output of the review. As the report itself noted, it made recommendations to be taken forward in a new Assembly Bill and anticipated that there would be some further consultation in advance of the drafting of that Bill.)

[8] The 2015 consultation posed a number of questions about public health law. The final report of the review addressed the current position by reference to a number of themes, summarised the consultation responses received, and then set out the Department's response on each issue. The final report ultimately set out 18 key recommendations for legislative reform and for shaping the future of public health law in Northern Ireland. It described the purpose of the review as being to ascertain whether the 1967 Act was fit for purpose. The short answer provided was that it was not considered to be. The executive summary of the 2016 final report included the following:

> "The review has identified a number of deficiencies in the 1967 Act, the most significant of which is the fact that the Act is concerned almost exclusively with infectious diseases, whereas other jurisdictions and international law have adopted an 'all-hazards' approach which seeks to protect populations against the full range of threat including contamination.
>
> The key recommendations are that a new public health bill should be included in the programme for the next Assembly mandate, and that the bill should address all hazards.
>
> A public health bill should also explicitly seek to balance the duty of the state to protect the public's health with the need to respect the rights of the individual.
>
> The review has examined the potential scope of a new public health bill, specifically whether the legislation should continue to be limited to health protection or should include provisions for other domains of public health. This question requires further consideration.
>
> The review has considered the key features that would need to be addressed in a new bill, including powers and duties of various public authorities, and specific interventions that can interfere with individuals' rights, such as compulsory quarantine, isolation, detention and medical examination and treatment.
>
> The review makes 18 recommendations in total."

The 2024 consultation process

[9] The intention at the time of the final report of the review in 2016 was that the 2015 consultation would be the first of two, with the second consultation inviting

views on more specific proposals for provisions to be included in a new Public Health Bill.

[10] The above background is reflected in the Ministerial Foreword to the recent consultation document, which is in the following terms:

> "A review of the current Public Health Act (Northern Ireland) 1967 highlighted the need to update our public health legislative framework in order that Northern Ireland can respond to 21st century public health emergencies.
>
> The overarching principle of the draft Bill is to protect the population against various forms of infection and contamination including biological, chemical and radiological, in addition to infectious diseases, which is the focus of the 1967 Act.
>
> This all hazards approach will enable broader surveillance, supporting more timely and effective interventions, controlling the further spread of infection and contamination generally and if needs be, in an emergency.
>
> This is the second consultation on Public Health and seeks your views on specific policy proposals that will underpin the provisions to be included in the Bill. The first consultation in September 2015 asked basic questions about current Public Health law. The outcome of that consultation enabled a Final Report to be published in March 2016, which set out key recommendations for legislative reform and the shaping of future public health protection law in Northern Ireland, leading to this current consultation.
>
> This consultation sets out the proposals which will underpin a new health protection legislative framework for Northern Ireland, and which are based on the recommendations of the Review of the 1967 Act and learning from recent public health emergencies."

[11] Further detail about the nature and purpose of the consultation is contained in section 2.1 of the consultation paper, which describes the background to the process as follows:

> "Current DoH public health legislation, the Public Health Act (Northern Ireland) 1967 ("the 1967 Act"), is over 56 years old. The purpose of the Review of the 1967 Act was to ascertain whether it is fit for purpose today. Following the publication of the Final Report of the Review in March 2016, work commenced on scoping policy proposals that would underpin a new health protection legislative framework for Northern Ireland. Unfortunately, in January 2018, work on the Bill had to be paused as a result of other work pressures. The Department's emergency response to the Covid-19 pandemic naturally further delayed progress on a Bill until it was feasible to divert resources to recommence this work. In May 2022, DoH ministerial agreement was given to set up a Bill Team, tasked with bringing forward a new legislative framework which would be limited in scope to health protection, which is the prevention and mitigation of the impacts of infectious disease, environmental, chemical and radiological threats on individuals, groups and populations.
>
> A sole focus on health protection matters allows the Bill to progress at pace. Widening the scope to incorporate other public health issues which may be contentious, risks holding up the passage of the Bill while these issues are considered. Without a new health protection legislative framework, Northern Ireland (NI) remains vulnerable to other 21st century public health emergencies, in terms of a legislative response, and therefore a new health protection legislative framework is urgently required."

[12] The applicant's complaint with the recent process is that it has failed to disclose adequate information in the course of the public consultation to permit properly informed response, in particular by failing to provide consultees with sufficient information about the basis for the Department's proposed decisions.

[13] The basic thrust of the consultation is that the new Bill will adopt an "all hazards" approach, which will bring Northern Ireland into line with the rest of the United Kingdom. The 1967 Act focused on infectious diseases. The most basic of summaries is again contained in section 2.1 of the consultation document, in the following terms:

> "In summary, it is proposed that the new Bill will:
>
> - be based on the all-hazards approach, in alignment with other UK jurisdictions, for the protection of

people from known or yet to be discovered hazards, infections or contamination;

- update certain powers around restrictions on employment, quarantine, isolation and medical examination;

- clarify roles and responsibilities for different authorities; and

- provide underlying human rights based principles under which powers of intervention would be exercised."

[14] The consultation paper contains a range of footnotes and hyperlinks, directing readers to other resources and allowing those reading the consultation paper online to click through directly to access those resources. These included the text of the 1967 Act; the final report from the earlier review; the International Health Regulations (2005) published by the World Health Organisation (WHO); other relevant statutory provisions from this jurisdiction and beyond; and various public health response plans formulated by government. A table of the conclusions and recommendations contained in the 2016 final report is set out in an annex to the consultation paper. The consultation paper is 79 pages long in total; but the core of the paper is section 2.3, which addresses the policy proposals being formulated to address the recommendations in the earlier review. This section runs to some 64 pages.

[15] Each of the policy proposals in the consultation paper is grouped under one of the four themes which were discussed in the 2016 review and which relate to the 18 recommendations in the 2016 final report. The paper sets out to address the policy proposals under each theme and identify which of the earlier recommendations were incorporated. The introductory section for each theme then provides commentary on each of the proposals and provides some information about (and, the Department submits, provides the rationale behind) the proposals. The Department's submissions emphasise that these are in the form of policy proposals only and do not constitute decisions about the final content of a draft Bill. A range of formal consultation questions are contained throughout the paper (43 in all), usually in the form of asking whether the respondent agrees or disagrees with the proposal or proposition at hand. In many instances, the questions specifically asked the respondent to give reasons for their answer either way.

[16] The consultation paper was accompanied by a pro forma consultation response form for respondents to use when providing their views on the questions posed in the consultation paper. Lifting the questions from the consultation paper itself, the response form generally asked respondents whether they agreed or disagreed with a proposition or a particular element described in the consultation

paper, or whether they were undecided or the question was not applicable in the circumstances. In each case there was a box in which reasons for the respondent's answer could be provided. The response form was broken down into the same themes as the 2016 review report and the 2024 consultation paper, namely: the structure and purpose of the Bill (pages 7-9 of the consultation paper); organisational responsibilities (pages 10-14); public health powers (pages 14-66); and protecting individuals (pages 67-69). In each instance the specific question was numbered and the questions were posed and/or grouped under a number of sub-headings. There were separate sections for comments on rural impact and equality or human rights considerations. Respondents were able to answer questions of their choosing and bypass others if they so wished.

[17] The Department also says that the consultation document was published generally only after there had been more targeted engagement with a range of stakeholders. (These included the Executive Office, MLAs, MPs and district councils; Northern Ireland Departments and relevant arm's-length bodies; the Northern Ireland Office, the Home Office and the Health Departments in the other jurisdictions of the United Kingdom and the Republic of Ireland; Northern Ireland health and social care bodies and emergency service organisations; professional medical bodies and regulators; some community and voluntary sector groups; and a number of bodies with an interest in human rights and equality matters.) This was part of what the Department described as a "comprehensive policy scoping", as well as a consideration of lessons learned from recent public health emergencies since the 2015 review (notably, the Covid-19 pandemic). Some of these key stakeholders were engaged with before the consultation; and others were engaged with more directly as part of the consultation.

[18] The intention behind the consultation process, which is evident on its face, is that the Department intends to produce an analysis of the responses in a report which will then be published on its website. Any final decision in relation to a proposed new legislative framework for health protection in Northern Ireland will then be based on consideration of the consultation responses and the advice of health protection professionals.

[19] On 19 September 2024 the Minister with responsibility for the Department of Health, Mr Mike Nesbitt MLA ("the Health Minister") decided to extend the consultation period, which was at that point due to end on 27 September, recognising that there had been significant public interest in the consultation. The press release issued by the Department on that date noted that, while the 1967 Act focused on infectious diseases, the new Bill would also cover infection and contamination from biological, chemical and radiological sources to bring Northern Ireland into line with the rest of the UK. The statement from the Minister also contained the following:

> "There has been significant public interest in the consultation. As we seek to replace outdated legislation, it

> is important that we consider all options. I am not in favour of mandatory vaccination even in limited and tightly prescribed circumstances. Nevertheless, it is right that we have a public conversation about all potential options in the public consultation, as we decide what should be in the final Bill to protect us all.
>
> Unfortunately, there has been some misunderstanding about the planned new bill.
>
> Any draft legislation emerging from the consultation must go through the Northern Ireland Assembly's normal scrutiny processes, including a detailed review by the Health Committee and an Assembly debate followed by votes of the full Assembly.
>
> It is important we have vigorous debate on the proposed legislation, which is why I welcome the strong interest in the consultation.
>
> I am determined that the planned Bill will strike the correct balance between the state's responsibility to protect the public's health, our collective responsibility to protect each other, and the economy, rights and dignity of individuals. The public consultation process and the subsequent Assembly scrutiny processes will help us achieve that balance."

[20] On the same date (19 September 2024), the relevant Assembly scrutiny committee ("the Health Committee") met and discussed the consultation process. (A full transcript of this meeting has not been provided to the court but the applicant comments on it in the course of her affidavit evidence.) It seems that, during the meeting, a number of committee members expressed concern over the scope of the proposed Bill and potential restrictions on public liberty. A number of comments reflected the fact that the consultation was considered to be complex and difficult to follow; and that members' constituents had expressed concern about this and the difficulty in responding to the consultation. There was discussion about whether it would be possible for the consultation to be simplified.

[21] The applicant also relies upon a number of statements or complaints made by various members of the Assembly. In particular, on 23 September 2024, Mrs Diane Dodds MLA (who was the Democratic Unionist Party (DUP) Health Spokesperson and is a member of the Health Committee) wrote to the Minister asking that the public consultation be withdrawn. The letter described the consultation document as containing some vagueness and imprecision in terms of language and the measures proposed (although these were not particularised in the

correspondence). It noted that the Health Minister had already announced that he did not support the mandatory vaccination element of the proposals (see para [19] above), which Mrs Dodds welcomed. Her letter invited the Department to withdraw the consultation paper and publish a new document which was "more precise with greater detail on suggested interventions and the specific circumstances in which they might be deployed." It also noted that there was "little positive to be gained from consulting on areas which have no prospect of securing Executive or Assembly approval", suggesting that a new consultation paper should be produced "mindful of the concerns that have been expressed around individual liberty and the checks and balances between the power of the Government and personal freedom and choice."

[22] The next day Mrs Dodds's Assembly colleague Mr Brett MLA repeated the request in the Assembly chamber that the consultation be withdrawn, complaining that the consultation process undermined public confidence in the Assembly.

[23] On 29 September an article was published in the *Belfast Telegraph* by Fionola Meredith also expressing concern at the consultation. The impetus for the article appears to have been Mrs Dodds' recent letter (which had also been published via press release). The author's central complaint appears to have been that the Department expected "people to spend hours and hours wading through a long, obscure and confusing questionnaire, simply in order to register their response." The article expressed concern at the government approach to some measures adopted during the Covid-19 pandemic and a view that "there remains an ingrained belief, especially among the political classes, that lockdowns and other draconian restrictions are the only answer to pandemic management." Nonetheless, Ms Meredith urged readers, whatever their view, to let the Department know them.

[24] The applicant also relies upon the actions of Causeway Coast and Glens Borough Council. On 1 October 2024 that council declined to send a corporate response to the consultation process. Recognising that the consultation engaged issues of policy upon which it may be difficult to reach consensus between political parties on the council, it was determined that it would be better for individual parties to respond rather than seeking to agree a corporate response on behalf of the council as a whole, which had been worked on by officials within the council. The press report exhibited by the applicant in this regard and relied upon by her suggests that the main proponent of this approach was a DUP representative, Alderman McAuley.

[25] Having been extended, the consultation period closed on 14 October 2024. The Department informed the court that there have been some 8,200 responses to the consultation – a figure which, the Department suggests, speaks to the clarity and transparency of the consultation document.

The present position

[26] After the impugned consultation closed, the Health Minister made a public statement including the following:

> "Contrary to what has been claimed in some quarters, there is currently no Public Health Bill. That should not and will not be written until we have had, and reflected upon, the public consultation on legislative options. Now that the consultation is concluded, responses will be reviewed and assessed.
>
> Then it will fall to me to bring forward a Bill and seek Assembly support.
>
> I look forward to further robust debate which will offer opportunities for amendments which remove proposals and add others."

[27] The statement went on to say that, although the Minister did not prejudge the outcome of the further processes to be undertaken, he could set out some of his guiding principles in terms of what the Department would propose. Those guiding principles were published in the following terms:

> "Firstly, the Bill I bring forward will not contain mandatory vaccination powers. That should not come as any surprise as I have already made clear my opposition to such a measure. But I say this – had I not included the option in consultation, I would likely have been questioned about omitting it and not offering the public an opportunity to comment. Proposals for an all hazards bill should allow the public to comment on all possible response options.
>
> Secondly, and for the first time, powers to introduce emergency public health regulations will be subject to a clear and time-limited triple lock. Under this system, they would need to be agreed by me as Minister, accountable to the Assembly; by the wider Executive; and by the Assembly itself.
>
> It is of course possible that emergency regulations would need to be introduced at rapid speed, due to the imminence and potentially catastrophic implication of a new threat against us. In such circumstances,

retrospective Assembly approval would be required within 14 days. Otherwise, the regulations would fall.

Thirdly, there would be significant safeguards to protect individual rights. Court orders would be required for a wide range of actions, including entering a dwelling, requiring a person to undergo a medical examination, be kept in isolation or limiting where a person goes.

It should be remembered that under existing legislation, authorities can already seek a court order to require that someone who has an infectious disease be removed to hospital or detained there, or not participate in any trade, business or occupation.

In an important additional safeguard under the proposals, a court order would be required for entry to a private dwelling. At present, entry to a dwelling can be demanded when 24 hours' notice is given – without the oversight of the courts.

I fully acknowledge that legitimate concerns have been raised during the public consultation. There is always a balance to be struck between the rights of individuals and the wider rights of neighbourhoods, communities and society.

Public health interventions in relation to households, businesses and schools are only used on very rare occasions. But the legal options must be there, unless we are to seriously argue that individuals have the right to knowingly or unknowingly cause biological, chemical and radiological contamination or otherwise put the health and lives of others at risk."

Relevant legal principles

[28] There is no major contention between the parties as to the legal principles to be applied in this area. The requirements in public law in respect of consultation have been set out in a range of authorities. These are often referred to as the *Gunning* principles (coming from the case of *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168); although they are sometimes known as the Sedley principles or the *Coughlan* principles. They were endorsed in the Court of Appeal in England and Wales in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, at para [108], in the following terms:

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; 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."

[29] I examined the relevant requirements in *Re Northern Ireland Badger Group's Application* [2023] NIKB 117, at paras [40]-[43], and identified the four key elements as being as follows:

> "(1) the consultation must be undertaken when the proposals are at a formative stage; (2) there must be sufficient reasons given for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; (3) adequate time must be afforded for this; and (4) the product of the consultation must be conscientiously taken into account when the decision is taken."

[30] The application of the principles in any given case is, of course, both fact and context specific; with the overriding question being whether the relevant consultation process has been conducted in a way which is so unfair as to be unlawful. Perfection is not required. A helpful modern summary of the principles, taking into account the important decision of the UK Supreme Court in *R (Moseley) v London Borough of Haringey* [2014] UKSC 56, is contained in the judgment of Hickinbottom LJ in *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] EWCA Civ 2098, at para [90] (set out in full at para [43] of my decision in the *Northern Ireland Badger Group* case).

Relevant guidance

[31] I have also been referred to a number of government publications containing guidance on consultation or policy-making processes for public bodies. It is the Department's case that the consultation paper and response form in this case were prepared in the light of best practice guidelines on policy formation. It quoted in particular 'Principle A' of the UK government's consultation principles of 2018, namely that:

> "**Consultations should be clear and concise**. Use plain English and avoid acronyms. Be clear what questions you are asking and limit the number of questions to those that are necessary. Make them easy to understand and easy to answer. Avoid lengthy documents when possible and consider merging those on related topics."

[32] The applicant has also referred me to the Northern Ireland Civil Service (NICS) publication, 'Making a Difference: The NICS Guide to Policy Making that Works' ("the NICS policy-making guidance"). I return to this below.

Summary of the parties' positions on the merits

[33] The applicant contends that the Department's consultation process in relation to the planned Public Health Bill contravenes the second *Gunning* principle since it is "jargon laden, conclusionary in format and provides no insight into why the Department has reached its conclusions and what factors it considers important in reaching that view." She further submits that Northern Ireland is "being required on the face of the consultation to rapidly follow in the footsteps of Great Britain with a consultation process that appears to present a foregone conclusion." It is submitted that the consultation procedure was unduly short and that the consultation paper fails to present viable or any alternatives to allow individuals to make intelligent consideration or response.

[34] The applicant also says that the effects (of the proposed legislation) are wide ranging in relation to a number of matters including surveillance, emergency powers, restrictions, power of entry to premises, detention, power over dead bodies and powers to keep children out of schools. She further says that adequate detail about particular proposals has not been provided, notwithstanding that the final report on the first consultation envisaged detailed and/or specific proposals being consulted upon at a later date. She is also critical of the fact that the consultation in its current format contains no glossary of terms and, more importantly, no possible alternative measures or options which are less onerous than those proposed.

[35] On the other hand, the proposed respondent invites the court to dismiss this application at the leave stage on the basis that it does not disclose an arguable case with a realistic prospect of success. It contends that the subject matter of the challenge is either non-justiciable or unsuitable for judicial intervention (a matter discussed separately below); and that, in any event, there is no basis for finding any breach of the second *Gunning* principle. The Department says that the detailed information before the court makes it clear that the consultation exercise *did* allow for the public to give intelligent consideration and make an intelligent response to the policy proposals in question. It further says that adequate information was disseminated; and that the language in the consultation document was appropriate and transparent.

[36] The Department also relies heavily upon the context of this consultation. First, it draws attention to the fact that many of the authorities on which the applicant relies arose in very different legal and factual contexts, usually addressing executive or policy decisions to be taken by the authority concerned and with a direct, immediate and/or irreversible impact. In contrast, this case involves proposed legislation which will itself be subject to further scrutiny and debate in the course of the democratic process. Mr Anthony relied in particular upon the general position at common law that there is no duty to consult in relation to proposed legislation: see, for instance, *Bates v Lord Hailsham* [1972] 1 WLR 1373 (followed in this jurisdiction in *Re Northern Ireland Commissioner for Children and Young People's Application* [2004] NIQB 40). He submitted that this approach was because (a) there will be a further opportunity to influence legislative choices through the democratic procedure within the legislature itself; and (b) the range of individuals who may be affected by legislation could be so diverse as to render consultation unworkable.

Justiciability

[37] In the written submissions provided on her behalf, the applicant anticipated that the proposed respondent would argue that the consultation process was not justiciable or amenable to judicial review and Mr McLean made submissions designed to defeat any such objection. The applicant accepts that the parliamentary process in Westminster ought not to be interfered with by virtue of Article 9 of the Bill of Rights 1688, as discussed (for instance) in the cases of *R (Wheeler) v Office of the Prime Minister and Others* [2008] EWHC 1409 and *R (A) v Secretary of State for the Home Department* [2022] EWHC 360 (Admin). Although this can extend to decisions as to the laying of a Bill before Parliament or its consideration, the applicant relies on the fact that, in this case, no such Bill has yet been produced for consideration by the Assembly. Indeed, after the impugned consultation closed, the Health Minister made a public statement (see para [26] above) expressly emphasising that no Bill was yet in existence and that a Bill would only be drafted following further consideration of the consultation responses.

[38] In light of this, the applicant contends that the impugned consultation is not in the character of a "preparatory legislative act" sufficiently connected to proceedings in the Assembly to benefit from any immunity such proceedings may have equivalent to those in Westminster. That is because there is no Public Health Bill in draft form or otherwise at this stage. The challenge is therefore directed squarely to Departmental actions and does not engage, nor can it be said to delay or restrict, the exercise of functions by the relevant legislative body.

[39] For its part, the Department says that the consultation process which is the subject of these proceedings "is intended to inform the political and legislative process within the devolved institutions, which involves decision-making in the Executive Committee and in plenary sessions of the Northern Ireland Assembly." It develops this argument by noting that the Northern Ireland Act 1998 (NIA) contains carefully designed mechanisms for constraining exercises of ministerial and

departmental power, which could include consultation exercises of the present kind. In its submission, the devolved institutions are the forum within which any proposed changes to public health legislation should be debated, not the courts; and the NIA envisages judicial intervention only once legislation has been enacted. The height of the proposed respondent's submission is that judicial intervention in this case would be constitutionally inappropriate.

[40] I reject the proposed respondent's submission that the applicant's challenge to the fairness of the consultation in this case is non-justiciable. I do so for a number of reasons. First, I accept the applicant's basic point that the consultation process is sufficiently far removed from, and in advance of, the process of Assembly consideration that it would not fall within any prohibition on interfering with Assembly processes. At present, the Department is still at the policy development stage and the Assembly's legislative function is not actively engaged. Albeit the Health Committee commented on the Department's ongoing consultation at its meeting on 19 September 2024, there are currently no Assembly proceedings in relation to any draft Bill (which remains to be drafted and introduced into the Assembly).

[41] Second, it appears to me (without having to decide the matter in the present case) that there is not the same constitutional prohibition on enquiring into, or interfering with, Assembly procedures as there is in relation to the Westminster Parliament. Put simply, Article 9 of the Bill of Rights does not apply in the context of the devolved legislature in this jurisdiction. That is not to say that the courts would or will be eager to become involved in disputes relating to Assembly processes; quite the contrary. However, the same prohibition does not apply in this context as applies at Westminster given the difference in character between the two legislatures. Parliament is sovereign, whereas a devolved legislature established under an Act of Parliament is not, leaving additional scope for supervisory jurisdiction on the part of the courts (see, for instance, *Axa General Insurance Ltd v The Lord Advocate and Others* [2011] UKSC 46, at paras [46]-[47] *per* Lord Hope, and at para [138] *per* Lord Reed). I accept Mr Anthony's submission that, at the very least, the courts will be reluctant to interfere in this sphere in certain instances, given their institutional competence and separation in constitutional function from that of the legislature. The nature of the power being exercised and the context will be important in terms of the court's role, the intensity of review and the grounds of judicial review which are available (as to this, see also paras [142]-[144] of Lord Reed's judgment in the *Axa Insurance* case). However, that plainly does not arise in the assessment of the fairness of a consultation exercise, which is classically a matter for the courts to determine.

[42] Third, the political context of this dispute is not itself a reason for the court declining to address the applicant's complaint that the Department acted unlawfully. The Department has decided itself, as a matter of best practice, to voluntarily undertake a consultation process. That being the case, the consultation process must still be "carried out properly" (see the *Coughlan* case (supra), at para [108]). The

Department accepts that the *Bates* authority (referred to at para [36] above) is not directly on point in this case because it has chosen to engage in the consultation process. In line with authority, where a public body chooses to consult, albeit it is under no statutory obligation to do so, it must nonetheless consult fairly and properly (see *Coughlan* (supra); and, in the context of secondary legislation in this jurisdiction, *Re Christian Institute and Others' Application* [2007] NIQB 66, at para [19]).

[43] For these reasons, I do not consider that the court should refuse leave in this case on the basis of concerns about jurisdiction or justiciability. I therefore turn to address the merits, on which, in my judgment, the Department's case is much stronger.

The challenge to the fairness of the consultation

[44] As I have indicated above, the Department accepts that the *Bates* authority does not wholly assist it in this case because it has voluntarily undertaken to engage in the consultation process. However, the proposed respondent nonetheless submits that the legislative context (in which neither public consultation nor the giving of reasons will generally be required) is highly important in determining what fairness may or may not require in the circumstances. I accept that submission. In the *Bates* case, Megarry J held that the legislative function of a committee (which set scale fees for certain legal work) did not attract obligations of fairness. The particular context of legislative functions, and the limitations on usual judicial review principles of procedural fairness in that context, were also recognised by Kerr J in *Re Campbell and Others' Application* [2005] NIQB 59, especially in cases where (as here) some form of scrutiny other than that provided by the courts by way of judicial review was available. Given that the authorities recognise that the application of the *Gunning* principles is context sensitive, the particular pre-legislative context of the present case is extremely important.

[45] As Mr Anthony's submissions demonstrated, many of the cases relied upon by the applicant arose in a different context: where consultation was the last opportunity, and often the only opportunity, which the public had to have their say before the consulting public authority made a decision which would have immediate effect. This case is different in three very important respects:

(i) First, once the Department has formulated a draft Bill, it will be the subject of detailed debate, scrutiny and amendment in the course of the Assembly process in its various stages, where the public are represented by those whom they have elected as law-makers. That is the primary means by which the public's voice is heard and represented in the course of the development of legislation in the form of an Act of the Assembly.

(ii) Second and relatedly, the Department is not itself the ultimate decision-maker in the case. All it can do is propose draft legislation. It will be the Executive and Assembly which determines whether, and if so the extent to which, any

of the Department's proposals become legally effective through legislation. This being the case, the application of the second *Gunning* principle – which requires the *decision-maker* to explain the thinking behind what it is proposing to do – is necessarily attenuated. (This factor less pronounced in a case, such as the *Christian Institute* case, where the relevant department is able to proceed by way of delegated legislation, which is subject only to very limited Assembly scrutiny, often limited to the negative resolution procedure.)

(iii) Third, in the present case the proposal is that statutory powers be provided for (either new powers or, in some cases, a replacement, restatement or amendment of existing powers) which would only be exercisable in certain circumstances and under certain conditions. Some of these powers could be exercised by the Public Health Agency by notice; other by the making of court orders; and others by way of regulations. These are perhaps some of the most contentious aspects of the proposed new Bill. However, the circumstances and conditions under which the powers will be exercisable, and the procedural protections to be incorporated before their exercise would be lawful, are themselves matters to be debated and settled upon (in addition to the substantive scope of the powers). In other words, the potentially controversial *effects* of the legislation are some way off.

[46] Each of the above considerations, and particularly the first and second, set a very different context for the assessment of what fairness requires than many of the cases relied upon by the applicant in her submissions.

[47] This case is also to be considered in the context that the Department's detailed proposals, in the form of the draft Bill, have not yet been published. Indeed, more importantly, the Department has not yet determined what those detailed proposals will be, other than having taken a view on some guiding principles. That much is entirely clear from the Minister's statement made after the consultation period closed: see para [26] above. The impugned consultation is part of a multi-layered and iterative process of policy development, in which the public has been invited to provide views on policy proposals for possible provisions to be included in the Bill. Many of the Department's proposals in this case are at an exceptionally formative stage, rather than representing settled preferences. In due course, a draft Bill will be prepared. It will then be subject to scrutiny and debate within the Assembly, including by the Health Committee and on the floor of the Assembly Chamber throughout the Bill's various stages.

[48] As noted above, the overarching question is whether the consultation has been carried out in a way which is so unfair as to amount to unlawfulness, bearing in mind the indications in the case-law that perfection is not required; that a challenge will not necessarily succeed simply because consultation could have been carried out in a better way; and that it is generally for the public body concerned to determine how the consultation is to be carried out. The proposed respondent relied heavily

upon the following guidance from Hickinbottom LJ in the *Help Refugees* case at para [90](v):

> "The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, "clear unfairness must be shown" (*Royal Brompton* at [13]); or, as Sullivan LJ said in *R (Baird) v Environment Agency* [2011] EWHC 939 (Admin) at [51], a conclusion by the court that: "… a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong."

[49] Bearing these principles in mind, I have not been persuaded that the applicant has raised an arguable case with a realistic prospect of success at full hearing for the reasons summarised below.

[50] First, there is some tension between various aspects of the applicant's case. For instance, she contends at one and the same time both that far too little information has been provided about a range of potential proposals within the draft Bill and also that the consultation is already much too complex for many people to understand. These complaints can potentially be reconciled because, as the court recognised in para [62] of the *Northern Ireland Badger Group* decision, government agencies are well able to provide detailed information and analysis but also to simplify that, so catering simultaneously for a variety of audiences. However, in this case, it appears to me that neither point has particular force.

[51] As to the claim that there is a lack of detail, this is to some degree for the reasons summarised at paras [45]-[47] above. The nature of this consultation is that the Department is seeking views on proposals which will be further worked up in the course of the legislative process. In addition, however, a central feature of the Department's case is that the impugned consultation clearly built upon the relevant recommendations in the 2016 review, which form the baseline for the drafting exercise. It submitted that if the 2024 consultation document replicated all of the information from the earlier consultation, this would have risked making the consultation paper difficult to navigate and would also have created the potential for misinterpretation as between the 2015 review recommendations and the consultation proposals. That was an entirely rational approach for the Department to take.

[52] However, the 2024 consultation paper, which contained the recommendations from the earlier review, clearly flagged that it was the second stage in an ongoing process of review of public health legislation and ongoing policy development in this area. Interested parties were free to access the 2016 final report (which was referred to and hyperlinked in the 2024 consultation paper), which was a substantial piece of work. If they wanted further information, the 2015 consultation paper which had preceded the final report, and a related technical supplement, remained available online on the Department's website. There was no shortage of information available showing how the recommendations in the 2016 report, which were proposed to be taken forward in the 2024 consultation, had been arrived at. This is not a case like the *Northern Ireland Badger Group* case, where there was evidence that the decision-maker had undertaken detailed analysis (in that case, with costings, weightings and undisclosed criteria) which was determinative of the selected option but which had been held back from the public such that they could not engage with the real meat of the debate.

[53] As to the alternative complaint that the Department has swamped the public with documentation or information, I also consider this to be overblown. The Department argues that the 'all hazards' approach proposed for the potential Bill necessitates that at least a minimum amount of information be made available about each proposal; and that this, by its nature, required a significant number of questions to be posed. At the same time, the Department sought to set out the policy proposals in the document in simplistic and accessible form, seeking to keep the level of detail proportionate, so that the consultation paper was both meaningful but also easy to navigate, with more engaged respondents being signposted to other resources where they wished to explore the background materials in more detail. It was seeking to strike this balance which led to the simultaneous complaints mentioned at para [50] above.

[54] In my view there is force in the proposed respondent's submission that the applicant has failed to properly specify which parts of the document she complains are either jargon-laden or conclusionary in nature. In this context, where the Department is consulting about replacement legislation, it is both necessary and desirable that legal terminology will be used in places. In addition, the subject matter – various types of infection and contamination, including potential unknown risks – necessarily involves an element of technical medical terminology.

[55] The central complaint on this element of the case appears to be that the 'all hazards' approach was not sufficiently clearly explained. I reject that submission. The concept is not difficult to understand and is introduced in the Foreword to the consultation paper and in section 2.2 (on page 5 of the consultation document). It involves extending the approach of the 1967 Act from a narrow focus on infectious diseases to cover all relevant hazards which significantly threaten public health, namely various forms of infection and contamination, including biological, chemical and radiological hazards. The nature of this approach is further explained in the section of the consultation paper dealing with recommendation 2 from the 2016 final

report, namely that the proposed Bill "should be based on the all-hazards approach and be consistent with the WHO International Health Regulations" (pages 8-9 of the document).

[56] The additional complaint that the proposals were 'conclusionary' in nature also appears to me to fail to properly recognise the context, namely that this was a consultation building upon the work of the earlier review in which a number of recommendations had been reached (for instance, that the all-hazards approach should be adopted and the new Bill should be consistent with the WHO International Health Regulations, to which the UK is a signatory). As noted above, further information about the rationale behind these recommendations, which formed the foundation of the 2024 consultation, was readily available and signposted in the document.

[57] In a number of other instances, the reasoning or justification was presented in pithy, but obvious, terms, such as being: to update clearly outdated legislation; to be consistent with approaches in other jurisdictions within the United Kingdom which were considered preferable or more effective; to 'future-proof' the legislation, by allowing it to cater for as yet unknown risks; or to align with international best practice or the requirements of the International Health Regulations. The consultation document (at section 2.2) describes the main deficiencies in the 1967 Act as having been "well rehearsed" – in a plain reference back to the 2016 final report – but nonetheless summarises those deficiencies.

[58] In para [42] of the *Northern Ireland Badger Group* case, having noted that the question (of whether the failure complained of had led to real unfairness) was highly context-specific, the court noted that, "In *some* circumstances, fairness *may* require that interested persons are consulted not only upon the preferred option but also upon arguable *yet discarded* alternative options…" [italicised emphasis added]. The applicant relied upon the lack of explanation about alternative options in the consultation paper. In the present context, I do not consider that this was unfair, for reasons which have already been discussed. As the Minister's statements have made clear, the Department has also not yet discarded options (save for one proposal which was consulted upon, which was particularly contentious, namely the potential for regulations to permit mandatory vaccination in some circumstances, which the Minister does not favour). The choice of options will ultimately be for the Assembly. Moreover, in many cases, the alternative is obvious, namely *not* to provide the powers which are proposed in general terms for inclusion in the Bill. Given the number, nature and possible field of application of the powers, as well as the fact that the Department was seeking input on whether the powers were necessary and how they should be shaped, it is entirely understandable that the Department did not feel the need to spell out detailed alternative proposals in each instance. To do so is likely to have made the consultation unnecessarily complex and unwieldy.

[59] As noted in the Department's response to pre-action correspondence, the initial consultation period from 5 July 2024 until 27 September 2024 amounted to a

consultation period of 12 weeks, which is in keeping with recommended practice as to consultation timescales (albeit this included the traditional public holiday period in Northern Ireland at the start of July). The Minister subsequently extended this period until 14 October 2024, thereby setting the overall consultation period at more than 14 weeks. I do not consider there to be an arguable case that insufficient time was provided for response such as to amount to unfairness.

[60] A further complaint made by the applicant is that it was too difficult for some people to respond to the consultation, given the number of questions posed. The consultation document makes clear that it used the NICS recommended online consultation tool. However, it also noted the following:

> "You can also share your views on this consultation in a number of other ways. Additional copies are available electronically and can be downloaded from https://www.health-ni.gov.uk/consultations
>
> In addition, a separate questionnaire is available to help you record your comments and views. This can be completed and submitted in the following ways:
>
> - Download and Email us at: phbt@health-ni.gov.uk
> - Download, print and post to: Public Health Bill Team, Castle Buildings, Stormont, Belfast, Northern Ireland, BT4 3SQ
>
> This document is also available in alternative formats on request. Please contact the Department, at the address above or email, to make your request."

[61] Again, I see no material unfairness in the way in which the consultation process approached these issues. Online response, favoured by many in this day and age, was the default means of engaging with the consultation. However, the Department recognised that some respondents may wish to respond in other ways, including by using the pro forma questionnaire in hard copy. There was no unfairness in encouraging use of the questionnaire, since this had been designed to allow respondents to express views on all of the material questions and issues. The Department rationally took the view that responses in this format would be most useful to it. It was open to respondents to ignore or bypass questions if they so wished and only respond to those in which they had an interest. The Department could also be contacted directly either by email or post. These means could be used to request the consultation document in alternative formats. (There is no concrete or specific evidence before the court of anyone being deprived of the consultation paper in a format which they had requested or required.) Plainly, responses submitted by post or email which did not use the recommended questionnaire could not be ignored and would have been taken into account.

[62] The extremely high level of response to the consultation also appears to me to confound the applicant's complaints addressed in the preceding three paragraphs.

[63] The Department has referred, in its response to pre-action correspondence, to the NICS policy-making guidance (see para [32] above). It contends that its consultation process was entirely consistent with best practice as expressed in that document, amongst others. The applicant relies upon the statement within that guidance to the effect that, where a policy will impact upon a range of partners and stakeholders, it can be most effective to design policy in conjunction with those partners in a process of "co-design." The applicant's written submissions summarise the intention behind this challenge in the following way: "the point of this challenge put simply is that the public consultation as it stands cannot allow true co-design to ensure the process is understood and informed by multiple perspectives." In the court's view, this is to misunderstand both the context of this case and the nature of consultation. First and foremost, co-design, in the sense referred to in the NICS policy-making guidance, is referring to a process which is different from that of public consultation. It is not possible to co-design a policy with the public at large, particularly on an issue as complex and contentious as possible public health powers. Second, it is in any event questionable whether it is possible to co-design a proposed Act to be passed by the Assembly, otherwise than through the Assembly processes. Third, insofar as co-design of the Bill is appropriate, that is likely to be with the primary stakeholders, such as those with whom the Department engaged in its targeted consultation referred to at para [17] above. Most fundamentally, however, the desirability in certain instances of closely involving key stakeholders in policy design does not set the appropriate standard in law for the fairness of a consultation process.

[64] Although the proposed respondent's argument – that the subject matter of these proposed proceedings is political and subject only to resolution through the political process – has been rejected, there appears to be some force in the suggestion that the most vocal objections to the consultation *process* upon which the applicant has relied were in truth, or were at least heavily influenced by, objections in substance to the *content* of the proposals which it was thought the Department may propose in the ultimate draft Bill.

[65] The particular developments relied upon by the applicant, summarised at paras [21]-[24] above, appear to have been linked to some degree. There is, of course, nothing at all wrong with political parties taking a position on a matter of substance which might be addressed in the proposed Public Health Bill. However, objections in substance to the proposals outlined in the consultation paper are matters to be addressed in the *course* of the consultation, rather than representing reasons why the consultation should not proceed.

[66] By way of example, the suggestion in Mrs Dodds' correspondence to the Health Minister that there is little to be gained in "consulting on areas which have no

prospect of securing Executive or Assembly approval" appears to turn the consultation and policy-formation processes on their head. It is for the Department to consult on its proposals – such as they have been formulated at present and based on the outcome of the earlier review – and to then consider the outcome of the consultation before producing a draft Bill. Issues which the Department considers worthy of consultation and consideration are not required to be simply left out of account merely on the basis that one party or another may in due course object to a proposal being brought forward in the Bill. Approaching the matter in that way does not allow for the necessary collection of evidence and debate which, at least in theory, should be capable of convincing elected representatives of changing their pre-existing views. If a party on the Executive or in the Assembly wishes to veto a proposal which the Department has, in good faith, considered it proper to bring forward, the appropriate time to do so is when the Department has proposed the measure (after consultation and consideration of the evidence) and has made the case for it. In the court's assessment, there is no requirement as a matter of law or procedural fairness that the Department decline to consult on a proposal merely because it anticipates that it may not find favour in the course of the legislative process. A further media article exhibited to the applicant's grounding affidavit, pre-dating the closure of the extended consultation period, quotes Mrs Dodds as saying that the proposals "represent a huge overreach and must be rejected." Anyone was free to make that point in the course of the consultation and the Department should obviously conscientiously consider any such responses. However, that does not mean that there is anything unfair about the conduct of the consultation itself.

[67] It is right to point out that the applicant does not rely solely on objections emanating from the DUP. Further to a protest on 11 October 2024 in relation to potential provision which might be made in the Public Health Bill, Sinn Féin's Health Spokesperson, Liz Kimmins MLA (who also chaired the Stormont Health Committee), objected over the apparent lack of equality and human rights impact assessments. According to the press report provided to the court, she also said the Department's proposals and the consultation were not fit for purpose and that Sinn Féin did not support the approach being pursued by the Health Minister. In response, the Department commented that Ms Kimmins' statement was not correct as a full draft Equality Screening, Disability Duties and Human Rights Assessment was published alongside the main consultation, which would be updated when any new Public Health Bill was actually produced. This document was also made publicly available with the consultation document. The concern on the part of Ms Kimmins appears to have been the potential human rights implications of the exercise of certain of the powers which were proposed in principle for inclusion within the Bill. Again, for the reasons discussed above, any objection in principle to the proposals was a matter to be contained in a response to the consultation, which specifically asked about these matters; and to be addressed in further detail through the democratic process when the Bill is introduced (with the benefit of further equality and human rights screening and/or assessment at that point).

[68] Having read and considered the Department's consultation document, I do not find there to be an arguable case with a realistic prospect of success that the consultation process has been so unfair as to be unlawful, bearing in mind the context of this particular consultation process which is discussed above. The Department had a very difficult balance to strike between trying to keep the consultation document streamlined and accessible, whilst dealing with a wide variety of issues, many of which were technical and complex. Taking into account the nature and purpose of the consultation, set between the earlier detailed review process and the forthcoming legislative process, I consider that the approach the Department took was permissible in law and did not give rise to any material unfairness.

Conclusion

[69] The issues raised by the consultation which was the focus of these proceedings and which are to be addressed in any draft Bill which the Department produces for consideration by the Executive and Assembly, after due consideration of the consultation responses it has received, are undoubtedly important and likely to be the subject of robust debate, particularly in light of society's experience of the Covid-19 pandemic in recent years. Arguments on the merits and demerits of any particular proposals brought forward by the Department are to be welcomed in the course of the democratic process. The Department's thinking on these matters is plainly still developing. Although it is frequently possible, particularly with the benefit of hindsight, to consider how a consultation exercise might have been run differently or better, that is not the legal test. For the reasons given above, I do not consider there to be an arguable case of breach of the second *Gunning* principle in this case with a realistic prospect of success in due course.

[70] I find for the applicant on the issue of justiciability; but against her on the merits and, accordingly, dismiss the application for leave to apply for judicial review.