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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

APPLICATION BY THE GENERAL CONSUMER COUNCIL FOR JUDICIAL REVIEW

WEATHERUP J

[1] The applicant in this application for judicial review is the General Consumer Council of Northern Ireland which is an executive non-departmental public body, established by the General Consumer Council (Northern Ireland) Order 1984 and charged with the statutory function of promoting and safeguarding the interests of consumers in Northern Ireland. The decision that is the subject of judicial review is that of the Minister with responsibility for the Department for Regional Development to lay before Parliament the draft Water and Sewage Services (Northern Ireland) Order 2006.

[2] The applicant's grounding affidavit is that of Eleanor Gill, the Chief Executive of the Consumer Counsel. She sets out in her first of four affidavits that have been filed in this application that on Monday 9 October 2006 the draft Order was laid before Parliament. The Order is made under the Northern Ireland Act 2000 and will be subject to the affirmative resolution procedure. There is a wealth of detail in the affidavits which I do not propose to repeat but the general background I summarise as follows. A central feature of the reforms contained in the draft Order is the transfer of responsibility for the delivery of water from the Department to a Government owned company known as Goco and it is intended that Goco would be appointed as the sole water and sewerage undertaker for Northern Ireland. Goco will be run on a commercial basis and the Government intends to introduce domestic charges for water and sewerage services from April 2007. The majority of the provisions contained in the draft order will come into force on 1 April 2007 but the provisions relating to the establishment of Goco will commence on 1 January 2007.

[3] Ms Gill attended a meeting with the Water Reform Unit of the Department on 7 April 2006. By that date the draft legislation had not been published

although from 28 July 2004 the Consumer Council had been addressing with the Department particular aspects of the proposed legislation pertaining to consumer representation. The Consumer Counsel then received the Water Reform Legislative Framework paper on 15 May 2006. On 26 May 2006 the Consumer Council received a letter from the Water Reform Unit enclosing a copy of the draft Order and the explanatory memorandum. This letter explained the proposal for a 12 week period of consultation on the draft Order commencing on 1 June 2006 and therefore ending on 24 August 2006.

[4] The Consumer Council completed its response to the consultation exercise on 22 August 2006. Ms Gill describes the document as running to 49 pages and including 99 drafting points which contain the recommendations for specific amendments to the legislation. On 8 September the Consumer Council received from the Water Reform Unit the written response to the submissions of the Consumer Council. When Consumer Council staff completed a comparative analysis of the Department's replies to the Consumer Council's submission Ms Gill states that the view was formed that there had been inadequate consideration of the submission on a number of key areas. She lists them as including the affordability tariff, the regulator's authorisation, the issue of land disposal, price protection and the duties of the Consumer Council. The Consumer Council decided to focus ongoing engagement with the Department on the critical issues.

[5] On 19 September 2006 the Consumer Council was provided with the final draft Order and Ms Gill indicates that the Department had not taken due notice of the detailed submissions that had been put by the Consumer Council on 22 August. It was noted that there were a total of 37 submissions put to the Department by 24 August. On 25 September the Consumer Council had a meeting with interested parties in the Long Gallery at Stormont and after that meeting it was resolved to address concerns directly to the Minister, Mr Cairns. Accordingly the Chairman of the Consumer Council, Mr Costello, wrote to the Minister on 26 September addressing a series of questions to the Minister and inviting him to provide various assurances in relation to the legislation. On 27 September Mr Sterling of the Department replied to Mr Costello and a response to the detailed questions was received on 29 September. On 3 October a meeting was held with the Permanent Secretary of the Department where further concerns were expressed about the draft legislation and after the meeting a further letter was addressed to the Permanent Secretary identifying core areas of concern. On 4 October the Chairman wrote to the Permanent Secretary advising that legal advice was being taken in relation to the consultation exercise and that judicial review proceedings were in contemplation. The application for judicial review was then made.

[6] The draft Order was laid before Parliament on 9 October 2006. On 18 April 2006 the Secretary of State had determined 24 November 2006 to be the deadline for devolution in ongoing political negotiations. The laying of the draft

Order before Parliament on 9 October had been a date determined by reference to the devolution deadline of 24 November. However, the negotiations that continued at St. Andrews in October 2006 led to variation of the devolution timeframe with the result that the parliamentary debates on the draft Order which had been scheduled to be completed prior to the devolution deadline were deferred. The debates are now scheduled to take place on 27 November and hence there has been a rather larger window of opportunity to hear this application for judicial review than might have been the position under the original timeframe.

[7] On behalf of the Department Mr Sterling, the Deputy Secretary of the Department, in his first of four affidavits, sets out something of the general background. The current legislation is the Water and Sewerage Services (Northern Ireland) Order 1973 and historically the services of water and sewerage have been in the control of Government bodies and all infra-structure has been in public ownership. Such services have mainly been paid for out of general public funds, unlike elsewhere in the United Kingdom where domestic customers pay direct charges for their water and sewerage services.

[8] From 2002 the Government has consulted extensively on the future of the services and since 2003 has produced 13 separate public consultation or impact assessment documents on the subject. By 2004 it was the clear view of the Government that steps had to be taken to place the provision of the services on a sound financial footing. New Government accounting policies meant that the full cost of the water service would now be set at Northern Ireland's share of the United Kingdom public expenditure. New Government accounting rules necessitated moving water service to a status which ensured that it was self-financing and no longer a liability. There was a shortfall estimated at £130 million pounds in 2007/8. Not to achieve self-financing status, it is said by Mr Sterling, would necessitate taking public funds from other Government services provided within Northern Ireland. From the middle of 2005 the Government was working to a time table of autumn 2006 for the laying of the draft Order before Parliament so that it could be made by the early part of the winter. Having regard to other calls on parliamentary time Ministers determined that 9 October 2006 was the appropriate date for the laying of the legislation.

[9] It was agreed at a project board meeting of the Department on 31 March 2006 that there should be a twin-track approach to consultation. This twin-track approach was a reference to a consultation process that was divided into an internal process within Government and an external process which engaged the public. Mr Sterling states that in the normal course of events bodies would either be part of the internal Government consultation or of the public consultation. However, in this case there were two bodies which were in an anomalous position. One was the Northern Ireland Authority for Energy Regulation, also being referred to as OFREG, and the other was the applicant, the General Consumer Council, both of which were non-Government bodies established to

carry out various functions that are relevant to this legislation. In the normal course of events, says Mr Sterling, when applying the internal/external consultation arrangements the two bodies would be regarded as external bodies and thus participants only in the public consultation process. However, the Government was aware that the likelihood was that the proposed legislation would lead to an expanded statutory remit for both bodies. The two bodies would be expected to be part of the mechanism of the legislation and their understanding of the legislation and their ability to meet the new roles imposed on them would be integral to the successful implementation of the legislation. Accordingly both bodies were given a hybrid status. This is described by Mr Sterling as an enhanced status which gave the two bodies an opportunity to become involved in the internal Government consultation process. Both bodies were thus in an enhanced position in that they could comment in the internal process and also comment as part of the public consultation process. Mr Sterling goes on to address a number of the complaints made on behalf of the applicant and rejects the complaints. I will come to those complaints.

[10] However first of all it is necessary to identify the grounds upon which this application for judicial review has been advanced. In the amended Order 53 Statement which is dated 13 October 2006 there are in total 16 grounds. They may be divided into four groups. The first group concerns the process of consultation to 24 August 2006 and also includes issues about the consultees. This group includes grounds (a) to (g) of the amended Order 53 Statement. Ground (a) is concerned to establish that there was a legitimate expectation of consultation to 24 August 2006. Ground (b) asserts that there was a unilateral decision to convert that 12 week consultation process into a 10 week consultation process. Ground (c) contends that by correspondence of 9 August 2006 a new deadline was imposed to pressurise consultees into producing an early response. Ground (d) contends that the Water Service was not going to consider certain proposals advanced after 9 August 2006. Ground (e) alleges that there was a heirarchary of consultees, ground (f) that there was an increasingly high threshold test introduced into the consultation process and ground (g) that there was differential treatment of some consultees.

The second area of complaint comprises ground (h) only and it is contended that the Water Service position led to conflict of interest.

The third group concerns the Department's consideration of the consultee representations and this is represented by grounds (i) to (l). Ground (i) contends that there was not adequate consideration of the representations; ground (j) contends that disproportionate weight was given to the devolution deadline of 24 November; ground (k) is concerned to establish that there was a closing of minds on 9 August 2006 and ground (l) indicates that there was not adequate time to respond to amendments. There is an additional issue raised that alleges that it was irrational to lay the draft Order while there was ongoing debate. This is treated as part of the third group concerning consideration of the responses.

The fourth group relates to the guidance documents, that is grounds (m), to (o). Ground (m) refers to the Office of the First Minister and Deputy First Minister's 2001 guidance, ground (n) refers to the Cabinet Office guidance of 2004 and ground (o) refers to the office of First Minister's Affirmative Resolution Procedure of 2006.

[11] The first group, grounds (a) to (g) concerns the consultation process up to 24 August 2006 and issues about the consultees. A letter from the Department to all legislative stakeholders of 7 August 2006 refers to an earlier minute inviting comments on the draft proposed Order by 21 June 2006. It then states:

> "I am very grateful to those who have provided comments and we will be finalising the position on these with the relevant stakeholders within the next few days.
>
> If there are any remaining points I would be grateful if these could be submitted by close of play on Wednesday 9 August. The immutable nature of ministers' timetable for the legislation means that Water Reform Unit will not have a chance to consider any proposals for changes to the draft order received after that date."

This letter led to some confusion because of the reference to an early close of play, given that the consultation period was supposed to end on 24 August. By e-mail dated 8 August from OFREG it was stated "I'm a bit confused about (the letter). I assumed we were working to the 24th August…." In a reply to OFREG it was stated:

> "This memo is mainly for the consumption of other legislative stakeholders - ie to pressurise them to respond (as we expect several will wish to!). It is also putting down a "marker" that, notwithstanding the general 24 August end date for the public consultation period, changes to the draft proposed Order will have to pass an increasingly high threshold test.
>
> However, I would also confirm that the 24 August timeframe still stands – (and acknowledge to you that Water Reform Unit will have to work round the constraints of ministerial availability and the legislative timetable if feedback from key consultees (clearly such as the Authority) requires it.)"

[12] On the basis of the above exchanges the applicant sets out the various grounds referred to in this first group. The response from the Department is to

reiterate the nature of the twin–track consultation process, that is that there was an internal process which was going to last eight weeks and which would proceed to 21 June 2006 and on another track was the public consultation process or external process which would proceed for a period of 12 weeks and which would end on 24 August 2006. The applicant does not accept the distinction. However a letter was sent to the Consumer Council on 26 May 2006 around the time that the draft Order was issued and prior to the commencement of the consultation process. That letter from the Department states that the Consumer Council is being written to "as a key stakeholder in the water reform process, to provide an advanced copy of the draft proposed Order…. The 12 week period of consultation commences on 1 June 2005. …….we are working to an extremely tight timetable. We are therefore encouraging all our Departmental legislative stakeholders to review the draft Order in respect of their area of responsibility and provide a response, if required, by Wednesday 21 June 2006." That is a reference to the eight week consultation period relating to the departmental legislative stakeholders. The letter continues - "As the Council is a major stakeholder we are similarly keen for early sight of your thoughts on this draft. Accordingly it would be helpful if you were to work within these timeframes; although as David Sterling has indicated this would not preclude the Council from submitting formal comments by the end of the consultation period." The end of the consultation period was 24 August 2006.

[13] This issue of the twin-track approach and the differences between internal and external consultation is developed in the replying affidavits. Mr Sterling's second affidavit at paragraph 76 takes up the issue. He states that the purpose of the letter of 7 August 2006 was to draw a line under internal comments and to press for any last minute responses. Mr Sterling states that the list of addresses for this communication should not have included OFREG and the applicant and he adds that "as Ms Gill notes I told her at the meeting on 10 August that the message was not intended for the Council." Further he states that it is quite correct that the Department wished to pressurise the internal consultees to conclude their responses. This e-mail was an extension of the deadline and not a contraction. However, it was necessary to bring the internal process to a close. An affidavit was filed in the application by Mr Peter Barber, an officer in the Department, and he reiterated the character of the consultation process as described in the letter and by Mr Sterling. Ms Gill in her replying affidavit does not accept this approach.

[14] I accept the Department's position in relation to the twin-track approach. I am satisfied that there was a twin-track approach; that it was notified to the Consumer Council in advance of the commencement of the consultation process; that it was there indicated that there would be an internal process involving departmental legislative stakeholders that would end on 21 June 2006; that there was a further consultation process that would take 12 weeks and would end on 24 August; that the external process applied to the applicant; that the applicant was being described as a key stakeholder and had a role in both processes by

being invited to contribute to the internal process without prejudice to their right to make their submission in the external process.

[15] The above findings lead to the following conclusions on the first group of the applicant's grounds, being (a) to (g). In relation to ground (a) the applicant contends there was a legitimate expectation of a consultation period up to 24 August. I am satisfied that the applicant did have an entitlement to consultation up to 24 August and was accorded such entitlement. In relation to ground (b) I am satisfied that the consultation process involving the applicant was not fore-shortened by two weeks. In relation to ground (c) concerning pressure on the consultees, I am satisfied that the 9 August deadline did not apply and was not applied to the non-departmental consultees and therefore did not apply to the applicant. In relation to ground (d) concerning Water Service consideration of proposals after 9 August I am satisfied that any such restraint did not apply to non-departmental submissions and that the applicants representations which were received on 22 August were not excluded from consideration. In relation to ground (e) concerning a hierarchy of consultees whereby some were designated key consultees, that is indeed the case. There was a hierarchy of consultees, there were internal consultees in the Departments, there were external consultees in the public, there were hybrid consultees that straddled both areas namely, OFREG and the Consumer Council. This was made clear in the correspondence at the beginning. There was no impropriety in their being the three types of consultees and ground (e) is not a basis for complaint. Ground (f) relates to an increasingly high threshold being imposed. Such a threshold was proposed for the late legislative departmental consultees but not for the Consumer Council and this complaint is rejected. In relation to ground (g), the differential treatment of some consultees, it is clear that there was differential consultee treatment. There were the three groups referred to and they were treated in different ways. They were treated in different ways for good reason. There was no disadvantage to the applicant. There was no impropriety in the consultation process on this account.

[16] There is one final part in relation to ground (g) and that is the complaint that there was differential treatment between the two hybrid consultees namely, OFREG and the Consumer Council. The complaint is that the draft legislation was given to OFREG in March of 2006 when it was not given to the Consumer Council. The draft legislation was advanced to both the Consumer Council and OFREG in October 2005 and was forwarded to OFREG in March 2006. Mr Sterling's second affidavit at paragraph 52 states that OFREG had been provided with a copy of the draft in October 2005 but had not been in a position to engage substantially. The Department was concerned about this given OFREG's key role and workshops were arranged in early 2006 to kick-start a process with full engagement with OFREG. Subsequent to the workshops OFREG asked for and were given the latest version of the draft Order and some feedback was then provided. Mr Sterling states that there was no hierarchy of consultees and that

both the Consumer Council and OFREG were then furnished with the current version in May 2006.

[17] Rigid rules cannot be applied to the ongoing pre-consultation process, which was the stage that this had reached at the time the drafts were sent out. The Consumer Council had received an earlier draft. There is a particular reason given why OFREG received a version in March. Both parties received the relevant document prior to the commencement of the consultation process. I have no grounds to suppose that the Consumer Council would not have received a copy of the current draft at any time they might have made a request, as occurred with OFREG. I have no grounds to conclude that not having had an up-dated version of the draft Order from March to May of 2006 affected the ability of the Consumer Council to make the response to the draft Order that they would otherwise have made. On the complaint of differential treatment between OFREG and the Consumer Council in ground (g) I am not satisfied that there is any legal irregularity.

[18] The second area is ground (h) concerning the Water Service conflict of interest. Here it is said that the Water Service would be a sole shareholder in the Goco company that will be established and that Water Service is also a legislative consultee. The contention is that this gives rise to an inappropriate conflict of interest. As the affidavit evidence developed it became apparent that there was another aspect to this conflict of interest issue, namely, that the Water Service had a role in relation to the Economic Regulation Project Board and a view had been taken that Water Service did indeed have a conflict of interest in relation to the Board. In relation to the first matter about the role of the Water Service as a consultee the respondent says that the Water Service has a particular contribution to make to the issues because of its background, because of the role that it will play in relation to the future design of the regulation of Water and Sewerage Services and the respondent emphasises that in relation to its consultee role the Water Service is not a decision maker. In relation to the second issue about the Project Board the respondent says that the Water Service was excluded from the Board as there may be a conflict of interest. However it was not the view of the Project Board or of the other interested parties other than the Consumer Council that the Water Service should thereby be excluded as a legislative consultee. The explanation in relation to this appears in Mr Sterling's second affidavit at paragraph 29 where he says this:

> "The decision to include Water Services as a consultee is completely consistent with its position as a 'legislative consultee'. The Respondent was alive to issues of conflict of interest that may arise with various parties when examining water reform and designing the statutory framework.
> Conflict was identified in the Water Service being a component part of the Board which would decide the

> Government's view of how regulation would be achieved. Once that policy is established there is no conflict in the Respondent's view in having regard to the Water Service's views as to the precise legislative arrangements for the implication of the policy".

[19] I accept the position stated above. I do not consider that there is conflict of interest arising in relation to the shareholder role and the position as a legislative consultee where the Water Service offers advice and is consulted on the issue but is not a decision maker. The issue in relation to the Project Board is a separate matter. Water Service was excluded from the Project Board because of conflict of interest but it was not the Project Board's view that the Water Service should be excluded from all aspects of the process. I am satisfied that on this conflict of interest issue there is no procedural irregularity.

[20] Next, I propose to consider the fourth group of complaints concerning the guidance, being grounds (m), (n) and (o). Initially the Department was not clear as to which was the relevant guidance document that was being applied to the process but eventually settled on the guidance document from the Office of First Minister's Guide on Orders in Council, published in 2006 just as the process was getting under way. The other two documents are the Office of First Minister's 2001 Guide which had been withdrawn earlier and the Cabinet Office Code of 2004 which was not applicable to devolution bodies.

[21] First the document which the Department agreed was the governing guidance document, namely the Affirmative Resolution Procedure of May 2006. It is guidance for departments during the current period of suspension of the Northern Ireland Assembly. The Introduction states that during suspension of the Northern Ireland Assembly the Northern Ireland Act 2000 provides for the legislative power of the Assembly to make legislation to be exercisable by Order in Council. At paragraph 8 it refers to the character of the process, with many of the pre-legislative stages of policy development and implementation being the same during suspension as during devolution, for example, public consultation on policy proposals, the preparation and consideration of impact assessment, Ministerial clearance etc. However, suspension does not provide for the contribution that the Departmental Committee would make to the policy development process during devolution. Neither is there an Executive input and once a draft Order is laid before Parliament there is no facility to have it amended, unlike a Bill during its passage through the Assembly. At paragraph 9 it is stated that the inability of Parliament to amend draft Orders once they are laid makes the prior consultation process even more important than the stages prior to the introduction of a Bill to the Assembly. Normally departments will carry out a twelve week consultation on proposals for a draft Order, that is public consultation on the draft legislation in addition to or along with any consultation on the policy proposals. Strong commitments to this effect have been given by Ministers to Parliament to help address criticisms of the Order in Council process

generally. There follows two sentences of some note. " Ministers also have indicated that they will be receptive to requests to have proposals for draft orders debated in the Northern Ireland Grand Committee in the House of Commons so as to give MP's an opportunity to suggest amendments before the draft Orders are laid. Departments should work on the basis that this additional scrutiny stage is likely to be required for high profile legislation." The present draft Order is high profile legislation. Initially there was a proposal that this matter would be debated by the Northern Ireland Grand Committee in the House of Commons, as appear in the earlier frameworks, but for various reasons the Grand Committee was not engaged in relation to this legislation.

[22] At paragraph 11 the main stages of the legislative process are set out. Stage (g) the twelve week public consultation, stage (h), where appropriate, consideration of the draft legislation by the Northern Ireland Grand Committee, which can take place during the twelve week consultation period and ground (i), consideration of the responses to consultation, clearance of changes by Minister, finalisation of the draft order and explanatory memorandum. There is a timetable for Orders and Council set out in Annex A to this document that states in relation to legislative consultation a period of three months that includes, as appropriate, consideration by the Northern Ireland Grand Committee around the end of the consultation period. The next stage is described as legislation finalisation and there is no specified time, but the comment is that this includes consideration of responses to consultation, instructing the Office of Legislative Council and clearance by the Minister. The Stages for legislative consultation and legislative finalisation are the two stages that fall to be considered on this application.

[23] Further timescale provisions set out in relation to the draft Order and the printing and laying of the draft Order, the draft Order being approved by both Houses, being made by the Privy Council and then an operative date being provided in relation to the draft Order. The comment is that by Westminster convention there is two month minimum period. The reference to the two month operative date follows the reference to the making of the Order and is providing that the time between the making of the Order and its operative date will be two months. A note in the Annex reads "Allow further time if subordinate legislation is required once the Order is operative". This extra time is not a reference to extra time being allowed in the legislative consultation process or in the legislative finalisation process, but it is extra time being allowed between the making of the Order and the operative date so that consideration might be given to such subordinate legislation as will be required once the Order is operative. This does not bear on this application for judicial review.

[24] The guidance provides for a legislative finalisation stage to which no timescale is specified. The particular time in the present case was between 25 August, being the day after the conclusion of the consultation process, and 18 September, being the date on which the final draft Order was submitted to the applicant.

[25] While the other two documents did not apply to this process they may be considered briefly as they provide some general guidance in relation to the character of consultation in the spheres and periods in which they operated as guidance. The Cabinet Office Code of Practice on consultation sets out six consultation criteria. Consultation criterion one makes reference to the formal consultation period being a minimum period of twelve weeks and comments that Departments should consider the specific circumstances of their stakeholders and consider longer consultation periods at certain times, for example, during the summer holiday period. The present consultation period of twelve weeks did proceed over the summer holiday period. Consultation criterion four refers to feedback regarding responses and states that the consultation documents should provide for dates on which a summary of responses will be published and as far as possible that should be within three months of the closing date of the consultation; there should be a summary which sets out an analysis of the responses, an explanation of how it is proposed to change any proposals in the light of responses received and a summary of the next steps to be taken. Of course there are differences between policy consultation and legislative consultation and this particular process is one of legislative consultation and legislative finalisation, to use the words of the Affirmative Resolution Procedure. The two issues that emerge out of that document are first of all the vacation issue and secondly the finalisation feedback issue.

[26] The withdrawn version of the office of First Minister's Guide to Consultation Methods for Northern Ireland Public Authorities dated 2001 lays out various consultation criteria. Criterion five provides that sufficient time should be allowed for considered responses from all groups with an interest and at paragraph 4 states that "An otherwise adequate period may be less so if a **substantial holiday period** falls within it. Many voluntary groups do not meet over the summer holidays (July & August…. " Criterion six deals with consultee responses which should be carefully and open-mindedly analysed and the results made available and paragraph 5 states that "**Decisions in the light of consultation should be made public promptly** with a summary of **views expressed** …. and clear **reasons for rejecting options that there not adopted**". Again the two issues that emerge are the vacation issue and the feedback issue.

[27] On the vacation issue the applicant suggests that the consultation period was inadequate because, while it extended to twelve weeks, it included a holiday period. In this case I do not accept this criticism because I have no indication that the summer period prevented a response being made that would otherwise have been made. While it may have created extra pressure on those who were being consulted because it took place over the summer I am not satisfied that the Consumer Council suffered a deficit in its ability to make a complete response. On the finalisation issue concerning responses to consultees I will return.

[28] On the general issue of consultation the Department contends that there is no duty of consultation in relation to legislation. Two questions arise, the first

being whether there is a duty to consult in relation to the draft Order and if so the second question concerns the proper extent of that consultation. The starting point is Bates v Lord Hailsham [1972]1 WLR 1373 where it was held that the rules of procedural fairness do not apply to the process of legislation. The Lord Chancellor had announced that scale fees in relation to solicitors remuneration on conveyancing transactions would be abolished and a draft Order was sent to the Law Society, further to a statutory duty to consult. The plaintiff was a solicitor, a member of a group called the British Legal Association and he issued a writ against the members of the statutory committee introducing the legislation seeking a declaration and an injunction to restrain that statutory committee. It was held that considerations of natural justice and fairness did not affect the legislative process whether primary or delegated. At page 1378 Megarry J states:

> "Let me accept that in the sphere of the so-called quasi- judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative authority is a common place; but although a few statutes have specifically provided for a general process of publishing draft legislation and considering objections, I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attack, whether by injunction or otherwise; but what is important is not its form but its nature, which is plainly legislative".

[29] Mr McCloskey QC for the Department refers to the textbooks to seek confirmation that Bates v Lord Hailsham is still considered to apply to the legislative process. He refers to DeSmith, Woolf and Jowell on Judicial Review of Administrative Action at paragraph 8-032 where the authors comment that decisions categorised as legislative have remained relatively immune from the assault that has been made upon the distinction between duties that are judicial and those that are purely administrative. It is stated that the courts "have been reluctant to impose the duty to consult on Ministers exercising powers delegated

under legislation to issues orders for directions. Nor is such a duty imposed upon the procedures for making policy of a less formal kind, although where consultation is required by statute the courts will police its implementation and insist that it is adequate and genuine". However the authors comment further at paragraph 8-036 that a legislative-type decision "is not ipso facto exempt from the duty to act fairly. Even in the absence of legitimate expectation of a hearing, it would seem fair to allow representation by at least some of those objecting to the decisions whose interests are substantially threatened by an adverse outcome."

[30] Two reasons are suggested by DeSmith why legislative decisions have been held to be exempt from the duty to provide a fair hearing. First, where the decision is taken by a Minister or other elected official who is accountable to Parliament or a local authority the courts will be chary of adding an additional forum of participation where one is already in place as part of the process of political accountability. The second reason is a practical one, bodies may be exempt from the duty to provide a hearing where the potential for adversely affected interests is too diverse or too numerous to permit individuals to participate. I do not accept that second reason, certainly in relation to the circumstances of this case where the potential for adversely affected interests was not too diverse or too numerous to permit participation. More generally the second reason might not be as potent nowadays as there is indeed a highly developed public participation consultation process attached to such decisions.

[31] Mr McCloskey QC also referred to Wade and Forsythe on Administrative Law at page 552 where it is stated that there is no right to be heard before the making of legislation, whether primary or delegated, unless it is provided by statute, relying on Bates v Lord Hailsham. However at page 884 of Wade and Forsythe there is further reference to Bates v Lord Hailsham with the comment "Difficult problems may therefore lie ahead in the wide area in which legislative and administrative functions overlap. But although the law gives no general right to be consulted, a duty of consultation is widely acknowledged in practice and sometimes also by statute, as with the duty to consult the Law Society (in Bates v Lord Hailsham). And special circumstances may give rise to exceptions …" (citing R (United States Tobacco Co.) v Secretary of State for Social Security).

[32] In United States Tobacco [1992] 1 QB 353 the Secretary of State announced proposals to make regulations under the Consumer Protection Act to ban snuff. The manufactures who had established a base in Scotland were obviously concerned that this legislation would extinguish their business. The court granted an injunction. There was a statutory duty to consult with interested parties. It was held that the Secretary of State had a duty under the Act to consult the applicant before making the regulations. Having regard to the history of the Government's dealing with the applicants and the very serious effect the regulations had on the applicant's commercial undertaking, fairness required that the applicant be informed of the matters that had caused the committee to re-evaluate the risk to health in the use of oral snuff. Within the context of a

statutory duty fairness required that certain information be given to the applicant. At page 370 there were stated to be three reasons why consultation pursuant to the Act required a high degree of fairness and candour. First, the history of encouragement of the applicants, even though they could not rely on legitimate expectation, secondly, the exclusive impact of the regulations on the applicant, and thirdly, the catastrophic effect that the regulations would have on their business.

[33] Where there is a statutory duty to consult that consultation must be proper and effective. In R(Association of Metropolitan Authorities v Secretary of State for Social Security) [1986] 1 All ER 164 the Secretary of State was empowered to make regulations setting up a housing benefit schemes and he was required to consult with organisations appearing to him to be representative of the authorities concerned. A declaration was granted that there had not been sufficient consultation but the regulations were not quashed as they were already in force and being administered. Webster J at page 167g stated that –

> "…in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in this context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled."

[34] The position moved on with the decision in R (The Law Society) v The Lord Chancellor [1993] Admin. L. R. 833. There was a statutory duty to consult with the Law Society before making regulations for the remuneration of solicitors. However the statutory duty to consult did not apply to the particular proposals that were being made. The Lord Chancellor introduced the regulations under the Affirmative Resolution procedure. It was found that the Law Society had made out a prima facie case for a legitimate expectation of being consulted by reason of its role in the development of legal aid, the likely effects of the proposed changes on the scheme and on the members of the Law Society, assurances which have been given and the co-operation offered by the Law Society to control expenditure. However the Court found that because of the urgent and critical situation that had developed and which required to be addressed there was no obligation to consult in the circumstances. Further it was found that adequate consultation would not have led to any materially different result, given the timescale imposed by the Lord Chancellor. Mr McCloskey QC relies on the above matters in relation to this case.

[35] Finally a decision in Northern Ireland by Girvan J in The Commissioner for Children and Young Persons Application [2004] NI QB 40. At paragraph 12

Girvan J refers to the passage on page 544 of Wade and Forsythe referred to above and to Megarry J in Bates v Lord Hailsham also referred to above and states "No question of legitimate expectation arises in this context having regard to the absence of any right to be consulted". There is no indication that Girvan J was referred to the above authorities or in particular that he was referred to the Law Society.

[36] My conclusion is this. A duty to consult on a draft Order before it is laid before Parliament may arise by legitimate expectation. Legitimate expectation may arise from a promise or practice by a decision-making authority. In the present case I am satisfied that the applicant had a legitimate expectation of consultation in relation to the draft Order. First of all this arose because a programme of consultation with the applicant was announced in advance of the process. Secondly, the applicant was regarded as a key party to and a major stakeholder in this process. Thirdly, the applicant has a special statutory position in relation to consumer issues and thus a particular statutory interest in the matters which are the subject matter of this draft Order. Fourthly the applicant has a special position in the new legislative scheme set up by the draft Order as a guardian of the consumer interest. In answer to the first question set out above as to the existence of a duty to consult I find that there was such as duty as a result of the legitimate expectation of consultation arising in the circumstances outlined above.

[37] The second question posed above concerns the proper extent of the duty to consult in the present case. The general scope of consultation is described in R (Coughlin) v North and East Devon Health Authority [2000] 2 WLR 622. At paragraph 108 it is stated that it is common ground that whether or not consultation with interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. There are four requirements -

> "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 consciously taken into account when the ultimate decision is taken."

[38] The present consultation was in the legislative context. Just how the four requirements are addressed will vary depending upon the nature of the consultation. The Department has sought to draw a clear line between the earlier policy process and impact assessment process and the later legislative process. The policy consultation procedure took place some years ago, an impact assessment consultation process took place more recently and then in 2006 the legislative consultation process was undertaken. At the policy stage consultation

documents were issued in March 2003 and a consultation report appeared in October 2003 where various proposals were made in relation to the policy to be adopted. Then in 2004 there was an integrated impact assessment and quality and regulatory consultation reports were issued in December 2005. From December 2005 there was the legislative consultation phase.

[39] I do not accept that there has been a clear cut division between the different phases. During the present legislative consultation process some policy considerations were still in play in relation to the draft Order. There were policy issues being debated, there were technical issues being debated, there were drafting issues being debated. Of course in an ideal world the policy would have been set in stone at a fixed date and the legislative phase would merely be a drafting exercise which carried into legislative effect the fixed policy position. That was not what happened in the present case and it is apparent from consideration of the exchanges between the applicant and others and the Department that to whatever extent the Department may have wished that there should be finality on policy before the legislative consultation process began, the relevant parties did engage about policy issues and the Department did respond on policy issues. This was not a pure legislative drafting process.

[40] To return to the four requirements of proper consultation. First of all it has to be undertaken at a time when proposals are still at a formative stage, bearing in mind that we are dealing with a legislative process with policy issues e still permeating that legislative process. I am satisfied that consultation was undertaken at a time when proposals were still at a formative stage and that the first requirement is not an issue. Secondly, it must include sufficient reasons for proposals to allow those consulted to give intelligent consideration and an intelligent response. I am satisfied that the process that was undertaken satisfies that second condition. Thirdly, adequate time must be given for this purpose. There has been an issue generally about the time limits involved and an issue about the vacation. As indicated earlier I am not satisfied that the vacation actually impacted on the ability to present the representations that the applicant wished to present. Overall I am satisfied that a 12 week period was granted for the applicant to make its written response and that that was a sufficient period.

[41] The fourth requirement of proper consultation is that the product of the consultation must be conscientiously taken into account when the ultimate decision is taken. Subject to the overall rejection of a duty to consult, it is not disputed by the Department that even in the legislative context the submission must be considered and it is contended that this obligation was honoured. The further issue that arises on the fourth requirement is whether it extends to the Department's engagement with the Consumer Council as part of the finalisation of the draft Order.

[42] That issue is whether or not from close of submissions on 24 August, when the submission was duly considered, which the Department agrees it had to be,

there was an obligation to engage with the applicant before finalising the process by laying the draft Order. It is clear that the Department contemplated that there would be a departmental response to the submission and the Department quickly prepared a draft response on 1 September and the final form was received by the applicant on 8 September. Further the applicant contemplated that a response would be received from the Department. Thus both parties proceeded on the basis that there would be engagement after the applicant's submission.

[43] Looking at the timescale within which this was operating one sees that the submission was received by 24 August and the devolution deadline that had been set was 24 November. Working back from that date there were certain constraints upon the timescale for any meaningful engagement. The laying of the draft Order had to take place on 9 October in order to allow Parliamentary processes to be completed in the requisite time. The final draft of the Order had been furnished to the applicant on 18 September. It appears that the completion of the final draft Order for the purposes of printing had occurred on 11 September. Ministerial clearance was granted on 30 August for certain changes to the draft Order in the light of the applicant's submission, this being six days after the closure of the consultation period. There were of course later references back to the Minister for other changes as that was not the final change. The changes were referred to the Office of Legislative Council on 31 August 2006 and again there were later references as further amendments were made after that date. As noted above the draft response to the applicant was prepared on 1 September. It is clear that within a matter of days of the closure of the consultation process very substantial progress had been made towards a final position in that a submission had been sent to the Minister for clearance of changes, papers had been sent to the Office Legislative Council for drafting of the changes and a draft response had been prepared to be sent to the applicant.

[44] At this point it is necessary to refer to some e-mails that were exchanged and upon which the applicant placed considerable reliance. The first e-mails were dated from 1 to 5 September. On 1 September Mr Mills of the Water Reform Unit was circulating internally a copy of the Department's draft response to the applicant's submission. The email states that the response covers a range of policy and implementation points beyond legislative ones and probably needs to issue towards the middle of the next week. There is then a reply by email on 5 September from Mr Stirling stating that the draft response "….. is a well balanced and measured response – let's hope it works……. What's not said in the letter is that if the CCNI (the Consumer Council) wish to escalate any of these issues then they will have to do so very quickly. I'm minded to speak to Eleanor (Ms Gill) to try and convey this message, though the danger is that this might only encourage her". There is a further email exchange on that day, the first stating "Think we might hold off a few days……. we now have Phil's very unhelpful intervention to cope with before we can issue". This is a reference to Philip Taylor and a comment that he made about the affordability tariff, a subject which I shall return to in a moment. The comment is made in the email "Premature contact might

incite (we know we haven't done enough to satisfy your concerns), as you say, and invite (you may not have got everything out of us yet). Not sure either is true so no need to be ultra defensive". A further exchange on that day relaters to Mr Taylor's comments about affordability tariffs - "…there can be no question of re-opening the CST/SofS deal of last September. What Phil is saying on the Affordability Tariff would be in breach of that deal - so I'll be looking for their support".

[45] The applicant complains that there was a stalling exercise going on, that the draft had been prepared, that it was being held back deliberately to limit the time within which the applicant might re-act and that Ms Gill was not to be told just how little time she had because it might only encourage her, presumably to pursue her concerns further. It is apparent from the above exchanges that those concerned were not minded to give the Consumer Council very much time within which to react to the Department's response, nor was there very much time available as is apparent from a consideration of all of the dates involved. There was the suggestion that they might hold the response for a few days in order to deal with Philip Taylor's comments on affordability tariff but in the event they did not await his final position before they did eventually issue the response on 8 September. Obviously the response was first in draft form and it did have to circulate to interested parties and it took a week to do so. I am satisfied that it may have been held back a day or two although whether or not that made very much difference given the very tight time constraints that there were is open to question. In the event the response went out Friday 8 September and the close of play on the final printing seems to have been Monday 11 September, so there was not really a window for any further engagement after receipt of the response from the Department. I doubt if it would have made very much difference had it been received a day or two earlier.

[46] The further e-mails concern Mr Taylor who had earlier commented on the draft "I am far more relaxed that we commit that the affordability tariff will continue". An exchange between Mr Stirling and Mr Taylor by e-mail of 7 September states "….we note your view that you would be relaxed about committing to the Affordability Tariff (AT) beyond 2010….. However, as you'll know the CST's letter to the SoS last autumn made it clear that the AT must not be repercussive and must be reviewed after three years (ie by 2010)….."Incidentally, there's a risk of going beyond the concern that the Council had. They (wrongly) believe that the legislation limits payment of the tariff by Government to three years(it doesn't). We can point out that the legislation allows payment of the tariff indefinitely, albeit Government has chosen to review the tariff after three years. This is a more neutral line than the Council would like but still an improvement on what they imagine to be the case. In any event we need to reply to them quickly".

[47] There has been much debate on the issues raised and a breakdown on both sides in relation to the treatment of the substantive legislative issues and

what was allowed and what was not allowed. I have looked through all of that and I have not found it very helpful in addressing the matters for decision in this case to become embroiled in the details of particular issues. It is not the concern of the Court to make an adjudication upon who may be right or wrong about particular points or whether something should or should not be within the legislation. This application is concerned with process rather than with merits. But there is one issue, affordability tariff, which I do intend to refer to a little further, as an illustration of the processing of the applicant's submission, the finalisation stage and the engagement of the applicant. There was an agreement between the Consumer Council and the Minister in November/December 2005 in relation to affordability. It is referred to in Mr Taylor's affidavit and he attaches a minute which indicates that he recommended the affordability model put forward by the Consumer Council. This model was that there should be a concession scheme based on income and a cap of 3% of income was considered to be the right approach. It was also considered that there should be a concession based on assets because it was recognised that ability to manage financial affairs were should allow for a second tier of concession to those classed as asset poor. The minute indicates that Mr Taylor was persuaded by the Consumer Council's position and that he had advised the Minister to agree to the Consumer Council's approach and he concluded by stating that he had discussed the issue with the Secretary of State and that the Secretary of State was content with his approach. The minute was dated 5 December 2005.

[48] Article 213 of the draft Order dealt with charges. The explanatory memorandum at paragraph 108 describes Article 213 as enabling the Department to make grants to undertakers for the purpose of meeting any costs or losses arising from undertakers compliance with regulations made by the Department. The Department would make regulations under the Order to provide assistance to low income groups in the form of an affordability tariff. This will result in a considerable loss of revenue and to make up this revenue the Government agreed to provide the undertaker with a grant equal to the amount of revenue lost because of the cost of the affordability tariff. It is stated that to assist the introduction of water charges the Government has announced that charges will be phased in over three years and as with the affordability tariff this will result in considerable lost revenue for the undertaker and so the Order obliges the Department to make a grant to the undertaker to cover the costs of phased introduction charges. There are two different issues being discussed here. One is the affordability tariff, and the less well of will not have to meet the charges and grants will be made by Government to cover the loss of revenue. The other issue arises from the phased introduction of charges over three years, and this will also result in a loss of revenue. However on the phasing issue there is a special provision in Article 213(3) of the Order which obliges the Department to make grants for a three year phasing period. The regulations are also referred to in an explanatory memorandum at paragraph 100 where it is stated that in order to implement the Government's announcements on providing assistance to lower income groups the Department will introduce regulations setting out the basis of

an affordability tariff and the Government has undertaken to make grants to meet the costs of the affordability tariff. It does not state in relation to the affordability tariff grants that there is or will be a three year limit in the regulations, but it does state that there will be a three year limit in relation to the phased charges.

[49] The applicant addressed this issue at paragraph 65 of the submission of 22 August 2006. It was noted that grants will be payable during the three years commencing with the introduction of charging and after that period the Department would have a discretion and the Consumer Council believed that the draft legislation fell well short of the commitment to the affordability tariff. The concern was the possibility, unless it was clearly defined, that the affordability tariff would cease to be available for lower income groups after the end of three years or that the burden would then be placed on consumers, contrary to the agreement with the Minister. The applicant asked that the principle of the affordability tariff be enshrined in the legislation and that there be provision to allow the Assembly to enhance the affordability tariff and that the legislation would expressly provide that the tariff would not lead to higher bills for consumers.

[50] There was a misunderstanding on the part of the Consumer Council in the way they presented this issue because it is the phasing that has a three year limit and not the affordability tariff. While there was no legislative limit on the affordability tariff it should be noted as is apparent from the e-mail of September that there was to be a review within three years of the issue of the affordability tariff, that is 2010. The Treasury had stated that the affordability tariff was not to be repercussive, by which it meant that it was not to continue. The Consumer Council would not have been aware of the agreement with the Treasury that there would be a three year limit on the Government covering the cost of the affordability tariff.

[51] The Department's reply to the Consumer Council on the affordability tariff issue on 8 September states that the Council's comments raised policy issues and rather more technical legislative issues; it points out that Article 213 allows the department to make grants to pay for the affordability tariff; this is not limited to the first three years as the Council suggests but may continue indefinitely; grants to meet the costs of the phased introduction of charges during the first three years of charging were limited to those first three years and must be meet by the Department, this being a reference to the phasing issue; the affordability tariff was a measure of the Government's commitment to avoid water poverty and on cross subsidy the Government's policy was to conform to the requirements of the Water Framework Directive.

[52] Meanwhile Mr Taylor had written an e-mail on 5 September in which he had said that he was relaxed about the affordability tariff continuing. As appears from his affidavit he was working towards securing from Government a

commitment to a continuing affordability tariff. In addition it was being pointed out in emails that Mr Taylor's approach involving a continuing affordability tariff would be in breach of the deal which the Secretary of State had reached with the Treasury that it would be extended for three years and would not continue thereafter. The affordability tariff issue was still being considered when the response of the Department was furnished on 8 September.

[53] Correspondence continued on the issue when on 28 September Mr Costello sought clarification of the key concerns relating to consumer protection, being fairness and stability of consumer water charges after 2010, affordability tariff funding arrangements after 2010, disposal of land and assets authorisation before and after 2010 and a fourth item that appears further on in the text in relation to general consumer protection powers. A number of questions were posed that included the affordability tariff and the Minister was asked to confirm that the consumer would not be picking up the £30 million affordability tariff cost from 2010 onwards through higher bills. The remedy required was said to be legislative change to Article 213. The Consumer Council had not picked up the correction which the Department had made, namely that the three year period referred to in Article 213 was relating to the phased introduction of charges and not to the affordability tariff.

[54] The response to the letter of 28 September stated that the legislation enabled the continuation of the affordability tariff and its current basis of funding indefinitely. That response was correct in that there was no legislative restriction; after three years they were confident that a devolved administration would be in place and it would then be for local Ministers to decide how best the policy might be developed to provide protection for those most in need. The response indicated that there was no limit on the affordability tariff and while that is correct there is no reference to the agreement with the Treasury that this arrangement would only continue for three years. Instead the response referred to the review that will take place in three years, at which stage it was assumed that a devolved administration would make the decision. The same financial pressure would apply at that stage, namely, there would be no Government funding and if the affordability tariff were to continue it would have to be funded elsewhere, either by introducing funds from some other use, or imposing the charges on others. The reference to indefinite funding was incomplete.

[55] There was further correspondence on the affordability issue in October when the Chairman of the Consumer Council wrote to the Minister and the Department replied on 4 October. The issue was still being debated and weeks had passed since the final draft Order had been completed and there were only days before the matter was to be laid before Parliament. In relation to the affordability tariff the reply stated that it would be in place for the first three years with the commitment to review in 2009; the Minister states that "….while I can see a very strong argument for the policy being continued beyond 2010 but it will represent a substantial financial commitment – perhaps in the region of £40m

-£50 million per year – and so I think it would be wrong of me to try to commit a future devolved administration to such an obligation…". This does not refer to the commitment to the Treasury but states "Indeed I would support you in calling on the local parties to provide clarity as to how they stand on the future of the Affordability Tariff".

[56] What the above matters demonstrate is first that there was clearly engagement with the Consumer Council as part of the legislative finalisation process. Through these exchanges of correspondence as well as the meetings that had taken place engagement continued even after the legislative deadline. Secondly, the exchanges show the incomplete character of the debate on the issue because there was a misunderstanding on the part of the Consumer Council, which is explained by the Department, but the detail is not picked up by the Consumer Council in its appraisal of this complex legislation. There is certainly a lack of clarity in relation to the issue because the Consumer Council is unaware of one imperative which is unspoken, namely, the agreement with the Treasury on the limits on funding. Thirdly, there is continued policy engagement because the issue of the affordability tariff involved attempts to secure some kind of arrangement on this key issue. Further, as is apparent from the affidavit of Mr Taylor, he was seeking to secure from Government a continuation of the affordability tariff scheme and presumably by some arrangement with Treasury about how that was to be funded. The policy engagement on this issue may have secured some advance. Fourthly, what is demonstrated is the impossibility of such engagement as took place actually completing the debate within the time frame that was available because the close down for the preparation of the legislation was in effect 11 September.

[57] The Department contends that there has been full consideration of all the responses and proper engagement with the Consumer Council, which engagement it is said was not necessary in any event. There was a duty to give proper consideration to the responses that had been received and that is not in dispute. I am satisfied that the duty extended to engagement with the Consumer Council. That duty arose from the legitimate expectation of engagement generated by the understanding that existed between the parties that there would be such engagement, the Department's intention that they should engage and the Departments actual engagement. Further such engagement was required to be meaningful and effective. It is noted that the context was that of a legislative scheme and originally it had been intended that the Grand Committee would be involved but the Grand Committee stage was removed from the process. The consultation process with the Consumer Council ought in part to have replaced the Grand Committee involvement in the examination of the legislation. There was a special interest of the Consumer Council in the issues because of its statutory role and further because of its statutory involvement in the mechanisms being put in place by the legislation. I am satisfied then in all the circumstances referred to above and all the circumstances of the case that the time frame from 24 August was not sufficient for a full assessment of the responses and

engagement of the Consumer Council by the Department. The consultation period for responses ended on 24 August and within the week the decision had been taken in relation to substantial aspects of the final draft Order, submissions had been made to Ministers and instructions had been issued to the Office of Legislative Council. None of this was the final position but there was substantial completion. A draft response to the Consumer Council had also been prepared and all of the steps referred to had been completed in a shorter period than it took for the draft response to the Consumer Council to circulate internally and to be issued. This is a monumental piece of legislation and there has been lengthy consultation taking place over a number of years on both policy and impact assessment. The legislative consultation extended to some policy issues that remained unresolved and the finalisation of the process was to be concluded it seems within a matter of days. Engagement with the Consumer Council was to be part of the process and in effect there was no time for such engagement.

[58] The statutory position of the Consumer Council and the special place that it has in this legislative scheme and the nature of the legislation give the Consumer Council a special place for engagement in relation to this legislation. I am not attempting to formulate any general duty in relation to engagement of consultees at the conclusion of any legislative consultation process but because of the special characteristics that I have outlined in relation to the applicant's position I am satisfied that the proper processing of the responses was such that it required engagement with the Consumer Council, as the parties intended, before the conclusion of the legislative finalisation stage of the Order in Council procedure. In relation to the fourth element of consultation, namely, the response stage I am not satisfied that there has been adequate consultation because of the absence of meaningful and effective engagement.

[59] There was an imperative driving the timeframe for the legislative process and that was the devolution date of 24 November 2006. Working back through the legislative process to closure of the process when the final draft Order was available on Monday 11 September and the Department's response to the Consumer Council on Friday 8 September, it is apparent that that devolution date forced the pace in an effort to achieve completion of the consultation process within the limited time available. It was an entirely proper political conclusion for Ministers to decide that the legislation should be put in place before the devolution date, if that was their political judgment, and there is no legal impropriety in relation to that political judgment. However in seeking to carry into effect that decision it is necessary to satisfy the legal requirements for proper consultation. It was not possible to observe the fourth legal requirement for proper consultation within the time frame that had been established.

[60] There has been much detail presented in the papers and I have not sought to examine in this judgment every item in the papers or indeed every issue raised in argument. For example I have not referred at all to an issue raised in the papers and in argument about OFREG as I do not find it to be of assistance in

relation to the decision to be made on the grounds of challenge. Further I have not sought to resolve a variety of factual disputes that have emerged in the papers because apart from the usual difficulties in dealing with such disputes in proceedings for judicial review I have not found it necessary to engage with those factual disputes.

[61] In conclusion I repeat that in relation to the fourth element of consultation, namely, the response stage, I am not satisfied that there has been adequate consultation because of the absence of meaningful and effective engagement.