What can we legitimately expect from the State?

Greg Weeks*

The title of this chapter asks a very broad question. There are of course many things we can and do expect of the state. Several of the later chapters in this book show that in countries with written constitutions, like Australia, South Africa and Canada, expectations may be framed by specific areas of constitutional legislative competence. Regardless of such a legal framework, we might expect many things in general from the state, such as attending to the demands of national security, providing services that are not necessarily provided by the free market (such as public transport, universal schooling, universal access to hospital facilities and so forth) and managing the economy. These *general* expectations are essentially of government fulfilling its normal role; they are not the concerns of this chapter. Rather, it will discuss *specific* expectations that we have of the state.[1]

There is no universal legal response where an individual to whom a promise has been made is then deprived of the fulfilment of that promise. This is in part because there have been a number of causes of action which turn on failure to adhere to a promise.[2] In some circumstances, such behaviour may cause a promissory estoppel to be formed. It may be negligent, whether the promise is provided as information or advice,[3] or amount to deceit.[4] These actions offer different remedies to those which are possible when a legitimate expectation is raised in judicial review proceedings. The torts of deceit and negligence sound exclusively in damages.[5] Estoppels are remedied by meeting the equity which they have created, which will usually be achieved by making good the reasonable expectation of the plaintiff,[6] although enforcement of an expectation is not the only available remedy when an estoppel is raised.[7] Equitable compensation may instead be payable in some circumstances.[8]

It is implicit to the scope of this chapter that what one may expect of the state differs from what it is reasonable to expect of a private actor. This contention is perhaps recognised most notably by the more limited remedies available when one's expectations are disappointed by a public authority. Conversely, this difference is also clear from an understanding of the nature of promises and the fact that the effect of a promise is necessarily connected to the depth of belief that it provokes in its recipient. Public authorities are not necessarily believed more readily than private

* My thanks are due to Matthew Groves for his advice and assistance.

1 cf *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 462 (Mason J).

2 The once-popular cause of action for breach of promise to marry was abolished in Australia by statute 40 years ago; see G Weeks, 'Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law' in M Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 224, 225. There are other doctrines which deal with conveying inaccurate information, such as contractual misrepresentation and claims under statutory provisions like *The Australian Consumer Law* §18 (Sch 2 to the *Competition and Consumer Act 2010* (Cth)) which almost universally affect commercial dealings or conduct "in trade or commerce".

3 *L Shaddock & Associates Pty Ltd v Parramatta City Council* (1981) 150 CLR 225; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

4 Although the tort of deceit has a very limited modern application; see RP Balkin and JLR Davis, *Law of Torts,* (5th ed, LexisNexis Butterworths, 2013), 680-92.

5 Paul Finn noted that "the tort of deceit came to prominence" for its capacity to provide compensation after the "jurisdiction to enforce representations [was] colonised by the law of contract": PD Finn, 'Equity as Tort?' in K Barker, R Grantham and W Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart Publishing, Oxford, 2015) 135, 143.

6 See J Hudson, 'The True Purpose of Estoppel by Representation' (2015) 32 *Journal of Contract Law* 275, 289.

7 This is especially apt where there are other reasons preventing such a remedy. For example, Australian courts will not enforce an estoppel where that would cause the defendant to act contrary to law. This has particular relevance to public bodies, which also cannot be estopped such that they are fettered from exercising the full range of a statutory discretion; see G Weeks, *Soft Law and Public Authorities: Remedies and Reform,* (Hart Publishing, Oxford, 2016) 194-6.

8 See G Weeks, 'Estoppel and Public Authorities: Examining the Case for an Equitable Remedy' (2010) 4 *Journal of Equity* 247.

parties in every circumstance; for example, we might place greater faith in an expectation created by a long-term commercial advisor than in one created by the receptionist in a government agency. However, public authorities have an almost unique capacity to cause people to comply with their instructions, even if they do not think they are legally required to do so, or they believe that to do so is not in their interests.[9] In the same way, public authorities have a greater capacity than individuals to create expectations in which it is reasonable for those individuals to put their faith. The paradoxical result which follows is that, while we are more likely to put our faith in the representations of public authorities, we are less likely to obtain legal remedies against them.

Given the special position of public authorities who create expectations in other parties, it is understandable that some jurisdictions have developed a specific, public law doctrine which allows for the substantive enforcement of legitimate expectations. England, for example, has set aside the private law estoppel reasoning which for so long informed the debate about holding public authorities to their promises[10] and has absorbed its "moral values" into a public law doctrine.[11] Elsewhere, the objections which existed to estopping public authorities have not been surmounted by seeking to conduct a broadly identical public law process.[12]

In addition to considering the kinds of expectations that we might reasonably have of the state, this chapter also addresses how such expectations might be created, and when and how they might be enforced. After all, this is the central point, not only of this chapter, but for the majority of people who assert that their legitimate expectation has been breached: one only asks about expectations created by the state because one wishes to bind the state to fulfill those expectations.

How are expectations formed?

Creating an expectation can be done with varying degrees of directness. One might divide the ways of creating an expectation usefully into three categories: promises, policies and practices.[13] A promise suggests that a fairly direct form of communication has been employed and has caused an expectation to be created of something relatively specific.[14] A policy, by contrast, is less direct. Rather than being directed specifically to a person or small group who then rely upon it, a policy tends to be published for the information of people more generally and need not be brought specifically to the attention of any one of them.[15] A policy speaks to what a public authority plans to do at a given time[16] rather than how its course of action will affect an individual (as a promise does). A practice is less certain than either a promise or a policy. It does not comprise an active expression of intention but essentially amounts to a person concluding that a course of action adhered to in the past will continue to be adhered to in the future.[17] Even when a practice is established, it may not assist a person to establish the breach of procedural fairness obligations.[18] In any case, it is important to recognise that the "nature of the decision will, therefore, always be

9 See eg G Weeks, *Soft Law and Public Authorities: Remedies and Reform,* (Hart Publishing, Oxford, 2016), 224.

10 See eg *Laker Airways v Department of Trade* [1977] QB 643; *R v Inland Revenue Commissioners; ex parte Preston* [1985] AC 835.

11 *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2003] 1 WLR 348, 358 (Lord Hoffmann).

12 The Canadian Supreme Court rejected the English approach to substantive enforcement of legitimate expectations but achieved a similar result through another public law doctrine: *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281. The Australian High Court has been even more dismissive of the legitimate expectations doctrine than it was of public law estoppel and applies neither.

13 See F Ahmed and A Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 *Cambridge Law Journal* 61, 64-6.

14 eg *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281. *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 also falls within this category, although there the failure to adhere to the promise had no legal consequence because Mr Lam suffered no practical disadvantage.

15 eg *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Nikac v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 20 FCR 65; *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1.

16 This leads to the question of whether a government can change its policy without being bound to an earlier policy statement. The general response in Australia is that it can: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1. The English cases, by contrast, are attended by greater uncertainty: see F Ahmed and A Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 *Cambridge Law Journal* 61, 82-4.

17 eg *F.A.I. Insurances Ltd. v Winneke* (1982) 151 CLR 342; *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629; *Geelong Community for Good Life Inc v Environment Protection Authority* (2008) 20 VR 338; cf *Duncan v Minister of Environmental Affairs and Tourism* 2010 (6) SA 374 (SCA).

18 See *Russell-Taylor v State of South Australia* [2011] SASC 238, [204]-[205].

relevant to the question whether the frustration of [a legitimate] expectation is an abuse of power"[19] or otherwise provides a basis for judicial intervention.

For all that public authorities have a degree of power that individuals do not, on the basis that their representations and promises are more likely to result in compliance, it remains necessary to consider what it is reasonable to expect of public authorities in any given situation. The question is not *whether* an individual can rely on that policy but *to what degree* s/he can rely on that policy. For example, imagine that the government has a policy which it has published.[20] To what group of people was the policy applicable? If a small group, or a single individual, it is more likely that a court will bind the government to its policy in some way.[21] How was the policy communicated? Policies published in writing tend to be more reliable than, say, a Ministerial speech.[22] On the other hand, politicians cannot consider themselves bound to adhere to the terms of manifesto policies once in office,[23] although policies adopted in office have been considered in England to form a possible basis for a legitimate expectation.[24] Written policies can also be subject to the same vagaries usually attendant only on statutory construction if challenged in court.[25] What was the subject of the policy? It should be obvious that policies in some areas of executive discretion, such as the appointment of judicial officers,[26] will seldom if ever be understood as binding the government.

An expectation generated by a public authority will generally be of greater significance than one either generated and held subjectively by the claimant or of which s/he has only constructive knowledge.[27] Representations and conduct can form the basis of procedural fairness obligations, a proposition for which there is "a considerable pedigree".[28] The Full Court in *SZSSJ* concluded that:[29]

> a departure by an official from a representation about future procedure will be unfair in at least two circumstances:
>
> (a) where, but for the statement, the claimant for judicial review would have taken a different course, that is to say, situations of actual reliance by the claimant; or
>
> (b) where if the procedure had been adhered to a different result might have been obtained.

19 *R (on the application of Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744, [50] (Dyson LJ).

20 In England, the Supreme Court held by majority that the Home Secretary had a public law duty to publish her policy and that detention of the claimants under an unpublished, blanket policy was unlawful: *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 264, 268-9 (Lord Dyson); 301 (Lord Hope); 307 (Lord Walker); 311 (Lady Hale); 315-16 (Lord Collins); 322-3 (Lord Kerr). However, even an unpublished policy may give rise to a legitimate expectation: *R (on the application of Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744, [25] (Pill LJ). By contrast, Australian law encourages, but does not require, that policies and other forms of soft law be published: G Weeks, *Soft Law and Public Authorities: Remedies and Reform,* (Hart Publishing, Oxford, 2016), 87. The High Court appears simply to have set aside the issue raised in *Lumba* for the appropriate case; see *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 665 (fn 94).

21 That is to say procedurally if not in substance.

22 See *Unilan Holdings Pty Ltd v Kerin* [1993] FCA 19. Most speeches are probably better characterised as undertakings or promises.

23 *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768, 829 (Lord Diplock). Some have considered that there are "particularly sound reasons" for an approach that allows politicians to rethink their commitments after reaching office: R Moules, *Actions Against Public Officials: Legitimate Expectations, Misstatements and Misconduct,* (Sweet & Maxwell, 2009), 64. With respect, such reasoning is more compelling where a government wishes to *abandon* its earlier promises than where only the intervention of a court prevents it from keeping them: *Bromley LBC v Greater London Council* [1983] 1 AC 768, 815 (Lord Wilberforce); 829-30 (Lord Diplock). The view expressed by Schiemann LJ, that the consequences of election promises "should be political and not legal", ought properly to extend to both circumstances: *R (on the application of Begbie) v Department of Education & Employment* [2000] 1 WLR 1115, 1126.

24 *R (on the application of Begbie) v Department of Education & Employment* [2000] 1 WLR 1115, 1134 (Sedley LJ).

25 See eg *R (Davies) v The Commissioners for Her Majesty's Revenue and Customs* [2011] 1 WLR 2625.

26 See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 17 (Mason CJ). *Quin* can also be explained as an instance where policy was binding (perhaps only to a loose extent) but, because of the subject matter in question, could also be varied at any time and without notice or specific consultation.

27 See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 and n51 below.

28 *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125, [90]. Rares, Perram and Griffiths JJ referred specifically to *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629 and *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

29 *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125, [94].

This summary is consistent with the High Court's previous analysis in *Lam*,[30] and also with earlier cases argued on different bases.[31] However, it is not reliant on legitimate expectation reasoning.[32] As Brennan J stated in *Quin*:[33]

> [W]hen a court is deciding what must be done in order to accord procedural fairness in a particular case, it has regard to precisely the same circumstances as those to which the court might refer in considering whether the applicant entertains a legitimate expectation, but the enquiry whether the applicant entertains a legitimate expectation is superfluous. Again, if an express promise be given or a regular practice be adopted by a public authority, and the promise or practice is the source of a legitimate expectation, the repository is bound to have regard to the promise or practice in exercising the power, and it is unnecessary to enquire whether those factors give rise to a legitimate expectation. But the court must stop short of compelling fulfilment of the promise or practice unless the statute so requires or the statute permits the repository of the power to bind itself as to the manner of the future exercise of the power. It follows that the notion of legitimate expectation is not the key which unlocks the treasury of natural justice and it ought not unlock the gate which shuts the court out of review on the merits.

Promises and practices[34] expressed or adopted by public authorities are sufficient of themselves to create procedural fairness obligations. I would add that the same is true of policies which constitute a sufficiently "pressing and focused … kind of assurance".[35] Brennan J made the point quoted above to emphasise the fact that legitimate expectations were irrelevant to the process of reasoning which led to this conclusion. However, if legitimate expectation reasoning is now forbidden in the context of determining procedural obligations,[36] the conclusions above regarding the importance of promises, practices and policies are not affected. It will be interesting to see whether the Australian decline of legitimate expectations will simply result in courts applying similar reasoning within the established rubric for determining the application and content of the rules of procedural fairness. Certainly, the High Court has itself proved adept at working around forbidden labels and proceeding as it had before.[37]

When is an expectation 'legitimate'?

'Legitimate expectation' was a contentious label long before debate arose about whether legitimate expectations could be enforced substantively. Although the type of expectation in question had been protected in European law for some time,[38] Lord Denning coined the phrase 'legitimate expectation' in *Schmidt v Home Secretary*[39] and is the figure with whom it is most associated.[40]

---

30 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1.

31 See eg *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193.

32 The Full Court in fact decided the case on the basis that the Department's representations that there would be a fair process created a common law duty of procedural fairness: *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125, [96]; cf T Brennan, 'Can Representations by a Decision-Maker Be the Source of a Duty to Accord Procedural Fairness: A New Life For Legitimate Expectations?' (2015) 82 *AIAL Forum* 69, 72-3.

33 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 40.

34 Schiemann LJ assumed that legitimate expectations could be formed by a public authority committing itself "by practice or by promise" only: *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, 244. However, policies were relevant to the availability of relief (at 240).

35 *R (on the application of Bhatt Murphy (a firm)) v The Independent Assessor* [2008] EWCA Civ 755, [46] (Laws LJ). See R Moules, *Actions Against Public Officials: Legitimate Expectations, Misstatements and Misconduct,* (Sweet & Maxwell, 2009) 59-60.

36 See below at nn99-100.

37 See eg the Court's response to a legislative ban on applying the *Wednesbury* ground in *Minister for Immigration & Multicultural Affairs; ex parte Applicant S20/2002* (2003) 198 ALR 59.

38 G Quinot, 'Substantive Legitimate Expectations in South African and European Administrative Law' (2004) 5 *German Law Journal* 65, 68; see *Case 54/65: Compagnie des Forges de Châtillon, Commentry et Neuves-Maisons v High Authority of the ECSC* [1966] ECR 185. Its use has been traced back as early as the 1950s in Germany; see R Perlingeiro, *Protection of Legitimate Expectations in Brazilian Administrative Law: 80-year-old Widow of a Pensioner* (SSRN eLibrary, 2015), 8 (available at <http://ssrn.com/abstract=2627341>).

39 *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170-1. Widgery LJ, who concurred with the Master of the Rolls, referred to "the withdrawal of a right which the applicant *legitimately expected* to hold" (at 173, emphasis added) but his Lordship was discussing the difference between the decisions to grant a licence and to renew a licence respectively. See *F.A.I. Insurances Ltd. v Winneke* (1982) 151 CLR 342.

40 See C Forsyth, 'The Provenance and Protection of Legitimate Expectations' (1988) 47 *Cambridge Law Journal* 238.

His Lordship's purpose was to extend the obligation to provide a hearing to those who did not meet the existing threshold for procedural fairness of having a right or interest which would be adversely affected by the conduct of a public authority.[41] It soon attracted criticism on the basis that it had produced a memorable label but gave little guidance as to how it applied to procedural fairness.[42]

The growth of the coverage of procedural fairness by the time that *Kioa v West* was decided should have made the issue moot[43] were it not for the fact that the scope of legitimate expectations had also "grown luxuriantly".[44] By contrast with *Schmidt*, which concerned an applicant's legitimate expectation of receiving a hearing prior to the cancellation of the remaining period of a valid visa, *Kioa* concerned an appellant with no legal right to remain in Australia and held that he and his family were nonetheless owed procedural fairness before the decision to deport them was taken. The approach of Brennan J, whose view in *Kioa* and other cases was that the purpose of judicial review is to enforce the limits of public power through judicial construction of statutory purpose,[45] ultimately became dominant in the High Court with regard to matters of procedural fairness.[46] His Honour favoured the expansion of procedural fairness, since the power of the state had expanded "beyond meaningful analogy to 'legal rights or interests'".[47]

Brennan J pointed out the lack of utility for that task that he observed in a doctrine which focused on "the state of the applicant's mind" rather than on the manner in which his or her interests had been affected.[48] This was amply illustrated by the fact that, while the infant daughter of Mr and Mrs Kioa had standing in her own right to oppose her parents' deportation, she cannot have *expected* anything. McHugh J took a similar position in dissent in *Teoh*,[49] disagreeing with the earlier statement of Toohey J that "[l]egitimate expectation does not depend upon the knowledge and state of mind of the individual concerned".[50] In *Teoh*, Toohey J reiterated his preference for legitimate expectations to be determined objectively,[51] and it is implicit that the rest of the majority did so too, since the evidence indicated that Mr Teoh had no subjective knowledge of the treaty upon which his legitimate expectation was based.

If the concept of 'expectation' has attracted criticism for being a "fiction",[52] so too has the issue of when such an expectation will be 'legitimate'. Perhaps this infelicitous nomenclature is to blame for the view, now utterly orthodox in Australia, that to raise legitimate expectations is unhelpful and confusing. Aronson has pointed out that cases often used the term to signify "something that the subject had not entertained in fact" but that s/he might have assumed or taken for granted.[53] Such an interpretation might have done more to extend the capacity to seek procedural fairness beyond the protection of rights and interests alone. However, the fact that, in contrast to other mechanisms for dealing with public authorities' broken promises, legitimate expectation does not 'do what it says on the tin' may not be determinative since, as Kirby J noted in agreeing that the term is a

41 The threshold cases were *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 and *Ridge v Baldwin* [1964] AC 40 respectively.

42 See eg *Salemi v Mackellar (No.2)* (1977) 137 CLR 396, 404 (Barwick CJ).

43 M Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 5. See also *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629.

44 *Kioa v West* (1985) 159 CLR 550, 617 (Brennan J).

45 G Weeks, *Soft Law and Public Authorities: Remedies and Reform,* (Hart Publishing, Oxford, 2016), 91-4 (NB the cases cited at fn 193).

46 M Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 2.

47 ibid., 6

48 *Kioa v West* (1985) 159 CLR 550, 621-2.

49 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 313-14. There is support for this view in Brazil, where a judge placed reliance on German procedure to state that a claimant's legitimate expectation should be protected based on "the confidence they have shown in the public powers, subject to demonstrating that [there] are serious reasons to believe in the stability of the administrative act" relied upon: R Perlingeiro, *Protection of Legitimate Expectations in Brazilian Administrative Law: 80-year-old Widow of a Pensioner* (SSRN eLibrary, 2015), 7.

50 *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648, 670. Toohey J had not contradicted Brennan J's statement that it is the terms of the relevant statute which are relevant rather than "the state of mind of an individual": *Kioa v West* (1985) 159 CLR 550, 618.

51 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 301.

52 ibid., 314 (McHugh J).

53 He submitted that these might better be called "reasonable assumptions" than legitimate expectations: M Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 5.

fiction, "in this area of legal discourse, fictions abound".[54] These words are employed other than in their normal English usage.[55]

Ultimately, the phrase 'legitimate expectation' garnered greater attention than the doctrine for which it stood. In *Lam*, Hayne J observed that it "poses more questions than it answers", such as "[w]hat is meant by 'legitimate'?".[56] His Honour had earlier seemed to express relief in stating that it was:[57]

> not necessary to consider … [issues] such as what is meant by 'abuse of power' and 'unfair' in a context where, by hypothesis, the relevant statute gives power to make the decision which is impugned, and could any relief of the kinds enumerated in s 75(v) be granted? I mention this use of the phrase legitimate expectation in connection with substantive rather than procedural benefits only to emphasise the dangers of using the phrase without *careful articulation of the content of the principle which is said to be engaged in the particular case*.

The two points are essentially the same and go to the dangers of advocating doctrine encapsulated in ill-defined language. Previously, Brennan J had remarked to similar effect in *Kioa* that 'legitimate expectation' is a term of "uncertain connotation" and therefore apt to mislead as a "criterion for determining the application or content" of procedural fairness.[58] The Privy Council in *Ng Yuen Shiu* commented with understatement that the phrase is "somewhat lacking in precision".[59]

'Legitimate' has long been read in this context as in fact meaning 'reasonable'[60] and not merely enforceable. This makes sense, since *Ridge v Baldwin* was decided on the basis that the plaintiff was owed procedural fairness before his employment was terminated even though his interest in his job fell short of being an enforceable right.[61] The difficulty with adding legitimate expectations to the position reached in *Ridge v Baldwin* may simply be that inquiries into the legitimacy of a claimant's expectations (which s/he may not even have held subjectively) went beyond the standard legal fictions which "abound" in administrative law and reached the realms of misdirection.[62] Furthermore, part of the 'legitimacy' or 'reasonableness' in holding an expectation is to accept that an expectation cannot be legitimate in the required sense if it is not also relevant. Lord Sumption noted for the Privy Council that: "Any expectation based on statute is by its nature defeasible. What Parliament gives, Parliament may take away provided that it does so consistently with the Constitution."[63]

By contrast with Australia, the English doctrine building on legitimate expectations has developed constantly: from the recognition of estoppel in public law, to the development of a substantive remedy in public law cases, to the relocation of equitable doctrine within the newly developed public law arrangements.[64] This constant surge onwards was initially accomplished regardless of any excessive concern about the syntax of its component terms, such as 'legitimate expectations'

---

54 *Applicant NAFF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 221 CLR 1, 22-3.

55 F Ahmed and A Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 *Cambridge Law Journal* 61, 64. This is a common feature of the language employed in administrative law; see G Weeks, 'Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law' in M Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 224, 228.

56 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 38.

57 ibid., 37 (emphasis added).

58 *Kioa v West* (1985) 159 CLR 550, 617.

59 *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629, 636.

60 ibid., 636 (Lord Fraser of Tullybelton); *Kioa v West* (1985) 159 CLR 550, 563 (Gibbs CJ); cf *Salemi v Mackellar (No.2)* (1977) 137 CLR 396, 404 (Barwick CJ).

61 *Ridge v Baldwin* [1964] AC 40, 66 (Lord Reid). In fact, the appellant did not want to save his job but his pension: ibid., 68.

62 The English preference for describing the doctrine whereby courts substantively enforce legitimate expectations as 'substantive unfairness' is perhaps understandable on the basis that it clearly focuses on fairness as an external "constraint on the public interest" rather than becoming embroiled in what the claimant expected and whether s/he was reasonable to do so: K Stern, 'Substantive Fairness in UK and Australian Law' (2007) 29 *Australian Bar Review* 266, 267.

63 *Ferguson, Maritime Life (Caribbean) Ltd v The Attorney General of Trinidad and Tobago (Trinidad and Tobago)* [2016] UKPC 2, [36]. His Lordship also noted that the "Constitution [of Trinidad and Tobago] does not protect legitimate expectations as such, and there must be some doubt whether, and if so when, breach of a legitimate expectation can ever, in itself, be the basis of a constitutional challenge to the validity of an otherwise regular law": ibid. The same doubts apply in any other country with a written constitution.

64 See respectively *R v Inland Revenue Commissioners; ex parte Preston* [1985] AC 835; *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; and *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2003] 1 WLR 348.

but extending to 'abuse of power'. This latter phrase was the fulcrum on which *Coughlan* turned the capacity of a court to remedy unfairness, specifically where a public authority failed to adhere to a legitimate expectation.[65] Lord Woolf MR noted in *Coughlan* that this area of law had been considered by the House of Lords in both *Preston*[66] and *ex parte Unilever plc*[67] but that there had remained a difference between the vocabulary of 'abuse of power' and the language of 'legitimate expectation', which his Lordship sought to correct.[68]

Abuse of power has been criticised on the basis that it is inherently imprecise, which is to say that 'power' is a concept that is usually defined with precision but whether it has been 'abused' is an issue on which the reasonable administrative mind might differ from the reasonable judicial mind. The orthodox judicial approach in Australia is that an exercise of statutory power which is otherwise *intra vires* can only be challenged on the narrow application of the *Wednesbury* ground. The English approach is considerably broader but, as Laws LJ noted in his much-quoted consideration of the topic in *Nadarajah*, abuse of power does little to supply a principled basis for the substantive enforcement of legitimate expectations, nor does it assist in differentiating on a case-by-case basis what behaviour will fall foul of the standard.[69]

Faced with a dispute which turned on the content of the phrase "abuse of [a public authority's] position or powers" in *Sisangia*, Lewison LJ looked at a range of judicial commentary on the related term 'abuse of power'.[70] His Lordship held that the authorities yielded no "definition of … universal application"[71] but that the "fact that 'abuse of position or power' cannot be given a hard-edged definition does not mean that the concept itself is meaningless", since its "ingredients" have been explained in a number of cases.[72] The Court of Appeal took the view that, although uncertain, sufficient meaning can be attached to the term 'abuse of power' to allow it to be usefully employed. To the extent that this is inconsistent with the approach of Laws LJ in *Nadarajah*, the difference might be explained by the greater number of cases which have sought to explain 'abuse of power'. However, given that the sources relied upon in *Sisangia* mostly preceded *Nadarajah*, it is perhaps more likely that the true answer is that an increasing number of common law and statutory actions[73] now oblige courts to discern meaning from 'abuse of power'. Lewison LJ made the point that any difficulty attendant on such a task does not allow a court to avoid it.

Labelling has in fact become more contentious rather than less in English law pertaining to substantive remedies against public authorities. The Supreme Court in *Keyu* deferred the constitutionally "profound" decision on whether to replace the traditional '*Wednesbury* rationality' standard with "more structured and principled" proportionality challenges.[74] In *Youssef*, the Court again deferred the issue, with a comment that threw doubt on the adequacy of the existing 'vocabulary' of substantive judicial review:[75]

> It is to be hoped that an opportunity can be found in the near future for an authoritative review in this court of the judicial and academic learning on the issue, including relevant comparative material from other common law jurisdictions. Such a review might aim for rather more structured guidance for the lower courts than such *imprecise concepts* as 'anxious scrutiny' and 'sliding scales'. (emphasis added)

65 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213, 242; 243-54.

66 *R v Inland Revenue Commissioners; ex parte Preston* [1985] AC 835.

67 *R v Inland Revenue Commissioners; ex parte Unilever plc* [1996] STC 681.

68 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213, 243.

69 *R (Abdi and Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [67].

70 *R (Sisangia) v Director of Legal Aid Casework* [2016] EWCA Civ 24, [14]-[22].

71 ibid., [14].

72 ibid., [17]. See eg *R v Hillingdon London Borough Council; ex parte Puhlhofer* [1986] AC 484, 518 (Lord Brightman); *R (on the application of Begbie) v Department of Education & Employment* [2000] 1 WLR 1115, 1129 (Laws LJ); *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, 235 (Lord Millett); *R v Lord President of the Privy Council; ex parte Page* [1993] AC 682, 693 (Lord Griffiths), 704 (Lord Browne-Wilkinson); *R (Lumba) v Secretary of State for the Home Department; R (Mighty) v Secretary of State for the Home Department* [2012] 1 AC 245.

73 As in *R (Sisangia) v Director of Legal Aid Casework* [2016] EWCA Civ 24, [3]-[4].

74 *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665, 1700-01 (Lord Neuberger).

75 *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3, [55] (Lord Carnwath).

The contentiousness of labelling, and its precision, in this area may be part and parcel of the increased frequency with which the Supreme Court has elected to comment on the future of substantive judicial review in recent years without determining the issue.[76] It may also be a result of the doubt that academic authors have thrown on the content of 'traditional' grounds of review, such as reasonableness.[77] The attempt of Laws LJ to place substantive judicial review challenges on a 'principled' basis in *Nadarajah* demonstrates the difficulty of the task ahead of the Supreme Court. While there is no reason to believe that the Australian High Court would shirk such a task, its 'profundity' is another reason why the Court might focus on the adequacy of the existing grounds of challenge rather than attempting to create a new, 'principled' system from the ground up. Principles, like values,[78] are seductive[79] but usually turn out to be extremely hard to isolate and define. Elliott takes a more optimistic view but has nonetheless commented that "[q]uestions about substantive judicial review … often appear to be as intractable as they are beguiling".[80]

Seemingly since very shortly after *Coughlan*'s revolutionary elevation of the importance of legitimate expectations in English law, the Australian High Court has been at pains to state its disapproval of the public law legitimate expectations doctrine. In *Lam*, this came in the form of a frontal assault on *Coughlan*, a case upon which neither party had relied in argument.[81] That attack was conducted with such vehemence that it has never seriously been questioned since. However, *Lam* also saw the High Court withdraw from *Teoh*,[82] which had been decided by the High Court only eight years before *Lam* and had somewhat similar facts. As with *Coughlan*, neither party in *Lam* sought either to rely upon or attack *Teoh*.[83] Much of the Court's discussion of *Teoh* reflected its preference for McHugh J's dissent in that case but did not expressly overturn the majority's reasoning.[84] *Teoh*'s status has been a matter of conjecture in the years since *Lam* was decided,[85] although Taggart was certain that the High Court in *Lam* had "done about as much as judges can by way of *obiter dicta* in a case where the point was not argued to overrule *Teoh*".[86] There is no doubt that he is right in as much as *Lam* read down the findings in *Teoh* until their application was extremely narrow.

What has occurred since *Lam* is that the High Court has changed its focus from substantive enforcement of legitimate expectations to the procedural consequences of legitimate expectations. In *S10*, the defendants made a submission based on the standard formula that procedural fairness applies where there exists "some identifiable right, interest, privilege or legitimate expectation" which is affected. In the circumstances of the case, this submission might easily have been dismissed on the basis that the Minister could not have been compelled to exercise his statutory powers. However, the majority took the opportunity to inveigh against the *language* of legitimate expectations more sternly than *Lam* had done:[87]

---

76 Mark Elliott has noted Supreme Court *dicta* on this issue in *Kennedy v The Charity Commission* [2015] AC 455; *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591; *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665; and *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3; see M Elliott, '*Youssef*: Another Supreme Court decision, another set of *obiter dicta* on substantive judicial review', (28 January 2016) *Public Law for Everyone*, available at: <http://publiclawforeveryone.com/2016/01/28/youssef-another-supreme-court-decision-another-set-of-obiter-dicta-on-substantive-judicial-review/>.

77 More "nuanced" views are said to bring that standard closer to proportionality: M Elliott, '*Youssef*: Another Supreme Court decision, another set of *obiter dicta* on substantive judicial review', (28 January 2016) *Public Law for Everyone*.

78 M Groves and G Weeks, 'Substantive (Procedural) Review in Australia' in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing, Oxford, 2015) 133, 151.

79 It is axiomatic amongst practising litigators that principles are always expensive.

80 M Elliott, 'From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification' in H Wilberg and M Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Michael Taggart's Rainbow* (Hart Publishing, Oxford, 2015) 61, 61.

81 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 22-7 (McHugh and Gummow JJ).

82 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. In practice, *Lam* could not overrule *Teoh* because to overrule such a recent case would have required that possibility to be put directly before a full bench of 7 judges, rather than indirectly before the bench of 5 which sat in *Lam*.

83 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 28 (McHugh and Gummow JJ). See also the transcripts in *Lam* [2001] HCATrans 144 and [2002] HCATrans 248.

84 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 27-34 (McHugh and Gummow JJ), 37-9 (Hayne J), 45-8 (Callinan J).

85 See eg M Groves, 'Treaties and Legitimate Expectations: The Rise and Fall of *Teoh* in Australia' (2010) 15 *Judicial Review* 323.

86 M Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 17.

87 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 (Gummow, Hayne, Crennan and Bell JJ).

> the phrase 'legitimate expectation' when used in the field of public law either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded. The phrase, as Brennan J explained in *South Australia v O'Shea*,[88] "tends to direct attention on the merits of the particular decision rather than on the character of the interests which any exercise of the power is apt to affect".

Brennan J had never been persuaded that the concept of legitimate expectations added anything to the process of determining to whom procedural fairness was owed,[89] a position he was not alone in holding.[90] In any case, for many years before *S10*,[91] the application of procedural fairness had already been sufficiently broad that the importance of the formula applied by the defendants in *S10* should have been minimal.[92] It is interesting not only that the majority elected to engage again with legitimate expectations in a case where it was not necessary to do so, but that the attack was driven entirely by the distracting nature of the term rather than its content. It is a curious aspect of the different paths that have been taken in England and Australia with regard to legitimate expectations that the highest courts in each country remain, after many years, so driven by the difficulties presented by the labels of legitimate expectations and its attendant doctrines.

The High Court's comment about the language of legitimate expectation in *obiter dicta* in *S10* seemed to have done little more than to encourage further consideration of the procedural significance of legitimate expectations by the time *WZARH* was heard three years later.[93] In that matter, the Full Court of the Federal Court had previously decided that a breach of procedural fairness resulted when an adverse review of an asylum-seeker's refugee status was commenced by one reviewer (who had interviewed the asylum-seeker) and completed by another (who made a strong adverse determination as to the asylum-seeker's credibility). The asylum-seeker's case was strong on this point and, in the Full Court, it succeeded in relatively short order.[94] The judgment of Flick and Gleeson JJ (with whom Nicholas J agreed) was in all substantive respects unimpeachable but for the fact that its reasoning on procedural fairness adopted the *language* of legitimate expectations.[95] It was ultimately adhered to in its other aspects by the High Court, a majority of which noted that the attention paid by Flick and Gleeson JJ to the failure of the second reviewer to alert the asylum-seeker to the change in the administrative process "was a sufficient basis for their Honours' decision, which might have been more readily apparent had their Honours not been disposed to deploy the concept of legitimate expectation in their analysis of the issue".[96]

The case therefore may not have seemed likely to receive special leave for appeal to the High Court, particularly given that counsel for the respondent asylum-seeker explicitly disclaimed the reasoning in the Full Federal Court which was founded in legitimate expectation.[97] However, it appeared that the High Court wished to reiterate forcefully some of the points it had made in *S10*. Kiefel, Bell and Keane JJ briefly recounted the history of the High Court's consideration of legitimate expectation reasoning, stating pointedly that the "position has been made sufficiently clear that it is not necessary for this Court to engage again in discussion of the concept of 'legitimate expectation'".[98] Their Honours concluded that:[99]

> Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question; namely, what is required in order to ensure that the decision is made fairly in the

88 (1987) 163 CLR 378, 411.

89 *Kioa v West* (1985) 159 CLR 550, 617-22.

90 See G Weeks, 'Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law' in M Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 224, 227-8.

91 Possibly as long ago as *Kioa v West* (1985) 159 CLR 550, but at least since *Annetts v McCann* (1990) 170 CLR 596.

92 cf AF Mason, 'Procedural Fairness: its Development and Continuing Role of Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 106.

93 *Minister for Immigration and Border Protection v WZARH* (2015) 90 ALJR 25.

94 Both judgments were delivered in a mere 57 paragraphs: *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130.

95 *WZARH v Minister for Immigration and Border Protection* (2014) 230 FCR 130, 137-42.

96 *Minister for Immigration and Border Protection v WZARH* (2015) 90 ALJR 25, 32 (Kiefel, Bell and Keane JJ).

97 *Minister for Immigration and Border Protection v WZARH* [2015] HCATrans 092.

98 *Minister for Immigration and Border Protection v WZARH* (2015) 90 ALJR 25, 32.

99 ibid.

> circumstances having regard to the legal framework within which the decision is to be made.

Gageler and Gordon JJ reached the same conclusions about the appeal but put their comments about legitimate expectations in slightly different terms. Their Honours noted that the concept was a confusing tool with which to determine the content of procedural fairness and that:[100]

> By focusing on the opportunity expected, or legitimately to have been expected, the concept can distract from the true inquiry into the opportunity that a reasonable administrator ought fairly to have given. The former is relevant only in so far as it bears on the latter.

Ultimately, the distinction between legitimate expectation being an "unnecessary and unhelpful" concept or simply confusing and of marginal relevance is less important that the overall message of *WZARH*. That was that the High Court had meant every word of its criticism of the concept in *S10*, that legitimate expectations will not only be refused substantive enforcement in Australia but can no longer be employed to determine the content of procedural fairness, and that even otherwise flawless judgments will have erred by thinking in terms of legitimate expectations. The Australian High Court was pellucidly clear on these points in *WZARH*, as it had indeed been previously in *S10*. The argument can no longer be sustained that, while *Lam* had indicated the High Court's disapproval of legitimate expectation reasoning, it had not reversed cases which had applied such reasoning but "simply pivot[ed] … away from a doctrinal reliance upon legitimate expectation towards an examination of the fairness of the process".[101] It would take unusually courageous[102] counsel to raise an argument based upon legitimate expectations before the High Court, or any other Australian court, again. It seems inescapable, unless a most unexpected change of approach occurs, that legitimate expectations are dead in Australian courts and will bear little further academic analysis in the Australian context. At the very least, the language of legitimate expectations will not now reappear.

What follows from a disappointed expectation?

The issue of an expectation's 'legitimacy' is not only about its formation; it is essentially one that goes to whether anything follows from the state failing or refusing to do what is expected of it. Gleeson CJ distinguished the "mer[e] departure from a representation" from unfairness consequent on any departure.[103] Defeating an expectation created by a public authority in another party is not legally significant without more. It therefore becomes important to determine what 'more' must be demonstrated in order to obtain a judicial remedy based upon the disappointment of an expectation. For the purposes of this chapter, it is not important to discuss the varying approaches to whether or not a judicial review court can or should provide substantive relief.[104]

The first point to note is that the rights consequent on establishing a legitimate expectation are always conditional. On a procedural level, this requirement goes to whether the creation of a legitimate expectation has in practice resulted in unfairness to the applicant. As Gleeson CJ explained in *Lam*, fairness is not an "abstract concept" but "is essentially practical", and "the concern of the law is to avoid practical injustice".[105] Where a public authority seeks to resile from a legitimate expectation, whether or not substantive enforcement of the legitimate expectation is sought, the interest of the individual concerned will always be subject to the public interest.

100 *Minister for Immigration and Border Protection v WZARH* (2015) 90 ALJR 25, 36. Their Honours cited *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 12-13 (Gleeson CJ).

101 *SZSSJ v Minister for Immigration and Border Protection* [2015] FCAFC 125, [92].

102 In the sense popularised by Sir Humphrey Appleby: A Jay and J Lynn, *The Complete 'Yes, Minister': The Diaries of a Cabinet Minister* (HarperCollins, 1988), 141-2.

103 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 12.

104 Particularly since the approaches in both England and Australia are now all but fixed; see respectively *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213; *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1.

105 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1, 14.

However, the onus is on the public authority to prove that there is an "overriding public interest" which demands such action.[106]

In England prior to *Coughlan*, whether the public interest outweighed a legitimate expectation was determined on the undemanding *Wednesbury* standard.[107] The *Coughlan* Court of Appeal limited *Wednesbury*'s application to circumstances where "the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course".[108] It differentiated cases in which a "promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken" in which it was considered "uncontentious that the court itself will require the *opportunity for consultation* to be given unless there is an overriding reason to resile from it".[109] The Court of Appeal stipulated that the court itself and not the decision-maker would determine whether the reason for refusing a hearing was adequate, a process that would be informed by the requirements of fairness. The Court of Appeal also held that, before a public authority could disappoint a legitimate expectation of a substantive benefit, it would fall to the court to "decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power" by "weighing the requirements of fairness against any overriding interest relied upon for the change of policy".[110] The rise of proportionality reasoning in England has only reinforced the role of courts as directing their attention "to the relative weight accorded to interests and considerations" in a given case.[111]

It follows that what one might legitimately expect from the state is heavily influenced by the remedial approach taken by the courts. An English claimant's expectations might take into account the fact that it falls to the court to assess what remedy should be granted based on concepts such as 'fairness' and 'abuse of power' which are either appropriately flexible or worryingly nebulous, according to one's outlook.[112] An Australian claimant, by contrast, who appealed to notions of fairness in judicial review proceedings could only expect to be told that s/he was inviting the court to dabble in the merits of the case and apply a standard suitable to tribunal hearings. A strict *ultra vires* approach to judicial review, such as is orthodox in Australia,[113] holds that a court can inquire whether a decision-maker has operated in excess of his or her jurisdiction but cannot exercise the statutory or executive power held by that decision-maker in his or her stead. Within this restriction falls any invitation for the court to weigh fairness to an individual against the interests of the public generally.

Additionally, there is a line of thought that says that, even if courts were constitutionally able to conduct such an exercise, they ought not because they lack the expertise to reach the right solution reliably.[114] This is familiar from where review is sought of polycentric decision-making,[115] a difficult process even before specialist tribunals.[116] Much has been made of the fact that the Court of Appeal in *Coughlan* gave greater weight to the disappointed expectation of a disabled (and faultless) woman than it did to the appellant health authority's plans to develop better health care

106 *R v Secretary of State for the Home Department; ex parte Asif Mahmood Khan* [1984] 1 WLR 1337, 1344 (Parker LJ); *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213, 238 (Lord Woolf).

107 R Moules, *Actions Against Public Officials: Legitimate Expectations, Misstatements and Misconduct,* (Sweet & Maxwell, 2009), 81.

108 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213, 241.

109 ibid., 242 (original emphasis). The Supreme Court in *Moseley* later approved key parts of what *Coughlan* said about consultation but made clear that a duty of consultation, while related to the doctrine of legitimate expectations, was also distinct from it: *R (Moseley) v London Borough of Haringey* [2014] 1 WLR 3947, 3956-7 (Lord Wilson), 3961 (Lord Reed).

110 *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 3 QB 213, 242.

111 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547 (Lord Steyn).

112 Schiemann LJ perhaps trod the middle ground when he remarked that "without refinement, the question whether the reneging on a promise would be so unfair as to amount to an abuse of power is an uncertain guide": *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, 247.

113 See the seminal modern statement in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6 (Brennan J).

114 See G Weeks, *Soft Law and Public Authorities: Remedies and Reform,* (Hart Publishing, Oxford, 2016), 164-5.

115 Most famously in L.L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

116 A Edgar, 'Participation and Responsiveness in Merits Review of Polycentric Decisions: A Comparison of Development Assessment Appeals' (2010) 27 *Environmental and Planning Law Journal* 36.

options for a wider range of people.[117] The Court of Appeal in *Bibi* was frank about this limitation, particularly where the legitimate expectations of the claimant may be at variance with the legitimate expectations of people not represented before the court.[118] Ultimately, the paths that courts in different countries have elected to take on this issue do not appear to have been driven by the concerns which are apparent with courts taking a role of balancing issues of fairness.

Conclusion

There is a difference between the administration we want and what we are able to compel. Should the courts hold the answers to every issue where a public authority has created an expectation in another party? To put the question another way, must we rely on judicial enforcement to protect our expectations, or is there sometimes a preferable option? The discussion above has touched on the possibilities that certain remedial options may be better suited to the executive than the judiciary, either by dint of the former's greater expertise in certain matters or because the issue for consideration is, of its nature, political. It is worth noting, however, that the differences between the various countries which engage with the concept of legitimate expectations can in the main be explained by different judicial arrangements in each. It is likelier that each has (or is working towards) a solution which suits it, and not that any country has taken an approach which is simply wrong.

What we can legitimately expect from the state depends on multiple variables. How was the expectation engendered? Is the expectation reasonable to hold? Is the expectation of a hearing or a more substantive outcome? One of the issues that seems common across several jurisdictions is whether or not the outcome is 'fair' – although determining that issue is beset with difficulties. There is no single answer to the question posed by the chapter. However, one possibility is that that question cannot be answered without also asking: what can we legitimately expect from our courts?

117 See M Groves and G Weeks, 'The Legitimacy of Expectations About Fairness: Can Process and Substance be Untangled?' in J Bell et al (eds), *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart Publishing, 2016) 165, 171.

118 *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237, 247-8 (Schiemann LJ).