

## Chapter 19 Requiring decision-makers to consult

Although several decades ago government policy tended to be developed behind closed doors, now, transparency and accountability are accepted norms and consultation is a standard part of most significant policy decisions. In fact, in some contexts, the expectation may extend beyond consultation to include stakeholder involvement or collaboration in the decision-making process (for example, in the Treaty of Waitangi context).

Consulting the public or affected stakeholders on significant decisions has the following benefits:

- It increases the transparent and inclusive nature of decisions, which improves their legitimacy.
- It improves the quality of decisions by ensuring that decision makers take into account the perspectives of those affected by them.
- It helps promote public understanding and acceptance of the decision (and so is likely to improve compliance).
- It enables those to whom the legislation or policy decision will apply to plan and adjust systems or processes appropriately.

Consultation often occurs simply because it is good practice or because there is an administrative requirement to consult (for example, the [Cabinet Manual](#) requires consultation prior to many Cabinet decisions).<sup>38</sup> Imposing a legislative obligation to consult is often not necessary. However, there may be good reasons to include obligations to consult in the legislation, particularly if the decision is delegated below the level of Cabinet or has a significant impact on others (and others' perspectives need to be transparently included), or if additional certainty is required about the scope of the obligation.

In this chapter, we discuss the question of whether legislation conferring decision-making powers should impose an express requirement to consult on those decisions. Those decision-making powers cover two main cases:

- administrative-type decisions that set or implement some government policy (for example, a decision, under section 236(1) of the [Land Transfer Act 2017](#), of the Registrar-General of Land to set standards and issue directives in relation to the administration and operation of the register of land); and
- decisions to make secondary legislation (for example, a Minister's decision, under section 201 of the [Health and Safety at Work Act 2015](#), to recommend the making of regulations for a funding levy).

This chapter does not cover circumstances where a person has a right to be heard in accordance with natural justice because the decision affects his or her rights or obligations (for example, a licensing

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<sup>38</sup> Cabinet Office *Cabinet Manual 2017* at [5.14]. More detailed guidance on consultation requirements is found in the [CabGuide](#) and Treasury [Guidance Note: Effective Consultation for Impact Analysis](#) (June 2017).

decision or the power to remove a person from office). Those types of decisions are discussed further in [Chapter 18](#).

If there is a duty to consult, the common law provides the details of how consultation should be conducted when the legislation itself is silent on that detail. The 1993 Court of Appeal decision in *Wellington International Airport Ltd v Air New Zealand* describes the nature of the consultation obligation, which applies except to the extent that legislation specifically provides otherwise:<sup>39</sup>

- Consultation includes listening to what others have to say and considering the responses.
- The consultative process must be genuine and not a sham.
- Sufficient time for consultation must be allowed.
- The party obliged to consult must provide enough information to enable the person consulted to be adequately informed so as to be able to make intelligent and useful responses.
- The party obliged to consult must keep an open mind and be ready to change and even start afresh, although it is entitled to have a work plan already in mind.

It is important to bear the nature and scope of this duty in mind in deciding whether to include a legislative obligation to consult.

## Guidelines

### 19.1 When should legislation include requirements to consult?

*Legislation should include a requirement to consult when that is necessary to clearly ensure good decision-making practice.*

There is a wide spectrum of decisions made under legislation where consultation may be expected but is not required by the legislation. In general, decisions made by Cabinet can be expected to be made in accordance with the Cabinet Manual requirements for consultation. However, in some circumstances, it may be useful to include a legislative requirement to consult.

Officials should identify the stakeholders affected by the particular decision and consider the significance of the decision, the nature of (and controls otherwise applying to) the decision-maker, and the need for transparency and accountability in the particular context. A legislative requirement to consult may be necessary to:

- provide additional assurance and certainty to people affected by a decision that their views can be presented. This may be important in securing support for the legislation or in addressing concerns about the delegation of decision-making

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<sup>39</sup> *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671, as described by Asher J in *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832.

powers. If there are conflicting perspectives, it may be important to ensure that they are given a clear opportunity to be included;

- set clear processes around what is required for consultation (to give certainty to decision makers and clarity to stakeholders);
- ensure consistency of consultation practice for similar decisions (particularly where there are multiple decision-makers and consistency of expectations and practice is important); or
- address concerns that consultation obligations from other sources (such as the common law or Cabinet Manual) are inaccessible to many people or do not apply.

However, there are some risks with solidifying the requirement to consult in legislation rather than leaving it up to good administrative practice. Including procedural requirements in legislation always risks reducing flexibility to tailor requirements to circumstances and potentially creates more complex legislation.

In assessing the risks, the following factors may limit the kind of consultation required by the legislation or may justify not including an obligation to consult:

- if, given the minor nature of the decision, consultation would add too much cost to the process;
- if, where the decision is required to be made urgently, consultation would create inappropriate delay; or
- if meaningful consultation could expose information that should remain confidential.

Officials should note that, in some cases, the common law provides a duty to consult (but usually only if the effect of a decision on an individual is significantly different to its effect on the general public). The common law duty to consult may occur where there is a legitimate expectation of consultation arising from a promise, past practice, or a combination of both on the general ground of fairness or because a duty can be implied into the statute.<sup>40</sup> However, in general, this is sufficiently rare or uncertain that it would not weigh against including a legislative obligation to consult if one would otherwise be advisable for the reasons given above.<sup>41</sup>

## **19.2 Who should be required to be consulted?**

*An obligation to consult should clearly identify who must be consulted.*

The particular circumstances of the policy will determine how the legislation should describe

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<sup>40</sup> See *Nicholls & Anor v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 369-370; *Talleys Fisheries Ltd v Cullen & Ors* (HC Wellington, CP 287/00, 31 January 2002 (Ronald Young J)).

<sup>41</sup> This situation should be distinguished from the situation where natural justice applies. In that case, statute law commonly relies with confidence on this duty applying to decisions affecting individual rights at common law.

who must be consulted. The two main concerns here are that the description:

- captures the key people or organisations likely to be interested in or affected by the decision; and
- is sufficiently certain, without unnecessarily restricting the requirements or being too inflexible to cater for change (for example, changing organisations).

Naming or describing the people or organisations to be consulted provides the greatest level of certainty about who must be consulted (for example, the Privacy Commissioner). Officials should, however, consider whether the description of the person or organisation is likely to change over time or be superseded, making the legislation obsolete.

The people or organisations to be consulted can also be described by category (for example, registered architects or “entities to which this decision applies”) or by their representative nature (for example, “organisations representing the interests of journalists”). In those cases, officials should consider whether the class of people included within a description is sufficiently confined so that the decision maker can be certain of satisfying the obligation.

Often, it will not be possible to name or describe in advance all the people who should be consulted. In that case, a “catch-all” description may also be added (for example, “any other person likely to be substantially affected by the decision” or “any other person that the [decision-maker] considers is likely to be affected by the decision”). Catch-all descriptions can result in more risk around decision-making processes (because they require a judgement about who must be consulted and that decision may be challenged). However, that risk should be balanced against the countervailing risk of being under-inclusive or allowing too much discretion. Those risks may be reduced by allowing consultation with the representatives of the people who are substantially affected.

### **19.3 What aspects of the consultation process should be prescribed?**

*The specific requirements for consultation should be set by legislation if certainty is needed on the scope or timing of the obligations.*

As mentioned earlier, if legislation does not specify the process to be followed in consultation, the common law will fill in the detail. Specifically, the principles outlined in the *Wellington International Airport* case apply. Generally, it is better to rely on the common law as it is sufficient to ensure meaningful consultation and minimises the risks that come from excessive legislation of detailed processes.

However, in some contexts, there may be advantages in imposing more specific (and possibly circumscribed) obligations in place of the standard common law duty. Those advantages may exist when express consultation provisions could:

- ensure consistent consultation practice across multiple decisions or decision-makers;
- provide certainty to decision-makers and affected people about the process that should be followed; or

- provide assurance to decision makers about the limits of their obligations to consult.

Aspects of the consultation process that could be specified in legislation include:

- the timing of the consultation obligation as part of the decision-making process;
- the way in which notice of the consultation opportunity should be given; and
- the information that must be provided to inform interested parties.

However, any prescribed consultation process should be crafted in a way that takes account of the degree of flexibility decision makers are likely to need in the particular context.

Officials should note that if the legislation confers an obligation to “consult”, it is not necessary to go on to impose specific obligations, such as to “have regard to the views of”, “consider the views of” or “request people to comment” (which are inherently part of the obligation to consult).

#### **19.4 What should be the consequences of failing to consult?**

*Judicial review should generally remain available as a means of challenging the adequacy of a consultation process.*

Generally, any failure to comply with the legislative process for making a decision (including a failure to consult) can be challenged by judicial review. If the failure involves a decision to make legislation, a failure to comply with a consultation obligation can also be queried by the Regulations Review Committee.<sup>42</sup>

Sometimes, consultation provisions in legislation contain a provision stating that a failure to comply with the requirement to consult before making a decision does not affect the validity of that decision. The purpose of this protection is to save a decision from an attack on its validity due to a minor or technical error in the course of a genuine consultation process (perhaps because a particular person missed out on being consulted or some minor information was not communicated). It does not generally protect against a deliberate decision not to consult in the face of a statutory obligation. Also, it does not save the decision if the lack of consultation means that relevant considerations were not taken into account or irrelevant considerations were taken into account.

However, this type of concern can often be addressed in other ways, for example, by clearly specifying the consultation process or by giving the decision maker some discretion as to how far to go in determining which members of a group need to be consulted. A validating provision may still be appropriate to ensure that minor or technical failures do not affect the validity of the decision. However, the scope of the validating provision should be clear.

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<sup>42</sup> [Standing Orders 2017](#) 319(2)(h).