

## Introduction

- 14.001 In December 1998, we presented to the House a report on *Public Consultation and Decision-making in Local Government*.<sup>1</sup> This Part summarises the main points and recommendations of that report.
- 14.002 Requirements for and expectations of local authority consultation have increased dramatically over the past ten years. But what is “consultation”? And when and how are local authorities required to consult?
- 14.003 Some local authorities are experiencing difficulties in interpreting and applying the legal requirements concerning consultation. In addition, there may be different expectations and understandings of what consultation requires – both among local authorities and between local authorities and their communities.
- 14.004 Recognising that local authorities may find some guidance on the subject timely and helpful, we commissioned an analysis of the current statutory requirements and relevant case law from law firm Simpson Grierson.
- 14.005 Our intention in reporting on the subject was to add to the current understanding of the consultation requirements affecting local government. However, consultation requirements under the Resource Management Act 1991 and consultation with iwi were not covered by our report as they had been comprehensively addressed by other agencies.

## Statutory and Related Legal Requirements

- 14.006 The Local Government Act 1974 imposes significant obligations for public participation, openness and accountability in local authority decision-making. The effect of these provisions is that local authorities are expected to include the community in the decision-making process, and in this sense to “consult” with the community on a broad front.

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<sup>1</sup> ISBN 0 477 02857 8.

- 14.007 Whether consultation is required – and, if so, the nature of the consultation that is required – will depend on the facts and the legal requirements in each case. The obligation to consult is generally derived from express statutory provisions. However, in other situations, an obligation to consult may be implied in legislation, or an obligation may arise out of a “legitimate expectation” on the part of the public.
- 14.008 Certain provisions in the Local Government Act expressly provide for, or may imply, a requirement to consult, and set out the procedural requirements of the special consultative and special order procedures. Case law on the meaning of “consultation” can provide a guide to local authorities as to when a decision can be seen as having been made after “consultation”. In addition, circumstances may give rise to a “legitimate expectation” of consultation.

### Application of Administrative Law

- 14.009 A decision to consult or not to consult, and any decision made after consultation, must be made in accordance with the principles of administrative law. These principles require local authorities to act:
- in accordance with law;
  - reasonably; and
  - fairly, in accordance with the principles of natural justice.
- 14.010 Decisions that are not made in accordance with these requirements may be challenged on procedural grounds.
- 14.011 The requirement to act fairly is most relevant to consultation, and this requirement must receive particular emphasis. Local authorities must follow proper processes to ensure that those individuals or groups affected by their decisions are given natural justice.
- 14.012 A decision can be challenged if a local authority member or officer is biased in such a way that prevents him or her from fairly considering the issue with an open mind. For example, where a decision-maker has a financial interest in the issue or has already made up his or her mind before considering relevant information (i.e. predetermination).

14.013 The very nature of consultation contains an inherent element of “predetermination”. The special consultative procedure is a situation in which a local authority has a pre-existing view on which it is seeking community comment. However, councillors should be cautious in what they say and do in relation to any issue upon which they may be called to decide. While statements that indicate a particular preference or view are not necessarily prohibited, any statements or conduct which may indicate a closed mind or predetermination – in the sense that councillors are not open to persuasion or argument – should be avoided.

## Specific Issues

14.014 The **special consultative procedure** under section 716A of the Local Government Act is increasingly being used as the main vehicle for local authority consultation. It involves releasing a proposal (which may be a draft plan or policy or a specific proposal) to the community for comment.

14.015 Making a written submission gives the submitter a right to be heard orally, and the council must consider all submissions before it makes its final decision on the proposal. The procedure provides an opportunity for community feedback on major proposals before they are finalised.

14.016 The special consultative procedure is different to the **special order procedure**, and local authorities need to be aware of the characteristics associated with both procedures.

## Problems and Current Trends

14.017 In addition to interpretation and analysis of the legal requirements for public consultation, there is the important dimension of its application in practice. The report discusses some of the problems which are being experienced with the special consultative procedure, and current trends in the application of the legislation.

### *Perceived Problems with the Special Consultative Procedure*

#### *The Perception that Consultation is “a sham”*

14.018 For a number of reasons, the public may believe that the consultation process carried out by a local authority was not adequate or appropriate. Issues that have come to our attention include:

- the local authority is unwilling to listen;
- too little time for compiling submissions;
- too little time for presenting submissions;
- lack of feedback about the final decision;
- the vested interest of a council and its officers;
- different expectations; and
- avoiding making a decision.

#### *Costs of Consultation*

14.019 There are also concerns that the heavy emphasis on consultation may be giving rise to difficulties and costs that local authorities had not fully anticipated. Examples that have come to our attention include:

- publishing and distribution;
- keeping in touch; and
- public meetings.

#### *Undue Pressure Group Influence*

14.020 Both local authorities and the public have expressed concern that public consultation processes can be dominated or captured by particular interest groups. Particular issues that have come to our attention include:

- reluctance to voice opinions;
- local authority “capture”;
- the nature of the process; and
- the “squeaky wheel syndrome”.

### *Current Trends*

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14.021 Aside from the direct problems which we have highlighted above, the implementation of the special consultative procedure and the development of consultation practices must be seen within a wider context. We have observed the following trends:

- increasing diversity;
- local authority “capture”;
- need for resources;
- changing community expectations; and
- changing role of consultation.

## Conclusions

14.022 A considerable body of knowledge and experience on good consultation processes exists within local government. Developments over the last ten years have established a sound foundation for public consultation as an appropriate management technique for improved representation, informed decision-making, and better results for local government.

### *From “requirement” to “investment”*

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14.023 The attitude of some local authorities on public consultation has shifted from viewing it as a legal requirement to regarding it as good management practice and a better way to communicate with communities and represent their interests and expectations.

### *Informed Decision-making*

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14.024 The most tangible benefit of adequate and appropriate public consultation is that it will help to produce better decisions. Informed policy decisions are more likely to avoid constant review and revision. Projects that are understood and accepted by the community are less likely to face pressure for their revision or removal. Good consultation can produce better, sustainable decisions. Getting it right first time can save time and money.

## *Good Consultation Practice*

14.025 Indicators of good consultation practice are:

- having the right attitude;
- allowing sufficient time;
- being clear;
- identifying all those with an interest; and
- providing good feedback.

## Recommendations

14.026 We recommended that every local authority should:

- Have appropriate policies and practices in place to ensure compliance with any specific legislative requirements, or any general duty to consult, when designing and carrying out a public consultation exercise.
- Use the special consultative procedure in section 716A as a framework for public consultation where an issue is controversial and likely to attract public interest and opinion.
- View public consultation as more than simply notifying the public and receiving written submissions.
- Ensure that the public and the council are clear about how the consultation will influence making the final decision.
- Develop a consultation process that:
  - **Is compelling**, so that all affected parts of the community will want to be involved and know that the council is interested in listening to their views.
  - **Allows sufficient time**, so that everyone who wants to is given an appropriate amount of time to respond to the proposal.
  - **Is clear about what the proposal is**, why the consultation is necessary, what will be done with the information, and who will be making the decisions.

- **Identifies all those with an interest**, so that all those affected and interested are identified and informed about the proposal and encouraged to participate.
- **Provides good feedback**, so that all those who participate are given reassurance that their views and efforts are valued.
- Recognise that public consultation is good management practice and a pragmatic way to assist with informed decision-making.
- Ensure that sufficient appropriate skills and resources are available to develop and carry out public consultation exercises.

