OFFICE OF THE
MINISTER OF HEALTH

**MEMORANDUM TO CABINET SOCIAL POLICY AND HEALTH COMMITTEE**

# CONSULTATION FRAMEWORK FOR DISTRICT HEALTH BOARDS

## PROPOSAL

1. This paper seeks Cabinet's agreement to establish a high level framework for District Health Boards' (DHBs) consultation with their communities and the mechanism to impose consultation obligations, as sought by Cabinet [CAB (00) M 15/10 refers]. It canvasses what DHBs should consult on, who they consult with, and how they consult, and notes that the framework will be informed by the outcome of consultation on the New Zealand Health Strategy.

## EXECUTIVE SUMMARY

2. Section 34 (3)(a) of the New Zealand Public Health and Disability Bill (the Bill) sets out a clear requirement for DHBs to consult with communities in developing their strategic plans. DHBs will also have to consult in the context of the partnership model previously agreed to by Cabinet (CAB (00) M 11/1A (4) refers). This paper proposes establishing wider expectations around consultation. As DHBs are Crown owned and Crown funded agencies, officials recommend an administrative approach to provide the necessary means to assure DHB performance in this area.

3. The Bill establishes a minimum statutory requirement for DHBs to consult over the development of their strategic plans. It is proposed that the principles underpinning consultation be established in the operational policy framework (the set of quasi-regulatory rules that apply to DHBs) and including overarching obligations in regard to:
   i. what DHBs consult on
   ii. who DHBs consult
   iii. how DHBs consult.

4. At an operational level, the New Zealand Health Strategy discussion document signalled the Government's intention that guidelines be developed for consultation in the health sector. I expect DHBs to participate in developing those guidelines. The guidelines will have a more detailed operational focus and will be consistent with the overarching obligations included in the operational policy framework. Like the principles to be included in the operational policy framework, the national guidelines will draw on:
   i. the outcome of consultation on the New Zealand Health Strategy currently underway (specific questions were raised about consultation)
   ii. common law consultation requirements, and case law
   iii. the Health Funding Authority's (HFA's) existing guidelines

iv. Te Puni Kokiri's guide for Government departments on consultation with iwi.

## BACKGROUND

5. On 8 May 2000, Cabinet made a number of decisions on accountability arrangements for DHBs. Cabinet agreed (and this is now embodied in the Bill) that DHBs develop a Strategic Plan in consultation with the community. Cabinet directed officials to report back to the Ad Hoc Ministerial Committee with advice on development of a consultation framework for DHBs, by 31 August 2000 (CAB (00) M 15/10 refers).

6. In addition to providing for strategic plans, the New Zealand Public Health Services Bill provides for:
   i. Crown funding agreements (between DHBs and the Crown)
   ii. the power to impose regulations on consultation obligations
   iii. the Minister of Health to give directions relating to government policy
   iv. the Bill to be interpreted in a manner consistent with the principles of the Treaty of Waitangi.

### The New Zealand Health Strategy

7. The New Zealand Health Strategy is currently under development. A discussion document on the Strategy, on which feedback will be available in September, poses several questions about consultation and invites specific comments on:
   i. the most effective ways for individuals, communities and organisations to be involved in future consultation
   ii. the best way for DHBs to provide information in order to elicit informed comment
   iii. what issues the public should be consulted on and how DHBs should decide on which issues these will be.

8. The discussion document also proposes the development of guidelines for consultation in the health sector. These could be based on the HFA's consultation guidelines, which draw from statutory obligations and case law. These would be informed by the results of consultation on the New Zealand Health Strategy.

### Principles of Consultation

9. The principles of consultation were discussed by the Court of Appeal in the Wellington International Airport Limited vs Air New Zealand case in 1993. This was a landmark case and principles or elements of consultation identified by the Court are widely accepted as defining consultation. Elaboration of what proper consultation involves has been provided by other case law. The HFA has used this and other material to compile a policy on its consultation obligations and guidelines. Elements of consultation noted in the HFA document are in Annex 1.

## COMMENT

10. The following discussion sets out a generic framework for consultation by DHBs.

### A Mechanism For Placing Requirements on DHBs Regarding Consultation

11. The provision in the Bill to consult on the strategic plan establishes a statutory mechanism for requiring consultation on DHB strategic plans. In addition, Cabinet has decided that DHBs will also have to consult in the context of the partnership model (CAB (00) M 11/1A (4) refers).

12. There are at least four options available to ensure DHBs undertake effective consultation as follows:
    (a) through regulation - the Bill provides the power to make such regulations
    (b) through direction by the Minister - the Bill provides for this
    (c) through including obligations in the operational policy framework
    (d) by simply encouraging DHBs to consult.

13. The use of regulations and direction by the Minister, while providing clear requirements, may be unnecessarily legalistic. The temptation with regulation is to do the absolute minimum to comply. If consultation is to be effective, DHBs have to accept its value as good management practice, rather than as an exercise in complying with the law.

14. Including consultation requirements in the operational policy framework, like the use of regulations or direction by the Minister, would also make DHB obligations transparent. As DHBs are Crown owned and Crown funded agencies, using an administrative approach will provide the necessary means to assure DHB performance in this area.

15. The fourth option of simply encouraging effective consultation is unlikely to be universally successful. It is less transparent and less likely to satisfy stakeholders that the Government is establishing clear consultation obligations.

16. There is a risk that there could be legal challenges and interpretation, by the Courts, of statutory provisions in the Bill to consult and share information. This may particularly occur in regard to the Treaty relationship and consultation with Mäori. It might result in the Courts determining an interpretation of consultation obligations at variance to that intended. Recourse to the Courts may also have high costs. This is a risk for the options of including obligations in the operational policy framework and of encouraging DHBs to consult. This is a lesser risk for the regulatory and direction by the Minister options.

17. On balance, the option of including consultation obligations in the operational policy framework to apply to DHBs is the favoured option. It is more appropriate for the Crown, as owner and funder of DHBs, to use administrative rather than legalistic means. It provides the transparency of regulation while allowing more

flexibility for these obligations to evolve from year to year. The option to resort to regulations would still exist, should that be required.

**What should DHBs consult on & when?**

18. Aside from their draft Strategic Plan, there are a number of other significant issues where it would be appropriate for DHBs to consider the views of the community. In general, high level policy will be determined at a central level in consultation with New Zealanders as part of determining the New Zealand Health Strategy and New Zealand Disability Strategy. High level policy should not be re-litigated at DHB level.

19. The type of services and level of access to those services will be determined principally at the centre, by way of a nation-wide framework, to ensure there is reasonable consistency in access across New Zealand. In practice DHBs' requirement to manage within their overall funding implies that their consultation will most often occur in regard to identifying local priorities and needs. This will involve DHBs determining the level and type of services that they fund.

20. Responsibility for funding decision-making will be progressively devolved to DHBs. Over time it is expected that DHBs will, for example:
    i. identify alternative strategies for addressing health and disability needs
    ii. shift resources from secondary care to primary care to ensure a stronger focus on disease prevention
    iii. prioritise services at a local level.

21. These matters are likely to be areas where consultation is relevant as part of developing DHBs' strategic plans. Which particular provider a DHB enters into a service agreement with would not be a suitable matter for public comment. In order for consultation to be meaningful, DHBs must make it clear to those being consulted what aspects of a proposal they can influence.

22. The existing HFA guidelines, which have evolved from case law, note that consultation is appropriate when:
    i. initiating new policies, services or plans
    ii. making changes to existing policies, services or plans
    iii. establishing priorities
    iv. making significant change to the range type or access to services
    v. proposing changes in methods of contracting.

23. DHBs should also be required to consult on these matters, subject to a test of materiality. Tight definition of these matters will ensure that consultation will not be unnecessarily onerous and expensive.

**Who should DHBs consult?**

24. Communities are comprised of individuals and groups. People belong to different groups at different times. Those individuals and groups who it may be appropriate for DHBs to consult include: Mäori, Pacific peoples, community groups, non-governmental organisations providing health services, health care providers, providers of disability services, other members of the general public, health professionals, territorial authorities, and central government agencies.

25. DHBs should not assume that coverage of groups equates to coverage of people. I expect DHBs to ensure that all individuals in the community have the opportunity to participate in consultation on their strategic plan and that DHBs will proactively consult with groups that, in total, are broadly representative of the interests of the community. In consulting on specific issues, DHBs must consult with the affected parties.

26. DHBs must ensure Mäori generally have the opportunity to participate in consultation on the DHBs' strategic plan, irrespective of the partnership model adopted within that area.

27. DHBs must extend relationships with Mäori beyond mana whenua. Not all Mäori in any one DHB geographic area are mana whenua.

28. DHBs must pay particular attention to consulting with groups in the community with poorer health status, particularly with Mäori and Pacific peoples in the context of Closing the Gaps.

**How should DHBs consult?**

29. Consultation strategies must be chosen to ensure optimum input to discharge common law requirements and provide sound input to decision-making. It is expected that methods will include: public meetings, advisory groups, written submissions in response to written documents, consumer surveys, hui, fono, focus groups, freephone, community fora by independent facilitators, and a number of others.

30. Individual DHBs will best be able to tailor consultation practice to suit the particular groups and individuals that constitute their communities. They may be able to build on existing community networks to ensure adequate coverage in an efficient manner. The HFA's consultation policy documents offer guidance on appropriate methods of consultation. In addition, Te Puni Kokiri's publication "A Guide for Departments on Consultation with Iwi" (1993), provides good advice.

31. For consulting widely on their strategic plan, the process used by local government offers a model for DHBs. Local authorities are required to consult by using a special consultative procedure. This is a key element of their accountability arrangements. The procedure is most commonly used by local authorities to consult on their annual plan. The procedure is noted in Annex 2.

32. The requirement for local authorities to use the special consultative procedure has expanded significantly. This process is familiar to the public and there may be benefits in DHBs using this approach for consulting on their strategic plans. Smaller DHBs may be able to undertake consultation in conjunction with local authorities.

33. Requiring a method such as the special consultative procedure for DHB strategic planning would result in a more consistent and transparent process. It may be more appropriate to consider this option after consulting DHBs on the merits of this approach. If at a later date a special consultative procedure is deemed appropriate, it should be included in the operational policy framework. Officials are currently developing the regulatory framework and mechanisms for establishing operational policy requirements for DHBs and will report on this at a later date.

## CONSULTATION

34. This paper has been prepared by the Ministry of Health, in consultation with the Health Funding Authority, Te Puni Kokiri, The Ministry of Pacific Island Affairs, The Treasury, and the State Services Commission. The Department of the Prime Minister and Cabinet has been consulted.

35. The Health Funding Authority favours a regulatory option whereby regulation requires compliance with national consultation standards. The HFA is concerned that there is continuity in consultation requirements. It believes regulation would ensure this but obligations in the operational policy framework may change from year to year.

## FINANCIAL IMPLICATIONS

36. The costs associated with greater community engagement in the decision making process will be business as usual for DHBs and met from within their allocated funding. Incremental costs for consultation by twenty one DHBs, (rather than by the HFA and hospital and health services), have not been identified for this proposal, but they are likely to be greater.

37. The costs of consultation can be substantial and DHBs will be expected to tailor their consultation to ensure that it is sufficient to be effective and publicly credible, without being overly expensive. There will be opportunities for DHBs to reduce costs, for example by working in conjunction with: other DHBs, territorial authorities, and existing community groups.

38. Cabinet has previously noted that officials will report back to the Cabinet Social Policy and Health committee by 31 December 2000, and subsequently if necessary, when all policy decisions have been taken and transitional plans have

been received, on the costs, savings, and sources of any savings relating to health sector changes (CAB (00) M 21/13 refers).

## LEGISLATIVE IMPLICATIONS

39. The obligation on DHBs to consult on strategic plans is included in the New Zealand Public Health and Disability Bill. The proposed consultation framework will be achieved by inserting requirements in the operational policy framework for DHBs. The Bill provides the power to impose regulations on consultation obligations and this would remain as a backstop.

## HUMAN RIGHTS ACT 1993

40. The advice provided in this paper does not have Human Rights Act 1993 implications.

## REGULATORY IMPACT STATEMENT

41. A regulatory impact statement is not required as the proposal is for an administrative mechanism rather than regulation.

## PUBLICITY

42. Any publicity related to the establishment of DHB accountability arrangements will be managed within the overall Communications Strategy developed by the Communications Workstream Group [SPH (00) M 6/6 refers].

**AT THE MEETING ON 11 SEPTEMBER 2000, FOLLOWING REFERENCE FROM THE CABINET SOCIAL POLICY AND HEALTH COMMITTEE (SPH), CABINET:**

CAB (00) M 30/6

**DISTRICT HEALTH BOARDS: CONSULTATION FRAMEWORK**

a **noted** that the New Zealand Public Health and Disability Bill (the Bill) imposes the requirement on District Health Boards (DHBs) to consult on their strategic plans, but the Bill does not specify the form that this consultation should take;

**Consultation Principles and Obligations**

b **agreed** that the Minister of Health should establish consultation principles and obligations on DHBs including:

i. what DHBs consult on;

ii. who DHBs consult;

iii. how DHBs consult;

c **agreed** that consultation principles and obligations will draw on common law consultation requirements, the Health Funding Authority's existing guidelines, and where relevant, on consultation currently underway on the New Zealand Health Strategy discussion document;

d **agreed** that, as a minimum and subject to a test of materiality, consultation principles will include general requirements to consult on:

i. initiating new policies, services or plans;

ii. making changes to existing policies, services or plans;

iii. establishing priorities;

iv. making significant change to the range or type of, or access to, services;

v. proposing changes in methods of contracting;

e **agreed** that, as a minimum, consultation principles will include a requirement to consult with:

i. affected parties;

ii. Maori;

f **agreed** that the consultation principles developed by the Minister of Health be included in the operational policy framework for DHBs (i.e. the quasi-regulatory rules applying to DHBs);

**Consultation Guidelines**

g **noted** the intention to develop consultation guidelines for the health sector that will have a more detailed operational focus and be consistent with the consultation principles included in the operational policy framework;

**Fiscal Impact**

h **noted** that there is likely to be a fiscal impact from consultation obligations, that consultation costs will be met from within existing funding, and that DHBs will be expected to minimise the costs of consultation, subject to ensuring that consultation is effective;

**Report Back**

i **noted** that officials will report to SPH by the end of December 2000, and subsequently if necessary, when all policy decisions have been taken and transitional plans have been received, on the costs, savings, and sources of any savings relating to health sector changes [CAB (00) M 21/13 refers].

## ANNEX 1

### Elements of Proper Consultation

The Health Funding Authority Consultation Obligations and Guidelines document identifies four key elements that must be identifiable in any proper consultation exercise as follows:

1. Setting out a clearly defined proposal (purchasing intentions) which has not yet been finally decided upon.
2. The provision of sufficient information about the proposal so that meaningful responses can be made and adequate time allowed for preparation of responses.
3. Proper evaluation of all responses received, by persons who have not predetermined the outcome.
4. Final decision-making on the proposal.

Maori and Pacific people have noted that they would like to be involved in the preparation of policy, prior to formal consultation. One component of final decision making not noted here but partly covered elsewhere in the document is the need to provide feedback to stakeholders. This should include the final decisions and the justification for these.

## ANNEX 2

### Special Consultative Procedure Used By Local Authorities

The special consultative procedure is set out in section 716A of the Local Government Act 1974 and requires:

i. notice of the proposal (eg draft annual plan) to be placed before a council meeting
ii. public notice of the period to make submissions which must be at least one month and not greater than three months unless the council decides otherwise
iii. any person who makes a written submission must be given a reasonable opportunity to be heard in person
iv. any meeting where the proposal is considered or the submissions are heard must be open to the public unless exclusion is permitted
v. all submissions must be available to the public unless there is good reason (privacy for example) for not making them available
vi. the Council may choose to have submissions heard either by the council itself, a community board or a committee of the council
vii. the final decision on the proposal (eg adoption of the plan) must be made at a council meeting.