

Civil Society in Policy and Process

Cath Wallace
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Civil society - what is it?

- It is non-government – the public but not the “public sector”
- Usually used to differentiate from the government and business sector
- Often includes indigenous people but as is common practice in NZ, Maori, Iwi or hapu are often also differentiated
- Often refers to the public, and not-for-profit sector.

Civil Society – increasing concerns

- Erosion of consultation and inclusion of civil society whilst privileging business.
- Government cavalier about Parliamentary process, use of urgency, curtailing of Select Committee scrutiny.
- Suspension of the rule of law
- Centralisation of ministerial power
- Strengthening central government powers over local government.
- Dismissal of concerns about environment, equity.

Civil society and policy and practice

- International norm that civil society is included in the development of policy, law, practice, and often in implementation.
- Debate goes back centuries – but NZ has commonly been perceived as a participatory democracy.
- Distinct from an elected dictatorship or Edmund Burke's perception of government elected to rule - citizens get out of the way.

International Norm -

- Agenda 21 (= Agenda for the 21st Century) – from Rio, chapter on and affirmed public participation in sustainable development.
- Aarhus Convention – rights of participation and of access to information.
- IUCN Resolutions over many years.

Prior New Zealand practice

- Prior to the RMA, highly variable.
- RMA established law of equal participation – input to policies and plans, consents, all have standing.
- Conservation Act, - public processes except for minerals.
- RMA practice and recent reforms – erosion on this – removal of presumption of public notification.
- Local Govt Act 2002 – community central to council plans. 4 Well beings – environmental, social, cultural and economic.
- Fisheries, – obligations to consult certain persons.

National-led government: erosion of engagement with civil society.

- Removal of the RMA presumption of public notification – eroded both law and practice.
- Local government, business and iwi consistently consulted, but public and civil society is frequently excluded or marginalised
 - Eg, Ministry of Science and Innovation – public and civil society missing from consultees.
 - EEZ&CS and Crown Minerals – some public notification but business, iwi, local government have privileged access.
 - Min Fish – policy of legal minimum of consultation.

Over riding due process

- Several cases of overriding due process and/or centralisation of Ministerial power.
- Use of Urgency in Parliament
- Suspension of the rule of law in Canterbury
- Dismissal of Env. Canterbury Council & threats to others.
- Suspension of Regional Coastal policy statements in Waikato and Tasman because of aquaculture.

Ministerial override, Henry VIII clauses – Minister is God, etc

- Aquaculture Bill – though eventually moderated by Parliament.
- Ministerial powers in new RMA changes?
- Centralisation of power over local government in the Local Government Act 2002 Amendment Bill or foreshadowed changes.
- Economic Ministers given extra powers over colleague portfolios – eg Mining on conservation land – MED Minister powers increased.

Public participation in Environmental Policy – why an issue?

- Public participation **intrinsically valuable** for democratic reasons, for policy quality reasons, for checks and balances on power – eg “sunlight” the best disinfectant against corruption.
- Can **enhance quality** of policy.
- **Gives expression to ethical, cultural and other non-market values**: helps government understand demand for environmental policy action, improve problem definition, agenda setting, analysis, and implementation – ie supply.

Reasons for Public Participation

- Intrinsic Reasons
 - Expression of non-market values, ethics, non-economic concerns.
 - Supports democratic values
 - Representation of people to government (directly, or via representatives).
 - Mechanism for “consent of the governed” – builds consensus and support for policy.
 - Enhancement of legitimacy of policy & govt.
 - Builds community cohesion and hence governance capability.
 - Builds capacity and understanding of the participants (including the policy makers).
 - Makes for more responsive government.

Reasons for participation in policy development & implementation

- Instrumental Reasons

- Improves regulatory and policy quality.

- Aids problem definition, understanding of scope, options, solutions, implementation.
 - Provides information not otherwise available to policy makers (relieves information asymmetry).
 - Identifies who is affected.
 - May help in other ways – eg below:

- People more ready to comply – ie “the consent of the governed”. Hence less active enforcement needed.

Reasons – instrumental continued.

- May motivate more monitoring and surveillance, reporting and compliance – eg, **Strong reciprocators more willing to act**, report, sanction non-compliers.
- Participation may **placate, distract people** from real issues or game (cynical reasons).
- Participation for **form's sake** (cynical).
- **Statutory requirement** (in law).

Methods of Public Participation: deliberative process or not?

- Some methods are about **direct expression of preferences**, others involve **deliberation**, discussion, listening, developing ideas, understanding and preferences, doing things, making and implementing policy and management.
- Various degrees of engagement and power sharing, from simple information to full citizen control.

Arnstein's ladder of Citizen Participation:

8	Citizen Control	Degrees of Citizen Power
7	Delegated Power	
6	Partnership	
5	Placation	Degrees of Tokenism
4	Consultation	
3	Informing	
2	Therapy	Non- participation
1	Manipulation	

Non-deliberative Methods

- **Voting for governments, policy proposals or packages via polls, referenda:** but often preceded by deliberation, and in MMP situation, coalition building generates new rounds of negotiations and deliberation between parties. General elections; referenda, votes for specific packages via polls etc.
- **Surveys and polls** on specific issues – may be genuine, others vacuous, Eg 2011 DoC poll on the species that most make us identify as kiwis. [Let me guess, a kiwi?]
- Independent action and management decisions; consumption & production decisions; exit, voice – eg letters.

Deliberative methods

- Round table policy discussions;
- “Town Hall” – ie public meetings or open meetings. May be organised by officials or citizens, citizen groups – eg Vote for the Environment.
- Hearings – public or private – Select Committees (of Parliament), official inquiries (Boards of Inquiry), Quasi judicial processes eg Environment Court;
- Citizen mapping, citizen juries;
- Discussion papers with opportunities for submissions, maybe hearings.
- Working or advisory groups – often not public, may be representative, may be hand picked to deliver government’s sought after policy prescriptions – - eg Technical Advisory Groups, TAGs.

Citizen Control

- **Power is devolved** to citizen groups
 - Eg devolved management.
 - Trusts are given authority to undertake functions;
 - Iwi given control of management of taonga; mataitai reserves, taipure.
- **Governance is by the citizen group**
 - Fish and Game runs game and introduced freshwater (mainly) fish management, licencing, replenishment, harvesting, with statutory backing for enforcement, QANGO status.

Consultation- often statutory requirement

- Discussion and policy documents for comment & submission – eg Res Management Act Plans, policies, standards.
- Release of proposals coupled with participation via meetings:
 - Public “Town hall” – rare in NZ
 - Stakeholders – formal – informal - eg Fisheries Working Groups, Research Cttees.
- Input to policy formation at any (or most) stages; peer review of policy proposals, implementation.

Wellington International Airport Ltd v Air New Zealand ([1993] 1 NZLR 671-684)

Consultation:

- The nature and objective of consultation depends on the context;
- Legal duty to consult “is never to be treated perfunctorily or as mere formality”.
- Consultation is more than telling or presenting information or intentions. It does not require reaching agreement. It “is quite different from negotiation” (though this may follow).

Wellington International Airport Ltd v Air New Zealand ([1993] 1 NZLR 671-684)

- Those being consulted must be provided “with relevant information and such other information as they request” though sometimes information may validly be withheld.
- Those being consulted must be told what is proposed before they give their views.
- They must be given a reasonable opportunity to state their views and be free to say what they think or to not say.

Wellington International Airport Ltd v Air New Zealand ([1993] 1 NZLR 671-684)

Decision makers must have a genuinely open mind but this does not mean that they cannot have a suggested option. They must be prepared to change. The decision may not be made prior to consultation.

- Eg, may not have let contracts etc that prejudice taking a different option or conditions etc.

Public Participation in NZ

- **Environment Act 1986** – requires that all views are heard – but gives no specific process or procedure. Ministry for the Environment uses a mix of methods – sometimes inclusive, sometimes not. “Road Shows” – prescribed topics, self-selected topic tables, presentation from Minister or ministry staff, questions, surveys, write-up posted on web – selective reporting;
- Papers and submissions called for;
- Meetings with business, professional or environmental NGOs, separately or together.

Resource Management Act

- Prescribes processes for public input – matters for consideration, time lines.
- **National Policy Statements, National Environmental Standards** – drafts to be notified, public submissions, right of appeal.
- **Regional Policy statements** (optional) and regional plans – matters to be considered are prescribed in the Act, tend to be large and complex. Drafts open for public submissions to council, right of appeal to Environment Court.
- **Resource consents** – only a few are publicly notified, but when they are, can make submissions, meet informally, attend hearings, take appeals to Environment Court, engage in mediation instead.

Other forms of participation, some are consultative some not

- Community hotlines, telephone input and voting; suggestion boxes and informal or formal suggestion and communication on an ad hoc basis. eg “ring the council if you see a pest” etc.
- Mediated meetings between players or agencies and players; - RMA mediation.
- Community monitoring and recording of environment, pests, environmental conditions.
- Community mapping – maps that the community can input into, drawing in sensitive aspects of the environment, mapping significant areas, recording sightings.

Forms of participation which may or may not involve consultation

- Focus Groups.
- Citizen juries
- Attitude and other surveys
- Stakeholder meetings with multi-criteria analysis
- Formal /informal meeting with politicians, lobbying.
- Community mapping

Participatory processes - resources

- Land-user or water user groups – may do allocation and regulation within prescribed limits;
- Fisheries Management plans – depends on system – suggestions of industry holding the pen, others as supplicants; Or Ministry holds the pen, non-industry participation difficult;
- In some countries, fisheries management boards involve joint technically informed decision making – can be captured by industry..

Informing

- Notices and Displays
- Information and interpretation – eg at national parks;
- Notices of intended or actual policy and measures
- Websites
- Open government – eg release of Cabinet papers, policy decisions.
- Notices of regulations – eg recreational fishing bag and size limits

What works and what doesn't? Aim and context dependent, but:

Good

- All who want to participate can, but working groups etc allow genuine problem solving.
- Genuine exchanges of view, understandings of positions, flexibility to change.
- Breaks down barriers, empowers participants, shares information, trust.

Bad

- Absorbs time, resources, no commitment to result;
- Raises false expectations.
- Exhaustion and demoralisation of participants.
- Being patronised.
- Bad faith, withholding of crucial information.
- Lacks focus, venting but not real change.
- "Managed Cast"

Conservation, RMA and Minerals

- Some processes of participation or consultation prescribed in law – eg, **Marine Reserves Act**: public can propose marine reserves, so can DoC, but public proposers then have to conduct much public consultation.
- **Conservation Act** – Conservation Management strategies, other policies, put out for public submission; meetings with particular groups of interested stakeholders – eg ENGOs, recreation or hunting groups; Specific responsibilities to “give effect to” the Treaty of Waitangi – hui and particular efforts re Maori. Co-management, delegation or devolution of management
- Prescribed public processes under the **Resource Management Act** for consideration, submission, appeals re National Policy Statements, NES, Policies and Plans at regional and district level, notification or not of consent applications, submissions, appeals etc.
- **Crown Minerals Act, Continental Shelf Act** - mining consent applications - no public process at all, even on conservation land, at sea. Iwi, owners may be consulted or have veto (from minerals, not oil and gas). Changes promised.

RMA – public participation

- City or district councils.
 - **District Plans and rules.** Drafts, open for public submission. Usually prior consultation as well. Variations can be applied for. The public can make submissions to the council; may take issue to the Environment Court – need lawyers, expert witnesses, courage and \$\$.
 - Have to be consistent with National and Regional Policies and Plans; take account of iwi management plans.
 - **Resource consent applications** – may be needed. On average fewer than 5% are publicly notified – was originally intended to allow for the public to participate and to spot potential effects. Presumption of notification has been removed.
 - Specific requirements in relation to attention to and inclusion of Maori – but very variable practice.

Local Government Act

- Variety of plans: Long Term [Community] Council Plans (LTCCP) to annual business plans
- Long term [Community] Council Plans – public participation was required, prescribed. Purpose was strategic planning with community driving council directions, **BUT recent Amendment Bill scraps wellbeings, combines consultations.**
- Variety of methods – submissions, focus groups, public meetings, etc.

Practice: civil society on the outer

- Current government business focused, Iwi included (Maori Party influence), sees public consultation and NGOs as source of inefficiency, delay.
- Democratic norms appear to be foreign to government. Dismissive of environment, NGOs, unions, etc.
- Public service is in some cases taking cue from government.
- MfE re EEZ & CS Regulations – oil and gas, minerals industry inside process of regs development.
- MfE re Plantation National Environmental Standards development – included Forestry industry, refused access to ENGOs.

Democracy is Precious – We need to speak up about all this.

- Vital to give voice – to speak, to write to MPs, to name the game of what is going on; to have informed commentary.
- Suggest that lawyers in particular speak out.
- NGOs need to work together across sectors, join with unions, social sector organisations.
- Challenge abuses of power
- Hold business to account for encouraging this – eg Phil O'Reilly of Business NZ recently suggested too much democracy (paraphrased).
- Raise issues with all political parties.