Opinion: Is consultation an acceptable standard in conservation laws?

By Sabine Elvy[1]

Nationwide State legislation which aims to preserve and protect delicate natural ecosystems should, in my view, give greater recognition to the traditional knowledge and culture of local Indigenous groups. These groups have been utilising this knowledge to live sustainably for far longer than any Western conservation and land management regimes.

Currently in Queensland the Wild Rivers Act 2005 protects and preserves numerous rivers in the Cape York Peninsula[2]. Prior to any river in Cape York being declared a 'Wild River', there is a mechanism for community "consultation" under the Act. A myriad of statutes and environmental planning codes then regulate what activities can, and can't, occur in a 'Wild River' area, depending on the zoning of that area.

It may appear straight-forward, however, reading over all these legislative statutes, codes and other planning instruments – containing multiple cross-references, negative definitions and planning terms that make lawyers dizzy – I am left to wonder how in the world the average person in the community can fully understand the implications of the legislation on their communities, their businesses and everyday lives.

An article, entitled 'Procedural fairness and public participation in planning' by Alexandra O'Mara (2004)[3] argues that the current structure for consultation in environmental planning laws does not address the structural impediments to participation faced by some groups in society. Rather, consultation involves a struggle between various self-interest groups over scarce social resources – or what O'Mara describes as "interest group pluralism". Marginalised groups are also less likely to have full access to information or the means to participate, in a full and meaningful way, in government decision-making. It, therefore, tends to be strong advantaged groups whose interests are given the most weight in the consultation process.

This is one reason why consultation needs to be reconsidered and reshaped into a process which is based on the principles of deliberative democracy and collective determination. Such a process would require extensive deliberation, critical scrutiny and recognition of disparities that exist in participation opportunities for different social groups, including the influence some groups wield over others.

The debate about consultation does not, however, end there. A strong argument exists that 'consultation' should go a step further and be replaced with 'free, prior and informed consent' (FPIC). As controversial as the concept may be, FPIC is nevertheless emerging internationally as an acceptable principle by which state governments engage with Indigenous peoples. Grounded in international rights law, FPIC is heavily emphasised in the United Nations Declaration on the Rights of Indigenous Peoples, signed by the Rudd government on 3 April 2009. Article 19, for instance, prescribes that States shall consult and cooperate with Indigenous peoples concerned through their representative institutions in order to obtain their Free, Prior and Informed Consent before implementing any legislative or administrative measures that may affect them.

Despite its non-binding status, if environmental planning and conservation laws are to reflect the treaty standards, consultation is not sufficient. Consultation is neither meaningful nor in line with emerging international standards unless it is both deliberative and leads to free, prior and informed consent before any developments or conservation measures occur on their lands. (For more discussion on the meaning of consent see Viviane Weitzner, 'Consultation Versus Consent: Going Beyond Reframing' (The North-South Institute Review, Spring-Summer 2005)).

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2 The Declared Wild Rivers are the Lockhart, Archer and Stewart Basins.
3 O'Mara A., 'Procedural fairness and public participation in planning' (2004) 21 *Environment and Planning Law Journal* 62.

In Cape York Peninsula where the Indigenous population is around 12,000, Indigenous people play a pivotal role in keeping the rivers, gorges, mountains and the wet tropics pristine due to their everyday connection with the land; their maintenance of traditional knowledge and land management; and a deep respect of caring for country which is engrained in indigenous custom and law. At the same time, small-scale development is crucial for job creations and lifting people from the perpetual welfare cycle that dominates peoples' lives in Indigenous communities.

The key word is responsibility: where governments remove responsibility, such as to take the lead in conservation and land management, then dignity is removed as well. Do we really want this for Indigenous people? Or should we be looking forward, to environmental planning and conservation laws and systems that place trust in Indigenous knowledge and an emphasis not just on consultation, but free, prior and informed consent?

Laws that purport to preserve the natural values of rivers and the country's wilderness are quite simply, not necessary, nor fair when the Indigenous custodians can do it themselves – and what's more, do it well. Deliberative consultation that leads to free, prior and informed consent would achieve equitable conservation outcomes whereby Indigenous custodians are able to exercise their right to take charge.