

**Ministerial consent under  
sections 24 and 28 of the  
New Zealand Public Health  
and Disability Act 2000**

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# Introduction

The New Zealand Public Health and Disability Act 2000 (the NZPHD Act) requires District Health Boards (DHBs) to obtain Ministerial consent to:

- enter cooperative agreements and arrangements (section 24); or
- hold shares or interests in bodies corporate or associations (section 28).

DHBs must seek Ministerial consent for involvement in legal entities under section 28. Consent under section 24 for a cooperative arrangement may be obtained either specifically or by including it in the DHB's District Annual Plan or District Strategic Plan.

In 2001, the Minister of Health issued guidelines under section 24(4) of the NZPHD Act for DHBs entering into cooperative arrangements and agreements (Appendix 1). The guidelines set out the criteria the Minister will consider in giving consent under section 24 and section 28 of the NZPHD Act. Those criteria are restated in the Operational Policy Framework (OPF).<sup>1</sup>

This document sets out in generic terms the process that the Ministry currently follows in relation to requests for consent and what information it usually needs to advise the Minister. The process may vary according to the scale and nature of the proposed arrangement, the risks associated with it, and the general level of risk associated with the requesting DHB (for example, if it is subject to additional monitoring under the Monitoring and Intervention Framework). As always, the decision rests with the Minister.

## Why consent is not automatic

The Crown is the principal funder of DHBs and most Government health spending is directed through them. In considering whether to give consent, the Minister of Health will therefore wish to ensure that the arrangements DHBs enter do not jeopardise their ability to deliver the services required from them under their statutory obligations and their respective accountability and funding agreements. Potential risks which the criteria for consent are intended to address include:

- financial loss
- loss or reduction of direct control by the DHB over its activities, including the potential for activities to diverge from current government policy
- reduction in transparency of a DHB's activities to monitoring and audit agencies and the public
- avoidance of restrictions applying to DHBs, for example relating to borrowing or capital expenditure
- the creation of arrangements which are more difficult to cancel or reorganise than they would be if under more direct DHB control.

These risks are generally able to be mitigated or removed through careful design of the arrangements, including the specific wording of the documentation used. Where risks remain, these may be outweighed by the benefits.

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<sup>1</sup> Some specific requirements relating to interests in Crown entity subsidiaries are now included in sections 97-99 of the Crown Entities Act 2004.

# The consent process

*DHBs must not commit themselves to any arrangement covered by sections 24 and/or 28 unless Ministerial consent has been obtained. Where the arrangement changes significantly after Ministerial consent has been given (e.g. one party exits a joint venture), advice should be sought from the Ministry as to whether a revised consent is required.*

## Stages in the process

Any arrangements requiring Ministerial consent will also require the approval of the board of the DHB, which may be given subject to the Minister's consent or confirmed once it has been obtained. The approval processes a DHB board will work through for arrangements requiring consent under section 24 or 28 are likely to be similar to those for significant capital expenditure projects. The table below shows how the stages in the section 24 and 28 processes relate to those described in *Guidelines for Capital Investment* (Ministry of Health, 2003):

<i>Guidelines stage</i>	<i>Board involvement</i>	<i>Ministry/Minister involvement</i>
1 Strategic stage	Board gives approval in principle to exploring options/outline proposal	Early discussions with Ministry regarding appropriate options
2 Options analysis	Board receives updates on progress and proposal, business case and/or draft agreements as available	Ministry provides informal feedback on one or more iterations of draft package
3 Completed business case	Board or board delegates approve final package	Ministry reviews final package (including legal review) and reports to Minister
Signoff	Board delegates await Ministerial letter before signing agreement(s)	Minister's letter gives consent to arrangements subject to signoff by board and possibly other conditions

## Ministry involvement

When seeking Ministerial consent under sections 24 and/or 28, the arrangements proposed by the DHB are reviewed by the Ministry of Health, which recommends to the Minister whether or not consent should be given and under what conditions.

Ministry involvement is optional in stages 1 and 2. Our experience has shown that early involvement of the Ministry will help to minimise wasted effort by identifying and resolving possible issues before work on the proposal is too far advanced. It should, however, be noted that the Minister's consent must be based on the proposal as finally submitted, and earlier feedback from the Ministry does not commit the Minister.

Depending on the nature and scope of the proposal, the Ministry can use any of its resources including but not limited to: legal, financial, clinical, and information technology services to review any DHB proposal.. Some proposals may also require review by other central

government agencies like Treasury.<sup>2</sup> The review process will be managed by a member of the Governance Section of the DHB Funding & Performance Directorate in close consultation with the DHB's Account Manager.

## **Timescale**

DHBs should generally allow a minimum of two months upon receipt of any proposal for the Ministry to complete its review.

Consents may be delayed if there are problems with the substance of the proposal or the documentation supplied. The Ministry will work with the DHB to resolve any issues with proposed arrangements, as it would normally prefer to be able to make a positive recommendation to the Minister. Resolving issues may involve requests for additional information or suggested revisions to the substance or documentation of the proposed arrangements. Delays may also arise if the proposal is received at a particularly busy time for the relevant officials or the Minister.

If there are critical deadlines which may be jeopardised by delays in the approval process, DHBs should inform their Account Manager as early as possible.

## **What information the DHB needs to supply**

The information required to advise on a consent will vary depending on the circumstances and complexity of the request.

The explanatory notes in the OPF list a series of points to be covered by applications for both section 24 and section 28 approval.<sup>3</sup> These are tabulated below with the documentation that the Ministry would expect to see and why.

The proposal and/or business case put to the board for approval will usually cover:

- analysis of the possible options which have been considered in arriving at the proposal
- rationale for why the proposal is the most appropriate way to support service delivery
- financial information showing the benefits and/or risk mitigation measures

Officials will require draft legal documentation establishing the arrangement or entity (such as memoranda of understanding (MOU), constitutions or shareholders' agreements) to understand how the main areas of potential risk are mitigated.

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<sup>2</sup> For example, Minister of Finance consent is also required for joint ventures above a certain size involving private entities or trusts (see Appendix 1).

<sup>3</sup> The OPF also sets out criteria for consideration where a cooperative agreement or arrangement involves delivery of privately funded health services using public sector infrastructure (see 4.2.B of the 2004/05 OPF). These criteria ensure that the arrangement is in accordance with current government policy, which is that public-private arrangements are welcomed as long as they are clearly beneficial to the public health system and its patients.

Appendix 2 illustrates the topics which officials would expect to see covered by legal documentation (where applicable), by providing the table of contents for a typical shareholders' agreement for a joint venture.

The following tables show how these documents typically enable officials to apply the OPF criteria.

**Section 24**

<i>OPF criterion</i>	<i>What to provide</i>	<i>Why it is needed</i>
Aim of the cooperative agreement or arrangement	Proposal, business case and/or MOU	Understand objective
Who the agreement or arrangement is with	Proposal, business case and/or MOU	Understand the parties
How it provides the assistance or enhancement signalled in S24(1) of the Act	Business case	Set out logic/rationale for the proposal (including quantifiable benefits where relevant)
Proposed review mechanism	Proposal, business case and/or MOU	If the arrangement doesn't fulfil its objectives, what happens?
Financial cost associated with it	Business case	Expect that business case will include financial information regarding both initial costs and ongoing expected <b>financial performance</b>
What consultation has taken place	Proposal	Information, especially where proposal may be controversial
Efficiency and effectiveness of the arrangements	Business case	See financial cost point above, but also need information on how the proposed arrangements would work
How benefits will be maximised	Proposal, business case and/or MOU	

**Section 28**

<i>OPF criterion</i>	<i>What to provide</i>	<i>Why it is needed</i>
Entity function and scope	Proposal and/or detailed covering letter	Understanding why the entity is needed and what other options have been considered
Mechanism to ensure ongoing consistency with Government policy	Final or near-final draft of foundation legal documents (constitution, shareholders' agreement, memorandum of understanding etc as applicable). If explanatory proposals have been supplied to the Board setting out the content of the documents, it is helpful to supply these to the Ministry as well.	A legal review will form part of the Ministry's assessment and advice to the Minister. Basing advice on draft legal documentation avoids the need for the DHB to write more documents specifically for the Ministry. It also allows the Ministry to be confident that it has a full understanding of the current proposal.  Where special provisions are needed to ensure compliance with accountability requirements and/or Government policy (e.g. regarding disclosure and reporting), <b>these</b> should be explicitly spelt out in the legal documentation to minimise the risk of future disputes.
Parties, directors, trustees, partners, other members of the arrangement		
DHB reporting, accountability and monitoring		
Financial arrangements		
Mechanisms for reducing exposure to financial and other significant risks	Foundation documents will set these out but financial projections (from the proposal or business case) are also likely to be needed to show how they are expected to work in practice and what risks have been considered	
Audit, accessibility of information, what details of activities to be listed in the DHB's annual report	Final or near-final draft of foundation legal documents (constitution, shareholders' agreement, memorandum of understanding etc as applicable)	
Duties of board members, trustees etc		
Disclosure of remuneration for highly paid individuals		

# **Appendix 1 – Minister’s guidelines issued under section 24(4) (2001)**



**Guidelines to be Followed by District Health Boards  
When Establishing Co-operative Agreements or Arrangements  
Issued Pursuant to Section 24(4) of the New Zealand Public Health  
and Disability Act 2000 (NZPHD Act)**

Section 24(1) of the NZPHD Act 2000 requires that for performing its function to actively investigate, facilitate, sponsor and develop co-operative and collaborative arrangements within the health and disability sector or any other sector to improve, promote and protect the health of people, and to promote the inclusion and participation in society and independence of people with disabilities, a DHB may enter into a co-operative agreement or arrangement with any person in order to:

- (a) assist the DHB to meet its objectives (set out in section 22 of the NZPHD Act)
- (b) enhance health or disability outcomes for people
- (c) enhance efficiencies in the health sector.

In determining whether or not to enter into such co-operative agreements or arrangements, DHBs must comply with the following guidelines. The guidelines are to assist DHBs to follow processes that are transparent and designed to ensure that DHBs accomplish their objectives in ways that:

- (a) take full account of all issues concerned
- (b) are effective and efficient so as to maximise the benefit to the public or group whom the agreements or arrangements are intended to benefit.

To ensure transparency of decision making, DHBs must follow the relevant provisions of the NZPHD Act 2000 that will apply to any particular agreement or arrangement. These guidelines are general, so that it is ensured that good initiatives are not prevented by being overly prescriptive.

**FIRST CATEGORY - CO-OPERATIVE AGREEMENTS AND ARRANGEMENTS THAT ARE CONTRACTUAL, MEMORANDA OF UNDERSTANDING, OR INFORMAL UNDER SECTION 24**

A DHB may enter into co-operative arrangements or agreements of these kinds in this first category where the DHB's district strategic plan or district annual plan permits, or where authorised by the Minister of Health.

**Ministerial Authorisation Process for the First Category**

Where a DHB wishes to enter into a cooperative agreement or arrangement of these kinds and the DHB's district strategic plan or district annual plan does not permit entry into the particular agreement or arrangement, in order for Ministerial authorisation to be given to a DHB request the following information should be provided:

- a) the aim of the cooperative agreement or arrangement
- b) who the agreement or arrangement is with
- c) how the agreement or arrangement provides the assistance or enhancement signalled in section 24(1) of the New Zealand Public Health and Disability Act 2000
- d) the proposed review mechanism if any
- e) the financial cost to the DHB associated with the agreement or arrangement (including any third party funding to the DHB)
- f) what consultation has taken place in respect of the entry of that agreement or arrangement
- g) all the relevant issues considered in respect of that agreement or arrangement
- h) the efficiency and effectiveness of the arrangements
- i) how benefits to the public or group in respect of whom the agreements or arrangements are intended to benefit, will be maximised.

**SECOND CATEGORY - SHARES IN A BODY CORPORATE OR INTERESTS IN AN ASSOCIATION OF PERSONS UNDER SECTION 28**

A DHB will be required to demonstrate, in its request for consent, compliance with relevant provisions in the NZPHD Act applying to the particular agreement or arrangement, and consistency with the following set of principles around the appropriate use of joint ventures. Subsidiaries will be subject to the same restrictions, regulations and reporting requirements as its parent DHB.

The following information summarises the requirements for a DHB wishing to have shares or interests in a body corporate or association of persons.

Type of arrangement	
<ul style="list-style-type: none"> <li>• Companies controlled by one or more DHBs</li> <li>• Companies controlled by DHBs and other Crown entities</li> </ul>	<ul style="list-style-type: none"> <li>• seek Minister's consent and signal intention in strategic and annual plans</li> <li>• comply with requirements imposed by legislation governing Crown entities, if such legislation comes into force</li> <li>• comply with Provider Selection and Private Involvement Protocols</li> </ul>
<ul style="list-style-type: none"> <li>• Companies that are not controlled by Crown entities</li> <li>• Other legal entities (trusts, incorporated societies)</li> <li>• Partnerships</li> <li>• Unincorporated joint ventures</li> </ul>	<ul style="list-style-type: none"> <li>• seek Minister's consent and signal intention through strategic and annual plans</li> <li>• comply with Provider Selection and Private Involvement Protocols</li> </ul>
<ul style="list-style-type: none"> <li>• Contracts for services and leases</li> </ul>	<ul style="list-style-type: none"> <li>• comply with Provider Selection and</li> </ul>

	<p><b>Private Involvement Protocols</b></p> <ul style="list-style-type: none"> <li>• comply with any restrictions included in the annual Crown Funding Agreement</li> <li>• if a DHB wants to grant a lease for more than 5 years, the Ministers' written approval is required.</li> </ul>
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The agreement of the Ministers of Health and Finance will be required for any joint ventures with private entities and trusts which:

- have a market value of \$5 million or 10 percent of the gross total assets, (including assets owned by DHB subsidiaries) whichever is the lesser; or
- have the potential to affect, in a strategic way, the performance of the DHB.

### **Consent Process for the Second Category**

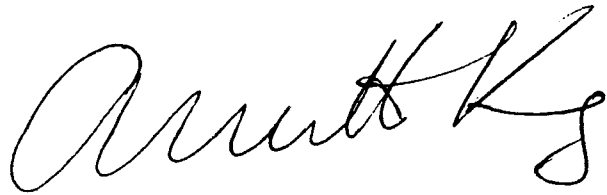
Where a DHB proposes to have shares or an interest in any:

- companies that are not controlled by Crown entities
- trusts, incorporated societies and any other non-company separate legal entities
- partnerships, unincorporated joint ventures and any other association of persons

The DHB in seeking the Minister's consent should also provide information as to:

- (j) the entity's functions and scope, and the mechanism for ensuring that these are and will remain, consistent with Government policies
- (k) the proposed directors, trustees, partners, members, or other parties to the arrangement
- (l) how the DHB will report on, be held accountable for, and be monitored on its involvement in the entity
- (m) the proposed financial arrangements (including assets, liabilities, and the investment required) and mechanisms for reducing exposure to financial and any other significant risks, and how the entity will be audited
- (n) the accessibility of information about the entity's activities (compared to access under the Official Information Act)
- (o) the duties of board members, trustees or members, and whether remuneration levels for highly paid individuals will be disclosed
- (p) what details of the entity's activities will be listed in the DHB's annual report.

Dated at Wellington this 21st day of June 2001.

A handwritten signature in black ink, appearing to read 'Annette King'. The signature is fluid and cursive, with the first letter 'A' being particularly large and stylized.

Annette King  
MINISTER OF HEALTH

## **Appendix 2 – Example contents list for a joint venture shareholders’ agreement**

This list is not exhaustive and serves as a guide only. Some of the contents may be covered instead by the company constitution, if specifically drafted for a joint venture company.

- (1) Interpretation
- (2) Commencement of Agreement
- (3) Objectives, e.g.
  - Objects of the company
  - Reference to the DHBs’ objectives under the New Zealand Public Health and Disability Act
  - Capital, resources and future expansion
  - Ethics
  - Shareholder expectations
  - Other interests
- (4) Policies and Processes, covering issues such as
  - Cost of service to shareholders
  - Best practices
  - Funding
  - Intellectual Property
  - Staff-related liabilities
  - Reporting policy
  - Establishment principles
- (5) Purpose, status and content of Service Level Agreements (if used)
- (6) Shareholding issues including processes for transfer, sale and valuation of shares and protection of all parties’ interests on exit by any party
- (7) Directors – appointment, duties, indemnity, whether shareholder interests are permitted to override the best interests of the joint venture company
- (8) Decisions requiring unanimous consent of shareholders
- (9) Term of Agreement, rights following termination and which clauses survive termination
- (10) Warranties (power, authorisation, disclosure)
- (11) Confidentiality (definition, exclusions, non-disclosure obligations, legal compliance e.g. under OIA, return of information)
- (12) Dispute resolution
- (13) Waiver
- (14) Partial Invalidity
- (15) Modification
- (16) Governing law and compliance
- (17) Notices
- (18) Counterparts
- (19) Entire Agreement
- (20) Public Announcements