

To Mark Schreurs and Kathie Fletcher
From Rob O'Connor

16 January 2020

Subject Hearing Commissioners Policy - summary of legal advice

Introduction

1. Kaipara District Council (**Council**) has the ability to delegate certain functions, powers and duties under the Resource Management Act 1991 (**RMA**) to appointed hearings commissioners, who may also be elected members of the Council.
2. I was asked to consider the Council's approach and the Council's draft Hearing Commissioners Policy (**Policy**). While section 34A of the RMA does enable elected members to be appointed as Hearings Commissioners, I raised some reservations in terms of the risks associated with this approach, and provided comments on the draft Policy as amended by the Council's Regulatory Working Group.
3. This memorandum sets out the legal advice that was provided to Council officers, and refers briefly to the latest version of the draft Policy.

Background

4. The Council prepared the draft Policy to outline how the Council appoints both independent and internal Hearings Commissioners (i.e. appropriately accredited elected members of Council) primarily in relation to specific hearing processes under the RMA.

Original draft Policy

5. The draft Policy was first prepared in early 2019 to be discussed at a Council Briefing and then by the Council's Regulatory Working Group. The original draft Policy outlined various matters, including the appointment process for independent and internal Hearings Commissioners further to the RMA.
6. There were then amendments made to, and further versions of, the draft Policy. This memorandum refers mainly to the changes proposed by the Council's Regulatory Working Group in July 2019 (**July draft Policy**), and the most recent version of the draft Policy prepared in December 2019 (**December draft Policy**).

July draft Policy

7. The Council's Regulatory Working Group proposed various amendments to the draft Policy in July 2019. In particular, the Regulatory Working Group proposed changes relating to:
 - (a) the appointment of internal Hearings Commissioners in both Council-initiated and private plan change hearings; and
 - (b) the ability for an internal Hearings Commissioner to chair private plan change hearings (and have the casting vote in the event of an even-numbered hearing panel).
8. The Council's Regulatory Working Group also proposed that the draft Policy be amended to refer to the hearing of resource consent applications by both independent and internal Hearings Commissioners, and for internal Hearings Commissioners "...to chair an appropriate consent hearing." The July draft Policy included a reference to a hearing chairperson having the power to "stand down" panel members (both internal and

independent Hearings Commissioners) from a hearings panel, if that panel member "...has a clear conflict of interest that they refuse to acknowledge".

9. On 30 August 2019, I was asked to review this version of the amended draft Policy and provide any comments in terms of the Policy and the approach generally. Comments were provided to Council officers on 3 September 2019.

The December draft Policy

10. In December 2019, a further version of the draft Policy was prepared, taking into account the various comments received and changes proposed. This latest version of the Policy is addressed further below, and will form the basis of discussions at the upcoming Council briefing.

Comments on the July draft Policy

11. Section 34A of the RMA enables the Council to delegate certain functions, powers and duties under the RMA, including to Hearings Commissioners appointed by the Council (who may or may not be a member of the Council).
12. This means that the Council can appoint elected members as Hearing Commissioners (provided they are appropriately qualified as Hearing Commissioners) and there is no obligation on the Council to only appoint independent Hearing Commissioners.
13. However, while there is an ability to delegate certain functions, powers and duties to internal Hearings Commissioners, my view is that appointing elected members in this capacity might be more appropriate as an exception rather than the rule (especially in terms of reducing any perception of predetermination or bias).
14. For example, in order to avoid any possible allegation of predetermination, bias, or conflicts of interest, it may be more appropriate that only independent Hearings Commissioners be appointed for Council-initiated plan change hearings, and resource consent application hearings where the Council is the applicant.
15. The Council's Regulatory Working Group proposed changes in the July draft Policy. The main changes were around the appointment of Internal Hearings Commissioners, including:
 - (a) Internal Hearings Commissioners being appointed to Council-initiated plan change hearing panels;
 - (b) Internal Hearings Commissioners being appointed as chairperson in private plan change and resource consent hearings; and
 - (c) Internal Hearings Commissioners effectively having casting votes as the chairperson where the hearing panel has an even number of hearing commissioners.
16. While these proposed appointments may not necessarily be inconsistent with section 34A of the RMA, I noted that only appointing independent Hearing Commissioners reduces any perception and allegations of bias, predetermination or that an elected member has a conflict of interest.
17. In addition, section 100A of the RMA provides that an applicant or submitter can request that a notified resource consent be heard by one or more independent Hearings

Commissioners. This limits the Council's ability to appoint internal Hearings Commissioners on resource consent hearings, should such a request be made.

18. As mentioned above, the July draft Policy included a reference to removing a panel member if a conflict of interest exists but is not acknowledged until after that panel member has being appointed. While this amendment may provide something of an additional safeguard, a preferable approach would be for any potential conflict of interest to be addressed before the panel member was appointed (if possible). This situation could also be addressed by the hearing panel establishing a procedure that is fair and reasonable in the circumstances (and further to section 39(1) of the RMA). This reference to removing a panel member is not included in the December draft Policy.
19. It is my view that it could be appropriate to appoint an internal Hearings Commissioner to private plan change hearing panels, but not as the chairperson of those hearings with the right of a casting vote. This is because a private plan change will often involve changes to the district plan's rules, objectives or methods as they relate to a particular area, but can also have wider implications for the district. Appointing an internal Hearings Commissioner may be more appropriate in this particular circumstance as they can provide a viewpoint as a representative of the district. Given the chairperson has an additional power of a casting vote, I consider that it would be more appropriate that the chairperson is independent.
20. I provided additional comments on other parts of the July draft Policy which have either been addressed, or removed in the further amended December draft Policy.

The December draft Policy

21. In December 2019, the draft Policy was further amended taking into the account various comments and suggested changes that had been made to the Policy up to that point. The draft Policy has been simplified and no longer includes a number of matters included in the earlier versions.
22. Perhaps of most relevance, the draft Policy now refers to internal Hearings Commissioners:
 - (a) only being appointed to private-plan change hearing panels;
 - (b) being appointed to a private-plan change hearing panel one at a time;
 - (c) not being appointed as the chairperson of private-plan change hearing panels; and
 - (d) not being appointed to private plan-change hearing panels, if the subject matter of that hearing relates to the Council ward of that elected member.
23. I agree that these proposed changes around appointing internal Hearings Commissioners as set out in the December draft Policy does reduce the perception of bias, predetermination or conflicts of interest.
24. Any appointment of internal Hearings Commissioners and delegation of functions made under section 34A of the RMA should be properly recorded by Council resolution, and this is addressed in the December draft Policy.
25. Finally, section 34A(1A) of the RMA is also relevant if the Council is proposing to appoint one or more Hearings Commissioners to exercise a delegated power to conduct a hearing under Part 1 or Part 5 of Schedule 1 of the RMA. The Council must consult tangata

whenua through local iwi authorities on whether it is appropriate to appoint a commissioner with an understanding of tikanga Māori and the perspectives of local iwi or hapū. If the Council considers it appropriate, the Council must appoint at least one Hearings Commissioner with these attributes in consultation with relevant iwi authorities.

26. This particular requirement does not appear in the December draft Policy, and probably should be included in the appropriate section (perhaps under section 4.3).

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