

Hearing Commissioners Policy Adoption

Meeting: Kaipara District Council
Date of meeting: 27 May 2020
Reporting officer: Kathie Fletcher, Policy Manager

Purpose/Ngā whāinga

To adopt the draft Hearing Commissioners Policy.

Executive summary/Whakarāpopototanga

There are situations under the Resource Management Act 1991 (RMA) where an application (e.g. for resource consent, a plan change, etc.) will require a hearing.

In these instances, the application would be heard by a hearing panel (note that the panel may consist of a single member) acting under delegations from Council. A hearing panel may be comprised of Commissioners who are either internal (elected members) or external (Independent Commissioners who are planning professionals not employed by Council) or a mix of both.

Currently, Kaipara uses one or more Independent Hearing Commissioners for all RMA hearings. Council approves a list of Independent Hearing Commissioners and delegates them authority under the RMA, to serve on these hearing panels. Staff then select Independent Hearing Commissioners from the list to serve on each hearing panel as required. There is currently no policy to guide how staff select Commissioners from the list for appointment to hear a particular application.

In July 2017, Council agreed with a Notice of Motion from Councillor Larsen, (**Attachment A**), to seek more transparency around the process used to appoint Independent and Internal Hearing Commissioners. This has led to the preparation of the draft Hearing Commissioners Policy.

Development of the draft Policy has been informed by elected members (via Council Briefings and the former Regulatory Working Group), legal review, industry best practice and comparison to the approaches taken by other Councils.

The Draft Policy is now presented with this report for adoption (**Attachment B**).

Recommendation/Ngā tūtohunga

That Kaipara District Council:

- a) Adopts the draft Hearing Commissioners Policy included with this report as **Attachment B**.
- b) Delegates the Mayor and Chief Executive the authority to make minor editorial changes.

Context/Horopaki

There are situations under the Resource Management Act 1991 (RMA) where an application (e.g. for resource consent, variation of resource consent conditions, a plan change, etc.) will require a hearing or an independent decision.

In these instances, where a hearing is required, the hearing would be conducted by a hearing panel (which may be comprised of a single or multiple members) acting under delegation from Council. The delegations are made under section 34A(1) of the RMA.

These delegations allow a hearing panel, to hear and either make a decision, or recommend a decision to Council to endorse. A hearing panel can be comprised of Hearing Commissioners who are either internal (elected members) or external (Independent Commissioners), or a mixture of both internal and independent.

Independent Commissioners are experienced planning professionals who are not elected members or employees of the Council.

All Commissioners, internal and independent, are required to fulfil the accreditation requirements of the RMA before being considered as a Commissioner. The accreditation required is the Ministry for the Environment certificate under the Making Good Decisions programme.

There are some circumstances under legislation, such as under sections 100A(4) and 357AB(2) of the RMA, where a Council must delegate its functions, duties and powers to hear and decide an application or objection to one or more Independent Hearing Commissioners. This is when Council has been requested to do so by an applicant, submitter or both. In these cases, these sections require an exclusive delegation to Independent Hearing Commissioners only, i.e. not a mixed panel.

Currently, all RMA applications the Kaipara District Council receives which require a hearing, are heard by an Independent Hearing Commissioner or a hearing panel made up of Independent Hearing Commissioners. Council approves a list of Independent Hearing Commissioners from which staff select to assist with hearings.

There is currently no policy to guide how staff select Commissioners from the list for appointment to hear a particular application. Instead, preference is currently given to those Independent Hearing Commissioners who have an excellent past track record of completing their work to a high standard and in a timely manner.

In July 2017 Council agreed with a Notice of Motion from Councillor Larsen that more transparency was needed around the appointment of Independent Hearing Commissioners. In addition, it is considered industry best practice that those councils who make extensive use of Independent Hearing Commissioners have a transparent policy as to their appointment.

This led to the development of the draft Hearing Commissioners Policy which has been workshopped with elected members via the Regulatory Working Group (a working group of Council that existed in the previous term) and Council Briefing sessions. In addition, it has received input from staff, legal review and has been compared to the approaches taken by other Councils. The draft Policy includes the direction that suitably qualified elected members are able to be appointed as Internal Hearing Commissioners to hear Private Plan Change applications.

The Draft Policy included with this report as Attachment B is considered a transparent, unbiased method for selecting Independent Hearing Commissioners to sit on hearing panels. It also provides the criteria and process for an Internal Hearing Commissioner to sit on hearing panels to hear private plan change applications.

Discussion/Ngā kōrerorero

It is vital that RMA decisions or recommendations that are made, are based on sound advice, in a professional manner, free from any actual or perceived conflicts of interest or bias that could open the path for challenges. The Council needs to appoint appropriately accredited and qualified Hearing Commissioners and delegate to them the functions, powers and duties under section 34A(1) of the RMA to hear and make decisions.

The draft Policy has been prepared to address these matters in a transparent way.

Under the draft Policy, most hearings will continue to be heard by a single Independent Hearing Commissioner. More complex cases and those requiring specific technical expertise may require a panel of several Independent Hearing Commissioners with one acting as Chair.

The draft Policy directs that one Internal Hearing Commissioner, may be appointed to a Private Plan change hearing panel. Such a panel will also include at least one Independent Hearing Commissioner, who will act as Chair, and will have a casting vote.

The draft policy does not include the ability for Internal Hearing Commissioners to be appointed to hearing panels considering Council initiated plan changes or any case in which Council has an interest. It is recognised that Internal Hearings Commissioners could be appointed to these types of hearings, however, this approach has been taken to minimise the likelihood of a challenge to a Council decision from a perceived conflict of interest which could result in costly court processes.

In preparing the draft Policy, Council staff contacted other Council's to enquire what approach they took to addressing these matters. It was found that a diversity of approaches are taken throughout New Zealand. However, most councils relied predominantly on Independent Hearing Commissioners with provision for Internal Hearing Commissioners to sit on some hearing panels, particularly for Plan Changes. **Table 1** sets out who is proposed to sit on a hearing panel under the draft Policy for different kinds of RMA decisions. **Table 2** compares this with the approaches taken by other councils.

Table 1: Summary of who hears/decides different kinds of RMA decisions under the draft Policy.

Decision under the RMA	Who hears/decides the application
Non-notified resource consents	Staff under delegated authority unless the recommendation is to decline consent in which case it is referred to Independent Hearing Commissioner(s). In addition, Council may have a conflict of interest in some non-notified applications, in which case, they are also referred to an Independent Hearing Commissioner to determine.
Limited notified resource consents	All Limited Notified applications are determined by Independent Hearing Commissioners unless a hearing is not necessary (s100) and the issue can be resolved. Under that circumstance, staff under delegated authority can make the decision.
Fully notified resource consents	Independent Hearing Commissioners or can have direct referral to the Environment Court.
Private plan changes	Mixed panel of one Internal Hearing Commissioner supported by Independent Hearing Commissioners with one acting as Chair. The hearing panel can only make a recommendation to Council who are the final decision makers.
Public plan changes	Independent Hearing Commissioners. The hearing panel can only make a recommendation to Council who are the final decision makers.

Table 2: Summary of the approach other councils take for different kinds of RMA decisions – compiled from 16 responses.

Question	Response
Does your council have a hearings policy?	Yes: 2 No: 14
Who hears non-notified resource consents?	Staff/Independent Commissioners 16

Who hears limited notified resource consents?	Staff/Independent Commissioners 9 Mix of Internal and Independent Hearing Commissioners 7
Who hears fully notified resource consents?	Independent Commissioners 5 Mix of Internal and Independent Hearing Commissioners 11*
Who hears private plan changes?	Independent Commissioners 2 Mix of Internal and Independent Hearing Commissioners 13* Just Internal Hearing Commissioners 1
Who hears public plan changes?	Independent Commissioners 2 Mix of Internal and Independent Hearing Commissioners 13* Just Internal Hearing Commissioners 1

*While most councils who responded had provisions for Internal Hearing Commissioners to hear Plan Changes and fully notified Resource Consents, in practice most councils advised that they relied almost exclusively on Independent Hearing Commissioners.

A comparison of tables 1 and 2 reveals many councils make use of Internal Hearing Commissioners to sit on Council initiated Plan Change hearing panels.

Consideration could be given to expanding the draft Policy to include discretion for Internal Hearing Commissioners to hear Council initiated Plan Changes as well. This would have the advantage of including local knowledge and the balanced views of local constituents (which elected members represent) in the hearing process. The elected member on the hearing panel can also support the panel's recommended decision when the recommendation is brought to Council for a formal decision. Recommended decisions on Plan Changes must always be brought back to Council for the decision to be formally endorsed through Council resolution.

The use of internal Commissioners in these instances needs to be weighed against the risk of allegations of predetermination, conflicts of interest and community pressure. The risk of these is considered greater for Council initiated Plan Changes than for Private Plan Changes because Council, as the initiator, has already proposed the direction it wishes to take.

As Council is responsible for developing the draft direction in Council initiated Plan Changes, it is considered that the elected members' local knowledge and the balanced views of the constituents they represent has already been included. The submission and hearing process could therefore be seen as testing the Council's proposed direction through a community (submitters) and professional planning (Independent Hearing Commissioners) lens, before a decision is brought to Council who remain the final decision makers with respect to plan changes.

While the draft Policy concentrates on hearings for RMA matters, there are many situations under other Acts such as the Local Government Act 2002 that also require hearings.

Hearing panels under other Acts will typically be comprised of elected members only, either as a full Council or a panel of elected members. In this situation elected members are not considered Internal Hearing Commissioners, and do not require specific qualifications (e.g. under the Making Good Decisions programme).

The Local Government Act 2002 allows these hearing panels to include a mix of elected members, Iwi partners and members of the public, so long as they have the appropriate delegations through a Council resolution. The draft Policy directs that Independent Hearing Commissioners can be included on non-RMA hearing panels where elected members direct staff that they require specialist expertise to assist them in their decision making.

Options

Kaipara District Council has the following options:

Option A: Adopt the draft Hearing Commissioners Policy as presented with this report as Attachment B, with not more than editorial changes.

Option B: Adopt the draft Hearing Commissioners Policy as presented with agreed amendments and delegate the Mayor and Chief Executive Officer to finalise these amendments.

Option C: Decline to adopt the draft Hearing Commissioners Policy and seek additional work be done on the policy or let the matter lie and rely on existing delegations (i.e. continue with the status quo).

Assessment of options

Option A: This option would put in place a transparent process for appointing Independent Hearing Commissioners to hearing panels and would also allow for elected members to serve as Internal Hearing Commissioners to hear Private Plan Change applications. While the draft Policy makes limited use of Internal Hearing Commissioners, this approach is considered to represent less risk to Council and less cost to applicants.

Option B: This option would be the appropriate course of action if the Council determine amendment is needed to the direction set out in the draft Policy before it is adopted.

Option C: This option would be the appropriate course of action if the Council determine that the draft Policy is not an acceptable approach and would either like to see further work on the policy direction or an alternative approach taken. If significant further work is required a further briefing session will be needed to determine the best approach to take. This could include endorsing or refining the status quo.

Policy and planning implications

This is not a statutory policy. There is no requirement to have such a policy, no requirements as to its contents and no requirement to consult on it.

The draft Hearing Commissioners Policy does provide guidance as a standalone policy that can be made without amending or superseding other existing policies.

Financial implications

The cost of using Independent and Internal Hearing Commissioners is passed on to applicants and submitters, unless it is a Council initiated application in which case costs are attributed to the approved budget for the project. The process of seeking consent therefore becomes increasingly expensive when additional Independent and Internal Hearing Commissioners are involved.

Further costs are incurred if decisions are subject to challenge.

Risks and mitigations

Relying on Independent Hearing Commissioners, as is proposed by the draft Policy for most matters, is the most risk adverse approach. It reduces the risk of allegations of predetermination and conflicts of interest. Such allegations may expose decisions to appeal in the Environment Court, resulting in further costs to submitters, applicants and Council.

Significance and engagement/Hirahira me ngā whakapāpā

The decisions or matters of this report do not trigger the significance criteria outlined in council's Significance and Engagement Policy, and the public will be informed via agenda on the website.

Next steps/E whaiake nei

If adopted, the draft Hearing Commissioners Policy will be put into practice by staff.

Attachments/Ngā tapiritanga

Number	Title
A	11 July 2017 Notice of Motion from Councillor Larsen
B	Draft Hearing Commissioners Policy

Kathie Fletcher, 11 May 2020