

Hearings Commissioner Policy

Meeting: Kaipara District Council Briefing
Date of meeting: 05 February 2020
Reporting officer: Jason Marris, General Manager Engagement & Transformation

Purpose/Ngā whāinga

To present a Draft Hearing Commissioners Policy to elected members for discussion, and to receive feedback on any changes before the Draft Policy is presented for adopted at a Council meeting.

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 private plan change, etc.) will require a hearing or an independent decision.

In these instances, the matter would be heard by a hearing panel or Independent Hearing Commissioner acting under delegations from Council. The delegations are to be made under section 34A(1) of the RMA.

These delegations allow a hearing panel or Independent Hearing Commissioner to hear and either make a decision, or recommend a decision to the 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.

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

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.

All Commissioners, internal and external, 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.

Currently, all RMA applications the Kaipara District Council receives are heard by an Independent Hearing Commissioner, or a hearing panel made up of Independent Hearing Commissioners. Council has a list of Independent Hearing Commissioners it can call on to assist with hearings. Preference is 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.

There is currently no policy to guide how Commissioners are put onto the list and how they are chosen for appointment for a particular application. There is also no guidance for Internal Hearing Commissioner appointment.

The Draft Policy (**Attachment A**) is considered a transparent, unbiased method for selecting Independent Hearing Commissioners to be on Council's Independent Hearing Commissioners List and provides a method on how they will be selected to sit on any given hearing panel. 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. In order to do this, 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.

Council staff have prepared a Draft Hearing Commissioners Policy (**Attachment A**) for elected members to discuss. This Draft Policy has been prepared with input from the Planning and Regulatory Working Group (Working Group) that existed during the term of the previous Council.

The Working Group was established in response to a notice of motion that was passed in July 2017 which requested a new policy and procedure around the appointment of Commissioners to hearing panels. This led to the establishment of a wider working group to look at regulatory and then planning issues. The terms of reference for this Working Group stated its purpose as;

“To review the process for appointing Independent Commissioners and provide advice and feedback on regulatory, planning and policy related matters”.

The Working Group’s responsibilities included developing a policy with regards to appointment of Independent Commissioners.

In developing this policy, the Working Group considered that clear and transparent direction is needed on the use of Internal and Independent Hearing Commissioners, including:

- a) How Independent Hearing Commissioners are recruited to the Council’s Independent Hearing Commissioners List;
- b) The process for selecting and appointing an Independent Hearing Commissioner/s to a hearing panel;
- c) How elected members can serve as Internal Hearing Commissioners;
- d) How disputes over appointments will be resolved;
- e) The standardisation of Hearing Commissioners’ remuneration; and
- f) To ensure hearings comply with legislation and the principles of fairness and natural justice.

The Draft Policy shown in **Attachment A** has been prepared to address these matters.

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 include at least one Independent Hearing Commissioner, who will act as Chair, and will have a casting vote.

It is considered best practise that Internal Hearing Commissioners not be appointed to hearing panels considering Council initiated plan changes or any case in which Council has an interest. This is to minimise the risk of allegations of predetermination or challenges to a Council decision from a perceived conflict of interest, which can result in costly court processes.

The direction of this Draft Policy is broadly consistent with that of other Councils in New Zealand. For example, Whangarei District Council allows one Internal Hearing Commissioner to sit on private plan change hearing panels. However, most Councils rely heavily, if not exclusively, on Independent Hearing Commissioners to hear most matters.

Table 1 sets out what kind of common applications would be heard by Internal and/or Independent Hearing Commissioners under the Draft Policy.

Table 1 – Summary of panel composition

Situation	Make up of Hearing Panel	Explanation
Consent Application – where Council is the applicant.	Independent Hearing Commissioners	In some cases, council's activities require it to apply for Consent e.g. in relation to road construction activities. In such cases, council would have a clear conflict of interest.
Council initiated Plan Change	Independent Hearing Commissioners	As Council is the entity driving the change, it can be perceived that council has a clear conflict of interest.
Private consent application (e.g. for subdivision consent or resource consent or to alter consent conditions)	Independent Hearing Commissioners	The majority of consent applications require only a single Independent Hearing Commissioner to hear them. Therefore, there is limited opportunity for an Internal Hearing Commissioner to sit on the hearing panel. Applications for larger, more complex cases which require a panel of hearing commissioners are rare and often attract public attention. This means there is a risk of community pressure and allegations of predetermination if elected members sit on these hearing panels.
Private Plan Change	Independent and Internal Hearing Commissioners	Unlike a consent application, which merely seeks to work around the rules in the District Plan for a single project, Plan Change applications seek a change to the District Plan rules. Thereby, they seek to change the requirements for future projects as well as the project at hand. In light of this, there can be value in having an Internal Hearing Commissioner contributing to the direction taken. This is because the decision can affect the future direction of development in the district.
All other matters under the RMA (e.g. notice of objection, notice of requirement to designate land etc.)	Independent Hearing Commissioners	Most of these matters seldom require more than one Independent Hearing Commissioner to hear them. Therefore, there is limited opportunity for an Internal Hearing Commissioner to sit on the hearing panel.

The following points were also given consideration by the Regulatory Working Group but were not included in the Draft Policy:

- a) Include a Regulatory Committee in the council committee structure and that the role of appointing Hearing Commissioners to any given hearing panel be delegated to that Committee.

This was not included in the Draft Policy because it would include an extra step to the process and would make it difficult for Council to meet its statutory timeframes for processing resource consents and other applications under the RMA. Further, it is the remit of the Mayor to include a committee of this nature in the structure;

- b) Internal Hearing Commissioners (elected members) being able to sit on all hearing panels.
Council's in house legal expert advised that Council initiated resource consents and plan changes, where Council was the applicant, proposed a high risk around conflicts of interest. The risk of conflict of interest and political pressure were also identified as risks for applications that related to a single development.

- c) Hearing panels being allowed to include more than one Internal Hearing Commissioner.

This is considered not best practice. The cost of remunerating Hearing Commissioners are passed on to the applicant. In the interests of keeping applications affordable, hearing panels should not include more members than is necessary. Additional members on a

hearing panel should be in response to special expertise being required e.g. geotechnical, air quality or tikanga Maori; and

- d) Internal Hearing Commissioners (elected members) being able to act as hearing panel chairs.

Internal Hearing Commissioners serving as Hearing Panel Chairs is widely considered not best practice in decision-making, especially in terms of reducing the risk of potential allegations of predetermination or bias. It also protects elected members from being exposed to undue community pressure. It would also place a lot of extra work on the elected member serving in this role.

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 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.

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 attached Draft Hearings Commissioners Policy of December 2019 was referred to the Council's Legal advisor whose advice was:

- a) That the December Policy version did take into account all the comments that were received;
- b) That the December Policy version addresses the matter of perceived conflict when internal Hearings Commissioners are considered and that the Policy reduces the perception of bias, predetermination or conflict of interest;
- c) It is reiterated that the delegation in terms of sec 34A, especially to internal Hearings Commissioners, has to be clearly recorded by Council resolution; and finally
- d) That in terms of sec 34A(1A) Council must consult with tangata whenua with an implication to appoint a commissioner with an understanding of tikanga Māori and the perspective of local iwi or hapū which is not clearly provided for in the Policy.
- e) That section 4.3 of the policy be expanded to include that Council must appoint at least one Hearings Commissioner with tikanga Māori knowledge, in consultation with the relevant iwi authority. The Draft Policy has been amended to provide for this requirement.

Next steps/E whaiake nei

Council staff will amend the Draft Hearing Commissioners Policy presented with this report to give effect to the feedback received from elected members at this briefing.

The amended Draft Policy shall then be presented to a Council Meeting for adoption.

Attachments/Ngā tapiritanga

	Title
A	Appointment of RMA Commissioners Policy - DRAFT

Mark Schreurs, 13 January 2020