



BRIEFING

Urban Development Legislation: Further advice on the Independent Hearings Panel process

Date:	28 September 2018	Priority:	Medium
Security classification:	In Confidence	Tracking number:	MBIE: 1129 18-19 MfE: 2018-B-04890

	Action sought	Deadline
Hon Phil Twyford Minister of Housing and Urban Development, and	Approval/Agreement	8 October 2018
Hon David Parker Minister for the Environment	Approval/Agreement Forward to Minister Sage as Minister responsible for the Environmental Protection Authority	8 October 2018

Contact for telephone discussion (if required)				
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Luke Dinneen	Policy Analyst (MfE)		s 9(2)(a)	

The following departments/agencies have been consulted

This joint advice was prepared by the Ministry for the Environment and the Ministry of Business, Innovation and Employment. Treasury, the Ministry of Justice, the Departments of Conservation and Internal Affairs, and Te Puni Kōkiri have been consulted on membership criteria and the appointment process for IHPs. The remaining content will be consulted on when included in one of the draft Cabinet papers on entity form.

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



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Purpose of briefing

1. This briefing provides advice on operational aspects of the Independent Hearings Panel (IHP) process under the Urban Development Authority (UDA) legislation agreed by Cabinet in May 2018 [CAB-18-MIN-0243 refers]. This briefing seeks your decisions on:
 - membership criteria and the appointment process for IHPs
 - the mechanisms available to ensure that the public is able to participate in IHP processes
 - how to service IHPs.
2. This advice is provided in response to:
 - Cabinet authorising you to determine criteria for appointing the members of IHPs, and any considerations that should apply to the appointment decisions, and issue drafting instructions to the Parliamentary Counsel Office accordingly [paragraph 61 of CAB-18-MIN-0243 refers]
 - the Cabinet Economic Development Committee's (DEV) invitation to you to report back with advice on the mechanisms provided to enable public participation in IHP processes [paragraph 98.1 of DEV-18-MIN-0170 refers]
 - advice sought by Ministers Parker and Sage on whether there is a servicing role for the Environmental Protection Authority (EPA) in IHP processes.

Recommended action

3. We recommend that you:

Membership and appointment of IHPs

- a. **Agree** that the UDA legislation include the following mandatory collective criteria that each IHP must meet:
 - knowledge of the management of legal proceedings, including cross examination
 - knowledge of alternative dispute resolution processes
 - knowledge of:
 - tikanga Māori as it applies to the project area
 - the Treaty of Waitangi and its principles
 - any Treaty settlements in the project area
 - the Māori land tenure system under the Te Ture Whenua Māori Act 1993 (if the project area includes Māori land)

- local knowledge, including knowledge of mana whenua groups and the wider community
- expertise in development economics and property development
- expertise in the assessment of environmental effects
- expertise in areas relevant to the particulars of the development project, including at least one panel member accredited under the Making Good Decisions programme if the recommended development plan proposes the use of planning and consenting powers.

Yes/No

- b. **Agree** that for each development project, the Ministry of Housing and Urban Development (MHUD), on advice from the UDA, must make a recommendation to the UDA Minister on membership, panel size, and relevant expertise for each IHP. In making those recommendations, MHUD must seek nominations for panel members from stakeholders including local authorities and iwi/hapū representatives.

Yes/No

- c. **Agree** that where a development project is within a region or district where appointments to RMA hearings panels are required to include members appointed (either directly or by inclusion on a list), by a post settlement governance entity, an entity created under a Treaty settlement, or a mana whenua group, then a similar requirement should apply to any IHP in that region or district.

Yes/No

- d. **Agree** that the UDA Minister's decision to appoint panel members, including the Chair, to each IHP be made in consultation with the Attorney General, the Minister for the Environment, the Minister of Conservation and the Minister for Māori Crown Relations: Te Arawhiti.

Yes/No

- e. **Note** that appointments to each IHP will be subject to consideration by the Cabinet Appointments and Honours Committee.

- f. **Agree** that the affiliation of a member of an IHP to a hapū or iwi with mana whenua interests in the project area is not an interest that of itself is grounds to disqualify that member.

Yes/No

- g. **Agree** that the UDA legislation provide for an immunity or indemnity for IHP members.

Yes/No

Public participation

- h. **Agree** that the Urban Development legislation provide for a range of mechanisms available to each IHP to ensure that public participation in the hearings process is provided for, and provide that each IHP may use its discretion in using those mechanisms.

Yes/No

Servicing of IHPs

- i. **Agree** that the UDA legislation provide for IHPs to be serviced by the UDA (or a private provider engaged by the UDA), any relevant local authority, or the EPA.
Yes/No
- j. **Agree** that any decision to delegate the servicing function be at the sole discretion of the UDA.
Yes/No
- k. **Note** that the Environmental Protection Authority Act 2011 will need to be amended to allow the EPA to service IHPs.
- l. **Agree** that all costs associated with IHP processes be borne by the UDA, including when it has delegated its servicing function.
Yes/No

Next Steps

- m. **Agree** that decisions made on membership and appointment of IHPs (recommendations a-g above) be included in drafting instructions to the Parliamentary Counsel Office.
Yes/No
- n. **Agree** that decisions made on public participation in hearings processes and servicing of IHPs (recommendations h-l above) will be included in one of the Cabinet papers on entity form for you to take to DEV.
Yes/No
- o. **Agree** to forward this briefing to Minister Sage as the Minister responsible for the EPA.
Yes/No

Key Messages

- 4. Each development project progressed under the UDA legislation will be different, so we **recommend** that the UDA legislation provide enough flexibility to ensure each hearings process can be tailored to the specifics of individual development projects.
- 5. We **recommend** that, when appointing an IHP for each development project, the Minister responsible for the UDA (the Minister) apply criteria that ensure each IHP possesses procedural and technical expertise, and local and cultural knowledge, and is sufficiently resourced to complete the hearings process within required timeframes.
- 6. We **consider** that previous decisions by Cabinet provide IHPs with scope to ensure the public is able to meaningfully participate in the hearings process. However, to assist IHPs in establishing procedures for hearings sessions, we **recommend** that the UDA legislation include a range of possible public participation mechanisms.
- 7. We **recommend** that the UDA legislation enable IHPs to be serviced by the UDA, any relevant local authority, or the EPA, depending on the specifics of each development project and the needs of each IHP.

Advice

The role of IHPs

8. Cabinet has agreed that for every development project progressed under the UDA legislation the Minister will appoint an IHP to review submissions on the recommended development plan, determine a view on the recommended plan, and make recommendations to the Minister [CAB-18-MIN-0243 refers].
9. This stage in the development plan process is vital to ensure the development plan is subject to robust and expert scrutiny to give the public confidence that their submissions have been considered in a balanced and independent manner. The projects progressed under the UDA legislation will vary in their location, scale and nature. Additionally, the range of enabling development powers required for a project and the demands placed on each IHP will differ from project to project. For example, IHPs for relatively small or non-controversial development projects are likely to consider fewer submissions on a narrower range of issues than IHPs for large, complex, or high profile development projects.
10. To ensure that the hearings process for each development project is fit for purpose, we recommend that the UDA legislation allow the Minister as much flexibility as possible in appointing members to the panel, while ensuring that appropriate knowledge and skills are held within each IHP. We also recommend allowing as much flexibility as possible for IHPs to set their own procedures, so they can tailor hearings processes to the specifics of each individual development project and the needs of stakeholders and the community to participate meaningfully in the hearings process.
11. The following advice on IHP membership and appointment, public participation, and servicing IHPs is to ensure IHP processes are fit for purpose for the range of development projects envisaged.

Membership and appointment of IHPs

12. You have been authorised by Cabinet to determine criteria for appointing members to IHPs, considerations that should apply to the appointment decisions, and to issue drafting instructions to the Parliamentary Counsel Office accordingly [paragraph 61 of CAB-18-MIN-0243 refers].
13. Once each development project has been established through Order in Council (OIC), we recommend that MHUD, on advice from the UDA, make recommendations to the Minister on:
 - the relevant expertise that each IHP will require to consider the full range of issues across the development project
 - the number of panel members needed to consider the likely range and volume of submissions.
14. When making these recommendations to the Minister, we recommend that MHUD receive advice from the UDA on the nature and scale of the individual development project, which enabling development powers the UDA is likely to exercise, and the volume of submissions IHPs will likely be required to consider. Final decisions on panel size and relevant expertise of IHPs would be made by the Minister through appointment of panel members.
15. We recommend that MHUD also make recommendations to the Minister for suitable candidates for appointment to each IHP. Potential panel members should be assessed on their individual merits and decision-making experience as well as the ability to contribute their specialist skills or expertise to the panel as a whole.

16. As hearings processes would benefit from panel members that are familiar with the local area and are well respected within and representative of the local community, we recommend that MHUD also seeks nominations for panel members from relevant stakeholders including local authorities and iwi/hapū representatives.
17. IHPs should have knowledge of the Treaty of Waitangi and its principles, as the UDA legislation will require IHPs to take the Treaty and its principles into consideration when making their recommendations. If a development project area includes Māori land, that IHP will also need knowledge of the Te Ture Whenua Māori Act 1993 and of any applicable Treaty settlements pertaining to the project area.
18. Upon receiving nominations from MHUD, we recommend that the Minister, in consultation with the Attorney General and the Ministers for the Environment, Conservation and Māori Crown Relations: Te Arawhiti, appoint panel members, including the Chair, to each IHP. As with Boards of Inquiry under the RMA, IHP appointments should be subject to consideration by the Cabinet Appointments and Honours Committee.
19. We note that the appointment of the IHP in the Auckland Unitary Plan (AUP) process took over five months. We therefore recommend determinations on panel size and composition are made as soon as practicable after each development project is established to ensure that IHP appointment does not delay the overall development process.

Collective skills of IHPs

20. Each IHP should collectively have the knowledge and experience necessary to consider the full range of development related issues for its respective development project. Drawing from appointment criteria in the AUP process, we recommend that the UDA legislation require each IHP to collectively possess:
 - knowledge of management of legal proceedings, including cross examination (note that Cabinet has agreed that each IHP must be chaired by a current or former Environment Court Judge [CAB-18-MIN-0243, paragraph 60.1 refers])
 - knowledge of alternative dispute resolution processes
 - knowledge of:
 - tikanga Māori as it applies to the project area
 - the Treaty of Waitangi and its principles
 - any Treaty settlements in the project area
 - the Māori land tenure system under the Te Tura Whenua Māori Act 1993 (if the project area includes Māori land)
 - local knowledge, including knowledge of mana whenua groups and the wider community
 - expertise in development economics and property development
 - expertise in the assessment of environmental effects
 - expertise in areas relevant to the development project. This expertise will largely be determined by which enabling development powers are proposed to be used, and will differ from project to project. For example, IHPs for projects which involve the use of planning and consenting powers will require at least one panel member accredited under the Making Good Decisions Programme (designed to help independent commissioners make better decisions under the RMA). Similarly, if a development plan prescribes funding and financing mechanisms for a project area,

equivalent accreditation or expertise in rating and funding mechanisms and local government practices would be required within that IHP.

Iwi and hapū participation

21. To uphold the spirit of Treaty of Waitangi settlement agreements, we recommended that where a development project is within a region or district where appointments to RMA hearings panels are required to include members appointed (either directly or by inclusion on a list), by a post settlement governance entity, an entity created under a Treaty settlement, or a mana whenua group, then a similar requirement should apply to the IHP for that development project.
22. Experience with local authorities has shown that opportunistic legal challenge has not been uncommon, particularly when members of local iwi/hapū have been appointed to hearing panels. We therefore recommend that the affiliation of a member of an IHP to a hapū or iwi with mana whenua interests in the project area should not be an interest that of itself is grounds to disqualify that member.

Personal risk and indemnity

23. It may be difficult to attract suitable candidates if there is any likelihood that panel members could be held personally liable for the decisions of IHPs. We therefore recommend that membership of an IHP should not expose a member to undue personal risk, and that the legislation should provide for an immunity or indemnity for IHP members.

Panel Size

24. Cabinet has agreed that each IHP must have a minimum membership of three expert commissioners [CAB-18-MIN-0243 refers]. We recommend that the UDA legislation allows for the appointment of additional panel members on the UDA's recommendation at any stage of the hearings process, with no set maximum membership. This will avoid the need to make changes to the UDA legislation should additional panel members be required, as was the case in the AUP process. Appointment of these subsequent panel members would follow the same process as that for original members.
25. While we do not recommend the setting of a maximum number of panel members, the advice of the UDA in this respect should carry significant weight as it will be the body funding IHP processes.

Public participation

26. You have been invited by DEV to report back with advice on the mechanisms provided to enable public participation in hearings processes [paragraph 98.1 of DEV-18-MIN-0170 refers]. We consider that previous Cabinet decisions provide IHPs with the necessary scope to establish hearings procedures that enable public participation. We also note that IHP processes follow two earlier rounds of public consultation; one before a development project is established, and another on the first draft of a development plan.
27. Cabinet agreed that IHPs must establish procedures for hearings that avoid unnecessary formality, recognise tikanga Māori where appropriate, and are appropriate and fair in the circumstances [paragraph 62.5 of CAB-18-MIN-0243 refers].
28. Previous Cabinet decisions also require:
 - hearings to be held in public unless there is a need to protect sensitive information [paragraph 62.2 of CAB-18-MIN-0243 refers]
 - IHPs to accept evidence written and spoken in te reo Māori [paragraph 62.2 of CAB-18-MIN-0243 refers].

29. In addition, previous Cabinet decisions provide IHPs with the discretion to:
- determine whether to allow the cross examination of submitters and witnesses [paragraph 62.4.1 of CAB-18-MIN-0243 refers]
 - direct mediation or expert conferencing between parties and experts [paragraph 62.4.3 of CAB-18-MIN-0243 refers].
30. To assist IHPs, we recommend that the UDA legislation include possible public participation mechanisms that IHPs may choose to use when appropriate, such as:
- scheduling hearings that allow submitters who work fulltime to attend
 - providing for hearings to be held at marae
 - holding concurrent hearings sessions where there is a large volume of submissions to consider (note that Cabinet has agreed that no fewer than two panel members must be present at each hearings session [paragraph 62.3 of CAB-18-MIN-0243 refers])
 - providing mediators, facilitators and other dispute resolution practitioners
 - providing for 'friends of submitters' to be available to assist submitters who are not familiar with submissions processes
 - adopting innovative or new public participation methods that reflect any changes in best practice.

Servicing of IHPs

31. IHPs will require a range of secretarial and support services to function effectively. The provision of these services will be purely administrative and will have no influence on each IHP's function as an independent review body. We recommend that the UDA legislation allow IHPs to be serviced by UDA staff (or a private provider engaged by the UDA). These staff would be separate from those involved in the preparation of the development plan. This approach is similar to that taken in the AUP process where the Auckland Council provided staff to service that IHP.
32. There may be instances where the UDA chooses not to service an IHP. For example, the UDA may be progressing multiple development projects concurrently and may not have the capacity to service multiple IHPs. There may also be development projects where public perception of independent hearings is particularly important. In these cases, we recommend that the UDA legislation allow the UDA to delegate the servicing function to either a relevant local authority (district councils, regional councils, or unitary authorities) or the EPA. Note that the Environmental Protection Authority Act 2011 will have to be amended to allow the EPA to perform this role.
33. Local authorities have expertise in providing similar administrative services for hearings processes under the RMA and have local connections that may help make the IHP process more accessible to lay submitters from their community. Additionally, staff provided by local authorities would likely live locally, reducing travel and accommodation costs. Delegation of this support function to local authorities may be a viable option where the local authority is willing, has capacity to provide staff and the project area is within their jurisdiction.
34. The EPA has institutional experience and expertise in providing administrative and secretarial support to decision making bodies, particularly Boards of Inquiry for nationally significant proposals under the RMA. The EPA may be an appropriate option for large or high profile developments where public perception of independence is particularly important. However, the EPA is Wellington-based and its secretarial function is typically staffed on a

project-by-project basis, meaning that it would likely need to engage new staff each time it was required to service an IHP. We have not directly consulted with the EPA in preparing this advice but understand that they are open to performing this role.

35. We do not recommend the Environment Court as an option for servicing IHPs as the servicing function is purely administrative and the Environment Court's primary role is as a formal decision making body. We also consider that the recommended options provide more flexibility to service the range of different hearings procedures that IHPs may establish and that the Environment Court's formality may dissuade the general public from participating in the hearings process.
36. We recommend that the legislation allow the UDA to consider the following factors when determining whether to delegate the servicing function:
 - the capacity of the UDA, local authorities, or the EPA to provide the service
 - the nature and scale of the individual development project
 - the importance of public perception of an independent hearings process
 - the location of the development project, including whether the project area crosses local authority boundaries
 - any other matters relevant to the development project.
37. We recommend that all costs associated with IHP processes be borne by the UDA, including when it has delegated its servicing functions.
38. s 9(2)(g)(i)

Next steps

39. If you agree with the advice we have provided on IHP appointments, we will issue drafting instructions accordingly to the Parliamentary Counsel Office on this aspect.
40. If you agree with the advice we have provided on the following, we will include the policy content in one of the Cabinet papers on entity form for you to take to DEV:
 - mechanisms available to ensure public participation
 - servicing of IHPs.



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Hon Phil Twyford
Minister of Housing and Urban Development

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