

Independent Hearing and Assessment Panels FAQs

August 2018

This table of frequently asked questions (FAQs) has been compiled to help answer common questions about local planning panels, more commonly known as Independent Hearing and Assessment Panels. These FAQs will continue to be updated.

1. Are Independent Hearing and Assessment Panels (IHAPs) the same as local planning panels (LPPs)?

Yes, the legislation refers to panels as local planning panels, but these panels were previously called IHAPs. The colloquial IHAPs name is often used in the media and in communication material.

2. What development applications (DAs) will panels determine?

Panels will determine DAs captured by the section 9.1 directions issued by the Minister.

3. Will panels review planning proposals?

Yes, from 1 June 2018 panels will review planning proposals captured by the section 9.1 directions issued by the Minister.

4. Will panels determine complying development certificates?

No. These are not matters considered by local planning panels.

5. Will councils need to update their delegations for determining DAs?

It is possible that some councils' delegations will not cover all DAs that are now to be determined by council staff. If this is the case, these delegations will need to be updated.

Until councils have updated their delegations, panels can determine these DAs.

6. Can a panel determine a section 4.55 modification application?

Yes, however, for a panel to determine a modification application it must be referred by the council.

7. Do councils outside the Greater Sydney region and Wollongong need to constitute a panel?

No, however, if a council wishes to constitute a panel, it must follow the panel model established in the Environmental Planning and Assessment Act 1979 (EP&A Act). Please contact the Planning Panels Secretariat for further assistance if your council is interested in establishing a panel (see contact details at the end of this document).

8. How do the referral criteria for matters that go to the panel apply to concept DAs?

A concept plan (section 4.22) for a development that would trigger the referral criteria must be referred to the panel.

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Panel members

9. How will an approved independent expert be advised that they have been selected for a panel?

Council will notify them.

10. Is the number of experts in the Department's managed pool fixed?

The size of the pool is not fixed and may vary from time to time.

11. What happens if an expert on a pool is not initially selected for an IHAP?

The expert will remain on the pool and may be contacted in the future, if chosen at a later date.

12. How is a panel member protected against personal liability?

All members are afforded protection from personal liability, subject to the provisions of section 2.28 of the Act.

2.28 Exclusion of personal liability

A matter or thing done, or omitted to be done, by:

...

(h) a member of a local planning panel, or

...

does not subject the Minister, the Planning Secretary or any such person, officer, member or individual so acting personally to any action, liability, claim or demand if the matter or thing was done, or omitted to be done, in good faith for the purpose of the administration of this Act.

13. How does Work Health and Safety apply to IHAP panel members?

WHS for IHAPs will need to be addressed by each council in accordance with relevant legislation and the council's responsibilities to employees, visitors, contractors etc.

14. Must panel members maintain membership of professional bodies, and practising certificates?

The Panel members have been chosen on their existing experience and skills at the time of the application process. We would encourage experts to maintain their qualifications.

15. What will panel members be paid?

The remuneration rates for panel members are available to view on the Department's website. There is a set rate for each meeting for the different panel members. This rate is inclusive of all the work a panel member does for a meeting, including preparation, site visits, the meeting itself and any deliberation and voting by the panel on matters considered at the meeting once the meeting is closed.

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Panel members can also claim an hourly rate for business that is undertaken outside of meetings, such as electronic determinations. This is in addition to the meeting rate.

Where reasonable, travel and out-of-pocket expenses can also be claimed.

16. Can councils set remuneration higher than that used by the Minister?

The Minister has set minimum remuneration rates. Councils are able to determine higher rates.

17. Are panel members considered to be council employees?

Panel members are not considered council employees. Members are appointed by council to its panel for a fixed term.

Panel members are considered 'public officials' for the purposes of the *Independent Commission Against Corruption Act 1988*.

18. Is the panel required to take the community representative's concerns into consideration prior to deciding on a matter?

Yes. The community representative is there to bring local knowledge and experience to the panel. Issues raised by the community representative will be an important consideration for the panel. The panel will be making its decision based on the technical planning merits of the proposal, the views expressed in submissions made on the proposal, and relevant legislative requirements, including the public interest. It will need to balance the views of all members in coming to its decision.

Panel members each have a vote, if a panel member has a dissenting view to the majority this view is to be formally documented and recorded in the panel's reasons for its decision.

19. Is a community representative allowed to attend a public meeting of its council where strategic planning is being discussed or decided on – to understand community concerns? What about making public statements on planning matters of personal concern?

Yes, a member can attend, in a private capacity, a meeting of council. However, panel members should always consider how others may view the situation when attending meetings where local planning issues are being discussed, either publicly or privately, to avoid any perceptions of bias. Meetings where discussions will be held on planning matters that will come before the panel should be avoided.

Members are to avoid making public statements on matters likely to come before the panel, including statements that may give rise to a perception of bias.

20. Can a community representative discuss a decision with a member of the public after the decision has been decided on?

No. The matter may come back to the panel for a modification in the future.

21. As a Community Representative, I may be a member of a community organisation or a member of a business chamber that makes a submission. Does that automatically disqualify me from sitting on the panel for that DA?

It will depend on your level of involvement. If you have been involved in drafting the submission in any way or are an office holder of the organisation then it may be appropriate for you to declare an interest and allow an alternate member to take your place on the panel for that matter.

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Membership will not disqualify you from sitting on the matter, however, for transparency your membership should be disclosed.

22. Can panel members discuss community concerns with the public?

If someone approaches us with an objection – do we direct them to put it in writing to the panel?

No. You must explain that you are unable to discuss the matter with them. You can ask them to put in a written submission to the council, and to register to speak to the panel at its public meeting. This way the objection is on record and the panel and the community can have the benefit of that person's views.

23. What do I do if I've been lobbied?

You must disclose in writing to the panel chair any effort made to lobby you. The chair will then report these disclosures to the council's general manager.

24. Do all the items on the Code of Conduct apply to alternate Community Members even if they are not sitting on the panel?

The Code of Conduct for Local Planning Panel Members applies to all members at all times.

Operations

25. Are the panel agenda/business papers made available before the meeting to the public (apart from people making submissions)?

The panel is to give reasonable notice of the times and places of its meetings. It is considered good practice to make business papers publicly available prior to the meeting.

26. Will proposals be brought to the panel at the pre-lodgement stage?

The panel is a determinative body and should not be used to provide advice on applications to come before it.

27. Will panels deliberate in public?

The panels can choose to do this.

28. How are panel members rotated with alternate members?

The chair and expert members are rotated with their alternates. This will be managed by the chair.

The community representative that is part of the panel's quorum is chosen by the chair. Only this community representative can deliberate and vote at the meeting. Other community representatives are entitled to attend but not deliberate or vote.

29. Should the community representative that votes be from the same ward as the matter/s being considered?

Where there are wards, community members are chosen to represent the community of that ward. Community members can be chosen to represent more than one ward.

In choosing the community representative for the meeting, the chair is to choose the representative whose ward has the most matters being considered at that meeting.

30. Will there be an architect or urban design expert on every panel?

The experts in the Minister approved pool have a wide range of skills and experience. Councils can include an architect (or any other discipline) from the pool as an expert. There is no requirement for an architect or other specific discipline to be on every panel.

An application may be reviewed by qualified design staff as part of the assessment by council's staff. In some circumstances this could include a Design Advisory Panel where one exists for a council.

31. Who manages a panel?

The chair manages the panel in accordance with the requirements of the legislation and the panels' operational procedures.

32. What is the role of the alternate chair?

Alternate chairs have the same role as the chair when presiding over a panel meeting or any other business. The alternate chair does not, however, have the same management responsibilities of the panel's functions and operations outside of a panel meeting.

33. Applicants occasionally offer quite detailed new material during meetings. How is this dealt with?

It will be up to the panel whether to accept new information at the meeting. If it is of a detailed, substantial, or technical nature then the panel's decision may need to be deferred to allow assessment by council staff.

34. What is the protocol for panel members wishing to address a panel as a consultant on behalf of the applicant?

Panel members should not address the panel of which they are a member. This is because members of a panel will have a close working relationship with each other. A member should not represent an applicant, council or submitter at a meeting of a panel of which they are a member.

35. Can a councillor contact a panel member directly?

No, councillors are only permitted to make a formal representation to the panel in the same manner as an objector.

36. How do panel members interact with council staff?

Where a panel member has questions for council staff, the chair is to contact the general manager or other senior staff member identified by the general manager.

Part 7 of the Code of Conduct outlines how a panel member is to appropriately liaise with council staff.

37. How does the panel manage an inadequate assessment report or an inadequate amount of information from an applicant?

If the panel defers a matter for any reason, such as an inadequate assessment or a lack of relevant information, then this should be listed as a reason for deferral in the panel's decision, along with a time frame within which the further information should be provided by council staff.

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38. Can a panel member discuss a matter that is to be considered by the panel with a member of the public?

No, panel members cannot discuss any matter that is to be considered by the panel with councillors, the applicant, their consultants, parties who have made a submission, or any other person with an interest in the matter outside of the panel meeting.

39. Can a panel discuss a matter before the IHAP with other experts not part of the IHAP?

No. The Panel cannot discuss any matter to be considered by the panel with councillors, the applicant, their consultants, parties who have made a submission, or any other person with an interest in the matter outside of the local planning panel meeting.

The panel members can draw on the council planner's assessment report for explanations of technical situations and request a staff briefing, through the panel Chair, where further clarification is required.

40. Will the council be responsible for defending an appeal of a decision by the IHAP?

Yes. The Act provides the council for the area concerned is to be the respondent to the appeal but is subject to the control and direction of the panel in connection with the conduct of the appeal (section 8.15(4)).

41. What happens if a panel member is unable to attend a site inspection or panel meeting?

Reasonable notice of panel meetings should be provided to panel members. Members should make all reasonable efforts to attend the meetings of the panel to which they have been invited. If a member is unable to attend part or all of a meeting they should inform the chair in advance.

42. How will the Department receive feedback on the operation of an IHAP?

Councils can provide regular feedback to the Department on the operation of their IHAP through the online reporting form.

Panel members can provide feedback at any time through the enquiry@planningpanels.nsw.gov.au email address.

Referral criteria

43. Is a development application for land owned by the Crown captured by the conflict of interest criteria?

If the land is owned and managed by the Crown, it is not captured.

If the Crown land is managed by council and council is the applicant, it is captured.

If the land is managed by council but council is not the applicant, the application is not captured.

44. Can a panel delegate an application back to council staff?

Generally, all matters captured by the Minister for Planning's Directions should be determined by the panel.

Under Section 2.20(8) of the *Environmental Planning and Assessment Act 1979*, there is an option that allows a matter to be delegated by the Panel back to council staff for determination.

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It is important that when using this provision, it does not undermine the functions of the panel.

Generally, this delegation should only be used if the application or outstanding matter/s are minor and simple in nature.

45. Can a councillor or a general manager refer a development application to a panel?

No, only development applications captured by the directions issued by the Minister can be referred to the panel.

46. How are petitions dealt with in relation to the contentious criteria and the number of objections?

Petitions are counted as one objection for the purpose the criteria. This is the same for form letters. Each objection needs to be unique.

47. If a development application was notified twice, the second time with amended plans, are objections from both notification periods counted in relation to the contentious criteria?

Yes, under criteria 2(b) of the development application referral direction, objections are counted from both notification periods as long as the objection is unique and has not been retracted by the original submitter.

48. Is value used as a criterion for the panel referral directions for development applications?

No, this criterion has been removed in response to stakeholder feedback.

49. Does demolition of a heritage item mean full demolition or partial demolition?

The use of demolition in the referral criteria has the same meaning as under the Standard Instrument—Principal Local Environmental Plan:

"demolish, in relation to a heritage item or an Aboriginal object, or a building, work, relic or tree within a heritage conservation area, means wholly or partly destroy, dismantle or deface the heritage item, Aboriginal object or building, work, relic or tree."

50. How does the criteria apply for concept development applications?

The referral criteria applies to all development applications, including concept development applications (Section 4.22 of the Act).

51. When is a planning proposal required to be reviewed by the panel?

Panels are to provide advice on whether the proposal should be submitted to DPE for Gateway determination.

To satisfy the Minister's directions, the advice must be sought prior to the proposal being forwarded to the Minister or Greater Sydney Commission under section 3.34 of the EP&A Act.

It is recommended that a full assessment report is provided to enable the panel to provide comprehensive advice to the council.

Conflicts of Interest

52. For the conflict of interest criteria, who is a “relative”?

The definition of a relative to be used for the conflict of interest criteria is the definition within the Local Government Act 1993, specifically:

“relative, in relation to a person, means any of the following:

(a) the parent, grandparent, brother, sister, uncle, aunt, nephew, niece, lineal descendant or adopted child of the person or of the person’s spouse or de facto partner,

(b) the spouse or de facto partner of the person or of a person referred to in paragraph (a).”

53. For the conflict of interest criteria, does “internal alterations and additions” include external additions?

No, only internal additions are exempted.

54. Does the declaration of interest exemptions for councillors in the Local Government Act apply to panel members?

No. Panel members are appointed by councils under the Environmental Planning & Assessment Act 1979. The Code of Conduct for Local Planning Panel Members and its disclosure requirements apply to all members.

55. Is the Department considering making consultants who are panel members declare a conflict of interest where their firm has received work from a developer’s application?

It is a requirement of all members to declare and appropriately manage any conflicts, or perceptions of conflict, in accordance with the Code of Conduct for Local Planning Panel Members. Any member in doubt about whether they are in a situation requiring a declaration should discuss the matter with the panel chair.

56. What is expected when a potential conflict of interest is only established during a meeting?

The matter should be disclosed as soon as it becomes known to the member. The significance of the conflict should be discussed with the chair and appropriate steps taken to manage the situation taken, which may require stepping aside from the panel in some circumstances.

Where to find out more

For more information, please contact the Planning Panels Secretariat:

Planning Panels Secretariat

enquiry@planningpanels.nsw.gov.au

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