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Fast-Track  
Environmental Protection Authority  
**Wellington**

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## Fast-Track Approvals Panel Conveners' Practice and Procedure Guidance Note

### 1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the draft Fast-Track Approvals Panel Conveners' Practice and Procedure Guidance Note (**Guidance Note**). This submission has been prepared with input from the Law Society's Environmental Law Committee.<sup>1</sup>

1.2 The submission is provided in two parts:

- (a) This document, which addresses the more substantive points and queries.
- (b) An annexed Word version of the consultation document, in which minor typographical errors and drafting refinements are tracked.

### 2 Part 1 Introduction and purpose

2.1 In the consultation draft, some references to Panel Convenor or Panel Conveners are capitalised while others are not. The Law Society has no style preference; however, it recommends correcting this for consistency.

### 3 Part 4 Application documentation

3.1 Para 4.1 provides guidelines for applicants' documentation, including reports. To improve clarity, the Law Society recommends rewording the heading of this section of the Guidance Note, changing "application documentation" to "requirements for substantive application".

3.2 In addition to the matters presently set out, the Law Society recommends providing guidance on how applicants should address confidential matters. For example, at 4.1(g) it would be helpful to address what an applicant should do when they are seeking to redact or withhold from the public parts of reports — such as when the report contains commercially or culturally sensitive information. This is an issue that commonly arose

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<sup>1</sup> More information about the Law Society's law reform committees is available at <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/>.

under the COVID Fast-Track regime. Later in the Guidance Note, confidentiality orders are addressed. However, as this issue also often arises at the application stage it would be useful to address it at that point in the guidance.

- 3.3 It would also be appropriate and useful at subpara (g) to direct that experts provide an overview of their experience and qualifications.
- 3.4 At subpara (c), applicants are cautioned to “be conscious of the volume of material lodged” and to ensure that it is proportionate to the application’s complexity and number of approvals sought. The Law Society suggests including some commentary that only material necessary to determining the application is required — noting, however, that early experience indicates some potential for tensions to arise at the completeness check stage on this point.

## 4 Part 5 Convener conference

### *Arranging the conference*

- 4.1 Para 5.1 states when the panel convener will convene a conference. The Law Society recommends an amendment to this sentence, as follows and tracked in the annexed Word doc: “The panel convener will convene a conference after the application for approval *is accepted as being complete and within scope under section 46, and the application* and the report on Treaty settlements and other obligations (sections 18 and 49) has been provided to them.”
- 4.2 Para 5.3 refers to who will be invited to a convener conference. The Law Society recommends providing at (c) and (d) for more than one administering agency or local authority, by inserting the words “administering agency *or agencies*” and “local authority *or authorities*”.
- 4.3 Para 5.4 provides that “[a] minute will be issued inviting participants to the conference”. The Law Society recommends also providing for timetabling in this sentence, for example by adding: “... and, where relevant, setting a timetable for the filing of any memoranda in advance of the conference”.
- 4.4 Para 5.4 says further that “[t]he procedure that applies for access [to a convener conference] will be advised three working days in advance of the conference”. The Law Society recommends allowing here for “at least” three working days.
- 4.5 If the intention is that the minute inviting participants to the conference will be issued first, followed by an email with details of how to connect, providing a separate minimum timeframe for the minute could be considered — for example, at least 10 working days.

### *Timing of panel decision*

- 4.6 To the final sentence of para 5.6, which provides that participants may be required to document their views on the application’s future process in a memorandum to be filed in advance, the Law Society recommends improving clarity and certainty for participants by adding “if directed to do so by a panel minute”.
- 4.7 Para 5.8 notes matters that may affect decision timing. At para 5.8(b), which relates to evidentiary complexity, the need to commission peer review reports where there are complex or conflicting evidentiary matters is another matter that it would be useful to expressly set out.

4.8 More generally, para 5.8 has a complex structure and multiple grammatical issues. Minor changes to improve readability are proposed in the annexed Word doc.

## 5 Part 7 Appointment of panels

### *Process leading to appointment of panel members*

5.1 Para 7.2 is slightly repetitive of matters at 5.1 of the Guidance Note. It would be easiest for applicants using the guide to have a clear idea of the order in which the steps take place. Potentially, this section should be before the Panel Convener section. Our earlier comments have proposed an amendment consolidating the key aspect of this paragraph into 5.1.

## 6 Part 9 Inviting comments

### *Treaty interests and tikanga*

6.1 As para 9.4 is not providing guidance for applicants, the Law Society queries whether this is necessary information to have in the Guidance Note.

6.2 At para 9.6, referring to iwi and hapū in the body of the paragraph text (“persons including iwi and hapū”) would be preferable to doing so in a footnote.

6.3 Subparas (c) of both paras 9.6 and 9.7 refer to the time required to adequately respond to an invitation for comments, within the timeframe that has been set for the panel’s decision. As these apply to all parties, the Law Society queries whether they are necessary, or in the right place in this section. Rather than being nested beneath the “Treaty interests and tikanga” subheading, they might be better included in the earlier general paras about inviting comments.

## 7 Part 10 Site visits

7.1 In the Law Society’s view, at para 10.3 a reference to the relevant section of the Act would be more appropriate than to the Guidance Note (which is not legally binding).

## 8 Part 11 Conferences

8.1 Para 11.9 offers general guidance to panels in relation to panel conferences. At para 11.9(b), the conference may be convened by a panel on the chair’s initiative or on the application of one or more of the participants. It is unclear whether this means that a conference must be held if a participant requests it. If that is not intended, perhaps the draft paragraph could be qualified by adding “where the panel agrees it would be assisted by holding a conference”.

8.2 The Law Society recommends simplifying and clarifying the drafting of para 11.9(d). Rewording the draft as follows may be some improvement: “at the conference, the chair may give directions to ensure that the process to determine the applications for approval is timely, efficient, consistent, cost-effective, and complies with the principles of natural justice”.

### *Project overview conference*

8.3 The Law Society recommends providing direction on who would be required to attend this conference.

## 9 Part 12 Commissioning of specialist and technical advisers, advice and reports

### *Commissioning advice or reports*

- 9.1 At para 12.5, the Law Society recommends amending the sentence which relates to additional reports, as follows: “If additional reports are required, be clear on their purpose *and the information they are to contain*”.
- 9.2 Para 12.7 says that panel conveners will, from time to time, commission legal advice on matters of general application across all FTAA applications, that “may” be provided on the FTA website where the advice offers important guidance. The Law Society queries whether “will” be provided, not “may”, would be preferable.
- 9.3 If advice is obtained on a matter in a particular proceeding, the Law Society recommends specifically requiring any such advice to be provided to other participants in the process for their comment.

### *Special advisers*

- 9.4 Para 12.8 relates to appointing advisers. Subpara (c) refers to planners, who may assist with “navigating through complex applications or providing assistance in relation to the non-evaluative/determinative aspects of a draft decision”.
- 9.5 In COVID Fast-Track processes it was helpful to have a planner assist with compiling the final set of conditions: an administrative task that can take a lot of time. A later section of the Guidance Note anticipates that such assistance may be provided (see technical advisers at 12.9). Given this, it would be helpful to also allow for this option at 12.8, by adding the words “and/or conditions”, as proposed in tracking in the annexed Word doc.

### *Technical advisers*

- 9.6 Para 12.9 enables the panel to consider appointing technical advisers or *mātanga*. Reasons include to facilitate expert witness conferencing or *wānanga* (subpara (a)). Subsequently, however, at para 13.4, the Guidance Note also says that a “special adviser” will facilitate expert conferencing. The Law Society queries whether this is intended to be “technical adviser”; alternatively, it recommends providing further explanation to distinguish these roles and functions.
- 9.7 At para 12.9(c), a technical adviser may be appointed to “question a party or witness on behalf of a panel”. Clarification is recommended of what this is intended to cover: for example, questioning at a hearing, or in a separate meeting? More guidance would be helpful to understand the scope of this role and the process that is intended.

### *Peer reviews*

- 9.8 At para 12.13, conflicts in expert opinion or competing reports on a subject is another situation where the panel may be assisted by an independent expert view. The Law Society recommends providing for this in a new subpara (c).

## 10 Part 13 Expert conferencing

- 10.1 The Law Society recommends either including within or relocating this Part adjacent to Part 11, which relates to conferencing.
- 10.2 Para 13.1 provides that the panel may direct expert conferencing prior to or during a formal hearing. Conferencing may also be helpful if a hearing is not required. The Law Society considers that conferencing should take place at any point of the process where it would allow parties to narrow the issues or address other matters. It would be advisable to review the drafting of this clause to ensure that the ability to direct conferencing is not tied to a hearing.
- 10.3 At para 13.4, the panel should discuss the form of the expert conferencing with the participants, including the facilitator. However, it may not always be necessary for there to be a facilitator, especially where there are limited experts and the experts involved are very experienced and capable of producing a conferencing statement on their own. The Law Society recommends adding the words “where applicable” to subpara (a); in addition, as noted above, the language of “special” (or “technical”?) adviser should be clarified in this paragraph.

### *Provision for cultural conferencing*

- 10.4 Para 13.6 requires expert conferencing is be completed in the timeframe directed by the panel. As presently drafted, that procedural paragraph would apply equally to cultural experts. The Guidance Note subsequently (at para 15.11(d)) anticipates cultural conferencing; however, does not provide any other guidance.
- 10.5 In the Law Society’s view, it would be helpful to both provide specific guidance for cultural conferencing and reassess the applicability of para 13.6, as these conferences would likely be a different format and follow different tikanga or protocols to other conferencing. Where cultural experts have relevant mātauranga Māori in a specific discipline (such as the moana), guidance on how conferencing could enable their participation in relevant conferencing (e.g. marine science) would also be useful. At present, conferencing practices are not set up for accommodating both non-Māori and Māori mātauranga in the one conference.

### *Joint witness statements*

- 10.6 Para 13.7 sets out the content requirements of joint witness statements. The Law Society suggests that it could assist to ensure that no matters are missed for the EPA to provide a template statement with the relevant headings and consistent style, that could be used by participants.

## 11 Part 14 Mediation

- 11.1 Para 14.2 provides for the panel to ask participants whether they consent to mediation. It does not specify what will happen if the issue only relates to some participants (for example, the effect on a particular adjacent landowner) — is the consent of all participants required in this situation or only those who are affected by that particular issue? The Law Society recommends further clarification on these details.

## 12 Part 15 Hearings

### *Types of hearing*

12.1 Para 15.5 encourages panels “to consider other types of quasi-inquisitorial hearing features”. As this paragraph is not specific to hearings, the Law Society queries whether it is best positioned in the hearing section. It could be moved up to where the Guidance Note talks about the quasi-inquisitorial role of the panel (either 2.3 or 11.2), leaving Part 15 specific to if a hearing is to take place.

12.2 The Law Society notes that the process described at 15.5(e) sounds like a mediation on conditions with the panel in the role as mediator. Is that what is intended? Clarity could be improved here by deleting the phrase “led by the chair,”. Subpara (c) is also not clear. The Law Society recommends clarifying what is meant by “joint empanelment of group(s) of experts”.

### *Hearing procedures*

12.3 The provision for technical advisers to question a witness on behalf of the panel has been noted earlier in this submission, suggesting that it needs clarification. At para 15.6, it might be appropriate to cross-reference that provision if such questioning is intended to be allowed at a hearing.

## 13 Part 18 Substantive decisions

13.1 The Law Society recommends including more detail at para 18.1 on timing of decisions, the process for publishing decisions on the Fast-track website, making minor corrections, and any other such administration.

## 14 Part 19 Release of draft decision or draft conditions

14.1 In the Law Society’s view, para 19.1 requires expansion to outline which parties will receive the draft decision, as this is different to who receives the draft conditions.

## 15 Part 20 Remote participation in and viewing of conferences and hearings

15.1 Para 20.3 enables requests to hold a hearing remotely. The Law Society recommends clarifying whether any person can also request that the hearing or part of it be held in person. This has occurred from time to time where a hearing has been proposed to be held remotely, when there has been a request for part of it to be held on marae. In addition to clarifying this issue, further consideration is recommended at para 20.4 of whether any recording or written transcript should occur either “as soon as practicable” following the hearing, or within a certain timeframe.

## 16 Part 24 Record of proceedings

16.1 Para 24.3 defines “document”, including “a decision, an order, or a minute of the panel, including any record of the reasons given by the chairperson of a panel” at subpara (b). The Law Society recommends giving guidance here as to whether this includes any panel meetings and panel member individual notes. Should these be recorded and kept by the EPA?

## 17 Next steps

- 17.1 We hope this feedback is useful. Please feel free to get in touch with me via the Law Society's Senior Law Reform and Advocacy Advisor, Claire Browning ([claire.browning@lawsociety.org.nz](mailto:claire.browning@lawsociety.org.nz)), if you have any questions or wish to discuss this feedback further.

Nāku noa, nā

A handwritten signature in black ink, appearing to read 'Jesse Savage'.

Jesse Savage  
**Vice-President**