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## GUIDANCE ON THE USE OF INDEPENDENT COMMISSIONERS

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### CIRCUMSTANCES WHEN AN INDEPENDENT COMMISSIONER MUST BE USED

#### Decisions on notified resource consents

Section 100A allows an applicant, and/or a submitter to a notified resource consent application, to request that the council appoints at least one independent commissioner to hear and decide on the application. This also applies to notified notices of requirement for a designation and heritage orders, but excludes applications for restricted coastal activities.

The request for an independent commissioner must be made in writing any time up to five working days after submissions close.

If such a request is received, then the council must delegate its functions, powers and duties to hear and decide the application to one or more independent commissioners. The council has the discretion to decide on the number of commissioners appointed. This will largely depend on the complexity of the application and the required expertise.

Councils also have the discretion to decide on who they employ as an independent commissioner, provided they meet the accreditation requirements of s39B of the RMA and are not a member (elected representative or staff) of the council. The intent of s100A is that the council delegation would be exclusive to independent commissioners.

Parties who request a commissioner have no right of objection to another party's request for a commissioner or to the council's choice of commissioner.

### Objections to decision of council officer on resource consent

Section 357AB allows an applicant who is objecting to a decision by a council officer on a resource consent application (or applications under s127, s128 or s221) to request that their objection be heard by an independent commissioner.

The objection, along with the request for an independent commissioner must be made in writing, no later than 15 working days after the decision on the application is issued. If such a request is received, then the council must delegate its functions, powers and duties to consider and decide on the objection to one or more commissioners appointed (who are not members of the council, and must be accredited (under s39B) unless there are special circumstances).

It should be noted that s357CA enables commissioners to call for further information or commission a report on any matter raised in the objection if that will help them make a decision on the objection.

Costs of using an independent commissioner falls on the person making the objection (the applicant).

## **OTHER CIRCUMSTANCES WHERE AN INDEPENDENT COMMISSIONER MAY BE USED**

The decision to use internal commissioners or independent commissioners (or a combination) will often involve the following considerations:

- perceived or actual conflicts of interest or perceptions of bias
- the need for specialist expertise not available within a council in cases where issues surrounding an application are complex or of a highly technical nature

- whether the application has substantive implications for the policy of a council such that elected representative input may be considered necessary or desirable
- the likely expense of using independent commissioners compared to the scale of the issue (particularly where an independent commissioner would have to be brought in from outside the district or region)
- the availability of independent commissioners at the time a hearing is required
- the willingness of elected members to delegate decision-making powers and functions to independent commissioners, when not already requested by the applicant and/or submitter(s) under s100A.

While consideration must be given to all these factors, it is generally accepted to be good practice to use independent commissioners in place of internal commissioners when:

- the council, or an individual elected representative, may otherwise be perceived to have an actual or perceived conflict of interest (refer to [Guidance for members of local authorities about the local authorities \(Members' Interests\) Act 1968](http://www.oag.govt.nz/2010/lamia) (<http://www.oag.govt.nz/2010/lamia>) )
- determining objections under s357 relating to council charges
- matters are outside the technical knowledge or experience of elected members or the council's own staff
- one or more committee members may have, or may be perceived to have, a closed mind on the proposal (such as when publicly stating opinions on the merits of a proposal in the media or at public meetings before it is heard)
- combined or joint hearings under s102 where a neutral chairperson or adviser is considered desirable.

Some councils also employ independent commissioners to make decisions on applications that are politically contentious. This removes the political pressures that may otherwise be placed on councillors at key times (such as in the lead-up to election).

Independent commissioners may also be employed to:

- assist council in carrying out their duties during times when councillors are not available due to conflicting meeting times, or heavy workloads (such as during annual plan hearings)
- to assist councils following local body elections, when there has been a considerable turnover of councillors, and hearing committees are perhaps lacking in skills and expertise, or cannot otherwise field a sufficient proportion of accredited hearing panel members hear applications,

plan changes or carry out other functions of councillors immediately after local authority elections when committees who may normally hear resource consent applications and plan changes have yet to be appointed

- to cover lengthy hearings which councillors would be unable to attend on a continuous basis due to business, financial, family or other limitations.

## USE OF MĀORI COMMISSIONERS

### Plan or Policy Statement Hearings (Standard Planning Process – Part 1 Schedule 1)

Section 34A(1A) requires councils when appointing commissioners to conduct hearings under Schedule 1, to consult iwi authorities about whether it is appropriate to appoint a commissioner who understands tikanga Māori and the perspectives of local iwi or hapū. If the council considers it appropriate, it must appoint at least one commissioner who understands these matters, in consultation with the relevant iwi authorities.

### Plan or Policy Statement (Collaborative Planning Process)

At least one member of a collaborative group must be appointed by iwi authorities to represent the views of tangata whenua (Schedule 1, Clause 40(1)). At least one member of a review panel must have understanding of tikanga Māori and the perspectives of tangata whenua, and be appointed after consultation with iwi authorities (Schedule 1, clause 64(5)).

### Plan or Policy Statement Hearings (Streamlined Planning Process)

If the Minister directs a hearing, the relevant planning process requirements under clause 77(5)(c) may apply, which include requirements for hearing panels which mirror those set out in Section 34A(1A) (see above re: Standard Planning Process). Regard must be had to any Mana Whakahono a Rohe (iwi participation arrangement) or iwi participation legislation, or treaty settlement obligation, and any process must be consistent with these obligations.

### Resource consent applications

Where formal relationships and mechanisms between local authorities and iwi, or between the Crown and iwi, confer particular resource management functions and responsibilities on iwi, these must be adhered to. For example, Mana Whakahono a Rohe – iwi participation arrangements, memoranda of understanding, co-management agreements.

There may be circumstances when Māori commissioners should be used, such as for applications involving:

- any water based issue (i.e. involving rivers, lakes, wetlands, groundwater, estuaries, harbours and coasts) such as:

- wastewater discharges to waterbodies
- taking of water
- inter-catchment water diversions
- large scale construction in waterways and the coastal marine area
- landfill developments
- use of geothermal resources
- developments near taiāpure and mātaimai
- developments that may impact on iconic waterbodies (e.g. Taupō-nui-a-Tia (Lake Taupo), Waikato River, Whanganui River and Te Waihora (Lake Ellesmere))
- proposals that are likely to affect marae, papakāinga, kōhanga reo, kura kaupapa Māori or other Māori institutions.
- proposals that may affect urupā (burial grounds), wāhi tapu (sacred sites), wāhi tupuna (ancestral sites) that are documented and/or known only to Māori (sometimes known as 'silent files'),
- any use or development that may affect mahinga kai, (culturally significant resources used in medicine, weaving, carving, art, ornamentation or other customary usages)
- activities or issues likely to affect Māori ownership or management of resources including Māori land, reserves, statutory acknowledgments, mataimai and taiapure.
- development in the vicinity of iconic natural features such as maunga and awa.
- proposals associated with specific activities or issues that are identified in iwi management plans.
- proposals based on Māori values, customary usages, practices and beliefs, for example:
- facilities associated with marae-based education and training in Māori language, arts and culture.
- wānanga (e.g. Te Wānanga o Aotearoa, Te Wānanga o Raukawa, Te Whare Wānanga o Awanuiarangi)
- use of land/sites and activities on the surface of water associated with the expression of Māori culture, such as:

- performing arts (e.g. kapa haka)
- sports events (e.g. waka ama)
- festivals, exhibitions and celebrations (e.g. Te Hui Ahurei a Tuhoe, Parihaka Peace Festival, Paihia Matariki Festival)
- tourism developments for example:
- restored/model Māori villages
- Te Wairoa buried village, Whakarewarewa thermal village, Tamaki Māori Village, Mitai Māori Village.
- Māori art and craft centres
- New Zealand Arts and Crafts Institute, art galleries
- operations or venues offering Māori cultural experiences
- Te Puia heritage park, Whakarewarewa geothermal valley, Whanganui River waka tours, marae-based tourism
- special reserves for culturally significant resources, for example:
- tōtara trees - carving, construction, medicinal
- kahikatea (white pine) – construction
- kōwhai tree - medicinal, construction
- harakeke (flax) - textiles, construction, medicinal
- tī kōuka (cabbage tree) - textiles, medicinal
- pīngao (sand sedge) - textiles, ornamentation
- remnant karaka groves – food
- hīnau trees – food
- kawakawa (pepper tree) – medicinal
- kōkōwai (red orche) - ornamentation, construction
- mānuka (tea tree) - tools, construction, medicinal
- pounamu (greenstone) - tools, ornaments

- raupō (bulrush) - construction, textiles
- tūhua (argillite) – tools
- matā (obsidian) – tools
- tītī (sooty shearwater or mutton bird) – food
- kererū (wood pigeon) – food
- tuna (freshwater eel) – food
- korokoro (lamprey) – food
- tohorā (whales) - tools, food, ornamentation

*Note: Pounamu resources are owned and controlled by Ngāi Tahu.*

- Proposals in communities that have a high Māori population and that identify strongly with Māori cultural and spiritual values e.g. papakainga and marae-based communities, and other special communities and locations) including:
  - Rātana (Rātana Church-based township)
  - Ruatahuna (Ngāi Tūhoe/Ringatū)
  - Parihaka (Whiti & Tohu movement)
  - Ngāruawāhia (Kīngitanga)
  - Whakarewarewa (traditional & natural heritage)
  - Waitangi (Treat of Waitangi)
- Proposals likely to be of significant interest to, and attract submissions from, Māori.

## GOOD PRACTICE IN THE USE OF INDEPENDENT COMMISSIONERS

- For the sake of transparency and consistency, councils should have a clear policy or set of guidelines on the use of independent commissioners which clearly states what circumstances are considered to warrant the use of a commissioner, what powers are to be delegated, and

what steps are to be followed in the appointment of a commissioner. Such a policy or set of guidelines may form part of a council's delegations manual or policy, or may constitute a separate policy.

- Councils should have a list of suitable persons from which they can appoint commissioners as back-up for occasions when commissioners who may otherwise have been appointed are not available.
- The skills and experience of independent commissioners employed should match the nature, scale and technical complexity of the issues on which a decision is being made.
- The Ministry for the Environment maintains a [list of independent commissioners](http://www.mfe.govt.nz/rma/resources/making-good-decisions-programme) (<http://www.mfe.govt.nz/rma/resources/making-good-decisions-programme>) and councillors (including their fields of expertise and areas of practice) who have achieved certification under the [Making Good Decisions programme](http://www.mfe.govt.nz/rma/practitioners/good-decisions/index.html). (<http://www.mfe.govt.nz/rma/practitioners/good-decisions/index.html>)
- A check of the past experience of candidates for independent commissioner work can be used to ensure that they have the capability to undertake the task for which they are being considered.
- Ensure the accreditation requirements of the RMA are taken into account.
- Where independent commissioner(s) are appointed for a hearing, the appointing council should confirm the appointment in writing. Such documentation should specify the powers being delegated, whether the independent commissioner(s) will be sitting alone or as part of a panel (and if part of a panel, their role on it) and details of the anticipated time, date and location of the hearing.
- Where a particular commissioner is being used by a council for the first time, the council may outline the style and detail to be contained in the written decision report, and may supplement any such outline with an example that demonstrates the style desired.
- Ensure that all material which a commissioner will need to make a decision on, is given to the commissioner as far ahead of the hearing (or the task they are to perform) as is possible. Such information should include a copy of the application, the council officer's report, and the plan(s) under which a decision on the application will be made. It is also helpful to provide an indexed copy of any submissions made to the application, and a clear map of the site to which the application relates.
- Where possible, a room separate from where the hearing is to be held, should be made available to commissioners for use in breaks during the hearing. This allows deliberation, avoids unnecessary distractions for the commissioner(s), and removes the ability of a party to try and approach or influence the commissioner(s) during or after the hearing.



- Check with the commissioner(s) if a site visit before or after the hearing is preferred, and if they want staff to assist them in pointing out the relevant features/issues on the site. (Note: some councils ensure that the person accompanying the commissioner is not the reporting officer; this eliminates any possible perception that the reporting officer may take the opportunity to influence the commissioner into favouring the council's recommendations).

## **APPOINTING INDEPENDENT COMMISSIONERS: STANDING ORDERS, CODES OF CONDUCT AND DELEGATED AUTHORITY**

Elected members or independents appointed as commissioners are not subject to standing orders or other formal committee procedures (because they are not a committee of the council). In any event, the hearing should be conducted without undue formality. From the point of view of applicants or submitters, there should be very little difference between hearings conducted by commissioners and those held by councillors.

Once the council has settled on the appointment of a commissioner, panel of commissioners or committee, it must ensure that sufficient delegations are given to these people to undertake the hearing and make decisions or recommendations. Appointment and delegation usually occur at the same time, but they are separate steps, and should both be documented.

Councils should ensure that the appointment and delegation of commissioners clearly sets out:

- the identity of the commissioners
- the identity of the chair, or whether the commissioners may elect a chair
- that the commissioners have the power, under s34A of the RMA, to both hear and make decisions on the relevant application and/or submissions or, where relevant, to hear and make recommendations
- whether the commissioners can continue to hear and make a decision if one or more of the commissioners is unable to continue with the hearing
- where necessary, that commissioners may make decisions in relation to preliminary consent processes, such as extensions of time limits, decisions on pre-hearing meetings, etc (in many cases these will not be relevant, as these steps will occur before the appointment of the commissioners)
- that the commissioners have been delegated the powers to exercise any additional power or function under ss41 to 42A of the RMA
- whether the commissioners are expected to deliberate in public or in private.

In delegating its procedural powers at the hearing, the council may wish to consider whether decisions on procedure should be delegated to the chair alone, rather than collectively to the panel of commissioners. Especially where an experienced chair has been appointed, it may be administratively convenient to leave decisions on hearing procedure entirely to the chair; this will also enable the other panel members to focus on the merits of the application.

Independent commissioners are not technically operating under a council's code of conduct. However, they should bear in mind that they represent the public face of the council in undertaking its RMA function. Commissioners must also be aware that they may only act in accordance with the terms of their delegation. Councils should ensure they clearly set out any procedural expectations for hearings conducted by commissioners at the time the commissioners are appointed.

## FULFILLING THE ACCREDITATION REQUIREMENTS OF THE RMA

There are accreditation requirements that apply when a council gives authority (including under s34A) to one person or a group of persons to conduct a hearing on:

- an application for a resource consent that is notified
- a notice of requirement given under s168 or s189
- a request under clause 21(1) of Schedule 1 for a change to be made to a plan (private plan change).

These accreditation requirements are set out in s39B. In the circumstances referred to above, the council must ensure that:

- a person is accredited (if it gives authority to one person)
- everyone in the group, including the chairperson, are accredited; unless there are exceptional circumstances that don't provide the time or opportunity to ensure that everyone is accredited but the chairperson must be accredited (if it gives authority to a group of persons that has a chairperson)
- everyone in the group is accredited; unless there are exceptional circumstances that don't provide the time and opportunity to ensure that everyone is accredited, in which case over half of all the persons must be accredited (if it wants to give authority to a group of persons that doesn't have a chairperson).

The Minister has approved the successful completion of the Making Good Decisions programme, as a qualification for accreditation. The Minister announced his decision by way of a notice in the New Zealand Gazette (<http://gazette.govt.nz/>) in accordance with s39A. All

alternate, temporary, current, retired and former judges of the Environment Court, High Court, Court of Appeal and Supreme Court are to be treated as having completed the programme. Automatic accreditation is also given to Environment Commissioners and Deputy Environment Commissioners, with five years or more experience in that capacity. To retain accreditation once retired from the Environment Commissioner role, recertification is required within three years of ceasing service and every five years thereafter, in line with recertification requirements for all other certificate holders.

Councils need to ensure that:

- the people they wish to appoint as sole commissioners or chairpersons hold a current certificate under the Making Good Decisions programme
- independent commissioners they wish to appoint as panel members hold a current certificate
- panels onto which they wish to appoint such people have the necessary majority of members who hold a current certificate.

From 12 September 2014 all members of hearing panels must be accredited under the Making Good Decision programme unless there are exceptional circumstances. This requirement was introduced by Section 14 of the Resource Management Amendment Bill (No 2) 2011. The section also introduced an extension to the range of hearings for which accreditation is required. Accreditation will also be required for hearings on:

- reviews of resource consents
- applications to change or cancel resource consent conditions
- proposed policy statements and plans
- any hearing of an objection under section 357C of the RMA

## **ADDITIONAL POINTS FOR COUNCILS WHO REGULARLY USE INDEPENDENT COMMISSIONERS**

- Where a council has many hearings that require the use of an independent commissioner over the course of a year, a pool of commissioners should be used; and the people appointed to hearings should be rotated to avoid perceptions of favouritism, or compromised commissioner independence.
- Any pool or register of commissioners should have sufficient variety of knowledge and experience to cover the typical range of hearing topics which a council may be expected to encounter during the course of a year.

- Any policy or guidelines used to guide a council in the employment of commissioners should allow for circumstances where none of the registered individuals are available, or a particular body of knowledge and experience is required but not available from those on the register.

The Ministry maintains a [list of independent commissioners \(http://www.mfe.govt.nz/rma/making-good-decisions-programme/certificate-holders-non-local-body-elected-members\)](http://www.mfe.govt.nz/rma/making-good-decisions-programme/certificate-holders-non-local-body-elected-members) and others (including their fields of expertise and areas of practice) who have achieved certification under the Making Good Decisions programme

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