

INDEPENDENT HEARING COMMISSIONER WORKSHOP

Gina Mohi

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What is a commissioner?

- ▶ A commissioner is a person appointed by a council to carry out statutory decision-making duties on the council's behalf, or to serve as an independent adviser to the council in the making of those statutory decisions.
- ▶ Commissioners may be generally classified as:
 - internal commissioners - who are appointed from within a council
 - independent commissioners - who are not a member of the council i.e. appointed from outside the elected members or staff of a council.
- ▶ Section 100A(4) requires councils to delegate its functions, duties and powers to hear and decide on an application to one or more hearing commissioners who are not members of the council when requested by an applicant, submitter or both. The intent is that this would be an exclusive delegation to independent commissioners only (i.e. not a mixed panel also containing elected members or staff of council).
- ▶ A council can appoint anyone to be an independent commissioner, but typically those appointed will have relevant skills and experience for the issue being decided (such as in planning, law, surveying, engineering or science). They may also be former councillors who are appointed for their chairing or hearing experience and expertise.

What decisions can a commissioner make?

Section 34A of the Resource Management Act 1991 (RMA) specifies the functions and powers that can be delegated to council employees or other persons such as commissioners.

Commissioners cannot:

- ▶ approve a proposed policy statement or plan; or
- ▶ delegate any powers or functions delegated to them.
- ▶ These powers are given to a council only.

Commissioners can be delegated powers in respect of:


- ▶ making decisions on proposed policy statements, proposed plans, variations or plan changes (other than approval)
- ▶ making decisions on resource consent applications and recommendations on notices of requirement
- ▶ making decisions on the notification or non-notification of resource consents
- ▶ making decisions in regard to the service of an application
- ▶ making decisions on plan changes or variations and on submissions to plan changes (other than declaring a plan change operative)
- ▶ reviewing resource consent conditions
- ▶ providing advice on technical or procedural matters in assisting councils to make decisions on particular applications.

Circumstances when an independent commissioner must be used

- ▶ 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 anytime 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 s39A 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.
- ▶ There are particular requirements for the costs of independent commissioners.

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](#))
- ▶ determining objections under s357 relating to council charges

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- ▶ 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

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 mātaītai
- ▶ 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, papa kāinga, 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, mataītai and taiāpure.

- ▶ 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: rakau rongoa, raranga, hanga whare, mahinga kai, nga mahi a rehia, nga mahi a toi, te mea te mea.

- ▶ 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.

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- ▶ 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)
 - ▶ 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. For example, memoranda of understanding, co-management agreements.
 - ▶ 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](#) and councillors (including their fields of expertise and areas of practice) who have achieved certification under the [Making Good Decisions programme](#).

Making Good Decisions Programme

- ▶ The Making Good Decisions Programme helps councillors, community board members, and independent commissioners make better decisions under the Resource Management Act 1991 (RMA).
- ▶ Commissioners must be accredited to sit on RMA hearings panels. This page outlines the accreditation process which is provided by the Making Good Decisions Programme.
- ▶ About the accreditation requirement
- ▶ It is the role of consent authorities to appoint decision-makers to RMA hearing panels.
- ▶ Under section 39B the RMA, appointees on hearing panels must have accreditation to make decisions on:
 - ▶ applications for resource consent
 - ▶ notice of requirements given under section 168 or 189
 - ▶ requests under clause 21(1) of Schedule 1 for a change to be made to a plan
 - ▶ reviews of resource consents
 - ▶ applications to change or cancel resource consent conditions
 - ▶ proposed policy statements and plans that have been notified
 - ▶ any hearing of an objection under section 357C of the RMA.
- ▶ The requirement is for all members of RMA hearing panels given authority by a local authority under sections 33, 34, or 34A to be accredited, unless there are exceptional circumstances.

How to become certified

- ▶ The certification process is run by Opus Environmental Training. To find out more see the [Making good decisions programme](#)

Recertification

- ▶ Since the inception of MGD, recertification with ongoing professional development and training has been a core component in the development and operation of the MGD programme. Changes to legislation, case law and practice can have a significant impact on the way decisions are made and the role of decision makers.
- ▶ Certificates are issued with an expiry date to ensure decision-makers have their knowledge and skills re-evaluated regularly (three years from initial certification and every five years after).

BOPRC: Making Good Decisions Sponsorship

The Bay of Plenty Regional Council sponsors three iwi representatives each year to attend the Making Good Decisions training programme. The programme provides resource management decision makers with the skills to run fair and effective hearings and to make informed decision. [Making Good Decisions Application Form](#)

- ▶ Three iwi representatives will be sponsored each year by the Bay of Plenty Regional Council. One per Māori consistency which will be selected as below:
 - Mauao - Tauranga and Western Bay of Plenty (1)
 - Ōkurei - Rotorua (1)
 - Kōhi - Eastern Bay of Plenty (1)
- ▶ The intention of the sponsorship is to provide iwi with an opportunity to build Resource Management Act knowledge and capability and to assist with fostering the capacity of Māori to contribute to decision-making.
- ▶ The initial outlay of costs will need to be met by the Iwi Authority (or their chosen candidate) in the first instance. Sponsorship is conditional upon successfully completing the course (proof of certification will be required).

Selection criteria

- ▶ The following are the criteria for the selection of nominees:
- ▶ (a) Nominees must be affiliated and/or registered with an Iwi Authority within the Bay of Plenty region.
- ▶ (b) Nominees must have endorsement in writing, from the relevant Iwi Authority.
- ▶ (c) One candidate will be selected from each of the three Māori constituencies per year. If there are no nominations from particular constituencies, other candidates can be considered.
- ▶ (d) Applicants should have experience with the Resource Management Act and decision making processes and exhibit some of the qualities, or have the potential to, as outlined above (refer above to Qualities of a Hearing Commissioner).
- ▶ (e) Preference will be given to those applicants who reside within their iwi rohe.

- ▶ **2.2.1 Selection process and closing date**
- ▶ The Chair of the Komiti Māori on advice from the Komiti Māori members will make the final selection of sponsorship candidates from those applications received.

- ▶ Apart from meeting the selection criteria, recommendations to the Komiti Māori will be based on:
- ▶ •The background information supporting the application stating why the applicant is suitable for this training (to assist in the selection process).
- ▶ •The nominee's standing and reputation in the community.
- ▶ •Feedback from the relevant iwi authority on the nominee's ability to successfully complete the programme.
- ▶ •The capacity of the relevant iwi authority in terms of environmental management.

Contact: Beverley Hughes (Māori Policy Team Leader, BOPRC) for more information

GENERAL DISCUSSION

- ▶ Writing good submissions
- ▶ Asking good questions
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