

## The direct referral process – information for submitters

This information sheet is about the direct referral process under the Resource Management Act 1991 (RMA). It has been prepared to help submitters understand the process.

### What is direct referral?

The direct referral process allows applicants to make a request to a council that their notified resource consent, notice of requirement, or heritage order application<sup>1</sup> be decided by the Environment Court, rather than the relevant council.

When an application is notified (publicly notified or limited notified), it is open to written submissions from people who may be affected by it, and then usually proceeds to a council hearing for a decision. In the case of direct referral, while the council still notifies the application and receives written submissions, the application is then transferred to the Environment Court for a decision, bypassing the council hearing and decision stage.

The direct referral process streamlines decision-making for large scale and/or complex applications that are otherwise likely to end up in the Environment Court on appeal following the council hearing and decision. The direct referral process is intended to save time and costs for both applicants and submitters.

### What type of applications does direct referral apply to?

The direct referral process only applies to **notified** applications, and only the following types:

- applications for resource consent
- applications for changes or cancellations to condition(s) of resource consent
- notices of requirement for a designation
- notices of requirement for a heritage order
- notices of requirement for an alteration to a designation or heritage order.

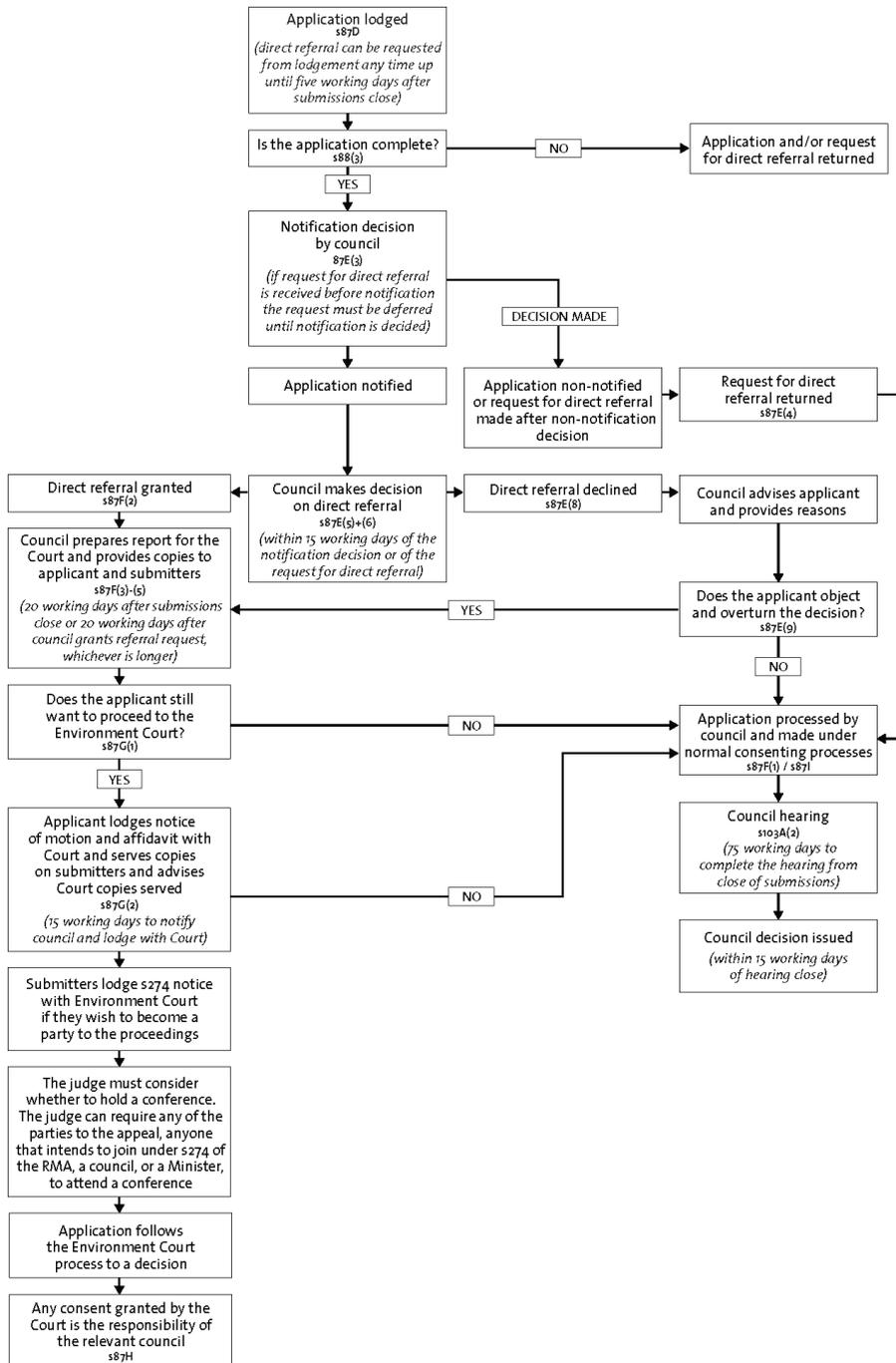
Examples of direct referral applications include large projects such as: quarries (Winstone Aggregates, Road Metals Ltd, Brookby Quarries); wind farms (Mainpower NZ Ltd and Meridian Energy); large infrastructure projects (Mahia Beach wastewater scheme and Queenstown Airport expansion); large retail developments (Pak n Save Rodney and Jackson Street Retail Ltd); and international sports venues (Hagley Oval). The direct referral process is different from, and separate to, the consenting process for matters of national significance. Refer to the [resource management section](#) on the Environmental Protection Authority's website for further information on the decision-making process for proposals of national significance.

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<sup>1</sup> Application' is used throughout this information sheet and refers to an application for direct referral, whether that is for a resource consent application or a notice of requirement for a designation or heritage order.

# What is the process for direct referral?

The diagram below summarises the direct referral process.



## Who can request an application be directly referred to the Environment Court?

Only the applicant is able to make a request to a council that an application be directly referred to the Environment Court for a decision.

## Who decides whether an application can be directly referred to the Environment Court?

The council decides on the direct referral request. The decision is made by a council officer, and/or a committee of elected council representatives or independent commissioners.

The Resource Management Amendment Act 2013 provides for an investment threshold to be prescribed, which councils will be required to use when deciding on a request for direct referral. If an application meets or exceeds the investment threshold, the council will not have the discretion to refuse a request for direct referral, unless there are exceptional circumstances.

The threshold amount and the matters a council will have regard to when determining if there are exceptional circumstances will be prescribed by regulations. These provisions will only apply once the regulations are made. A council will retain full discretion to agree or decline a request for direct referral for all applications that do not meet the investment threshold or if no such regulations are made.

People who made written submissions to the council on the notified application do not have any ability to be involved in the council decision on direct referral.

The council must make its decision to grant or decline the request for direct referral within 15 working days. The 15 working day timeframe is calculated from either the day after the council makes the decision to notify the application (if the request for direct referral is made before notification of the application), or after the request for direct referral is received (if the request is received after the notification decision).

If a council grants an applicant's request for direct referral, the Environment Court must hear the application.

## How do I find out if a request for direct referral and a decision on the request has been made?

If you have made a written submission to the council on the notified application, the council will let you know about any request for direct referral and the council's decision on that request.

## What happens if a request for direct referral is declined by the council?

If the request for direct referral is declined by the council, the applicant has a right to object to the council. Submitters do not have any ability to object or appeal the council's decision.

If an objection is made by the applicant, the council needs to reconsider its original decision and can either maintain the decision, or change its position and grant it.

If the applicant's objection is not successful, the council continues to process the application and it will proceed to a council hearing for a decision.

If you are a submitter, you can rely on your written submission to get your views across to council, or you can choose to be heard and speak to your written submission at the council hearing. The council submission form asks you to indicate whether you wish to be heard or not. You can also say whether you are interested in presenting a joint submission with another submitter. Refer to the Ministry for the Environment's booklet, [Making a Submission about a Resource Consent Application](#), for more guidance.

## What happens if a request for direct referral is granted by the council?

If a request for direct referral is granted by the council, an applicant can then lodge their application with the Environment Court. The Environment Court must hear and decide on the application.

The council is required to prepare a report on the application for the Court. This report must address the planning issues relevant to the application, suggest conditions that should be imposed if the Environment Court decides to grant the application, and provide a summary of written submissions received by the council.

The council needs to produce this report within 20 working days after written submissions close, or 20 working days after it grants the direct referral request, whichever is longer.

The council must supply a copy of its report to the applicant and all submitters, by post and/or email. It may also make the report available on its website or at council offices.

Once the applicant has received the council report, they have 15 working days to lodge an application for direct referral with the Court. This consists of a 'notice of motion' and an 'affidavit'. Once the matter is lodged with the Court, the Court becomes the decision-maker.

## Can an applicant decide not to proceed to the Environment Court?

The applicant can decide not to proceed to the Environment Court, even if a request for direct referral is granted by the council and the council has prepared a report for the Court. In this instance, the council must decide on the application.

Similarly, if, after receiving the council report, an applicant does not lodge a notice of motion with the Environment Court or within the time limit set by the Court, the council must decide the application.

The council hearing must be completed within 75 working days from the close of submissions and a decision issued within 15 working days of the close of the hearing. As a submitter, you have a right to be heard at any council hearing.

## As a submitter, how can I get involved if the application is directly referred to the Environment Court?

When the applicant lodges the application with the Environment Court, a copy of the applicant's notice of motion is served on the submitters. This lets you know the applicant is proceeding with direct referral and the application is before the Court. The Court may also advise submitters the matter is now before it (but is not required to do so).

The council will transfer your original written submission to the Court and it will be considered as part of the case. The council report will also include a summary of all written submissions for the Court.

You have the right to appear before the Court and be involved in the hearing, including speaking at the hearing. However, to do so, you must become a 'section 274 party', or a party to the Court proceedings. Unless you become a s274 party, you will not be kept informed of the Court proceedings or the decision; however, the written submission you made to the council will still be taken into account by the Court if you are a s274 party or not.

Becoming a s274 party is relatively simple. Use [Form 33](#) as a template to complete your section 274 notice. Form 33 can be downloaded from the Environment Court's website. The Court will also likely send you a copy of this form.

If you wish to be involved in the Court proceedings, within 15 working days of the applicant lodging the notice of motion with the Court, you must formally lodge your s274 notice with the Court and serve your s274 notice on the relevant council(s) and the applicant. The Court will let you know who all the other parties are. You must send your s274 notice to those other parties within 5 working days of the deadline you had for lodging your s274 notice with the Court. You do not have to pay a fee to lodge a s274 notice. If you are unclear about the timing and process, then contact the Court to discuss. The Court corresponds with s274 parties about the hearing and Court support is available throughout the Court proceedings to help s274 parties understand the process.

You may choose to seek professional help from a lawyer and/or other relevant professional, such as a planner, to help decide whether or not to become a s274 party or rely on your written submission as summarised by the council report provided to the Court. An expert may also help you complete the s274 notice and prepare for the Court hearing.

## What are the implications of being a section 274 party?

### Involved in court proceedings – speaking and cross-examination rights

By becoming a s274 party, you have a right to be involved in the Environment Court proceedings related to the application, and in particular, have speaking rights at the Court hearing. This gives you the ability to speak to your legal submission or any evidence you produce for the Court hearing (or have others speak on your behalf). You also have the ability to cross examine other parties. However, you do not have to do any of these things if you choose not to.

Section 274 prevents certain persons becoming parties to direct referral proceedings before the Environment Court. For example, trade competitors of the applicant funding persons to become a party to a direct referral application.

### Mediation or pre-hearing conferences

You may be required by the Judge to attend mediation or pre-hearing conferences. If the Judge requires you to participate in such a process, you must participate unless the Court grants leave otherwise. You may be represented by other people, but only if at least one of those people is authorised to make decisions on your behalf about any matters reasonably expected to arise in the mediation or conference.

Refer to the Ministry for the Environment's booklet, [You, Mediation and the Environment Court](#), for more information about the mediation process. You may also become involved in resolutions, such as consent memoranda or orders, which can be reached by the Court before the hearing occurs.

## Costs

A further important implication of being a s274 party is that you are potentially liable for costs. The Environment Court may order any party to pay money to any other party to help offset the expenses incurred during a hearing. Costs are not awarded automatically. The party seeking costs must apply to the Court. The Environment Court has the discretion to decide whether to award costs, and how much.

It is generally unlikely that costs would be awarded against you as a s274 party in a direct referral case, unless the matters you have raised are considered by the Court to be frivolous or vexatious or your conduct during the proceedings has led to Court's time being wasted. There is a presumption in the Act that costs will not be awarded against s274 parties. Generally, the bulk of the costs will rest with the applicant. Refer to the Ministry for the Environment's booklet, [The Environment Court: Awarding and Securing Costs](#), for more general information about costs.

## Appeal

As a s274 party, you may also appeal a Court decision. See Appeals on the Environment Court decision section for more information about appeals.

## Where will be the Court hearing held?

The Court is required to hold the hearing as close to the locality of the application's subject matter as it considers convenient, unless the parties agree otherwise.

As a submitter, you may request a location for the hearing, but the final location is at the Court's discretion. Wherever possible, the Court will look to hold hearings in its own Court rooms.

## What is the Court process?

An Environment Judge will be assigned to the case and a Hearing Manager (also known as Courtroom Registrar) from the Court will be formally appointed. If you become a s274 party, you will receive a letter with the Hearing Manager. The Hearing Manager usually works with the Environment Judge to plan the course of the proceedings and is your key contact.

The Court can appoint a Court member as a process advisor, particularly when there are a number of parties representing themselves. The role of the process advisor is to help submitters understand the Court process to better prepare for the hearing of the application. However, process advisors cannot give legal advice.

## Pre-hearing conferences, expert witness conferencing, and mediation

The Court will encourage the applicant to try and resolve your issues before the hearing. If the issues cannot be resolved, the Court may require a pre-hearing conference. If the Judge requires you to participate in such a process, you must participate unless the Court grants leave otherwise. You may be represented by other people, but only if at least one of those people is authorised to make decisions on your behalf about any matters reasonably expected to arise in the conference. The pre-hearing conference enables the Court to ensure proper preparations are made for the hearing of the proceedings at a later date.

As a s274 party, you can call expert witnesses (see below) and they will be expected to participate in conferencing. Expert witness conferencing occurs before a hearing generally as a matter of course and is the process by which expert witnesses confer and attempt to reach agreement on issues, or at least to

identify the issues of disagreement. For more information, refer to the [Environmental Court Practice Notice 2014](#).

The Court may require you to proceed to mediation. Mediation can help parties identify common ground and define, narrow and even resolve issues, which may avoid the need for a hearing, or at least narrow issues to reduce the hearing time. If the Judge requires you to participate in such a process, you must participate unless the Court grants leave otherwise. If you are required to attend mediation you may be represented by other people, but only if at least one of those people is authorised to make decisions on your behalf about any matters reasonably expected to arise in the meditation.

For further information, on mediation refer to the Ministry for the Environment’s booklet, [You, Mediation and the Environment Court](#).

## **‘Submissions’, evidence and witnesses**

A case consists of two key elements – submissions and evidence. ‘Court submissions’ should not be confused with written submissions made to the council in the earlier part of this process when the application is notified. All parties (the applicant, the council and s274 parties) can make submissions to the Court.

At the Environment Court, submissions mean a statement (usually written but can be oral) at the Court hearing outlining the law and suggesting why the Court should take a particular course of action. Submissions may also give reasons why the evidence of one group of witnesses should be preferred to that of another. This is the parties’ opportunity to state their position. The Court may ask questions, but other parties may not cross-examine submissions.

Submissions are not evidence. Evidence is given by witnesses, under an oath or an affirmation to tell the truth. Most evidence is evidence of fact, but it can also include opinion. For the Court to give weight to opinion evidence, the person giving it must be qualified to do so. Evidence is subject to cross examination from other parties and to questions from the Court. If you do give evidence, it must be in writing and exchanged in advance (refer to the section below on evidence exchange).

Witnesses who give evidence may be either experts or lay witnesses. Lay witnesses may only give evidence of fact – for example, how a proposal may impact on them. Expert witnesses may give evidence that is a mixture of both fact and opinion. To give ‘expert evidence’, you must be skilled or qualified in the matter on which you are giving your opinion. The test is whether something is within the general knowledge of an average person, or whether to validly offer an opinion or interpretation, the witness must have specialised knowledge. An expert witness may be a person with specialised knowledge on matters such as planning, noise, Maori cultural matters, or geology. The [Environmental Court Practice Notice 2014](#) sets out a code of conduct for expert witnesses.

The Court has commented that it finds certain information from lay witnesses to be useful. This includes those aspects of the environment you appreciate, your reasons for that appreciation, and how your appreciation might be affected by a particular proposal. The Court has stated that it is not appropriate to rely on technical information sourced from the internet.

If there are other submitters with the same issues, you should consider whether to prepare and present a joint submission and share legal and expert representation to potentially save time and costs.

You may make submissions and/or give evidence. Ask yourself – “How will what I say help the Court to come to the conclusion I want?”

## Evidence exchange

Evidence in an Environment Court hearing is circulated to the parties in advance of the hearing. Parties may agree on an evidence exchange timetable or the Court will direct one. A date is set for the applicant to file their evidence in chief (the documents, affidavits, and annexures used in making your case). Then a further date is set for the s274 parties and the respondent(s) to file their evidence in chief. All evidence must be served on all other parties. The Court will advise of the parties involved and the number of copies required.

The evidence must be in writing (preferably typed) and may include visual material such as photographs, maps and plans. It is sensible to take the applicant's and respondent(s)' evidence into account when writing your evidence.

Your evidence should start with your name, address and possibly occupation. The Court will be interested in the effects of the proposal on you personally. For example, matters of relevance include the proximity and direction of your property to/from the activity and how the proposal impacts on you and your property. It is important to make clear what your concerns are and to concentrate on the main points and present them in a logical order. If there are inaccuracies in your evidence, you must correct it in Court, but you cannot add new material. The purpose of pre-circulating evidence is that no party is taken by surprise.

## What happens at the Court hearing?

If an agreement is not reached through mediation then the application will proceed to a hearing before the Environment Court. The Court consists of a Judge and usually two Commissioners. Commissioners are specialist members of the Court who can help evaluate expert evidence. For example, Commissioners may be qualified in fields such as economics, commerce, planning, business, local government, heritage protection, environmental science, architecture, engineering, surveying, construction, minerals technology, matters relating to the Treaty of Waitangi, and kaupapa Maori.

The Commissioners are not simply advisors to the Judge. They are members of the Court and have an equal say in the decision the Court comes to. The usual course of events at the hearing is listed below.

1. The applicant presents their case. This may include legal submissions and/or expert witnesses presenting evidence.
2. The council presents its report. This may also include legal submissions and/or expert witnesses presenting evidence.
3. Submitters present their case. This may include legal submissions and evidence – both from experts and lay witnesses.
4. The applicant makes their final submission.

You may speak yourself, or you may prefer for a representative to speak on your behalf at the hearing, or both.

On the first day of the hearing the Courtroom Registrar will 'call' the matter. All parties (or their legal counsel) will stand, and state their name and who they represent.

At the start of the hearing each party presents its opening legal submissions. Opening legal submissions usually outline the evidence that will be called (if any), state the resource management issues of relevance, and state any legal principles that will be relied on. In most cases, the Court will have pre-read all the evidence that has been filed and expects all parties to also have read it. Generally, a witness will take the oath or affirmation, be asked to confirm qualifications (if relevant), and confirm the evidence is true, and then proceed straight to questions on it.

Alternatively, the Court may ask parties to read their evidence in Court or they might adjourn so the Court can read the evidence. The order of the proceedings is generally as above, or as agreed by parties at a pre-hearing conference, or as directed by the Court. When presenting your arguments (either in legal submissions or evidence) you should be focussed and only include matters that are relevant. When making legal submissions you will be limited to the issues you raised in your s274 notice.

Nobody can be precluded from cross-examination; however, the Judge will keep an order to proceedings to ensure the hearing is run efficiently and to avoid repetitive questions. Re-examination of witnesses (by their own legal counsel) is also available.

While the Court may give submitters representing themselves considerable latitude, that does not mean that 'anything goes'.

There are points of etiquette to be aware of when you appear before the Court, including rising when the Judge enters, addressing the Judge as "Your Honour" or "Ma'am" and addressing other parties by their formal names, even if you know their first name. For more information about Environment Court protocol, refer to the Ministry's booklet, [Your Guide to the Environment Court](#).

You are welcome to observe other Environment Court hearings before the case you are involved in. This can be a good opportunity to see the place a hearing will be held in and how a hearing is conducted. If you would like to attend an Environment Court hearing as an observer please contact the Courtroom Registrar.

## The Environment Court decision

Once a decision has been made, the Environment Court will issue a copy of the decision to you at the address you gave on the s274 notice.

The Environment Court will also let all submitters, including those who do not become a s274 party, know when a final decision is available.

## Appeals on the Environment Court decision

Appeals on the Environment Court decision can be made to the High Court by the applicant and any s274 party, but only on points of law and not on findings of fact. As a s274 party, if you are considering an appeal, you should seek legal advice about whether an appeal has merit.

## Monitoring and enforcement of the decision

If the Environment Court grants the application, the council is responsible for monitoring and enforcing the decision, including all conditions.

## Relevant publications and information

[The direct referral process – information for applicants](#)

An Everyday Guide to the Resource Management Act:

- [Making a Submission about a Resource Consent Application](#)
- [Your Guide to the Environment Court](#)
- [You, Mediation and the Environment Court](#)
- [The Environment Court: Awarding and Securing Costs Environmental Court Practice Notice 2014](#)

## Glossary

**Affidavit** – a voluntary declaration of facts which is written down and sworn before an authorised officer.

**Affirmation** – in giving evidence to the Court, if a witness does not wish to swear on a bible and to God, they may affirm that they will speak the truth. See also ‘Oath’.

**Applicant** – a party who requests something, or makes an application to the Court. May also refer to the party that made a resource consent application to the council.

**Brief of evidence** – a statement of evidence completed by a witness. See also ‘Expert evidence’ and ‘Witness’.

**Closing legal submission** – a summary of the main points of your case, which is given orally and/or in writing.

**Costs** – when the Environment Court orders any party to pay money to another party, to help offset expenses incurred in a hearing.

**Court brief** – a written set of the evidence that has been filed on a case and provided to the Court.

**Courtroom Registrar** – the Environment Court staff member allocated to manage the case from filing through to the hearing of a matter. They will liaise between the Court/Judge and the parties, organise the hearing, administer directions in relation to the hearing, record and log the hearing for transcript purposes, swear in witnesses, and provide assistance to the Court and parties during the hearing process.

**Cross examination** – the questioning of a witness at a hearing by a party opposed to the party who has called the witness.

**Evidence** – statements of fact made by a witness. Evidence can be two kinds – evidence of fact and evidence of opinion. Evidence of opinion may only be given by expert witnesses – someone who has qualifications and experience. See also ‘Expert evidence’.

**Evidence in chief** – the documents, affidavits, and annexures used in making your case. It does not include information obtained under cross-examination.

**Exhibits** – documents such as photographs, maps or plans that are included in evidence.

**Expert evidence** – evidence about a scientific, technical, professional, or other specialised issue given by a person qualified to testify because of familiarity with a subject or special training.

**Expert witness conferencing** – the process by which expert witnesses confer and attempt to reach agreement on issues, or to identify the issues on which they cannot agree, and the reasons for disagreement. Expert witness conferencing normally occurs before a hearing. Also known as expert witness caucusing.

**Hearing Manager** – see Courtroom Registrar.

**Legal submission** – written or oral arguments presented to the Court to persuade the Court your case is valid. This is different to evidence, but relies on the evidence that has been produced to support the submission. (Note: this is different to a ‘written submission’ made to the council on a notified resource consent application.)

**Mediation** – a process to resolve disputes using an independent person.

**Notice of motion** – a written document informing the Court and other parties that you have lodged a request with the Court.

**Oath** – a spoken promise that you will be truthful and honest. See also ‘Affirmation’.

**Points of law** – questions (or an appeal) about how the law was interpreted or applied.

**Pre-hearing conference** – a conference held in Court with all relevant parties to sort out any pre-hearing matters. These matters may include the filing of evidence, attendance at mediations and caucusing, the order of parties at a hearing, and witness availability. No substantive issues are addressed at a pre-hearing conference.

**Rebuttal evidence** – further evidence in reply to cover points raised in other witnesses' evidence in chief.

**Section 274 party** – a party to an Environment Court proceeding who has registered their interest under section 274 of the RMA.

**Submitter** – person or group who has made a written submission to the council on a notified resource consent application.

**Witness** – a person called to give evidence in Court because they have knowledge or information about a relevant factual point in the case. See also 'Expert witness'.

**Witness statements** – written statements of evidence produced by a witness.

**Written submission** – a written submission made to the council on a notified resource consent application. It is different from a 'legal submission' made to the Court.

## Disclaimer

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You can contact the Courtroom Registrar on 09 916 9091.

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