Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Pāremata

Inquiry on the Natural and Built Environments Bill: Parliamentary Paper

Oral presentation to Environment Committee

Via Zoom, 2 September 2021

- At the outset, let me say something very nice: I applaud the Government's decision to place an exposure draft in front of the select committee and the public. This is the grown-up way to conduct complex law reform. Now for the critique.
- The Bill must provide a measure of priority for the natural environment. In my view, the natural environment is prior to the economy and society. Whatever social, cultural and economic aspirations we may have are only achievable if we have secured the biophysical systems on which life depends. To put it starkly, the economy and society are a subset of the environment.
- The current drafting does not guarantee that. As it stands there is a risk that the Natural and Built Environments Bill (NBEB) becomes something of a blank canvas, with the environmental limits, environmental outcomes and national planning framework supporting whatever trade-offs between the protection and use of the natural environment the Minister favours at the time. Trade-offs are unavoidable. However, Parliament should be clear about who makes those trade-offs and within what limits. In my view the NBEB should not merely create a framework for environmental protection and development. The core elements of environmental protection should be enshrined in primary legislation rather than left to be made by way of regulation.
- As you will be aware I have focused my submission on clauses 5 and 7 which, in my view, need to be strengthened to secure the environmental ambition of the Bill. I can provide a tracked changes version for comparative purposes if that would be helpful.[1]
- With respect to clause 5, I have proposed a number of amendments, the most important of which is to make clause 5(1)(b) – which talks about the use of the environment – subject to 5(1)(a) which is in essence about protecting the environment. This is not such a radical thing to do. As the local government professionals organisation, Taituarā, note, just such a hierarchy can be found in the recent National Policy Statement for Freshwater Management, which imposes a clear hierarchy to ensure that the water is being managed in a way that prioritises: first, the health and wellbeing of waterbodies and freshwater ecosystems; second, the health needs of people (such as drinking water); and third, the ability of people and communities to provide for their social, economic and cultural wellbeing, now and in the future.
- With respect to clause 7 concerning limit setting, as drafted, limits do not have to be set at any particular level. This is left entirely to the Minister.
- In my view, Parliament should give environmental limits more substantive content in primary legislation by clarifying that their ambition is, where necessary, restorative. The limits clause refers by and large to common or shared resources. My impression is that most New Zealanders today

[1] See https://www.pce.parliament.nz/media/197129/pce-proposed-nbeb-drafting-changes-pdf-223-kb.pdf.

would say that we shouldn't let the state or health of these resources deteriorate further and that where possible, we should be trying to improve their state.

- I've proposed an amendment that would make it clear that environmental limits must, in degraded environments, lead to improvement beyond the status quo. It would preclude a Minister from deciding to interpret the clause to support whatever trade-off he or she favoured and avoid limits being set at the current lowest common denominator of already degraded ecosystems.

- As currently drafted, clause 7 leaves significant policy matters (the level of ambition and their impact on property rights) to secondary legislation. Good practice would see key determinations about the way such regulatory powers can be exercised apparent on the face of the statute.[2] In my view, it should be Parliament that determines the scope of how powers to protect the environment are exercised.

- In addition, primary legislation should specify the relevant considerations to which the Minister must have regard in setting limits.[3] Parliament did that recently in the Climate Change Response Act requiring the Climate Commission and the Minister to have regard to a range of considerations in setting emissions budgets.

- Important considerations for setting environmental limits include the transparency with which advice from relevant scientific experts is used, and the way the public is consulted. The select committee should take advice on both the process of limit setting and the scope of ministerial discretion.

- Finally let me add a few observations that relate to the closing paragraphs of my submission under the heading "a final word of caution".

- As I have noted, our experience of the Resource Management Act 1991 (RMA) tell us that placing aspirational words on the face of a statute is no guarantee of their ambition being realised. The RMA did not require limits to be set. It was permissive. When governments have set out to use their powers under the Act they have frequently met opposition. The RMA did not fail to achieve environmental outcomes because decision makers lacked the legal authority to pursue them. Rather, decision makers were unwilling to impose solutions. A requirement for environmental limits that bite will not make them any less controversial because a statute has made their prescription mandatory.

- The committee should scrutinise very carefully the rationale that requires the proposed national planning framework to promote sixteen (unprioritised) outcomes. There is a view that the RMA's focus on environmental effects was somehow limiting, and that the promotion of environmental outcomes is a more wholesome thing to do. The words following the notorious "while" in section 5(2) of the RMA was in effect a single outcome. Having sixteen will not make life any easier. I have already questioned whether they can all appropriately be called *environmental* outcomes. Even more questionable is whether a Minister or a planning committee can "direct" such outcomes – but that is the word used in clause 13(1).

- But even if they can, having to focus on all of them means, inevitably, that decision makers from the Minister downwards will be thinking about a great deal more than the natural environment. There are practical limits to the number of outcomes public agencies can be asked to 'direct' let alone do so effectively and coherently. They will invite the close input of at least half the Cabinet.

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[2] See Legislation Design and Advisory Committee, Legislation Guidelines (2018), chapter 14.

[3] These relevant considerations need not only apply to environmental limits as they could also be applied to other parts, such as the National Planning Framework, where substantial heavy lifting is expected to be done in secondary legislation.

The Minister for the Environment will be competing for attention with a wide range of developmentally mandated colleagues.

- The determination to put everything into this Act flows from a longstanding demand for 'integration' or, to use another piece of jargon, 'policy coherence'. That was one of the big innovations of the RMA and I've always gone along with it. But I have to admit that I have started to have second thoughts. That 'integrationist' ethic is what drives the battle you can see from submissions about where the balance lies in the purpose clause. It's interesting that submitters as different as Stephen Selwood, an infrastructure guru, and the New Zealand Conservation Authority have in different ways suggested that perhaps we should have two statutes – something the Resource Management Review Panel rejected.

- I think there is something artificial about labelling all of the sixteen outcomes as "environmental outcomes". At least a quarter of them relate squarely to the built environment. The built environment is different. It's a developed, created environment and it is developed and created spatially. It happens somewhere. I am wondering if the promotion of these sort of outcomes wouldn't be better as part of the proposed Spatial Planning Act. Rather than being 'consistent' with the Natural and Built Environments Act (NBEA), it could be subject *to* that Act – or even a separate, subordinate part *of* it.

- I accept that separating the material into two parts doesn't avoid the need to integrate. But for me at least it would make the terms of that integration clear at the highest level.

- I have come to the view that high-level spatial planning to facilitate and integrate infrastructure development and shape the sort of urban environments we need to cope with climate change and the health of the people who live in them, makes a lot of sense. I don't believe the RMA has managed that well.

- Dealing to the built, created environment in its own statute could also be the place to say more about the quality of the urban environment that is being created and recreated. (I note that Mr Randerson himself and many submitters have expressed concern about the near absence of anything about the quality of the urban environment that we should be aspiring to). Dedicating a spatial planning statute or a part of the NBEA to these issues while still making them subject to the environmental purpose and limits I have argued for is, again, not such a radical idea. As the Auckland Council wisely noted in its submission to you, urban form responds to the natural environment and not vice versa.

- Finally, Parliament needs to try to reach broad agreement on the core elements of environmental protection that *must* be put in place, and the scope that should be available to ministers to implement and amend those over time. This is every bit as important as the framework that has been developed for carbon budgets. The means will always be up for debate, but the direction of environmental ambition should not be.

- At its passage, the RMA enjoyed a consensus on what it sought to achieve. Parliament needs once again to deliver a stable legislated basis if we are to make progress. Otherwise, we will have exchanged a statute whose terminology is well tested and carries a degree of certainty, for two new ones with uncertainties and the prospect of wholesale repeal.

- I think there is a large measure of agreement about some of the long overdue reforms of process that the Review Panel identified. I also sense a broad consensus that environmental quality has to be given a higher priority. But I think Parliament needs to see all the pieces of the jigsaw on the table before it tries to finalise any bit of the picture. It doesn't make sense to pass new environmental legislation without knowing what the future shape of local government looks like. This is now under review as is the future management of the so-called 'three waters'. A line of

sight to where all that will end up is important before you start delegating decision-making powers to levels of local government.

- New Zealand seems very good at conceptualising legislation but much less impressive when it comes to implementation. But it is the funding and implementation of stuff that has so often bedevilled development. Local government has too often been asked to implement central government's grand plans without the fiscal or technical tools to do so. I know the Government is very much aware of this, but Parliament needs to satisfy itself that any tasks it asks local government to carry out are within its competence. You can't be sure of that until you can see the shape that local government will take.