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

# Submission on the Natural and Built Environments Bill Exposure Draft

To the Environment Committee
4 August 2021

## Submitter details

This submission is from the Parliamentary Commissioner for the Environment, Simon Upton.

I wish to appear before the Environment Committee to present my submission.

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**Key points**

I recommend that the Environment Committee consider:

- Clarifying and strengthening the hierarchy of the natural environment in the purpose (clause 5)
- Revising the section on environmental limits (clause 7) to:
  - Consolidate all the clauses relevant to environmental limits in one clause
  - Ensure limits can be set that enable restoration of already degraded environments where this is necessary
  - Ensure that mandatory limits cover all of New Zealand although the level of the limit may vary regionally
- Including in the primary legislation relevant considerations to which the Minister must have regard in setting environmental limits

## The Parliamentary Commissioner for the Environment

The Parliamentary Commissioner for the Environment was established under the Environment Act 1986. As an independent Officer of Parliament, the Commissioner has broad powers to investigate environmental concerns and make recommendations to improve environmental outcomes. He is wholly independent of the government of the day. The current Parliamentary Commissioner for the Environment is Simon Upton.

# Introduction

1. Firstly, I would like to commend the Government for placing an exposure draft of its planned Natural and Built Environments Bill (NBEB) before the public through this select committee. It is an excellent way to seek a wide range of inputs on key clauses before the legislative process is set in train.

2. The NBEB seeks to extend government direction over a very wide range of environmental, social, cultural and economic matters. My submission, as your Commissioner for the Environment, extends only to matters concerning the environment. My role covers only a fraction of the issues that would be dealt with under a statute conceived along the lines of the NBEB.

3. It appears that the Government intends that the NBEB should be the flagship piece of legislation that addresses the protection of New Zealand's environment. I start from the premise that if this is to be the case, it *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.

4. It is important to stress this point because the policies of recent decades have treated economic and social progress as being of pre-eminent importance. We have thought about the environment as something 'external' that provides an almost limitless flow of services, and whose underlying resources can be endlessly substituted for by other forms of capital. It is only the appearance of serious environmental stress that has aroused an awareness that there are limits to the extent to which we can claim those 'services' and 'assets'.

5. I have, therefore, tried to assess this exposure draft with the following question in mind: to what extent does the drafting prioritise the protection and, where appropriate, the restoration of the natural environment. That is the primary issue of substance I address.

6. If the NBEB is to meet this objective, two clauses in particular require further work:

    a. the purpose statement (clause 5) should be amended to expressly prioritise the protection and restoration of the natural environment; and

    b. the concept of environmental limits (clause 7) should be given further substantive meaning so that the limits provide a buffer of protection for the ecological integrity of the natural environment.

7. Without these changes there is a risk that the 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.

## Purpose statement

8. Clause 5 of the NBEB sets out its purpose. As with any statute, a clear articulation of the purpose is important because:

    a. the purpose statement will be used to interpret the Act (and any environmental limits, outcomes or national planning framework, etc determined under it);[1] and

    b. all powers and functions that exist under the Act must be exercised in accordance with their statutory purpose.[2]

9. My concern with the present drafting of clause 5 is that there is no clear hierarchy between the protection of the natural environment and the use of the environment. Rather, the concepts are merged together in clause 5(1) (or within the concept of Te Oranga o te Taiao).

10. This can be contrasted with the explanatory material to the exposure draft (page 9 of the Parliamentary Paper) which lists the first two reform objectives as being to:

    a. protect and where necessary restore the natural environment, including its capacity to provide for the well-being of present and future generations

    b. better enable development within environmental biophysical limits including a significant improvement in housing supply, affordability and choice, and timely provision of appropriate infrastructure, including social infrastructure

11. I read this as establishing a hierarchy between the protection of the natural environment on the one hand, and its use and development on the other, with such use and development being subject to environmental biophysical limits. This hierarchy is important and is not reflected in the current drafting of clause 5.

12. The purpose of the Act is to "enable" Te Oranga o te Taiao to be upheld *and* people and communities to use the environment. I note that clause 5(1)(b) relies on a definition of the environment (see clause 3 – Interpretation) so broad that it can incorporate almost anything. In my view the matters in clause 5(1)(b) should be enabled subject to clause 5(1)(a).

13. I note that the term "Te Oranga o te Taiao" has not appeared in legislation before. It is important that its scope is understood in conjunction with the words "including by protecting and enhancing the natural environment". The use of the word *including* implies that the concept is broader and this is confirmed by the definition of the phrase in clause 5(3) which extends to "the intrinsic relationship between iwi and hapū and te taiao".

14. The select committee should satisfy itself about what that intrinsic relationship might imply for the distinction between the protection or restoration of the natural environment in clause 5(1)(a) and the use and development of the environment as contemplated by clause 5(1)(b).

15. If the relationship is one that implies use it might not be possible to give the natural environment priority when it comes to the use of the environment. If it does not imply use, then I find the

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[1] See Burrows and Carter Statute Law in New Zealand (6th ed, 2021), Chapter 8; s 10(1) of the Legislation Act 2019; and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) at [22].

[2] See *Unison Networks v Commerce Commission* [2008] 1 NZLR 42 (SC) at [53].

definition of the term a very useful way of talking about how we might understand the environment of which we are a part.

16. To best give effect to the objectives set out in the explanatory material, I would recommend that clause 5 is redrafted as follows:

**5 Purposes of this Act**

(1) The purposes of this Act are to,—

(a) uphold Te Oranga o te Taiao and to protect, and where possible, restore, the ecological integrity of the natural environment;[3]

(b) subject to (a),[4] enable people and communities to determine how the environment may be protected, used and developed in a way that supports the well-being of present generations without compromising the well-being of future generations.[5]

(2) To achieve these purposes in an integrated manner, the Act —

(a) provides for environmental limits that must be complied with; and

(b) provides for environmental outcomes that must be promoted which will include the protection, restoration and enhancement of the natural environment;[6] and

(c) requires that any adverse effects on the environment from its use must be avoided, remedied, or mitigated.

(3) In this section, Te Oranga o te Taiao incorporates—

(a) the health of the natural environment; and

(b) the intrinsic relationship between iwi and hapū and te taiao; and

(c) the interconnectedness of all parts of the natural environment; and

(d) the essential relationship between the health of the natural environment and its capacity to sustain all life.

## Environmental limits

17. The exposure draft creates a framework for the establishment of environmental limits and environmental outcomes. Such limits appear to be the principal way the draft seeks to privilege environmental outcomes. There are two problems with the drafting: firstly, it does not provide any direction about the level of ambition that the limits should secure; secondly, the term 'limits' does not lend itself easily to the range of environmental protections that the clause seems to have in mind.

[3] This wording is from the explanatory material to the NBEB with an added reference to ecological integrity and is not governed by the verb "enable".

[4] It is relatively common for statutes to refer to a primary or main purpose, and then have other or additional purposes. However, in my view the concept of (a) and (b) being the two purposes of the NBEB, but with (b) being subject to (a), fits best with the explanatory material and the idea that development should occur within environmental biophysical limits.

[5] This wording is from current clause 5(1)(b) with an added reference to people and communities determining how the environment will be used and developed.

[6] The addition of "which will include the protection, restoration and enhancement of the natural environment" is intended to emphasise the priority of protecting the natural environment as part of outcome setting.

18. On the question of ambition, limits do not have to be set at any particular level. This is left entirely to the Minister. The only guidance is provided by the definition of 'ecological integrity' in clause 3 – Interpretation. The definition reads as follows:

> **ecological integrity** means the ability of an ecosystem to support and maintain—
> (a) its composition: the natural diversity of indigenous species, habitats, and communities that make up the ecosystem; and
> (b) its structure: the biotic and abiotic physical features of an ecosystem; and
> (c) its functions: the ecological and physical functions and processes of an ecosystem; and
> (d) its resilience to the adverse impacts of natural or human disturbances

19. While I support the use of this term, all the heavy lifting in terms of guaranteeing some sort of 'bottom line' is being done by the word *natural* in paragraph (a). It could be argued that if ecological integrity means being able to support the natural (i.e. pre-degraded) diversity of indigenous biodiversity, this is a demanding standard. However, natural diversity is not defined and composition could, along with structure, functions and resilience, be interpreted to mean the current, degraded state of the environment or something modestly better than that.

20. In my view, Parliament should give environmental limits more substantive content in primary legislation by clarifying that their ambition is, where necessary, restorative. The 'matters' referred to in clause 7(4) in respect of which limits must be prescribed largely refer to common or shared resources. My impression is that most New Zealanders today 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. An appropriate way to do this would be to describe what the minimum acceptable limit is and require a buffer above this.[7] Accordingly, new subclauses could be inserted as follows:

> Environmental limits must provide a margin of safety above the level required to achieve the purpose in subsection (1).
>
> Where the state of the environment is degraded and would not without restoration or improvement achieve the purpose of subsection (1), limits must specify a minimum level of restoration or improvement and the time limit within which that restoration or improvement must be achieved.

21. This addition would make it clear that environmental limits must, in degraded environments, lead to improvement beyond the status quo and avert the possibility that a Minister could interpret the clause to support whatever trade-off between the protection and use of the natural environment he or she for the moment favoured.[8] Such wording would also help avoid the perverse outcome of an environmental limit being set at the current lowest common denominator of already degraded ecosystems.[9]

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[7] See RMLA Salmon Lecture 2020, Simon Upton, 12 October 2020, found at https://www.pce.parliament.nz/media/197067/salmon-lecture-rma-reform-coming-full-circle.pdf

[8] It could also preclude the need to make reference to a 'precautionary approach'.

[9] This is a real risk because once set, environmental limits must immediately be complied with. For already degraded ecosystems a limit with any degree of ambition would require an immediate cessation of some current activity. That is neither practicable nor fair. Providing a mechanism by which a more ambitious limit can be met over time will help avoid that.

22. Providing a better division of labour between primary and secondary legislation is important. 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.[10] In my view, it should be Parliament that determines the scope of how powers to protect the environment are exercised.

23. An additional approach that would both improve ambition and help ensure limits are set robustly would be to spell out in the primary legislation relevant considerations to which the Minister must have regard in setting limits.[11] An example of such an approach is section 5ZC(2) of the Climate Change Response Act 2002 which requires the 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.

24. Beyond this, the Committee should consider whether the term "limit" adequately covers the range of ways in which the effect of environmental controls should sensibly be described. Clause 7(6) talks of either a minimum biophysical state or a maximum amount of harm or stress. The term limit seems well-suited to specific environmental media like water or air but less well-suited to the effects of activities on biodiversity or particular specified places where natural attributes call for protection.

25. Furthermore, there is no indication of the coverage of those environmental limits that must be prescribed. The fact that an environmental limit must be prescribed in the proposed national planning framework does not mean it will have national coverage. A reading of clause 7(3) suggests that a Minister could discharge his or her obligation to prescribe a limit for any of the matters listed in clause 7(4) by proposing something that applies only to a part of the country. On the other hand, national coverage does not have to mean uniform coverage.

26. It would make sense to consolidate references to limits in one place so that it takes on the shape of a code. Clause 12(2) (form of environmental limits) could, for example, becomes part of clause 7.[12] A possible consolidated alternative draft of clause 7 is attached as an appendix.

## Other matters – outcomes and the relationship of the NBEB and the proposed Spatial Planning Act

27. Section 8 details a lengthy list of outcomes that must be promoted "to assist in achieving the purpose of the Act". They are described as *environmental* outcomes but that can only be meaningful in terms of the definition of environment in clause 3 – Interpretation, which, as I have noted above (paragraph 12) is so broad as to incorporate just about any social, cultural, economic or environmental outcome. I would question whether this is a useful or accurate description of the outcomes and would be inclined simply to describe them as "outcomes".

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

[11] 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.

[12] This would also apply to clause 16 (precautionary principle) but this is superseded by the proposed "buffer" definition of environmental limits. See paragraph 20 above.

28. Furthermore, it is a moot point whether any public agency can simultaneously try to provide for all these outcomes and align them. Neither is it clear why only some of the outcomes listed must be provided for in the national planning framework (clause 13).

29. The draft leaves the Minister to resolve conflicts between outcomes by regulation (clause 13(3)). The select committee needs to consider whether this is appropriate or whether some hierarchy of priorities is required.

30. Provided the changes I have proposed to sections 5 and 7 are effected, limits should be able to protect the natural environment. But for the avoidance of any doubt, the opening words of section 8 could state that:

    To assist in achieving the purpose of the Act, the national planning framework and all plans must, subject to section 7, promote the following outcomes…

31. The proposed NBEB's limits and outcomes are also supposed to be consistent with regional spatial strategies to be developed under a new Strategic Planning Act. These are described in the explanatory material as follows (page 18):

    They will be a key mechanism in the RM system requiring local government, central government and iwi, hapū and Māori, and to take a joined-up strategic vision of the future. This is about identifying the big issues and opportunities facing a region and identifying how it will grow and change over the next 30 plus years. RSSs will provide a clear strategic direction to decision-makers.

32. I can see that there is sense to providing a spatial plan that can integrate the provision of infrastructure with both urban and rural development and response to climate adaptation. Without the text of this companion Bill, it is impossible to know what its effect is likely to be on the protection of the environment. There is no reason why regional spatial strategies could not be developed under the NBEB. If they are not, the Strategic Planning Act will have to duplicate or cross reference large parts of the NBEB. I will reserve my comments on the wisdom of this division of labour between the two bills until we can see them side by side. But the development of regional spatial strategies must incorporate limits on the use of the natural environment as non-negotiable boundaries within which the spatial development of regions is elaborated.

## A final word of caution

33. If anything is to be learnt from our experience of the Resource Management Act 1991 it is 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 they lacked the legal authority to pursue them. Rather, decision makers were unwilling to impose solutions. In a sense, nothing has changed. A requirement for environmental limits that bite will not make them any less controversial because a statute has made their prescription mandatory.

34. Further, I think the Committee should not assume that requiring sixteen (unprioritised) outcomes to be promoted is necessarily a step forward. 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 RMA's focus on environmental externalities 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. 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'- the word used in clause 13(1) – let alone do so effectively and coherently. The approach carries with it the risk that many of the core concerns the environmental community holds dear will be competing for attention with a wide range of developmental issues.

35. That is why 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.

36. Much is at stake here because if a stable consensus cannot be achieved, we will have exchanged an environmental protection statute whose terminology is well tested and carries a degree of certainty, for a new one with uncertainties that may take two or more decades to resolve. Many of the frustrations that surround the RMA are procedural and linked with the capacity and structure of local government to implement complex legislation. They could be addressed within existing legislation as easily as they can be in new legislation. So it is vitally important that in opting for a new statutory framework, Parliament can deliver a stable legislated basis from which to move forward.

# Appendix 1: Possible drafting for environmental limits

**7 Environmental limits**

(1) The purpose of environmental limits is to protect, or where necessary restore or improve:

(a) the ecological integrity of the natural environment:

(b) the mana and mauri of the natural environment:[13]

(c) the capacity of the natural environment to support the health needs of people.

(2) All persons using or protecting the environment must comply with environmental limits.

(3) Environmental limits must be prescribed for all—

(a) air:

(b) biodiversity, habitats, and ecosystems on land, in freshwater and in coastal water:

(c) coastal waters:

(d) estuaries:

(e) freshwater:

(f) soil.

(4) Environmental limits may also be prescribed for any other matter that accords with the purpose set out in subsection (1).

(5) Environmental limits must provide a margin of safety above the level required to achieve the purpose in subsection (1).

(6) Where the state of the environment is degraded and would not without restoration or improvement achieve the purpose of subsection (1), limits must specify a minimum level of restoration or improvement and the time limit within which that restoration or improvement must be achieved.

(7) Environmental limits may be formulated as a combination of any or all of the following—

(a) the minimum biophysical state of the natural environment or of a specified part of that environment:

(b) the maximum amount of harm or stress that may be permitted to the natural environment or on a specified part of that environment:

(c) spatial controls:

(d) controls on intensity or location of human activities.

(8) Environmental limits may be prescribed—

(a) qualitatively or quantitatively:

(b) at different levels for different circumstances and locations.

[13] This subclause has been moved from the outcome clause – see clause 8(g) – thereby ensuring that limit-setting takes account of Māori values and avoids it being lost amongst 15 other unprioritised outcomes.

(9) Environmental limits must be prescribed either—

(a) in the national planning framework (see Part 3); or

(b) in plans, if the national planning framework prescribes the requirements relevant to the setting of limits by planning committees (see section 25).

(10) In subsection (7)(a), biophysical means biotic or abiotic physical features.