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

What I will be looking for in resource management reform

Resource Management Law Association conference

Rotorua, 23 September 2022

Introduction

One aspect of my role as Parliamentary Commissioner for the Environment is to ask whether policy makers are asking, from the environment's point of view, the right questions. If they aren't asking the right questions, we can't hope for enduring solutions to the problems that are alleged to plague environmental management

Since I work for Parliament, not the Government, I can be most effective if I can help select committees to ask penetrating questions. It is their job to hold the government to account.

In helping them with their job, I will be applying an *environmental* lens to what is proposed. But although the environment is a key element of the proposed reforms to the Resource Management Act 1991 (RMA), they are not just about the environment. They are also about:

- the biophysical and spatial footprint of economic development
- the delivery of certain social outcomes such as housing and recreational amenity
- the allocation of natural resources (and the distributional outcomes they raise)
- the development of physical infrastructure
- a re-dealing of the cards when it comes to the responsibilities of elected officials at all levels of government
- and last but not least, a new chapter in the dialogue about how to make contemporary sense of the Treaty of Waitangi in respect of the governance of natural resources.

That's at least six additional lenses. Six lenses in respect of which there are frictions and trade-offs when it comes to the environment. It would be nice if this exercise was about aspirations and ambitions. But at its heart it will be as much about processes. While my focus is largely environmental, I make no apology for commenting on process because without good process and accountability, the mandate for environmental action will be weakened.

So what will I be looking out for?

The primacy of the environment

Our economy, our cultures and our wellbeing are completely dependent on the environment. They are inseparable from it. New Zealand's premier environmental legislation needs to make that clear. We have so far seen an exposure draft of a small fraction of the likely content of the National and Built Environments Act (NBEA). We haven't seen the equally important Spatial Planning Act (SPA).

Without a precise understanding of how these two statutes legally relate to one another, there is no way of knowing exactly what sort of priority the environment will be accorded and what processes and accountabilities will apply.

In my view, environmental and developmental matters are necessarily spatial. The environment isn't an abstract collection of attributes. We live in it, cut across it and degrade it (as well as protect it) in *places*. It is a living system. So what we do in places – and what we do *spatially* – has to fit with the living grain of the environment.

That means spatial plans can't start with a clean sheet. They should be constrained by the enduring environmental values and services that have been identified. Obviously we can't start with a clean sheet even if we wanted to. Past infrastructural decisions cast a heavy shadow. Places have been irrevocably changed. The question is how much more irrevocable change will we permit?

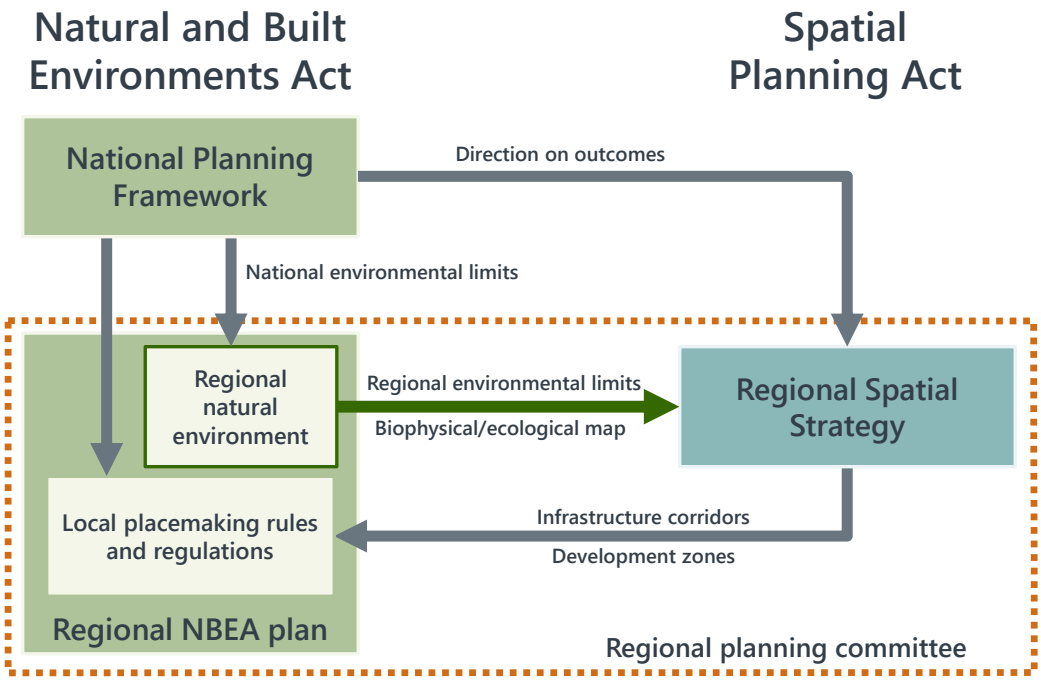
A single regulatory plan is proposed for each region under the NBEA. This plan needs to be developed in two parts. In the first place, the grain of the landscape – its topographical, biophysical, ecological and cultural particularities – need to be mapped and any national or regional environmental limits applied. Only then can you lay out the broad lines of future development: the infrastructure that will need to be built, the sorts of activities that you want to group together – residential here, commercial there, etc.

Once you've done that, you can return to the detail of the many regulatory settings that are needed to implement the spatial plan and the regional NBEA plan. This sequence shouldn't be a problem because both plans are being developed by the same Regional Planning Committee. But the sequence really matters.

Simply stating that regional spatial plans and regional NBEA plans should be 'consistent' isn't enough. Regional spatial plans should be elaborated *subject to* the environmental limitations and protections that have been identified nationally *and* regionally. Spatial plans need to map environmental no-go areas: environmentally and culturally sensitive areas where, if development proceeds, extra care must be taken; and areas where, provided environmental limits are not threatened, a much more permissive approach is acceptable. Detailed regulation should then be tuned to what has been spatially mapped.

I would propose a sequenced approach that allows feedback like this:

Proposed hierarchy and sequencing



In establishing a clear hierarchy of what's important, I think the Government could draw inspiration from the hierarchy of obligations set out for *Te Mana o te Wai* in the National Policy Statement for Freshwater Management 2020 (clause 1.3.5).

The National Policy Statement for Freshwater Management 2020 specifically "*prioritises:*

- *first, the health and well-being of water bodies and freshwater ecosystems*
- *second, the health needs of people (such as drinking water)*
- *third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future."*

Surely these priorities apply to all the claims we make on the environment, not just water? It is high time we took the primacy of the environment seriously. People say they do – but then a lot of time and money is spent lobbying for 'pathways' or arrangements that continue to imply on-going trade-offs. The climatic disruption we are starting to see is a grim reminder that we are running out of pathways that keep on trying to make the environment a subset of the economy, not the other way round.

This logic suggests that the smorgasbord of outcomes we glimpsed in the exposure draft of the NBEA needs to be triaged between the rather different goals of environmental protection and spatial planning. Rather than pretending that the provision of housing and infrastructure are 'environmental' outcomes, I would suggest they should be associated with spatial planning and be pursued subject to real bio-physical environmental outcomes such as the ecological integrity of our rivers and wetlands or the natural and eroding character of the coastline.

I remain unconvinced that we need *two* separate statutes to achieve the integration of outcomes we are seeking. The argument has been advanced that we need a separate SPA to provide links to the

Local Government Act 2002, the Land Transport Act 1998 and a few others. I see no reason why those links couldn't be made directly with the RMA's replacement, the NBEA, particularly when it appears that the same regional planning committees will be drawing up both environmental and spatial plans.

Nevertheless, the Government has opted for two acts. What cannot be avoided is the reality that the subject matter of the two bills will encompass contested, even conflictual matters which makes the *process* for grappling with them so important. I will come back to that point later.

But for the moment I just want to note that I will be asking:

- *Do the Bills give clear unambiguous priority to the natural environment?*
- *Does spatial planning start with the needs of the natural environment first and only then overlay future development?*
- *Is there a clear hierarchy which decision makers can refer to in respect of conflicts that arise?*

Who should do what, at which level?

The proposed reforms represent a determination to make much greater use of central direction; and to impose significant new responsibilities at the regional level. What will remain within local control is not clear. Let's take each in turn.

National-level decisions

An absence of national direction is widely agreed to have been a serious shortcoming of the Resource Management Act's implementation. That had more to do with a reluctance to use the Act's possibilities rather than any design flaw. Indeed, in recent times, governments of both political colours have started to become more directive as the pressures of population growth and deteriorating environmental quality have made themselves felt.

The new code will bring together all existing national direction, add new stuff and explicitly empower the Minister to resolve any and all conflicts that arise between them. This will be no easy task.

And it will be no panacea. Only some things can be resolved by or benefit from national direction – things like consistent methodologies for environmental monitoring and reporting; some minimum environmental limits; definitions and rules for things that will have little local variation.

But there are plenty of matters that inevitably raise conflicts, nationally, regionally and locally. The new emphasis on requiring the promotion of some very heterogeneous outcomes almost guarantees the need for national direction. From what we have seen so far, the Minister for the Environment will have pretty much carte-blanche to decide what requires national direction and what that direction should be.

These new powers – and the process governing how they can be exercised – will need to be carefully considered.

I hope the Medium Density Residential Standards (MDRS) is not a harbinger of what is to come. While not a National Policy Statement or National Environmental Standard, it represents national direction. The fact that it was imposed by bi-partisan legislation doesn't make it any more desirable.

This broad-brush liberalisation of density limits allows for little flexibility. It is highly prescriptive. I have been talking with a number of councils about the consequences of the MDRS. They are causing problems not because councils don't want to make provision for more housing, but because the

MDRS requirements clash with other services councils are obliged to provide such as stormwater and related infrastructure.

The MDRS has trumped existing national direction and other regulatory requirements. It clashes with the National Policy Statement on Urban Development 2020. It also clashes with the not unreasonable aspirations of residents who purchased property with restrictions that were integral to its value in the broadest sense.

The MDRS was, in my view, a knee jerk reaction by both major political parties to a housing crisis whose causes are multifaceted and were a long time in the making. Zoning restrictions provided a convenient scapegoat while factors such as very low interest rates and the tax-free gains available to investors in residential properties were conveniently overlooked.

I have dwelt on the MDRS because if national direction and conflict resolution of this nature can be dealt with in future by regulation, we are conferring very considerable powers on Ministers. Those powers must be subject to a process that provides proper scrutiny and limits the room for environmentally questionable trade-offs. Legislation cannot assume benign intentions. For that reason, primary legislation needs to have sufficient checks and balances on those powers and set out rigorous, independent processes for setting environmental limits, providing national direction and resolving conflicts.

Key questions I will be asking are:

- *Are there sufficient checks and balances set in legislation to limit the power to make regulations with far-reaching effects?*
- *Are the principles and criteria that must be considered when setting limits, the national planning framework, and resolving conflicts clearly stated in primary legislation?*

National level participation in regional decisions

Beyond directing lower levels of government on what must happen, central government also needs to be a collaborator. Central government is a major service provider and investor in such things as roading, hospitals, education facilities and social housing. Regional spatial plans provide a useful vehicle for central government to play a more constructive and facilitative role.

Under existing legislative arrangements, central government participation at regional and local levels has arguably been too light touch. It has tended to do so in the name of individual agencies rather than taking a more joined-up approach.

For regional spatial plans (and regional NBEA plans) to work, that will have to change. Central government needs to develop a way of engaging with one voice. It also needs to be able to integrate the way it makes key investments and financial contributions through the various agencies it is responsible for.

Napoleon doesn't feature in our history books and we lack the French penchant for central planning, but I must confess to having been intrigued and impressed during my years in France by the way the French Government manages to mobilise resources alongside regional level government to pursue urban development and infrastructure. Our efforts feel like a cottage industry in comparison.

Regional level decisions

It is clear that the engine room of the new system will be at the regional level. In addition to their existing powers, regional planning committees will take over setting all the regulations currently in the hands of Territorial Local Authorities (TLAs) as well as developing spatial plans.

From an environmental point of view, I have no problems with this. As a unit of environmental management, the catchment has long been the logical jurisdictional boundary. New Zealand realised this long before many other countries that still struggle with fragmented management units. It is the obvious basis for managing soil and water. Much of our conservation and reserve land is of regional significance. Giving these same entities responsibility for regional spatial plans makes good sense.

Major infrastructure traverses regions and services populations across rural and urban areas. Managing many of these assets, and providing for development and change, demands that we look beyond the somewhat arbitrary boundaries of existing TLAs. It is pretty clear from this that regional councils are going to become more important entities and are likely to need significant new resources.

Yet, while publicly elected, regional councils are probably the element of elected government that is currently most detached from the public (leaving to one side Auckland and the other existing unitary councils). That is not a criticism of regional councils. It just reflects the reality that the day-to-day concerns of most New Zealanders, particularly urban ones, are managed by TLAs.

The push for a single regulatory plan to be determined by a committee comprising representatives from the TLAs and iwi Māori will inevitably test the limits of what can be claimed to be a body with genuinely democratic proximity. And it inevitably raises the question of why local government reform hasn't been more transparently discussed.

Since local government reform is squarely outside my remit, I can perhaps speak more frankly on this topic than those with a direct interest in it.

If making the region the engine room of the resource management system means that regional and local government will be making financial commitments with less local public accountability, funding reform needs to be part of the conversation. Central government may have to give local government resources it has to date been reluctant to consider: a combination of additional central government funding coupled with new financing tools to implement some of the investments required by regional spatial and NBEA plans. Tools to capture value-uplift, price scarce resources or impose congestion charges are just some of the mechanisms that should be explored. It is no surprise to me that many officials – elected and otherwise – are taking an interest in the 'city-deal' approaches that have worked in the UK and Australia.

As for the proposed new quasi-democratic regional planning committees, they seem in part to be an unspoken work around for avoiding the word that shall not be uttered – amalgamation.

Many of the pressures that have been hardest to accommodate under the Resource Management Act are growth pressures around our largest cities. The pressure for change in many peri-urban environments has been made much more difficult by TLA boundaries which reflect another era. Fast-growing urban centres like Hamilton and Tauranga abut multiple TLAs. District Councils that were once squarely rural and provincial in flavour find themselves pulled in two directions: a peri-urban fringe integrating rapidly with the metropolitan centre and a rural periphery concerned with the maintenance of traditional and in some cases increasingly fragile services and infrastructure. They are chalk and cheese. It is not hard to make the case for amalgamating the peri-urban fringe into the centre and consolidating what's left as new and largely rural authorities.

A further problem which has been raised in conversations with some regional groups is the potential for spatial plans to over-reach. I am a strong supporter of these plans. But while you will want consistent, region-wide standards for managing things like water quality across an entire catchment, managing growth along the Hamilton to Auckland corridor has limited relevance to what is happening in Piopio, Awakino or National Park. While a genuinely pan-regional approach will apply to some issues, there will be others that don't extend to every corner of a region.

The reality is that while communities are located in regions, people don't *live* regionally (except maybe for rugby): they live locally. The concern has been expressed to me that if spatial plans have to cover an entire region, there is a risk that this will lead to all sorts of 'horse-trading' to satisfy disparate and physically distant interests. The risk arises because implementing regional plans will require funding from constituent TLAs. Elected councils currently have very little financial head room to make the new investments needed and only one main way to finance them – rates. The incentive is for each part of a region to negotiate as hard as it can to get investment in its particular patch even if it has no bearing on another part of the region.

This is not a theoretical risk. It has been the experience of all of those I have talked to who have been involved in existing spatial plans – whether mandatory, like the Auckland Plan, or voluntary arrangements such as SmartGrowth in Bay of Plenty and FutureProof in Waikato.

In my view there needs to be provision for sub-regional spatial plans – such as the Hamilton to Auckland corridor or the Queenstown-Wanaka-Alexandra triangle – that allow for more detailed focus and thinking on particular sub-regional issues without having to engage representatives from places far away.

Sub-regional plans could also help to solve the local representation issues on regional planning committees, both for district council politicians and officials as well as Māori where the proximity of hapu to place is so important.

District and city level decision-making

Finally, and very briefly, let me observe that not every regulatory decision needs to be taken at the regional level even if it will appear in the single regulatory plan. There are all manner of things of a 'place-making' nature that can safely – indeed desirably – be delegated to the level of TLAs or even Community Boards. A determined effort needs to be made to invest in the principle of subsidiarity for both regulation and expenditure.

The questions I will be asking are*:*

- *How does spatial planning allow for levels of granularity?*
- *Are the processes for developing spatial plans conducted by people with relevant expertise and, in particular, environmental expertise?*
- *Will the Crown speak with one voice? and will it deliver the funding mechanisms to achieve the mix of environmental and infrastructural outcomes that are in play?*

Knowing whether we are making a difference

I've had quite a bit to say about roles and responsibilities. On one matter I have a particularly clear view: the need for sufficient information to tell us whether our policies, rules and regulations are making a difference. As some of you may be aware, I have produced three major reports which touch in one way or another on the quality of the information base on which environmental management relies. The have focused on:

- The Environmental Reporting Act 2015.
- The way we prioritise and fund environmental research.
- The way environmental evidence informs – or doesn't inform – wellbeing budgets.

In a month or so I will be producing a final wrap-up report which asks how we can join the dots and ensure that there is a constant feedback loop between environmental reporting, expenditure and research.

But my concern is wider than the ground I've covered in these three reports. Everything I have touched over the last five years reveals worrying gaps and inconsistencies in the way we try to inform environmental management. It was a key theme in my review of the threat weeds pose to our indigenous biodiversity and in our management of hazardous chemicals. We seem very good at grand policy and altogether reluctant when it comes to ground-truthing whether we are making a difference.

The proposed reforms will make even greater claims on environmental information if they are to have a chance of succeeding. Establishing environmental limits will require information and knowledge informed by science and mātauranga. Monitoring and information will also be needed to know how close we are to breaching environmental limits.

Some of this information can be assembled nationally. Some is inherently local and arises from consent monitoring. There will be a need for guidance on collection methodologies and the use of modelling. This will require technical expertise, consistent resourcing and, critically, independence – all things that are sparse in the current system.

Regional ratepayers are currently reluctant to shoulder significant, centrally-imposed environmental monitoring costs. As the focus swings towards the regionalisation of management under national direction, that reluctance will grow. While the knowledge and expertise that has been built up in some regional councils must be retained, who funds it and guides it has to be the subject of some serious and urgent consideration.

In my view, giving some of these functions to the Environmental Protection Authority (EPA) and funding it centrally would resolve a funding stand-off that has held back environmental monitoring for three decades. Those functions could include:

- Providing national operational direction on standards and methodologies for biophysical data collection.
- Advising on an appropriate national network of monitoring sites for all environmental domains.
- Leading the creation of new environmental data sets.
- Driving innovation in the collection and analysis of environmental data.

I am not proposing that the EPA should attempt to monitor the environment from Wellington. But it could provide a better coordinating and resourcing role for local, on-the-ground monitoring if it had a regional presence.

At one extreme, regional council staff currently assigned to this function could simply be transferred to the EPA creating a regional office. A less disruptive option would be for a few EPA staff to be co-located in each regional council. They could provide liaison between local experience and knowledge, including locally acquired mātauranga, and centrally held knowledge. They could form the nodes of a network of technical expertise across regional councils and within the EPA national office.

Such a change would simultaneously strengthen the environmental monitoring and reporting system and the resource management system. It would help link national direction with local implementation.

The questions I will be asking include:

- *Is environmental monitoring mandatory?*
- *Will there be sufficient resources for monitoring the state of the environment and compliance with consents and limits?*
- *Are the institutional settings, roles and responsibilities clear for who monitors what?*

Conclusions

If anything is to be learnt from our experience of the Resource Management Act, 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 set out to use their powers under the Act they frequently met opposition.

The RMA did not fail to achieve environmental outcomes because it failed to provide 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.

Further, we should not assume that requiring a range of 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 a whole list of them 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' let alone do so effectively and coherently.

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 limit the scope that is available to Ministers to 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. 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.

Finally, many of the frustrations that have plagued the RMA are procedural and linked with the capacity and structure of local government to implement complex legislation. The fact that we failed to address those concerns under existing arrangements raises the possibility that we will face the same difficulties under new legislation. The RMA was seen as a progressive and sophisticated piece of

legislation. The motivation that underpins the current reform is no less progressive or sophisticated. Even though we haven't yet seen what the new bills will look like, it seems fair to bet that they will make heavy demands on elected officials – in particular, regional level politicians.

We must be careful not to ask too much of people. Central government has built a large, well-funded bureaucracy to support the citizens our electoral process delivers to Wellington. We need to be wary of passing complex new tasks to elected officials at lower levels of government without the means to support them. Otherwise we risk a crisis of confidence.

Voter turnout in regional council elections was 56% in 1989. It has only topped 50% twice since then. In recent times it has hovered around the 44% mark. For almost a decade, democratic control was suspended in one of the largest and most important of them. As Parliamentary Commissioner for the Environment, I am acutely aware of how much environmental management already relies on regional councils – and how stretched they are. If central government wants to make new environmental and spatial planning demands of regional authorities, it must match its directions with resources or dial back its ambitions. Passing laws alone won't do the trick.

As I've remarked to many of you, the RMA became a convenient scapegoat behind which people promoting radically different interests could safely take shelter. They will now have to come out into the open.

Many people are hoping for a simpler, less complex planning system. The current RMA runs to about 835 pages. It remains to be seen what the two proposed new bills will weigh in at. But I have the feeling that it will not be long before we hear people moaning about the new legislation because they can't do what they want to.

Unavoidably, this legislation cuts across every property right in New Zealand. It cuts across a huge debate about the place of the treaty in relation to natural resources. Peel away the aspirational language and its subject matter is inherently contested. That is why the processes it establishes and the mandate they can command will be so important. Never has the need for a resource management *law* association that asks probing questions been so important.