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

# Submission on
# The Natural and Built Environment Bill and the Spatial Planning Bill

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## Submitter details

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## Overview

The reforms proposed by the two bills before the Environment Committee (the Natural and Built Environment Bill and the Spatial Planning Bill) amount to a far-reaching reorganisation of environmental management in New Zealand. As Parliamentary Commissioner for the Environment, I have a statutory responsibility to provide Parliament with, *inter alia*, advice on the effectiveness of our environmental planning and management systems.

At the highest level the proposed reforms:

- significantly strengthen the power of central government to lead and direct environmental regulation through an integrated national planning framework rather than a collection of ad hoc policies and environmental standards
- require the setting of environmental limits
- require the development of regional spatial strategies to support the coherent development of infrastructure and urban expansion
- hand responsibility for environmental regulation and regional spatial strategies to unelected regional planning committees
- require everyone exercising powers under these Acts to do so in a way that promotes a wide range of social, economic and environmental outcomes.

The first three objectives have considerable merit. If we want to halt and reverse the decline in environmental quality we face, there has to be better accountability for clear, enforceable environmental regulation. If we want 'stuff to happen' then we need to be able to stitch together the big infrastructural investments that underpin urban and regional development in a coherent way.

I have more doubts about whether regulatory authority and accountability for exercising it are well-aligned.

And I consider the attempt to weld a wide range of unprioritised outcomes into what is supposed to be the basis for environmental law in New Zealand unwise. This framing inevitably invites a debate over how these outcomes should be balanced, setting protective 'green' outcomes and outcomes which place a stronger emphasis on housing, infrastructure and development in opposition to one another.

My submission concentrates on the major structural elements of the proposed reform together with some attention to key clauses. One of the biggest problems I discern, is the locus of accountability proposed for various elements of the environmental management system and the sequence in which regulatory provisions are developed.

In my view, it is preferable to think about the material these Bills cover as three layers, *all* of them spatial and each with its own accountability structure. The first is biophysical – the natural environment on which we depend and with which we interact. This layer requires a long-term view, and a degree of independence from short term political pressures. The complexity of the natural environment means that the technical and financial resources of central government will be needed to do this well. A significantly re-tooled Environmental Protection Authority is the obvious candidate to fulfill this role.

The second layer concerns the spatial form that land use development takes and the way in which long-lived infrastructure connects it. This layer is all about integrating outcomes of a socio-economic nature. Provided this is done in a way that runs with the grain and assimilative capacity of the underlying landscape as detailed in the first layer, there is no reason why directly-elected regional councils should not be fully accountable for this layer. The sequencing of these two layers is crucial.

Finally, a third layer concerns the world of local communities embedded within the first two layers. This is all about the wishes and preferences of local communities about their own place. Elected councils are best-placed to make these place-based rules – provided they are consistent with the biophysical and regional spatial layers.

In addition to my comments on outcomes, sequencing and accountability, there are other key problems. In trying to be all things economic, social, cultural and environmental to all people, the purpose clause is filled with ambiguity. It needs to be crisper and more focused. Environmental limits and protected areas are expected to do the heavy lifting to protect the environment but are so full of holes they are not up to the task.

Changing the law alone will not necessarily improve the state of the environment. To do that requires the marshalling of expertise and financial resources, and placing regulatory powers in the hands of those best placed to exercise them. Social, economic and cultural objectives rely on the natural environment so they must be pursued subject to the natural environment's limits and carrying capacity. The proposed reforms do not succeed in doing that.

Even if the Bills are substantively amended, I question whether they can deliver an enduring framework. As they stand, they substitute the uncertainty of new law with novel definitions and complex ambitions for the relative certainty of amending the existing legislation. They propose uneasy accountabilities. Significant reform could equally be achieved through comprehensive amendment of the Resource Management Act 1991 (RMA). Either way, the task facing the committee is more than just simple drafting changes.

A large amount of good work has been undertaken since the commissioning of the RMA review panel. These bills are the first time we have been able to appreciate how the whole system will fit together. They are, in effect, our first real exposure draft. They reveal that much work remains to be done. The time needs to be taken to do that work. Otherwise, it will be left to the courts to determine what this legislation means and to Parliament to make running repairs as it was so frequently called to do with the RMA.

## Some introductory comments about what the bills are trying to achieve

Let me say at the outset that these bills propose some good changes that are overdue.

- Getting rid of the absurd process whereby district and regional plans can be appealed *ab initio* on their merits. Why go through this all twice at enormous expense over a timeframe that can last most of a decade?
- Requiring integrated national direction on mandatory topics in a single document, rather than an assortment of (sometimes contradictory) National Policy Statements and National Environmental Standards.
- Requiring the setting of environmental limits.
- Introducing a framework for targets for environmental improvement.
- Providing provisions to shorten or cancel consents for poor compliance or if the activity will breach a limit.
- Providing a statutory basis for regional spatial strategies.
- Improving environmental monitoring and compliance, monitoring & enforcement.

Unfortunately, the bills avoid other changes which are overdue.

- Providing a robust basis for the non-bureaucratic allocation of resources such as water.
- Investing the resources needed to understand and monitor environmental processes to inform environmental regulation.
- Aligning local government boundaries with the realities of dynamic change in some key growth nodes.
- Reviewing the fiscal levers available to regional and local government.

While it can be argued that the last two matters are matters of local government reform, believing that this can wait is a mistake. The Natural and Built Environment Bill and the Spatial Planning Bill radically change accountability by elected officials. That accountability cannot be considered separately from the substance of what people are asked to be accountable for.

As Parliamentary Commissioner for the Environment, my fundamental concern is to ask if the environmental interest is advanced by these two bills. The reforms represented by the bills seem to be rooted in the premise that failure to achieve better environmental and planning outcomes under the RMA is the result of legal deficiencies in that statute – deficiencies that can be rectified by passing new laws. While some strengthening of the law is needed, my conclusion is that the main barriers to better environmental outcomes aren't legal ones. They are, rather, rooted in:

- a lack of willingness to use some of the powers that the RMA provided (although this is starting to change)
- insufficient high-quality information to inform many existing regulations let alone the much more demanding world of targets, limits and other protections envisaged by the proposed legislation
- an inability to articulate the scale of the transition that faces some communities let alone how such a transition might be accomplished.

The results are evident in rural New Zealand where water quality is, in many catchments, far below acceptable levels. There is a tendency to agree on aspirational environmental outcomes but a reluctance to carry them through into the field. In some places, land use will have to change or reduce its intensity. But the only significant changes occurring at present are being driven by the accidents of climatic damage or the incentivised conversion of land to forestry as a means of avoiding fossil fuel emissions reductions. The business of tackling over-allocated catchments or higher discharges of pollutants than the environment can assimilate has barely begun. The technical and governance challenges of linking farm-level outcomes with overall catchment carrying capacity are profound. And despite years of talking about it, we don't seem able to devise allocation regimes that match the productive market economy we say we want.

In urban New Zealand there has been a reluctance to deal with managing urban density, mobility and air quality. Mandating minimum density requirements will not address a reluctance to charge for congestion and invest in the infrastructure needed to support the intensification of urban space. The problem here is one of investment, not law. Modified and new urban environments designed and built in line with modern environmental design criteria can result in vastly better outcomes than the mid to late twentieth century wiring we live with – and see failing – today.

Many of these shortcomings could be secured through the on-going development of national direction. Others require changes to other Acts and other policies.

The select committee is asked to consider two bills that will create a new framing for environmental law and new processes. By themselves, even if extensively amended as many environmental submitters are urging, I very much doubt whether they will yield better environmental outcomes than could be achieved by simply amending the RMA without having to embark on a new voyage of legal discovery in the courts. And even if everyone agrees that it is better to have newly minted law, I do not believe we need two separate Acts of Parliament to achieve better management of growth and service provision at the regional level.

## What this submission will not be saying

Before outlining the reasons for my doubts about the proposed legislation, I want to identify some complaints you will not be hearing from me:

- **The claim that the bills are too long and complex**

  The RMA is complex. So are the proposed replacement bills.

  Complexity in legislation of this nature is inevitable. The environment we live in is not simple. It intersects with everyone's property rights. There are many interdependencies between property owners as well as many spillovers from their use of environmental resources. The natural environment also goes to the core of Māori identity. Any attempt to manage these frictions or conflicts, whether through regulations or markets, will involve complexity and demand high levels of specialist expertise. The question is how best to do that.

- **The claim that the bills rely too heavily on regulation**

  This flows from the complexity point. Even if your policy tools of choice were market mechanisms to enable individuals to reach mutually agreed, contractual solutions, you would need to create those markets. In itself, that is a hugely complex regulatory exercise – just look at the New Zealand Emissions Trading Scheme if you don't believe me.

## Key issues

The Committee will need to rely on the knowledge and technical skills of resource management, planning and legal experts all of whom have conducted forensic examinations of the text of these bills. They have access to far larger legal resources than I do. Many of the shortcomings they have identified are the result of poor drafting and can no doubt be fixed.

But there are a lot of them and that underscores two things: firstly, this is immensely complex legislation and much depends on interpretation; secondly, it gives a glimpse of what lies ahead – a future that is as litigiously fraught as the present, but one in which we will only learn over time exactly where the legal cards have been dealt. The committee really needs to question whether the immensity of the proposed change is worth it in terms of the uncertainty that will come in its train.

Rather than offer another fine-grained legal opinion (of which the committee has no shortage from which to choose), I would like to draw attention to a few key areas that I consider to be particularly problematic.

- **The problem with so many outcomes**

  Fundamental to the proposed reform is the belief that because the RMA did not mention a raft of developmental outcomes as being important, they were strangled by a focus on the effects they might cause. The proposed solution is to name all the outcomes we might be seeking and require conflicts between them to be resolved through national direction.

  Reading the Randerson report, it is hard to pin down exactly why the Resource Management Review Panel felt that listing a large number of outcomes would change anything.[1] Most of the text on this matter (see paragraphs 65-70) simply reports the thrust of the submissions it received. It seemed to agree with what it heard from the New Zealand Planning Institute:

  > "As the New Zealand Planning Institute said in its submission on our issues and options paper, 'an aspirational and forward-looking planning approach is needed to complement effects-based planning.' This would provide greater clarity about what the system seeks to achieve in management of both the built and natural environments."

  Clause 5 provides a rich menu of 16 discrete outcomes to be provided for. Whether it adds clarity is another matter. Familiar environmental outcomes are present in subclause (a). But subclause (c) takes expansive flight:

  > (c) "well functioning urban and rural areas that are responsive to the diverse and changing needs of people and communities in a way that promotes—
  >
  > (i) the use and development of land for a variety of activities, including for housing, business use, and primary production; and
  > (ii) the ample supply of land for development, to avoid inflated urban land prices; and
  > (ii) housing choice and affordability; and
  > (ii) an adaptable and resilient urban form with good accessibility for people and communities to social, economic, and cultural opportunities; and"

  The extent to which these outcomes are dependent on being planned for is a moot point. Housing affordability is the consequence of a myriad economic factors including monetary conditions and demand-side pressure from net immigration, not just the supply of land for which the bill demands an "ample supply". If it is good enough to demand ample supply of land for housing why not a clause demanding "an ample supply of water for primary production"?

[1] Resource Management Review Panel, 2020. New Directions for Resource Management in New Zealand. Wellington: Ministry for the Environment.

Since when has choice been something we legislate for? Planning and environmental restrictions will affect what can take place where and to what degree. But does spelling out a long shopping list like this change anything? One thing it certainly does do is invite the question: what is the relative priority of these many outcomes?

With hindsight there is some irony in this extract from the Randerson report:

> "From an environmental perspective, Forest & Bird points out that a focus on 'outcomes' in addition to effects could provide greater certainty about environmental limits and a necessary focus on restoration of the natural environment. We agree."

But only if you focus on the *right* outcomes. One suspects Forest & Bird had environmental outcomes in mind, not the use and development of land for housing, business and primary production. The all-embracing nature of the purpose clause coupled with a wide range of desirable outcomes inevitably raises the question of whether decision-makers are being invited to balance this all up depending on their developmental or conservationist appetites.

Now in fairness, the notion of limits is supposed to save the day and constrain what can be balanced. The Natural and Built Environment Bill (NBEB) at least is pretty clear that decision-makers cannot breach limits – except where one of the myriad exceptions is exercised. But if limits are only set at levels that prevent "the ecological integrity of the natural environment from degrading from the state it was in" at the time the bills are passed into law, they will lock in currently degraded states of the environment. Balancing an "aspirational and forward-looking" planning approach to social and economic outcomes against an undemanding limit opens the way to leaving the natural environment in a perpetually degraded state.

In any case, conflict on this point cannot be legislated away. It is inevitable that wherever the bar is set, it will be informed by political considerations about social, cultural and economic trade-offs. There seems little use in denying that. To repeat my earlier formulation, the question is whether we are prepared to erect as an outcome of economic and social life the broad requirement that the way we live in and use our environment's resources has to always be consistent with its health and assimilative capacity. I believe we should. Our primary environmental law should set the bar rather than leave it to on-going compromise by a thousand trade-offs.

In my view, many of the outcomes in clause 5 would be better deployed as guiding the content of regional spatial strategies – of which I am supportive. There are good reasons to steer infrastructure and urban growth in particular directions for reasons of efficiency and affordability as well as the environmental dividends that are associated with certain urban forms. But where land use change and infrastructural development takes place should still be subject to the health and assimilative capacity of the natural environment. Or in other words, it should run with the grain of the landscape and the environmental services that the natural environment provides, not against it.

- **The purpose clause of the NBEB**

The determination to place a wide range of outcomes at the centre of the bill means the purpose clause has to embrace a large amount of material that has nothing to do with the natural environment and is potentially in conflict with it. The broad, all-inclusive definition of the environment (which goes back to the RMA) means that the first part of the clause – (a) – has to enable its use, development and protection "in a way that … promotes outcomes for the benefit of the environment" which includes the social, economic and cultural conditions that affect the natural environment, people and communities and the built environment they create "as the context requires". There is a field day of opportunities in such sweeping, all-inclusive language.

Perhaps that is why the clause has a second limb – (b) – recognising and upholding te Oranga o te Taiao. This is defined in English under four headings in forty words. They are much more clearly related to the environment as most of us think about it. I like this concept but there are at least three problems: firstly, what is the relationship of subclause (a) to subclause (b)?; secondly, what does recognising and upholding mean in practical terms (or is this just a mental state)?; and finally, are we comfortable with trying to provide such a wordy definition of a phrase that is so admirably succinct in Māori?

I think we should aspire to a crisper and more focused purpose clause. I have long considered the RMA's definition of the environment meaningless in its all-inclusiveness. For this reason, I would suggest a purpose clause that focuses on the natural environment and directs those exercising powers under the Act to draw on the sort of hierarchy of obligations articulated in the name of Te Mana o te Wai that are found in the National Policy Statement for Freshwater Management.

The purpose clause does not have embrace a universe of desirable outcomes to permit spatial planning and enable development. The sort of drafting I have in mind might look something like this and underscores my view that **the way we live in and use our environment's resources has to always be consistent with its health and assimilative capacity:**

> The purpose of this Act is to:
>
> (1) protect the health of the natural environment and its capacity to sustain life
> (2) subject to (1), enable people and communities to provide for their needs and the needs of future generations.

This very simple formulation would allow two useful elements of the Bill as drafted to be shifted elsewhere.

The Bill's requirement to "recognise and uphold" te Oranga o te Taiao suggests that this is something that should guide those who exercise powers under this Act. In that case, I wonder if that duty might not sit better in clause 6. Rather than repeat a forty word legal definition of the phrase, the Bill should spell out that, in recognising and upholding te Oranga o te Taiao, decision makers should apply a hierarchy of obligations adapted from Te Mana o te Wai: to preserve the living environment; to protect the health of the people; and to provide for the social, economic and cultural wellbeing of the people.

The other element that could be moved to clause 6 concerns limits and targets. One feels they have been inserted into clause 3 to bolster what is otherwise a weak or ambiguous purpose. That problem dissipates if the purpose is clearly focused on the natural environment. It would, however, be useful to require those making decisions under the Act to enforce environmental limits and promote any associated targets.

- **Limits, targets and effects management**

*Limits and significant area protections*

The bill contains two key mechanisms to protect the environment – environmental limits and significant area protections (e.g. places of significant biodiversity, areas of highly vulnerable biodiversity, and other places of national importance). They are equally important. They should be seen as a package. I suggest the relevant provisions for both are co-located near the front of the bill.

Relying on environmental limits as the primary protection for the environment is probably heroic and certainly risky. Limits, as currently designed in the bill, will almost certainly not be up to the job.

Defining environmental limits at the environment's current state regardless of the level of compromise that represents is conceptually and fundamentally flawed. Most people's understanding of a limit is a threshold beyond which it is unsafe or excessively risky to proceed – for example a speed limit. That is not how the bill conceives of an environmental limit. The bill proposes setting limits at the environment's current state (clause 37) regardless of whether that current state is safe or healthy.

While the current state of the environment may be (relatively) easy to measure, it tells us nothing about environmental health, the environment's capacity to sustain life or its assimilative capacity. In many places the current state of the environment is significantly degraded. The bill will lock that in.

Using current state, and other aspects of the limits framework (such as averaging across management units), creates all sort of conceptual, legal and practical problems that undermine the ability of limits to actually protect the environment. Other submitters, such as the Environmental Defence Society (EDS), Forest & Bird and the Resource Management Law Association (RMLA), traverse the bill's drafting around limits in detail. I agree with many of their points so I will not repeat them here. Their solutions to some of the smaller issues with drafting are sound, but the conceptual issue of how we think about the notion of limits is a larger question. More policy work and a collaborative process will be needed to resolve that.

At the very least, environmental limits should be set at an objective level of healthiness, informed by science and advice from the proposed Limits and Target panel. I note that the current drafting around environmental limits and targets (clauses 37-55) contains, surprisingly, no reference to the panel which is tucked away in clause 3 of Schedule 6. It should be in the main statute.

Even if the significant conceptual, legal and drafting issues are fixed, achieving environment protection by heavily relying on limits is still risky. The natural environment is complex, imprecise, uncertain, dynamic and unpredictable.

Ensuring that limits are effective in practice will require large amounts of monitoring data, contextual information and new knowledge from research. Just as important is the need for significantly improved analytical capabilities to interpret and apply that information. Almost every report I have provided to this Committee has remarked on deficiencies in our current environmental information systems and knowledge base. Our systems cannot cope with what we need from them now. We would be foolish to think we will be able to cope with the demands required to manage within limits without significant new investment.

Despite being critical protective mechanisms, the bill contains broad exemptions to both limits and significant area protections. These mechanisms provide a fence at the top of the cliff to prevent the environment tumbling down. Exemptions are akin to deliberately leaving gaps in the fence. There will be no surprises if they facilitate on-going environmental decline.

The proposed ability to use effects management in protected areas provides significant flexibility to projects that have little choice but to be located in those areas. But the bill also provides for very broad exemptions to the 'effects management framework'. That would effectively leave no environmental control on those projects that are exempted. I see no need for these additional exemptions. If a project cannot apply any of the flexibility provided by the effects management framework, it probably should not go ahead at all.

If the committee does see a need for exemptions, I suggest they should be strictly limited to nationally significant public projects (e.g. national projects that would meet Public Works Act 1981 criteria).

*Effects Management*

If environmental limits and significant area protections are the fence at the top of the cliff, effects management can be seen as a key tool to ensure we avoid hitting the fence in the first place.

In areas other than protected areas, the effects management framework should be the default rather than the exception as suggested by clause 62 "the framework does not apply to … other resources unless the national planning framework directs that the framework applies".

Submitters, such as Forest & Bird, EDS and the RMLA, have identified some unworkable provisions and multiple variations of the effects management framework in the bill with the potential for conflict. This is both confusing and likely to lead to inconsistent application. There should be one effects management framework for use where it is applicable.

I share the concerns Forest & Bird and EDS have expressed about the unsuitability of offsetting and redress in respect of "significant biodiversity areas" and "specified cultural heritage". If it is decided that an activity is appropriate in those areas, the focus should be avoiding adverse effects and (if appropriate) mitigating and remedying effects. The full spectrum of the framework should not apply.

*Targets*

While limits have a protective purpose, the purpose of targets is to improve the state of the environment. Including provision for targets in the bill is a useful addition. Targets can be set for a much wider range of things than limits. Because of their related, but different, purpose, I suggest the provisions governing targets should have their own, separate, sub-part.

For targets to be effective, the improvements they generate need to be locked in. I support the calls from others, such as EDS, Forest & Bird and Horticulture NZ, for some sort of no backsliding provision.

- **The evaporation of amenity**

One of the most popular elements of the proposed legislation is something that is entirely missing – mention of amenity. There is a widely perceived view that the RMA's emphasis on effects enabled all manner of people to rely on the notion of amenity to stymie change. I am pleased to see such a vague word removed. However, there are a wide variety of externalities – both positive and negative – that contribute to the quality of urban (and rural) life. I am concerned by a growing tendency to label anyone who raises such concerns as a 'NIMBY'. It does not qualify as a serious response to legitimate concerns that people expect local councils to deal with.

I am thinking here of the unwelcome effects of noise and odour (both of which are often associated with traffic), lighting or the absence of light, the capacity of the built environment to mitigate heat and precipitation, and access to green space for recreation and mental health and wellbeing. I will shortly be publishing an investigation into what is happening to green space in some of New Zealand's rapidly growing cities. It shows that the pressure to densify cities is being poorly handled to the detriment of the environment in which people will be living.

Current drafting refers to "well-functioning urban and rural areas that are responsive to the diverse and changing needs of people and communities in a way that promotes … an adaptable

and resilient urban form with good accessibility for people and communities to social, economic, and cultural opportunities". Bland generalities like this provide no basis on which planners can be held to account for the consequences of the urban environments they create. For people in rural areas, there aren't even bland generalities. The bill is completely silent.

Finally, a word about views. The bills are quite explicit that private views cannot be taken into account in preparing plans or considering resource consents. This seems appropriate. But projects that disfigure landscape views should not be given a free pass. Yet s 108(b) rules out any consideration of "any effect on scenic views from … land transport assets that are not stopping places". Views do not start and stop at the (increasingly rare) stopping places provided by Waka Kotahi. The Committee should think hard about this, particularly in a country that widely markets its landscapes to international tourists. In the 1950s, transmission lines were built on the west side of the Desert Road guaranteeing forever that travelers' views of the Tongariro volcanoes would be viewed through a network of power lines. Do we really want to go back to those days?

- **Accountability – a mixed bag**

  The bills rearrange the locus of decision-making power and accountability for decisions taken. While political accountability is more of an issue for constitutional and local government experts, I am concerned that any changes should be ones that will win the support of the public at large and be likely to secure good environmental outcomes. Environmental protection affects everyone and if the decisions made to manage and restore our environment issue from institutions that do not enjoy some form of legitimacy and accountability, they are unlikely to be enduring ones.

  On this score the reforms are a mixed bag. At the national level, Ministerial accountability is improved. The Minister must lead and direct environmental regulation through an integrated national planning framework rather than a collection of ad hoc policies and environmental standards. They are required to set limits and targets. Opportunities for public participation in the preparation of national direction for inclusion in the National Planning Framework are an improvement over existing arrangements.

  On the other hand, the elaboration of natural and built environment plans and regional spatial strategies has been handed to unelected regional planning committees. The membership of these committees will emerge from a 'composition agreement' between local authorities and iwi and hapu committees, or be imposed by the Local Government Commission in the event of a failure to agree. This is a very important and powerful committee that will, subject to the National Planning Framework:

  (1) flesh out the content of wide-ranging plans that will attempt to pursue the many outcomes being promoted by the NBEB as well as setting limits, targets and rules
  (2) in parallel develop regional strategies that establish a vision and objectives for the region's development and change.

  As proposed, the accountability of regional planning committees to the communities they serve is highly attenuated and their incentives to act split between the interests of nominating bodies and the demands of the Minister. If this body is going to have to impose controversial regulatory measures and defend them, it is not easy to see how it will easily command the understanding and endorsement of local authorities let alone their citizens and ratepayers.

  While I support the idea of regional spatial strategies, I see no reason why they should not be the responsibility of elected regional officials. For environmental regulation, on the other hand, these committees have neither the financial nor technical resources to do the job that is

required. I have come to the conclusion that this role would be better returned to central government. I discuss this matter further below.

- **Who is responsible for what and in what sequence?**

  A key issue that remains unsatisfactory concerns the relationship of the natural and built environment plans and the regional spatial strategies and who takes accountability for what. My starting premise is that, after nearly 200 years of consistent environmental run-down, we have to make sustaining future environmental quality our prior or pre-eminent goal. Other goals – such as those set out in clause 5 (c), (d) and (i) – should be pursued subject to that pre-eminent environmental goal. Erecting this priority is not some radical green insurgency. It is an imperative for our economic and social survival.

  The simplest way to do this would be to incorporate the provisions dealing with spatial planning into the NBEB and be clear about the relative priority of the two quite different sets of outcomes we are seeking to achieve by regulatory means. I think of this as layers that are built on top of one another.

  Firstly, we should be seeking to give regional spatial expression to the environmental limits and protections that are necessary to sustain future environmental quality. These are determined by the topography, soil, water and biodiversity that represents the natural environment and its ecological processes. This requires significant technical expertise and the financial resources required to support that. These reside largely at the national level.

  Secondly, we should be seeking to ensure that the way we carry out our activities runs with the grain of the land and the water. That means ensuring that the spatial extension of urban areas, transport corridors and other network utilities, and the future provision of green space are, at a high level, steered towards the places where they will have the least impact and be most resilient, particularly to the effects of climate change. These regional spatial strategies require national input to link with the many national level services that are delivered but they need to be led by the people who live in the regions.

  These two layers should be developed sequentially. The spatial overlay has to be subject to the biophysical foundation layer. It has to be fully informed by the constraints that the particular biophysical features of the region present.

  There is, for me, an open question as to whether the spatial strategies need to cover every inch of the territory of a region as an environmental management plan must. Some regions embrace far-flung communities with very different interests: take the Waikato Region – the catchment of the awa from Ruapehu to Port Waikato, plus the Coromandel peninsula, plus the fourth largest city in New Zealand with intense growth around the Auckland-Hamilton-Tauranga corridors. While there is some homogeneity to the Waikato region as a catchment, the social and economic pressures and needs that occur are very heterogeneous.

  This in turn has implications for who exercises what powers and highlights the huge gap in this reform process: the structure of local government. Local democracy is strongest at the local level and weakest at the regional level. Under the two bills the focus of decision-making power would be focused regionally and displaced to an unelected committee. While technical expertise exists at the level of regional councils, its depth is uneven and critical research capacity is held nationally. The financing levers to get stuff done are particularly limited at the regional level. This suggests that some very challenging thinking is required before signing off on this distribution of decision-making power.

The shape of local government is not my core responsibility but I would like to suggest that we should be prepared to consider a new tripartite arrangement.

- Hand the elaboration of rules and limits governing the biophysical layer to central government in the form of a significantly re-tooled EPA, transforming regional council technical staff into regional outposts of the EPA. This would enable better use of a vital network of skills together with better linkages to national funding and research. It would also provide central government with capability on the ground that is currently lacking. This would repair a troubled legacy of the reforms of the 1990s. The fact that environmental protections need to be spelt out at regional or catchment level does not mean that defining them has to be delegated to the local level. If we are to have nationally directed environmental protection, central government should take responsibility for its decisions rather than delegate the implementation to regional committees. Accountability for developing environmental regulation and elaborating it at the level of the catchment should sit squarely with the Minister.

- Give Regional Councils responsibility for the regional spatial overlay drawing on the full array of data embedded in the underlying biophysical layer. There is no reason that elected regional officials should not take full responsibility for this process. More work needs to be done to ensure that central government speaks with one voice when it comes to the requirements of nationally funded services such as health, education, corrections etc. I would recommend, however, defining the boundaries of the spatial strategies on the basis of infrastructure and growth dynamics, not topography and catchments. To take my Waikato example, spatial planning makes sense in the core areas currently served by the councils that have painfully generated Future Proof from the bottom up. But it doesn't make sense in the far-flung corners of the region.

- Finally, leave locally elected councilors with responsibility for making rules for the management of their communities. This is a matter of local democracy. These rules do not need to be uniform, one size fits all, in the way biophysical and spatial rules need to be. But they do need to conform to environmental regulations, and they should have to be consistent with the regional strategies.

- Regional councils and territorial local authorities (TLAs) would be responsible for consenting and overseeing those activities that are permitted locally albeit subject to discretion. The EPA would the enforcer of environmental regulation.

- Making such a proposal work well depends on being prepared to adjust TLA boundaries to better map communities of interest. Where I live, the peri-urban parts of Waikato and Waipa need to join Hamilton. The genuinely rural areas by contrast have far more in common with adjoining rural authorities. Similar considerations apply around other growth nodes like Tauranga and Christchurch. Whatever its logic, talk of picking apart the boundaries of existing TLAs is always very contentious. Someone has to put it on the table.

- Such an approach would thwart the proposed reform's plan to eliminate district plans (although sensible amalgamations and realignments would reduce their number).
  In my view, it is not so much the number of plans that is the problem but their length, detail and unnecessary variation. National direction could quite easily require common formats and default provisions to produce much more alignment but leave local district communities to make specific provision for matters of importance to their local

communities. (The current National Planning Standards are a good start.) The alternative would be to maintain the idea of a single plan but specifically delegate the development of district 'chapters' to local councils which would insert their local-level rules.

- **The role of the Parliamentary Commissioner for the Environment (PCE)**

  Two issues arise concerning the role of the Parliamentary Commissioner for the Environment.

  - Under clause 837, Ministers are required, at least every six years, to table in the House a system evaluation report that evaluates the operation and effectiveness of the planning system created by the two statutes. And under clause 838 the Parliamentary Commissioner for the Environment "must carry out an independent review of each evaluation report published under section 837 and report on the review to the House of Representatives".

    I have two problems with this. Firstly, it is not necessary to require this because it is already fully within my discretion to review any element of the resource management planning system. I cannot imagine not commenting on any such report. But carrying out "an independent review of each evaluation report" implies the need for some serious in-house skills and knowledge if such a review is to be anything more than a desktop exercise. The PCE office currently has 16 analytical staff. The Ministry for the Environment alone has north of 1000. The sort of review you can expect will have its limitations.

    But much more importantly, is the Parliamentary Commissioner going to be competent to review the entire proposed system that is envisaged to secure housing, infrastructure, and social and economic goals as well as the natural environment? The PCE is not the Commissioner for "the diverse and changing needs of people and communities". The Environment Committee should consider whether it wants to consider sharing this potentially expansive role with a number of entities in addition to the PCE such as the Infrastructure Commission and the Productivity Commission.

  - The second issue concerns the Limits and Targets Review Panel currently tucked away in schedule 6 of the Act. I agree with EDS's suggestion that the PCE might be a useful entity to recommend the membership of the Limits & Review Panel. This *is* something the PCE could usefully contribute to the planned system.

## The choice before the Environment Committee

Finally, I want to say a word about the way forward. If the broad statutory framework governing environmental law and process is to endure it requires broad support in Parliament. We were last in this position a third of a century ago. Back then, a draft resource management bill was awaiting parliamentary consideration with a general election pressing on the time available to 'get it right'. In the end, the two main parties agreed that there was sufficient common ground to hold the bill over to the next Parliament so that it could be given further detailed scrutiny. We avoided a rushed and contentious enactment.

It is up to the parties in Parliament to determine whether they are sufficiently satisfied to put this to bed in a matter of a few months. I would not for the reasons I have given, most importantly:

- The bills' failure to ensure that environment outcomes are of primary importance through the addition of a raft of competing additional outcomes.

- The decision to proceed with two statutes that do not make it clear that regional spatial strategies have to run with the grain of the biophysical environment and are subject to the requirements of the environmental management regime.
- The allocation of responsibility for implementation to unelected regional planning committees who have neither the financial resources, expertise nor clear public accountability to discharge their role.

Problems with the RMA have been in no small part to do with inadequate information, scarce expertise, a lack of leadership and poor accountability. I do not believe the bills as they stand will resolve these shortcomings. Assuming these problems can be worked on, there remain considerable risks in embarking on a legislative adventure whose ultimate legal consequences will take time to be determined by the courts. So much is at stake, that legal challenges will be worth pursuing by those with deep enough pockets to sustain them.

On the other hand, I think many of the most useful changes that have been proposed along with some of the changes I have recommended could be grafted into a comprehensively amended Resource Management Act. I have sketched what might be workable in Appendix 1.

If, however, the Environment Committee considers that the proposed structure is workable, then it needs to send the bills away for a great deal of work. In doing so it should take very seriously the detailed and extensive critique supplied by EDS, Forest & Bird, local government and many resource management practitioners. These are not minor drafting tweaks. They involve some weighty matters. I would also recommend considering comments on rearranging the structure of the NBEB. The current architecture feels as though it has been bolted together without a coherent understanding of how the parts fit together. Again, EDS has provided useful thoughts on this.

As I have noted, my comments do not pretend to be a comprehensive catalogue of drafting changes. But it may be useful to the committee to know what elements of the reforms I would wish to see survive, be amended, or eliminated. To that end, in Appendix 2, I offer three lists. The matters listed are not minor.

Some may be tempted to say that the reform process has been going on for five years and it is time to put this all to bed. The reality however is that, at least for those of us outside the drafting process, all we have had to go on are general concepts. I applauded the Minister's decision to release an exposure draft, but it covered only a fraction of the Natural and Built Environments Bill and nothing of the Spatial Planning Bill. Critical elements were lacking. Of the critical elements that were there, many have been significantly changed.

The bills before us are our first real exposure draft and reveal much that needs searching consideration if we are to arrive at an enduring solution. I am not suggesting we start from scratch. Rather, we need to invest the necessary time and effort to get the structure and substance right. It is a small investment for a statute that will need to last many decades.

# Appendix 1: How amending the RMA to achieve the same purposes might work

In the course of analysing the improvements the bills propose and the risks entailed in changing to a new system, I have come to the conclusion that most, if not all, of the key changes could be effected through a comprehensive amendment to the RMA. Briefly the changes could work like this:

- The National Planning Framework is essentially a meta-level piece of national direction. There is nothing in the RMA requiring national direction to be given in the piecemeal way it has been to date. All of the mandatory content proposed for the National Planning Framework could be made mandatory through the provisions governing RMA national direction. The RMA's mandatory requirement for the New Zealand Coastal Policy Statement 2010 is a precedent.
- Limits are possible under the RMA. The National Policy Statement for Freshwater Management 2020 and draft National Policy Statement for Indigenous Biodiversity both contain forms of limits. Adding the proposed limits (and significant area protection) provisions to the primary legislation to ensure they happen should be relatively straight forward.
- Regional spatial plans could be led by regional councils and incorporated as part of existing regional plans. The concepts are compatible. In preparing the 'spatial plan' part of their regional plans, regional councils could be required to undertake a collaborative planning process with their constituent territorial local authorities, with some sort of ratification process for the final product. Links to other Acts (such as the Local Government Act 2002, Urban Development Act 2020, Land Transport Act 1998 etc.) could easily be added to the RMA. They do not need a separate Act.
- Reducing the number of plans would require some creative thinking. Conceptually, district plans could become chapters of the regional plan. Regional councils could lead a collaborative process with their constituent territorial local authorities to identify areas of commonality that could apply regionally, and those which need to be locally specific. The current National Planning Standards show how national direction can help in this regard. There could be some sort of ratification process to ensure local accountability is maintained.
- Including outcomes should be treated with great care for the reasons I have given. The RMA's purpose clause effectively covers off the environmental outcomes that we seek. The use of targets for both the natural and built environment is one way to promote and achieve positive outcomes and could easily be included in the RMA. Providing for desired social and economic outcomes can also be done in the 'regional spatial strategy' part of plans.
- The 'problematic' aspects of amenity could be handled by listing specific aspects as 'matters than must be disregarded' in plans and consents, similar to the way in which 'private views' are addressed in clauses 108 (b) and 223(8)(c) of the NBEB.
- Updated Te Tiriti o Waitangi provisions could easily replace the existing ones.
- A range of other, smaller improvements could also be made by changing the relevant existing RMA provisions or by adding new ones. These include: improvements to compliance monitoring and enforcement; the ability to curtail consents; giving effect to water conservation orders; decision making principles (which could include te Oranga o te Taiao and the Te Mana o te Wai hierarchy); and allocation principles and methods.

These would be major changes. They would not be easy and would require more work. But whereas past amendments to the RMA have been piecemeal, these would amount to a comprehensive, whole

of Act amendment. This approach would capture the positive work that has been done over the past five years while reducing the risks associated with introducing a slew of new legal language that will bring uncertainty and costs in its wake.

# Appendix 2: Some things to keep, amend, and remove from the bills

Below are three lists of changes I would like to see to better enable protection of the environment. They are not comprehensive.

On my 'green list' I'd like to see the following improvements retained or even improved:

- The compliance, monitoring and enforcement provisions (Part 11). These are stronger and more practical than those in the RMA.
- The decision-making principles (clause 6) at the front of the Act makes it clear to those implementing the legislation what they should be doing. The committee should consider suggestions for additions to the list. Useful additions include: te Oranga o te Taiao; the te Mana o te Wai hierarchy; and consistency with limits and targets (especially when considering that 'outcomes' are already included as one of the principles).
- The allocation principles and methods (clauses 36 and 87-88) provide useful guidance that will hopefully help to overcome the reluctance to adopt efficient allocation tools under the RMA.
- The ability to curtail consents for non-compliance or if a limit will be breached (clauses 719) is an important improvement. The absence of tools to course-correct in a timely fashion in the face of a deteriorating environment is a serious omission from the RMA. Making previous non-compliance a matter that must be considered in consent applications (clauses 223(2)(f) 289 and 290) is a further improvement.
- Permitted activity notices. These will fill a critical gap in understanding the impact permitted activities are actually having on the environment. That information is a crucial input into understanding cumulative effects.
- Stating that discharges of contaminants (to water or land) must not be made permitted activities unless the regional planning committee is satisfied that specified effects will not result (clause 118) usefully modernises the similar RMA provision.
- The new requirements around contaminated land (clauses 416-427) to ensure clean up are overdue. Serious consideration should be given to extending similar provisions to other types of pollution.
- Requirements that plans must specifically include provisions to give effect to water conservation orders (clause 102(h)).

On my 'amber list', I'd like to see the following improvements retained but significantly amended and improved.

- The purpose clause should be simplified to make it unambiguously clear that securing the outcome of a healthy, life-sustaining natural environment comes first.
- If social and economic outcomes are to be spelled out, they should only be pursued in the context of regional spatial plans.
- The Natural and Built Environment Bill and Spatial Planning Bill should be merged into a single piece of legislation.
- A clear statement that the matters regional spatial plans can promote are *subject to* environmental limits and other protections determined in natural and built environment (NBE)

plans. This implies a clear sequence in the development of three layers: (1) natural environment layers; (2) development layers; (3) detailed planning rules.

- Increased public participation in regional spatial strategies (RSS) preparation and appeal rights should be added. It is anomalous that NBE plans need to be consistent with RSS but the public has much less ability to input into the RSS than NBE plans. People will be constrained by something they have little ability to influence.
- Environmental limits must be set based on the contribution they can make to environmental health and integrity, not on the basis of the current state of the environment.
- There should be no exceptions to either environmental limits or protections surrounding places of national importance (significant biodiversity areas etc.). If a case for any exceptions can be sustained, they should be limited to nationally significant projects for which there are overwhelming public good benefits.
- A no-backsliding provision should be added to enable environmental improvements achieved by targets to be locked in. Where the current environment is significantly degraded there should be minimum level targets to restore it.
- Use of the effects management framework should be the default, not merely "as directed by the Minister". The different versions of the effects management framework in the bill should be cast as a single framework.

On my 'red list', I would like to see the following provisions (in no particular order) either significantly amended or removed.

- The requirement to present all evidence along with submissions should be removed (Schedule 7, clause 34(3)(c).). This will impose significant cost and a barrier to public participation. The current practice of providing evidence prior to the hearing should remain.
- The restriction that only the Attorney-General can represent a relevant aspect of the public interest is too narrow. (Schedule 7, clause 36) It should be amended to include any person representing the public interest or having an interest greater than the general public (in line with current RMA practice).
- The fast-track consenting pathway should be removed. It adds little that would not be available through the 'Ministerial call-in' and 'direct referral' pathways. I note that the National Infrastructure Strategy addressed many ways of speeding up and reducing the cost of consenting, but wisely stopped short of recommending that public hearings be further curbed. Ironically, an outcomes-based planning system is likely to widen the range, subjectivity and community-dependent nature of matters to be balanced in consenting, making public hearings even more important than they have been under the RMA.
- Remove the Minister's power to alter existing national direction without following normal change processes (Schedule 1, clause 7). Potentially significant changes to mandatory direction could be made without public input.
- Significantly narrow the 'public benefit' test for designations (clause 500) to be more specific about what is covered. Current wording could allow an incredibly wide range of projects, even private ones, to be covered if a public benefit could be demonstrated. For example, the current

wording could encompass prisons and pre-schools. Almost any structure that could plausibly confer a climate benefit could make a case.

- Significantly reword clause 805 on "Best Information". Using multiple lines of evidence (i.e. the weight of evidence approach) increases rigour and analytical strength. While well-intended, the requirements as worded are confusing and difficult to interpret. It implies that information obtained from modelling, local knowledge, any partial information, and information obtained from other sources are "not scientifically robust", and thus sit lower in the hierarchy of information sources. "Scientifically robust" is also not defined in the bill.
    - Modelling and monitoring (i.e. field data and measurements) are interdependent. Models provide vital information for things that may be hard to measure or have not yet been measured. Models are able to fill gaps in monitoring data, identify trends, gain insights into the processes and provide critical predictions. At the same time, it is essential to have monitoring data to build, calibrate and use environmental models.
    - Uncertainty is presented as a negative when it will be present in *all* data and information, including field measurements and modelling outputs. What is important is being able to transparently quantify and communicate that uncertainty so that it can be usefully inform decision-making. Further, uncertainty shouldn't be used as an excuse to do nothing, so I support the wording of sub-clause 805(4).
    - Finally, the wording that implies that local knowledge is inferior in the hierarchy of information may pose challenges when attempting to use mātauranga Māori to support decision-making. The slightly different language of section 28 of the Spatial Planning Bill, which requires "robust and reliable evidence and other information, including mātauranga Māori, that is proportionate to the level of detail required in the particular context", may be preferable. Advice from scientists and mātauranga Māori experts should be sought in any redrafting.
- Amend clause 124(7) by deleting the phrase "unless it is consistent with the purpose of this Act to do so". Allowing freshwater quality to deteriorate is clearly inconsistent with the purpose of the act. It should not be implied that it could be otherwise.
- The 'evaluation report' (Schedule 7 clauses 24 and 25) and 'compliance report' (Schedule 7 clauses 29) should be combined and the combined report publicly notified. The content of both is in the public interest and it would be more efficient for regional planning committees to prepare them together.
- Clause 200(3)(b) should be deleted. It is, in my view, nearly impossible to know in advance "whether any information obtained from the notification process is likely to make a material difference to the consent decision" or indeed know with sufficient certainty the environmental effects of an activity that depend on the state of the receiving environment.
- Review the blanket exclusion in clause 108 (b) of protecting landscape views from roads other than roadside stopping places.
- Subdivision should not be exempt from effects management (clause 66(1)(i)). While the act of drawing lines on a survey map may not have any environmental effect, land is only subdivided to be used for a different purpose that will have effects. Those should be considered prior to any subdivision being approved.

- The composition of the Independent Hearings Panel needs more specific environment expertise. Currently, the environment is only one of eight criteria (Schedule 7, clause 93). More environment specific criteria need to be added.