



# Submission on New Zealand's New Planning System: Testing the Approach to National Policy Direction

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To the Ministry for Cities, Environment, Regions, and Transport

## Submitter details

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## Parliamentary Commissioner for the Environment

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

## Introduction

The 'illustrative' National Policy Direction (NPD) is offered as a test-run of what is intended to be promulgated to underpin the new planning and environmental management system. As such, it provides a welcome insight into what we may expect. It also provides an opportunity to highlight concerns that, if not addressed, could blight that system right at the outset. While I welcome the initiative, I consider that it reveals some serious risks and deficiencies in both framing and approach. This commentary focuses only on some of those high-level issues and the Illustrative NPD's alignment with the law. It is not a comprehensive record of my views on the detail of the Illustrative NPD.

The scope of ministerial discretion to shape NPD under the legislation is very wide. The basic premise of this submission is that the more aligned NPD is with the Planning Act (PA) and Natural Environment Act (NEA) (collectively the Acts), and the more work that NPD can do to support interpretation and direct the outcomes the system is seeking to achieve, the less opportunity there will be for legal challenge and delay to its implementation. This submission is written in the belief that if the new resource management framework is going to endure, the first iteration of NPD needs to be clear, authoritative and able to command a broad consensus. It is not currently in that state.

## NPD must fulfil its purpose

The two Acts have a clear structure – they both contain goals (with no hierarchy) and it is left to the Minister to translate those goals into directions that can be applied throughout the system. Where conflict between directions occurs (both within and across Acts), the Minister may decide that it is necessary to prioritise one goal over another. This structure is reflected in the purpose of NPD, which is to (1) particularise all the goals and (2) direct how the goals are to be achieved, including by identifying and resolving conflicts between goals as far as is practicable.<sup>1</sup>

Users of NPD should immediately see that it is consistent with the requirements spelt out in law. In other words, users of NPD must be able to see how the law functions – NPD must follow any requirements for what it must do or must contain.

The Acts give NPD its purpose, and NPD must be consistent with its purpose. The Illustrative NPD is not, for two main reasons: firstly, its purpose cannot be clearly understood from the language used in the statute, i.e. to ‘particularise all the goals’; and secondly, part of its purpose has been insufficiently addressed, i.e. to ‘direct how the goals are to be achieved’ and ‘identify and provide for conflict resolution as far as is practicable’. The result is a document that reads as a statement of political intent, illustrative of how NPD might be wielded, rather than critical secondary legislation that fulfils the statutory requirements necessary to guide the planning and environmental management system. This is perhaps best demonstrated in the explanatory text at the front of the document where language that has no statutory basis is used. For example, the statute does not include reference to property rights and there is nothing in the legislation that talks about NPD’s purpose being to set the Government’s national priorities.<sup>2</sup>

The following sections outline where I consider the Illustrative NPD falls short of fulfilling its purpose.

### Particularise the goals and direct how they are to be achieved

As outlined above, the purpose of NPD has two separate parts to it – (1) to particularise the goals and (2) to direct how they are to be achieved and identify and resolve conflict (as far as is practicable). For the law to function effectively, the particularising and directing should go together. Having particularised (explained) the relevant goal(s) and how they are to apply in different contexts, it then follows that direction about *how* the particularised goals are to be achieved should flow logically from that explanation (and any relevant context that is given).

The first aspect of the purpose of NPD is to ‘particularise’ all the goals. ‘Particularise’ is defined in the Acts to mean explaining the goal in detail, including by providing any context relevant to the goal.<sup>3</sup> Particularise is a novel word for the statute books. What it means to ‘particularise’, or to explain in detail, may mean different things to different audiences. The Minister may interpret particularise as mentioning all the goals in some way throughout NPD. Others might reasonably interpret it as defining terms and specifying outcomes or priorities.

The Acts require both particularisation of the goals and direction as to how the goals are to be achieved. It seems logical then that any directives would give effect to, or implement, the goals as they have been particularised. The structure the Illustrative NPD follows, and the terminology used, complicate any evaluation of whether all goals have been particularised and the relationship between the goals and some of the directives. Some directives simply repeat

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<sup>1</sup> Natural Environment Act, s 79 and Planning Act, s 54.

<sup>2</sup> The MCERT website, which holds the NPD document, also states in its explanatory text that “NPD articulates the system’s goals and is the mechanism through which the Government will set national priorities...” <https://environment.govt.nz/publications/new-zealands-new-planning-system-testing-the-approach-to-national-policy-direction/>

<sup>3</sup> Natural Environment Act, s 79(3) and Planning Act, s 54(3).

what is in the Acts.<sup>4</sup> Others are unrelated to the particularisation of a goal and have no lawful basis for inclusion in NPD.<sup>5</sup>

In terms of structure, NPD must be clear as to how directives relate to the goals because the directives must be relevant to a goal to be included in NPD. As it stands, it is difficult to follow which directives apply to the respective goals. This is because the relevant goals are shown at the start of a theme, but not the sub-themes, and Table 2 is inconsistent with the goals that are listed in each theme.<sup>6</sup> One notable example, where it is unclear how (or whether) a goal has been particularised, relates to the protection of significant indigenous biodiversity.<sup>7</sup> The goal to protect significant indigenous biodiversity is shown as a key goal in the primary production and rural economy theme,<sup>8</sup> but none of the directives in that theme include reference to indigenous biodiversity. The indigenous biodiversity sub-theme also has no reference to potential conflict with primary production and the rural economy (only urban growth and infrastructure).

The use of themes adds further complexity. Themes may be a useful presentational device, but they play no part in decision-making. It is the particularisation of the goals, directives related to their achievement and directives around resolving conflicts between goals that matter. Use of themes in the manner currently proposed is likely to obscure the particularisation of goals. Themes cover multiple goals. Similarly, most goals are spread over multiple themes. Such a complex web makes it very difficult to understand what a particular goal is trying to achieve and exactly how it has been particularised. This in turn makes it very difficult to determine whether a goal has been sufficiently particularised and given direction to meet its statutory purpose.

That said, the themes inevitably give a sense of where thinking about the new planning system lies. The decision to lump anything to do with the public good and the environment together under an umbrella theme of 'public values' suggests that we have gone back to seeing the biophysical environment as something that can be treated in a separate 'box'. One way of avoiding this impression would be to frame matters that provide for the protection of human and environmental health as system-wide direction that applies across NPD. This would make it clearer to decision-makers that activity-specific directives and the decisions that flow from them should be made having specific regard to protection of human and environmental health, subject to whatever conflict-resolving directives have been issued.

Understanding how (or whether) the goals have been particularised is further complicated by directives using terminology that differs from that used in the Acts.<sup>9</sup> To uphold certainty of the law, the terms used in NPD should be those found and defined in the statutes. Where new terms are used, definitions should be included. This is important for system certainty, given that the Acts and NPD direct the entirety of the planning system. In addition to increasing the risk of legal challenge as to whether goals have been sufficiently particularised, unclear, undefined or subjective terms increase the risk of litigation as to whether the first part of the second aspect of the purpose of NPD has been met, which is to 'direct how the goals are to be achieved'. To 'direct' (or provide 'direction') implies mandatory language that is capable of being complied with. If NPD is not sufficiently directive, users will challenge the extent to which the relevant aspect of NPD *must* be complied with. To this end, I observe there are directives

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<sup>4</sup> Examples include PV-Directive 1.1(a), which mirrors s 57 of the NEA, and CC-Directive 9 which and is unnecessary given the decision-maker is prescribed by the Acts.

<sup>5</sup> For example, CC-Directives 1, 6, 8 and 9.

<sup>6</sup> For example, the 'protect significant indigenous biodiversity' goal is mentioned in Theme 4: Resources – mining, quarrying and waste but is not shown as being included in Table 2; and Theme 5: Public values lists the goal to enable the use and development of natural resources and has PV-Directive 1.7 which clearly relates to that goal, but this is not reflected in Table 2.

<sup>7</sup> Natural Environment Act, s 13(1)(e).

<sup>8</sup> See key goals on page 37.

<sup>9</sup> For example, 'development' – What is development? It clearly does not include housing, but does it include every other possible form of development? Without a definition it is impossible to understand the scope of the housing and development theme.

in the Illustrative NPD that lack mandatory language (or direction) and should be amended or removed.<sup>10</sup>

There are also countless examples of unclear or undefined terminology that do not assist interpretation or understanding. For example, directives feature words and phrases, such as *unduly, unreasonable, unnecessary, incompatible, efficiently, effectively, support strategic opportunities, abundant, appropriate, proportionate* and *stringently manage*. These words are somehow supposed to direct plans, but they lack precision, are not further explained and are in many cases completely subjective. They will mean different things to different people and will no doubt mean different things in different contexts. Even if there is current case law around some of these terms, it is hard to see how it will translate into the new contexts in which they are being applied without being relitigated.

To achieve the purpose of the respective Acts, NPD must give sufficient meaning to the goals so that appropriate policy direction can be given to the subsequent layers of the system. To do this, a different approach to 'direction' – one that is clear on the outcomes to be achieved – may be needed. This would likely be more efficient and would better achieve the policy intent to increase certainty and consistency for system users.

### **Identify and resolve conflicts (as far as is practicable)**

In its report on the Bills, the Environment Committee said NPD would “resolve any conflicts between different goals”.<sup>11</sup> The Illustrative NPD falls a long way short of that aspiration. While it is, in my view, not possible to identify in advance all the potential conflicts that might arise, NPD must do significantly more if it is to come even close to identifying and resolving conflicts that are reasonably foreseeable.

The Illustrative NPD's problem is rooted in its failure to sufficiently particularise and direct how the goals are to be achieved. If NPD can clearly direct what is to be achieved or what is required to advance the outcomes sought, then it should be possible for NPD to identify conflicts within and across Acts (to the extent practicable). A failure to sufficiently particularise the goals or direct how they are to be achieved will inevitably entail a failure to appropriately identify conflicts.

While the Illustrative NPD identifies (and resolves) some conflicts, particularly those related to reverse sensitivity and incompatible land uses, it is clear that not all conflicts have been identified (or resolved). There are unidentified and unresolved conflicts between goals, both within and across the Acts. Examples include, but are not limited to, the following:

- Unidentified and unresolved conflict between the goal which seeks to enable the use and development of land and the goal which seeks to protect significant historic heritage.<sup>12,13</sup> While other matters in section 13(1)(g) of the PA are recognised in the housing and development theme (in HD-Directive 1.6), the directives are silent on significant historic heritage.
- Unidentified and unresolved conflict between directives in the housing and development theme and the goals in the NEA. The goal which seeks to enable housing and development will inevitably conflict with the goals in the NEA which seek to safeguard the life-supporting capacity of air, water, soil, and ecosystems and protect

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<sup>10</sup> This includes CC-Directives 5 and 6, which are policies, not directives and even then are poorly written. It seems perverse to encourage “growth and change” in areas “that provide for significant environmental ... values.” CC-Directives 7 and 8 and PV-Directive 1.6 lack any mandatory language.

<sup>11</sup> Environment Committee final report on the Natural Environment Bill and Planning Bill, p.2.

<sup>12</sup> Planning Act, s 13(1)(b).

<sup>13</sup> As above, s 13(1)(g).

significant indigenous biodiversity.<sup>14,15,16</sup> While the 'indigenous biodiversity and urban growth and infrastructure' directive on page 71 directs users to the housing and development theme for direction on managing conflicts between indigenous biodiversity outcomes and housing, there is no conflict resolution directive there. In fact, there is no directive that recognises indigenous biodiversity in the housing and development theme.

- Unresolved conflict between directives in the primary production theme and directives in the housing and development theme. For example, to manage reverse sensitivity, PP-Directive 1.6 directs housing and development to "appropriate locations" (without defining what 'appropriate' might be) whereas HD-Directive 1.5 directs that housing and development can effectively go anywhere and plans must do away with rural/urban boundaries. Conflict arising between the goals in sections 13(1)(a) and 13(1)(b) of the PA is unresolved.
- As identified earlier, unidentified conflict between directives in the primary production and rural economy theme and significant indigenous biodiversity. The Illustrative NPD is silent on what happens when primary production runs up against significant indigenous biodiversity. What happens when Tier 1 biodiversity, which must be avoided or stringently managed, conflicts with a proposal for new or expanded primary production? Such conflict is not hypothetical. The National Environmental Standard for Commercial Forestry (NES-CF) recognises that conflict between forestry and indigenous biodiversity (in the form of significant natural areas) will occur, and directs that in such circumstances more restrictive rules can be applied to protect biodiversity. While some conflict is acknowledged on page 66 ('life-supporting capacity and land use and development (primary production and infrastructure)'), the indigenous biodiversity sub-theme does not acknowledge conflict between primary production and indigenous biodiversity at all. It is noted that "limits are a key mechanism" for safeguarding the 'life-supporting capacity of the environment' but that is simply restating the requirement in section 56 of the NEA for regional councils to set limits for, *inter alia*, biodiversity.
- Unidentified conflict as to the continuation of access to water. Directives that provide for existing infrastructure's access to resources (INFR-Directive 1.4), protection of existing hydro-generation output (INFR-Directives 2.2(b)(ii) and 2.4(d)) and allocation and high-flow harvesting for agriculture and horticulture (PP-Directive 1.4) all have the potential to lead to competing claims on the same water. There is clearly the potential for conflict between section 13(1)(e) of the PA and section 13(1)(a) of the NEA but no recognition of this potential conflict and no direction as to which activity (or activities) should be prioritised.

Where conflicts between particularised goals are identified or can be anticipated, NPD needs to provide direction on how that conflict can be managed to achieve compatibility or clearly identify where one outcome has (or should have) priority. If how a conflict should be resolved depends on local context, NPD should clearly identify the matters that decision-makers need to consider when evaluating trade-offs and resolving the conflict.

Ultimately, the better NPD can identify and resolve conflicts, or otherwise direct how conflicts are to be resolved, the more smoothly the subsequent national standard and plan making processes will go. To this end, a more appropriate way to provide for the identification and resolution of conflict (as far as is practicable) may be to:

- 1) systematically particularise all the goals for all contexts in which they are to apply (particularise the goals and direct where and how they are to be achieved); then

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<sup>14</sup> As above, s 13(1)(b).

<sup>15</sup> Natural Environment Act, s 13(1)(b).

<sup>16</sup> As above, s 13(1)(e).

- 2) identify any conflicts that arise (and the contexts in which they arise) between the particularised goals and directives, and, for the avoidance of doubt, note the absence of conflicts; then
- 3) direct how identified conflicts between the particularised goals and directives should be resolved.

This would make it crystal clear that, where no conflict is identified, decision-makers are afforded discretion to decide how one goal relates to another and how any conflict is resolved, in the event it occurs at lower levels of the system.

## **Resolving conflict in national standards (and lower levels of the system)**

Where conflict is identified but cannot be resolved in NPD, greater direction is needed on how decision-makers are expected to manage or resolve the conflict.

In some places, the Illustrative NPD defers the resolution of conflict to national standards without any additional direction to support resolution of the conflict. Examples include:

- INFR-Directive 1.5, which requires conflicts between the infrastructure goal and goals that protect natural environment values to be managed in accordance with national standards;<sup>17,18</sup> and
- HD-Directive 1.6, which permits land use plans to allow urban development in high-value growing areas or areas of high natural character and Outstanding Natural Features and Landscapes if the development meets (unknown) criteria set out in national standards. This results in conflict between goals both within the PA and across Acts.<sup>19,20</sup>

Deferring the resolution of conflict to standards without additional direction is almost guaranteed to result in litigation as to whether the Minister's obligations for developing NPD have been met.<sup>21</sup> Notwithstanding that there are questions as to whether national standards are even empowered to resolve conflict,<sup>22</sup> it would be difficult for the Minister to claim that the current and long-term impacts and any severe or irreversible effects of conflicting goals had been considered if the assessment of such matters had simply been deferred to the standards-making process. While the Minister might consider that directing conflict resolution through national standards fulfils the obligation to do so 'as far as is practicable', litigation of that decision and associated reasoning is to be expected.

Not all conflicts are foreseeable in advance. Neither NPD nor national standards can identify and resolve every conflict within and across Acts. Plans and consenting will still need to identify and resolve conflicts. Yet the Illustrative NPD provides no direction on how decision-makers for plans and consents should consider conflicts and make decisions where they arise. While the approach of giving unguided discretion to lower-level decision-makers would provide flexibility for different contexts and circumstances, it is also fertile ground for system inconsistency and legal challenge.

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<sup>17</sup> Planning Act, s 13(1)(e).

<sup>18</sup> Planning Act, s 13(1)(g) and Natural Environment Act, ss 13(1)(b) and (e).

<sup>19</sup> In terms of Planning Act, ss 13(1)(b) and 13(1)(g).

<sup>20</sup> With respect to Planning Act, s 13(1)(b) and Natural Environment Act, s 13(1)(a).

<sup>21</sup> Particularly those in Natural Environment Act, s 79 and Planning Act, s 54.

<sup>22</sup> Pursuant to Natural Environment Act, s 82 and Planning Act, s 57, national standards are only empowered to: (a) implement national policy direction, (b) provide procedural consistency and (c) provide regulatory consistency.

## Information requirements

The Illustrative NPD contains several directives that require the identification of specific *areas*. These include, but are not limited to:

- identification of high-value growing areas of regional or national significance (using best available information) (PP-Directive 2.2)
- identification of areas suitable for aquaculture and other marine primary production activities (PP-Directive 4.1)
- identification of regionally significant mineral resources (including gravel in rivers and streams) (RW-Directive 1.2)
- identification of contaminated land and assessments of the risks it poses to human and/or environmental health (RW-Directive 3.2)
- identification and mapping of source water risk management areas for every registered drinking water supply serving over 100 people (PV-Directive 1.4)
- identification, mapping and categorisation of terrestrial indigenous biodiversity using a nationally consistent approach (PV-Directive 2.1).

Throughout my tenure, I have emphasised the need for robust information as a foundation for management, policy and investment decisions. The intent of these directives to obtain information is therefore supported. On the face of it, these directives appear to encourage the generation of better information, and in places encourage the use of the best available information to inform environmental management. National standards may also be used to prescribe the information requirements that apply in any given situation.

However, I am concerned that the procedural principles in section 16(1)(d) of the Acts are likely to have a chilling effect on the quality and quantity of information collected and used in the system. This is because they provide decision-makers with a way to avoid using the best available information on the basis of costs and feasibility. In the context of NPD, this could take the form of cheaper, lower-quality information being used in the interests of 'getting on with it' and getting the system up and running. Because they are a requirement of the Acts, these procedural principles will undoubtedly prevail over any directives in NPD, making any directive to use best available information effectively moot. In turn, coarse, low-quality and outdated information might be misleading, and therefore the NPD will have no chance of appropriately identifying conflicts and resolving them, meaning that the outcomes set through particularisation of the goals will not be met.

## Stability or volatility

As mentioned earlier, while the introduction to the Illustrative NPD describes it as the mechanism through which "the Government will set national priorities", that is not its statutory purpose. Using NPD in that way will almost guarantee that it becomes a political football rather than a recipe for system stability.

For example:

- Throughout the Bills' passage, opposition parties were clear that they did not agree with the 'private property rights' framing. A different government could well see CC-Directive 1 deleted.
- CC-Directive 2 promotes 'economic growth' as a primary consideration. All governments pursue economic growth to a degree but not always as a priority that trumps all others. It is not a stretch to imagine this directive being replaced by one of "enhancing wellbeing", as was a policy priority of a previous government.

The political lens flows through to the choice of themes. The Illustrative NPD has individual themes around housing and development, infrastructure, primary production and the rural economy and resources (quarrying, mining and waste). It could equally have had a tourism theme with sub-themes to cover resorts, marinas, casinos and ski fields. Unless great care is taken, there is an obvious invitation for industries and activities to lobby for special inclusion as a theme.

Remarkably, given its importance to the economy and to recreation, cultural and environmental values, water does not merit a theme or sub-theme. Furthermore, anything to do with the public good and the environment is lumped together under an umbrella theme of 'public values'. Rather than a single catch-all theme, a different government might want to have separate themes for water, environmental limits and biodiversity, and move relevant bits of resources to other themes.

The essential point is that by leaving the substantive core of NPD to ministerial discretion, that core risks being a moving feast. Changing governments will invite retheming, reprioritisation and rewriting of NPD – maybe from scratch.

While some degree of political churn will be inevitable in a directive document approved by politicians, NPD that is structured more closely around its statutory purpose and does not stray into subjective language and themes will be more stable.

We have already seen the uncertainty and instability generated by the multiple iterations of the National Policy Statement for Freshwater Management, with a new iteration issued before the previous one could even be implemented. Unless there is great restraint demonstrated, NPD seems destined for a repeat of the same experience.

Similarly, given that the two Acts will be the only effective means through which vast areas of the physical environment can be managed, a stable NPD will be one that seeks a genuine balance between the value of enabling development while securing important biophysical values. Both are important and both need to be achieved. The Acts deferred crystallising that balance to the NPD. This illustrative NPD does not achieve it.

Kind regards



Rt Hon Simon Upton  
**Parliamentary Commissioner for the Environment**  
**Te Kaitiaki Taiao a Te Whare Pāremata**