Taituarā
Local Government Professionals Aotearoa

Spatial Planning Act (SPA) and Natural and Built Environment Act (NBA)

Submission to the Environment Committee

February 2023

leadinglearninglinking

What is Taituarā?

Taituarā – Local Government Professionals Aotearoa is an incorporated society of nearly 1,000[1] members drawn from local government chief executives, senior managers, and council staff with significant policy or operational responsibilities. We are an apolitical organisation. Our contribution lies in our wealth of knowledge of the local government sector and of the technical, practical, and managerial implications of legislation.

Our vision is:

> *Professional local government management, leading staff and enabling communities to shape their future.*

Our primary role is to help local authorities perform their roles and responsibilities as effectively and efficiently as possible. We have an interest in all aspects of the management of local authorities from the provision of advice to the planning and delivery of services, infrastructure, urban development and placemaking, community wellbeing and climate resilience and mitigation. We are therefore highly motivated to assist in the creation of a more efficient, certain, less complex and implementable resource management system that delivers positive outcomes for the environment and communities.

We are particularly interested in ensuring transition arrangements are workable, adequately resourced and there is sufficient capability and capacity within the local government sector and workforce to make the significant shift to the new system.

Our Submission

This submission has been developed with input from many local government chief executives, senior managers, and council staff from across Aotearoa. We would like to thank our Resource Management Reference Group for their contributions both to the development of our submission and for their feedback in policy development.

The members of Taituarā RMRG are:

- Aileen Lawrie, Chief Executive, Thames-Coromandel District Council.
- Lucy Hicks, Policy and Planning Manager, Environment Southland.
- Anna Johnson, City Development Manager, Dunedin City Council.
- Simon Banks, former Project Leader – Urban Planning, Tauranga City Council.
- Marianna Brook, Senior Advisor, Otago Mayoral Forum.
- Blair Dickie, Principal Strategic Advisor, Waikato Regional Council.

[1] As at December 2022.

- Matt Bacon, Development Planning Manager, Waimakariri District Council.
- Joanna Noble, Chief of Strategy and Science, Gisborne District Council.

We also engaged Simpson Grierson to provide legal advice on particular matters. This legal advice has been incorporated into this draft submission and is also attached in full for the benefit of the committee.

Our feedback builds on our previous submissions and feedback on Ministry consultation documents and the exposure draft of the NBEA Bill.

We wish to be heard in support of our submission.

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Executive Summary

1. We welcome the opportunity to give feedback on the Bills. Our contribution aims to ensure the problems of the past are not carried over into the future resource management system and the objectives of the reform are achieved. It is in our interest to do so, as our members are going to be at the forefront of making the new system work.

2. Reform of the Resource Management Act 1991 (RMA) has been called for, for decades. Many reasons have been identified for the failures of the RMA from its implementation to the current complexity for users and practitioners navigating the system. One of biggest issues with the RMA-based system arose from the ongoing tension between enabling urban development (including infrastructure) and protecting the environment; a tension that will remain under the new system, particularly without a clear hierarchy of outcomes. Another was the lack of national direction at the right time and of sufficient quality, as well as capacity and capability issues. Both issues remain a concern today.

3. So while we welcome some aspects of the system proposed under the Natural and Built Environment Bill (NBEA) and the Spatial Planning Bill (SPA), such as the introduction of mandatory spatial planning, recognition of Te Tiriti and a more strategic role for Māori, Taituarā remains unconvinced that the reform package overall will produce a simpler, more efficient and cost effective system and deliver the climate, environmental, urban and Te Tiriti objectives of the Government. We are convinced however that democratic input and accountability has been permanently undermined.

Simpler, more efficient and cost effective.

4. Gaining assurance that the new system will be better has been a difficult task because many of the hard decisions have not yet been taken and are not reflected in the Bills. Much of the necessary detail is left to future subordinate legislation that is not currently available, such as the National Planning Framework (NPF), and key elements of the system such the Climate Adaptation Act (CAA) and the transition of Settlement legislation are missing.

5. Much of the existing system (such as the consenting provisions) is being carried over. Where the system is different, complex layers and arrangements have been added, like Regional Planning Committees (RPCs) and independent Secretariats. These involve complicated appointment, engagement and funding arrangements, many of which appear unnecessary and overly bureaucratic. We think there are far simpler solutions available that can be used in the absence of local government

reform such as the use of a Joint Committee (or in the case of a unitary council a council committee) under the Local Government Act 2002 and the direct employment of the Director of the Secretariat by the host council. Simple changes such as these would enable critical parts of the system, such as spatial planning to be turned on early and with far less complexity that is currently proposed.

6. The proposed reform is also predicated on regional planning at the wrong scale, particularly for the Natural and Bulit Environment plans. At least three districts must contribute to two or more regional arrangements, and places like the Bay of Plenty and the Waikato are arguably too large for the diverse communities, interests, socio-economic conditions and numerous iwi/hapū and councils involved.

7. Other new aspects of the system, such as enduring submissions, while retaining cross submissions, provide little benefit and run counter to the objective of a simpler, more efficient system. Notification and designation changes appear ill-thought out, as does the use of Permitted Activity Notices (PANs). All three are overly complex and will introduce unnecessary cost.

8. There are a plethora of new terms, many without definition. Where definitions for new terms have been provided many are subjectively framed, which will lead to lengthy and costly litigation. The substantial cross referencing between the Bills and within the Natural and Bulit Environment Bill are a minefield to negotiate, and we seriously question the need for a separate Spatial Planning Act given much of the detail needed to implement it is contained within the Natural and Bulit Environment Act.

9. With the development of the CAA falling behind the NBEA and SPA and the weak connections with the Climate Change Response Act 2002 (CCRA) we have significant concerns that the reform package will not integrate holistically and enable the country to mitigate and adapt to climate change, particularly at place.

10. The current national emergency highlights the need for rapid acceleration of central government efforts to progress climate change adaptation and a joined up investment programme. We are already living in a disrupted climate. The impact on human, economic and natural systems is being felt at an unprecedented level right now in our communities. There is a grave danger that we will building back the same as what we had before. The transition to a different future must start now with proper planning and access to the funding and investment communities need to recover and be resilient. Taituarā cannot emphasise enough the need for spatial

planning and aligned investment plans that get down to impacts at place, support communities to transition to living under our disrupted climate and addresses inequity.

11. We also detail our concerns about the achievement of environmental and development objectives in this submission and conclude that the reform objectives are unlikely to be achieved.

Alignment with other reforms

12. We are also concerned that the Bills, as proposed, do not align with other reform and review programmes despite the clear links between the resource management system water reform and the future for local government. This is unhelpful and creates gaps, while also risking duplication and unnecessary cost. When combined with the likelihood of subsequent amendment of legislation, we think there is high possibility that system objectives will be frustrated and issues with the current system will be perpetuated.

13. Prior to the introduction of the Resource Management Act 1991 local government functions and structure were changed as this was critical to the system. The allocation of roles and responsibilities under the new system without structural reform to local government or more flexibility to accommodate local circumstances will result in an overly complex, disconnected and disjointed planning system.

14. While there is an emphasis on collaboration throughout the system, divorcing plan making from other key aspects of the system (such as consenting, infrastructure provision, funding and accountability) will cause problems. The current proposal sheets home responsibilities to Councils, their staff and communities that they have no control over (from funding to monitoring and enforcement). This not only reduces local democratic and community input into the plan making process, but it will also impact on plan ownership and the effective implementation of the new system. It exacerbates current funding and resourcing issues. Councils must resource the new system, maintain the old system (until plans take effect) and maintain the critical capability and capacity to carry out the daily functions of councils, which communities expect and pay for.

15. Local government has consistently pointed these issues out but has largely been ignored.

Loss of local voice and accountability

16. As the local government sector has stated before, we are concerned that the proposed reforms will curtail local democratic input and reduce the ability for councils and communities to contribute to place-making. Most people in the community have no idea what the reforms mean for them and their ability to shape their local place.

17. Members of the public are unlikely to engage with long and complex documents that deal with matters at a regional level and the right to be heard (as a principle of natural justice) has been restricted at both the strategic spatial planning level and at the consent level.

18. While we are pleased that the Local Government Steering Group's suggested Statements of Community Outcomes (SCOs) and Statements of Regional Outcomes (SREOs) have been included in the Bills, they are a poor substitute for the meaningful participation of councils and communities in the planning system and place making. It should be noted that SCOs and SREOs were developed to address a serious system gap and would not have been necessary if the resource management reform had not removed community voice from the system and democratic accountability. Where SCOs and SREOs are developed, it should be clear what they should address, and they must be given greater weight in the system. We urge the Committee to undertake further work to ensure there are appropriate mechanisms for public participation throughout the system. The needs and aspirations of communities are best known by the communities themselves.

19. SCOs and SREOs might not be necessary in the future if the signals for a comprehensive Wellbeing Plan in the Future for Local Government Panel's draft report (He mata whāriki, he matawhanui) come to pass. This is another reason to re-examine the pace of the reform and the integration with other processes, particularly climate change adaption and the Future for Local Government.

20. If the Regional Planning Committee needed to recognise and provide for existing plans (at the community level) and RMA instruments this would also go some way to address local voice concerns.

21. The Bills also confer significant powers to the Minister. We have serious concerns that although the need for some powers is justified, the unfettered nature of their drafting gives a Minister significant discretion. This places the system at risk due to changing political priorities, allows the Minister to intervene when it is inappropriate, and creates overlapping responsibilities with other authorities.

Te Tiriti o Waitangi

22. While we fully support the increased weight given to Te Tiriti o Waitangi and the need for a more strategic role for Māori in the system, without commensurate funding and support the objectives of the reform participation will not be realised. Given the limited investment indicated in the Supplementary Analysis Report, we think not enough support is being provided to iwi and hapū who will need to build capacity and capability to fulfil the increased participation provided for in the Bills.

23. We are concerned that the RPC process can commence prior to appointment processes being concluded and we note that the Waitangi Tribunal[2] found it difficult to assess the compliance of the proposed RPC appointment process with Treaty obligations due to the reliance on agreements that will be negotiated during the transition period.

24. We are also concerned that existing relationships and arrangements with councils will be undermined, and that not enough thought has gone into the difference between the proposed RPC and its relationships and agreements (such as Mana Whakahono a Rohe) and those of councils, including arrangements set up by the Treaty Settlement process.

Capacity and capability

25. One of our biggest concerns is that we do not have the workforce needed to produce quality products, respond to consent expiry requirements, and complete the work that is already in train in the timeframes outlined by the Ministry for the Environment (MfE).

26. The local government planning workforce in New Zealand already has significant vacancy rates, which when coupled with the various consultant and council staff positions that will be required to support the development of RSSs and NBE plans, enable councils to participate as submitters on behalf of their communities, contribute to the development of the NPF and address current Government policy direction (NPS-UD, Freshwater etc) and that which is coming down the pipeline (e.g. NPS-Indigenous Biodiversity), assess risk and address climate change. This places the attainment of the system outcomes and Government objectives at risk.

27. It also places other key parts of council business at risk such as Civil Defence Emergency Management. Particularly in smaller councils, critical staff may be

[2] The Interim Report on Māori Appointments to Regional Planning Committees, Waitangi Tribunal, 2022.

unavailable to staff Emergency Operations Centres or support communities due to secondments to (or employment by) Secretariats.

28. Councils will also be impacted by the three waters reform and the new Water Services Entities will be in a stage of transition post 1 July 2024 that may take many years.

29. The reform programme and the employment of key staff from the sector by MfE has already depleted the existing council planning resource. The uncertainty around the timing of implementation and the tight deadlines in the Bills could exacerbate existing recruitment and retention issues facing the sector.

30. In addition to this, the proposed RPC and secretariat structure will result in complex employment fictions, and we have significant concerns with their employment law implications (particularly in health, safety and wellbeing and the severing of the employment relationship between council Chief Executives and local government staff).

31. There is therefore an immediate need to focus on the capacity and capability of local government (and iwi and hapū) to implement the new system and consider the health, safety and wellbeing of those that will be involved in making it work.

Implementation and transition

32. The implementation of the new system and transition to it represents one of the biggest risks to the success of the new system. While implementing the new system in regional tranches attempts to accommodate workforce capacity and capability constraints, the tight timeframes for individual components of the system and the current lack of certainty about when the system will turn on and for whom (and when to turn off the current system and the work already underway) means that local government is unable to properly plan and prepare for its introduction.

33. Local government must be a critical partner in the development of the transition and the instruments and guidance that is yet to come. Taituarā and LGNZ (and our members) are here to help develop these critical building blocks and ensure that a practical implementation plan is developed. There should be no planning for us that is without us, and we encourage a more collaborate and co-design approach to all aspects of transition and implementation. There is much that the local government sector can lead and assist with.

34. That said, central government should not underestimate the time and funding that will be required to transition to and implement the new system successfully. It should equitably share the costs with local government, particularly for the new features of the system and the pace and sequencing of the reform should be critically examined. Spatial planning and aligned investment must be the priority, particularly in light of the current national emergency.

Conclusion

35. Overall, our conclusion is that the Bills as proposed do not meet the objectives of reform and the reform package and will likely carry over many issues people identified under the RMA without significant further work.

36. Our submission therefore focuses on how the Bills and the overall reform package could be improved and is split into three parts. The first relates to addressing our overarching concerns. The subsequent two parts make specific recommendations on the Natural and Built Environment Bill and the Spatial Planning Bill as currently drafted. It is highly likely given the timeframes we have had to work to that we will have missed things.

37. We wish to work with the Committee to ensure its recommendations on the Bills are workable and enhance the system and are committed to working with central government to ensure transition and implementation deliver an improved system. To do this, the sector, Taituarā and LGNZ and key partners in the system need to be intimately involved in the design of the next steps, not merely consulted.

38. A full list of recommendations can be found at in Appendix A.

Glossary of Terms

CAA – Climate Adaptation Act
CCRA – Climate Change Response Act 2002
CDEM – Civil Defence Emergency Management
CIP – Construction and Implementation Plan
CRPC – Cross-regional Planning Committee
CRSS – Cross-regional Planning Committee
EPA – Environmental Protection Agency
FfLG – Future for Local Government review
JMA – Joint Management Agreements
LGC – Local Government Commission
LGA – Local Government Act 2002
LTMA – Land Transport Management Act 2003
LTP – Long Term Plan
MfE – Ministry for the Environment
NME – National Māori Entity
NPF – National Planning Framework
NZCPS – New Zealand Coastal Policy Statement
NPS UD – National Policy Statement on Urban Development
NBEA – Natural and Built Environment Bill (or Act as the context requires)
NBE plan – Natural and Built Environment plan
RMA – Resource Management Act
RPC – Regional Planning Committees
RSS – Regional Spatial Strategy
RLTP – Regional Land Transport Plans
SAR – Supplementary Analysis Report
SCO – Statement of Community Outcomes
SOI – Statement of Intent
SREO – Statement of Regional Environmental Outcomes
SPA – Spatial Planning Bill (or Act as the context requires)
SAR – Supplementary Analysis Report
TOWA 1975 – Treaty of Waitangi Act 1975
WSE – Water Service Entity

Part One – Overarching Commentary

1. Reform of the Resource Management Act 1991 (RMA) has been called for, for decades. Despite significant amendments to the RMA the resource management system is perceived as restrictive, complex, costly and time consuming. The environment is under pressure with biodiversity and wider environmental decline compounded by the present and future impacts of climate change. Urban areas are struggling to keep pace with population growth, there is a lack of infrastructure in the right place at the right time and a lack of nationwide long-term strategic land use planning.

2. Many reasons have been identified for the failures of the RMA from its implementation to the current complexity for users and practitioners navigating the system. The Randerson report identified several issues with the current system including:

    a) Lack of clear environmental protections.
    b) Lack of recognition of the benefits of urban development.
    c) Focus on managing the effects of resource use rather than planning for outcomes.
    d) Bias towards the status quo.
    e) Lack of effective integration across the resource management system.
    f) Excessive complexity, uncertainty, and cost across the resource management system.
    g) Lack of adequate national direction.
    h) Insufficient recognition of Te Tiriti and lack of support for Māori participation
    i) Weak and slow policy planning.
    j) Weak compliance, monitoring and enforcement.
    k) Capability and capacity challenges in central and local government.
    l) Weak accountability for outcomes and lack of monitoring and oversight[3].

[3] New Directions for Resource Management in New Zealand: Report of the Resource Management Review Panel, June 2020.

3. The RMA was ground-breaking and could have been successful. Additional legislative weight could have been given to Treaty principles and amendments to address climate change could have been made earlier. Central government could have issued the necessary national policy statements and environmental standards in a timely manner to implement the system as it was intended, and it could have invested in capacity and capability across the system. The politicisation of the RMA's implementation has not contributed constructively.

4. Amendments to the RMA aimed at simplifying and speeding up processes and developing workarounds to unintended consequences, have been clumsy and often inappropriate, ultimately this led to an increasingly complex resource management system that frustrates both the interests of environmental management and development. Issues such as the need for significant infrastructure investment in high growth areas to service development by an under resourced local government sector dependent on rates revenue were always beyond the scope of the RMA. Despite this the RMA has borne a lot of the criticism for constraints that have effectively been beyond "its control". The new system will need to address these issues if it is to fare any better. We don't think it does.

5. Ultimately some of the biggest issues with the RMA-based system arose from the ongoing tension between enabling urban development (including infrastructure) and protecting the environment; a tension that is likely to remain under any new framework that aims to achieve integrated management and deal with large and complex issues. This is especially true in the proposed system where there continues to be a reluctance from central government to provide a hierarchy of outcomes in primary legislation.

6. Taituarā has identified several risks and concerns with the reform package as presented. We consider that the objectives of reform are unlikely to be met, that this reform is misaligned with other reforms, and that poor implementation presents a significant risk to the success of the current reforms given that "the key to realising the potential benefits will be effective implementation".[4]

[4] Supplementary Analysis Report, pg. 10

Objectives unlikely to be met

7. Taituarā largely supports the Government's objectives for reform:
    1) Protect and restore the environment and its capacity to provide for the wellbeing of present and future generations.
    2) Better enable development within natural environmental limits.
    3) Give proper recognition to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori and mātauranga Māori.
    4) Better prepare for adapting to climate change and risks from natural hazards, and better mitigate emissions contributing to climate change.
    5) Improve system efficiency and effectiveness and reduce complexity while retaining appropriate local democratic input.

8. While we agree with these objectives, we believe that the Bills as drafted do not meet these objectives, especially objective five.

Objective 5

9. We have significant reservations that the Bills and the future CAA will lead to a more efficient, effective, simpler system. Indeed, the Supplementary Analysis Report (SAR) recognises there is considerable risk to achieving this objective, assessing a high likelihood that risks to system effectiveness and efficiency will be realised, a high impact if they are realised, and low certainty rating overall.[5]

10. Significant time and resource will be required to set up RPCs, especially around the appointment arrangements and agreeing funding and support. Central government has not addressed key matters such as Treaty Settlements and the functions and structure of local government, instead relying on complex arrangements of host councils, secretariats, employment fictions and yet to be agreed funding arrangements.

11. The shift from over 100 planning documents to 15 regional plans is not an insignificant undertaking and reducing the number of plans will not necessarily drive simplicity and efficiency. The new NBE plans will be developed under a similar process to the Auckland Unitary Plan which replaced seven district plans and a regional plan (Air, Land and Water) into a single document, adopting key elements of the Auckland Unitary Independent Hearings Panel process. The changes involved in preparing combined plans should not be under-estimated from a governance, funding, and resourcing perspective.

[5] Supplementary Analysis Report, pg. 87

12. Using existing regional boundaries captures wide-ranging variation. One only needs to consider the differences between areas like Christchurch and Timaru; Queenstown, Clutha and Dunedin; Tauranga and Ōpotiki; Wellington and South Wairarapa, and their communities. These differences include (but not limited to):

    - socio-economic conditions
    - urban vs rural communities
    - different land uses
    - variation in population sizes
    - high growth vs stagnant communities
    - catchment areas
    - iwi and hapū (number, rights, interests and responsibilities) and
    - varying levels of political power, influence, capacity, and capital.

13. It also continues to split the Taupō District and its communities between four different regions (Waikato, Bay of Plenty, Hawke's Bay and Manawatū-Whanganui). Although most of the district's land area sits within the Waikato Region, the people of the Taupō District associate with various communities of interest and regional groupings (particularly depending on context). Rotorua District and Waitaki District continues to be split across two regions, with similar issues for its communities. While cross regional and sub regional subcommittees are proposed, some of the complexity could and should be reduced if not avoided through reform to local government prior to NBA plans being developed and/or more relevant spatial scales being used.

14. The NBEA relies on a lot of front-end work in developing an almost 'perfect' spatial plan (under the SPA) and regional plan resolving very complex issues around resource allocation. At the other end of the plan development process, the new system has retained submissions, further submissions (now primary and secondary submissions) and introduced enduring submissions. With the power to request information, we wonder whether the secondary submissions are entirely necessary if the goal is to achieve an efficient process. For example, the experience of our members suggests secondary submissions are of limited value. In a process where thousands of submissions can be anticipated they are likely to clog up the system. Other processes, such as Long Term Plans (LTPs), Regional Land Transport Plans (RLTPs) or indeed Select Committees, don't use this arrangement.

15. There are other examples of unnecessary complexity and inefficiency that we highlight through this submission. We ask that the Committee ensures unnecessary features are removed from the final Act.

16. The system also hinges upon a yet unseen National Planning Framework (NPF). We are aware that the first iteration of the NPF will only constitute an amalgamation of existing national direction with some gap filling and conflict resolution. We welcome the removal of existing conflicting direction and believe it should be applied across both those transitioning to the new system and those who are still waiting. However, the risk with this ad hoc development (using existing NPSs as a base) is that it will suffer the same flaws as the existing framework. Where conflicts are left to RPCs to resolve, costly and time-consuming litigation seems inevitable. This approach appears to be a lost opportunity and may set the standard for what follows. It would be preferable to take time at the outset to get it right, and to enable co-production with local authorities and iwi/hapū/Māori experts with subsequent engagement and consultation. After all, everything hangs off the NPF.

17. The staged development of the NPF, the multitude of dates for NBA plan rules having legal effect, the tranche approach to plan making (without knowing which regions are in which tranches), and the lack of clarity on the transition of Treaty Settlements to the new system all add to a very complex picture which significantly undermines the claim that the new system will "Improve system efficiency and effectiveness and reduce complexity".

18. Furthermore, the second limb of the objective – "while retaining appropriate local democratic input" – is in serious question. Local democratic input and accountability has been reduced through the introduction of RPCs. At the same time responsibility for implementation and funding has been sheeted home to local government. The rhetoric of this objective does not match the reality of what is proposed.

19. The role of democracy in the new system is significantly curtailed. RPCs are not councils and are not democratically accountable to communities. The NBEA seeks to give local authorities some influence over the shape and content of plans by allowing them to submit SCOs and SREOs and enables a single representative of each council to be member of the RPC. These are poor substitutes to the current system of allowing for local democratic input in plan making. It also undermines the critical role of councils in placemaking and risks a disconnect with other local government functions, which we elaborate on later in our submission.

20. The new system establishment costs for local government are estimated as $350 million over ten years with additional average costs per annum estimated at $43 million. These are only estimates and the real detail of the new system won't be known even when the SPA and NBEA are enacted. As such there is a high level of uncertainty around these numbers and there is likely to be a significant underestimation of the costs for the whole reform. What is certain is that the largest absolute increase in costs fall to local government at a time when local government revenue and funding is under enormous pressure and there is limited ability to increase rates.

21. This is the case regardless of whether the individual councils and their communities agree with what is proposed or decided upon. When combined with the role of the Independent Hearings Panel (IHP) this seriously stretches the notion of "no taxation without representation" that underpins democracy in Aotearoa and is yet another example of the unfunded mandate.

22. We reiterate our concerns from our submission on the exposure draft that communities are unlikely to engage with large, complex and regional plans. It is likely that communities will express their views (including their frustrations) later in the process at the time of consenting, monitoring and/or enforcement, when the effects of the plans are better known. Local authorities are likely to bear the brunt of these views given their continued role in consenting, monitoring and enforcement with limited ability to influence the major decisions on the plans themselves.

23. With much of the detail on how the NBEA and SPA will be operationalised and what (if any) Government funding will be available for all system participants yet to come, we do not have a high level of confidence that the future system will improve system efficiency and effectiveness and reduce complexity while retaining appropriate local democratic input. Developing a Natural and Built Environment plan (NBE Plan) will be anything but simple and the process will be expensive, time consuming, litigious and no doubt "political", albeit with limited democratic input.

24. We have had the opportunity to review the points raised about local voice in the Local Government New Zealand (LGNZ) submission on the Bills and agree that the Committee should assure itself local democratic input is maintained in line with its objectives and ensure that communities are heard in the regionalised system.

25. We also ask that the Committee critically analyses the Minister's proposed new powers against the tests of necessity and local democratic input and considers whether it is necessary or desirable to maintain two separate Acts for spatial planning and resource management given the significant overlap and cross referencing between the two.

Objective 4

26. The ability of the reforms to achieve objective four (to "better prepare for adapting to climate change and risks from natural hazards, and better mitigate emissions contributing to climate change") is difficult to assess without the third leg of the stool – the CAA. While the NPF might add value, and it must add value in this area, it too is not available to assess. In addition to this, the whole reform process and the significant effort, time and resource it will take to implement is likely (in the short to medium term) to divert resources away from tackling the immediate need to comprehensively address climate change adaptation and mitigation.

27. It is important that the NBEA, the SPA, and the CAA are well aligned to achieve the RM reform objectives. There is a risk that delays to the CAA and NPF may result in wasted work or duplication of effort. Worse it could delay much needed action and investment, a delay we can't afford given the current national emergency.

Objective 3

28. Taituarā supports the objective to "give proper recognition to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori and mātauranga Māori." But we note that there are various issues throughout the Bills, especially when it comes to implementation and funding, that could undermine this objective. These range from the lack of certainty as to how Treaty Settlements will be upheld in the new system, the minimum number of appointments to RPCs, the development of the first NPF without iwi and hapū engagement and a lack of mātauranga Māori, capacity constraints, the potential for new arrangements to cut across existing relationships, limited central government investment in capability and capacity building, and the expectation that local government will fund agreements and input into a planning process that are "independent" of local authorities. We delve deeper into these examples in our analysis of the Bills.

Objectives 1 and 2

29. Objectives 1 and 2 aim to protect and restore the environment and better enable development within environmental limits respectively. There is potential to achieve these objectives but there will be inevitable national, regional, and local conflicts that will need to be reconciled and decided at the appropriate level. In line with the Committee's recommendation against a hierarchy of outcomes, the NBEA does not resolve key national level conflicts (between outcomes) and leaves this to the NPF and potentially RPCs.

30. We cover our concerns with this approach as well as the potential for inappropriate standardisation in Part 2 of our submission but note here that there is risk with centralisation, a standardised national planning framework with national standards, and regionalised decision making that the system will be less responsive to the needs of local communities and undermine local placemaking. We also note Scotland has been down this path and has recently introduced the Place Principle into its National Planning Framework that applies at the regional and local level.

31. We remain concerned that the substantive role for local authorities in place-based planning and the need for a quality built environment is not clearly spelt out in the drafting of the SPA and NBEA. We request that this is rectified in the final Acts.

Recommendations

That the Committee:

1.1 Amend the Bills to recognise and provide for local place-based planning by local authorities.

1.2 Specifically include the need to ensure a quality built environment.

Alignment With other Legislation and Reforms

32. The RM Reform programme closely links with and is occurring alongside other Government review, reform, and policy programmes, including:

    - Three Waters Reform
    - the Future for Local Government Review
    - the Government's work on climate change, including the introduction of a National Adaptation Plan (NAP)and Emissions Reduction Plan (ERP) and the CAA
    - the introduction of New Zealand's first Infrastructure Strategy
    - the Building Consent Review
    - Emergency Management System Reform.

33. We are concerned there is little alignment and integration between the reform of the resource management system and these other significant programmes. In addition, the current sequencing and pace of the programmes creates unnecessary cost and uncertainty and risks gaps and overlaps. We are certain there is insufficient capacity (and capability) to carry them all out effectively, risking policy failure.

34. These concerns have been continually raised by the local government sector and we have largely been ignored.

Three waters

35. We are concerned that there will be reduced capacity for Water Service Entity (WSE) involvement in early tranches of RSSs and NBE Plans due the transition state they will be in, but councils will no longer have the inhouse expertise to assist the Committee and Secretariat. The Bills should be clear where responsibility lies (with the WSE from 1 July 2023) and enable effective participation in the new system by the WSEs.

36. As a critical partner in delivering the RSS and its implementation plans and agreements and in achieving environmental and built environment outcomes WSEs should, alongside entities such as Waka Kotahi, be part of the process of their development. In addition to this, they should be responding to NBE plans developed under the NBEA.

37. To enable integrated decision making, reduce duplication and promote efficiency, the WSE should be required to provide information, policies, plans, Te

Mana o Te Wai statements, advice, and their expertise to the RPC (in practice via the Secretariat). RPCs should engage with them early in the development process to enable collaboration and ensure the information and advice is available when it is needed. Decision makers should also be required to have "particular regard" to statements, plans and strategies prepared under the Water Services Entities Act 2022 and given their critical delivery role, a representative of the WSE should be a member of any water sub-committees that are set up.

38. For similar reasons and given their subject matter expertise, WSE staff should be part of and be able to be seconded to the Secretariat. They should also be involved in the development of the NPF, particularly the development of environmental limits, which will affect the delivery and operation of critical infrastructure.

39. We note the concerns raised by LGNZ about the consenting pathways and Effects Management Framework for critical three waters infrastructure and support further consideration of an exemption from the Framework and alternative consenting arrangements.

40. We request clarity around the three-year maximum duration for "affected consents". We are concerned that the life of the consent will adversely affect the timely investment in much needed infrastructure for communities and create consenting and capacity issues when all consents expire.

41. We support the recommendations LGNZ has submitted to the Committee on Three Waters Reform.

Future for Local Government

42. The review and potential reform of local government is out of step with the reform of the resource management system. Unlike the 1989 reforms that preceded the introduction of the RMA, this reform is proceeding without a solid foundation for its administration and implementation. This has led to overly complex arrangements for strategy and plan making particularly the RPC, Secretariat, support and funding arrangements. Fragmented consenting, compliance, monitoring and enforcement arrangements across exiting councils risks inconsistency and breaks existing feedback loops. This will prevent timely agile advice and adaptive course correction in the system.

43. The disconnect between accountability and responsibility (with councils becoming plan takers) and between resource management and other council

functions (particularly LGA functions) is a significant concern. We want to emphasise that regionalisation and divorcing plan making from plan taking not only reduces local democratic and community input into the plan making process, but it will also impact on plan ownership and the effective implementation of the new system. It jeopardises input from necessary experts and communities. It makes alignment with funding and staff resourcing for councils very difficult and we are also concerned it will undermine local place-making.

44. Misalignment with the FfLG and the disconnect that has occurred without structural reform of the sector is a critical risk to the success of the NBEA and SPA.

45. The Committee has been previously warned by submitters including the Parliamentary Commissioner for the Environment, Simon Upton that structural reform is needed to ensure a more efficient and effective system[6]. He posed alternative potential arrangements in his 2020 RMLA Salmon Lecture (including compliance monitoring and enforcement potentially moving to the EPA)[7]. Indeed, even though the review and reform of local government was outside the Resource Management Review Panel's terms of reference, the Panel still suggested reform occur.

46. While we appreciate that central government has no appetite to slow the pace of resource management reform and create space for the review and reform of local government to catch up, doing so would allow time for the future direction of the local government reforms to become clear. The current proposals (in particular the RPC and Secretariat model) could then be assessed against the desired future structure, functions, and funding for local government and the achievement of the objectives of the reform.

47. Integrating the reforms would avoid unnecessary complexity, uncertainty and the consequential risks that go with these, not least of which is the further exodus of the range of professionals from local government that will be needed to make the system work.

[6] Harman, R., (2021) 'Upton and Salmon's problems with David Parker's resource management reforms'.
[7] Parliamentary Commissioner for the Environment, 2020, Salmon Lecture: RMA Reform Coming Full Circle. Accessed from: https://pce.parliament.nz/media/hxjhxecy/salmon-lecture-rma-reform-coming-full-circle.pdf

48. Perversely slowing down may speed up the overall transition to the new resource management system (which is already disproportionate to the expected life of the proposed Acts[8]), particularly if the early signals from the Future for Local Government Review Panel (FfLG) are accepted.

49. We note that the functional allocation and structural models currently being considered by the FfLG Review Panel (such as combined authorities - akin to the Greater Manchester Combined Authority, unitary authorities and the regionalisation of several regulatory functions) are a very close fit with the intent that sits behind the resource management reform's complex plan making arrangements. If adopted any of these options would align accountability and responsibility and provide a permanent, skilled staff to support regional decision making and implementation and integrate resource management with a range of other regional functions and responsibilities.

50. We note that the Combined Authority model is also underpinned by significant central government resourcing creating a partnership, accountability, and necessary co-investment for outcomes.

51. If such a model was adopted in the future, we anticipate it would also enable "local" councils to focus on local community wellbeing strategies, plans, action, and local place making and feed into regionalised plan making. There would be representation on the Combined Authority to ensure the whole regions needs and aspirations are met. This could obviate the need for SCOs and SREOs. In the case of a unitary approach there is already this integration.

52. While our members have not yet had the opportunity to fully consider the Combined Authority model, we think it or something like it could be used effectively in some regions as part of the resource management reform process.

53. Other options have also been suggested to us, such as a Special Purpose Regional Planning Authority, which could be more accountable to communities and stakeholders. The Authority could for example be established as a body corporate with general powers of competence, accountability, rate setting, borrowing, and Te Tiriti obligations. Aotearoa has had a history of special purpose boards of this nature and at one time there was specific provision in the Local Government Act 2002 (LGA) for them[9].

[8] There is a 10 year transition period. The life of the RMA was 30 years. It is unlikely the NBEA and SPA will last much longer.
[9] which we understand was repealed in 2019.

54. A Regional Planning Authority could be created at a scale that fitted the context and if appropriate it could be supported by a host council. There is precedent for this in Settlement legislation, for example in the role played by the Waikato Regional Council with the Waihou, Piako and Coromandel Catchment Authority proposed under the Pare Hauraki Redress Bill and in other arrangements for taonga governance and management, such Te Oneroa a Tōhē. If Regional Planning Authorities were pursued, they could potentially evolve to support or undertake other resource management and/or regulatory functions such as compliance, monitoring, enforcement and/or consenting.

55. It could be argued that the key tools needed to address the RM reform goals are:

- New outcomes focussed purpose and principles and a consolidated NPF.
- Regional Spatial Strategies that provide the necessary connection between national, regional and local outcomes, priorities, and funding.
- Clear role for Māori in the resource management system that recognise the principles of Te Tiriti o Waitangi and te ao Māori and mātauranga Māori.
- Local government having tools to manage climate change (either through Climate Adaptation Act or national direction).

and these should be the key focus.

56. If these were prioritised there would be time to work through a more appropriate and less complex structure for regionalised planning and delivery under the NBEA that won't require reworking in the future (potentially mid-way through the 10-year transition process). For example, each regional and unitary council could develop a RSS using a LGA joint or existing committee structure, drawing on the experience of the Greater Wellington Region and other urban growth partnerships as a first step.

57. Indeed, without structural reform a joint committee (or in the case of most unitary authorities a council committee) under the LGA is by far the simplest approach.

Climate Change

58. The reform the RM system is included in both the first ERP[10] and the first NAP[11] which note the importance of integrated land use and infrastructure planning to reduce emissions and help adapt to the impacts of climate change. While we

[10] Action 7.1 in Ministry for the Environment, First Emissions Reduction Plan pg. 133
[11] Action 4.1 in Ministry for the Environment, First National Adaptation Plan pg. 71

support this in principle it is yet to be seen whether the proposed system will provide a climate resilient integrated approach to decision making.

59. Furthermore, while climate considerations are included in the Bills (e.g., *clause 17(j) SPA*) and other government policies *(schedule 3 SPA)* are listed for consideration, the ERP and NAP are not included. This seems like a clear omission as *sections 17 and 18* of the Resource Management Amendment Act 2020 recently imposed a requirement on local government to have regard to NAP and ERP when preparing policy statements and plans. We recommend that the ERP and NAP be explicitly mentioned as considerations when developing NBE plans and RSSs.

60. As noted earlier, the CAA has not progressed alongside the NBEA and SPA. These three pieces of legislation are supposed to work in concert to effectively manage development and use, build resilience, and enable adaptative pathways in the face of climate change impacts, which are growing in intensity.

61. Currently, the planning and implementation of adaptation measures is provided by the RMA, LGA, and consenting processes under the Building Act 2004. This legislative framework is restrictive and not fit for purpose. The statutory timeframes for planning under each regime differ significantly, with decisions being made anywhere from a 10 year to 100-year timeframe. Furthermore, these processes are difficult to fund under the current regime and where funding is secured it is done inequitably (i.e., those with a rate paying base which can be drawn on to relocate communities and infrastructure).

62. Bringing together the disparate functions and powers to create a coherent pathway for affected communities is resource intensive. Without understanding the contents of the CAA and whether funding issues will be resolved, it is difficult to assess whether the SPA and NBEA will provide sufficient tools to address critical climate change issues and address the Government's objectives. We are also concerned that delays to the CAA and NPF may result in wasted work, duplication of effort or inaction.

63. We therefore strongly encourage the Government to make considerable progress on the CAA before the NBEA and SPA are enacted and that this is done in partnership with local government, harnessing its on-the-ground experience. It is imperative that local government has the tools to effectively manage climate change and its impacts, and these are integrated into the future system.

What else is missing from the integrated package

64. A more efficient, simpler RM system should integrate with strengthened bylaw mechanisms under the Local Government Act 2002, including better monitoring, compliance and enforcement provisions such as infringement notices. This would enable more minor and locally specific regulatory matters to be managed outside of the regional planning process, which would support objective 5 of the Government's RM reforms. Specifically, it would enable issues such as noise and nuisance that clog up the resource management system today to be more effectively dealt with.

65. While this may appear to be more within the in scope for the Future for Local Government Review, we consider that there would be merit in the Department of Internal Affairs considering this as part of their more immediate programme of work on Local Government System Stewardship. Further detail on this proposal can be found in the Local Government Steering Group's (LGSG) report "Enabling local voice and accountability in the future RM system".

Recommendations

That the Committee:

1.3 Notes our support for the recommendations LGNZ has submitted to the Committee on Three Waters Reform.

1.4 Requires WSEs to provide information, policies, plans, Te Mana o Te Wai statements, advice, and their expertise to the RPC.

1.5 Requires decision makers to have "particular regard" to statements, plans and strategies prepared under the Water Services Entities Act 2022.

1.6 Requires WSE representation on any water sub-committees that are established.

1.7 Clarifies that WSE staff can and should be seconded to the Secretariat.

1.8 Recommends that WSEs should be involved in the development of the NPF.

1.9 Reviews the three-year maximum duration for affected consents.

1.10 Slows down RM reform (particularly the development of NBEA plans) and sequences the roll out of the new Acts to allow space for FfLG reform. If this is not accepted, then the Committee should alternatively provide for simpler models and processes in the interim, such as the use of joint committees (or for unitary councils, council committees) under the LGA and sub-regional NBE plans.

1.11 Explicitly require decision makers to consider the NAP and ERP when making NBE Plans and RSSs.

1.12 Encourage the Government to make considerable progress on the CAA before the NBEA and SPA are enacted.

1.13 Recommend amending (or make a consequential amendment to the LGA) to improve bylaw enforcement tools.

Funding

66. One of the critical issues for us throughout this reform process has been a lack of funding commitments or new mechanisms to provide funding for all aspects of the reform including transition. Significant funding commitments will be required to implement the new system and establish the new bodies. This funding will be required both up front (e.g., costs to support the RPC agreement process) and ongoing (e.g., funding the work of the Secretariat). While we acknowledge the Government has committed $179 million towards implementing the new system[12] this is insufficient to implement the scale of changes required by the reform. Long-term substantial investment is needed to build capacity and capability within the new system.

67. As noted in the SAR, the establishment costs over the ten-year period are estimated at $864m[13] with costs being incurred mainly by central and local government. The new system establishment cost for local government is estimated $350m, with additional average costs per annum estimated at $43m. These are only estimates and the real detail of the new system won't be known even when the SPA and NBEA are enacted. But it is important to note that the SAR indicates that compared to the current system there is an expected 11% increase in ongoing costs for local government (at a time when councils and communities are facing critical affordability issues and there is a cost of living crisis).

68. In addition, we have identified ongoing costs that are not in the SAR and don't have an allocated funding source. For example, *schedule 7, clause 93* provides the Chief Environment Court Judge the power to appoint members of the IHP. We recommend the funding for this be committed by the Government as the courts have significant discretion in appointing members.

69. There is a high level of uncertainty around the numbers included in the SAR and there is likely to be a significant underestimation of the costs for the whole reform. What is certain is that the largest absolute increase in costs falls on local government at a time when local government revenue and funding is under enormous pressure and there is limited ability to increase rates. Central government expects that these additional costs will be covered through existing LGA processes. We are concerned that in addition to attributing funding

[12] Funding allocated in Budget 2022. See: https://www.treasury.govt.nz/sites/default/files/2022-06/b22-wellbeing-budget-soi.pdf
[13] SAR, pg. 12

responsibilities without clear accountability, that the LGA processes may not be fit for purpose. For example, the need to relate funding to the "community" may put limitations on councils funding RPCs.

70. The proposed structure of RPCs and national direction through the NPF divorces the council's plan-making functions from the delivery of services and infrastructure despite retaining the responsibility to fund the plan-making process and its implementation *(clause 647)*. This breaks current local government accountability mechanisms and creates increased stress to the system.

71. As noted in the draft report on FfLG, local government has significant funding and financing issues and has indicated that "new funding mechanisms should be established" and "the passing of unfunded mandates should end".[14] Requiring local government and communities to fund the plan-making when they have been effectively excluded from the process is essentially an unfunded mandate and should stop. The lack of transparency and accountability back to communities makes it unjust for the bulk of the money to come from local government via rates.

72. There is also significant concern that without substantial central government investment, Māori will not be able to effectively participate in the new system. Iwi and hapū have been afforded a greater, more strategic, role in the system but some may not have the capacity and resources to give effect to the larger participation role outlined in the legislation. Passing the funding of Māori participation in the system to local government is likely to result in underfunding. It is incumbent on central Government to work with iwi and hapū to provide the resourcing required.

73. Central government should be contributing its fair share to the costs of reform of the resource management system to ensure the transformation is successful. What is a fair contribution is a matter for debate, but we have always said transformational change requires transformational funding. Key areas for central government investment with local government in the new system include supporting the RPC and Secretariat, IHP plan-making process, monitoring, compliance, enforcement and reporting, appeals lodged against RPC decisions and the litigation of new terms included in the Bills, and in building capacity and capability. This will require long-term financial commitments and we encourage

[14] FFLG Draft Report pg. 189

the Committee to work their colleagues to develop a 10-year cross-party funding agreement to for the reform and providing certainty that those transitioning in later stages/tranches are still afforded this necessary support.

74. We recommend the Committee consider what amendments are necessary to the Bills or LGA to ensure there are clear and sensible rating and reporting processes for local authorities. For example, the ability of a regional council to rate on behalf of the region should be clarified and councils should not be required report on matters that they have limited control of such as expenditure by the RPC. Further discussion with local government and the Auditor General will be required and guidance produced to ensure local government has appropriate mechanisms to achieve the outcomes sought by the NBEA and SPA.

Recommendations

That the Committee:

1.14 Recommends that central government equitably share the cost of implementing and running the new system with local authorities and gains cross-party support for this.

1.15 Ensure the Bills do not pass unfunded mandates to local government.

1.16 Specifically recommends that Central Government should fund Māori participation in the system and any new local government responsibilities conferred in the Bills or novel aspects of the system (like IHP appointments and litigation over new terms).

1.17 Ensure that long-term cross-party funding commitments are agreed.

1.18 Amend the Bills (or LGA) to ensure there are clear and sensible rating and reporting processes for local authorities.

1.19 Clarify that a council can rate on behalf of the region.

1.20 Recommends that officials urgently work with the Office of the Auditor General and Taituarā to develop further guidance for local authorities on how to incorporate these activities in LTPs.

Capacity and Capability

75. There are already (and for at least the medium term there will continue to be) considerable capacity and capability constraints which present a significant risk to implementing the new system as well as maintaining the current one through the transition period.

76. We are aware of significant vacancy rates for planners across councils, our initial estimate was that it is in excess of 20%. This capacity gap is likely to be greater when the fuller range of expertise required for the development and implementation RSSs and NBE plans is considered (based on regional council feedback that includes skills such as freshwater ecology and hydrology).

77. This capacity and capability problem will be compounded by the expected 50% increase in planners required to make regional plans under the new system (based on Auckland Unitary Plan). Other areas of expertise (including project management, risk analysts, economists, scientists, Te Ao Māori and mātauranga Māori, engineering, transport, communications and engagement specialists, geospatial analysts, IT professionals, legal, and governance support for example) will also be required to develop RSSs and NBEA plans.

78. Therefore, the development of RSSs and NBE plans will put significant stress on an already strained system. Councils may also need to retain key staff to assist them to submit on the new RSSs and NBEA plans (and potentially participate in litigation). There is also BAU under the RMA to complete from progressing current plan changes resulting from new national direction to processing consents and monitoring. Furthermore, the automatic expiry for resource consents granted after the NBEA comes into force but before the first NBE plan is notified will exacerbate the strain on the system and impact on the delivery of other services within councils. Environment Canterbury's submission contains staggering numbers, which are likely to be replicated in other regions. We also note the practical impacts on council's own activities of the "affected resource consent decisions".

79. MfE's research (in conjunction with NZIER) on Workforce Capacity will be an important input into understanding the current risk within the system, and the magnitude of the risk as we transition to the new one.

80. It should also be noted that the uncertainty surrounding the reform and the current pressure on staff is also taking its toll.

81. If the Government desires a more efficient and effective system, building the capacity and capability of local authorities and iwi/hapū should be a priority action. To build sustainable capacity within the workforce will take time and we reiterate our request that the implementation of the new system matched with enough time to ensure the workforce is in place and appropriately trained to implement the new system. Options such as immigration settings and expanded training options should be explored to build capacity within the system.

82. Furthermore, guidance and training will be needed to support existing staff transition to the new system. While some aspects of the RMA have carried over to the new system existing staff would need training and guidance to deal with the shift to an outcomes-based approach and to navigate the new legislation and the systems and processes they contain. We invite MfE to work with Taituarā, NZPI (and other professional bodies) and the local government sector to develop a workforce plan to ensure there is sufficient capacity, capability and training available to implement the system.

83. Alongside this, the implementation of the new system needs to support a significant culture shift within the current workforce. The move from thinking local to thinking at a regional scale will be one of the significant mindset and culture shifts required throughout the transition. Developing strong regional relationships and cooperation and coordination will also take time and will be crucial to culture of the new system.

Recommendations

That the Committee

1.21 Encourage MfE to work with Taituarā, the local government sector and other professional bodies to develop a workforce plan to ensure there is sufficient capacity, capability, and training available to implement the system.

1.22 Match the timing of the reforms to the availability of the workforce to deliver.

A staged approach to implementation

84. MfE has indicated that the new system will be implemented in tranches, based on regional groupings, over a ten-year period. A process for allocating regions to particular time periods is provided for in the SPA, with all regions being required to have a RSS within the next seven years. It should be noted however that the schedule 7, clause 2 of the NBEA ties the development of the first NBE plans to RSSs it does not explicitly provide for the staged approach and Councils are currently unsure which tranche they will be in and indeed whether the tranche approach will be used.

85. This uncertainty is concerning, especially for those who may end up in the first tranche who will need to incorporate funding changes into their next LTP and start developing workforce capacity and capability quickly. Also, given the sheer amount of work that is already occurring under the current system, knowing when to switch focus will be crucial information for Councils.

86. We understand that MfE have developed criteria for selecting at least the first tranche of regions. We recommend the Government make clear who will be in each regional tranche (if this approach will be used) and if that cannot be provided a clear process and criteria for tranche selection is articulated.

87. Taituarā proposed a staged approach in our submission on the Exposure Draft that was somewhat different to the proposed tranche process (with all regions preparing RSSs before any region commenced a NBE plan), which we still consider is a viable option. Given MfE's indication that the preference was for an alternative approach to staging the transition, we have supported the introduction of the NBEA and SPA in regional tranches (including model regions) during the development of the Bills on the basis that this would provide practical templates and lessons for other regions.

88. However, under the proposed process, we are concerned that sufficient time may not be given to accommodate the successful transition of Treaty Settlements, set up RPCs, develop the NPF to a sufficient level of detail and with co-design to ensure it is workable for NBE plans. Furthermore, lessons learnt in earlier tranches need time to be circulated and applied to later tranches. There is also the potential for local government roles, responsibilities, and structures to change mid process and current and future capability and capacity constraints to address.

89. The staging of tranches and the speed of implementation also needs to be paced so that regions who are ready and have the capacity to move through the development of RSSs are able to do so. While it may be difficult to assess which regions are able to quickly prepare for the process, the transition plan needs to accommodate regions that are ready to transition and those that are not.

90. For example, the Wellington/Horowhenua region has recently developed a regional spatial strategy, using a LGA committee with Government, Māori and local government representation and a dedicated secretariat. Depending on the degree of change required by the NPF, they may be close to having a fit for purpose RSS already or, at least, be a solid position to amend their current one with relative ease. Other regions however may need longer to transfer multiple complex Treaty settlements, identify representation, and build the capacity of their workforce before development of their RSS can start.

91. Potentially the answer is to indicate by when tranches of regions are expected to have commenced the development of a RSS and NBEA plan, which would enable those who are ready to move sooner but they would not need to delay if they were ready.

92. As indicated above, our original priority for implementation was on ensuring all regions have developed an RSS before any region started working on developing NBE plans. While we understand the desire to implement the whole system as quickly as possible (and address the real and perceived shortcomings of the RMA and current plans) time and care should be taken to ensure that the development of these first plans is simplified and produces quality products. Waiting to develop NBE plans could allow more time to get the NPF right and reduce complexity as conflicts are addressed at the most appropriate level.

93. As noted earlier, the development of NBE plans may be significantly simpler if they were introduced following the implementation of structural reform resulting from FfLG. It would also give local authorities time to properly embed the recent flurry of national direction (such as the National Policy Statement on Indigenous Biodiversity (NPS IB), National Policy Statement on Freshwater Management (NPS FM), National Policy Statement on Highly Productive Land (NPS HPL), and the National Policy Statement on Urban Development (NPS UD)) and current plan changes into existing plans without the risk of repeating the exercise immediately afterwards. We are however acutely aware that for many people any real or perceived delays will be unacceptable and create uncertainty that is also undesirable.

94. Irrespective of the staging process for implementation that is adopted in the NBEA and SPA, Taituarā requests that clarity and certainty is given to the local government sector on what the transition will look like for each region as soon as possible. Furthermore, guidance should be developed on how local authorities should incorporate these reforms into their work programmes. This guidance should be updated following each tranche to allow for lessons to be shared and the process improved for later tranches. Taituarā and LGNZ think there is merit in the guidance on transition and implementation being prepared by the sector for the sector in partnership with Government.

95. We also request that the Committee carefully considers the timeframes in the Bills for preparing and notifying strategies and plans. The two year timeframe to develop and notify a plan and two years for submissions, recommendations and decisions under the NBEA appear particularly ambitious for untested legislation. A five year period may be more appropriate, as could a backstop date for completion.

Recommendations

That the Committee:

1.23 Clarifies that the regional tranche approach applies to RSSs and NBEA plans.

1.24 Requires officials to work with local government and identify who will be in each tranche before the Committee reports back to Parliament. If that cannot be provided, we request that a clear process and criteria for tranche selection is articulated by then.

1.25 Ensures that implementation tranches provide sufficient time and opportunity so that Treaty settlements can be transferred, RPCs can be established, and lessons learnt in earlier tranches can be circulated and applied to later tranches.

1.26 Recommend that Taituarā and LGNZ be funded to develop transition and implementation guidance with the local government sector on transition and implementation in partnership with Government.

1.27 Ensure that the timeframe for developing NBE plans is realistic.

Complex Transitional Arrangements

96. The process of switching from the RMA to the new system will be complex and while a staged approach to implementation is needed, there is a lack of certainty around when parts the RMA 'switch off' and when parts of the new system are 'switched on'.

97. Transitional and savings provisions are found in the NBEA but the timeframes for implementation are largely dependent on Orders in Council. Due to the proposed tranche system for implementation. There will likely be a considerable amount of confusion as to what aspects of each system apply in which regions at a given time. Furthermore, this lack of certainty does not allow for Councils to make informed workforce programme plans.

98. The Government is yet to give local authorities clear signals around when in their planning cycle should they stop and prepare for transitioning to the new system. We request clear indications around what work council planning departments should continue and which aspects of plan reviews and changes can be delayed avoiding duplication or wasted effort.

99. In addition to this lack of certainty there is a lack of clarity of how parts of the NBEA which have specified timeframes in the legislation will interact and fold into the RMA. For example, provisions relating to water, air, soil, protecting indigenous biodiversity or cultural heritage will have immediate legal effect but there is not guidance provided on how these provisions will impact on existing RMA consenting if at all. We are concerned that this will create unnecessary complexity and confusion and support all elements of the NBE plan coming into legal effect at the same time. This will be particularly concerning regarding consenting during the transition period. Consents will not be able to be bundled across both systems and we consider it inefficient and impractical to assess activities across two Acts and their resulting Plans. We believe by not having a clear demarcation between the RMA and the new system the current issues with proposed and operative plans will be exacerbated and confuse the consent applicant.

100. Furthermore, *Schedule 1 Subpart 1 Clause 2* of the NBEA provides that RMA plans and policies will continue in force "subject to the NBEA". We are unsure how this will work in practice. We request guidance for decision makers on how to give effect to RMA plans subject to the NBEA.

Recommendations

That the Committee:

1.28 Request guidance for local authorities (that is co-designed with the local government sector) on when they should stop work on existing RMA plan changes and prepare for the transition.

1.29 Clarifies *Schedule 1 Subpart 1 Clause 2* of the NBEA and the requirement that RMA plans and policies will continue in force "subject to the NBEA".

1.30 Require all elements of a plan to come into legal force at once. If this is not possible, provide guidance (that is co-designed with the local government sector) on how decisionmakers should deal with RMA documents that still have legal effect once the new system is enacted.

Part Two – Natural and Built Environment Bill

Preliminary Matters

Commencement (Clause 2)

101. There are a wide range of "start" dates for aspects of the NBEA and it appears that some aspects of the NBEA do not have a commencement date (for example compliance and enforcement in Part 11). This has caused confusion within the sector. For example, Waikato Regional Council has raised the issue of farm plans and unlawful discharges and the uncertainties over inspections, monitoring, compliance, and enforcement. There is also significant uncertainty for councils as to when they will be expected to commence preparation of NBEA plans and whether the regional tranche approach will be applied (as discussed in our commentary on our overarching concerns).

102. We ask that the Committee specifically considers the commencement provisions to ensure they are comprehensive and workable and that they can be easily communicated. It is imperative that local authorities and communities are aware of when aspects of the new regime will apply.

Recommendations

That the Committee:

2.1 Ensures the commencement dates provided in *clause 2* are comprehensive and workable.

Purpose (Clause 3)

103. Taituarā generally supports the purpose of the NBEA. We note that it is effectively a dual purpose and may be overly complicated as a purpose statement, creating interpretation and implementation issues.

104. Firstly, while we welcome the introduction of Te Oranga o te Taiao, clarification is needed to understand what "upholding" it means and whether this will be compatible with enabling the use, development, and protection of the environment (the first limb of the purpose statement, which is itself subject to qualifications). The term 'uphold' is new in a planning context and there is

potential for varying interpretations. There may be a more familiar term than "uphold" that would reduce some ambiguity such as "recognise and provide for". We also note that as defined the concept of Te Oranga o te Taiao has a number of limbs that overlap and may be difficult to apply particularly if there was a tension between the limbs. As a new concept it is likely to be the subject of litigation.

105. We note the SAR indicates that guidance will be produced on upholding Te Oranga o te Taiao. We welcome this guidance and request that MfE works with iwi, hapū and local government to co-design this guidance as soon as possible to avoid unnecessary litigation and assist with the development of the first strategies and plans. This guidance should also consider the relationship between the concept and iwi and hapū statements on Te Oranga o te Taiao and the practical effect of these for those exercising functions under the NBEA.

106. We are also unsure how Te Oranga o te Taiao integrates with the concept of Te Mana o te Wai (a fundamental part of the freshwater reforms and Three Waters Reform) and would welcome clarification in the Bills and in future guidance.

107. Secondly, it would be useful to clarify the meaning of "promote outcomes" for the benefit of the environment (in clauses 3 and 6) and the alternatives of 'provide for' (in clauses 5 and s 102(2)(d)), and "contributes" (in 223 (c)). For example, it would be useful know whether this is specifically referring to the system outcomes in clause 5 or to the system outcomes that relate to the environment. If the latter, does this mean the environmental system outcomes take precedence over the other system outcomes including built environment and natural hazards? I.e., is there actually a default hierarchy within the system outcomes (beyond ensuring limits and targets are met)?

108. We presume the intent is to promote positive outcomes and the reference to the environment should be interpreted in this context to include "the natural environment and people and communities and the built environment" etc. We ask the Committee to ensure the wording is clear and unambiguous.

109. Finally, it would be useful to explain the meaning and how one would assess whether the wellbeing of future generations will be "compromised".

Recommendations

That the Committee:

2.2 Remove unnecessary complexity from the purpose statement.

2.3 Clarify the meaning of "promote outcomes" in *clauses 3 and 6*.

2.4 Clarify how to assess whether the wellbeing of future generations will be "compromised".

System Outcomes (Clause 5)

110. We support the shift from effects management to outcomes and note that the objectives contained in modern plans are often framed as positive outcomes (e.g., improved fresh and coastal water quality, improve economic wellbeing). We also support the inclusion of climate change as well as strengthened Te Tiriti obligations as outcomes. However, we have concerns around the clause as it is currently drafted and a fundamental concern with the choice not to have a clear hierarchy of outcomes and direction on how to manage competing priorities and between outcomes.

111. Firstly, we would like clarification on the term "must provide". It appears the RMA equivalent is "recognise and provide" which already has a settled definition. If "must provide" is intended to be the equivalent to "recognise and provide" we recommend the current RMA term is used to avoid unnecessary litigation.

Built Environment Outcomes

112. Secondly, while the built environment outcomes are more fleshed out than in the exposure draft, further refinement of these outcomes would enable better decision making. As noted in our submission on the Exposure Draft, a greater focus on quality built environments that support wellbeing should be considered. Poorly designed urban environments can lead to and exacerbate social and health issues as well as reduce quality of life, undermining the wellbeing of communities.

113. Conflating outcomes for rural and urban environments creates potential conflicts and may undermine appropriate use and development of the rural environment, including the availability of highly productive land for land-based primary production. Furthermore, the drafting in these outcomes could use some attention. For example, "well-functioning urban and rural areas" should be amended to "well-functioning urban and rural environments" to reflect the terminology used in the NPS UD and RMA. If it is not, the "area" will need to be defined. Alternatively, the term "urban form" is used in the outcome and may be

preferred. Both "urban form" and "urban environment" have different meanings with the former only used in clause 5 and without an indication of scale. This could lead to unnecessary litigation and differences in interpretation and creates uncertainty that we think is unjustified.

114. There is also a difference in the SPA, which references "urban centres of scale" meaning "an urban area that is used mainly for a range of commercial, community, recreational, and residential activities that service a region, district, city, town, or a group of suburbs or neighbourhoods". We wonder whether the gap/inconsistency was intentional and what the justification for it is.

115. We reiterate our concern that the Bill does not sufficiently address the quality and liveability of the built environment and the fundamental role of councils in place making. We request that the concept of quality and good urban design is included in "an adaptable and resilient urban form"/environment to enable the creation of well-functioning built urban environments. The concept of "well-functioning" also needs to be further defined as per the Select Committee's recommendations on the Exposure Draft.[15]

Restoration - Outstanding Natural Environments and other matters

116. Thirdly, we have concerns about the use of "the protection or, if degraded, restoration, of" in relation to outstanding natural features and outstanding landscapes. We question whether something that is outstanding can or should be restored. An outstanding landscape may not have been "pristine" at the time it was classified as outstanding, for example a mountain range with development on it. We assume it is not intended that this development be removed but there is unnecessary uncertainty introduced by the reference to "restoration".

117. There will also be change to these features and landscapes because of factors that we cannot control like climate change. In these cases, adaptive capacity will be important and for some situations managed retreat might be appropriate. That is, change may be appropriate to limit or enable an impact on some character-defining feature with high priority. In other cases, allowing the resource to deteriorate (without intervention) but capturing data and information might be the appropriate "action". We ask the Committee to carefully consider whether the restoration limb of "the protection or, if degraded, restoration" outcome has been applied to the "right" things (e.g., what happens to waterways with

[15] The Committee may find Auckland Council's research useful. Defining a well-functioning urban environment. A systematic literature review in response to the National Policy Statement on Urban Development (knowledgeauckland.org.nz)

hydrological power schemes on them) and specifically ask that it is not applied to outstanding natural features and outstanding landscapes.

118. We also note that any "outstanding natural feature or outstanding natural landscape" becomes a place of national importance (as do some of the other system outcomes) and is subject to stringent "protective" requirements. As a matter of principle we think that places and matters of national importance and significance should be identified nationally and there is precedence for this – surf breaks of national significance in the New Zealand Coastal Policy Statement (NZCPS).

Lack of Hierarchy of Outcomes

119. Finally, in *clause 5* there is no explicit hierarchy of outcomes. As previously stated in submissions, a lack of hierarchy is particularly difficult where it is not clear that all outcomes can be achieved at the same time. For example:

- between housing and natural hazards,
- between the need to protect and restore the natural environment and the need to enable urban infrastructure development, and
- between infrastructure development and coastal character, biodiversity, and natural character.

120. While the built environmental outcomes are more fleshed out than the exposure draft, potentially resolving the Committee's original concerns that there was an implicit hierarchy, there remains an inevitable tension between more environmental protection and enabling housing and infrastructure delivery.

121. We would like to see some sort of in principle hierarchy in the Act itself, perhaps along the lines of the Te Mana o Te Wai with additional levels to encompass the fuller meaning of environment, such as basic human needs, emissions reduction etc. However, we recognise that the Committee is unlikely to revisit its earlier position and many conflicts will need to be resolved in their particular contexts using the NPF.

122. The role of the NPF therefore becomes the fundamental tool for establishing the nation's system of resource management and priorities. As such must be co-designed with local government, iwi and hapū, to ensure it provides clear statements on how national-level conflicts should be resolved with enough flexibility to ensure regional and local needs and issues can be addressed appropriately in RSSs and NBEA plans.

Recommendations

That the Committee:

2.5 Ensure the of the drafting of *clause 5* is simple, clear and workable.

2.6 Include the concept of quality and good urban design in "an adaptable and resilient urban form"/environment to enable the creation of well-functioning built urban environments.

2.7 Reconsiders its position on the hierarchy of outcomes.

2.8 Considers whether an expanded hierarchy of needs along the lines of Te Mana o Te Wai could be usefully included in the Act.

2.9 Consider whether the restoration limb of "the protection or, if degraded, restoration" outcome has been applied to the "right" things.

2.10 Remove the application of "restoration" to outstanding natural features and outstanding landscapes.

2.11 Requires places and matters of national importance and significance to be identified nationally (rather than elevate regional places and matters to this status automatically).

Decision Making Principles

123. Taituarā generally supports the decision-making principles outlined in *clause 6*. Integrated management of the environment and the management of cumulative effects will provide a necessary backstop for environmental protection and will contribute to the objective mitigating and adapting to the impacts of climate change.

124. Where there is uncertain or inadequate information the precautionary principle makes sense, and we support its inclusion. However, we note that a key area of tension that must be addressed in the NPF is how to resolve conflicts between the application of the precautionary approach (particularly when setting environmental limits) and the objective of enabling land use and development. Furthermore, it remains to be seen how the requirement to take the precautionary approach will impact local government's ability to take other approaches, such as the dynamic adaptive approach.

125. We recommend the Committee seeks assurance from officials that the precautionary principle as defined will not be overly restrictive on development and that other approaches may be used where appropriate.

126. We are unsure how the different functions and decisionmakers will recognise and provide for "the responsibility and mana of each iwi and hapū … in accordance

with the kawa, tikanga (including kaitiakitanga), and mātauranga in their area of interest". For example, in developing the NPF how will local kawa, tikanga (including kaitiakitanga), and mātauranga be provided for?[16] What should happen when there are difference between iwi and hapū? Guidance on how to apply these principles will be required.

Recommendations

That the Committee:

2.12 Ensure the precautionary principle (as currently defined) will not be overly restrictive and won't curtail other approaches that may be more suitable.

2.13 Assures itself that the requirement for all decision makers to recognise and provide for "the responsibility and mana of each iwi and hapū … in accordance with the kawa, tikanga (including kaitiakitanga), and mātauranga in their area of interest" can be implemented at all levels of the system.

Interpretation

127. *Clause 7* is the main interpretation section, but there are definitions throughout the Bill. Other terms are not defined in the Bill but are found in other Acts. This has created some readability issues which could be ameliorated by consolidating definitions in *clause 7*. Furthermore, the Bill has introduced a number of new and subjective terms that could give rise to lengthy and costly litigation. Currently, some terms appear unworkable and contain technical issues that need to be rectified. We have outlined the drafting issues we have identified in Appendix B but it should be noted that this is not necessarily a comprehensive list, given the timeframes we have had to examine the Bills.

Recommendations

That the Committee:

2.14 Amend *clause 7* to consolidate definitions, deal with the drafting errors identified in Appendix B of this submission and reduce referrals to other sections in the Bill.

[16] This is potentially a significant issue when it comes to the first NPF, building as it does from predominantly existing national direction.

Te Tiriti o Waitangi

Giving Effect to Te Tiriti

128. Taituarā supports *clause 4* and the increased weight given to the principles of Te Tiriti in the new system. Taituarā also supports clause 6 requiring decision makers recognise and provide for the authority and responsibility of each iwi and hapū in principle. However, this will be complex.

129. We are concerned that it is not clear how local government and other participants in the system will be enabled to meet their responsibilities consistently, especially given there may be different answers for different rohe and the existence of multiple groups. Timely and practical guidance on how to "give effect to" the principles of Te Tiriti o Waitangi, alongside access to accurate information on iwi and hapū authorities, traditional rohe, interests and responsibilities will be required.

Increased and More Strategic Role for Māori

130. Taituarā supports the more strategic role Māori have been given in the new resource management system. An overarching concern is the funding, time and capability and capacity (of local government and iwi/hapū/Māori) that will be necessary to support the participation of iwi/hapū/Māori in the new system.

131. We support iwi/hapū/Māori having representation on RPCs and providing a flexible process for selection to allow for variation. We note that adequate funding and support from the Crown for the self-determination process will also be critical to ensuring Treaty compliance and the success of the appointment process. As highlighted by the Waitangi Tribunal earlier this year[17], it will be crucial to ensure bespoke regional arrangements are Treaty compliant, noting they and other processes could potentially trump or even displace the proposed appointments process in some regions. We recommend that agreement between the Crown and the relevant Treaty Settlement party/parties be secured as soon as possible (preferably before the NBEA and SPA comes into force) to enable the RPC to be initiated with confidence that the necessary measures are in place to uphold Treaty settlements.

132. In addition, while councils aren't parties to settlements, where the settlement affects one or more local authorities (which many do), we recommend that those local authorities are also involved in the conversations about the new system, its

[17] Waitangi Tribunal (2022), Interim Report on Māori Appointments to Regional Planning Committees.

implementation, and the transitional arrangements. This will avoid confusion, uncertainty, and the undermining of existing relationships, particularly where there is already joint governance and/or management of resources.

133. Furthermore, the rights and responsibilities of pre-settlement iwi and hapū will need to be accommodated. The Government needs to urgently start work to identify and address these rights and responsibilities and provide support for these iwi and hapu to build capacity and capability to participate in the new system.

134. We support in principle the introduction of Engagement Agreements under *schedule 7, clause 9*. However, we note that these engagement agreements could potentially cut across existing council relationships creating inconsistencies and confusion. In some cases, the legislation assumes existing arrangements e.g., Mana Whakahono a Rohe may be sufficient to comprise an engagement agreement if the parties agree. However, these are arrangements with local authorities and not the RPC. We think that (potentially with the exception of arrangements with unitary authorities) existing arrangements are unlikely to be appropriate without major modification, which would require the agreement of the original parties) and that separate arrangements are likely to be required.

135. We anticipate that the engagement agreements will likely take a significant amount of time to establish, and funding and other resourcing is likely to be an issue. We are concerned that it is unclear what happens after best endeavours if an agreement cannot be reached. We recommend the Committee propose a dispute resolution process in the event agreement cannot be reached and that both the process to establish and engagement agreement and its implementation (at least for the first round of strategies and plans) is funded by the Crown.

136. Capacity and capability will be the critical issue in providing an increased and more strategic role for Māori in the new resource management system. Central government should fund, resource and support Māori participation, including the development of iwi and hapū capability and capacity, and the development and implementation of engagement agreements. As the RPC is supposedly "independent" of local government, councils should not have to foot the bill for agreements that they are not party to and are required by the crown.

137. Despite the Government commitment to provide direct support to help iwi and hapū organisations participate in resource management processes at around

$5m per year[18] we think this is insufficient and most of the required funding and resourcing will fall to RPCs, which really means local authorities, who may be unable to secure sufficient funding for their participation. This risks a further injustice for Māori. We recommend that central government significantly increase its financial support for Māori participation in the new system given it role as the Treaty partner.

Recommendations

That the Committee:

2.15 Include a dispute resolution process for schedule 7, clause 9 in case an engagement agreement cannot be reached.

2.16 Recommends:

a) Guidance (that is co-designed with the local government sector, iwi and hapū) on how to "give effect to" the principles of Te Tiriti to support the application of clause 4 is developed prior to the commencement of the legislation.

b) information on the authority and responsibility of each iwi and hapū to support the duty under clause 6 is developed prior to the commencement of the legislation.

c) significantly more funding and resource is made available from the Crown to increase the capacity and capability of Māori organisations participating in the system, including funding for:

- the self-determination process to identify iwi/hapū representation on RPCs.
- the development and implementation of engagement agreements by the RPC.
- Mana Whakahono ā Rohe.
- building capability and capacity for Māori and for local government to support Māori participation in the system.
- the new National Māori Entity.

National Māori Entity

138. In addition to representation on, and engagement with RPCs, a National Māori Entity (NME)will be established under *part 10, subpart 5*. The NME will be tasked with monitoring Te Tiriti performance and will input into the NPF. While we support independent scrutiny by an entity, we recognise that iwi and hapū will also have a role in monitoring performance regionally and locally.

[18] SAR, pg. 107

139. We are interested to know what information will be used to monitor performance and how the NME will be resourced to support this work. We note that the RPC is not specifically named as a "monitored entity", but we assume it falls within the category of "other persons or groups". Given its significant role in the system this appears to be an oversight. The Committee might consider specifically including RPCs in clause 662(4). This clause could be further refined by removing reference to unitary authorities which is unnecessary as they are local authorities.

140. We are also concerned that the first NPF will be developed without adequate involvement of the NME, and without sufficient input from iwi and hapū, which does not convey the right signals for a reformed system that gives effect to Te Tiriti and promises greater iwi/hapū/Māori participation.

Recommendations

That the Committee:

2.17 Clarify the information requirements and whether the NME will be adequately resourced.

2.18 Include RPCs in the list of "monitored entities" in clause 662(4) and remove the reference to unitary authorities.

2.19 Requests assurance from its legal advisors itself that the lack iwi and hapū input into the first NPF gives effect to the principles of Te Tiriti contained in the SPA and NBEA.

Mana Whakahono ā Rohe

141. Under *schedule 7, clause 4 and subpart 5* Mana Whakahono ā Rohe can be developed and implemented but cannot constrain the engagement required by the NBA or SPA. The processes for Mana Whakahono ā Rohe and Joint Management Agreements (JMAs) do not appear to have changed substantially. That said the change to enable hapū to be able to initiate a Mana Whakahono ā Rohe is significant, particularly given the number of hapū within some regions. We note the ability to agree the order in which Mana Whakahono are negotiated (*clause 679(6)*), which is likely to be necessary should a number of hapū within a region chose to initiate an agreement with the RPC and/or local authority/local authorities. We also note the potential for overlapping arrangements and confusion, which should be avoided. We ask the Committee to consider how this might best be achieved.

142. The timeframes for reaching agreement and the amount of resource and funding that will be required should not be underestimated. We recommend the

Government contributes to the funding and resourcing of Mana Whakahono ā Rohe to enable RPCs to comply with their obligations and to ensure iwi and hapū aspirations and expectations are met. It would also support the Crown's commitment to its Treaty partnership.

Transitional Arrangements for existing settlements etc

143. We support the need for transitional arrangements under *schedule 2 and clause 11* to ensure that the integrity, intent, and effect of Treaty settlements, the NHNP Act and other arrangements made under the RMA are upheld. The process for doing this is not currently clear and the SAR notes this falls to future workstreams. For Settlement legislation, ideally the agreement of the Crown and the relevant settlement party as to how this will occur would be secured prior to the Bills being enacted.

144. We note that Ministers may not recommend the making of an Order in Council to enable the RPC to be initiated for any region or regions until the necessary measures are in place to protect Treaty of Waitangi Settlement arrangements or as agreed by the relevant governance entities, unless two years have elapsed. Enabling an RPC to be initiated without these arrangements or agreements in place is likely to affect the RPC's (and the Crown's) compliance or perceived compliance with its Treaty obligations under the Bill. Furthermore, it will be practically difficult to comprise RPCs which are designed to include iwi/hapū representatives, without resolving these issues. This may have negative flow on effects for council relationships, already established governance and management regimes with mana whenua, and costly litigation.

145. While settlement negotiations are between the Crown and iwi/hapū representative groups however local authorities are parties to Whakahono ā Rohe arrangements and JMAs, not the Crown. Many Treaty settlements establish arrangements which are not Whakahono ā Rohe arrangements or Joint Management Agreements (e.g. Waikato River Authority, Te Oneroa-a-Tōhē Beach Management Board) but involve local authorities. As such councils should be included in the list of "relevant parties" to an (other) arrangement and no order in council should be possible, especially ones that modify existing agreements that councils are party to, without discussion and agreement of the relevant council. We also consider that councils implementing settlement agreements will be able to provide valuable insights into the arrangement and their advice may avoid unintended consequences. We therefore strongly recommend that they are involved in the conversation.

146. We consider that the full range of arrangements and interests are not sufficiently accounted for in the Bills and when combined with new arrangements this risks uncertainty, confusion, the undermining of existing arrangements and relationships, and potentially duplication. We do not think amending arrangements between parties that are not the Crown by regulation is sensible or appropriate, especially without consultation with interested groups (in this case councils). The process proposed does not appear to be in accordance with the Cabinet Manual.

Recommendations

That the Committee:

2.20 Considers how best the system might avoid unnecessary duplication, overlap and confusion between Mana Whakahono ā Rohe, Joint Management Agreements and other arrangements with local authorities and the new RPC.

2.21 Require the Minister to engage with councils when they propose to amend a Mana Whakahono ā Rohe or Joint Management Agreements that a council is party to.

2.22 Require the agreement of the council (and the relevant iwi or hapū) for any changes to a Whakahono ā Rohe, Joint Management Agreement or other arrangement (that is not a Treaty Settlement) that a council is party to.

2.23 Notes that it will be crucial the Crown initiates arrangements for Treaty Settlements immediately as failure to do so may compromise compliance with Treaty legislation and the NBEA, particularly where a council has a role in implementing Settlement obligations.

2.24 Recommends to officials that councils should be part of the conversations to amend Treaty Settlements to ensure no unintended consequences arise.

National Planning Framework

National Planning Framework Purpose and Form

147. The NPF will sit at the top of the hierarchy of planning documents and intended to provide integrated management of the environment and system outcomes, direction to help resolve (inevitable) conflicts, and set environmental limits, targets, and strategic directions *(clause 33)*. We welcome a greater role for national direction and the resolution of conflicts between pieces of national direction; it is something the sector has called for a long time. However, it is important that it is developed with meaningful engagement with local authorities

and will not result in disproportionate costs to local decision making where there are not greater benefits in terms of efficiency and effectiveness. Clause 33(a) (ii) introduces the subjective test of 'desirability' for a matter's inclusion in the NPF, this needs to be refined to ensure there is a clear test which weighs up the efficiency benefits against the loss of local decision making.

148. Whether the NPF provides for sufficient regional and local decision making and will increase system efficiency and reduce costs associated with repeated and lengthy planning processes and re-litigation, achieve certainty and national consistency, remains to be seen given the NPF has not been produced yet. This is less than ideal. This hinders our ability to comment on the effectiveness of the NPF (and to an extent the new system as a whole) and risks significant issues being unaddressed until future iterations of the NPF and plans. While we support the NPF in principle the devil is in the detail, and we are concerned the quality of the first NPF will be compromised.

149. Increasing the use of mandatory national direction should help provide consistency and certainty on matters of national significance and where national approaches are desirable. For example, housing should not be developed in areas with a significant risk to natural hazards and climate change impacts. But the NPF needs to also recognise that the priorities will be different depending on the location and significance. For example, a region might be prepared to damage a wetland of moderate or low ecological value to make way for urban development or accommodate much needed housing growth in certain circumstances - but it wouldn't allow it for a high value one. Likewise, intensification might not be acceptable where there is inadequate infrastructure (or the cost of upgrade is too high) or it draws development away from an ideal location for it to one that will compromise environmental outcomes or exacerbate emissions.

150. It is therefore imperative that the NPF allows decision makers for the RSS and NBE Plan to take account of local issues or concerns.

151. *Schedule 6, clause 19(2)(a)* outlines the matters that must be disregarded when making decisions on the content of the NPF. We are concerned with the workability of the provision and that important matters may be disregarded. For example, we are concerned that excluding effects on land transport assets that are not stopping places will include and unintentionally undermine transport safety considerations.

Recommendations

That the Committee:

2.25 Amend clause 33(a)(ii) to 'matters for which national consistency is necessary to achieve limits or targets or nationally strategic objectives or otherwise where consistency will enable more efficient and effective plans and this benefit outweighs the need to enable local decision making'.

The First National Planning Framework

152. The first NPF will amalgamate existing national direction and provide for limits and targets. This will be a good opportunity to resolve existing conflicts between the objectives of existing national direction. Importantly, the NPF needs to include guidance not only on how to resolve conflicts between the outcomes, but also guidance on how to resolve any conflicts between environmental limits and outcomes, including where trade-offs may be appropriate.

153. We do, however, have significant concern with the speed, limited scope and ad hoc approach to developing the first iteration. The first NPF is expected to become effective six months after the Bills pass into law. This truncated timeframe means it is unable to be co-produced with local authorities, iwi and hapū and the National Māori Entity. This lack of input can result in poorly drafted direction which causes a significant amount of litigation. For example, before the Courts are important interpretive questions around the recent NPS-HPL which introduced unclear language and new concepts without consultation with local authorities. Furthermore, it is unlikely that mātuaranga Māori will be incorporated in the first iteration (given it is a consolidation of existing work) which begs the question whether it will give effect to Te Tiriti.

154. An "NPF – light" doing the bare minimum to reconcile existing national direction and plug gaps e.g., for infrastructure using the existing NPS as a base with limited local government involvement risks the same flaws as occur within the existing framework. It will fail to be enduring and it won't achieve efficiencies in the system. It also risks creating unintended consequences for example with limits setting at the local level. We are concerned that it will set the bar or standard for what follows.

155. That said, a light version might suffice to produce a RSS and if all regions completed their RSSs before any moved on to develop NBEA plans there may be less concern with a truncated approach to the production of the first NPF. However, the second iteration will need to be ready and of sufficient quality when

regions commence the NBE plans and if the RMA has taught us anything this can never be guaranteed.

156. Getting the NPF right requires having the right people involved at the right time and the ability for complex issues to be worked through methodically. While we support the use of a BOI process to develop the NPF we request that schedule 6, clause 9(3) is amended to also seek nominations from local authorities. Local authority input at this stage would help ensure the final product is workable and implementable. We also suggest a role for the NME below. Furthermore, we recommend that sufficient time at the outset is taken to get it right and enable co-production with local government and iwi/hapū/Māori experts. This should be followed by engagement and consultation, and this should be done well before commencing the first group of regional spatial strategies and certainly before the development of NBE plans. Sufficient time should also be allowed for people to submit on the draft NPF. The current timeframe is too short to ensure all that have valuable insights can participate. We want to ensure the best information is presented to the BOI and that its development is robust. After all, everything hangs off the NPF.

157. While we have our reservations about the first NPF, we request that the NPF applies to the plans and policy statements developed under the RMA as part of the transition process. We understand that MfE intends to amend the existing National Policy Statements and National Environmental Standards to the extent necessary to ensure consistency with the NPF, but this seems to be unnecessary duplication and complexity. We understand the potential difficulty in applying the framework across legislation with different purposes, but the original National Policy Statements and National Environmental Standards were developed under the RMA. The dual route also potentially delays transformative aspects of the reform for regions that are later in the queue and may waste precious resources.

158. We recommend that the RMA is amended to enable the NPF to apply to RMA plans and policy statements as well as RSSs and NBEA plans (recognising some aspects of the NPF will need to be phased in over time).

Limits and Targets

159. One of the key aspects of the NPF will be the introduction of environmental limits, targets (including minimum level targets) and management units. There is minimal detail in the NBEA about how the limits will be framed or operate which has impacted on our ability to adequately assess their effectiveness.

160. To ensure that the process for doing this is workable at the regional and local level it is imperative that the process is developed in partnership with local government and draws on the significant experience councils already have under the NPS-FM for setting freshwater limits. Their experience of setting locally derived limits to give effect to national limits has proven challenging.

161. We support:
    - the inclusion of limit setting at the regional and local level where this is the appropriate scale, and
    - the development of interim limits that are allowed to be more lenient than the current state where degradation is likely to continue beyond the commencement of this Bill as a practical necessity.

162. We support in principle the intended purpose of targets noting that there may be unforeseen, negative consequences and difficulties achieving other system outcomes. It will be important to avoid misalignment between targets.

Minimum Level Targets

163. While we appreciate there is a difference in targets for improvement and improvement targets for degraded environments, we question the need to differentiate these targets as "minimum level targets" in law versus targets (for degraded environments). We are concerned that the phrase "minimum level target" will result in a race to the bottom as they will likely become the default and we note there is likely to be litigation where targets are higher than a limit or minimum level target. On balance we recommended removing the provision for "minimum level targets".

Management Units

164. Management units must be set for environmental units and targets *(under clause 54 and 55)*. While we understand the intention it will be extremely difficult to achieve at a national scale and significant investment will be required. Indeed, it has proven nigh on impossible to set management units for freshwater under NPS FM. We reiterate the need to work with regional councils to understand the lessons learnt from this process and recommend that development of the NPF

does not undo the freshwater management process underway. In addition to this, allocation statements (clause 693) could be overlapping and difficult to resolve and their timing and sequencing with the freshwater planning process will need to be carefully planned.

165. It will also be important that the assumed increase in permitted activities in the NPF does not undermine the achievement of targets and limits.

Difficulties Setting Limits

166. We think the lack of data and variation in data sets across the country will make the process of setting limits and targets difficult. Furthermore, setting limits to ensure no net loss of ecological integrity of the natural environment *(clause 33)* relies on clear protocols to assess the current state. We recommend central government complete a stocktake of current data and gap analysis to understand what data needs to be collected to set appropriate limits and targets.

167. It will also be difficult to set limits for complex ecosystems like the coastal environment and estuaries. It will take significant time, data, and input from experts to set limits to aspects of these ecosystems. Adding further complexity, increased stress on the natural environment caused by climate change is difficult to build into targets. We believe it will take a significant amount of time and resource to set these limits which risks that they won't be ready in time for the NPF and the first iterations of NBE plans. Furthermore, there are some aspects of the environment that cannot easily be regulated by reference to limits. Natural hazards are a good example of this as it involves a combination of technical, planning and social inputs.

168. We also need to ensure limits are not drafted in such a way that when layered on top of each other they have the effect of prohibiting (either as a result of activity status or by directive policy) development in areas which would otherwise contribute to addressing climate change – either through the development of renewable energy, or urban form which contributes to reduced emissions via the reduced need to travel. At some point in the system, we need to make difficult decisions around trade-offs. We can't meet urban development capacity, natural environment protection, and climate change mitigation and adaptation in all places, at all times.

169. Finally, while we support the use of a limits and targets review panel to provide a level of scrutiny and accountability for the setting of limits by the Minister *(schedule 6, clause 3)* we are concerned it is not clear who is accountable if the

NPF contains permitted activities that breach limits. In the case where national developed rules and activities are insufficient or directly undermine the achievement of limits, we believe the Minister (and as such central government) should be accountable noting the Minister has broad powers to make exemptions under clause 44.

Monitoring and Development

170. Where the Minister does not accept the advice of the IHP the Minister should be obliged to state their reasons as part of the schedule 6, clause 5 evaluation report. We also recommend that these reasons should be included as mandatory matters for the evaluation report under schedule 6, clause 6.

171. Significant resources will be required to monitor whether limits are being breached or not. This will be expensive and local authorities cannot carry the cost burden. Central government should fund the monitoring it requires under *clause 53* and invest in consistent national data and information.

172. We ask the Committee to assure itself that the development of limits and targets will be carefully co-produced with local authorities, iwi and hapū, communities and the MME. We recommend that an advisory group drawing on relevant expertise and experience from the sector is set up to work with officials.

Strategic Direction

173. *Clause 56* provides that strategic direction will be given on how to achieve system outcomes, wellbeing within environmental limits, key long term environmental issues, priorities, and monitoring. We support this in principle but as already articulated the detail is important and we are unable to comment fully without seeing a draft NPF. *Clauses 59 and 60* outline the discretionary content including outcomes, rules, RSS and NBE plan requirements (including their structure). We support this and believe the majority of the content proposed will be useful. However, we note that the collection and publishing of specified information (unknown at this stage) could be very expensive and resource intensive.

174. Under *clauses 61-64* the NPF can also apply the effects management framework, provide for standards and methods, processes and exemptions. It may give directions to RPCs or local authorities on monitoring and reporting or direct a plan to use an adaptive management approach. It may also direct NBE plans to make rules that will affect existing rights and land use consents when there is harm to the natural environment or risks associated with natural hazards, climate change or contaminated land. It is critical that there is sufficient flexibility and

room to address local and regional needs and variations to ensure the eventual results can be implemented on the ground.

175. In the current drafting a new term ("trivial adverse effect") is introduced. As noted in Appendix B there is no definition of trivial adverse effect and we request that it is replaced with 'de minimus' which is an accepted planning term with settled case law on its meaning.

176. Pursuant to a Board of Inquiry (BOI) is used to make recommendations on a proposed NPF. We support this however it will be important that the content is co-developed with local authorities and the NME. Given the importance of the BOI and the emphasis in the NBEA on the Treaty, it is recommended that the NME should be given a seat on the BOI, not just the opportunity to nominate someone. The BOI should also have the flexibility to appoint an expert in environmental science (and other relevant disciplines), particularly when the NPF proposal contains limits or targets. Additional expertise would assist the Board in achieving the objectives of the NBEA.

177. We suggest the public notification period in clause 8(2) from 40 working days to 60 working days for the first NPF proposal and any full review but retaining 40 days for any update. This revised timeline would allow submitters, consultants, and lawyers sufficient time to review planning documents that affect communities. The Board will be assisted by better researched submissions that will improve the quality of hearing time.

178. We also support a full review of the NPF every nine years in accordance with clause 93 but note that reviews are likely to occur more frequently than this given the first iteration will likely be an NPF-lite and subsequent versions are likely to be developed at speed. We suggest that yearly framework effectiveness monitoring (including through surveys of RPC and local authorities) and reporting, and a three yearly review cycle, even if the decision from that review is for no change might be necessary to ensure the NPF is performing as intended.

179. We oppose clause 21 on the basis that the Minister should have regard to all matters in the clause. The BOI will have particular regard to the evaluation report through its process. This change would enable the Minister to reach a decision by reviewing relevant matters i.e., it would avoid the Minister duplicating the role of the BOI.

Recommendations

That the Committee:

2.26 Include in the BOI membership a scientist and a representative from the NME, alongside a local government nominee (*Sch 6 clause 9(3)*).

2.27 Include a requirement that the process for setting targets is developed in conjunction with local authorities and iwi/hapū/Māori.

2.28 Amend the public notification period from 40 to 60 working days to enable good quality submissions to be prepared for the NPF introduction and major re-works.

2.29 Amend *clause 33(a)(ii)* to ensure there is not overreach and local contexts can be considered e.g., 'matters for which national consistency is necessary to achieve limits, targets or nationally strategic objectives OR where consistency will enable more efficient or effective plans AND the benefit outweighs the need to enable local decision making'.

2.30 Amend the RMA to enable the NPF to apply to RMA plans and policy statements.

2.31 Amend the Minister's decision-making factors so that they distinguish the Minister's role from the BOI.

2.32 Remove *Sch 6 clause 50* which provides for minimum level targets.

2.33 Retain interim limits as a practical measure.

2.34 Amend *Sch 6 clause 5 and 6* to include "stated reasons the Minister has given for not accepting the advice of the limits and targets review panel".

2.35 Notes our support for a full review at 9 years but considers including more frequent reviews of the NPF (i.e. before the 9 year full review) to ensure the first iterations are effective, particularly in light of the speed they will be developed.

We also ask the Committee to:

2.36 Clarify that the Minister is accountable if the NPF contains permitted activities that breach limits.

2.37 Recommend a slow down in the reform and development of the first iteration of the NPF to allow for proper engagement and co-design with experts from local government, iwi, hapū and Māori organisations.

2.38 Encourage the central government to undertake further work with local government and mana whenua to determine what can be learnt from the NPS-FM NOF/limit setting process and/or rolled over into the setting of environmental limits in the NPF or NBE plans.

2.39 Encourage central government to complete a stocktake of current data and gap analysis to understand what data needs to be collected to set appropriate limits.

2.40 Recommend the required monitoring of NPF limits is funded by central government.

Regional Planning Committees

180. One of the most significant shifts arising from these reforms is the introduction of RPCs. Transferring responsibility for planning to a separate statutory body while retaining responsibility for implementation with local authorities will fundamentally change resource management in Aotearoa New Zealand – and not necessarily for the better. As noted in our submission on the Exposure Draft, we are concerned that the proposed RPC structure will disconnect planning from implementation and monitoring in addition to significantly reducing local democratic input and accountability. Taituarā understands that the introduction of RPCs will unlikely change at this stage, therefore our recommendations focus on ensuring the processes, implementation and reorganisation of responsibilities are as workable as possible.

Regional Planning Committee Form

181. *Clause 100* establishes RPCs as independent statutory bodies that are committees of all local authorities, despite not being accountable to, nor requiring a mandate from, those local authorities. Taituarā appreciates that RPCs must act independently but we are concerned that local authorities are responsible for nearly everything the RPC does with limited input and accountability back to them.

182. As we noted in our overview, we are concerned about disconnecting planning functions from contributing functions such as science, consenting, compliance, infrastructure, and community development as this diminishes the prospect of integrated management and increases the possibility of duplication of effort.

183. We refer to our earlier comments that the regionalisation and integration of plan making and delivery would be far easier to implement if structural reform of local government complemented the current reforms. This has precedence as the 1989 reforms were enacted prior to the introduction of the RMA.

184. While severance and duplication are less likely for unitary authorities under the proposals, there are still easier ways to achieve the intent without structural reform. It would be much simpler if RPCs were established as committees or joint committees under *schedule 7 clause 30(1)(a) of the LGA 2002* and locally appropriate arrangements could be made.

185. Without reform, the use of a host council to provide human resources and administrative support to the RPC and its secretariat and manage the finances on behalf of the RPC (*schedule 8, part 3, clause 35*) is a practical step which aligns with the current arrangements for Civil Defence Emergency Management (CDEM). Although as noted earlier, we have concerns about the lack of input and accountability despite the assumed responsibility of the host council.

186. As a practical matter, the host council is likely to default to the largest council in the region as the support for a committee and Secretariat (from communications and engagement to administration) is likely to be significant.

187. Taituarā supports one RPC being responsible for developing both the NBE Plan and RSS for a region as it promotes continuity. We anticipate that the workload will be high for RPCs particularly for the development of NBE Plans. Having one RPC will reduce capacity constraints and the cost of training members (which should be provided by central government). Furthermore, given NBE Plans must give effect to RSSs continuity of oversight will reduce duplication and ensure the intent and community aspirations articulated in the RSS carry over to the development of NBE Plans.

188. The regionalisation of plan making is likely to diminish community input as the scale of the plan usually is inversely proportional to engagement. Furthermore, current regional boundaries cut across environmental issues and communities of interest. We therefore support the ability to create subcommittees to consider local aspirations, issues, and circumstances as well as joint subcommittees to consider cross boundary issues. We also support that subcommittees only have an advisory role but note that their recommendations should carry significant weight. This is particularly relevant in the case of joint subcommittees where binding decisions could create a risk that the issues they are considering will not be integrated with other issues within the region.

189. However, we have some concerns with the way *schedule 8, clause 32* is drafted. Firstly, the delegation can also be to an individual. This further breaks the thread of accountability and democratic input and *clause 32* should be amended to remove this provision. Secondly, the thread of accountability could be severed if a subcommittee delegated their responsibilities, we therefore request that the ability to sub-delegate is expressly prohibited.

Recommendations

That the Committee

2.41 Amend *clause 100* so that RPCs are established as a Committee under *Schedule 7 clause 30(1)(a) of the Local Government Act 2002*.

If this is not acceptable amend Schedule 8 to:

a) allow alternative RPC models to be put forward that operate at different spatial scales, better reflect treaty settlements and existing arrangements.

b) allow the use of LGA committees and joint committees under *Schedule 7 clause 30(1)(a) of the Local Government Act 2002*.

2.42 Amend *schedule 8, clause 32* to remove the ability to delegate to an individual and expressly prohibit the ability for subcommittees to sub-delegate.

Regional Planning Committee Composition

190. Under *schedule 8, clauses 2 and 3,* each RPC has the flexibility to establish their own composition arrangement to reflect regional variations. However, at a minimum each RPC will have six members including at least two Māori representatives. We are concerned that the minimum number of Māori appointees will be inadequate in most regions where several iwi/hapū whakapapa to the area. For example, in addition to 12 local authorities there are more than 40 iwi and 180 hapū in the Waikato region. We also think that the Government has underestimated the time and resource required to enable Māori to have the complex conversations to determine representation, especially where there are many iwi/hapū in a region.

191. We support the ability for all local authorities *(schedule 8, clause 2)* to be represented and the criteria proposed under *schedule 8, clause 3(2)(b)* to consider regional, district, rural and urban representation when making composition arrangements. However, it is unclear how the purpose of local government *(section 10 LGA)* will be considered in the composition arrangement under *schedule 8, clause 3(2)(c*). It is unclear how the four wellbeings could assist in reaching decisions on composition arrangements and it is difficult to see how enabling "democratic local decision making" will be considered given that RPCs are independent decision makers.

192. We think that members of the RPC should possess a range of skills and have access to training related to their role on the committee. We ask that the Select Committee also consider the desirability of minimum criteria for membership and reasons that would prevent someone becoming or continuing to be a member. Such conditions might include becoming mentally incapable. Developing a clear

skills matrix and the process for appointment at a national level (either in primary legislation or through guidance) would support RPCs having the right skills across a broad range of areas.

193. There will also be a central government representative on RPCs when developing an RSS, this representative will be appointed by the Minister. They will need a coherent plan to support their representation and resolve/avoid any conflicts between government objectives. We recommend the development of a National Spatial Strategy to bring together Government direction (and include this as a specific recommendation on the SPA).

Recommendations

That the Committee:

2.43 Clarify how the purpose of local government will be considered under *schedule 8, clause 3(2) (c)*.

2.44 Include minimum criteria for Committee membership and reasons that would prevent someone becoming or continuing to be a member.

2.45 Require a skills matrix to be prepared for each Committee as part of the appointment process to ensure the right mix of skills are present on the RPC.

Establishing Regional Planning Committees

194. Taituarā is concerned that the process for establishing RPC will be protracted and complex. While statutory deadlines can be set pursuant to *schedule 8, clause 41*, developing composition agreements across multiple appointing bodies will take time, require funding, and rely on good relationships with all interests in the region. Also, Treaty Settlements in the region may produce issues that need to be worked through when establishing RPCs and as we have mentioned there isn't visible progress on how they will be handled. So, deadlines may motivate the parties but there are likely to be instances where they are inappropriate.

195. There are dispute resolution processes built into the process for appointments by Māori appointing bodies and a provision for the LGC to facilitate between the parties and make determinations on composition arrangements where they cannot be agreed *(under schedule 8, clause 12)*. What is clear, is that guidance will be needed on how to establish an effective RPC. The guidance should include who will initiate and manage the process on behalf of a region's councils, the sequencing of decisions, and how statutory considerations should be applied. This guidance should also be updated as the process is road tested through the first tranche of regions. This may include a specified streamlined process for

Unitary Authorities and potentially other councils where their existing committee structures and arrangements could be augmented to provide for greater recognition of Māori, or their terms of reference expanded to meet the intent of the legislation.

Recommendations

The Committee recommends:
2.46 Central government funds and co-designs with local government, the LGC, the NME, iwi and hapū guidance on establishing effective RPCs.

Regional Planning Committee Decision Making

196. The independence of RPC decision making is provided by *schedule 8, clause 18*. RPC members may fully participate without the appointing body's prior authority and the decisions of RPCs do not need to be ratified by them. In conjunction with the duty to act collectively under *schedule 8, clause 17*, this severs accountability back to appointing bodies.

197. Taituarā has significant concerns about the separation of policy making from implementation and agreement of councils. Appointees should have a responsibility to report back to their appointing bodies and should be assisted in doing this throughout the development of the strategy and plan process. This could mitigate any conflict between local and regional obligations by providing an outlet for local obligations. The Secretariat could support this activity.

198. *Clause 100 (3)* also requires RPCs act independently of the host authority and other local authorities when exercising its functions, duties, and powers. However, it caveats this with "in accordance with the local authority within which the planning committee operates (host local authority)". While we are not supportive of an RCP with no accountability back to the local authorities who remain responsible for implementation and compliance, the clause as currently drafted is contradictory. We request the Committee clarify the intent of *clause 100 (3)* and propose amendments accordingly.

199. RPCs will have legal standing to initiate and defend legal proceedings under *clause 100 (4)*. Taituarā is concerned around who would fund these legal proceedings given that local authorities are responsible for funding RPCs. This would particularly be unpalatable in the case where a contributing local authority initiates legal proceedings against the RPC. We ask the Committee to identify a funding source other than local authorities for the RPCs legal proceedings.

200. *Schedule 8, clause 17* references the need for members to act in the interest of the region. This will be a significant shift for members from territorial authorities. Experience from existing regional bodies shows that asking individuals to shift from a local focus to a regional focus and back again is challenging, even with a formal mandate. Furthermore, making decisions with a regional outcome in mind could create tension with their role as an elected member of their district or city. Central government in partnership with local government needs to provide training and support for members to make the shift from a local focus to a regional focus and develop guidance to assist members navigate their dual role as a member of the RPC and an elected member accountable to their community.

201. Another shift for RPC members is that pursuant to *schedule 8, clause 20* consensus decision making is preferred, if that cannot be achieved the chairperson can initiate majority voting. A majority is defined under *schedule 8, clause 23* as 50%+1. Given the quorum for a meeting is also 50%+1 *(per schedule 8, clause 22)* it is conceivable that the quorum arrangements and voting arrangements as drafted could lead to decisions that only reflect a minority position. For example, allowing for a decision to be made without the presence or need to include iwi/hapū members. Given the importance of the RPC and the nature of the decisions they can make we recommend the quorum is increased and that the quorum arrangement also cater for minimum attendance by iwi/hapū/Māori and local government representatives. There is precedent for this for example Te Oneroa a Tōhe Beach Management Board quorum arrangements. We are also in favour of more than a simple majority decision should voting become necessary.

202. *Clause 106* provides that iwi or hapū may provide a te Oranga o te Taiao statement to the relevant RPC. It is not clear from the Bill what this statement could contain or its role or purpose in relation to the functions of the RPC. We ask the Committee to clarify the purpose of te Oranga o te Taiao statements and whether the RPC must consider them.

Recommendations

That the Committee:

2.47 Amend *schedule 8, clause 18* to require members to report back to their appointing bodies.

2.48 Amend *clause 100 (3)* to clarify whether the RPC will act independently or in accordance with the host local authority.

2.49 Amend *schedule 8, clause 23* to require more than a simple majority when the RPC chairperson has initiated voting.

2.50 Amend *schedule 8, clause 22* to increase the quorum and require the quorum arrangement to cater for minimum attendance by iwi/hapū/Māori and local government representatives.

2.51 Amend *schedule 8, clause 39* to include appropriate accountability and scrutiny on the advice of the Auditor General.

2.52 Clarify the purpose of te Oranga o te Taiao statements under *clause 106* and whether the RPC must consider them.

2.53 Recommends that central government co-designs with local government training and guidance for members who are elected members of territorial authorities to apply a regional lens and navigate any tensions that may arise from the dual roles.

Ministerial Powers

203. We are also concerned the Minister has been granted broad, sweeping, unfettered powers of intervention in the Bill. For example:

- The Minister can sack an RPC and appoint a commission under *schedule 8, clause 27*.
- The Minister may investigate and make recommendations to an RPC under *clause 631*.
- The Minister has the power to require information from an RPC, local authority, requiring authority or heritage protection authority under *clause 841*.
- The Minister may investigate and make recommendations around the performance of RPCs and local authorities.
- The Minster can direct preparation of plan change or variation and can direct that a review of a plan commences under *clauses 633 and 634* along similar lines to the existing RMA provisions. However, this power of direction appears to have been extended further in clause 635, which enables the Minister to direct the RPC and local authorities to take "other

action" – "to exercise or perform a power, function, or duty under this Act". This is a considerable extension of Ministerial power.

- The Minister may direct amendment to RSSs under *clause 60*.
- And the Minister can establish a cross-regional planning committee at their discretion.

204. We oppose such sweeping and unfettered powers. Virtually all involve additional operational expenditure to deliver ministerial functions and, in many cases, undercut local democratic input and accountability to communities. They also blur the line between stewardship and national direction setting and independent decision making by RPCs and IHPs.

205. In addition, we ask the Committee to consider making information sharing a mutual obligation between central government and local government so that local authorities or RPCs are aware of advice being commissioned that may affect their powers, functions or operations. Local government should be given the opportunity to respond to any perceived shortfalls in performance.

206. We ask the Committee to assure itself that there are sufficient checks and balances on the powers provided to the Minister as Ministerial intervention further undercuts local democratic input and accountability to communities. We must avoid the situation where a Minister could exercise their powers simply because they did not like the outcome of an RPC decision. Where action is required by the Minister, such as the establishment of a cross-regional planning committee, we think that this action should be funded by central government.

Recommendations

That the Committee:

2.54 Insert a corresponding information sharing obligation *(clause 841)* from central government to local government to share information.

2.55 Amend the investigation clauses to provide for an opportunity for a RPC or local authority to respond to any perceived shortfalls in their performance at an early stage.

2.56 Insert a requirement for government funding of Ministerially directed action relating to the formation of committees, preparation of plan changes and variations etc.

2.57 Assure itself that there are sufficient checks and balances on the powers provided to the Minister.

Regional Planning Committee and Secretariat Funding

207. RPCs are "independent" of councils and will be resource intensive to establish and support. There are no new funding mechanisms contained in the NBEA. Instead, *schedule 8, clause 36* states local authorities in the region "jointly fund" the work of the RPC via rates collected under the LGA. This is despite the lack of relationship, alignment, or accountability back to the rating authority or community that pays. This is unjust and yet another example of an unfunded mandate. It also undermines democratic accountability and local decision making.

208. Our simple answer is that there is considerable public benefit in getting the new planning system right at the outset. Central government wants regionalised planning. To ensure the new system delivers the objectives the Government is seeking, it should be funding the new independent plan making process and secretariat to support it (at least in part and preferably for the first iterations of RSSs and NBE plans).

209. Under the NBEA each local authority in the region must agree RPC composition arrangements and funding contributions. In the case where multiple local authorities are required to contribute funding they must work in "good faith" to agree the amount and distribution of funding contributions. This introduces complexity and will create an uneven financial burden on councils. For example, Taupō would be expected to contribute to four RPCs, potentially more if it was expected to fund joint committees as well.

210. The Secretariat must also be jointly funded by the local authorities in the region under *schedule 8, clause 36*. We foresee similar challenges with this approach.

211. Local authorities and their communities are likely to be reluctant to fund plan making governance, processes, and budgets that they have little control over, and that are unaccountable to them. Some communities and regions have already spent considerable amounts of money on plan making (including litigation), which is typically an unpopular spending item, and may be reluctant to spend more where they consider this unnecessary, unaffordable, or where the benefits accrue to other districts and communities. This may make it difficult for local authorities to guarantee sufficient funding being allocated through their long-term plans.

212. Careful thought needs to be given to how to deal with situations where communities don't support or can't afford the level of funding that is "needed" from their local authority to enable the secretariat and RPC to function.

213. It may be possible (although it is unclear) under the current proposed funding arrangements that the regional/unitary authority could be established as the host council and have sole responsibility for funding. This would consolidate funding with a single authority that is democratically accountable across the region and should be explicitly provided for in the Bill. Regional/unitary authorities may be able to appropriately distribute costs throughout the region, potentially using differential rates to account for socio-economic and equity concerns.[19]

214. This regional funding model would be in line with both the direction of travel for FFLG as well as recent funding models the Local Government Commission has adopted e.g., Local Government Reorganisation Scheme (West Coast Region) Order 2019. However, it should be noted that not all regional and unitary councils have the same ability to raise revenue from rates given the size of their rating base and the socio-economic profile of their region. So regionalised funding based on current regions without a central government contribution is likely to exacerbate current inequities.

215. Local authorities do not have autonomy to set the amount of funding the RPC receives. If there is a dispute about a council's share *schedule 8, clause 37* enables that dispute to be determined by an independent person. The power to resolve funding disputes is broad and unfettered; there are no criteria such as affordability or socio-economic considerations set out for the independent person to use in deciding "an appropriate budget" or contribution. The ability for an independent person to fix the amount of funding and respective contributions undermines local democracy and accountability to communities. If funding is to come from rates and the independent decision maker is retained, at the very least *clause 37* should be amended to include criteria (such as affordability and socio-economic considerations) for resolving funding disputes.

216. The new regime will have significant implications for LTPs and create a significant cost burden on the already stretched budgets of many local authorities (who will continue funding resource management BAU as well as their other functions).

[19] This would be dependent on the outcome of the appeal of *New Zealand Forest Owners Association Inc v Wairoa District Council [2022] NZHC 761*

217. Further abrogating local accountability is that despite providing funding, local authorities have no control over how that money is spent (of overspent). RPCs are required by *schedule 8, clause 38* to prepare annual Statements of Intent (SOI) outlining how the budget will be spent. These SOIs need to align with LTP and rating timeframes. We recommend that specific backstop timeframes are provided for the delivery of the annual SOI in early December. We also encourage the Committee to consider requiring the SOI to provide detailed funding requirements for the first year and indicative funding requirements for the next two years to align with LTP planning processes and enable local authorities to prudently plan.

218. Guidance on estimated costs, inclusion in LTPs and example cost-sharing models will be essential, especially for circumstances where costs exceed estimates (and therefore allocated funding).

219. The RPC is also required to provide an annual report under *schedule 8, clause 39*. As a committee's annual report is not a report under the *LGA*, and councils have no ability to direct the funding or ensure the RPC and secretariat stick to their budgets. In lieu of local government reform, we recommend the Committee take advice from the Auditor General on this matter. Councils should be exempt from any auditing of their "contribution" to the RPC/Secretariat and consideration should be given to what independent scrutiny should be given to the PRC/Secretariat's expenditure.

220. *Schedule 8, clause 42* provides for the establishment of freshwater subcommittees by Order in Council on advice of the Minister. While we acknowledge the pressing issues relating to freshwater in Aotearoa New Zealand, it is our view that if the Minister wishes to set up freshwater subcommittees (especially given their wide discretion e.g., determining the number of participants), then the Minister/government should fund these committees. This should also be the case if other subcommittees become mandatory.

221. We conclude, where we began, that central government should pay for or at least share in the costs of RPCs, especially for the first iteration of RSSs and NBE plans and the litigation that will undoubtedly be involved. It should, as the Treaty partner, also fund mana whenua participation in RPCs and secretariats, and iwi and hapū capacity building to ensure they can actively participate in the new system.

Recommendations

That the Committee:

2.58 Removes the requirement that local authorities fund the RPC.

2.59 Amend *schedule 8, clause 38* to align with LTP processes and timeframes by requiring annual SOIs to be submitted in early December and require a detailed financial plan for the first year and indicative funding requirements for the next two years.

2.60 Specifies in the legislation that central government funds freshwater subcommittees and any other mandatory subcommittee or joint committee.

2.61 Clarify whether it is possible under the proposed funding arrangements for a regional/unitary authority to solely fund the RPC.

2.62 Amend *schedule 8, clause 37* to include criteria (such as affordability and socio-economic considerations) for determining funding disputes.

This is in addition to the recommendation to specify in legislation that central government funds any Ministerially direct plan change or variation.

That the Committee recommends:

2.63 LTP guidance, example cost-sharing models, and estimated costs is developed in partnership with Taituarā.

2.64 Central Government fund (at least) the establishment of RPCs and Secretariats and provide funding to support iwi and hapū to build their own capacity to actively participate in the new system.

2.65 Central government commits to and identifies the funding source for RPC legal proceedings.

The Secretariat

222. According to clause 100, each RPC will be serviced by a secretariat which will provide technical and administrative support. This will be necessary as it will take significant resources to support the RPC carryout its duties and functions.

Director of Secretariat and Relationship with Host Council

223. The RPC will establish the secretariat beneath a Director of the Secretariat (DOS) who will be delegated broad powers to support the RPC under *schedule 8, clause 33*. This includes the ability to employ staff necessary to support the RPC and confers all the rights, powers, and duties of an employer. Previous Ministerial statements have also indicated that in addition to staff being directly employed

by the DOS, they can also be seconded to the secretariat. We support the opportunity for secondment (rather than all staff transferring to the Secretariat) as this will allow local authorities to retain the necessary expertise for their other responsibilities but we note that some councils would prefer their staff remains as direct employees of the council and secondment arrangements are unlikely to be successful for extended periods of time i.e., two or more years.

224. These are complex arrangements, particularly for employment law, and raise serious concerns around accountability and liability. This is further complicated by the legal fiction that Secretariat staff are employees of the host council, despite being employed by and reporting to the RPC and DOS. Not only will this proposed structure frustrate the current responsibilities and accountabilities of local government Chief Executives (who are the sole employers of staff in their local authorities) but will also muddle reporting lines and accountabilities.

225. While we understand the need for the Secretariat to be vested with a legal entity, we do not support the host council assuming responsibility for ensuring all legal obligations are met as the technical employer while not having the ability to influence these legal obligations (as it must delegate all the rights, powers, and duties of an employer under *schedule 8, clause 33(4)).* The host council will have to comply with and hold responsibilities under the:
    - Employment Relations Act 2000,
    - Holidays Act 2003,
    - Parental Leave and Employment Protection Act 1987,
    - Human Rights Act 1993,
    - Health and Safety at Work Act 2015 and the
    - Privacy Act 2020.

226. This is of concern because it is unclear how health, safety and wellbeing obligations can sit with the host council if it has no ability to provide reasonable instructions to the DOS or their employees to adhere to health and safety rules. Furthermore, it could result in the host council, for example, having proceedings against them filed with the Employment Relations Authority despite having no knowledge of or control over the grievance raised. It seems manifestly unfair that the host authority should incur costs to defend proceedings which reflect adversely on their reputation when they are unable to influence the decisions and actions leading to it.

227. In our view these arrangements would be much simpler and provide clearer lines of accountability if structural reforms were to occur before regional plans are

developed. However, in lieu of this structural reform we recommend that the DOS and their staff should be employed by the host council and the Secretariat run as a project or programme management office. This will further simplify things as the artificial delineation between staff seconded to the secretariat and council staff supporting the development of the RSSs and NBE plans who will both be delivering for the RPC and DOS.

228. Alternatively, we recommend providing flexibility for using an alternative collaboration model. Under this model there would be no independent entity. Instead, resource would be pulled from local authorities and the host authorities' responsibilities would be limited to supporting the DOS only and the management of RPC finances. This model also more aligns with the reality that support to the RPC will need to come from a range of council departments and roles. This will also allow for district planning teams to directly input into plan making, providing local knowledge (and local voice) for the matters these planners deal with every day. This will accommodate regional variations such as high growth areas with housing affordability issues; low growth areas in need of economic activity; providing infrastructure to urban communities and allowing for various productive uses of rural land.

229. Ultimately, allowing for flexibility in this area will provide for regional variation in capacity and capability as secondment to, and employment by, an independent Secretariat may completely gut smaller councils planning departments and leave them unable to maintain the current system as the new is developed.

Recommendations

That the Committee:

2.66 Amend *schedule 8, clause 33* to allow that the DOS and secretariat staff are employed by the host council with the secretariat run as a project or programme management office within the host council and allow for council collaboration without an independent entity.

2.67 If this is not accepted, we ask the committee to clarify in the legislation that the DOS can be an employee of the host council.

Capacity and Capability

230. One critical issue with the proposed secretariat is the proposals lack certainty and may not present as a desirable career opportunity given the complex employment arrangements. We are concerned this will contribute to the current exodus from the planning profession and could seriously deplete local authority

planning departments which are already experiencing high vacancy rates and will remain responsible for continuing business as usual. There is a significant risk that there will be insufficient capacity and skilled personnel to support the RPC, secretariat, and deliver BAU. We recommend significant investment in training and culture to deliver the transformation required.

231. The DOS is also responsible for preparing a resourcing plan that ensures the secretariat has sufficient technical expertise and skills after consultation with the RPC under *schedule 8, clause 34*. Taituarā supports this workforce planning but recommends that the DOS should also be required to consult the constituent local authorities in establishing the resourcing plan given they will fund and supply the resources. It would also be wise to engage with iwi/hapū over resourcing to ensure the objectives of the reform and Te Tiriti o Waitangi obligations are met.

232. The resourcing plan is critical to the success of the system as unlike the Auckland Unitary Plan IHP secretariat, the RPC secretariat will be enduring and there is a real risk local authorities will permanently have their own internal planning resource (and associated disciplines) depleted. We are concerned about what "sufficient resourcing" looks like in practice and whether it will leave sufficient resourcing within councils to carry out their obligations under business as usual, while implementing all the changes that central government is imposing and meet the needs of communities. For regional council functions a significant proportion of their staff – from ecologists to freshwater scientists, to planners will be required to prepare the regional plan and as we have already noted it will also cause difficulties for territorial authorities performing their functions in an integrated manner.

Recommendations

That the Committee:

2.68 Amend *schedule 8, clause 34* to require the DOS to consult with all constituent local authorities in developing a resourcing plan.

2.69 Acknowledge the workforce risks under the current proposal and encourage align transition and implementation timeframes with workforce capacity.

2.70 Make any further changes that will give certainty to local authority staff whose employment relations will be impacted by this Bill.

Natural Built Environment Plans

Regionalised Plan Making

233. Under *clause 95* each region will be required to develop a NBE plan. The purpose of NBE plans is to provide for the integrated management of the natural and built environment *(clause 96)* and will replace existing plans under the RMA. *Clause 105* also provides for more decisions to be made in plans (for example notification). The proposal to shift from over 100 planning documents to 15 regional plans is not an insignificant undertaking. While we agree in principle that a single regional plan could be easier for users, navigating these plans will be difficult.

234. The amalgamation and additional content will likely make them unwieldy in length. By requiring, for example, every rule to contain notification requirements and matter for control NBE plans will become enormous and complex.

235. We are concerned that the regionalisation of plans will diminish the role and contributions of local communities in plan making. It is important that each constituent local authority (and ultimately its community) has some means of appropriately contributing to the development of an NBA plan, and in particular the parts of the plan that will impact significantly on their locality and communities. Ensuring appropriate local democratic input into plan making is not only consistent with the Government's objectives, but consistent with the basis upon which local government operates in Aotearoa.

236. While we acknowledge the potential to retain local voice through SCOs and SREOs *(clauses 643 and 645*), this is a poor substitute for local democratic input and even with the test of "must have particular regard to" these are unlikely to have the degree of influence that local authorities would expect within a planning system they must implement and provide for community wellbeing and placemaking. At a minimum we recommend replacing "have particular regard to" with the higher test of "recognise and provide for" to ensure community expectations are incorporated into plans. While we recognise the RPC needs to retain the ability to resolve any conflicts, we believe the higher test is more appropriate to give effect to the vision, objectives and desired outcomes of communities.

237. We are concerned that the interests of constituent districts may not be adequately considered and that the opportunities for the public to engage in

plan making processes may reduce significantly as consequence of the shift to larger bureaucracies and larger plans. While communities will have an opportunity to give feedback during the IHP process under *schedule 4, clause 4,* facilitating engagement in a process like this will be difficult. While we support giving the community the opportunity to participate in the IHP process, we would like to stress that communities do not tend to engage with high level documents and the degree of complexity and size of NBE plans will be prohibitive for many.

238. In addition to our concerns around communities' willingness to engage with large and complex planning documents, there is a risk that communities will lack confidence in the RPC's and IHP's ability to adequately understand or properly consider their specific local concerns and circumstances. Engagement policies under *schedule 7, clause 17* will be crucial to maintaining a social license. Expertise and experience from local authorities should be drawn upon when developing engagement policies.

239. The complexity of developing new NBE plans that will take account of multiple (and potentially competing) regional interests should not be underestimated. To unblock the system and meet the needs of communities, small or local matters should be dealt with through council bylaws. However, the law governing bylaws and their enforcement provisions must be updated urgently to ensure they are fit for purpose.

Recommendations

That the Committee:

2.71 Notes our support for the use of bylaws to deal with small or local matters.

2.72 Recommend amending (or make a consequential amendment) to the LGA to improve bylaw enforcement tools so they are fit for purpose.

2.73 Amend *clauses 643 and 645* to "recognise and provide for" SCOs and SREOs.

2.74 Assures itself there are sufficient mechanisms for effective and meaningful public input into plan making processes.

Content of Plans

240. NBE plans will set out the objectives, rules, processes, and limits and targets for a region under *clause 105*. Taituarā supports the codification of the approach in King Salmon[20] in *clauses 97 and 109* where NBE plans will be required to give effect to the NPF and RSS. We also support retaining the duty to "avoid, remedy,

[20] See: Environmental Defence Society Inc v New Zealand King Salmon [2014] NZSC 38

or mitigate" under *clause 14* and the adaptive management approach set out in *clause 110*.

241. We note that the disclosure document indicates that existing plans and policy statements could inform the first NBE plans. However, this is not immediately apparent from the draft Bill. Existing RPS and RMA plans are the result of extensive community engagement and rigorous development processes. Many of those documents are viewed positively by large sections of the communities where they apply. Ensuring that they are considered also provides a considerable degree of certainty to resource users, communities and other stakeholder groups while new NBE plans and RSSs are being developed. If existing content can't be used (and is to be relitigated despite potentially only just having been adopted) this would constitute a waste of resource and would reduce the goodwill of the sector.

242. For example, regional councils are currently embarking in a huge work programme to have updated Freshwater plans notified by the end of 2024 (as required by the NPS FM). If stronger consideration of this work is not included in the NBEA then it may jeopardise the value placed on the current processes. Delaying the freshwater work is not an option, as the associated environmental issues simply cannot wait for the resource management reforms to be enacted and implemented. However, as currently drafted, there is a high risk that, if the work programme results don't align perfectly with the Bill's intentions, the work to date could be disregarded. Such a possibility creates a high risk of unnecessary cost for ratepayers and their associated local authorities.

243. We would appreciate confirmation that existing plans and regional policy statements (including proposed ones where they are beyond challenge) and the evidence underpinning them can form the basis of the new NBE plans to avoid wasted work. Unless there is evidence that an issue has changed, we do not see much value in reviewing matters that have been issued in the last five years. Any concern about possibly prolonging elements of the existing RMA regime that are considered no longer appropriate is easily managed by specifying that inconsistency with Part 1 of the NBEA is a "strong reason" for not adopting a part of any existing document. This provision could be seen as an extension to the provisions currently contained in *schedule 1, clause 2* of the SPA.

244. *Clause 108* outlines things that must be disregarded in NBE plans. While we understand the intent of *clause 108*, we think it will lead to unintended consequences. For example, the effects on views that maintain or enhance the

relationship of Māori with their ancestral land, water, sites, waahi tapu, and other taonga are not protected. We are also concerned that scenic views, views from cycle trails and walking tracks (and other land transport assets) cannot be considered, which has the potential to undermine our tourism industry and economic activity in the regions as well as health and wellbeing benefits. There is no definition of 'low income', or 'special housing needs' (opening the door to substantial litigation) and potentially an implicit assumption that the land use referred to is housing. However, there are all manner of land uses that could be undertaken by people on low incomes that will have adverse effects (for example waste disposal) that should not be disregarded. We think the drafting risks capturing a myriad of activities and uses that were not intended. Overall, we are unconvinced that the section is necessary and consider that it will be about as useful as the current trade competition restrictions – which is to say – of very limited value.

Rules

245. *Clauses 117-125* outline the rules that are included in NBE plans. While most of the provisions relating to rules appear sensible the addition of *clause 125* relating to tree protection seems out of place. We ask the Committee to determine whether *clause 125* is appropriate in this context.

246. *Clauses 130-136* provide for when rules have legal effect. We consider all elements of the NBE plan should come into legal effect at the same time as this is simpler for the customer and is more efficient for the RPC and local authorities. We suggest that all rules should have immediate legal effect as this would also avoid a goldrush effect. If that is not accepted, we ask that another specific time is applied to all rules to avoid confusion, complexity, and unnecessary cost.

247. We support the use of non-regulatory methods in plans and the requirement that agreement from an affected local authority is required if funding from them will be necessary. However, this will be complex to achieve as it appears that the funding must exist in an Annual Plan or LTP first. The focus of the NBEA on regulatory instruments is potentially to the detriment of the effective use of non-regulatory measures.

Recommendations

That the Committee:

2.75 Confirm that existing plans and regional policy statements (including proposed ones where they are beyond challenge) and the evidence underpinning them can form the basis of the new NBE plans.

2.76 Remove the requirement to review plans and policy statements etc that have been issued in the last five years.

2.77 Amend *clauses 130-135* so that all elements of a NBE plan come into legal effect at the same time.

2.78 Remove *clause 108* outlining things that must be disregarded. If this is recommendation is rejected, then the clause needs considerable amendment and definitions to make it workable.

2.79 Determine whether *clause 125* relating to tree protection is appropriate.

Allocation

248. *Clause 36* sets out the resource allocation principles which will guide decision-making throughout the system. These are simply stated as sustainability, efficiency, and equity. *Clause 87* requires the NPF to give direction on allocations and *clause 126* provides that RPCs must include plans rules to require allocation methods to be used for freshwater and any resource required by the NPF. Market-based allocation can be used pursuant to *clause 88*. The wider suite of allocation methods is an improvement as first in first served has not worked well in the past. There is however some ambiguity around the requirement for consensus and guidance will be required for RPCs and consenting authorities on how to apply the suite of methods and how to resolve potential conflicts.

Recommendations

That the Committee:

2.80 Retains the range of allocation methods.

2.81 Clarifies whether the definition of consensus in *schedule 8, clause 20* applies or whether a different standard e.g., unanimity is required and who the parties are.

2.82 Requests guidance (that is co-designed with the local government sector) on the application of the resource allocation principles set out in *clause 36* is prepared in partnership with local government.

Designations

249. *Part 8, subpart 1* outlines the process for designations. An initial notice of requirement to identify and protect a spatial footprint is followed by a more

detailed Construction and Implementation Plan (CIP). Flexibility for a one-stage process is also included and is at the discretion of the infrastructure provider. Designations will continue to be the primary land use tool for public infrastructure and as per the SAR, the current designation process will largely be carried over into the new system, this is at odds with the new process design. However, there is some confusion about the proposed designation process and whether resource consents will be needed in the proposed system.

250. If resource consents are needed there appears to be a duplication of roles between local authorities and RPCs in the proposed designation process. If, however, there is no longer a need to obtain a resource consent and the CIP is the mechanisms for enabling the work to be carried out and the management of impacts and effects, we question whether the RPC is the correct body to assess both the spatial footprint and the specific impacts of the works. The processing requirements to construct infrastructure are more aligned with the resource consenting process. It may be that because designations are ultimately included in NBE plans a potentially erroneous assumption has been made that all aspects of the designation process should sit with the RPC. Given consenting functions remain with local authorities we think they should they be responsible for authorising the works and while the initial spatial footprint work could be the more relevant aspect for the RPCs consideration it too could be effectively and efficiently managed at the local level and fed into the RPC process.

251. We ask the Committee to consider whether these provisions ensure a simple, effective system and specifically clarify who is intended to have responsibility for the designation process and whether consents will be required. The Committee may wish to draw on the processes for Heritage Protection Orders and Independent Plan Changes (which sit with local authorities and are then passed to the RPC) for comparison. It may also wish to consider that an additional consenting pathway has been designed for infrastructure projects that includes a panel with appropriate skills and expertise to consider these applications.

252. We note that there are some drafting errors and improvements that can be made to ensure the system is workable. For example, in *clause 540* the heading refers to territorial authorities, but the text of the section refers to RPCs. This may indicate this part has been drafted in haste and would benefit from further scrutiny to ensure it is clear and easily implemented.

253. We ask the Committee to consider whether designations should be extended to apply in the coastal marine area and rivers and streams thus enabling infrastructure providers a simpler pathway for critical works.

Recommendations

That the Committee:

2.83 Amend *part 8, subpart 5* (designation provisions) to ensure a simple, effective designation system.

2.84 Specifically clarify that local authorities are responsible for authorising the works either through the CIP process or via consents unless a fast-track process is used.

2.85 Correct drafting errors as per appendix B.

2.86 Include/consider including designations in the coastal marine area, rivers and streams.

Preparation of Plans

254. *Schedule 7* outlines the processes for preparing, changing, and reviewing NBE plans. The two year timeframe for preparing a new plan is an overly ambitious target (especially in view of the capacity and capability issues raised earlier). Furthermore, issuing decisions two years after notification will likely prove impossible as hearing submissions and evidence across all content could take up all of this time. We suggest these timeframes are increased and that five years may be more appropriate.

255. The submission process is an area for increased efficiency. A significant amount of hearing preparation and hearing time is wasted on incomplete and unfocused submissions. One way to make the process more efficient would be to expand *schedule 7, clause 37* to enable a RPC to request amendments from submitters so that their submission is focused and in the prescribed form. Another way would be to improve the power to strike out submissions.

256. *Schedule 7, clause 38* provides the power to strike out submissions. The drafting of this clause is largely a carryover from the RMA (compare to *schedule 1, clause 8* RMA). The power to strike out submissions has not been widely used yet but could be an important tool to speed up plan preparation processes if clearer direction and guidance is provided in the NBEA.

257. Additional guidance or the codification of current case law on what is 'in scope' and 'out of scope', in addition to requiring that 'out of scope' submissions are struck out, would ensure an efficient hearings process.

258. We support the truncated appeals process (with appeals on points of law only) but we are concerned about the compounding effect of a truncated appeals process where IHPs are able to make recommendations that are outside the scope of submissions. We ask the Committee to remove the ability for IHPs to make recommendations out of scope to avoid potential natural justice issues. In the absence of reform, we also question whether it is necessary to include requirements regarding the keeping of a full record given LGOIMA requirements.

Recommendations

That the Committee:

2.87 Review the timeframes given in *schedule 7* to ensure they are workable.

2.88 Amend *schedule 7, clauses 37 and 38* to focus submissions and require IHPs to strike out of scope submissions.

2.89 Remove the ability for IHPs to make recommendations that are out of scope (of submissions) without the opportunity to be heard.

2.90 Remove the requirement to keep a full record of meetings if the meetings are subject to LGOIMA.

Consenting

Issuing Consents

259. While plan making no longer sits with local authorities the power to issue resource consents remains with them. While *clause 152* retains all five types of resource consents available under the RMA, the number of activity classes available has been reduced with the non-complying category removed under *clause 153*. We support the four activity classes but note that the change for controlled activities (that applications for them can now be refused[21]) effectively makes them more like restricted discretionary activities under the RMA and is likely to create confusion for applicants. It may also have the perverse effect of reducing certainty, particularly for small scale activities.

[21] Under the RMA consents for controlled activities must be granted but conditions may be imposed.

260. The removal of non-complying activities also raises concerns about whether more activities will now be prohibited. We therefore request guidance on how to deal with previously non-complying activities under the new system.

261. In addition, we are aware of concerns with the *clause 154(4)* which directs activities to be classified as prohibited if the activity would "breach a limit specified in the national planning framework or a plan (either taken in isolation or, if allowed to be carried out in addition to consented activities that have existing rights or are permitted) or if it would not contribute to relevant outcomes." Environment Canterbury notes in their case that nitrate concentrations exceed current national bottom lines and the current drafting of the section would effectively mean all activities that contribute to a breach of this limit would need to be prohibited in future NBEA plans, despite steps already in train to address over-allocation and reduce leaching. The drafting of this clause appears to be inconsistent with the NPS-FM.

262. Permitted activities are intended to cover a wider class of activities (*clause 156* the NPF or a NBE plans can provide for permitted activities which will not require a resource consent *(clause 153))*. *Clause 156(3)(a)* provides that a permitted activity can be subject to conditions or requirements that the activity be monitored. While we understand the intent to reduce cost and make the system more efficient, we have concerns about the monitoring requirements associated (see section on Monitoring). We are also concerned that cumulatively permitted activities have the potential to undermine the achievement of limits and targets.

263. *Clause 187* provides processing times for consents; these appear reasonable however we are concerned that the ability to extend timeframes has been curtailed (which could be very necessary when combined with the three year expiry period for consents contained in the Bill).

264. *Clause 223* outlines the considerations for consent authorities when processing an application for resource consent. The requirement not to grant consent contrary to an environmental limit or target will not work in practice (particularly for catchment or non-point source limits and targets). The reason is that applications will likely require a large amount of evidence to demonstrate that a catchment target will not be exceeded. This will likely lead to a lot of consents being refused due to lack of information. While the consideration is consistent with system outcomes, it would be better if NBE plans dealt with these issues upfront by prohibiting the activity.

265. *Clause 223 (2) (f)* also needs clarification. It is currently unclear whether the track record provisions apply to company directors and whether it should apply to all non-compliances or just significant non-compliances. Overall, the clause includes a number of uncertain elements through its use of terms such as 'sufficiently' and 'adequate' which should be deleted as they introduce elements of subjectivity.

Recommendations

That the Committee:

2.91 Retain *clause 152*.

2.92 Provide guidance (that is co-designed with the local government sector) on how to deal with previously non-complying activities.

2.93 Amend *clause 223* (and *clause 105*) to ensure activities that will exceed limits or targets can be appropriately dealt with in NBE plans through prohibition if necessary or adaptive management / reducing allocations to archive the limit or target in the future.

2.94 Clarify whether *clause 223 (2) (f)* applies to company directors and whether it should apply to all non-compliances or just significant non-compliances.

Notification and Information Requirements

266. The information requirements under *clauses 183-186* are meant to be more flexible under this new system with requirements proportionate to the nature, scale, and complexity of the issue. What information is required should sit within the NBE plan and streamline the consenting process.

267. Consent authorities retain responsibility for non-notification, limited notification, and public notification of consents *(clauses 205-207),* but notification requirements will be linked to activity classes and dealt with in the NPF or NBE plans under *clause 199*. While we support front loading the system, we think notification and affected person identification at the plan making stage will be extremely challenging and may be unworkable.

268. We have had the benefit of reading a number of council submissions on the issue of notification including Auckland Council's submission. We consider they, as the largest consent authority, are well placed to advise the Committee on the practicalities of the notification aspects of the NBEA. We are concerned about the number of issues they and other submitters have raised and the potential for this part of the system to be inefficient, ineffective and litigious.

269. For our part, we note that the thresholds for notification outlined in *clauses 205 and 206* are important to set at the right level given that reaching them makes it mandatory to require public or limited notification and getting this right will have a large impact on the efficiency of the new system. The drafting of these clauses, however, creates uncertainty. For example, is unclear what "sufficient uncertainty" means in *clause 205* and how the RPC or the Minister will determine whether there are "relevant concerns from the community".

270. If the notification regime is retained as proposed, we think *clause 204* should be amended to provide consent authorities with discretion to make a notification decision in relation to discretionary activities. This could avoid needless notification of discretionary activities simply on the basis that the NPF or NBE plan had not provided for their limited notification or non-notification.

271. *Clause 302* introduces permitted activity notices (PANs) which are required to be produced in 10 days. We are concerned that PANs will increase local authority workloads considerably and that the 10-day period may be unrealistic. This is of particular concern as the value of PANs is questionable. Our experience suggests that those who are law abiding will likely want to receive PANs for insurance purposes, sale etc. much like certificate of compliance. Those who have less regard to the law are unlikely to apply for them regardless of any requirement in the NPF particularly as they can be used to target and recover monitoring costs.

272. The clauses themselves create confusion and should be clarified.

Recommendations

That the Committee:

2.95 Reconsider the notification provisions in light of Auckland's submission outlining serious concerns with how these will work. If retained, ensure the tests for notification are set the right level and that the clauses provide clarity, certainty and enhance the efficiency and effectiveness of the system.

2.96 Review the purpose and drafting of the PAN provisions (*cl 302, cl 156 and cl157*) and the ensure are of value and workable.

Alternative Processing Pathways

273. *Clauses 315-327* provide alternative pathways for processing consents. We support retaining the ability to apply to the Environment Court as a direct referral and that nationally significant proposals should be decided by the Environment Court. *Clauses 328*-348 provide for call-ins. Local authorities must agree before

a plan change is called-in given the significant costs involved. *Clause 349* also retains the COVID 19 Fast Tracking Process. Māori and councils have had issues with the fast-track process. For local authorities, it will be crucial to ensure the necessary infrastructure is in place for fast-tracked development and without new funding and financing tools this will be difficult.

Recommendations

That the Committee:

2.97 Retain alternative pathways for processing consents (*cl315-27*).

2.98 Amend *clause 330* to require the Minister to consult the relevant local authority before they call in a matter.

Contaminated Land

274. Contaminated land is defined as land where a contaminant is present in any physical state in, on, or under the land, and in concentrations that exceeds an environmental limit or pose an unacceptable risk to human health or the environment. This is very different to the RMA definition of contaminated land and will likely broaden the substances that could be identified as contaminating land and the extent of land identified as contaminated.

275. The NBEA has introduced novel requirements relating to the regulation of contaminated land. Under *clause 421* territorial authorities are required to consider the environmental effects of development, subdivision and the use of contaminated land and must also control the use and development of contaminated land to prevent any adverse effects. *Clause 423* establishes the role of the Environmental Protection Agency (EPA) as lead regulator for contaminated land sites of national significance and *clause 422* allows the Minister to classify or declassify a site as a significantly contaminated land site. There is no definition or threshold for "significantly" contaminated land in the Bills. This means it is unclear whether there is a tiered approach (national significant contaminated land/ significantly contaminated land) or if there has been a drafting error and they are one in the same thing.

276. We broadly support the introduction of the polluter pays principle under *clause 417*. While it is intended to ensure those who pollute are responsible for costs, it will be difficult to identify and pursue polluters particularly for historic contamination.

277. We strongly object to *clause 427*. Where the EPA is unable to recover costs from the polluter it should not be able to recover them from the local authority. It is manifestly unfair to put the costs of remediation to local authorities who have not been responsible for contaminations. While the EPA must take account any events that are outside the control of the local authority, requiring the local authority apply to the Environment Court to determine cost apportionment is also unjust. This process will cost the local authority unnecessarily and we recommend the provision is removed.

278. If it is not removed, then we recommend that the Committee consider a more just approach to challenging the costs – for example where the costs are not agreed that alternative dispute resolution processes (ADR) or mediation is available, and central government funded. If the EPA is the lead regulator, any costs of investigations that cannot be recovered should be absorbed by the EPA and not the local authority.

Recommendations

That the Committee:

2.99 Clarify the meaning and threshold of "significantly contaminated land" in *clause 422*.

2.100 Remove *clause 427*. If the clause is not removed, then the EPA should be responsible for remediation as the national regulator. If the EPA is not made responsible, then *clause 427* should be amended to allow cost apportionment to be decided via alternative dispute resolution processes or central government funded mediation.

Compliance, Monitoring and Enforcement

279. While plan making no longer sits with local authorities, compliance, monitoring, and enforcement (CME) responsibilities will remain. Under *clause 694* an RPC and the EPA may also act as a regulator under this Act. We have concerns about the inclusion of the RPC as they are established as a planning body rather than a regulator. We recommend removing the RPC from *clause 649*. We support *clause 649* (which requires each local authority to publish a compliance and enforcement strategy) but consider a single strategy under a reformed local government system would be simpler and more effective.

Enforcement Tools

280. *Part 11* of the Bill provides for a broad range of enforcement tools and cost recovery provisions. In addition to strengthening existing enforcement tools, the new tools are an improvement in what was available under the RMA.

281. *Clause 718* introduces monetary benefit orders (MBOs) which require a person to pay back a sum that represents the amount of monetary benefit acquired by the person as a result of an offence or contravention under the NBEA. *Clause 776* introduces pecuniary penalty orders (PPOs) which intends to penalise non-compliant behaviour and can order the offender to pay a large sum of money if the Court is satisfied the person has failed to comply with a requirement imposed by the NBEA.

282. There are different tests for when the Environment Court can make an MBO or PPO. The difference may be unintentional. It is most likely a result of the MBO provisions being copied across from the Environmental Protection Act 2017 (Victoria, Australia) and the PPO provisions being copied from the Biosecurity Act 1993. We expect that this drafting can be tidied up before the NBEA is enacted.

283. In addition to MBOs and PBOs the new enforcement regime allows the Environment to revoke or suspend a resource consent in circumstances of ongoing and severe non-compliance under *clause 719*. The test set out under *clause 719* is quite high. Furthermore, under *clause 731* adverse publicity orders have been introduced to the system. Here the Environment Court will be empowered to make an adverse publicity order to publicise their non-compliance with a resource consent. This tool will be particularly useful to hold offenders accountable for non-compliance and to deter future offending.

284. NBE regulators may also require financial assurances pursuant to *clauses 732-750*. Financial assurances can be provided as an environmental restoration account, as a form of insurance, or in any other form specified by the regulator. These changes provide a comprehensive system for enforcement and are an improvement on what is contained in the RMA.

Recommendations

That the Committee:

2.101 Remove RPC from *clause 694*.

2.102 Retain *clause 649* which requires each local authority to publish a compliance and enforcement strategy.

2.103 Retain the strengthened enforcement tools in the new system under *part 11*.

Monitoring

285. In addition to strengthened enforcement provisions, there are increased monitoring obligations for local authorities. *Clause 783(3)(b)* should be deleted because it introduces an obligation on local authorities that they do not have the authority to meet. Mātauranga Māori is the intellectual property of local iwi and hapū and should not be carried out by local authorities unless given specific approvals to do so from tangata whenua.

286. The largest increase in monitoring will be the requirement to monitor permitted activities under *clause 783(1)(g)* which requires that local authorities must "monitor permitted activities that have effect in the region or district". Furthermore *clause 156(3)* states that a permitted activity can be subject to requirement that the activity is monitored for compliance. It is unclear from the NBEA drafting which (or whether all) permitted activities must be monitored. This could potentially impose a heavy burden on local authorities, as on its face it requires local authorities to monitor all permitted activities no matter the activity. This is unrealistic and we recommend *clause 783(1)(g)* is amended to outline which permitted activities will need to be monitored.

287. The scope of a local authorities monitoring requirements will be informed by new regional monitoring and reporting strategies which will be prepared by RPCs under *clause 785*. We do not support the RPC directing local authorities as part of the regional monitoring and reporting strategy. With the attendant funding implications this creates an issue for local authorities under the requirements for the LGA. Any power of direction should be subject to agreement and where agreement cannot be reached, we recommend the use of alternative dispute resolution processes or mediation to resolve the dispute.

288. We support the administrative charges set under *clause 821* and cost recovery provisions under *clauses 821(7) and 781*. However, we have two concerns. Firstly, we ask for clarification about whether an administrative change set under *clause 821* limits the ability for a NBE regulator to recover costs under *clause 781*.

Secondly, the cost of monitoring under the new system is likely to be significant and the capacity constraints within the CME professions may limit local authorities' ability to adequately monitor and enforce the rules. CME training needs to be developed now to be operational when we switch to the new system. We also recommend that central government invest in training and development and base funding for more extensive monitoring to meet the needs of the Government as a system steward, mātauranga Māori and tikanga Māori methods, and to monitor the effect of the NPF and prescribed permitted activities.

Recommendations

That the Committee:

2.104 Amend clause *783 (1) (g)* to outline which permitted activities must be monitored.

2.105 Remove *clause 785*. If it is retained, amend *clause 785* to subject the power of direction to agreement with the relevant local authority.

2.106 Clarify whether an administrative change set under *clause 821* limits the ability for a NBE regulator to recover costs under *clause 781*.

2.107 Delete *clause 783(3)(*b).

2.108 Commit central government investment in training and development as well as base funding for more extensive monitoring.

Part Three – Spatial Planning Bill

289. The SPA is potentially one of the more transformative aspects of the proposed new system and one we thoroughly support. Mandating spatial planning and integrating decision making across transport, infrastructure and land use functions will allow Aotearoa to plan for development and growth in the regions.

290. We note our earlier concern that given the amount of cross referencing to the NBEA, having two Acts is unlikely to be the most effective, efficient, and simple way of providing RSSs. All of our comments and recommendations relating to the shared features of the two Bills, such as the Regional Planning Committee and Secretariat, and described in Part 1, apply to this Part.

Purpose and Decision-Making Principles

291. The purpose of the SPA (as set out in *clause 3*) is to provide for RSSs that assist in achieving the NBEA purpose and promote integration in the performance of functions across several Acts. *Clause 4* outlines how RSSs relate to NBE plans under the NBEA, Regional Land Transport Plans under the Land Transport Management Act 2003, and annual reports and LTPs under LGA. The integration across functions and duties and the hierarchy of planning documents created under *clauses 4 and 16* are a significant step forward. However, the slow progress of the CAA creates challenges in addressing the significance of the climate and the need for funding and integrated planning.

Recommendations

That the Committee notes:

3.1 It is imperative that development of the CAA is accelerated.

Te Tiriti o Waitangi

292. *Clause 5* of the Bill requires that decision makers will be required to "give effect to" the principles of Te Tiriti o Waitangi. We support this and as noted in Parts One and Two of this submission, we are concerned that it is not clear how local authorities will be enabled to do this consistently. There may be different answers

for different rohe. Timely and practical guidance on how to give effect to the principle of Te Tiriti will be required.

293. *Clause 7* provides that decision makers must recognise and provide for the authority and responsibility of each iwi and hapū. We again note that decision makers will need access to accurate information on what authorities and responsibilities are at play in their region. As discussed in the corresponding section in Part Two, significant investment from central government will be needed to resource this information gathering exercise and to ensure iwi and hapū are resourced to exercise their authority and responsibilities. We are concerned that opportunities for system transformation will be lost due to critical capacity and capability issues without significant central government investment and support.

Recommendations

That the Committee notes:

3.2 Guidance (that is co-designed with the local government sector, iwi, and hapū) on how to give effect to Te Tiriti and information on the authorities and responsibilities of iwi and hapū will be critical to success.

3.3 Sufficient funding from central government will be required to support iwi and hapū to exercise their authority and responsibilities.

Regional Spatial Strategies

294. *Clause 12* requires each region to develop an RSS with Nelson and Tasman developing a combined RSS. RSSs set the strategic direction for the use, development, protection, restoration, and enhancement of the environment over a period of 30 years and are required to provide for the integrated management and support the efficient and effective management of the environment in addition to giving effect to the NPF under *clause 15*. In doing so it must support a co-ordinated approach to infrastructure funding and investment. Taituarā supports the introduction of RSSs as mandatory spatial planning can enable integrated management of the natural and built environments by planning development in the right place at the right time. Furthermore, we support the proposal to support coordinated funding of infrastructure between local authorities, central government, and iwi. This aligns with the FfLG panels direction

of thinking that opportunities for co-investment in public goods should be seized.[22]

Preparation of Regional Spatial Strategies

295. Pursuant to *clause 24* an RSS must be adopted following the enactment of the Bill and again when a renewal is required. RSSs must be renewed every nine years *(clause 46)* and must be reviewed if the NPF is amended or replaced *(clause 47)* or if there has been significant change in the region *(clause 4*8). RSS will be prepared by RPCs which will have a central government representative for the development of the RSS pursuant to *schedule 8, clause 2* of the NBEA. This central government representative should come to the RPC with a coherent plan and clear priorities for the region. This would be further enabled by a national spatial plan which expressed the Government's key strategies relating to waste, transport, and other matters it considered important spatially.

296. The process for preparing RSSs must be adopted by the RPC under *(clause 30)* and must support quality decision making *(clause 31)*. The process must also encourage participation by the public and particularly those who may be involved in implementing the RSS according to *clause 32*. We support this in principle as not only will this provide for local communities to input into matters that affect them but will also enable early buy in by implementation authorities. We however believe the drafting of this clause should be strengthened to require engagement with those involved in implementation such as WSEs, electricity generation providers, and other infrastructure providers.

297. Engagement agreements *(clauses 37-41)* will provide a mechanism for RPC to outline how Māori groups will participate in the process and how this participation will be funded. We support the introduction of engagement agreements in principle. As noted in Parts One and Two of this submission, clear expectations and assurances for funding will be critical to ensuring Māori are able to participate in the RPC process but these agreements may cut across existing relationships. Care will need to be taken to ensure that Treaty relationships between local authorities and iwi/hapū are not undermined by the agreements reached by the RPC.

298. Central government should fund, resource and support Māori participation, including the development of iwi and hapū capacity and capability and the development of engagement agreements. Because central government has

[22] FfLG Draft Report, pg. 189

constructed RPCs as independent of local authorities it should be expected to fund contributions. Local authorities on the other hand, should not be expected to fund an agreement they are not party to. The level of funding and resource is likely to be significant, especially during the first iteration, due to the complexity of these arrangements. The number of Māori groups that need to be invited will be large in many regions. For example, the Bay of Plenty has 39 iwi and treaty settlement entities and places within it such as Tauranga are hapū-centric. The SPA should include mediation (or any other dispute resolution mechanism) if an agreement cannot be reached after best endeavours. This may be critical as funding is likely to be an issue.

Recommendations

That the Committee:

3.4 Ensure that the scope and content properly reflect system outcomes such as well-functioning urban and rural areas.

3.5 Include a requirement for a National Spatial Strategy (or alternatively if this was not supported encourage central government to develop a National Spatial Strategy) to integrate national level priorities and direction and frame the central government representative's input.

3.6 Insert a dispute resolution mechanism where Engagement Agreements cannot be agreed.

Regional Spatial Strategy Content and Form

299. An RSS must set out the vision and objectives for a regions development and set out the actions needed to achieve them *(clause 16*). There is a need to ensure that the scope and content properly reflect system outcomes such as well-functioning urban and rural areas and ensure that relevant content within existing spatial plans can form the basis of new RSSs. *Clause 17* sets out the key matters each region will have to give strategic direction on. These include areas that require protection, restoration, or enhancement; areas of cultural significance; areas that are appropriate for urban development, extracting natural resources, or rural use; areas of the coastal marine environment appropriate for development; infrastructure needs; and areas that may be vulnerable to natural hazards and the effects of climate change. We support the general content described.

300. We consider it would be more practical to identify areas that require protection, restoration or enhancement, and areas that 'are' vulnerable to significant risks arising from natural hazards or climate change rather than identify areas that

'may' require this. It is also unlikely at a regional scale that the RPC would be able to identify areas that 'are' appropriate for development without specific assessment. Rather the RPC should be indicating areas that 'may' be appropriate for development because there is more certainty around areas to avoid and protect than areas to develop. We recommend that the Committee consider carefully the use of "may" and "are" in this section and use "are" only where matters are sufficiently certain.

301. *Clause 18* outlines other matters of "sufficient significance" that must also be included in RSSs. The clause establishes a test for the RPC to determine whether something is of regional or national significance. While we support this in principle, we believe the drafting of this clause should align with the defined term in the NBEA "national importance". If it is not, then there could be a lack of alignment in the hierarchy of planning documents under the new regime, which could warrant recourse to the NPF to resolve under *clause 223* of the NBEA (for consent decision making).

302. We consider it would be preferable for the NBEA and SPA to use the same terminology, and that there be a clear direction to consider areas of national importance when preparing RSSs, even if they are not mapped until the NBE plans are prepared.

303. We support the level of detailed required by RSSs prescribed in *clause 19* and the intent to provide sufficient certainty to those implementing the RSS. However, we note that it is likely subregional components of the RSS will need to be developed to illustrate a greater level of detail and certainty. This may require extensive use of sub-committees established under *schedule 8, clause 32 of the NBEA*.

304. If there are issues common to two or more regions, then a cross-regional planning committee (CRPC) may be established under Ministerial discretion or by agreement under *clause 42*. We support cross regional planning in principle as it will enable environmental issues and communities of interest which do not align with current regional boundaries to be considered in an integrated way. Whether a CRPC is necessary to address an issue or issues will be dependent on the context. It also assumes that a neighbouring region has the resourcing and capacity to participate. With a staggered approach to implementation this may prove trickier than anticipated. A subcommittee with representation from the neighbouring region may be more appropriate in some cases, particularly during the transition.

305. The CRPC will be disestablished once it has completed a cross-regional spatial strategy (CRSS) on the issues it was established to address pursuant to *clause 43*. Under this clause a CRSS once adopted must be incorporated into the RSSs of the parent RPC, however the parent RPC will have the ability to direct the CRPC to reconsider the CRSS if it is inconsistent with the RSS before adoption. The primacy of the CRPC and its strategy as well as the potential for directions for inconsistency under *clause 43(4)* appears to add further layers of bureaucracy to an already complicated system. This is a potentially unnecessary complication of the process particularly for the round of RSSs. However, should it remain, it will be important that the parent RPC is able to advise of potential inconsistencies and ask for matters to be reconsidered.

Recommendations

That the Committee:

3.7 Review the use of "may" and "are" in *clause 17* and retain "are" only where matters are sufficiently certain.

3.8 Amend *clause 18* to replace "sufficient significance" with "regional or national importance" to align terminology across the NBEA and SPA.

3.9 Insert a mandatory requirement for local authorities to be given the opportunity to review the draft RSS.

3.10 Increase the weight given to SCOs and SREOs from "have particular regard to" to "recognise and provide for".

3.11 Amend *clause 32* to require engagement with WSEs and infrastructure providers.

3.12 Amend *clause 39* to include a dispute resolution mechanism like mediation if agreement cannot be reached.

3.13 Retain cross regional spatial planning under *clauses 42 and 43* in principle but where it is directed by the Minister funding should come from central government.

3.14 Clarify that subcommittees with representation from neighbouring regions can be established under *schedule 9, clause 32* of the NBEA.

3.15 Amend clause 43 to strengthen the parent RPCs ability to direct CRPCs to reconsider matters.

3.16 Secures central government funding for the engagement agreements under *clause 37*.

Considerations when Preparing a Regional Spatial Strategy

306. *Clause 24* outlines the instruments which must be considered when developing an RSS. The RPC must have particular regard to Government policy statements, SREOs and SCOs, and iwi planning documents. In addition to this the RPC must have regard to any strategies, plans, or other instruments made under other legislation or for the purpose of complying with New Zealand's international obligations, and the Government statements responding to reports provided under *part 2, subpart 3 of the New Zealand Infrastructure Commission/Te Waihanga Act 2019*. Furthermore, the RPC must recognise and provide for planning documents prepared by customary marine title groups *(clause 26)* and protected Māori land *(clause 27)*.

307. We support this in principle, but we are unconvinced that the thresholds of "particular regard" and "regard" are high enough. Given the importance of retaining local voice in placemaking and planning we recommend that the weight of these statements is increased. We encourage the Committee to consider the approach contained in the Pare Hauraki Redress Bill as a model for giving weight to SCOs and SREOs. Under *clause 116* of that Bill, the Waikato Regional Council is given the discretion to consider including all or part of the Waihou, Paiko and Coromandel Catchment Plan into its operative RPS. If it decides not to directly incorporate the plan provisions then, under *clause 121* it is required to "recognise and provide for the vision, objectives and desired outcomes in the plan".

308. While the RPC would need the ability to resolve any conflicts between the vision, objectives and desired outcomes in the different SCOs and SREOs if local authorities and communities are going to put in the effort to develop them we recommend that the higher test "recognise and provide for" should replace the "have particular regard" test.

309. Furthermore, many local authorities across the country have adopted development strategies and some regions are already developing or have developed regional spatial strategies. While we welcome a consistent approach to spatial planning across Aotearoa New Zealand, we request confirmation that the Acts provide for incorporation of material from current spatial strategies to ensure work is not wasted and duplication of effort is reduced. This will be particularly crucial given the timeframes proposed for adopting RSSs.

310. Any implementation of international obligations should be contained in primary legislation.

311. *Clause 25 (2)* outlines other matters for the RPC to consider when preparing an RSS. These include any cumulative effects of use and development, mātauranga Māori and technical advice, and whether implementation of the RSS will have significant environmental consequences. Taituarā supports these considerations but note that it will be important to ensure that members of the RPC receive training in key aspects of decision making such as the weighing of evidence. This will be particularly important as the RPC is also tasked with ensuring the RSS is based on robust and reliable evidence under *clause 28*.

312. There are also a couple of matters the RPC is prohibited from considering. *Clause 25 (3)* directs the RPC to disregard effects on scenic views from private properties or land transport assets and the effect on the visibility of commercial signage or advertising. While we understand that amenity values have been removed from the NBEA and this is an attempt to align the pieces of legislation we are concerned the impact this has on rights and interests. As drafted, the clause has removed protection for views that maintain, or enhance the relationship of Māori with their ancestral land, water sites, and waahi tapu, and other taonga. Furthermore, removing the ability consider the effects on views from acknowledged scenic views cycle trails and walking tracks (and other land transport assets) has the potential to undermine our tourism industry and economic activity in the regions as well as health and wellbeing benefits. We recommend *clause (3)* is redrafted to protect views which have cultural importance to Māori or provide other value to the region.

Recommendations

That the Committee notes:

3.17 Confirm the Bill provides for the incorporation of existing spatial strategies, (as well as plans and policy and masterplans).

3.18 Ensure the RPC members have training in key aspects of decision making.

3.19 Amend *clause 25 (3)* to protect views which have cultural importance to Māori and from land transport assets.

Implementation

Implementation Plans and Agreements

313. We support requiring RPCs to prepare and adopt an implementation plan for the RSS and publish it within six months of adopting the RSS, including the requirement to consult on them. These plans should be developed alongside the development of the RSS with key partners (such as local government, central government and their agencies, WSEs and other infrastructure providers) to ensure strategic priorities and system outcomes are achieved, activities are logically prioritised and programmed and funding sources are identified and ultimately secured.

314. Implementation agreements will be a vital tool to ensure the delivery of RSSs. A critical failure of the urban growth partnership and growth strategies has been a lack of commitment to the funding of key elements in a timely manner. Neither the SPA nor the NBEA address the very real funding constraints by providing additional sources of revenue and clause 57 provides that these implementation agreements are voluntary and not enforceable. While we understand the desire to not bind delivery partners unreasonably, the lack of enforceability creates a significant risk that the proposed benefits of RSSs will not be realised. Funding is and has always been the key dependency for infrastructure, development and protection and coordinated funding commitments will be crucial to delivering the strategies efficiently.

315. The funding and financing tools currently contained in the Infrastructure Funding and Financing Act 2020 and the Local Government Act 2002 should also be reviewed to ensure that local authorities have appropriate mechanisms to fund infrastructure and deliver on the requirements of their implementation agreements. The funding and financing principles in Te Waihanga New Zealand's Infrastructure Strategy could usefully inform discussions on infrastructure spending and numerous reviews into local government have produced recommendations for an equitable funding and financing system. We strongly urge the Committee to look into what improvements need to be made to local government funding mechanisms as this will be crucial to realise the benefits of the proposed reform.

316. Local government is required to prepare 10 year financial strategies (and for now at least 30 year infrastructure strategies) which can be updated and amended often with a need for community engagement but there is no such requirement

on central government. It will therefore be important that there are cross-party long-term commitments from central government in these agreements and funding mechanisms to ensure the central government commitments and priorities are delivered.[23]

317. Taituarā sees the Bill as a missed opportunity to create stronger linkages between planning outcomes, infrastructure investment and funding. The non-binding nature of implementation plans do not address the infrastructure funding challenges facing many communities. Including a funding and financing plan alongside the RSS could commit partners to deliver infrastructure investment in a way that is affordable and an efficient use of scarce resources.

318. Where there is slippage or an inability (or unwillingness) to deliver agreed actions and funding there should be a duty to disclose this and the reason why.

Recommendations

That the Committee:

3.20 Clarify how central government will deliver on the strategic outcomes that they seek through the RSS, including funding mechanisms.

3.21 Encourage the Government to review local government funding and financing mechanisms to ensure they are 'fit for purpose' to achieve the outcomes sought for the NBEA and SPA.

3.22 Insert a central government duty to report when and why agreed commitments have not been met or need to be changed.

[23] A Government Policy Statement on Spatial Planning that builds on a national spatial strategy and gives clear long-term funding commitments for the implementation of the Government's priorities and those contained in Regional Spatial Plans might be an appropriate tool, but we have not had time to investigate the potential pros and cons of this option.

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Appendix A: All Recommendations

Part One – Overarching Concerns

Topic	*We recommend that the Committee:*
Objectives unlikely to be met	Amend the Bills to recognise and provide for local place-based planning by local authorities.
	Specifically include the need to ensure a quality built environment.
Alignment With other Legislation and Reforms	Notes our support for the recommendations LGNZ has submitted to the Committee on Three Waters Reform.
	Requires WSEs to provide information, policies, plans, Te Mana o Te Wai statements, advice, and their expertise to the RPC.
	Requires decision makers to have "particular regard" to statements, plans and strategies prepared under the Water Services Entities Act 2022.
	Requires WSE representation on any water sub-committees that are established.
	Clarifies that WSE staff can and should be seconded to the Secretariat.
	Recommends that WSEs should be involved in the development of the NPF.
	Reviews the three-year maximum duration for affected consents.
	Slows down RM reform (particularly the development of NBEA plans) and sequences the roll out of the new Acts to allow space for FfLG reform. If this is not accepted, then the Committee should alternatively provide for simpler models and processes in the interim, such as the use of joint committees (or for unitary councils, council committees) under the LGA and sub-regional NBE plans.
	Explicitly require decision makers to consider the NAP and ERP when making NBE Plans and RSSs.
	Encourage the Government to make considerable progress on the CAA before the NBEA and SPA are enacted.
	Recommend amending (or make a consequential amendment to the LGA) to improve bylaw enforcement tools.
Funding	Recommends that central government equitably share the cost of implementing and running the new system with local authorities and gains cross-party support for this.

	Ensure the Bills do not pass unfunded mandates to local government.
	Specifically recommends that Central Government should fund Māori participation in the system and any new local government responsibilities conferred in the Bills or novel aspects of the system (like IHP appointments and litigation over new terms).
	Ensure that long-term cross-party funding commitments are agreed.
	Amend the Bills (or LGA) to ensure there are clear and sensible rating and reporting processes for local authorities.
	Clarify that a council can rate on behalf of the region.
	Recommends that officials urgently work with the Office of the Auditor General and Taituarā to develop further guidance for local authorities on how to incorporate these activities in LTPs.
Capacity and Capability	Encourage MfE to work with Taituarā, the local government sector and other professional bodies to develop a workforce plan to ensure there is sufficient capacity, capability, and training available to implement the system.
	Match the timing of the reforms to the availability of the workforce to deliver.
A staged approach to implementation	Clarifies that the regional tranche approach applies to RSSs and NBEA plans.
	Requires officials to work with local government and identify who will be in each tranche before the Committee reports back to Parliament. If that cannot be provided we request that a clear process and criteria for tranche selection is articulated by then.
	Ensures that implementation tranches provide sufficient time and opportunity so that Treaty settlements can be transferred, RPCs can be established, and lessons learnt in earlier tranches can be circulated and applied to later tranches.
	Recommend that Taituarā and LGNZ be funded to develop transition and implementation guidance with the local government sector on transition and implementation in partnership with Government.
	Ensure that the timeframe for developing NBE plans is realistic.
	Request guidance for local authorities (that is co-designed with the local government sector) on when they should stop work on existing RMA plan changes and prepare for the transition.

Complex Transitional Arrangements	Clarifies *Schedule 1 Subpart 1 Clause 2* of the NBEA and the requirement that RMA plans and policies will continue in force "subject to the NBEA".
	Require all elements of a plan to come into legal force at once. If this is not possible, provide guidance (that is co-designed with the local government sector) on how decisionmakers should deal with RMA documents that still have legal effect once the new system is enacted.

Part Two – Natural and Built Environment Bill

Topic	***We recommend that the Committee:***
Commencement	Ensures the commencement dates provided in *clause 2* are comprehensive and workable.
Purpose	Remove unnecessary complexity from the purpose statement.
	Consider whether the purpose statement has become overly complex.
	Clarify the meaning of "promote outcomes" in *clauses 3 and 6*.
System Outcomes	Ensure the of the drafting of *clause 5* is clear and workable.
	Include the concept of quality and good urban design in "an adaptable and resilient urban form"/environment to enable the creation of well-functioning built urban environments.
	Considers whether an expanded hierarchy of needs along the lines of Te Mana o Te Wai could be usefully included in the Act.
	Reconsiders its position on the hierarchy of outcomes.
	Considers whether an expanded hierarchy of needs along the lines of Te Mana o Te Wai could be usefully included in the Act.
	Consider whether the restoration limb of "the protection or, if degraded, restoration" outcome has been applied to the "right" things.
	Remove the application of "restoration" to outstanding natural features and outstanding landscapes.

	Requires places and matters of national importance and significance to be identified nationally (rather than elevate regional places and matters to this status automatically).
Decision Making Principles	Ensure the precautionary principle as defined will not be overly restrictive and won't curtail other approaches that may be more suitable.
	Assures itself that the requirement for all decision makers to recognise and provide for "the responsibility and mana of each iwi and hapū … in accordance with the kawa, tikanga (including kaitiakitanga), and mātauranga in their area of interest" can be implemented at all levels of the system.
Interpretation	Amend *clause 7* to consolidate definitions, deal with the drafting errors identified in Appendix B, and reduce referrals to other sections in the Bill.
Te Tiriti o Waitangi	
Giving Effect to Te Tiriti	Provide guidance (that is co-designed with the local government sector, iwi, and hapū) on how to "give effect to" the principles of Te Tiriti to support the application of *clause 4*.
Increased and More Strategic Role for Māori	Provide information on the authority and responsibility of each iwi and hapu to support the duty under *clause 6*.
	Include a dispute resolution process for schedule 7, clause 9 in case an engagement agreement cannot be reached.
	Request that significantly more funding and resource is made available from the Crown to increase the capacity and capability of Māori organisations participating in the system, including funding for: • the self-determination process to identify iwi / hapū representation on RPCs. • the development and implementation of engagement agreements by the RPC. • Mana Whakahono ā Rohe. • building capability and capacity for Māori and for local government to support Māori participation in the system. • the new National Māori Entity.
National Māori Entity	Clarify the information requirements and whether the NME will be adequately resourced.
	Include RPCs in the list of "monitored entities" and removing the reference to unitary authorities as local authorities are already included.

	Requests assurance from its legal advisors itself that the lack of iwi and hapū input into the first NPF gives effect to the principles of Te Tiriti contained in the SPA and NBEA.
Transitional Arrangements for existing settlements and Mana Whakahono ā Rohe	Considers how best the system might avoid unnecessary duplication, overlap and confusion between Mana Whakahono ā Rohe, Joint Management Agreements and other arrangements with local authorities and the new RPC.
	Require the Minister to engage with councils when they propose to amend a Mana Whakahono ā Rohe or Joint Management Agreements that a council is party to.
	Require the agreement of the council (and the relevant iwi or hapū) for any changes to a Whakahono ā Rohe, Joint Management Agreement or other arrangement (that is not a Treaty Settlement) that a council is party to.
	Notes it will be crucial the Crown initiates arrangements for Treaty Settlements immediately as failure to do so may compromise compliance with Treaty legislation and the NBEA, particularly where a council has a role in implementing Settlement obligations.
	Recommends to officials that councils should be part of the conversations to amend Treaty Settlements to ensure no unintended consequences arise.
National Planning Framework	
National Planning Framework Purpose and Form	Amend *clause 33(a)(ii)* to 'matters for which national consistency is necessary to achieve limits or targets or nationally strategic objectives or otherwise where consistency will enable more efficient and effective plans and this benefit outweighs the need to enable local decision making'.
The First National Planning Framework	Recommend a slow down in the reform and development of the first iteration of the NPF to allow for proper engagement and co-design with experts from local government and iwi, hapū and Māori organisations.
	Amend the RMA to enable the NPF to apply to RMA plans and policy statements.
Limits and Targets	Include in the BOI membership a scientist and a representative from the NME, alongside a local government nominee (*Sch 6 clause 9(3)*).
	Include a requirement that the process for setting targets is developed in conjunction with local authorities, iwi and hapū.

	Amend the public notification period from 40 to 60 working days to enable good quality submissions to be prepared for the NPF introduction and major re-works.
	Amend *clause 33(a)(ii)* to ensure there is not overreach and local contexts can be considered e.g. 'matters for which national consistency is necessary to achieve limits, targets or nationally strategic objectives OR where consistency will enable more efficient or effective plans AND the benefit outweighs the need to enable local decision making'
	Amend the Minister's decision-making factors so that they distinguish the Minister's role from the BOI.
	Retain interim limits as a practical measure.
	Amend *Sch 6 clause 5 and 6* to include "stated reasons the Minister has given for not accepting the advice of the limits and targets review panel".
	Notes our support for a full review at nine years but considers including more frequent reviews of the NPF (ie before the nine year full review) to ensure the first iterations are effective, particularly in light of the speed they will be developed.
Strategic Direction	Clarify that the Minister is accountable if the NPF contains permitted activities that breach limits.
	Encourage the central government to undertake further work with local government and mana whenua to determine what can be learnt from the NPS-FM NOF/limit setting process and/or rolled over into the setting of environmental limits in the NPF or NBE plans.
	Encourage central government to complete a stocktake of current data and gap analysis to understand what data needs to be collected to set appropriate limits.
	Recommend the required monitoring of NPF limits is funded by central government.
Regional Planning Committees	
Regional Planning Committee Form	Amend *clause 100* so that RPCs are established as a Joint Committee under *Schedule 7 clause 30A of the Local Government Act 2002*. If this is not acceptable amend *Schedule 8* to: a. allow alternative RPC models to be put forward that operate at different spatial scales, better reflect treaty settlements and existing arrangements.

	b. allow the use of LGA committees and joint committees under *Schedule 7 clause 30(1)(a) of the Local Government Act 2002*.
	Amend *schedule 8, clause 32* to remove the ability to delegate to an individual and expressly prohibit the ability for subcommittees to sub-delegate.
Regional Planning Committee Composition	Clarify how the purpose of local government will be considered under schedule 8, clause 3(2) (c).
	Include minimum criteria for Committee membership and reasons that would prevent someone becoming or continuing to be a member.
	Require a skills matrix to be prepared for each Committee as part of the appointment process to ensure the right mix of skills are present on the RPC.
Establishing Regional Planning Committees	Central government funds and co-designs with local government, the LGC, the NME and iwi and hapū guidance on establishing effective RPCs.
Regional Planning Committee Decision Making	Amend *schedule 8, clause 18* to require members to report back to their appointing bodies.
	Amend *clause 100 (3)* to clarify whether the RPC will act independently or in accordance with the host local authority.
	Amend *schedule 8, clause 23* to require more than a simple majority when the RPC chairperson has initiated voting.
	Amend *schedule 8, clause 22* to increase the quorum and require the quorum arrangement to cater for minimum attendance by iwi/hapū/Māori and local government representatives.
	Amend *schedule 8, clause 39* to include appropriate accountability and scrutiny on the advice of the Auditor General.
	Clarify the purpose of te Oranga o te Taiao statements under *clause 106* and whether the RPC must consider them.
	That the Committee recommends that central government co-designs with local government training and guidance for members who are elected members of territorial authorities to apply a regional lens and navigate any tensions that may arise from the dual roles.
Ministerial Powers	Insert a corresponding information sharing obligation (*clause 841*) from central government to local government to share information.

	Amend the investigation clauses to provide for an opportunity for a RPC or local authority to respond to any perceived shortfalls in their performance at an early stage.
	Insert a requirement for government funding of Ministerially directed action relating to the formation of committees, preparation of plan changes and variations etc.
	Assure itself that there are sufficient checks and balances on the powers provided to the Minister.
Regional Planning Committee and Secretariat Funding	Removes the requirement that local authorities fund the RPC.
	Amend *schedule 8, clause 38* to align with LTP processes and timeframes by requiring annual SOIs to be submitted in early December and require a detailed financial plan for the first year and indicative funding requirements for the next two years.
	Specifies in the legislation that central government funds freshwater subcommittees and any other mandatory subcommittee or joint committee.
	Clarify whether it is possible under the proposed funding arrangements for a regional/unitary authority to solely fund the RPC.
	Amend *schedule 8, clause 37* to include criteria (such as affordability and socio-economic considerations) for determining funding disputes.
	LTP guidance, example cost-sharing models, and estimated costs is developed in partnership with Taituarā.
	Central Government fund (at least) the establishment of RPCs and Secretariats and provide funding to support iwi and hapū to build their own capacity to actively participate in the new system.
	Central government commits to and identifies the funding source for RPC legal proceedings.
Director of Secretariat and Relationship with Host Council	Amend schedule 8, clause 33 to allow that the DOS and secretariat staff are employed by the host council with the secretariat run as a project or programme management office within the host council and allow for council collaboration without an independent entity.
	If this is not accepted, we ask the committee to clarify in the legislation that the DOS can be an employee of the host council.

Capacity and Capability	Amend *schedule 8, clause 34* to require the DOS to consult with all constituent local authorities in developing a resourcing plan.
	Acknowledge the workforce risks under the current proposal and encourage align transition and implementation timeframes with workforce capacity.
	Make any further changes that will give certainty to local authority staff whose employment relations will be impacted by this Bill.
Natural Built Environment Plans	
Regionalised Plan Making	Notes our support for the use of bylaws to deal with small or local matters.
	Recommend amending (or make a consequential amendment) to the LGA to improve bylaw enforcement tools so they are fit for purpose.
	Amend *clauses 643 and 645* to "recognise and provide for" SCOs and SREOs.
	Assures itself there are sufficient mechanisms for effective and meaningful public input into plan making processes.
Content of Plans	Confirm that existing plans and regional policy statements (including proposed ones where they are beyond challenge) and the evidence underpinning them can form the basis of the new NBE plans.
	Remove the requirement to review plans and policy statements etc that have been issued in the last five years.
	Amend *clauses 130-135* so that all elements of a NBE plan come into legal effect at the same time.
	Remove *clause 108* outlining things that must be disregarded. If this is recommendation is rejected, then the clause needs considerable amendment and definitions to make it workable.
Rules	Determine whether *clause 125* relating to tree protection is appropriate.
Allocation	Retains the range of allocation methods.
	Clarifies whether the definition of consensus in *schedule 8, clause 20* applies or whether a different standard e.g., unanimity is required and who the parties are.

	Requests guidance (that is co-designed with the local government sector) on the application of the resource allocation principles set out in *clause 36* is prepared in partnership with local government.
Designations	Amend *part 8, subpart 5* (designation provisions) to ensure a simple, effective designation system.
	Specifically clarify that local authorities are responsible for authorising the works either through the CIP process or via consents unless a fast-track process is used.
	Correct drafting errors as per appendix B.
	Include / consider including designations in the coastal marine area, rivers and streams.
Preparation of Plans	Review the timeframes given in *schedule 7* to ensure they are workable.
	Amend *schedule 7, clauses 37 and 38* to focus submissions and require IHPs to strike out of scope submissions.
	Remove the ability for IHPs to make recommendations that are out of scope (of submissions) without the opportunity to be heard.
	Remove the requirement to keep a full record of meetings if the meetings are subject to LGOIMA.
Consenting	
Issuing Consents	Retain *clause 152*.
	Provide guidance (that is co-designed with the local government sector) on how to deal with previously non-complying activities.
	Amend *clause 223* (and *clause 105*) to prohibit activities that will exceed limits or targets are dealt with in NBE plans.
	Clarify whether *clause 223 (2) (f)* applies to company directors and whether it should apply to all non-compliances or just significant non-compliances.
Notification and Information Requirements	Reconsider the notification provisions in light of Auckland's submission outlining serious concerns with how these will work. If retained, ensure the tests for notification are set the right level and that the clauses provide clarity, certainty and enhance the efficiency and effectiveness of the system.

	Review the purpose and drafting of the PAN provisions *(clause 302, clause 156 and clause 157)* and the ensure are of value and workable.
Alternative Processing Pathways	Amend *clause 330* to require the Minister to consult the relevant local authority before they call in a matter.
	Retain alternative pathways for processing consents (*cl315-27*)
Contaminated Land	Clarify the meaning and threshold of "significantly contaminated land" in *clause 422*.
	Remove *clause 427* or amend to allow cost apportionment to be decided via alternative dispute resolution processes or central government funded mediation.
Compliance, Monitoring and Enforcement	
Enforcement Tools	Remove RPC from *clause 694*.
	Retain *clause 649* which requires each local authority to publish a compliance and enforcement strategy.
	Retain the strengthened enforcement tools in the new system under *part 11*.
Monitoring	Amend *clause 783 (1) (g)* to outline which permitted activities must be monitored.
	Remove *clause 785*. If it is retained, amend *clause 785* to subject the power of direction to agreement with the relevant local authority.
	Clarify whether an administrative change set under *clause 821* limits the ability for a NBE regulator to recover costs under *clause 781*.
	Commit central government investment in training and development as well as base funding for more extensive monitoring.
	Delete *clause 783(3)(b)*.

Part Three – Spatial Planning Bill

Topic	*We recommend that the Committee:*
Purpose	It is imperative that development of the CAA is accelerated.
Te Tiriti o Waitangi	Provide guidance (that is co-designed with the local government sector, iwi, and hapū) on how to give effect to Te Tiriti and information on the authorities and responsibilities of iwi and hapū will be critical to success.
	Sufficient funding from central government will be required to support iwi and hapū to exercise their authority and responsibilities.
Preparation of Regional Spatial Strategies	Ensure that the scope and content properly reflect system outcomes such as well-functioning urban and rural areas.
	Include a requirement for a National Spatial Strategy (or alternatively if this was not supported encourage central government to develop a National Spatial Strategy) to integrate national level priorities and direction and frame the central government representative's input.
	Insert a dispute resolution mechanism where Engagement Agreements cannot be agreed.
Regional Spatial Strategy Content and Form	Review the use of "may" and "are" in *clause 17* and retain "are" only where matters are sufficiently certain.
	Amend *clause 18* to replace "sufficient significance" with "regional or national importance" to align terminology across the NBEA and SPA.
	Insert a mandatory requirement for local authorities to be given the opportunity to review the draft RSS.
	Increase the weight given to SCOs and SREOs from "have particular regard to" to "recognise and provide for".
	Amend *clause 32* to require engagement with WSEs and infrastructure providers.
	Amend *clause 39* to include a dispute resolution mechanism like mediation if agreement cannot be reached.
	Retain cross regional spatial planning under *clauses 42 and 43* in principle but where it is directed by the Minister funding should come from central government.
	Clarify that subcommittees with representation from neighbouring regions can be established under *schedule 9, clause 32* of the NBEA.

	Amend *clause 43* to strengthen the parent RPCs ability to direct CRPCs to reconsider matters.
	Secures central government funding for the engagement agreements under *clause 37*.
Considerations when Preparing a Regional Spatial Strategy	Confirm the Bill provides for the incorporation of existing spatial strategies, (as well as plans and policy and masterplans).
	Ensure the RPC members have training in key aspects of decision making.
	Amend *clause 25 (3*) to protect views which have cultural importance to Māori and from land transport assets.
Implementation Plans and Agreements	Clarify how central government will deliver on the strategic outcomes that they seek through the RSS, including funding mechanisms.
	Encourage the Government to review local government funding and financing mechanisms to ensure they are 'fit for purpose' to achieve the outcomes sought for the NBEA and SPA.
	Insert a central government duty to report when and why agreed commitments have not been met or need to be changed.

Appendix B: Drafting Matters

Cl.	Issue	Recommendation
5	The numbering under paragraph c is incorrect.	Amend roman numerals in *clause 5(c)*.
7	**Access strip** is defined under *clause 7* with reference to *schedule 12, clause 6*, this is incorrect	Amend the definition to refer to *schedule 11*.
	Adverse effect is defined as not including a "trivial effect". This needs further definition as it is not clear what a trivial effect is.	Our preference is to replace this term with 'de minimus' as the meaning has been the subject of case law and is well understood.
	Allocation method refers to a "consensus". Consensus usually means everyone agrees. It is also unclear in the context of allocation who the parties are that are required to reach consensus.	Please clarify whether the definition of consensus in *schedule 8, clause 20* applies or whether a different standard e.g., unanimity is required and who the parties are.
	Contaminated land has had its definition extended. No longer does this just pertain to a hazardous substance but also to adverse effects on the environment. It is unclear how these fit and will practically applied.	Clarify and provide guidance (that is co-designed with the local government sector) on applying the new environmental limit and health limbs of the definition.
	Cultural heritage is defined as "those aspects of the environment that contribute to an understanding and appreciation of New Zealand's history and cultures" … "that possess" … "cultural" qualities etc. There appears to be circularity within the definition. We note there is no definition of "cultural landscapes", which is likely to require guidance either in the primary legislation or in the NPF.	Clarify the definition of cultural heritage and provide a definition for cultural landscapes.
	Ecological integrity is defined as a more expansive version of the definition form the Environmental Reporting Act 2015. We do not expect there to be any real workability issues with it, particularly as ecological integrity is a concept commonly applied by ecologists. If anything, the framing of the definition may provide useful guidance for assessment as it breaks down the concept into four component parts.	No recommendation.

	Environment has changed its definition from the RMA most notably excluding amenity and aesthetic values. It also introduced the reference to "context". We are concerned that the definition, when considered alongside the definition of Te Oranga o te Taio, may lead to unnecessary complexity.	Ensure the definition of Environment is clear and objective and is compatible with the definition of Te Oranga o te Taio.
	Environmental contribution appears to replace financial contributions. If this change was intentional, then the change in name appears symbolic and we question whether it is necessary. We were unable to find a consequential amendment to mirror the change in the LGA (which contains at least 13 references to financial contributions).	Replace "environmental contribution" with "financial contributions" or propose amendments to the LGAs financial contributions.
	Environmental limit means a limit set for ecological integrity of human health. This definition has a grammatical error.	Amend to "a limit for ecological integrity <u>or</u> human health".
	Hazardous substance is now limited to only substances in *section 2* of HSNA.	We support this clarification.
	Highly vulnerable biodiversity area (HVBA) refers to *clause 555* which itself refers to criteria set out in *clause 562* relating to identification.	We request the definition only refers to *clause 562 and the clause 555* definition is removed.
	Incident means for the purposes of *Part 11*, have the meaning in *section 796*. This definition has a grammatical error.	Amend to "means for the purposes of *Part 11*, <u>has</u> the meaning in *section 796*"
	Indigenous biodiversity is defined differently from the definition provided in the NPS IB exposure draft.	Ensure these definitions are consistent.
	Iwi and hapū participation legislation refers to *schedule 14* which encompasses settlement legislation (that include statutory acknowledgements), but none of these provide for a role for iwi or hapū processes under the NBEA. This may prove problematic in the interim as settlement legislation will need to be amended. Furthermore, this definition appears to be missing reference to *schedule 3 of TOWA 1975*.	Include reference to *schedule 3* of the *Treaty of Waitangi Act 1975.*

	Minimum level target is defined under *clause 49(3)*. We are concerned this might lead to a race to the bottom despite it being about a minimum level of improvement.	We ask the Committee to assure itself that this is an appropriate term and definition.
	Minister for oceans and fisheries means the Minister who, under the authority of a warrant or with the authority of the Prime Minister, has overall responsibility of fisheries. There is a grammatical error in this definition.	Amend to "means the Minister who, under the authority of a warrant or with the authority of the Prime Minister, has overall responsibility <u>for</u> fisheries
	Natural environmental limit and environmental limit appear to mean the same thing: an 'environmental limit' under *clause 39*. We note that "natural environmental limit" is only used in *clause 783* with "environmental limits" being the term used more regularly throughout the Act.	We recommend amending this part of *clause 7* to have the definition relate to "environmental limits". This would also be useful considering the term "limit" is used in the Bill with alternative intent e.g., does not limit the following.
	Notice of decision is defined in the same way as it was under the RMA and includes "a provision of a policy statement or plan". We assume this is in error.	Reference to policy statements should be deleted.
	Polluter has the meaning given in *section 424*. We are concerned the definition will not be workable as it goes beyond caused or knowingly permitted. Significant time is likely to have elapsed for historic contamination and will affect the ability to identify who caused the pollution.	
	Polluter pays is an ideal to be aimed for. However, we note that the Bill proposes local government is effectively a backstop, where the EPA can recover costs from a local authority in the event EPA cannot recover costs from a polluter of contaminated land. This is not in keeping with the principle.	Remove local government as the backstop in the case where the EPA cannot recover costs from a polluter.
	Regional spatial strategies refers to the Strategic Planning Act rather than the Spatial Planning Act.	Amend to refer to Spatial Planning Act 2022.

	Resource allocation principles refers *section 36* which outlines but does not define the principles per se. Guidance on their application will be needed.	Provide guidance (that is co-designed with the local government sector) on application.
	River is defined in three limbs, *(c)* includes the caveat "or any other artificial watercourse" which is redundant and should be removed.	Remove "or any other artificial watercourse".
	Te Oranga o te Taio is defined using four limbs. One potential issue with the new phrase is the used of the conjunctive "and" between each clause in the new definition. What this means is that Te Oranga o te Taio, as a concept, engages all relevant limbs of its definition. In satisfying the requirement to recognise and uphold this concept, there is significant overlap between these limbs and no clear hierarchy between them. This may prove difficult to apply if there is tension between the limbs. Furthermore, guidance will be needed to assist the application of this new term.	Consider the use of "and" between the limbs of the definition and provide guidance (that is co-designed with the local government sector) on its application.
	Taonga tuku iho is a new term in. However, a definition is not included in the Bill. While we understand the issues with legally defining concepts from Te Ao Māori, we recommend the Committee considers whether one should be added in *clause 7*.	Provide a definition for taonga tuku iho.
	Transport infrastructure requires a definition.	Provide a definition of transport infrastructure. We suggest 'means the physical systems, networks, corridors, structures and facilities that enable the provision and operation of transport infrastructure services and the movement of people, goods, and services on land, water and air.
	Transport infrastructure services requires a definition.	Provide a definition for transport infrastructure services. We suggest 'means the transport systems, services and activities, including operational and maintenance requirements that enable and support the function of the transport infrastructure network, including all modes of public transport'.

	Water body repeats the phrase "any part".	We suggest the removal of "or any part of any of those".
	Well-being means the social, economic, environmental, and cultural well-being of people and communities, and includes their health and safety. On its own it appears to be a good definition, however we have concern that it does not align with uses of well-being in the Bill. For example, well-being in *clause 13* does not appear to fit with the definition in terms of communities and its use in *clause 329* appears to create a loop.	We recommend the use of well-being is made consistent throughout the Bill.
	Wetland is defined differently to that in the NPS FM. We suggest aligning these definitions.	Align the definition of wetland with the definition in the NPS FM.
	Working day definition should be changed to include the regional anniversary observed relevant to each RPC and local authority. It should also be altered to accommodate the Christmas stand down period. Many professional firms shut and cannot advise affected persons prior to 20 January.	
11	*Subclause (4)* has a spelling error.	Replace "Nāori" with "Māori"
24	*Subclause (2) (c)* has a grammatical error.	Replace the full stop with a comma in *(2)(c)*.
26	*Subclause (2)* has a spelling error.	Replace "planing" with "planning"
27	Refers to "objectives and policies" which appear to be carried over from the corresponding RMA provision.	Replace "objectives and policies" with "plan outcomes".
30	In *subclause (1)* there are grammatical errors.	Replace "sections" with "section" and remove the parenthesis before the comma.
63	It would improve clarity if the word "specified" should be added before the words "cultural heritage".	Add the word "specified" before the words "cultural heritage".
66	*Subclause (1)(n)* has a grammatical error.	Replace "Defences" with "Defence".

Sp 6	The heading for *Subpart 6* has a grammatical error.	Add the word "the" before "national planning framework".
79	The cross-reference in *subclause (2)* is wrong. Furthermore, whether an activity has significant effects is usually a factor of the scale, operation, and location of the activity. This clause might be more clearly expressed with regard to conditions.	Consider rewording the provision to have regard to conditions rather than significant effects. Replace "section 81(b)" with "section 81(c)".
99	*Clause 99* requires decision makers to "have regard to the extent to which it is appropriate for conflicts between system outcomes to be resolved by the plan or by resource consents or designations" while *clause 102(2)(e)* requires plans for "resolve conflicts relating to any aspect of the natural and built environment" which is inconsistent.	Address the inconsistency between *clauses 99 and 102*.
108	The language (d) is unworkable and undefined.	Define "people on low incomes" and ensure the wording in (d) does not have any unintended consequences.
261	Refers to a non-existent clause.	Replace reference to section 262 cases.
318	Refers to the Minister "for" Conservation, this is incorrect.	Replace "for" with "of".
419	In *subclause (1) (b)* there is a spelling error.	Replace "is" with "its".
540	The heading of this clause refers to territorial authorities, but the text of the section refers to RPCs.	Amend heading to refer to RPCs.
851	Refers to *subpart 1 of part 7A* which does not exist.	Remove reference to subpart 1 of part 7A.
S7 38	*Clause 38(g) of schedule 7* has a grammatical error.	Replace "does" with "do".
S1	In *schedule 1* under matters relating to Natural and Built Environment Act it refers to the "Natural and Built Environments Act"	Remove the pluralisation of Environments.

Appendix C: Legal Advice on Definitions and New Terms

Simpson Grierson
Barristers & Solicitors

Our advice

Prepared for	Kath Ross and Jen Coatham, Taituarā
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Date	16 December 2022

PRIVILEGED AND CONFIDENTIAL

Natural and Built Environment Bill and Spatial Planning Bill
Topic 1: Definitions and new terms

Background

On 15 November 2022, the Natural and Built Environment Bill (**NBE Bill**) and the Spatial Planning Bill (**SP Bill**) were introduced to the House. Together with the Climate Adaptation Bill (which is yet to be introduced) these Bills are intended to replace the Resource Management Act 1991 (**RMA**). The system reform includes a rolling over of existing RMA concepts, as well as introducing new concepts and different or augmented decision-making processes.

We have been asked by Taituarā to consider some of the key impacts for local government. This is one of seven pieces of advice considering the implications of the NBE and SP Bills.

In this advice we have focused on definitions and the new terms proposed for inclusion in the Bills, and sought to identify any lack of clarity, uncertainty or new terms or phrases that could impact on the Bills' operation, or which could create challenges for workability. We have not attempted to cover all changes, instead focusing on areas which may warrant further consideration through the select committee process.

Submissions are being accepted on the Bills until midnight on 5 February 2023.

Question and answer

Are definitions and new terms clear and unambiguous?

Key areas of interest for submissions will be the new definitions and terms relating to the new processes and direction for iwi, hapū, and Māori involvement in planning processes, the use of terms and phrases that lack clarity, and the defined terms relating to environmental limits. We have outlined below, in general terms, where definitions have been changed from the ones used in the RMA, or are new.

The interpretation section reveals some readability issues in the Bill. Section 7 is the main interpretation section, but there are definitions throughout the Bill. Other terms are not defined in the Bill, but are found in other Acts. Definitions throughout the Bill could potentially be consolidated to make the Bill easier to read and navigate.

Definitions and new terms

Definitions and terms that relate to the increased involvement of Māori and Māori concepts

1. The NBE Bill provides stronger direction in relation to Te Tiriti o Waitangi than the RMA. The NBE Bill requires all persons to "give effect" to the principles of Te Tiriti,[1] whereas the RMA requires decision makers to "take into account" the principles of Te Tiriti.[2]

2. Working in tandem with this strengthening, greater provision is made for Māori involvement and concepts generally (in both planning processes and consenting). This is reflected in a number of provisions within the NBE Bill and SP Bills, including:

   2.1 The incorporation of Te Ao Māori concepts that are new and untested in a legislative context;
   2.2 Inclusion of Te Ao Māori terms and definitions that are used in other Acts; and
   2.3 The increased emphasis placed on involving and recognising the role of Māori relative to the environment in various decision-making processes.

3. This advice considers the new definitions and terms relating to these changes, but there may be benefit in seeking further clarification about the wider implications of these changes.

New Te Ao Māori concepts

4. Clause 3 of the NBE Bill provides a dual purpose. Recognising and upholding te Oranga o te Taiao is one of those limbs.[3]

5. Te Oranga o te Taiao is defined in clause 7 as meaning:

   (a) the health of the natural environment; and
   (b) the essential relationship between the health of the natural environment and its capacity to sustain life; and
   (c) the interconnectedness of all parts of the environment; and
   (d) the intrinsic relationship between iwi and hapu and te Taiao.[4]

6. The inclusion of this new phrase, and its proposed definition, is novel. It does not appear in any other legislation, and given its centrality to the Bill's purpose it is likely to be the subject of litigation to resolve its interpretation.

7. In saying this, we note that the purpose of the NBE Bill is not likely to play a significant role in plan making, or consenting. Clause 223(10) of the NBE Bill provides that the purpose (in clause 3) can come into the frame in limited circumstances (where the National Planning Framework does not "adequately deal with" any matter), but otherwise

1 NBE Bill, cl 4.
2 RMA, s 8.
3 NBE Bill, cl 3(b).
4 NBE Bill, cl 7.

the new phrase - Te Oranga o te Taiao - is not widely used in the NBE or SP Bills.

8. It may be that the interpretation of this new phrase will be litigated at an early stage under the Urban Development Act 2020, as the NBE Bill proposes amendments to the principles in section 5 of the UDA.

9. One potential issue with the new phrase is the use of the conjunctive "and" between each clause in the new definition. What this means is that Te Oranga o te Taiao, as a concept, engages all relevant limbs of its definition. In satisfying the requirement to recognise and uphold this concept, there is significant overlap between these limbs, and with no clear hierarchy between them it may prove difficult to apply (if there is tension between the limbs).

10. The NBE Bill provides for Te Oranga o te Taiao statements to be prepared by iwi or hapū, and provided to regional planning committees,[5] which will assist to elaborate on this concept. It may, however, be useful for further guidance to be provided on how this new purpose is to be applied (potentially through non-statutory guidance).

Incorporation of Te Ao Māori terms and definitions already in other Acts

11. The NBE Bill adopts Te Ao Māori terms and definitions from existing Acts, including the Heritage New Zealand Pouhere Taonga Act 2014.

12. One of the required outcomes of all plans prepared under the NBE is that iwi and hapū are able to exercise their kawa in relation to their Wāhi tapu and Wāhi tūpuna.[6] It will therefore be important for decision-makers to understand what these terms mean in practice, as well as the process by which areas are identified and defined within each region.

Other key terms and definitions

13. In line with the strengthening of the direction to recognise Te Tiriti, iwi and hapu will have a greater role under the NBE Bill. This is reflected in several new or amended terms and definitions included in the Bill. For example:

    13.1 "Area of interest" is defined as the area that iwi authorities or groups representing hapū identify as their traditional rohe.[7] This pertains to one of the decision-making principles of the Bill: all persons exercising powers and functions under the NBE Bill must provide for iwi and hapu to sustain the health and wellbeing of their *area of interest*.[8]

    13.2 Part 8 of the Bill contains matters relevant to NBE plans. All

5 NBE Bill, cl 106.
6 NBE Bill, cl 5.
7 NBE Bill, cl 7.
8 NBE Bill, cl 6.

matters stated in paragraphs (a) to (b) or that are affected by those matters.[14]

17. A key change here is the addition of a reference to context. This implies that what constitutes the environment will be subjective, and location specific, with decision makers required to form a view as to what components are engaged for specific proposals. In practice this is not materially different to the existing approach under the RMA, but it may lead to complexity if considered alongside or in tandem with the all-encompassing definition of Te Oranga o te Taiao (discussed above).

18. While there may be no need to clarify this amended definition, the relationship between it and other key definitions will require careful consideration.

Places of National importance

19. There is a new requirement that every NBE plan identify each place in the region that is a place of national importance.

20. Areas of national importance are defined as:

    (a) An area of the coastal environment, or a wetland, or lake, or river or its margins that has outstanding natural character.
    (b) An outstanding natural feature or outstanding natural landscape.
    (c) Specified cultural heritage.
    (d) A significant biodiversity area
    (e) An area that provides public access to the coastal environment, or to a wetland, lake, or river or its margins.

21. While section 6 of the RMA lists matters of national importance, and it is increasingly the case that section 6 matters should be identified and mapped in district plans (for example, outstanding natural landscapes), the NBE Bill codifies this requirement by directing that such areas are identified and mapped in "every plan".

22. The term "national importance" is not used in the SP Bill. However, the wording in the SP Bill appears to reference areas of national importance without them being clearly labelled as such. Clauses 17 and 18 of the SP Bill state that Regional Spatial Strategies (**RSS**) ought to provide strategic direction about specific matters, to the extent that the regional planning committee considers they are of strategic importance or sufficient significance. While these clauses do not use the term 'national importance', it appears that the same concept is captured by way of the reference to:

    (a) Areas of cultural heritage and areas with resources that are of significance to Māori.
    (b) The matter relates to a *nationally significant* feature or activity.

14 NBE Bill, cl7.

functions, duties, and powers conferred by this subpart must be exercised in a manner "that recognises protected Māori land is a Taonga tuku iho for the owners of the land", and in a manner that considers the rights and interests of owners of that land.[9] "Taonga tuku iho" is not defined under the Bill but based on the meaning of its component parts, and its use in external documentation, we understand it means the treasures handed down from ancestors.

13.3 "Protected Māori land" means Māori customary land, Māori freehold land, and other land which has been set apart under various protective Acts or acts of the Crown.[10]

13.4 The definition of "heritage protection authority" has been extended to include any Māori entity or body corporate approved to be a heritage protection authority.[11] Under clause 541, **any** Māori entity with mana whenua in relation to a place may apply for approval as a heritage protection authority. This is different from the RMA, under which iwi authorities are not permitted to be heritage protection authorities. The NBE not only permits iwi authorities to be heritage protection authorities, but also any other Maori entity with mana whenua in relation to a place. This is a significant expansion of groups who could apply to be heritage protection authorities.[12]

14. Ultimately, the strengthening of direction relative to Te Tiriti under the NBE Bill directly and indirectly impacts many sections and terms in the proposed legislation. For instance, "best practicable option" in relation to a discharge of a contaminant or an emission "means the best method for preventing or minimising the adverse effects on the environment".[13] Due to the amended purpose of the NBE Bill, and the amended definition of "environment" (discussed below), this will include consideration of non-physical impacts, due to the need to uphold Te Oranga o te Taiao.

Other important changes

15. We set out below several other important changes to defined terms.

Environment

16. The term "environment" has an amended definition under the NBE Bill. Environment is proposed to mean:

> *as the context requires*,
> (a) the natural environment:
> (b) people and communities and the built environment that they create;
> (c) the social, economic, and cultural conditions that affect the

9 NBE Bill, cl 498.
10 NBE Bill, cl 497.
11 NBE Bill, cl 7.
12 See RMA, s 187.
13 NBE Bill, cl7.

23. It follows that there is some potential inconsistency between the NBE and SP Bills in terms of the use of the defined term "national importance".

24. If the intention is that the RSS should provide direction on such matters (which we consider appropriate), then the terminology should be aligned. If it is not, then there could be a lack of alignment in the hierarchy of planning documents under the new regime, which could warrant recourse to the National Planning Framework to resolve under clause 223 of the NBE Bill (for consent decision-making). We consider it would be preferable for the NBE and SP Bills to use the same terminology, and that there be a clear direction to consider areas of national importance when preparing RSS, even if they are not mapped until the NBE Plans are prepared.

Cultural Heritage

25. "Cultural heritage" in clause 7 of the NBE Bill is defined as:

    (a) Means those aspects of the environment that contribute to an understanding and appreciation of New Zealand's history and cultures that possess any of the following qualities:
        (i) Archaeological:
        (ii) Architectural:
        (iii) Cultural:
        (iv) Historic:
        (v) Scientific:
        (vi) Technological; and
    (b) Includes-
        (i) Historic sites, structures, places, and areas; and
        (ii) Archaeological sites; and
        (iii) Sites of significance to Māori, including wahi tapu and wahi tupuna; and
        (iv) The surroundings associated with sites referred to in subparagraphs (i) to (iii); and
        (v) Cultural landscapes.

26. The term "cultural landscapes" is a new term. Maori cultural landscapes have been considered in case law under the RMA, and generally capture areas of significance due to the "concentration of wahi tapu or Taonga values" or the importance of the area to an iwi's "cultural traditions, history or identity".[15]

27. Although we have not identified any workability issues with this new term, we note that the determination of what constitutes a cultural landscape may be a matter for debate, including in relation to the relevant expertise involved. The reason we have highlighted this is that any "specified cultural heritage" constitutes a "place of national importance" under clause 555 of the NBE Bill. In the event that a "cultural landscape" is specified, then it will be afforded heightened protection, including through section 559, which prohibits activities that

15 *Heritage New Zealand Pouhere Taonga v West Coast Regional Council* [2020] NZEnvC 080.

may have a "more than trivial adverse effect" on the "attributes that make an area a place of national importance" (unless certain exemptions apply).

Well-being

28. There is a definition of "well-being" included in the NBE Bill, which is a novel approach.[16] The definition takes on meaning in several provisions in the NBE Bill, which seek that development of the environment supports the well-being of present and future generations.[17]

29. "Well-being" is defined as "the social, economic, environmental, and cultural well-being of people and communities, and includes their health and safety".

30. Largely the same phrase is used in the Local Government Act 2002, and it has been interpreted as conferring a very broad ambit for consideration of how to achieve well-being. In our view, and in light of how the term is used in the NBE Bill, it seems appropriate that such a definition is used.

Resource allocation principles and methods

31. The NBE Bill sets out several "resource allocation principles" that are to guide the development of "allocation methods" for resources in NBE plans.[18] The new allocation principles are: sustainability, equity, and efficiency. The principles are not defined in any further detail, and there is no supporting guidance at this stage. According to the NBE Bill explanatory note, the principles *may* be explained further in the national planning framework.

32. "Allocation method" means:

> … except in Part 7, a method to determine the allocation of a resource, and includes (but is not limited to) the following:
> (a) consensus:
> (b) standard consenting process:
> (c) affected application pathway:
> (d) auction or tender.

33. It is unclear what "consensus" means in this context. It presumably means full agreement, but does not clarify which parties should be involved in reaching consensus, or the process by which consensus is intended to be reached. We note that there is a definition of consensus in clause 20 of Schedule 8, relative to the regional planning committee, which could usefully provide guidance on the definition of consensus (although unanimity may be expected when dealing with allocation matters).

16 NBE Bill, cl 7.
17 NBE Bill, cl 3.
18 NBE Bill, cl 7.

Definitions relating to environmental limits

34. There are new definitions and terms within the NBE Bill that relate specifically to the development of environmental limits.

35. The purpose of setting environmental limits is:

> (a) to prevent the ecological integrity of the natural environment from degrading from the state it was in at the commencement of this Part:
> (b) to protect human health.[19]

Ecological integrity

36. "Ecological integrity" is a new term used in the NBE Bill. It is defined as meaning:

> … the ability of the natural environment to support and maintain the following:
> (a) Representation: the occurrence and extent of ecosystems and indigenous species and their habitats; and
> (b) Composition: the natural diversity and abundance of indigenous species, habitats, and communities; and
> (c) Structure: the biotic and abiotic physical features of ecosystems; and
> (d) Functions: the ecological and physical functions and processes of ecosystems.[20]

37. This new definition is different from that in section 4 of the Environmental Reporting Act 2015, which reads:

> **ecological integrity** means the full potential of indigenous biotic and abiotic features and natural processes, functioning in sustainable communities, habitats, and landscapes

38. In effect, the new definition is a more expansive version of the definition from the Environmental Reporting Act 2015, and we do not expect there to be any real or workability issues with it, particularly as ecological integrity is a concept commonly applied by ecologists. If anything, the framing of the definition may provide useful guidance for the assessment of ecological integrity, as it breaks down the concept into four component parts.

Minimum level targets

39. Associated with environmental limits are "minimum level targets". It is a requirement that "targets set in plans are to be set at or better than a minimum level specified in the national planning framework".[21]

40. A "target" is stated (although not specifically defined) to be something that:[22]

19 NBE Bill, cl 37.
20 NBE Bill, cl 7.
21 NBE Bill, cl 49 (3).
22 NBE Bill, cl 48.

(a) is able to be measured; and
(b) must be achieved by a specified time; and
(c) is designed to assist in achieving-
  (i) a system outcome (see section 5); or
  (ii) a framework outcome; or
  (iii) in relation to a target set in a plan, a plan outcome specified in the plan.

41. This clause in the NBE Bill appears to align with the use of targets in the new regime, but it does introduce some potential subjectivity in clause (c), by allowing targets to delivery on various (and possibly) different outcomes. In the event that the hierarchy of documents under the new regime does not properly flow from top-down, there could be some potential for misalignment between targets. This will likely need to be resolved through the plan making processes.

Management Unit

42. A "management unit" is a technical term relating to environmental limits and targets.[23] It is defined as a "geographic area defined for the purpose of planning and managing activities to meet an environmental limit or target".

43. "Management units" must be set for every environmental limit and target, and can be set by the Minister (through the NPF), or through NBE plans. While we do not consider there to be any issue with the definition of this term, as with other new terms the process supporting the setting of management units will be of practical importance (and could lead to potential contention). At present, clause 55 sets out several matters that will inform the setting of management units, but there are no other process or consultation requirements set out in the NBE Bill.

Other terms

Proposed plan

44. The NBE Bill has consolidated sections 43AA, 43AAB and 43AAC of the RMA, so that all definitions are included in clause 7. This is an improvement and enhances readability and navigation of these important definitions.

45. Of the definitions that appear in sections 43AA-43AAC of the RMA, the most notable change is to the definition of "operative", which is defined as:

> **operative**, in relation to a provision in the national planning framework or plan, means that the provision or plan—
>
> (a) has come into force and has legal effect; and
> (b) has not ceased to be operative

23 NBE Bill, cl 31.

46. In conjunction with this definition, clause 130 of the NBE Bill provides a new standalone provision that guides when rules take on "legal effect" (as that term is used in the new definition). We have not identified any interpretation issues with this new provision, and note that it largely aligns with the approach under the RMA.

47. The phrase "comes into force" is defined in clause 467 of the NBE Bill as follows:

> **comes into force** means, in relation to a rule in a proposed plan, that the rule has legal effect

48. It is not clear to us why this definition is provided in clause 467, rather than in tandem with the definition of "operative" in clause 7, or even in proximity to clause 130. We also note that it is not clear why it is needed at all, given that comes into force means "legal effect", and the term legal effect could simply be used on its own.

49. There will still be a place for the phrase "come into force" in the definition of operative, as that refers to the making of a framework rule in the NPF, which will be made (and will come into force) as regulations.

Urban form

50. One of the proposed system outcomes under the NBE Bill is an "adaptable and resilient urban form". The focus on "urban form" is a departure from the current National Policy Statement on Urban Development 2020, which is fundamentally concerned with achieving *well-functioning* urban environments.

51. "Urban form" and "urban environment" have different meanings:

> **Urban form** means the physical characteristics that make up an urban area, including the shape, size, density, and configuration of the urban area". (NBE Bill)
>
> **Urban environment** means any area of land (regardless of size, and irrespective of local authority or statistical boundaries) that: is, or is intended to be, predominantly urban in character; and is, or is intended to be, part of a housing and labour market of at least 10,000 people. (RMA)

52. In light of the proposed new system outcome, it is unclear whether the term "urban form" is the most appropriate term to use, because:

    52.1 First, the term is only used in clause 5 and it does not provide any guidance as to the scale of a relevant urban form or urban area. As a result, there could be debate around whether this system outcome applies to any / all urban areas, including smaller rural towns or settlements.

    52.2 Secondly, the SP Bill uses the term "urban centre of scale", which

is defined as meaning "an urban area that is used mainly for a range of commercial, community, recreational, and residential activities that service a region, district, city, town, or a group of suburbs or neighbourhoods". The RSSs are only required to provide direction on this type of urban area, and so there is potentially a lacuna for any urban form that does not satisfy these criteria.

52.3 Thirdly, while it may be for the National Planning Framework to provide additional direction on what is expected for "urban form" – in terms of achieving the system outcomes - without any alignment between the relevant terminology, there is scope for uncertainty.

Please call or email to discuss any aspect of this advice

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Appendix D: Legal advice on Links between Bills and LGA Processes

Simpson Grierson
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Our advice

Prepared for	Kath Ross and Jen Coatham, Taituarā
Prepared by	Matt Conway, Mike Wakefield, Katherine Viskovic and Olliver Maassen
Date	16 December 2022

PRIVILEGED AND CONFIDENTIAL

Natural and Built Environment Bill and Spatial Planning Bill
Topic 2: links between Bills and LGA processes

Background

On 15 November 2022, the Natural and Built Environment Bill (**NBE Bill**) and the Spatial Planning Bill (**SP Bill**) were introduced to the House. Together with the Climate Adaptation Bill (which is yet to be introduced) these Bills are intended replace the Resource Management Act 1991 (**RMA**). The system reform includes a rolling over of existing RMA concepts, as well as introducing new concepts and different or augmented decision-making processes.

We have been asked by Taituarā to consider some of the key impacts for local government. This is one of seven pieces of advice considering the implications of the NBE and SP Bills. In this advice we have considered whether there are appropriate links between the Bills and Local Government Act 2002 (**LGA**) processes.

Submissions are being accepted on the Bills until midnight on 5 February 2023.

Question and answer

Are there appropriate links between the Bills and LGA processes?

The Bills are specific legislation that integrates land use planning and environmental protection. In contrast, the LGA is general legislation that provides the functions and powers of local government. While local authorities will have functions under both the Bills and the LGA, the Bills operate independently of the LGA, in the same way as the RMA.

In effect, councils (and by extension, regional planning committees (**RPCs**)) must discharge their planning, consenting and enforcement responsibilities consistently with the Bills, not based upon the direct application of the LGA.[1] This appropriately distances the local authority functions and powers under the Bills from LGA processes.

The Bills incorporate some reference to LGA powers and processes. These references demarcate the specific instances when the LGA applies. It is otherwise implicit that the LGA decision-making and consultation requirements will not apply. In particular, there are specific consultation and engagement processes for the preparation of Natural and Built

1 Other than to the extent that council decision-making inherently relies on some LGA structures (such as committees) or processes.

Are there appropriate links between the Bills and LGA processes?

As with the RMA, the Bills generally operate independently of the LGA

1. Before discussing the NBE Bill and SP Bill, it is useful to first consider the link between the RMA and the LGA. The reason for this is that the Bills are proposed to interact with the LGA in a similar way to the RMA.

2. The RMA is specific legislation that seeks to achieve the sustainable management of natural and physical resources.[2] The LGA is more general legislation that empowers local government, and provides a dual purpose: to enable democratic, community decision-making, and to promote community well-being.[3]

3. While all local authorities have functions under both the RMA and LGA, the RMA operates independently of the LGA. In making substantive decisions or exercising powers under the RMA, local authorities are required to discharge their responsibilities consistently with the RMA and its purpose, as opposed to the purpose of the LGA. This follows from the general legal principle that specific legislation should apply over and above general legislation.[4]

4. In effect, there is a separation of powers between the LGA and RMA, with the RMA conferring regulatory functions that are specific, and largely distinct, from those under the LGA. That said, the RMA does rely on certain LGA processes where incorporated by reference. For example, clause 3(4) of Schedule 1 to the RMA incorporates the section 82 (LGA) consultation principles for the preparation of proposed policy statements and plans. Section 34 also provides for the delegation of RMA functions, powers or duties to committees established in accordance with the LGA. It is this type of reference that creates an overlap between the RMA and LGA, and sharing of processes.

5. In much the same way, the Bills are designed to operate independently of the LGA.

6. It is implicit that the decision-making and consultation requirements in Part 6 of the LGA will not apply to decisions made under the Bills, unless expressly incorporated. For example, resource consent notification decisions are to be considered against the matters in clause 200 of the NBE Bill.[5] While it could be made explicit that the LGA does not apply because the NBE Bill is a separate and specific regime, we do not consider it is likely to cause any real issue.

7. The NBE Bill adopts the special consultative procedure (under

2 Resource Management Act 1991 (**RMA**), section 5.
3 Local Government Act 2002 (**LGA**), section 10.
4 See *Paraparaumu Airport Coalition Inc v Kapiti Coast District Council* EnvC Wellington, W077/08, 5 November 2008. A council plan change was appealed, with one of the grounds alleging non-compliance with section 77(1)(c) of the LGA. The Environment Court dismissed the ground of appeal, finding that the decision-making process is guided by the provisions of the RMA and not those of the LGA.
5 Clause 200 provides for the notification status of an activity to be provided for either in the national planning framework or NB Plans.

Environment Plans (**NBE Plans**) and Regional Spatial Strategies (**RSS**).

One particular area that could create issues in relation to councils' broader functions relates to the transfer of planning responsibilities to RPCs. As RPCs will operate independently of councils, this may complicate the relationship between strategic planning and infrastructure provision. Regional land transport plans are required to be consistent with RSSs, which are developed and approved by the RPC not councils. Councils are also required to set out steps to implement the RSS in their long-term plans, and report on the steps taken.

It is appropriate for the SP Bill to link strategic direction across spatial planning, land transport, and community infrastructure. However, the effect of the proposed integration is that the RPCs will be influencing direction on council infrastructure. Within the structure proposed in the SP Bill, it will be important for this influence to be bi-directional, with councils giving input into the feasibility of infrastructure provision. Council input could be achieved, to some extent, through the development of statements of regional environmental outcomes (**SREOs**) or statements of community outcomes (**SCOs**) which the RPC must have particular regard to in developing the RSS.

The key issue we have identified with the framework summarised above is that the RPC may become highly influential in making strategic decisions regarding provision of infrastructure or areas that may require protection, restoration or enhancement. Given the link between RSS and long-term plans this could have implications for the allocation of council funds without those decisions going through a meaningful LGA process. Furthermore, as the RPC is not directly accountable to communities for making what may be funding decisions, we can see that this approach could have issues moving forward.

section 83 of the LGA) for certain *local authority* decisions or processes, including the transfer of local authority powers[6] and the fixing of administrative charges.[7]

8. The operation of the new RPCs is distinct, with the NBE Bill providing a specific, bespoke process for engagement and consultation during the preparation, change and review of NBE Plans and RSSs.[8] This appears to be sensible, as although the RPCs are to deemed to be committees of all of the constituent councils in a region, they are also independent and not democratically accountable in the same way as local authorities. The benefit of including separate process requirements is that it removes any uncertainty around the application of the LGA's requirements to RPCs.

9. One area of potential uncertainty is the lack of any clear process for the preparation of statements of regional environmental outcomes (**SREOs**) and the statements of community outcomes (**SCOs**). To explain:

   9.1 Territorial and unitary authorities may decide to prepare SCOs, which are for the purpose of recording a summary of the views of a district or local community within a region. RPCs must give "particular regard" to SCOs when preparing and changing NBE Plans and RSSs,[9] and also "have regard to" SCOs in identifying "major regional policy issues".[10]

   9.2 Regional councils and unitary authorities may prepare SREOs to record a summary of the significant resource management issues of the region, or of a district or local community within the region. RPCs must have "particular regard" to SREOs when preparing and changing NBE Plans and RSS,[11] and also have regard to SREO's in identifying "major regional policy issues".[12]

10. The Bills do not address or describe the process that local authorities should follow if they choose to prepare SCOs[13] or SREOs.[14] As a result, and consistent with the approach to other RMA-related policies (e.g. spatial plans), it is left for a local authority to exercise discretion about how it will approach its decision-making process, as provided for by Part 6 of the LGA. Our current thinking is that this is appropriate, as the nature of SCOs and SREOs can be expected to involve community involvement, and if so the section 82 principles should be engaged.[15] There would be benefit in clarifying that these

6 NBE Bill, cl 650(3)(b).
7 NBE Bill, cl 821(5)(b).
8 NBE Bill, Sch 8; SP Bill 2022, Sch 4. However, we note that the public engagement process for RSSs, particularly in clause 4 of Schedule 4 (referred to as Step 3) is ambiguous and should be fut
9 NBE Bill, cl 107; SP Bill, clause 24.
10 NBE Bill, Sch 7, cl 14.
11 NBE Bill, cl 107; SP Bill 2022, cl 24.
12 NBE Bill, Sch 7, cl 14.
13 NBE Bill, cl 645.
14 NBE Bill, cl 643.
15 We also note the disconnect between clauses 643 and 645. The general obligations set out in subpart 1 of Part 1 of the NBE Bill only apply to SCOs (clause 643(5)). It is not clear to us why those same requirements should not apply to the preparation of SREOs.

documents should be developed using the LGA process; the Bills currently proceed on the basis that the LGA does not apply unless expressly incorporated, leaving unnecessary ambiguity as to the application of Part 6.

There is a strategic relationship between infrastructure provision and planning functions; further consideration on integrating decision-making across RPCs and councils is required

11. There is a clear strategic relationship between planning functions and LGA responsibilities. Strategic / spatial policy planning is a central aspect in implementing community outcomes and council activities, and councils' long-term plans generally inform regional and district planning. This includes making appropriate provision for council services and infrastructure (we refer to this as simply "**council infrastructure**"), and deciding where it will be located to service growth. For the purpose of this advice we have focused on infrastructure, but similar overlaps could conceivably occur in relation to other aspects that will be addressed in the RSS, such as areas that may require protection, restoration and enhancement.[16]

12. The strategic relationship between planning and a council's LGA responsibilities is not explicit in the RMA. Despite this, integration is achieved as councils are responsible for planning and the provision of council infrastructure at present.

13. Under the Bills' proposed framework, RPCs will undertake regional spatial planning activities. We have addressed the function of the RPCs in **Topic 4** of our advice. As we discuss further below, the proposed transfer of spatial / strategic planning functions to the RPCs makes it necessary to provide explicit mechanisms to integrate with other council functions.

14. The SP Bill seeks to integrate the performance of functions under the NBE Bill, the Land Transport Management Act 2003, and the LGA through RSSs. RSSs are intended to play a crucial role in integrating decision-making across regions.

15. RSSs prepared under the SP Bill will have a 30-year outlook, and will set out each region's approach to integrating land and coastal marine area planning, infrastructure provision, environmental protection and climate change matters.[17]

16. Not only are NBE Plans required to be consistent with the relevant RSS,[18] the SP Bill also proposes to amend:

    16.1 the Land Transport Management Act 2003 (**LTMA**), to require regional land transport plans to be consistent with the relevant RSS;[19] and

    16.2 the LGA, to require councils' long-term plans to "set out steps to implement the priority actions for which the local authority is

16 SP Bill, clause 17 lists key matters that are likely to be addressed in an RSS.
17 SP Bill, cl 16 - 18.
18 NBE Bill, cl 97(b); SP Bill, cl 4(1)(a).
19 SP Bill, cl 4(1)(b).

responsible under the [RSS]" and to require annual reporting of the steps taken.[20]

17. The intention of the LTMA amendment is to ensure effective land transport planning that reflects (and is consistent with) the direction provided in the relevant RSS. For the LGA amendment, the intention is to ensure that long-term plans recognise and then implement the direction provided by the RSS, which will presumably include financial planning, and later infrastructure and service provision.

18. We consider it appropriate for the RSSs to not only link, but also provide relevant strategic direction for spatial planning, land transport, and community infrastructure. These matters intersect and overlap, and ought to be considered in an integrated manner. How this integration is achieved is important however, and it remains unclear what the direction to "set out steps to implement" in clause 4(d) of the SP Bill will require.

19. We note that the effect of the proposed amendment to the LGA will be that the RPCs (through RSSs) will influence the provision of council infrastructure. In our view, it would be important for this influence to work in both directions, as the feasibility of councils' ability to provide infrastructure to service growth is an important relevant consideration for regional spatial planning. This is particularly important as, through the RSS, it appears that the RPC may identify provision of strategic infrastructure in an RSS that has not been considered in accordance with the LGA. This may create issues between councils and communities, as councils will remain responsible for funding and delivering the local authority projects that the RPC identifies.

20. The relationship between the RPCs' planning responsibilities and other council functions is also articulated in clause 105(1)(b) of the NBE Bill, which provides that an NBE Plan:

> may specify a non-regulatory method for achieving plan outcomes and policies, as long as the relevant local authority has agreed to the funding necessary to implement a method in its annual or long-term plan made under the [LGA].

21. This provision illustrates the importance of dialogue between RPCs and councils on land transport and community infrastructure matters. It also indicates that the SREOs and SCOs could play an important role. However, at this stage, the purpose and content of these statements remains somewhat ambiguous. Councils may wish to seek development of the function of the SREOs and SCOs to trigger integrated decision-making between RPCs and councils.

The NBE Bill details RPC decision-making

22. The structure and implications of the RPCs is discussed in **Topic 4** of our advice. We only briefly summarise the RPC's relevant links to LGA processes in this advice.

20 SP Bill, cl 4(1)(c) and (d).

and constitution processes limiting the application of the LGA

Decision-making and constitution

23. Schedule 8 of the NBE Bill sets out the decision-making and constitution processes for the RPCs. These provisions substantially limit the application of the LGA for the RPCs.

24. Of note, clause 40 provides that:

> In the event of a conflict between a provision in this schedule and a provision in the Local Government Act 2002 or the Local Government (Auckland Council) Act 2009, the provision in this schedule prevails.

As a result, the matters set out in Schedule 7 of the LGA relating to committees, joint committees and delegations may apply, to the extent that they are not provided for under Schedule 8 of the NBE Bill, and except to the extent that a conflict arises.

25. For composition of the RPCs, local authorities and the iwi and hapū committee for the region must reach agreement on the total number of members of the RPCs, and how many members are to be appointed by each local authority and Māori appointing body.[21] One of the statutory considerations incorporated into this process is the purpose of local government, as set out in section 10 LGA.[22]

26. The reference to the purpose of local government is unusual in this context. In particular, the RPCs are independent from local authorities in terms of their decision-making functions (consistent with the Government intent to depoliticise plan-making). It is therefore difficult to see how enabling "democratic local decision-making and action by, and on behalf of, communities" is a key consideration. It is also unclear how the four "well-beings" could assist in reaching decisions on constitution arrangements. These points may warrant clarification.

27. Appointing local authorities and Māori appointing bodies must establish an appointment policy, for making appointments to RPCs.[23] For local authorities, this must be consistent with the LGA, including the purpose of local government (section 10) and the principles relating to local authorities (section 14).[24] Again, it is difficult to see how these broad purposes and principles fit into this decision-making. The RPC's members are not elected by constituents in the region/district and local authority's members need not be elected members, so provision for "democratic decision-making" sits somewhat uncomfortably with the intention of the legislation. The general breadth of the four well-beings and local authority principles will also do little to guide decision-making on appointments.

Funding

21 NBE Bill, Sch 8, cl 3(1).
22 NBE Bill, Sch 8, cl 3(2)(c).
23 NBE Bill, Sch 8, cl 14(1).
24 NBE Bill, Sch 8, cl 14(6).

28. The Bills require local authorities to fund the RPCs, but do not establish any new funding mechanisms. It is therefore inherent that the LGA methods currently used to fund RMA processes and planning activities will be used to fund the new council functions, and the RPC, under the NBE and SP Bills.

29. In our view, the current section 101(3)(a) LGA considerations will remain appropriate for the determination of the funding of strategic planning activities, and the functions of joint committees under the LGA. For most councils, their share of the RPC's activities will continue to be funded from the general rate.

30. We also note that any funding of the RPCs will need to be included in long-term plan and annual plan budgets, with councils' revenue and financing policy stating their policy on the sources of funding the council will use to fund this expenditure.[25] The same will also apply to annual reports.

Community outcomes

31. It may not be appropriate, nor possible, for councils to be required to identify the community outcomes to which any planning by the RPCs will contribute, or to report on the progress towards these outcomes (as required for long-term plans and annual reports). This is because of the limited ability for any council to influence or control the outcome of an RPC process, given the RPC's statutory independence from local authorities. Specific provision should be made in the NBE Bill and/or LGA for this particular exemption.

Please call or email to discuss any aspect of this advice

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25 LGA, s 103.

Appendix E: Legal advice on the Content and Form of the NPF, RSSs, and NBE Plans

Simpson Grierson
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Our advice

Prepared for	Kath Ross and Jen Coatham, Taituarā
Prepared by	Matt Conway, Mike Wakefield, Katherine Viskovic and Sal Lennon
Date	20 December 2022
	PRIVILEGED AND CONFIDENTIAL

Natural and Built Environment Bill and Spatial Planning Bill
Topic 3: content and form of the National Planning Framework, Regional Spatial Strategies and Natural and Built Environment Plans

Background	On 15 November 2022, the Natural and Built Environment Bill (**NBE Bill**) and the Spatial Planning Bill (**SP Bill**) were introduced to the House. Together with the Climate Adaptation Bill (which is yet to be introduced) these Bills are intended replace the Resource Management Act 1991 (**RMA**). The system reform includes a rolling over of existing RMA concepts, as well as introducing new concepts and different or augmented decision-making processes. We have been asked by Taituarā to consider some of the key impacts for local government. This is one of seven pieces of advice considering the implications of the NBE and SP Bills. In this advice we have considered the content and form of the National Planning Framework (**NPF**), Regional Spatial Strategies (**RSS**) and Natural and Built Environment Plans (**NBE Plans**). Submissions are being accepted on the Bills until midnight on 5 February 2023.
Questions and answers	**Is the content and form of the NPF, RSS and NBE Plans sufficiently certain, practicable and workable?** The NBE Bill and the SP Bill set out the new planning framework at a conceptual level. Whilst the general intent for each of the NPF, the RSS and the NBE Plans is fairly clear from the Bills, many of the provisions within the Bills (and even those that appear to be specific or exhaustive) are worded in a very general and hypothetical way. This means that, overall, it has proven difficult to be certain about both the content and form of these documents. Much of the content and form of the RSS and the NBE Plans will be informed by the NPF, so this content remains uncertain. For example, the form of the RSS will be prescribed in the NPF, and the environmental limits and targets, which will form a significant part of NBE Plans, will also be prescribed by the NPF. There is no clear guidance on how limits and targets may be framed and operate, and it is not clear whether they can be realistically developed for all aspects of the environment. We consider that there are some critical details missing from the Bills,

particularly in relation to how all of the concepts and documents will work together. These details may not be ironed out until the preparation of the first NPF is underway. For example, there is provision for an iwi or hapū to provide a statement on te Oranga o te Taiao to the relevant regional planning committee, but no corresponding requirement for the RPC to consider such a statement. Conversely, the RPC must have particular regard to a statement of community outcomes and a statement of regional environmental outcomes when making a RSS or NBE Plan.

The limits and targets set in the NPF will apply to particular *management units* (not regions), but both an RSS and an NBE Plan will be produced for regions. The provisions within an NBE Plan (and the consenting regime) will need to be highly tailored, to take into account different activities, different attributes, targets and limits, and the fact that these apply within management units, rather than on a region-wide basis.

Are there appropriate mechanisms to resolve conflicts between competing outcomes and environmental limits?

The NPF is to provide direction on the resolution of conflict about environmental matters, including those between or among system outcomes (which are listed in clause 5). There is no further detail provided on conflict resolution within either Bill, and in our view, that direction will be absolutely critical to the workability of the new framework. Our impression is that outcomes that relate to protecting the natural environment are likely to prevail over more development-focused outcomes, because the former are subject to mandatory limits and the latter are not.

Reasoning (summary)

Content and form of the National Planning Framework, Regional Spatial Strategies and Natural and Built Environment Plans

Overview - content and form of the NPF

1. Together, the NBE Bill and the SP Bill establish a new hierarchy of planning documents.

2. The NPF (which is established by the NBE Bill) will sit at the top of the hierarchy, and drive the achievement of the new system outcomes in the NBE Bill. Sitting under the NPF will be RSS and NBE Plans, which are discussed in more detail below.

3. The NPF will replace the current National Policy Statements, National Environmental Standards, National Planning Standards and regulations prepared under the RMA, and provide national direction on a range of environmental matters.

4. The purpose of the NPF is set out in clause 33 of the NBE Bill. In summary, the purpose is to further the purpose of the NBE Bill by:

    4.1 Providing direction on the integrated management of the environment, in relation to matters of national significance, matters for which national consistency is desirable, and matters for which consistency is desirable in some parts of New Zealand.

    4.2 Helping resolve conflicts about environmental matters, including those between or among system outcomes (which are set out in clause 5 of the NBE Bill).

    4.3 Setting environmental limits and targets, and strategic directions.

5. We discuss the content and form of the NPF in more detail below.

Prescribed content of the NPF

6. The NBE Bill prescribes much of the content of the NPF, which includes:

   6.1 environmental limits and targets (clauses 37-53);

   6.2 management units (or a process for prescribing how management units are set in NBE Plans (clause 54);

   6.3 strategic direction on various matters (clause 56(1));

   6.4 direction on how the implementation and effectiveness of the NPF itself will be monitored (clause 56(2));

   6.5 direction for each system outcome (in clause 5) and for the resolution of conflicts between the outcomes (clause 57);

   6.6 direction on non-commercial housing on Māori land, papakāinga on Māori land, enabling development capacity well ahead of expected demand, enabling infrastructure and development corridors, and enabling renewable electricity generation and its transmission (clause 58);

   6.7 outcomes and policies, and rules and methods for implementing those outcomes and policies (clauses 60(1)(a) and (b));

   6.8 substantive or procedural requirements for RSS and NBE Plans (clause 60(1)(c)); and

   6.9 direction on specific provisions to be included in RSS and NBE Plans (clauses 60(1)(d) and (e)).

7. The NPF must also specify, in relation to a framework rule, whether responsibility for enforcing the rule lies with the regional council, the territorial authority, or both.[1]

Although the intent of environmental limits is relatively clear, whether they are practicable and workable remains to be seen

8. Environmental limits will likely comprise an important component of the NPF. These limits are intended to prevent further degradation of the ecological integrity of the natural environment and protect human health.[2] Environmental limits *must* be set in relation to air, indigenous biodiversity, coastal water, estuaries, freshwater and soil, but can be set for any other aspect of the natural environment.[3]

9. The Minister may set environmental limits to be included in the NPF, or prescribe (in the NPF) requirements for limits to be set in NBE Plans.[4] The NPF will likely contain a mix of environmental limits and directions for environmental limits to be set, where certain limits are more appropriately developed in a tailored way for each region.

1 NBE Bill, cl 74 - Responsibility for enforcement of framework rules.
2 NBE Bill, cl 37 - Purpose of setting environmental limits.
3 NBE Bill, cl 38 - Environmental limits.
4 NBE Bill, cl 39 - How environmental limits are to be set

10. Limits are required to be set as either: *a minimum biophysical state* or *the maximum amount of harm or stress to the natural environment that may be permitted*.[5] The limits can be qualitative or quantitative, and may be set in a way that integrates different aspects of the natural environment. The proposed "baseline" for any limits set under the NBE Bill regime is the state of the environment as at the commencement of the NBE Act – i.e. the limits cannot be any more lenient than what currently exists.

11. The NPF may also prescribe *interim* limits in relation to ecological integrity and human health. Interim limits are allowed to be *more lenient* than the current state of the environment, and can be set where the Minister is satisfied that degradation is likely to continue beyond the commencement of the Act. In practical terms, if a particular environment (or component of the environment) is degrading and will continue to do so (despite the existence of environmental limits), interim limits can be set to reflect that reality. A useful example of this situation could be nutrients in freshwater; despite changes in industry practices or the adoption of improvement measures, there can be a lag time before water quality improves.

12. The NBE Bill provides the Minister with an ability to include time-limited exemptions to an environmental or interim limit, upon request by a regional planning committee.[6] These exemptions must be designed to result in the "least possible net loss of ecological integrity that is compatible with the activity proposed", and the relevant activity must "provide public benefits that justify the loss of ecological integrity".

13. There is minimal detail in the NBE Bill about how the limits will be framed, or operate. It will be for the NPF to identify limits, and what aspects of the environment will be subject to any limits, but at this stage it does not seem plausible for there to be limits relating to each system outcome. By way of example, the coastal environment and estuaries are complex ecological systems, and it would be difficult to set limits to address all aspects of those ecosystems. In addition, there are aspects of the environment that cannot be easily regulated by reference to limits, and so it may be that direction is provided for those aspects by policies in the NPF, rather than limits (natural hazards being a good example, as it involves a combination of technical, planning and social inputs).

14. Until the final form of any limits is presented by the Minister (through the NPF), it is difficult to say with any certainty whether the limits will be workable or not. Based on the current NPS and NES that are in force today, there may be a complex interrelationship between limits and policy, which will need to be reconciled in the NPF initially, and then potentially the NBE Plans (or through consenting).

5 NBE Bill, cl 40 - Form of environmental limits
6 The process for exemptions is set out in more detail in clauses 44-46 of the NBE Bill.

Although the intent behind targets is clear, again, whether they are practicable and workable remains to be seen	15.	Both the NPF and NBE Plans can also include targets.[7] Unlike limits, which are focused on the natural environment, targets have the purpose of improving the state of the natural *and built* environment.[8]
	16.	From the NBE Bill, it appears that targets will function in a similar way to limits, albeit with a broader purpose as noted immediately above. However, while a limit will set a "bottom line" (beyond which there would be degradation), a target will function as a future-focused goal (to improve the state of the environment). We say this as the NBE specifically provides that in all cases, targets must be set at a level equal to or better than that of the associated environmental limit.
	17.	Targets are to be measurable, time-bound and designed to assist in achieving a system outcome (set out in clause 5), a framework outcome, or an outcome specified in an NBE Plan. A target may be expressed as a series of steps, each with a time limit, that are collectively designed to achieve improvement.
	18.	Similar to limits, targets *must* be set for each aspect of the natural environment (air, indigenous biodiversity, coastal water, estuaries, freshwater and soil). Targets relating to other aspects of the environment (including the built environment) are discretionary.
	19.	The same questions we have outlined for limits also apply to targets. There is no clear guidance on how targets may be framed and operate, and it is not clear whether they can be realistically developed for all aspects of the environment.
	20.	In relation to both limits and targets, the NPF will require monitoring and reporting, with data obtained and aggregated at a national level.
The intent behind "management units" is not certain and "management units" may not be practicable or workable	21.	The NPF *may* set management units, which are defined as "geographic areas defined for the purpose of planning and managing activities to meet an environmental limit or a target".[9]
	22.	The statutory requirements relating to management units are set out in clauses 54 and 55. In short, management units **must** be set for every environmental limit and target, but a management unit can relate to more than one environmental limit or target.
	23.	The new limits, targets and management unit concepts appear to operate together. While it is possible to interpret the Bill in a way that requires targets / limits to be set first, with management units to follow, from a practical perspective it makes sense to set all at the same time. This approach would seem more logical, so that there is certainty that within any management unit it is feasible to achieve the relevant targets and limits. We note that under the National

7 NBE Bill, cl 48 - Form of targets.
8 NBE Bill, cl 47 – Purpose of setting targets.
9 Defined in cl 31 - Interpretation.

Policy Statement for Freshwater Management 2020 the first step is to identify Freshwater Management Units, and then the applicable outcomes (which may include limits and targets).

24. We also note that management units can comprise different areas, relative to different limits and targets. From a practical / logical perspective, this makes sense, but it may result in increased complexity within the NPF, RSS and NBE Plans, particularly as the lower order documents will be required to achieve the NPF directions within (potentially) multi-layered management areas. We would anticipate that some management units could be the whole country whereas others could potentially be down to a catchment level.

25. In the alternative, the ability to set management areas for specific targets and limits may provide for greater flexibility and options to satisfy / achieve the limits (including through environmental compensation / offsetting). Trying to set limits or targets across standardised management units may also be difficult given the different environmental effects the limits and targets may relate to. On that basis a degree of flexibility is likely to be necessary.

26. We discuss management units and how they will be relevant to NBE Plans further below.

The NPF must contain a range of other directive content, but the NBE Bill does not prescribe that content

27. The NPF must contain a range of other direction. Clauses 56 to 58 of the NBE Bill prescribe this mandatory content, but at a high level only. How this direction is developed will be for the Minister to determine.

28. As a brief summary:

28.1 Clause 56 provides that the NPF must include strategic direction on:

(a) how decision-makers are to achieve the system outcomes;
(b) how the well-being of present and future generations is to be provided for within the relevant environmental limits; and
(c) the key long-term environmental issues and priorities and how they are to be dealt with.

28.2 Clause 56 also requires that the NPF must specify how the implementation and effectiveness of the NPF will be monitored. Given the breadth of matters the NPF must cover, and the fact that it will comprise national policy and limits / targets, it may be difficult to measure the effectiveness of the NPF as a whole. Instead, the initial focus may be on monitoring the implementation of the limits and targets set by the NPF, given that they will (presumably) provide measurable outcomes.

28.3 Clause 57 requires that the NPF include content that provides

direction for each system outcome (in clause 5), and for the resolution of conflicts between environmental matters, including between / among system outcomes.

28.4 This direction will be critical, as there is overlap and competition within the new system outcomes which makes achievement of them challenging. Clause 57 addresses this matter briefly, but in our view, this guidance in the NPF will need to be comprehensive and coherent to guide the development of RSS and NBE Plans (and potentially consenting in certain instances). Under the RMA conflicts within Part 2 are a regular occurrence, and we expect that this will remain the same. These conflicts will need clear, understandable direction to assist with implementation, and so the NPF will play an important role in the new regime. There is no guidance yet as to how these conflicts may be resolved, although our impression from reading the NBE Bill is that outcomes that relate to protecting the natural environment are likely to prevail over more development-focused outcomes, because the former are subject to mandatory limits. Preparing the NPF as a collective whole may prove beneficial for identifying and reconciling any conflict.

28.5 Clause 58 requires that the NPF include content that provides direction on non-commercial housing on Māori land; papakāinga on Māori land; enabling development capacity well ahead of expected demand; enabling infrastructure and development corridors; and enabling renewable electricity generation and its transmission. These are broadly expressed matters that are unaccompanied by any further detail. The NPF will again play an important role in elaborating on this mandatory requirement.

The NPF may also contain policies, framework rules and processes, but it is not entirely clear how these provisions will interact with NBE Plans

29. Clause 60 of the NBE Bill lists a number of matters that *may* be included in the NPF.

30. In short, the NPF may provide direction on a range of outcomes and policies, rules and methods, and requirements for RSS and NBE Plans. The list in clause 60 appears to resemble what could commonly be included in a regional policy statement or regional / district plan.

31. Clause 60 does not clarify what these non-mandatory matters can address, which affords significant flexibility to the Minister to provide direction on any matter that serves the purpose of the NPF. In relation to a "framework rule", the NBE Bill allows those rules to cover any matter that a "plan rule" may provide for.[10]

32. We consider it to be sensible and useful that the NPF can provide direction on procedural requirements for the development of the RSS and NBE Plans, as well as on structure and form of those

10 See cl 117 – Purpose and effect of Rules, (3) and (6)-(8).

documents. If the eventual product is similar to the National Planning Standards, and there is nation-wide consistency in both structure and form, this will provide for easier administration.

33. Until such time as the NPF is developed, it is not apparent how these provisions will interact with RSS and NBE Plans. Given that the new regime has been designed to align with the *King Salmon* hierarchy of planning documents, and that the RSS and NBE Plans must either "give effect to" or be "consistent with" the NPF, it would seem that the RSS and NBE Plans would closely follow (and elaborate on) whatever direction is provided in the NPF. In principle, there is no reason why this framework would not be workable, and provide for clear top-down direction. Much will depend on the clarity of drafting in the NPF, and the way in which conflicts are identified and reconciled.

Overview - content and form of the RSS

34. RSSs are the next document in the new hierarchy. They are to be developed by Regional Planning Committees (**RPC**) and must give effect to the NPF to the extent directed, or otherwise be consistent with the NPF.[11] In turn, an NBE Plan must be consistent with the RSS.[12]

35. An RSS will set the strategic direction for the use, development, protection, restoration, and enhancement of the environment of a region for not less than 30 years. They are to be renewed every 9 years, but must be reviewed if the NPF is amended or replaced, or if there is significant change in a region.[13] "Significant change" is not defined and there is no other guidance in the Bill about what it means.

36. Clauses 15 to 21 of the SP Bill detail the form and content of an RSS. At a high level, RSS are expected to have a strong 'visual mapping component'. The Minister indicated at a conference in November 2022 that the RSS will be mainly maps with a few words, although the mandatory requirements in the SP Bill suggest that it will be difficult to keep the words to only a few.

37. The general content and form of an RSS is set out in clause 16 of the SP Bill. Most relevantly, an RSS must:

    37.1 Set out a vision and objectives for the region's development and change;

    37.2 Set out actions to be taken to achieve the vision and objectives;

    37.3 Provide strategic direction on **key matters**;[14] and

11 SP Bill, cl 15(1)(d)-(e).
12 SP Bill, cl 4 - How regional spatial strategies promote integration.
13 See clauses 46-48 of the SP Bill.
14 The key matters are set out in cl 17 - Contents of regional spatial strategies: key matters.

37.4 Provide strategic direction on any other matters that meet the criteria for **sufficient significance**;[15]

37.5 Be in the form prescribed by the NPF.

38. The SP Bill does not provide any more information on these elements. However, there is some detail provided in relation to **key matters** which we discuss below.

39. The NBE Bill framework anticipates that, if the Minister thinks it is warranted, the NPF will provide additional direction on the content / form of the RSS. Whether this happens ahead of the RPCs commencing their development of RSS, or after the first test-RSSs are developed, remains to be seen. Given that certain regions will be used as the pilot areas for the RSS, it may be that the Minister develops guidance for the NPF in parallel or immediately after those RSS have been developed, to ensure that national consistency is achieved.

Given the number of matters an RSS will need to prioritise and provide direction on, there may be issues with workability

40. An RSS must provide strategic direction on various key matters, being those listed in clause 17 of the SP Bill. The matters are:

40.1 Areas that may require protection, restoration, or enhancement;

40.2 Areas of cultural heritage and areas with resources that are of significance to Māori;

40.3 Areas that are appropriate for urban development and change, including existing planned, or potential urban centres of scale;

40.4 Areas that are appropriate for developing, using, or extracting natural resources, including generating power;

40.5 Areas that are appropriate to be reserved for rural use or where there is expected to be significant change in the type of rural use;

40.6 Areas of the coastal marine area that are appropriate for development or significant change in use;

40.7 Major existing, planned, or potential infrastructure or major infrastructure corridors, networks, or sites (including existing designations) that are required to meet current and future needs;

40.8 Other infrastructure matters, including –

(a) Opportunities to make better use of existing infrastructure; and

15 The criteria are out in clause 18 – Contents of regional spatial strategies: other matters of sufficient significance

(b) The need for other small-to-medium-sized infrastructure required to meet future needs or enable development;

40.9 Areas that are vulnerable to significant risks arising from natural hazards, and measures for reducing those risks and increasing resilience;

40.10 Areas that are vulnerable to the effects of climate change both now and in the future, and measures for addressing those effects and increasing resilience in the region, including indicative locations for –

(a) Major new infrastructure that would help to address the effects of climate change in the region; and

(b) Areas that are suitable for land use changes that would promote climate change mitigation and adaptation.

40.11 Areas where any development or significant change in use needs to be carefully managed because the areas are subject to constraints;

40.12 The indicative location of planned or potential business and residential activities and the likely general scale and intensity of those activities, if that information is necessary to inform the consideration of any other matters.

41. An RSS must also provide strategic direction on matters of sufficient significance. The criteria for sufficient significance are set out in clause 18 of the SP Bill. These criteria cover a broad range of matters and, in our view, are likely to capture numerous activities or outcomes. For example, a matter that requires collaboration between two or more infrastructure providers, or local authorities will be of sufficient significance.

42. How the RSS will provide direction on these "sufficiently significant" matters is a live issue. Our initial view is that many of the matters set out in clause 18 are not readily capable of spatial / mapping direction. As a result, if direction is provided it may need to be provided through policy text.

43. In providing direction on the matters set out in clause 17 and those identified in clause 18, an RSS will inevitably need to identify, resolve and prioritise competing interests and trade-offs. For example, there may be areas which require protection or restoration, where there is also the potential (or need) for infrastructure. While the NPF will provide guidance on how to resolve such conflicts, an RSS is tasked with a different focus – being regional. The NPF will need to provide sufficient scope and flexibility for RSSs to make bold decisions on where infrastructure in particular will need to be located, which will likely create tension with system outcomes.

44. There is no process that allows an RSS to be revisited or re-litigated at the NBE Plan stage or level, except where new or more specific information becomes available.[16]

45. The detail within an RSS must reflect the level of certainty provided by the evidence and other information available during preparation, including the extent of work or planning already undertaken on a relevant activity or proposal.[17] The level of detail must also be sufficient to give reasonable certainty about the matters provided for in the RSS.

46. In our view, it may be difficult to find the right balance between these requirements. An RSS is required to set strategic direction for the next 30 years, and will need to provide *reasonable* certainty, but will also be the product of information and evidence that is available now.[18] When planning for the new 30 years, there will be an element of estimation and forecasting involved, which could warrant a conservative approach. In reality, this is no different from the current situation under the RMA, and there is wide use of population projections and the like to inform what growth should be provided for. What is perhaps different under the new regime is the need for RSS to give effect to certain outcomes, or limits / targets. Depending on how those aspects are framed in the NPF, there may be less ability to rely on projections or estimates when completing spatial planning.

47. Clauses 15, 24 and 25 of the SP Bill will also be instrumental in informing the content of an RSS:

    47.1 Clause 15 provides that an RSS must support a co-ordinated approach to infrastructure funding and investment by central government, local authorities, and other infrastructure providers.

    47.2 Clause 24 sets out the instruments an RPC must have particular regard to, and have regard to, when preparing an RSS. These include Government policy statements (listed in Schedule 3), planning documents recognised by an iwi authority and statutory acknowledgements.

    47.3 Clause 25 lists specific matters an RPC must have regard to, and those that it must **not** have regard to, when preparing an RSS. Notably, an RPC must have regard to cumulative effects and mātauranga Māori and must not have regard to effects on scenic views from private properties and the effects on the visibility of commercial signage or advertising.

16 NBE Bill, cl 109. Every NBE Plan must be consistent the relevant regional spatial strategy, unless and to that extent that— (a) new information becomes available that supersedes the information used to determine the content of the regional spatial strategy; and (b) there is a significant change in circumstances or in the physical environment since the regional spatial strategy was developed (for example, a major environmental or economic event).
17 SP Bill, cl 19 - Level of detail in regional spatial strategies.
18 Within this context, it is important that an RSS is able to incorporate information on the state and characteristics of the environment from a recent operative RMA planning document.

48. Clause 2 of Schedule 1 of the SP Bill also appears important, particularly for local authorities. It provides that a RSS *may* incorporate information from an "operative RMA planning document", including information on the state and characteristics of the environment, and decisions on whether areas or features of the environment have particular characteristics, should be classified in a particular way. Before incorporating any such information, a RPC must consider whether there has been *significant change* in the relevant environment, and whether any *significant new information* about the relevant environment has become available.

49. In our view, this clause could be of assistance (or comfort) to local authorities, in that it offers a pathway for incorporating pre-existing information from RMA planning documents. There is scope for amendment however, in that the clause reserves discretion to the RPCs to incorporate information (through the word "may"), and there could be a reasonable basis to make it mandatory (through the word "must") to consider whether to incorporate existing information. In addition, the clause applies to RMA planning documents only, and will not capture any other existing planning documents prepared and developed under other legislation (for example, spatial plans under the Local Government Act 2002, or future developments strategies under the National Policy Statement on Urban Development 2020). This may be an area of focus for local authorities in terms of their submissions.

50. Overall, the prescribed content for an RSS comprises a demanding shopping list. These new regional strategies will need to identify and reconcile numerous potentially conflicting interests, comprehensively and coherently, as they will ultimately drive the regulation of land use for a 30 year period. Although the SP Bill is relatively prescriptive on the contents of an RSS, how the RSS are fleshed out, and how workable they will be, will really hinge on the NPF directions – and how specific they are for certain issues, or matters (including for certain regions).

Overview - content and form of NBE Plans

51. Each region will also be required to develop an NBE Plan.

52. NBE Plans must be consistent with the relevant RSS (under clauses 97 and 104 of the NBE Bill) and cover both resource allocation and land use for a region.

53. NBE Plans will regulate resource and land use in a manner similar to the current regional policy statements, and regional and district plans under the RMA. In practice, these plans may look similar to the Auckland Unitary Plan.

54. NBE Plans must assign responsibility for administering each rule to the regional council or to one or more territorial authorities, unless the plan is administered by a unitary authority.[19] We anticipate

19 NBE Bill, cl 117(4) - Purpose and effect of rules.

those responsibilities would align with the respective functions and responsibilities of regional councils and territorial authorities as set out in clauses 643 to 647.

55. At a high level, NBE Plans will give effect to the NPF,[20] in particular by providing for the environmental limits and targets set in the NPF, and by setting separate environmental limits and targets for the region (if directed by the NPF).

56. Clause 102 of the NBE Bill sets out the matters that NBE Plans *must* include. These mandatory matters are phrased in a general way – they are things a plan must *do* rather than specific matters a plan must include. Amongst other things, an NBE Plan must:

    56.1 Manage effects (including cumulative effects);

    56.2 Achieve environmental limits and targets;

    56.3 Resolve conflicts relating to any aspect of the natural and built environment in the region, including conflicts between or among the environmental outcomes stated for the region and its constituent districts;

    56.4 Ensure integration of infrastructure with land use; and

    56.5 Ensure there is sufficient development capacity for housing and business.

57. Clause 105 sets out the matters that an NBE Plan *may* include. Again these non-mandatory matters are phrased in a general way, which affords flexibility for the RPCs to adopt regional differentiation on certain matters. Importantly, under clause 105(1)(a), an NBE Plan may include outcomes and policies, rules and other methods. We address this matter in more detail below.

58. Statements of community outcomes and statements of regional environmental outcomes may also be included in an NBE Plan.[21] They are voluntary instruments to provide local authorities with a mechanism to directly input local voice into the plans. Without reviewing the content of these documents, it is difficult to know how they may be reflected in any RSS. The RPC must have particular regard to such statements when preparing an RSS[22] and an NBE Plan[23] but the obligation is not set any higher than that, which may be a matter of concern to local authorities in terms of their level of influence over the RSS and NBE Plan.

NBE Plans will

59. Although it is intended that the planning framework will be "top-

20 NBE Bill, cl 98.
21 Under cl 645 of the NBE Bill, a territorial authority may, at its discretion, prepare statements of community outcomes. A RPC must have particlar regard to a statement of community outcomes when preparing an NBE Plan under cl 107.
22 SP Bill, cl 24(2) - General considerations: instruments.
23 NBE Bill, cl 107(1) - Considerations relevant to preparing and changing plans.

contain outcomes and policies, rules and other methods, so they may look substantially similar to a unitary plan		loaded" to provide as much direction and certainty as possible within the higher order planning documents, resource consents will still be part of the NBE system. Consenting decisions will continue to be made by local authorities under the NBE Plans.
	60.	The NBE Bill proposes to retain the current RMA resource consent types: land use consent, subdivision consents, coastal permits, water permits and discharge permits, however, consent categories will be reduced from six to four, with non-complying and restricted discretionary categories being abandoned (although the new controlled status has many of the same features of the restricted discretionary activity status under the RMA). The details of the activities categories are set out in clause 153.
	61.	The NBE Bill anticipates that more direction regarding notification will be provided in NBE Plans, with the intent appearing to be that consent authorities will have far less discretion to determine whether applications will be notified. This is discussed further in our advice on Topic 5.
	62.	It can be expected that a substantial part of the NBE Plans will provide policies, rules and methods, which will regulate land use and subdivision activities within regions, and achieve the NPF and RSS directions.
An NBE Plan may include a Te Oranga o te Taiao statement (the purpose of which is unclear), and will include statutory acknowledgements	63.	Clause 106 in the NBE Bill provides that iwi or hapū may, at any time, provide a te Oranga o te Taiao statement to the relevant RPC. It is not at all clear from the Bill what such a statement might look like, or what it could contain, or its role or purpose in relation to the functions of the RPC. Unlike a statement of community outcomes and statements of regional environmental outcomes, there is no requirement for the RPC to consider a te Oranga o te Taiao statement when making the RSS or NBE Plan. The only mention of a te Oranga o te Taiao statement at all in either the SP Bill or the NBE Bill is in clause 106 of the NBE Bill.
	64.	Clause 111 in the NBE Bill provides that every statutory acknowledgement that applies in a region must be attached to, and treated as part of, the plan for that region. So statutory acknowledgements will form part of the content of NBE Plans.
Overall, the form and content for NBE Plans seems to be certain and workable although how NBE Plans will interact with the NPF is less certain	65.	Our analysis of the potential contents of an NBE Plan is heavily informed by what we know about district and regional plans under the RMA. Reading the mandated contents of NBE Plans, along with the provisions of the NBE Bill that relate to the consenting regime, it appears that NBE Plans are intended to function in a very similar way.
	66.	So in this sense, we think there is logic to the new hierarchy in that it closely aligns with what we already have.
	67.	The benefit of the new model is that the RSS and NBE Plans will

both apply at a regional level, meaning that it may be easier to develop rules and methods that respond to regional direction. Conversely though, there is a risk that regional direction through the RSS will not allow NBE plans to respond – or allow flexibility to respond – to local differences or issues, and so the details in all of the NPF, RSS and NBE Plans will be critical.

68. The way NBE Plans include the environmental limits and targets (that will be part of the NPF) will also be very important. These limits and targets could be tailored to apply in different parts of regions (because each target and limit will apply to a particular *management units*, not regions), so the way an NBE Plan is structured will need to take account of this. Put another way, the interaction between the limits and targets in the NPF, the provisions in the NBE Plan which inform consenting regimes, and the management units within a region will be critical.

69. These workability issues will no doubt be better understood as the NPF is developed, as that will be the first insight we get into how directive the NPF might be, or how specific the limits / targets may be. The NPF will also be critical in terms of how it proposes to resolve tension between competing, or overlapping, outcomes.

Please call or email to discuss any aspect of this advice

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Appendix F: Legal advice on Regional Planning Committee Structure and Implications

Simpson Grierson
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Our advice

Prepared for	Kath Ross and Jen Coatham, Taituarā
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Date	20 December 2022

PRIVILEGED AND CONFIDENTIAL

Natural and Built Environment Bill and Spatial Planning Bill
Topic 4: Structure of Regional Planning Committees

Background

On 15 November 2022, the Natural and Built Environment Bill (**NBE Bill**) and the Spatial Planning Bill (**SP Bill**) were introduced to the House. Together with the Climate Adaptation Bill (which is yet to be introduced) these Bills are intended replace the Resource Management Act 1991 (**RMA**). The system reform includes a rolling over of existing RMA concepts, as well as introducing new concepts and different or augmented decision-making processes.

We have been asked by Taituarā to consider some of the key impacts for local government. This is one of seven pieces of advice considering the implications of the NBE and SP Bills. In this advice we have focused on the newly introduced regional planning committees (**RPCs**), considered their role and functions, decision-making processes, funding, resourcing and implications of their introduction for local authorities.

Submissions are being accepted on the Bills until midnight on 5 February 2023.

Question and answer

What are the arrangements for the RPC and secretariat, and implications of this structure for reporting lines within councils and between councils and the RPC?

The NBE Bill establishes the RPCs as a specific statutory form of "committee" that is deemed to be a committee of all of the local authorities in a region, but is not accountable to, and does not require a mandate from, those local authorities when undertaking its functions.

Each local authority may appoint a member to the RPC, at least two members must be appointed by Māori appointing bodies, and the Minister for the Environment (**Minister**) may also appoint one member, although this member only participates in functions under the SP Bill.

All RPCs will be supported by a "host local authority" and a secretariat. The host local authority will provide administrative support to the RPC and the secretariat, and manage the RPC's finances. The secretariat is established beneath a director, who is appointed by the RPC but employed by the host authority. The director's role is to provide technical advice and administrative support to the RPC, and is treated as having being

delegated from the host local authority all powers necessary to carry out their role, including the appointment of employees.

All of the local authorities in the region are required to "jointly fund" and resource the RPC and secretariat, as well as fund all members, other than the Minister's appointee. We expect that resourcing arrangements will differ from region to region. Some regions may establish a large permanent secretariat to assist the RPC, while others may opt for a smaller secretariat, with local authorities seconding relevant staff to assist in planning processes when required.

The reporting lines within the RPCs align with their statutory independence. The RPC appoints the director, who is delegated broad powers to support the RPC. In turn, the director appoints employees to staff the secretariat, and has all the rights, powers, and duties of an employer in relation to those staff.

By intention, there are only a few ways that local authorities can influence RPCs, outside of the submissions and appeals processes. For example, that influence could occur through the council's appointed member of the RPC, the budget the RPC is allocated, consultation undertaken by the RPC or through the development of statements of community outcomes (**SCOs**) (for territorial authorities) and statements of regional environmental outcomes (**SREOs**).

Structure

We have answered your above question by splitting our advice into the following five parts, incorporating our critical comments throughout:

Regional planning committee arrangements and implications

Part One: Overview of RPCs' function and structure

1. The Government's resource management reforms propose to establish new, independent, "regional planning committees". The key function of the RPCs will be to prepare regional spatial strategies (**RSSs**), under the SP Bill, and Natural and Built Environment Plans (**NBE Plans**), under the NBE Bill.

2. The NBE Bill establishes the RPCs as a specific statutory form of "committee", which is deemed to be a committee of all of the local authorities in a region, but is not accountable to or requiring of any mandate from those local authorities. This independence is consistent with one of the stated intentions of the reform, being to remove politics from planning decisions. Clause 100 of the NBE Bill relevantly provides that:

   (1) A regional planning committee must be appointed for each region as a statutory body that is a committee of all the local authorities in the region, in accordance with **Schedule 8**.

   …

   (3) A regional planning committee must, in performing or exercising its functions, duties, and powers under this Act and under the Spatial Planning Act 2022, act independently of the host local authority and other local authorities in its region, in accordance with the local authority within which planning the committee operates (**host local authority**).

3. Schedule 8 of the NBE Bill specifies how the RPCs are to be constituted, composition arrangements and the process for appointment of members, and general operating processes.

4. In terms of composition, the NBE Bill provides a degree of flexibility. For example:

   4.1 RPCs are to be comprised of Māori, local government and central government representatives.

   4.2 While there must be at least six members, there is no upper limit on the total number of members.[1]

   4.3 At least two members must be appointed by Māori appointing bodies.[2] Each local authority in the region may appoint one member. The Minister for the Environment (**Minister**) may also appoint one member, although this member only participates in functions under the SP Bill and not the NBE Bill.[3]

1 NBE Bill, Sch 8, cl 2.
2 The **iwi and hapū committee** means the committee formed by the iwi and hapū in a region for the purpose of either agreeing with local authorities the composition arrangements and leading the process to determine the one or more Māori appointing bodies. **Māori appointing body** means any body identified by the iwi and hapū committee to make appointments to the regional planning committee. See NBE Bill, Schedule 8, clause 1.
3 NBE Bill, Sch 8, cl 2.

4.4 Composition matters are to be determined before a statutory deadline[4] by the region's local authorities and an "iwi and hapū committee". The composition requirements include determining the number of local authority-appointed members, and the number of members appointed by the Māori appointing bodies.[5]

5. The NBE Bill sets out a number of relevant considerations when determining composition arrangements. Generally, these considerations focus on effective and efficient functioning of the RPCs, and appropriate representation of populations and interests.[6]

6. While the NBE Bill provides these considerations to support the composition arrangement process, individual appointments will remain decisions of the respective local authorities and Māori appointing bodies. This could, conceivably still involve some degree of political influence.

7. There is a layer of complexity in the number bodies established by the NBE Bill to make appointments to RPCs. In particular, the iwi and hapū committee is formed by the iwi and hapū in a region to determine the "Māori appointing bodies", who are then responsible for making appointments to the RPC.[7]

8. Potentially adding to this complexity, although there are dispute resolution processes built into the process relating to the appointment of members by the Māori appointing bodies, the appointment of that body itself does not have a prescribed process. Iwi authorities and groups that represent hapū are to determine the process for setting up an iwi and hapū committee for the purpose of determining the Māori appointing body or bodies.[8] It is potentially unclear which groups are to be involved in this process as "groups that represent hapū" is not defined. While there are dispute resolution processes available to the iwi and hapū committee once formed,[9] it is not clear how any dispute as to who should sit on iwi and hapū committee itself is to be resolved.

9. If composition arrangements cannot be agreed, the Local Government Commission has the role of facilitating agreement between the parties, and may also make determinations on composition issues when agreement is unable to be reached.[10]

10. All RPCs will have a "host local authority". The host local authority will essentially have the same function as an administering authority for an LGA-type joint-committee, providing all administrative support to the RPCs and the secretariat, and managing the RPC's finances.[11] If the host authority is not able to be agreed, then the statutory

4 The deadline is to be set following a formula contained in clause 41 of Schedule 8 of the NBE Bill.
5 This being the body chosen by the iwi and hapū committee to make appointments.
6 NBE Bill, Sch 8, cl 3(2).
7 NBE Bill, Sch 8, cl 1.
8 NBE Bill, Sch 8, cl 2(4).
9 NBE Bill, Sch 8, cl 12.
10 NBE Bill, Sch 8, cl 8.
11 NBE Bill, Sch 8, cl 35.

backstop is that the regional council fulfils this role.[12]

11. It is proposed that the secretariat is supported by a "director", who is appointed by the RPC but employed by the host authority. This will be an important consideration for local authorities within a region, as the director will play an important role for the RPC. The NBE Bill highlights this, as the host local authority will be deemed to have:[13]

> delegated to the director all rights, powers, and duties of the host local authority that are reasonably necessary to carry out their responsibilities, functions, and duties, including the power to enter contracts, leases, and other agreements to enable the secretariat to operate efficiently and effectively

12. This broad delegation is designed to allow the director to do all things necessary to provide technical advice and administrative support to the RPC.

13. The director is able to appoint any employees as necessary to fulfil the secretariat's functions.[14] The director has all the rights, powers, and duties of an employer in relation to the secretariat staff,[15] although secretariat staff will legally remain employees of the host local authority.[16]

Part Two: RPCs' decision-making processes

14. The independence of the RPCs is further clarified within Schedule 8. In particular:

    14.1 RPC members may fully participate in decision-making without their appointing bodies' prior authority; [17]

    14.2 decisions of the RPCs do not need to be ratified by the appointing bodies;[18] and

    14.3 RPC members must work collectively to achieve the purpose of the NBE Bill and SP Bill *across the region*.[19]

15. The reference in clause 17 to "across the region" highlights that the RPCs and appointed members are charged with a regional task. In the event that any elected members of a district council are appointed to a RPC, they will be required to approach their decision-making with a regional product / outcome in mind, which could create some tension with their role as an elected member of their district.

16. RPCs may develop their own standing orders (or adopt those of their host local authorities), and they have the power to regulate their own procedure in accordance with its standing orders, except as

12 NBE Bill, Sch 8, cl 35(1)(4).
13 NBE Bill, Sch 8, cl 33(4)(b).
14 NBE Bill, Sch 8, cl 33(2).
15 NBE Bill, Sch 8, cl 33(6).
16 NBE Bill, Sch 8, cl 33(3).
17 NBE Bill, Sch 8, cl 18(1).
18 NBE Bill, Sch 8, cl 18(2).
19 NBE Bill, Sch 8, cl 17.

otherwise provided by the NBE Bill or the Local Government Act 2002.[20]

17. It will be for the RPC to appoint a chairperson, co-chairpersons, alternate chairpersons or a non-member to be a non-voting independent chairperson.[21] Consensus decision-making is encouraged, but if that cannot be achieved the chairperson can initiate majority voting.[22]

18. There is provision for mediation where agreement is not able to be reached,[23] and subsequent referral to the Minister for intervention if this is unsuccessful.[24] The Minister also has wide powers of intervention if the RPC (or one of its members) is unable to effectively fulfil its responsibilities, which includes the power to appoint a Crown Observer, or even replace a RPC with a commission.[25]

19. Provision is also made for RPCs to delegate functions to a subcommittee or any other person, provided this is not a power to make decisions on a NBE Plan or a RSS.[26] An RPC may also seek advice from subcommittees in exercising its functions. Any member of the RPC, and any other person, may be appointed to a subcommittee.[27]

20. With a few modifications, the Local Government Official Information and Meetings Act 1987, Public Records Act 2005 and Local Authority (Members' Interests) Act 1968 apply to RPCs and all of their members.[28]

Part Three: Funding of the RPCs and secretariats

21. The NBE Bill requires that all of the local authorities in the region "jointly fund" the RPCs and the secretariat.[29] The local authorities will be required to fund all members of the RPCs as well, other than the Minister's appointee.[30]

22. If there are multiple local authorities in a region, those local authorities must work together in "good faith" to agree the amount of funding to be provided to the RPC, and the share of funding to be provided by each authority.[31] In the case of a region with a unitary authority, that authority must determine the amount of funding to be provided to the planning committee.[32]

20 NBE Bill, Sch 8, cl 17.
21 NBE Bill, Sch 8, cl 19 and 28.
22 NBE Bill, Sch 8, cl 20.
23 NBE Bill, Sch 8, cl 24.
24 NBE Bill, Sch 8, cl 20.
25 NBE Bill, Sch 8, cl 27.
26 NBE Bill, Sch 8, cl 31. Subclause 1 provides that, "A regional planning committee may not delegate its power to make decisions on a plan under this Act or a regional spatial strategy, except as otherwise provided in this Act, the Spatial Planning Act 2022, or any Treaty settlement legislation"
27 NBE Bill, Sch 8, cl 32.
28 NBE Bill, Sch 8, cl 29 and 30.
29 NBE Bill, Sch 8, cl 29 and 30.
30 NBE Bill, Sch 8, cl 36.
31 NBE Bill, Sch 8, cl 36(4).
32 NBE Bill, Sch 8, cl 36(5).

23. The RPC must prepare, and make publicly available, a statement of intent for each financial year which reflects the budget agreed between the RPC and the local authorities.[33] The content of these documents will be prescribed by regulations, but must include:[34]

> provision of funding for Māori participation in the development, implementation, and monitoring of regional spatial strategies and plans, in accordance with any regulations

24. In the event of any funding dispute, the local authorities are to apply to the Minister to appoint an independent person to investigate and resolve the dispute.[35] The appointee may decide an appropriate budget outcome by fixing the amount of funding and/or the respective contributions to be made by the local authorities.[36] If the Minister considers it necessary, he/she may set a provisional funding contribution to be provided by each local authority.[37]

25. Because of the relative lack of statutory guidance in relation to funding, we consider that this matter could be one of the more contentious matters to resolve. In particular, and given the already tight fiscal situation for many local authorities, it may fall to the larger metropolitan councils to fund the RPC and secretariat. If this is the case, it could generate pressure for this increased funding to be reflected in more appointees. Reaching agreement on what constitutes effective representation across a region will be important.

26. On this point, we note that funding and composition are dealt with separately in the NBE Bill. While this may reflect the underlying intention to remove politics from planning, in practice funding may be a real consideration for the local authorities when determining composition.

27. In terms of how to approach funding, there appear to be two options for local authorities to consider (under the current proposed funding arrangements):[38]

    27.1 First, the regional / unitary council could be established as the host local authority, and have sole responsibility for funding the RPC and secretariat.

    27.2 Second, each local authority could work together "in good faith" to agree their respective contributions to the RPC and the secretariat, for its annual funding. This is the approach anticipated by the NBE Bill.

28. In our view, the first option would simplify the funding process, by

33 NBE Bill, Sch 8, cl 38(1) and (2).
34 NBE Bill, Sch 8, cl 38(3) and (4).
35 NBE Bill, Sch 8, cl 37(1).
36 NBE Bill, Sch 8, cl 37(2).
37 NBE Bill, Sch 8, cl 37(3).
38 Councils may also wish to seek that relevant considerations be incorporated into the NBE Bill to guide councils in reaching agreement on funding arrangements and/or relevant considerations for the Minister's appointee to make decisions on funding apportionments, in cases where there is a funding dispute under Schedule 8, clause 37.

consolidating funding with a single local authority that is democratically accountable across the relevant region. Once the RPC's budget has been set for each year, it will then be for the regional / unitary council to determine how that will be funded.

29. If funded through rates, the regional / unitary council would be able to determine how the cost of the RPC's activities should be appropriately distributed throughout the community, potentially using differential or targeted rates.[39] We also note that the Local Government Commission adopted the regional funding model in its 2018 West Coast reorganisation proposal.[40]

30. The remuneration of RPC members will be determined by the Remuneration Authority.[41]

31. Because the RPCs are not established as separate legal entities, they are not able to hold their own assets or incur their own debt. As a result, we expect that the host local authority will satisfy any of the RPC's immediate expenses, and seek to recover those from the other local authorities pursuant to the agreed funding arrangements.

Part Four: Resourcing of the RPCs and secretariats

32. As with funding, the NBE Bill requires the local authorities in a region to jointly resource the RPCs and the secretariat, sufficient for them to perform or exercise their functions, duties and powers.[42] The secretariat director has broad powers to employ staff within the agreed budget.

33. We expect that resourcing arrangements will differ from region to region (potentially significantly). Some regions may establish a large permanent secretariat to assist the RPCs, while others may opt for a smaller secretariat, with local authorities seconding relevant staff to assist in planning processes when required. In the latter situation, the secondment expense will be borne by the secretariat and subject to the agreed collective funding arrangements. The use of secondment arrangements will also ensure that councils retain the necessary expertise for their other relevant responsibilities under the NBE Bill.

34. The funding disputes provision in clause 37 of Schedule 8 of the NBE Bill does not clearly extend to disputes relating to "resourcing". While this ought to be clarified, we expect that if local authorities provide insufficient resources to the secretariat, the secretariat director may seek an increased budget to cover this lack of resources. For example, if councils do not make staff available to be seconded to the RPC, the director may seek additional funding to employ permanent staff. This may in turn become a funding issue, as the director is not allowed to commit to expenditure outside the agreed budget.[43]

39 Pursuant to Schedule 2 of the Local Government (Rating) Act 2002.
40 Local Government Reorganisation Scheme (West Coast Region) Order 2019
41 NBE Bill, Sch 8, cl 36(3).
42 NBE Bill, Sch 8, cl 36.
43 NBE Bill, Schedule 8, clause 33(4)(c).

43. The employment law implications of the NBE Bill's approach to the RPC and secretariat may warrant further consideration, but are outside the scope of this advice.

44. In practice, the secretariat will likely operate in a manner similar to the Auckland Unitary Plan Independent Hearings Panel (**IHP**) support arrangement (and that which was in place for the Christchurch Replacement District Plan). In those cases, staff were seconded from Auckland Council (or specifically employed on fixed term contracts) to support the Panel through the hearings process. Once the recommendations / decisions were issued, the secretariat was dissolved.

45. The distinction here is that the RPC will be an enduring committee, and so there is the potential that any secretariat will continue – with an ongoing role supporting the RPC. This creates a risk for local authorities in particular, who may (due to the creation of the secretariat) have their own internal policy planning resources depleted.

Possible ways local authorities could influence RPC decision making

46. Given there is no direct reporting line between the RPC and local authorities, outside of the submission process local authorities would need to consider other ways to influence RPC decision making to achieve local outcomes.

47. One means of influence for any appointing body will be through the appointment process, including the ability to remove or replace a member, at any time, in accordance with an appointment policy (which is to be developed by each local authority).[49] The counter to this is that all RPC members are required to "work collectively to achieve the purpose" of the NBE and SPA Bills, "across the region of the committee",[50] without prior authority from an appointing body.[51] What this will mean in practice is that members will not be expected (or authorised) to act with a district focus, and if they do there is scope for the Minister to become involved and exercise oversight.

48. Local authorities will also have some measure of control over the RPC's annual budget. However, there are restrictions in the NBE Bill that seek to ensure that local authorities cannot direct the use of funding, as a potential means of controlling RPC decisions.[52]

49. Councils will also have some means of influencing the development of NBE Plans and RSSs. In particular, RPCs must consult with constituent local authorities during the preparation of NBE Plans,[53] and at the request of an appointing body, provide the body with an

49 NBE Bill, Sch 8, cl 14(1).
50 NBE Bill, Sch 8, cl 17.
51 NBE Bill, Sch 8, cl 18.
52 NBE Bill, Sch 8, cl 36(6).
53 NBE Bill, Sch 8, cl 22(1).

35. In our view, it would be in the interests of the constituent councils to resource the RPC so that there is appropriate experience and understanding of their respective regions and districts. This may also help to reduce overall costs. However, given the dual roles councils will have in the RSS and NBE Plan making processes, we acknowledge that seconding staff to the RPC may create resourcing issues for the council in relation to its participation in the NBE Plan and RSS submission and appeal processes.

Part Five: Reporting lines within councils and between councils and RPCs

36. As discussed above, the intention behind the RPCs is that they are independent and not subject to political influence. The RPCs will effectively be a separate entity for the purpose of fulfilling their substantive planning functions.

37. This is seen in the RPCs' separate juridical status, in clause 100(4). This provision enables local authorities to bring appeals against RPC decisions, if they are dissatisfied with the outcome.

38. Because of the independence of the RPCs, there is no direct reporting line from RPCs to councils. RPCs must provide annual reports to councils, but this is merely a procedural provision, and does not provide any real accountability mechanism.[44] Indeed, and by intention, there are only a few ways that local authorities can influence RPCs, outside of the submissions and appeals processes. These are discussed below.

39. Local authorities will also have some measure of control over the RPC's annual budget. However, there are restrictions in the NBE Bill that seek to ensure that local authorities cannot direct the use of funding, as a potential means of controlling RPC decisions.[45]

40. The reporting lines within the RPCs align with their statutory independence. The RPC appoints the director, who is delegated broad powers to support the RPC.[46] In turn, the director appoints employees to staff the secretariat, and has all the rights, powers, and duties of an employer in relation to those staff.[47]

41. While the host local authority remains the technical employer of the secretariat staff, we consider that this is merely to ensure that legal responsibility is vested in a legal entity. Significantly, the NBE Bill expressly provides that the host local authority must be treated as "**not** having [the] rights, powers and duties [of an employer] in relation to the director and employees".[48] The clear intention is for secretariat staff to report to the director, and the director to report to the RPC.

42. Where secondment arrangements are used, we expect that while still employed by a local authority, those staff will report to the director.

44 NBE Bill, Sch 8, cl 39(1).
45 NBE Bill, Sch 8, cl 36(6).
46 NBE Bill, Sch 8, cl 33(4)(a).
47 NBE Bill, Sch 8, cl 33(6).
48 NBE Bill, Sch 8, cl 33(4)(c).

opportunity to review draft RSSs.[54] However, there is no obligation for RPCs to implement local authority recommendations. If not adopted, these recommendations would need to be otherwise pursued through submissions and appeals processes.

50. The development of statements of community outcomes (**SCOs**) by territorial authorities and statements of regional environmental outcomes (**SREOs**) also provide a means of influencing the NBE and RSS processes. RPCs must give "particular regard" to SCOs and SREOs when preparing and changing NBE Plans and RSSs,[55] and also "have regard to" these documents in identifying "major regional policy issues".[56]

51. In **Topic 2** of our advice we discuss the inter-relationship between regional planning and community infrastructure, and the potentially critical role of SREOs and SCOs in establishing dialogue between RPCs and councils. In our view, given the need to integrate decision-making across councils and RPCs, there should be an elevated role for local authorities in the planning process, and particularly in the development of RSSs. In particular, we consider that there should be a requirement RPCs to report on how they have sought to achieve the outcomes specified in SCOs and SREOs.

Please call or email to discuss any aspect of this advice

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54 SP Bill, cl 16 - 18.
55 NBE Bill, cl 107; SP Bill, cl 24.
56 NBE Bill, Sch 7, cl 14.

Appendix G: Legal Advice on Consenting, Monitoring, and Enforcement

Simpson Grierson
Barristers & Solicitors

Our advice

Prepared for	Kath Ross and Jen Coatham, Taituarā
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Date	20 December 2022

PRIVILEGED AND CONFIDENTIAL

Natural and Built Environment Bill and Spatial Planning Bill
Topic 5: consenting, monitoring and enforcement

Background

On 15 November 2022, the Natural and Built Environment Bill (**NBE Bill**) and the Spatial Planning Bill (**SP Bill**) were introduced to the House. Together with the Climate Adaptation Bill (which is yet to be introduced) these Bills are intended replace the Resource Management Act 1991 (**RMA**). The system reform includes a rolling over of existing RMA concepts, as well as introducing new concepts and different or augmented decision-making processes.

We have been asked by Taituarā to consider some of the key impacts for local government. This is one of seven pieces of advice considering the implications of the NBE and SP Bills. In this advice we have focused on four key questions you have asked in relation to the new regimes for consenting, monitoring and enforcement.

Submissions are being accepted on the Bills until midnight on 5 February 2023.

Questions and answers

Will local authorities be able to sufficiently recover the costs associated with monitoring permitted activities?

In theory, the NBE Bill provides local authorities with sufficient mechanisms to recover costs from monitoring permitted activities. However, there are several issues that require close scrutiny.

First, the Bill does not expressly acknowledge that local authorities will have any discretion to carry out their monitoring obligations in a manner of their choosing. Without this express acknowledgement, some may be confused as to whether a local authority is required to monitor all permitted activities in its district, or whether it can exercise its discretion as to which activities it can monitor.

Secondly, the Bill appears to provide two separate pathways for cost recovery and does not expressly state how the two relate to each other. The first provides a new mechanism for recovery of costs associated with monitoring and enforcement. The second requires that administrative charges be set for a range of matters and allows for additional charges to be imposed (similar to section 36 of the RMA). The relationship between

activities that are non-complying under the RMA will be categorised under the NPF and NBE Plans. While it can be expected that many activities will now become discretionary, this is by no means guaranteed and a case-by-case analysis will be necessary for each instance.

Are the notification requirements clear?

The notification regime under the NBE Bill is another significant departure from the RMA's approach. The Bill:

- imposes sweeping mandatory requirements for when the NPF or NBE Plans must either require public notification[1], require limited notification[2] or preclude any notification;[3] and
- requires that the NPF or NBE Plans either set the notification status of an activity or provide for the consent authority to determine the notification status.

While the Bill provides decision-makers with direction in relation to the first stage, there is unclear and potentially conflicting direction in relation to the second stage. This is especially the case where the NPF or NBE Plans provide for the consent authority to determine the notification status.

In its current form, the regime will likely leave very little discretion for consent authorities to determine the notification status of an application on a case-by-case basis. This is a conflict with the Bill's intent (as set out in the explanatory note).

In our view, the notification provisions would substantially improve if consent authorities were provided with discretion to make a notification decision in relation to discretionary activities. This may avoid needless notification of discretionary activities simply on the basis that the NPF or NBE Plan had not provided for their limited notification or non-notification. It may also reduce a negative perception being associated with discretionary activities as compared with controlled activities.

1 NBE Bill, cl 205.
2 NBE Bill, cl 206.
3 NBE Bill, cl 207.

these two regimes requires clarification, as at present the Bill is ambiguous as to when a local authority can recover costs over and above the administrative charges that it has set.

Finally, if a local authority does exercise its discretion to impose a charge over and above a fixed administrative charge, it would need to do so carefully and proportionately. Particular care will be needed where a person has not been provided advanced warning that they may be liable for additional monitoring costs.

What are the new compliance and enforcement tools, and will they be useful?

Overall, the enforcement powers available have been significantly strengthened and broadened. The Bill introduces a suite of new enforcement tools, which are largely taken from other existing regulatory regimes in both New Zealand and Australia.

In brief, the new enforcement tools are as follows:

- Monetary benefit orders and pecuniary penalty orders, being two mechanisms by which the Court can order environmental offenders, or people who otherwise contravene environmental laws, to pay money.
- The Court has the ability to revoke or suspend resource consents.
- A person who has committed environmental wrongdoing may provide an enforceable undertaking, the breach of which has consequences.
- Adverse publicity orders can be made in respect of environmental wrongdoers, which require them to publicise their wrongdoing and the effect of it.
- A person may be required to provide a financial assurance, to provide security for the costs and expenses of remediation or clean up in connection with a particular activity.

Finally, the Bill strengthens the (existing) prosecutorial powers.

Our substantive advice below provides an overview of these new enforcement tools, and comments on their suitability.

Is there clear direction for previously non-complying activities?

The NBE Bill provides a new regime for how an activity is classified, with new criteria for decision-makers to apply when determine whether an activity is permitted, controlled, discretionary, non-complying or prohibited.

Due to these new criteria, it is difficult to predict with any certainty how

Consenting, monitoring and enforcement

Will local authorities be able to sufficiently recover the costs associated with monitoring permitted activities?

1. The NBE Bill introduces a new monitoring obligation for local authorities, in addition to their previous monitoring obligations. This obligation is to *"monitor permitted activities that have effect in the region or district"*.[4]

2. In this section we:

   2.1 set out the potential scope of this obligation by summarising the new permitted activity regime and the monitoring obligations for local authorities; and

   2.2 assess whether the NBE Bill adequately enables local authorities to recover the costs that they will incur from new monitoring functions under this regime.

Meaning of "permitted activity"

3. Under the NBE Bill, permitted activities are intended to cover a wider class of activities than RMA permitted activities. The explanatory note provides further background as to the intent:

   > The scope of the permitted activity category is broadened to enable NBE plans to permit activities with written approval and certification by a qualified person. This is intended to remove unnecessary consents such as those for activities with localised effects or requiring monitoring.

4. Additionally, clause 153 describes permitted activities as *"activities that do not require a resource consent but may be subject to other requirements"*. To qualify as a permitted activity, an activity is expected to meet the relevant outcomes and have known positive and adverse effects that are capable of being managed through requirements specified in a rule.[5]

5. The NBE Bill's intent is reflected in clause 156, which enables the National Planning Framework (**NPF**) or any NBE Plan to provide for permitted activities in the following manner:

   > **156 Activities may be permitted with or without requirements**
   > (1) The national planning framework or a plan may provide that an activity is a permitted activity subject to compliance with conditions or requirements specified in the national planning framework or plan.
   > (2) The national planning framework or a plan may direct an applicant to apply for a permitted activity notice under **section 302**.
   > (3) Conditions or requirements may include (without limitation)—
   > (a) monitoring the activity for compliance with standards prescribed in the national planning framework or plan:
   > (b) certification by a qualified or certified person:

4 NBE Bill, cl 783(1)(g). It is not clear to us what the words "that have effect" add to the clause.
5 NBE Bill, cl 154(2).

(c) requiring that the activity be undertaken in accordance with a report or management plan prepared by a qualified person:
(d) requiring work to be done by a qualified or certified person:
(e) requiring a report or assessment prepared by an iwi within an area identified as having significant value to Māori:
(f) requiring persons or groups to give written approval:
(g) requiring an environmental contribution to be made.

Monitoring obligations

6. There are three requirements under the Bill to monitor permitted activities.

7. First, clause 783(1) generally sets out the monitoring requirements for local authorities. While subclauses (1)(a)–(f) largely reflect the monitoring requirements set out in section 35 of the RMA, subclause (1)(g) additionally requires that local authorities *"must monitor permitted activities that have effect in the region or district"*. Beyond the qualifier *"that have effect in the region or district"*, this provision does not specify which permitted activities must be monitored.

8. Secondly, as set out above, clause 156(3)(a) states that a permitted activity can be subject to conditions or requirements that the activity be monitored for compliance with standards prescribed in the NPF or a NBE Plan. We anticipate this monitoring would include self-monitoring by the person carrying out the activity. While clause 783 does not specifically require a local authority to monitor for compliance with standards, the obligation to do so arguably arises under 783(1)(g).

9. Thirdly, if required by the NPF or a NBE Plan, a person may only commence a permitted activity after they have applied for, and been issued, a permitted activity notice (**PAN**). PANs are provided for two purposes, one being *"compliance, monitoring and enforcement, including cost-recovery and plan effectiveness monitoring"*.[6] Again, while not expressly described in clause 783(1)(g), the requirement to monitor these activities likely arises under clause 783(1)(g) due to the wide manner in which the clause is drafted.

10. The scope of a local authority's monitoring requirements will be informed by new regional monitoring and reporting strategies. These strategies are prepared by each regional planning committee (**RPC**) *"to describe how local authorities in its region are to carry out their monitoring functions"*.[7] Under clause 785(2), the strategy must "*describe the monitoring responsibilities of each local authority in the region*".

Cost recovery

6 NBE Bill, cl 302(2)(a). The other purpose is "ensuring any third party approval or certification is obtained as appropriate".
7 NBE Bill, cl 785.

11. Clause 781 provides for a cost recovery scheme for all functions that a local authority undertakes under Part 11 (which includes the monitoring obligations under clause 783).

> **781 Cost recovery**
> (1) An NBE regulator may require a person to pay any reasonable costs incurred by the regulator in, or incidental to, taking any action in connection with monitoring or enforcing the person's compliance with this Act.
> (2) The costs that are recoverable under **subsection (1)** include (without limitation) the costs of or incidental to action taken by the NBE regulator in respect of—
> (a) any enforcement action referred to in **subsection (3)**:
> (b) any investigation, supervision, and monitoring of the adverse effect on the environment, and the costs of any actions required to avoid, remedy, or mitigate the adverse effect:
> (c) a statutory notice:
> (d) an enforcement order:
> (e) an abatement notice:
> (f) any prescribed action.
> (3) In **subsection (2)(a)**, **enforcement action** means—
> (a) an inspection, investigation, or other activity carried out in accordance with this Act for the purpose of determining whether there is or has been—
> (i) a contravention of a provision of this Act, any regulations, a rule in a plan, a rule in a proposed plan that has legal effect, the national planning framework, or a resource consent; or
> (ii) a failure to comply with a requirement of a statutory notice, an enforcement order, or an abatement notice; or
> (b) an application for an enforcement order under **section 700**; or
> (c) an application for an interim enforcement order under **section 706**; or
> (d) the service of an abatement notice under **section 708**; or
> (e) the filing of a charging document relating to an offence described in **section 760**; or
> (f) the issuing of an infringement notice under **section 769**; or
> (g) an inspection, investigation, or other activity carried out in accordance with this Act for the purpose of an enforcement action described in **paragraphs (b) to (f)**.
> (4) For the purposes of **subsection (1)**, **reasonable costs** include the costs of investigation, supervision, and monitoring of the adverse effect on the environment, and the costs of any actions required to avoid, remedy, or mitigate the adverse effect.
> (5) An NBE regulator may recover the costs in any court of competent jurisdiction as a debt due to the regulator.

12. Additionally, the NBE Bill provides for administrative charges under

clause 821, in a manner similar to charges under section 36 of the RMA. Where any administrative charge set under clause 821 proves to be inadequate, the local authority may impose an additional charge.

Our assessment

13. Local authorities may wish to make submissions on both the requirement to monitor permitted activities and the ability to recover costs for this monitoring.

14. The requirement in clause 783(1)(g) to monitor *"permitted activities that have effect in the region or district"* could potentially impose a heavy burden on local authorities. As currently drafted, the provision does not qualify which permitted activities must be monitored or what adequate monitoring involves. On its face, the provision requires local authorities to monitor all permitted activities that have effect in the region, no matter what the activity is. It is unrealistic for local authorities do so in a literal sense all of the time. It would be useful for the Bill to acknowledge that local authorities have a discretion to carry out their monitoring obligations in a manner of their choosing. For most permitted activities, it may be acceptable and proportionate to continue to rely on the public to report complaints.

15. Whether or not such an acknowledgement is made in the Bill, we consider it arguable that the NBE Bill does not intend that all permitted activities in the district be actively monitored. For example, there are signals that a more tailored approach may be envisaged, because the NPF or a NBE Plan may specifically require that:

    15.1 a permitted activity be subject to conditions or requirements that the activity be monitored for compliance with standards; and

    15.2 a person obtain a PAN prior to undertaking a permitted activity, which are provided for the purpose of compliance, monitoring and enforcement.

16. The fact that specific monitoring requirements can apply in respect of certain permitted activities points away from a general obligation on local authorities to actively monitor all activities.

17. In terms of cost recovery, neither clause 781 nor 821 refer to each other. It is therefore unclear what the relationship is between the two cost recovery regimes is, and to what extent a local authority can use its discretionary power under clause 781 outside of the administrative charges imposed under clause 821.

18. In our view, the first port of call for cost recovery would be through administrative charges set under clause 821. If these fixed charges prove insufficient for any given monitoring activity, then the ability to

recover additional charges is provided for under clauses 821(7) and 781. However, it could be argued that any administrative charge set under clause 821 does not limit the ability for an NBE regulator to recover costs under clause 781. This aspect should be clarified to provide local authorities with certainty on the matter.

19. We expect that there will be some scrutiny through the special consultative procedure of the first set of administrative charges set under the NBE Bill, and in particular the approach that is taken to monitoring charges for permitted activities.

20. We add that local authorities would need to exercise their discretion to impose any charge over and above a fixed administrative charge carefully and proportionately. In relation to additional charges under clause 821, there is a right of objection under clause 831 if a person is required to pay an additional charge.

21. While local authorities are able to recover costs for monitoring permitted activities, the use of this power will need to be carefully considered, and in particular where either:

    21.1 the person undertaking the activity is not required to apply for a PAN; or

    21.2 there are no conditions or requirements in the NPF or a NBE Plan to monitoring compliance with.

22. In such circumstances, the person whose activities are being monitored may not be aware of this monitoring, or that that they may incur charges. Any attempt by a local authority to pass on the costs of such monitoring is likely to be criticised and resisted. Local authorities will need to clearly communicate the potential for monitoring costs, well before these costs are charged.

What are the new compliance and enforcement tools, and will they be useful?

23. Overall, the enforcement powers available have been significantly strengthened and broadened. The Bill introduces a suite of new enforcement tools, which are largely taken from other existing regulatory regimes in both New Zealand and Australia.

24. We provide an overview of the new enforcement tools and comment on their suitability.

Monetary benefit orders and pecuniary penalty orders

25. The NBE Bill introduces two new mechanisms by which the Court can order environmental offenders, or people who otherwise contravene environmental laws, to pay money: monetary benefit orders (**MBOs**) and pecuniary penalty orders (**PPOs**).

Purpose of MBOs and PPOs

26. The purpose of MBOs and PPOs differ slightly. For MBOs, the purpose is to require a person to pay back a sum that *"represents*

the amount of any monetary benefits acquired by the person, or accrued or accruing to the person", as a result of an offence or contravention under the NBE Bill.

27. A PPO is a more serious tool; its purpose is to penalise non-compliant behaviour, and in this respect can order the offender to pay a much larger sum.

When the Court can make an MBO or PPO

28. The Court can make a MBO where there has been either a commission of an offence or a "contravention". Similarly, the Court may make a PPO *"if the court is satisfied that the person failed to comply with a requirement imposed on the person by this Act"*.

29. These differences in wording may be unintentional. It is most likely a result of the MBO provisions being copied across from the Environmental Protection Act 2017 (Victoria) and the PPO provisions being copied from different legislation, being the Biosecurity Act 1993. We expect that this drafting can be tidied up through the Bill's passage.

30. However, the current drafting enables regulators to apply for a MBO or PPO as part of, or outside of, criminal proceedings. The standard of proof to make such an order is the civil standard (the balance of probabilities) rather than the criminal standard (beyond reasonable doubt).[8] The fact that such orders can be made outside of criminal proceedings may provide a more efficient mechanism for regulators to recover money that has been acquired by breaching environmental law.

Quantum of penalty

31. When determining the amount payable for an MBO, the Court may order the payment of an amount not exceeding the amount of the monetary benefit. In doing so, the Court may take into account:

    31.1 the person's financial circumstances; and

    31.2 the amount submitted by the NBE regulator to be a reasonable estimate of the monetary benefit.

32. When determining the amount of a pecuniary penalty under a PPO, the Court must have regard to all relevant matters, including:[9]

    32.1 the nature and extent of the contravention;

    32.2 the nature and extent of loss or damage caused to a person, human health, or a natural and physical resource as a result of the contravention;

8 NBE Bill, cl 718(1) and cl 776(3).
9 Clause 778(1).

32.3 the circumstances in which the contravention took place;

32.4 whether or not the person has been found in previous proceedings under this Act to have engaged in similar conduct;

32.5 the steps taken by the person to bring the contravention to the attention of the appropriate authority; and

32.6 the steps taken by the person to avoid, remedy, or mitigate the effects of the contravention.

33. As with the new maximum penalties for offences, the maximum penalty for a PPO is $1,000,000 for natural persons and $10,000,000 for non-natural persons. Additionally, pecuniary penalties for body corporates (but not natural persons) can be increased substantially where a failure has resulted in commercial gain.[10] It is unclear to us why the provisions make this distinction between body corporates and natural persons.

34. Due to the potential for a Court to impose a substantial pecuniary penalty under a PPO, we have reservations as to the appropriateness of such orders being made outside of criminal proceedings. The ability to penalise a person without proving criminal offending is arguably inconsistent with the principles of both natural justice and criminal justice. If the ability to impose PPOs outside of criminal proceedings does remain in the final legislation, we suspect that the Court will be reluctant to impose high penalties outside of criminal proceedings without a compelling evidential foundation.

Recipient of money paid under MBO or PPO

35. One difference between MBOs and PPOs is that in the case of an MBO, the money *"must be paid to the NBE regulator unless otherwise directed by the court"*, but for PPOs, the penalty must be paid *"to the Crown or any other person specified by the court"*. Again, these differences appear to originate from the two different statutes that the provisions were copied from.

36. We agree that the Crown is a more appropriate default recipient for pecuniary penalties rather than NBE regulators. This is because there should be no incentive for NBE regulators to seek high pecuniary penalties due to the potential for financial benefit. If there were such an incentive, this could erode trust in NBE regulators that do seek high pecuniary penalties.

37. There is also potential for NBE regulators who opt to seek a MBO rather than a PPO to be accused of choosing that mechanism because they will be the default recipient of money paid under an

10 NBE Bill, cl 778(4)–(6). Under section 229B of the RMA, a Court may impose a higher penalty on conviction where the offence was committed for commercial gain. Under the NBE Bill, the Court may only impose a higher penalty owing to commercial gain under a PPO.

MBO but not under a PPO. This potential could be reduced if the PPO provisions are amended so that a specified sum goes back to the NBE regulator with the balance to the Crown.

Liability of principals and employers

38. Under clause 777, where an agent or employee is found liable for a PPO, the Court can make a separate PPO against the principal or employer. This power is not available for MBOs.

Limitation period

39. The limitation period in respect of the imposition of a PPO is six years after the contravention in question became known, or should have become known, to the relevant NBE regulator.[11] This is significantly higher than the limitation period for bringing a prosecution (which is two years under the NBE Bill).

40. The NBE Bill does not set out the limitation period for an MBO being made. If this omission remains, there is likely to be uncertainty as to whether the limitation period of six years in the Limitation Act 2010 applies instead.[12] To avoid this uncertainty, it would be preferable for the NBE Bill to expressly state the limitation period for a person to seek an MBO.

Revoking or suspending resource consents

41. Under clause 719, the Environment Court may revoke or suspend a resource consent in circumstances of ongoing and severe non-compliance.

42. We can see this tool being a useful addition to the enforcement toolbox. However, clause 719 imposes a high threshold before a Court will revoke or suspend a resource consent. The Court will have to be satisfied that:

    42.1 the non-compliance is both ongoing and severe;

    42.2 the revocation or suspension is in the best interests of the public; and

    42.3 the revocation or suspension will not result in any further adverse effects on the environment.

43. The third requirement in particular is likely to mean that revocation is not suitable where the effects of an activity will require remediation, for example where land has become contaminated as a result of the activity. In such situations, an enforcement order may be more appropriate. Regulators will still need to carefully consider which enforcement mechanism is most suitable, because, with one

11 NBE Bill, cl 759(b).
12 Limitation Act 2010, s 11. In particular, it is unclear whether an MBO is a "money claim" as defined in s 12 of the Limitation Act.

EU includes an undertaking to pay compensation to the NBE regulator, the regulator must give notice on its website of that undertaking.[18] It may do so for other EUs but is not required to.

48. This tool will be useful where an NBE regulator is considering bringing a prosecution for environmental offending, or where prosecution or other proceedings are already underway[19], but the regulator ultimately determines that accepting an EU is more proportionate in the circumstances. This may be the case where the offender:

    48.1 has no prior history of non-compliance;

    48.2 accepts their responsibility in the offending;

    48.3 shows genuine remorse; and

    48.4 is committed to both remediating any adverse effects that have arisen from the contravention and taking steps to ensure that no future contraventions occur.

Adverse publicity orders

49. An adverse publicity order can be made for non-compliance with the NBE Bill in relation to a resource consent.[20] It may require a consent holder or any other person involved in the non-compliance to take specific action to publicise their non-compliance and the effect of this non-compliance, and to publish this either generally or to specific people.

50. An adverse publicity order may be made by the Environment Court in enforcement proceedings or be offered by the consent holder as part of an EU.

51. This tool will be particularly useful to hold offenders accountable for non-compliance and to deter future offending. It is essentially a tool to "name and shame" environmental offenders. While environmental offending is generally well publicised through sentencing decisions and media coverage, this provides an additional pathway to inform the community of such offending.

Financial assurances

52. An NBE regulator may require a financial assurance from a person undertaking an activity, to provide security for the costs and expenses of remediation or clean up in connection with a particular activity.[21]

53. This is somewhat familiar territory for local authorities, as under

18 NBE Bill, cl 724(3).
19 NBE Bill, cl 730(3). This will be familiar territory for local authorities that have a diversion policy.
20 NBE Bill, cl 731.
21 NBE Bill, cl 732-750.

exception,[13] there is no indication in the Bill that the Court can choose to impose a different type of sanction than the one applied for.

Enforceable undertakings

44. As an alternative to prosecution, a person who has contravened the NBA or is alleged to have contravened the NBA, may make an application to an NBE regulator for an enforceable undertaking (**EU**).[14] This enforcement tool has been taken from the Health and Safety at Work Act 2015 (**HSWA**), and has been widely adopted under that regime by Worksafe.[15]

45. An EU is not an admission of guilt, however, in the HSWA context, it usually entails the applicant acknowledging and accepting responsibility for the underlying conduct/failures that gave rise to the contravention. An EU enables an applicant to accept its failures and conduct to the regulator on a without prejudice basis (which means that this acceptance cannot be used as evidence in court).

46. The NBE regulator may choose to accept or reject the undertaking, and must provide written reasons for its decision. If an undertaking is accepted and complied with, no proceedings may be brought in respect of the original contravention. However, if an undertaking is accepted but not complied with, the regulator may either apply to the Court for an order directing the person to comply with the undertaking, or bring proceedings in relation to the original contravention.[16] It is not clear:

    46.1 Whether the regulator could both apply to the Court for an order directing compliance *and* bring proceedings for the original contravention. We anticipate this is not the intention but clarification of that point would be of benefit.

    46.2 Whether the limitation period for bringing proceedings in relation to the original contravention would be extended in the event that a person avoided prosecution late in the limitation period by way of an enforceable undertaking, but then failed to comply with the undertaking. It would be unfortunate if the regulator was unable to bring proceedings in such a situation. The HSWA expressly extends the limitation period where an EU has been given,[17] and adding a similar provision in the NBE Bill would provide more certainty on the matter.

47. The Bill does not prescribe the types of undertakings that can be included in an EU, except for undertakings to pay compensation either to any person or the NBE regulator (clause 724). Where an

13 In relation to MBOs, the NBE Bill does not require that the NBE regulator apply for an MBO. But in practice, the Court will only make an MBO if it has evidence of the monetary benefit that has accrued to the person involved.
14 NBE Bill, cl 723-730.
15 https://www.worksafe.govt.nz/laws-and-regulations/enforceable-undertakings/accepted-enforceable-undertakings/
16 NBE Bill, cl 728(4) and cl 730.
17 HSWA, s 147.

section 108A of the RMA, a local authority is able to require a bond to secure the performance of conditions associated with remediation and clean-up of activities. The existing provisions in the RMA that relate to bonds have been carried across into the Bill. Additionally, a financial assurance can be provided as an environmental restoration account, as a form of insurance, or *"in any other form specified by the regulator"*.

Prosecutions

54. Finally, although the ability to bring a prosecution exists under the RMA, the NBE Bill makes three key changes:

    54.1 First, as stated above, the maximum financial penalties have substantially increased. These are now $1,000,000 for natural persons ($300,000 under the RMA) and $10,000,000 for non-natural persons ($600,000 under the RMA).

    54.2 Secondly, the maximum imprisonment term has decreased from two years to 18 months. This change means that defendants will no longer be able to elect jury trials – a tactic which is often used to delay a hearing and/or remove control of the prosecution from the local authority to the Crown Prosecutor.

    54.3 Thirdly, the NBE Bill does not automatically provide the Court with the power to increase a penalty where an offence is committed for commercial gain. Instead an NBE regulator (i.e. the prosecutor) must separately apply for a PPO. As stated above, only PPOs that are made against a body corporate can be increased to account for commercial gain.

55. The new maximum penalties will provide a substantial deterrent against environmental offending. However, it is unclear why there needs to be two regimes for determining penalties: one under the offence provisions and another under the PPO provisions. It is also unclear why an increase in penalty cannot be made where a natural person committed offending for commercial gain.

Is there clear direction for previously non-complying activities?

56. Under the NBE Bill, there are four activity "categories":[22] permitted, controlled, discretionary and prohibited. This removes two activity categories that existed under the RMA: restricted discretionary and non-complying.

57. Under clause 154, the NBE Bill requires that the NPF and NBE Plans set out the category for different activities, and sets out criteria that the relevant decision-makers must follow to determine the category of each activity. These differ significantly from the regime under the RMA and are more prescriptive. The new criteria require an activity category to be determined based on:

22 NBE Bill, cl 153. We note that the NBE Bill uses the word "category" rather than "classification".

57.1 the "relevant outcomes";

57.2 the limits and targets in the NPF or an NBE Plan;

57.3 whether the activity will meet or contribute to the relevant outcomes, limits and targets or not, or whether it is unclear or unknown whether the activity will do so;

57.4 whether the positive and adverse effects of the activity are known, or are generally known but may vary on a case-by-case basis; and

57.5 whether the effects can be managed through requirements, standards, and other criteria specified in the NPF or a NBE Plan rule.

58. As a preliminary note, it is uncertain what is meant by the reference to "relevant outcomes" in clause 154. The NBE Bill provides separate definitions for "system outcomes", "framework outcomes" and "plan outcomes".[23] Where an RPC is determining an activity category, it is uncertain whether the "relevant outcomes" cover all three categories of outcomes, or just one or two. Relevance may refer to the fact that not every outcome might be triggered by every activity, but clarification of this would reduce the potential for debate.

59. Due to these new criteria, it is difficult to predict with any certainty how activities that are non-complying under the RMA will be categorised under the NPF and NBE Plans. While it can be expected that many activities will now become discretionary, this is by no means guaranteed and a case-by-case analysis will be necessary for each instance.

60. In some circumstances, an activity that is non-complying under the RMA may end up being a prohibited activity under the NPF or an NBE Plan. This will occur where the activity:[24]

60.1 breaches a limit specified in the national planning framework or a NBE Plan (either taken in isolation or if allowed to be carried out in addition to consented activities that have existing use rights or are permitted); or

60.2 does not contribute to the relevant outcomes.

61. A key theme that arises from our assessment above, is that until the outcomes, limits and targets in the NPF become known, it will be difficult to predict how activities will be categorised (regardless of their classification under the RMA).

Are the notification

62. The notification regime under the NBE Bill departs from the RMA in two key ways:

23 NBE Bill, cl 7.
24 NBE Bill, cl 154(4).

requirements clear?

62.1 Under the NBE Bill, the focus will be on whether notification will provide the decision maker with more information (rather than providing for public involvement where potential effects reach a certain level). This is reflected through a purpose section[25], which will guide decision-makers in making notification decisions.

62.2 At sections 95A–95C, the RMA sets out step-by-step processes for notification that decision-makers must follow. These processes have been removed entirely in the NBE Bill.

63. Notification decisions under the RMA have been the subject of considerable debate before the courts. There is a large body of case-law on the meaning of terms such as "minor", "affected" and "special circumstances". The proposed new regime will depart from the established RMA principles entirely.

64. Instead, the Bill:

64.1 first, imposes mandatory requirements for when the NPF or NBE Plans must either require public notification[26], require limited notification[27] or preclude any notification;[28] and

64.2 secondly, requires that the NPF or NBE Plans either set the notification status of an activity or provide for the consent authority to determine the notification status.

65. While the Bill provides decision-makers with direction in relation to the first stage, there is unclear and potentially conflicting direction in relation to the second stage. This is especially the case where the NPF or NBE Plans provide for the consent authority to determine the notification status. We discuss this further below.

Mandatory requirements

66. Under clause 205, the NPF and NBE Plans must require public notification if:

66.1 there is sufficient uncertainty as to whether an activity would meet outcomes or breach limits;

66.2 there are clear risks or impacts that cannot be mitigated by the proposal;

66.3 there are relevant concerns from the community; or

66.4 the scale or significance (or both) of the proposed activity warrants it.

25 NBE Bill, cl 198.
26 NBE Bill, cl 205.
27 NBE Bill, cl 206.
28 NBE Bill, cl 207.

67. Under clause 206, limited notification will be required if:

67.1 it is appropriate to notify any person who may represent the public interest;

67.2 there is an affected person;[29] or

67.3 the scale or significance (or both) of the proposed activity warrants it.

68. Under clause 207, notification must be prohibited where an activity clearly aligns with relevant outcomes or targets or there is no "affected person".

69. As a general point, the thresholds in clauses 205 and 206 in particular are important to set at the right level, given that reaching them makes it mandatory to require public or limited notification. Whether these thresholds are set at the right level will have a significant influence on the efficiency of the new system, and its success or failure in the eyes of the public. We recommend close consideration is given to these thresholds.

70. Given that all of the above decisions are to be made at the NPF or NBE Plan stage rather than in relation to a particular proposal, we can foresee difficulties in reaching a clear view about some of these matters. For example, under clause 205:

70.1 What does "sufficient uncertainty" mean? To what extent can limits be included in standards in the rules themselves as a means of resolving any such uncertainty?

70.2 In the absence of a particular proposal, how will the RPC or Minister know whether proposals that will be considered under the rule in future will be able to mitigate risks or impacts, or whether such activities are of a scale or significance that warrant public notification?

70.3 How will the RPC or the Minister determine whether there are "relevant concerns from the community" in relation to all of the activities that will be covered by a particular activity? Does this provision effectively enable community groups to prevent particular classes of activity from being processed on a non-notified basis by lobbying the Minister or RPC?

71. Some of the considerations noted above seem more suitable for determination at the individual consent application level, but they expressly only apply to the Minister when making the NPF and an RPC when making an NBE Plan.

29 The NBE Bill provides a list of matters to be taken into account when deciding whether a person is an affected person for the purposes of limited notification. This includes: weighing the positive effects of a proposal against the adverse effects on that person, and whether additional information is necessary for assessing the activity against relevant limits, targets and outcomes.

72. In addition, there is no express requirement that the Minister and RPC consider the positive effects of proposed activities when considering whether the NPF or the NBE Plan should require public or limited notification. Clause 207 requires the Minister or RPC to prohibit notification if the activity is clearly aligned with outcomes or targets and/or there is no affected person, but these matters are not mandatory considerations under clause 205. This seems to be an oversight.

Determining notification outside of mandatory requirements

73. In relation to each activity that requires a resource consent, the NPF or NBE Plan must either state the notification status of the activity or provide for the consent authority to determine the notification status.

74. Outside of the mandatory requirements set out above, the Bill does not expressly state whether the NPF or NBE Plans *may* determine the notification status of any activity. This is a source of uncertainty and litigation will be likely if a decision-maker attempts to include the notification status of any activity in the NPF or NBE Plan, outside of the provisions that impose a mandatory requirement to do so.

75. Where the NPF or NBE Plans provides for the consent authority to determine the notification status, the Bill provides the following direction:[30]

    75.1 In relation to controlled activities, a consent authority must not publicly notify the activity unless the NPF or an NBE Plan states otherwise.

    75.2 In relation to a discretionary activity, a consent authority must publicly notify the application unless the NPF or an NBE Plan states that no notification or limited notification is required.

76. This leaves little discretion for consent authorities and reinforces the importance of the mandatory thresholds in clauses 205-207. If the consent authority is processing an application for a controlled activity, it must firstly comply with any direction in the NPF or NBE Plan, and if no such direction exists, determine whether the application should be limited notified or non-notified.

77. But for a discretionary activity, the consent authority has no discretion as to notification. It must either comply with the directions in the NPF or NBE Plan, or otherwise publicly notify the application if the NPF and NBE Plan are silent on the matter.

78. The fact that there is little discretion left to consent authorities results in a potential conflict with clause 200(1)(b), which specifically allows NPF and NBE Plans to defer notification decisions to consent authorities. It is also a conflict with the Bill's intention that, where

30 NBE Bill, cl 203 and cl 204.

appropriate, consent authorities do make notification decisions, as conveyed in the explanatory note:

> In certain circumstances, notification and clear identification of affected persons may not be practical. The NPF or NBE plan may delegate the ability to determine who is notified and identify affected persons to consent authorities. This gives flexibility to respond to local circumstances. The same approach is required for consents that will be amended or reviewed after issuance.

79. In our view, the notification provisions would substantially improve if clause 204 was amended to provide consent authorities with discretion to make a notification decision in relation to discretionary activities. This may avoid needless notification of discretionary activities simply on the basis that the NPF or NBE Plan had not provided for their limited notification or non-notification. It may also reduce a negative perception being associated with discretionary activities as compared with controlled activities.

Please call or email to discuss any aspect of this advice

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Appendix H: Legal Advice on Transitional and Savings Provisions

Simpson Grierson
Barristers & Solicitors

Our advice

Prepared for	Kath Ross and Jen Coatham, Taituarā
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Date	16 December 2022

PRIVILEGED AND CONFIDENTIAL

Natural and Built Environment Bill and Spatial Planning Bill
Topic 6: transitional and saving provisions

Background

On 15 November 2022, the Natural and Built Environment Bill (**NBE Bill**) and the Spatial Planning Bill (**SP Bill**) were introduced to the House. Together with the Climate Adaptation Bill (which is yet to be introduced) these Bills are intended replace the Resource Management Act 1991 (**RMA**). The system reform includes a rolling over of existing RMA concepts, as well as introducing new concepts and different or augmented decision-making processes.

We have been asked by Taituarā to consider some of the key impacts for local government. This is one of seven pieces of advice considering the implications of the NBE and SP Bills. In this advice we have considered the implications of the transitional provisions.

Submissions are being accepted on the Bills until midnight on 5 February 2023.

Question and Answer

What are the legal and practical implications of the transitional and savings provisions, and are they workable?[1]

The first key practical implication is that the transition will take time. We anticipate it could take between 5 to 10 years before the transition is fully completed nationwide. There are potentially difficulties in the overlapping timeframes of different planning documents. Regional Planning Committees (**RPCs**) may seek to develop Regional Spatial Strategies (**RSSs**) and NBE Plans in tandem, and in our view the ability and timing for doing so would benefit from being clarified.

Additionally, there will likely be a period where the RSS and NPF are in force but the NBE Plans have not yet been developed. In this case, the NBE Bill and SP Bill should clarify how RMA plans should be applied in light of the development of the RSSs and NPF. In particular, the weight and role that the NPF and RSS is intended to play in consenting under the RMA should be clarified to reduce confusion and litigation risk.

Similarly, there is a likelihood that some consent applications will be in progress under RMA processes when an NBE Plan is notified. New

1 This advice does not discuss the transitional provisions relating to Marine and Coastal Area (Takutai Moana) Act 2011 planning documents or fisheries authorisations. Please advise us, if you would like further advice on these.

consent information requirements under the NBE Bill would appear to apply to the application from that point onwards. The NBE and SP Bill do not directly address this and it appears an applicant would need to meet both the NBE Bill's new information requirements and the RMA's requirements. This creates significant uncertainty for applicants and should be clarified. There is also uncertainty about what happens to a consent application made under the RMA when an NBE Plan for the region becomes operative and the relevant RMA plan ceases to apply.

Additionally, there are some provisions relating to Land Information New Zealand Toitū te Whenua (**LINZ**) that reserve discretion to LINZ. These could benefit from clarification of what LINZ expects of practitioners in the transition period, otherwise increased delays to property matters may occur.

Finally, the transition of Treaty settlement legislation, Mana Whakahono ā Rohe arrangements and Joint Management Agreements does not provide for any local authority participation. Instead, the Bills provide for iwi/hapū to engage with the Crown. This appears to be a significant oversight as the parties to a JMA or Mana Whakahono ā Rohe arrangement are local authorities and iwi/hapū rather than the Crown. Further, while the Crown is the relevant participant for Treaty settlement legislation, there are statutory bodies established by Treaty settlement legislation which include local authorities (such as the Waikato River Authority). Local authorities should therefore arguably have some input into the transition of such legislation where it affects them.

Transitional and Savings Provisions

Full transition to the NBE/SP system is likely to take time

1. The commencement of the NBE Bill and SP Bill and the notification and completion of all the relevant planning documents are staggered, with some inbuilt flexibility as to timeframes. While flexibility could be useful, it may result in full nationwide transition taking around a decade and as a result the interim and transitional provisions are crucial.

2. Moving through transition, the following actions must be completed:

   (a) The first NPF must be notified within six months after the NBE Bill is enacted.

   (b) RPCs must be established by a time determined by the Minister in regulations.

   (c) RSSs must be publicly notified either on a date set by the Minister by Order in Council, or seven years after the SP Bill is enacted.

   (d) NBE Plans must be prepared within four years (plus 40 working days) after a decision by the RPC to adopt the RSS.

NBE Bill

3. The NBE Bill's commencement is largely split into two parts.

4. Initially, the provisions covering purpose and principles, the National Planning Framework (**NPF**), transitional provisions, principles of biodiversity, cultural heritage offsetting, information required in application for resource consents, and Environment Court come into force on the day after Royal assent.[2] Subsequently, 3 months after Royal assent, the provisions governing who can be a requiring authority come into force.[3]

5. The rest of the Act comes into effect on a date or dates appointed by the Governor-General, through an Order in Council. This date is decided based on the Minister for the Environment's recommendation.[4] The Governor-General is able to make several Orders in Council in order for different provisions to come into force on different dates either for different purposes or for different regions.[5] This includes Schedule 7, which governs the making of NBE Plans.

RPC Appointment

6. Schedule 8, which provides for the RPC appointment process, can only be brought into force by Order in Council with the recommendation of the Minister for the Environment and the Minister for Māori Crown Relations (and in Gisborne, the Minister for Treaty of Waitangi Negotiations).[6] The Ministers can recommend Schedule 8 comes into force where:[7]

   (a) any agreed amendments to relevant Treaty settlement legislation have been enacted;

   (b) the relevant parties have agreed on how to transition any existing Mana Whakahono ā Rohe and Joint Management Arrangements;[8] or

   (c) if neither (a) nor (b) have occurred, after 2 years has passed since Royal assent.

7. Functionally, this means that where the Crown and relevant iwi/hapū authorities cannot agree on transition arrangements in a particular region, the formation of the relevant RPC cannot begin until at least

2 NBE Bill, cl 2(1).
3 NBE Bill, cl 2(2)
4 NBE Bill, cl 2(3).
5 NBE Bill, cl 2(4) and 2(5).
6 NBE Bill, cl 2(6).
7 NBE Bill, cl 2(7).
8 NBE Bill, cl 2(7)(b) refers to "relevant governance entities, Ngā hapū o Ngāti Porou, and the relevant iwi or hapū" reaching agreeement with the Crown. This drafting is somewhat unclear and could appear as though it only relates to Ngā Hapū o Ngāti Porou. It appears that the drafting intended it to apply to any relevant iwi/hapū that may need transitional arrangements, but this could do with being clarified, potentially by adopting the 'relevant parties' definition in Schedule 2.

two years after the Bill receives Royal assent. We return to this aspect of transition in paragraphs 59 to 61 below.

NPF

8. The Minister for the Environment is required to notify a proposed NPF within 6 months of the day after Royal assent.[9]

9. The NBE Bill also defines the statutory 'Transition Period' as being from 6 months of the day after Royal assent to a date appointed by the Governor-General by Order in Council.[10]

NBE Plans

10. Critically for councils, all RMA plans/policy statements continue to apply after the Act commences.[11] Neither the NBE Bill nor the SP Bill amend the plan making and consent provisions of the RMA.

11. This suggests that the status quo will continue until the first NBE plan for a region is notified. An NBE Plan will not be prepared until the establishment of the RPCs and the creation of an RSS. The preparation of an NBE Plan will occur through an independent hearings panel (**IHP**) process, and the first NBE Plan for a region will not apply until the RPC notifies its decision on IHP recommendations.[12] We expect the likely timeframe for full nationwide transition is likely to be more than 5 years and closer to 10 years.

Interim Changes to National Direction

12. New national direction can be issued or existing national direction amended or during the Transition Period through Part 5 of the RMA. Alternatively, it can be changed through a combined process where the Board of Inquiry that hears the NPF also hears submissions on the change to national direction and then reports recommendations to the Minister for the Environment.[13]

13. If a combined process is used and the national direction being altered or replaced is a national environmental standard or a national policy statement, the Minister is able to establish and follow a process, provided it contains the steps outlined in section 46A(4) of the RMA.[14] The steps largely relate to natural justice and process.

14. In the combined Board of Inquiry process, the Board must consider the factors in section 51(1) of the RMA, but also consider the desirability of consistency with the NBE Bill.[15] In our view, this is

9 NBE Bill, Sch 1, cl 5.
10 NBE Bill, Sch 1, cl 1.
11 NBE Bill, Sch 1, Cl 2.
12 NBE Bill, Sch 1, cl 2(2).
13 NBE Bill, Sch 1, cl 6.
14 NBE Bill, Sch 1, cl 6(3).
15 NBE Bill, Sch 1, cl 6(3).

likely to cause tension between the purpose of the RMA and the purpose of the NBE Bill when making or amending national direction. In turn this will blur the line between the regimes when it comes to other RMA planning and consenting processes that have to give effect to or have regard to the national direction.

15. Similarly, for a combined process to alter or replace national planning standards, the Minister is able to establish and follow a process, provided it contains the steps outlined in section 58(3)(d) of the RMA. This process largely relates to natural justice and notification. In a combined Board of Inquiry process for national planning standards, the Board and Minister must both consider the desirability of consistency with NBE Bill.[16]

16. The NBE Bill also retains the ability for the Minister to amend national direction, if the changes have no more than a minor effect, correct errors or make technical alterations. The Minister can do so where they are satisfied that the content would be more efficiently addressed in processes under the NBE Bill or the SP Bill or that the content is redundant because of the transition.[17]

17. It appears that national consistency could be achieved between the RMA and NBEA/SPA regimes (to at least some extent) by contemporaneous updates to the current national policy statements and National Environmental Standards as the NPF is prepared and then notified. Such updates would be possible under the NBE Bill but clarity about whether they are encouraged or even required would assist.

18. In our view, such updates are likely to be important because the NPF does not have any express standing in RMA processes in the bills. If it did, that would be problematic because the purposes of the NBE Bill and SP Bill are different to the RMA. The NPF is required to implement the purposes of the NBE Bill and there is no certainty that the NPF would also implement the sustainable management purpose of the RMA.

SP Bill

19. The whole of the SP Bill comes into force the day after it receives Royal assent.[18]

20. The first draft regional spatial strategy (**RSS**) must be publicly notified either on a date specified by the Governor-General in an Order in Council, as recommended by the Minister for the Environment, or at the latest seven years after the date of Royal assent. In deciding whether to recommend a date be selected through an Order in Council, the Minister must consult the RPC (or its appointing body) and any local authority that the Minister

16 NBE Bill, Sch 1, cl 6(3).
17 NBE Bill, Sch 1, cl 7.
18 NBE Bill, cl 2.

considers likely to be affected.[19]

21. The above timings allow for flexibility in when different RPCs must notify an RSS, but also demonstrate (in the case of an RSS notified in seven years) how the transition could take a long time, given that the RSS would then need to work its way through the preparation process, and then the NBE Plan for that region would need to be prepared within the following four year period.

22. RPCs are able to incorporate the following from currently operative RMA documents into the RSS:[20]

    (a) information on the state and characteristics of the environment; and

    (b) decisions on whether areas or features of the environment have particular characteristics, should be classified in a particular way, or meet related criteria that are set out in legislation.

23. Before incorporating this information, RPCs must consider whether there has been a significant change in the relevant environment and whether any significant new information about the relevant environment has become available since the RMA planning document became operative. If the RPC chooses to incorporate this information, it does not need to apply clauses 24 to 28 of the SP Bill, which set out the considerations RPCs must apply in deciding to include information in an RSS. The RPC also does not need to have regard to any submissions on this information.[21]

24. Allowing for incorporation of material in this manner should result in some efficiency gains for RPCs when drafting their RSS.

It is not clear whether concurrent preparation of an RSS and NBE Plan is possible

25. One issue arising from the timing of the RSS and NBE Plans is uncertainty as to whether these documents can prepared simultaneously.

26. An RSS could take up to seven years to be notified,[22] however the provisions establishing RPCs come into force the day after Royal assent. As a result, while we anticipate that an RPC would seek to develop the RSS first, there is the possibility that they seek to develop the RSS and NBE Plan in tandem, as currently occurs with Regional Plans and Regional Policy Statements.[23]

27. However, NBE Plans are required to give effect to the RSS and it is unclear whether RSS and NBE Plans can be prepared

19 NBE Bill, Sch 1, cl 1.
20 NBE Bill, Sch 1, cl 2.
21 NBE Bill, Sch 1, cl 2.
22 NBE Bill, Sch 1, cl 1.
23 It is also possible that RPCs seek to develop NBE Plans first, however, given the RSS is the higher-level document, this approach seems unlikely as it is not a logical method to develop these documents.

simultaneously.[24]

28. This could benefit from clarification in the NBE Bill because simultaneous preparation of the RSS and NBE Plan could *potentially* be more efficient and condense the transition period. Additionally, simultaneous preparation of the RSS and NBE Plan could reduce some of the uncertainty highlighted below of consenting under RMA plans while higher order NBE/SP Bill documents are in force.

29. Alternatively, depending on the issues faced in a particular region and the RPC composition and efficiency, tandem preparation of these documents could prove more complex, or result in a situation where the RSS is drafted around the NBE Plan rather than the NBE Plan giving effect to the RSS.

There is uncertainty concerning RMA consenting and designations once an RSS and the NPF are in place

Timing of RSS and NPF relative to NBE Plans

30. Another area of uncertainty is consenting and designation processes under the RMA while an RSS and NPF is in force.

31. The RSS will likely be notified and become operative before NBE Plans are made. This is because both the date for an RSS being notified and the date Schedule 7, which governs the development of NBE Plans, comes into force are to be specified by Order in Council.[25] Given NBE Plans must give effect to the RSS, it appears the scheme of the NBE/SPA envisages the RSS coming first.

32. Similarly, the NPF provisions of the NBE Bill come into force the day after Royal assent and an NPF must be notified within 6 months. As a result, the NPF could be in force relatively quickly, while NBE Plans may lag behind as they require the appointment of RPCs and the coming into force of Schedule 7. Again, this would result in a higher level document – the NPF– being in place, while RMA plans that may not give effect to the NPF continue underneath it.

No requirement to give effect to NPF/RSS in RMA planning documents

33. The above issues may result in confusion for the interim period where RMA plans that do not give effect to the RSS or the NPF are to be applied but the RSS and NPF exist as higher level documents (albeit under a different statutory regime). There are no proposed changes to the RMA to require RMA plans to give effect to the RSS or the NPF, and the relevance of the NPF and RSS in an RMA consenting or designation processes is also unclear. However, inconsistency between the RSS and NPF and RMA plans may prove confusing.

34. The power to amend existing national direction for consistency with the NPF may assist in reconciling differences between the NPF and

24 NBE Bill, cl 109.
25 NBE Bill, cl 2(3).

RMA planning documents during the transition, but whether this is desirable, given the differing purpose of the new system from the RMA, is unclear.

RMA consent and designation decisions

35. The effect of on consenting and designations is also not particularly clear. The NBE Bill does amend the RMA to alter notification requirements and lapse dates for particular types of discharge consents.[26] However, more general guidance on how decision-makers should assess a consent application and notice of requirement for a designation during the Transition Period is lacking.

36. Under the NBE Bill, decisions on consent applications are governed by clause 223(10) of the NBE Bill and decisions on designations in Part 8. These provisions do not come into force until the Minister determines they should, and it appears (but is not entirely clear) that they will only apply once an NBE Plan is in place. Until then, consent applications and designations under RMA plans will continue to be processed under the RMA.

37. Under the RMA, sections 104 and 171 of the RMA do not expressly direct decision-makers to have regard to the NPF or RSS and no amendments are proposed to do so. However, section 104(1)(c) and 171(1)(d) require the decision-maker to have regard to "any other matter the consent authority considers **relevant and reasonably necessary to determine the application**" (emphasis added).

38. It could be argued that the NPF or an RSS is an 'other matter' under sections 104 and 171. Our preliminary view is that neither the NPF nor an RSS should be considered under sections 104 and 171 unless these sections are amended to clearly require the NPF or RSS be considered, but the transitional provisions should be amended to clarify the position.

39. The reason for our reservation is based on the *King Salmon* and *RJ Davidson* decisions. Those decisions make it clear that recourse to higher order documents and Part 2 of the RMA is not generally necessary, unless there are special reasons to do so (such as a District Plan being obviously out of date).

40. The higher order RMA documents are prepared to give effect to the sustainable management purpose of the RMA. The NPF and any RSSs will be prepared to give effect to a different statutory purpose. Accordingly, it is difficult to see how reference to those documents could be "relevant and reasonably necessary" to determine a resource consent application under the RMA.

41. The position will however be confusing, particularly if there are material differences between the NPF or an RSS and the operative

26 NBE Bill, Sch 15.

RMA documents. This will also be the case for any environmental limits that are included under one regime but not the other. A further source of confusion is the fact that each region will be preparing their RSS and NBE Plans at different times.

42. As mentioned above, this issue could be managed (at least to some extent) through contemporaneous updates to the national policy framework under the RMA to reduce any differences between that framework and the NBEA and SPA framework. However, whether this is desirable given the differing purposes of the NBE/SP Bill and the RMA is a serious question that will need to be drawn out. Further, if regard should not be had to the NPF/RSS, amendments to national direction to align it more clearly with the NBE and SP Bills could create further confusion given the RMA's different purpose.

43. The transitional provisions should ideally direct decision-makers, plan users and plan makers how they should give effect to competing documents in each of these scenarios, especially given the timing of each region's RPC may differ and different scenarios may occur in different regions.

There is uncertainty concerning a consent application in progress when an NBE Plan is notified and also when it is made operative

44. A similarly complex issue arises with consents where a consent application has been lodged and is being progressed through the RMA processes when an NBE Plan is notified.

45. It further provides that new information requirements for resource consent applications will take effect from the date after Royal assent.[27]

46. Therefore, if an application for resource consent is lodged and, while it is being considered, an NBE Plan is notified, it appears the applicant would need to meet the new information requirements in the NBE Bill (e.g. by showing how the proposal will meet or align with relevant outcomes in the NPF) in addition to existing requirements under the RMA. However, this point does not appear to be directly addressed or considered by the NBE Bill. This creates significant uncertainty for applicants, who risk being caught off guard by the notification of an NBE Plan.

47. Further, under the NBE Bill, consenting requirements in RMA plans continue to apply until the RPC notifies its decisions on NBE Plans.[28] The implication is that the relevant RMA plans would simply fall away at that point. It is unclear whether a resource consent application that has been made under the RMA would continue to be processed under the RMA after the NBE Plan becomes operative. There is no provision saying whether:

    (a) such consent applications continue to be considered and decided on as if the change in planning framework had not

27 NBE Bill, cl 2(1)(h).
28 NBE Bill, Sch 1, cl 2(1), (2) and (5).

occurred; or

(b) (more problematically) the application would need to be assessed against the NBE Plan; or

(c) (also problematically) the application would become redundant and a new application would need to be made.

48. We consider this needs to be clarified. It may be that the Bill needs to preserve the application of the RMA and RMA plans for consent applications lodged before a particular date, for example. If the intent is something different from that, that should be spelled out carefully.

LINZ matters could potentially be clarified

49. The transitional provisions in Schedule 1 of the NBE Bill describe how applications to Land Information New Zealand Toitū te Whenua (**LINZ**) will work during the Transition Period.

50. Clause 3 of Schedule 1 prevents the subdivision and reclamation parts[29] of the NBE Bill and provisions restricting subdivisions[30] from applying to registration of memoranda of cross leases or company leases that renew or are substitutes for existing cross leases or company lease and the issuing of a record of title for a lease for a building or parts of buildings on plans:[31]

(a) deposited or lodged with LINZ for cross lease/company lease reasons before NBE Bill commencement; or

(b) that relate to units/cross lease developments/ company lease developments ready to be registered when the NBE Bill commences.

51. The NBE Bill also provides for scenarios where a plan is deposited before commencement of the Bill (Plan A) and a further plan is deposited for subdivision under the NBE Bill for the same land (Plan B).[32] If Plan A is approved before or on the same date as Plan B is deposited then Plan A is treated as cancelled, insofar as it overlaps with Plan B.[33] The exception to this is where the deposit of the plan gives effect to a cross lease, company lease, of for lease of part of allotment that is or could be for more than 35 years.[34]

52. The provisions concerning LINZ matters could potentially be clarified. In particular, the phrase "ready to be registered" may create uncertainty as it is unclear what state a plan or document needs to be reach to qualify as 'ready to be registered'. It is unclear whether 'ready to be registered' requires plans to be approved to survey and section 223 or section 224 RMA certificates to be issued

29 NBE Bill, Part 9.
30 NBE Bill, cl 18.
31 NBE Bill, Sch 1, cl 3.
32 NBE Bill, Sch 1, cl 4(1).
33 NBE Bill, Sch 1, cl 4(2).
34 NBE Bill, Sch 1, cl 4(3).

or whether it simply requires the plans to be prepared in draft. This lack of clarity could result in unnecessary requisitions or delays to plans. We consider this aspect of the NBE Bill could be significantly clarified.[35]

53. Further, it is not apparent from the Bill whether the reference to commencement in clause 4(1)(a) refers to commencement of the *full* Act or whether the period for applying these provisions starts with the commencement of the first parts of the Act.

54. Careful consideration may need to be given to these provisions to ensure they are sufficiently clear but also avoid a rush of applications if the category of documents is too narrowly refined.

Transition of Treaty settlement legislation and Mana Whakahono ā Rohe arrangements and Joint Management Agreements does not provide for local authority participation

55. The NBE and SP Bills set out a process for amending Treaty Settlement legislation, Mana Whakahono ā Rohe and Joint Management Agreements (**JMAs**).[36] The aim of the process is for the Crown and relevant iwi/hapū body to agree on how to uphold the integrity, intent and effect of Treaty settlements, Mana Whakahono ā Rohe and JMAs within the new system.[37]

56. The process involves the Crown discussing with the relevant iwi/hapū body how the integrity, intent, and effect of the Treaty settlement, Mana Whakahono ā Rohe or JMAs will be upheld in the new system. The Crown must provide appropriate resources for the iwi/hapū body to be able to participate in this discussion.[38] Following this, the parties can enter any agreements that are necessary to uphold the Treaty settlement or iwi/hapū body enter into any agreements with the relevant party that are necessary to uphold the Treaty settlement, Mana Whakahono ā Rohe or JMAs.

57. If an amendment to Treaty settlement legislation is needed, the Crown must take all necessary steps to introduce a bill doing so, and use its best endeavours to do so within 18 months of the NBE and SP Bills being enacted. The Crown is also required to give 3-monthly updates on progress on any Bill to the relevant iwi/hapū body.[39]

58. In addition, the Governor-General, on the recommendation of the Minister for the Environment, may make regulations that modify Schedule 8 (relating to the RPCs and their composition).[40] The Governor-General can also, on the recommendation of the Minister for the Environment, make regulations to provide for a process to give effect to Whakahono ā Rohe arrangements and JMAs.[41] The Minister can only recommend regulations if they are satisfied the

35 If not clarified in the SPE Bill, LINZ could issue some guidance, however this would be less desirable than simply clarifying the Bill.
36 We refer in the footnotes below to the location of these clauses in the NB Bill but they are also contained in Schedule 2 of the SP Bill.
37 NBE Bill, Sch 2, cl 4(2).
38 NBE Bill, Sch 2, cl 4.
39 NBE Bill, Sch 2, cl 4.
40 NBE Bill, Sch 2, cl 5.
41 NBE Bill, Sch 2, cl 6.

regulations would uphold the integrity, intent and effect of Treaty settlements, Mana Whakahono ā Rohe and JMAs within the new system.[42]

59. One potential difficulty with these provisions is the timing and lack of contingency planning. As discussed above in paragraph 7, if, in two years, no agreement is reached on these matters, the Minister may make a recommendation to the Governor-General that they make an Order in Council bringing Schedule 8 (which begins the development of RPCs) into force.

60. While failing to reach agreement is not ideal, the ability for the Minister to bring Schedule 8 into force without agreement from iwi and hapū on how the new system account for Treaty settlements, Mana Whakahono ā Rohe arrangements and JMAs could strain relationships. Local authorities could be inadvertently caught in this scenario by virtue of being part of the RPCs. In addition, it may prove practically difficult to comprise RPCs, which are designed to include iwi/hapū representatives, without resolving these issues. As a result, we anticipate that this power may prove contentious and use of it may be limited.

61. Additionally, negotiating these matters may prove complex and take some time, potentially exceeding two years. If agreement is not reached but the Minister is reluctant to use their powers due to the potential relationship impacts, the ability for Governor-General to make regulations concerning these matters may be designed to act as a contingency plan. However, further thought could be put into what such regulations could contain and how they would operate, otherwise this represents a significant area of uncertainty and potential delay. It is essential that contingency planning for this aspect of the transition occurs in a way that maintains relationships while equally ensuring that transition is timely.

62. Another key issue is that negotiations are between the Crown and iwi/hapū representative groups. While this may broadly be logical for Treaty settlement legislation, the inclusion of local authorities in negotiations and discussions is likely to be necessary for Whakahono ā Rohe arrangements and JMAs as local authorities are key partners with Māori in those arrangements.

63. Similarly, some Treaty settlement legislation establishes arrangements that are not Whakahono ā Rohe arrangements or JMAs but involve local authorities. These do not appear to be accounted for in the Bills. The definition of "other arrangements" is limited to Whakahono ā Rohe arrangements and JMAs.

64. An example of this is the Waikato River Authority, which is created by Treaty settlement legislation, but comprises Crown representatives appointed by local authorities. The documents that the Waikato River Authority produces play a key role in planning for

42 NBE Bill, Sch 2, cl 5(3) and 6(2).

	the region. Therefore, in some instances, it may be appropriate for local authorities to play a role in discussion of how Treaty settlement legislation is to be transitioned, as well as Whakahono ā Rohe arrangements and JMAs.
Please call or email to discuss any aspect of this advice	**Matt Conway** Partner +64 4 924 3536 +64 21 455 422 matt.conway@simpsongrierson.com

Appendix I: Legal Advice on the Application of Existing Case Law

Simpson Grierson
Barristers & Solicitors

Our advice

Prepared for	Kath Ross and Jen Coatham, Taituarā
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Date	21 December 2022

PRIVILEGED AND CONFIDENTIAL

Natural and Built Environment Bill and Spatial Planning Bill
Topic 7: application of existing key case law

Background	On 15 November 2022, the Natural and Built Environment Bill (**NBE Bill**) and the Spatial Planning Bill (**SP Bill**) were introduced to the House. Together with the Climate Adaptation Bill (which is yet to be introduced) these Bills are intended replace the Resource Management Act 1991 (**RMA**). The system reform includes a rolling over of existing RMA concepts, as well as introducing new concepts and different or augmented decision-making processes. We have been asked by Taituarā to consider some of the key impacts for local government. This is one of seven pieces of advice considering the implications of the NBE and SP Bills. In this advice we have considered the extent to which existing (and key) case law under the RMA could apply to the new Bills. We have particularly focused on the purpose and principles (Part 1 of the NBE Bill), avenues for legal challenge, relationship between planning instruments, consenting and notification decision-making. Submissions are being accepted on the Bills until midnight on 5 February 2023.
Question and answer	**To what extent will existing case law apply to the NBE Bill?** The application of existing RMA case law to the NBE and SP Bills will likely be subject and clause specific. In some instances, where the concepts and processes are largely in keeping with the RMA, existing authority will likely translate across to the Bills. Several examples of potentially translating authority are set out in Part Two of the advice, including the purpose of the Bill, system outcomes, consenting, designations, and section 32 evaluation reports. In other instances, the changes proposed by the Bills are so material that existing case law will no longer directly apply. Existing authority under the RMA may colour the interpretation and application of the NBE Bill initially, but in certain cases the differences in terminology and/or process will be such that this case law will (in our view) lose its relevance, and new authority will be developed. Examples of these include the amendments

to the Te Tiriti clause, and challenges to plan-making and notification.

We note that the new Bills provide substantially different appeal rights for plan making, which will reduces the scope of the matters that can be appealed. We discuss this in Part One of the advice, and the effect this may have on existing case law.

Structure

We have answered your above question by splitting our advice into the following three parts, incorporating our critical comments throughout:

Application of existing case law to the Natural and Built Environment Bill

Part One: Avenues for legal challenge under the NBE and SP Bills that differ from those under the RMA

1. The NBE Bill limits appeal rights more than the RMA, particularly for plan making processes. While this is intentional, and designed to reduce the risk of costly and time-consuming merits appeals, it has the secondary effect of reducing the utility or applicability of existing case law. This is particularly so for plan making processes, which will not have an automatic right of de novo appeal, instead requiring judicial review.

2. In particular, the NPF development process does not provide for any appeal rights, and neither does the process for developing the RSS. In practical terms, given that both can only be challenged through judicial review, it is only the existing High Court authority that will be directly relevant to these points.[1] It may be possible to take some guidance from Environment Court authority which relates to the weighting or balancing of mandatory considerations, but the primary legal tests will be those that are now relatively settled before the High Court (and based on the *Countdown Properties (Northlands) Ltd v Dunedin City Council*[2] in relation to errors of law).

3. In relation to NBE Plans, a merits appeal right is available (through the standard process) only where the RPC rejects the recommendation of the Independent Hearing Panel, or accepts a

1 *Muaūpoko Tribal Authority Inc v Minister for Environment* [2022] NZHC 883 would be especially relevant in this circumstance as it was a judicial review of a national direction decision.
2 (1994) 1B ELRNZ 150, [1994] NZRMA 145.

recommendation that is beyond the scope of submissions.[3] This right of appeal is to the Environment Court, on a de novo basis. Other than those two merits appeal scenarios, a person may only appeal on a question of law to the High Court.[4] These limited appeal rights adopt the same formulation as those which applied to the Auckland Unitary Plan process. In that instance, the Auckland Council rejected several recommendations, which led to lengthy merits appeal processes, and there were many High Court appeals raising alleged questions of law.

4. In relation to consenting, the NBE Bill provides a right of appeal to applicants or submitters, to the Environment Court. These appeal rights are generally unchanged from the RMA, and so the existing authority is likely to remain relevant.[5]

Part Two: Parts of the Bill where existing case law may continue to apply

Purpose – clause 3

5. The purpose statement in the NBE Bill has been recast, and no longer expressly refers to sustainable management. Despite this, the NBE Bill (like the RMA) has a focus on environmental and resource management that must be intergenerational, which is an existing core part of sustainable management.

6. The NBE Bill's purpose in clause 3, like the current RMA purpose in section 5, sets an overall objective, rather than being intended as a primary operative decision-making provision. In relation to the RMA, the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* (*King Salmon*) held that:

> Section 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in pt 2, ss 6, 7 and 8.[6]

7. Clause 3 of the NBE Bill is likely to fulfil the same role, although it is not engaged in decision-making in the same way as the current Part 2 of the RMA. In essence, clause 3 is aligned with the wide ranging clause 5 system outcomes, and it is these outcomes that are expected to elaborate on the purpose through the NPF.

8. It is currently unclear whether or how the existing case law addressing section 5 of the RMA may continue to be relevant, but it may be that the use of clause 3 is as more of a guide to interpretation, as opposed to the new purpose being considered a "lodestar" that can guide decision-making under the NBE Bill.

9. Of note, clause 3 introduces a new purpose, being to recognise and uphold the concept of "Te Oranga o te Taiao."

3 NBE Bill, Schedule 7, clauses 132 and 133.
4 NBE Bill, Schedule 7, clause 137.
5 NBE Bill, clause 253.
6 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [25] (***King Salmon***).

10. This is a new concept, and is broadly and intangibly defined.[7] The direction to "recognise and uphold" is not a phrase used in the RMA, and not commonly used in other legislation. We have found one Act, the Arts Council of New Zealand Toi Aotearoa Act 2014, where the phrase is used in the purpose and principles section of the Act to recognise and uphold principles, however, there is no case law that grapples with the intended meaning or application of this phrase. It is likely that this new purpose will be the subject of litigation, as decision makers and users of the system seek to understand how and what recognising and upholding te Oranga o te Taiao means in practice.

11. There is also some potential that the inclusion of two limbs in the new purpose may result in tension. One example could be a development that manages adverse effects and supports the wellbeing of present generations, but harms the intrinsic relationship between iwi and hapū and te Taiao. It is unclear how a decision-maker will weigh these two aspects, if one does not trump the other.

12. This may be where the new clause 6(3) principle comes into play. That principle uses the phrase "recognise and provide for", which case law has established is a strong direction. The effect of this principle (discussed below) may be that Te Oranga o te Taiao could play a more significant role in the new regime, and provide a basis for refusal if the new purpose and principle are not achieved / satisfied.

13. The increased use of te reo in the NBE Bill also introduces a number of metaphysical concepts which are ubiquitous in te ao Māori, but that many non-Māori New Zealanders are less familiar with. If decision-makers and actors in the system do not have this background knowledge, there is potential for their actions under the NBE Bill to result in litigation.

Clause 5: System outcomes

14. Clause 5 of the NBE Bill sets out a number of system outcomes that are designed to inform the development of the National Planning Framework (**NPF**) and all Plans. The new outcomes are expressed in non-hierarchical terms, which is consistent with the expression *within* each of sections 6 and 7 of the RMA but is a change from the relationship *between* section 6 and 7.

15. As a result, the existing case law on how to balance the matters within section 6 and 7 will no longer be applicable, but there is still the potential for existing case law addressing the weighting or balancing of competing outcomes to apply. The stated role of the NPF is to provide guidance on how to reconcile tension between

7 Te Oranga o te Taiao is defined as:
(a) the health of the natural environment; and
(b) the essential relationship between the health of the natural environment and its capacity to sustain life; and
(c) the interconnectedness of all parts of the environment; and
(d) the intrinsic relationship between iwi and hapū and te Taiao

any outcomes, and so there may be less of a need to test that tension before the Courts.

16. One area where existing case law on section 6 and 7 may continue to be applicable is when interpretation / application issues arise in relation to terms and expressions that are also found in the RMA. Although the clause 5 outcomes are expressed in different terms from the RMA's matters of national importance, and other section 7 matters, there is some similarity in expression. For example, the use of the term "protection" may benefit from existing case law addressing certain section 6 matters of national importance.

17. As noted above, because clause 5 will only to apply to the decision-makers on the NPF and NBE Plans, and there are limited avenues for legal challenge, any developing case law will likely arise from judicial review proceedings. There is limited authority addressing challenges to national direction, but *Muaūpoko Tribal Authority Inc v Minister for Environment* involved a challenge to the National Policy Statement on Freshwater 2020, and its vegetable exemption clause which applies to the Horowhenua, which is in the rohe of Muaūpoko. This challenge considered whether the Minister failed to take into account the mandatory relevant considerations in sections 6 and 7 of the RMA.[8] This form of challenge is more likely to apply to the NPF and NBE Plans, and will bring into frame the approach to considering and achieving the system outcomes in clause 5.

Consenting

18. The existing case law is likely to remain relevant, at least in part, for the NBE Bill consent decision-making process. This is largely because the decision-making framework under clause 223 is similar in form and structure to section 104 of the RMA, and adopts aspects of the existing case law.

19. There are aspects of clause 223 that closely resemble section 104, including the reference to "actual and potential effects on the environment of allowing the activity" in subclause (2)(a), and the way relevant planning provisions are involved (subclause 2(d)).

20. The reference to effects "on the environment" will likely mean that the authority addressing the "existing environment" will continue to apply.[9]

21. In relation to relevant plan provisions, while the framing of subclause 2(d) is different and refers to "inconsistency", in practice that is largely what occurs now. As a result, case law addressing the consideration of planning provisions, and in particular weighting between provisions, will likely remain applicable.

22. Subclause (2)(e) is new, and reads:

8 *Muaūpoko Tribal Authority Inc v Minister for Environment* [2022] NZHC 883.
9 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

> … the likely state of the future environment as specified in a plan, a regional spatial strategy, or the national planning framework

23. It appears that this subclause is an attempt to codify the "existing and reasonably foreseeable future environment" construct under the RMA, and this may be an area where new case law is developed. To the extent that clause 223(2)(e) may also bring in the "permitted baseline" concept (which we think would benefit from clarification), it would now be a mandatory consideration, whereas the permitted baseline is discretionary under the RMA. There remains a question as to whether the existing permitted baseline authority will apply in a more general sense, or whether it is captured by subclause (2)(e) on its own.

24. Finally, the NBE Bill, through clause 223(10) codifies the key principles arising in the Court of Appeal's decision in *R J Davidson Family Trust v Marlborough District Council*. The Court of Appeal held that recourse to Part 2 under section 104 was only required in limited circumstances involving doubt about whether the plan had been "competently prepared".[10]

25. Clause 223(10) now states that a consent authority may have regard to:

    25.1 The NPF, if the NBE plan does not "adequately deal with the matter"; and

    25.2 The purpose of the NBE Bill, "only if, and to the extent that, the consent authority is satisfied that the national planning framework does not adequately deal with the matter".

26. It follows that recourse to the NPF or purpose are available in limited scenarios, and where there is inadequacy of direction. The term "adequate" will be significant, and with that in mind the *RJ Davidson* line of authority may remain useful in part.

27. It is worth highlighting that clause 23 provides recourse to the purpose of the NBE Bill, rather than to the system outcomes in clause 5. This will bring into frame the higher level objective of the NBE Bill (and the potential tension between the two limbs in that purpose statement).

Designations

28. The existing designation process is largely retained, so case law will carry over. One difference is that more entities are able to become requiring authorities where their projects are in the nature of a public good, or have an identifiable public benefit.

10 [2018] NZCA 316 at [75].

Part Three: Parts of the Bill where existing case law may not apply

Te Tiriti given greater decision-making weight – clause 4

29. The NBE Bill contains an amended Te Tiriti clause, which is different from that in the RMA in two significant ways:

    29.1 It requires decision makers to "give effect" to the principles of Te Tiriti, rather than "take into account"; and

    29.2 Giving effect to Te Tiriti is expressed as a standalone provision, rather than in conjunction with achieving the purpose of the RMA.

30. Existing case law has established that the direction to "give effect" is far stronger than "take into account".[11] From a decision-making perspective, it is clear that this change will impact on the application of existing authority. Existing case law on what "give effect" means will become relevant to clause 4.

~~31.~~ The Conservation Act 1987 contains a similar "give effect" direction, and it may be that case law arising from this Act could become relevant.[12]

32. Another notable change is that the direction in clause 4 of the NBE Bill applies in a much broader context. Clause 4 will apply to "all persons exercising powers and performing functions and duties under this Act". This differs from the RMA, which only engaged the "take into account" direction when persons were "managing the use, development, and protection of natural and physical resources". It remains to be seen how this will lead to a changed approach to Te Tiriti, but one example may be that in reaching views on the adequacy of information (which is not directly linked to "management … of resources", closer attention could be given to the relevance of the principles of Te Tiriti.

33. Another change is that section 8 is expressed in conjunction with achieving the purpose of the RMA, whereas proposed clause 4 is decoupled from the purpose of the NBE Bill. This potentially means that it could be applied in a standalone way in a much broader set of circumstances.

Decision-making principles – clause 6

34. Clause 6 of the NBE Bill introduces new decision-making principles, which include new and untested principles, and which codify existing RMA concepts (albeit not directly).

35. Clause (6)(1) applies to the Minister and all regional planning

11 *Genesis Power Limited v Franklin District Council* [2005] NZRMA 541 (EnvC) at [55], and *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593.

12 The Conservation Act's give effect to clause is slightly different and states: "this Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi." Whereas, the NBE Bill places the onus on persons exercising powers under the Bill to give effect to the Treaty. As a result it is possible that the NBE Bill itself could not give effect to the Treaty.

committees (**RPCs**) only, and sets out several principles that they must adhere to as part of their substantive decision-making. These principles involve four separate, but overlapping, concepts, and there is no provision guiding how to reconcile any potential conflict between the principles.

36. As these principles are new, and as there are no immediately relevant equivalents in other legislation, there is some potential here for new case law to be created.

37. Further to Part One above however, there is a more constrained set of appeal rights applying to the NPF and RPC processes, and so it is likely that these principles will be challenged more often through judicial review proceedings than through appeals. Given the equal weighting given to these principles, and that they are mandatory considerations, this could present a real risk as it opens up legal challenge on the basis of failing to apply (equally) the principles in a particular case.

38. Clause 6(2) seeks to codify a principle that resembles the precautionary principle established by case law. This principle applies to all persons (rather than just the Minister or RPCs) and directs that they exercise caution, and a level of environmental protection that is "proportionate to the risks and effects involved" in circumstances of uncertainty or inadequacy.

39. Apart from the proportionate aspect, this clause is framed similarly to section 34 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**).

40. Recent authority on the EEZ Act may become relevant for the application of clause 6(2), particularly the decisions in *Trans-Tasman Resources Ltd*[13] and *Protect Aotea*.[14] Both of these decisions emphasised the obligation to favour caution under the EEZ Act where information is incomplete or inadequate, with the decision maker to favour caution and environmental protection.

41. Bearing in mind the more limited appeal rights under the NBE Bill, in *Protect Aotea* the High Court held that whether a decision maker is in possession of the best available information is a *factual* decision, not a question of law.[15] If translated to the NBE Bill, this finding will limit the potential for judicial review challenges based on decisions to accept information as the "best available information".

42. We note that clause 6(2) of the NBE Bill will work in tandem with new clauses 804 and 805, which set out procedural (replacing section 18A of the RMA) and "best information" principles. The new clause 805 in particular contains statutory direction that will need to

13 All three cases may be applied where relevant: *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127; *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86; *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217.
14 [2022] NZHC 1689.
15 *Protect Aotea v Environmental Protection Authority* [2018] NZHC 1689 at [30].

be closely considered when applying the now codified precautionary principle.

43. The direction to "favour" caution will likely be tested under the NBE Bill. In an RMA context, the High Court has held that, where it is triggered, "the precautionary approach would weigh very heavily against granting a resource management application."[16] The difference is that the RMA has been concerned with applying the precautionary principle in the absence of any statutory direction. Now that there is a direction to "favour … caution" in relevant circumstances, there are likely to be more disputes about whether information is inadequate or uncertain and therefore whether clause 6(2) has been triggered. It appears that clause 805 is designed to assist with that dispute, but as it is new it will certainly be at risk of judicial scrutiny.

44. Lastly, clause 6(3) requires that all persons exercising powers and performing functions and duties "must recognise and provide for" the responsibility and mana of each iwi and hapū to protect and sustain the health and well-being of te taiao in their area of interest.

45. This is a new direction that is expressed in a way that may be capable of varying interpretations. The statutory direction is stronger than the former section 8, as it uses "recognise and provide for", which existing case law has held to be at the top of the hierarchy within the current Part 2 of the RMA.[17] This is an important change, as the existing case law has established that consideration of tangata whenua matters under sections 6, 7, and 8 do not give priority over, or trump, other values relevant to achieving the purpose of the RMA (see for example, *Marr v Bay of Plenty Regional Council* [2010] NZEnvC 347).

46. By opting for a "recognise and provide for" direction, it appears that the intention is for clause 6(3) to be placed at the top of the statutory hierarchy, and be treated as equivalent to the current 'matters of national importance' in section 6 of the RMA. The implication of this change is that the clause 6(3) principles relating to iwi and hapū will need to be given significant priority.[18]

47. Turning then to the wording of clause 6(3), the subclause refers to kaitiakitanga, but also refers to all tikanga, kawa, and mātauranga that an iwi or hapū may value in their responsibility to the environment. This is a broader set of issues and values, and may require judicial intervention to properly understand.

48. In effect, subclause 6(3) is markedly different to section 6(a) of the RMA, which requires persons exercising functions under the Act to have particular regard to kaitiakitanga. The existing case law concerning kaitiakitanga (being a subset of tikanga in action) may well colour the interpretation of this clause, but will not likely be

16 *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2013] NZHC 1992 at [83].
17 *Long Bay-Okura Great Park Society Incorporated v North Shore City Council*, Environment Court, A078/08.
18 *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC).

decisive in terms of guiding how to apply the new clause, due to the stronger statutory direction, and because the direction applies to a wider set of te ao Māori concepts.

Plan-making under the NBE Bill, uncertainty in relation to the role of the purpose of the NBE Bill

49. Under the NBE Bill, plans must give effect to the NPF through clause 97, and be consistent with a regional spatial strategy (**RSS**). There will no longer be national direction issued under the RMA (in the form of the New Zealand Coastal Policy Statement, National Policy Statements or National Environmental Standards) as that direction will be provided by the NPF alone.

50. Stepping down the hierarchy, there will be NBE Plans, and no regional or district plans. The result will be a less complex hierarchy of planning instruments under the NBE Bill, but one that is fundamentally in keeping with the existing approach under the RMA.

51. The effect of clause 97 of the NBE Bill is that the existing *King Salmon* authority is essentially codified, because plan makers are required to ensure that NBE Plans: (1) "give effect" to the NPF in the region, and (2) that they are consistent with the relevant RSS.

52. Clause 96 states that "the purpose of a [NBE] plan is to further the purpose of this Act by providing for the integrated management of the natural and built environment in the region that the plan relates to". Despite this provision, it is unclear how the purpose of the NBE Bill is to specifically inform plan-making given the focus on establishing a hierarchy of planning documents, and the direction to give effect to an NPF.

53. It is perhaps inherent that the purpose will be relevant for plan making due to the wording "to further the purpose of this Act", but that will need to be read alongside the more confined application of clause 5, which means that the system outcomes are only in play when developing the NPF and RSS / NBE Plans.

54. It is relevant that clause 25 of Schedule 7 to the NBE Bill addresses the contents of evaluation reports for proposals for plans or plan changes, and requires that it include "consideration of the extent to which the proposal presents the most appropriate way of achieving the purpose of the Act". This is largely the same wording as current clause 32(1)(a) of Schedule 1 of the RMA, which requires an examination of the "extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act".

55. The focus on the purpose of the Act, but not the system outcomes in clause 5, is somewhat at odds with the framing of the new regime. While the system outcomes are framed as assisting in "achieving the purpose of the Act", there is no direct link between clause 25 and clause 5, which could be problematic.

56. In terms of case law, it is arguable that the existing case law relating to section 32 of the RMA could remain relevant. We say this is as there are clear similarities between the framing of section 32 and clause 25. However, the planning hierarchy and focus on achieving the purpose of the Act is different, and so there is room for debate as to whether the *Colonial Vineyards* line of authority (which seeks to encapsulate and summarise the complete set of obligations when making a regional or district plan) could be distinguished.

Notification under the NBE Bill

57. The NBE Bill introduces a new notification regime that focuses on whether notification will provide the decision maker with more information, rather than providing for public involvement where potential effects reach a certain threshold.

58. The notification tests have been the subject of much debate before the High Court, through judicial review. There is a large, existing body of law that provides guidance on the meaning of terms including "minor," "affected" and what constitutes "special circumstances". The proposed notification regime moves away from these concepts, and will inevitably lead to new case law. In particular, the "minor" test has been removed entirely, and with it the relevant case law.[19]

59. Under the proposed new regime, it will be for the planning instruments to specify whether consent applications for certain activities will be processed on the basis of public or limited notification, or whether they will be non-notified. As a result, there is a deliberate shift away from assessing notification on a case-by-case basis, which will mean that the existing case law on section 95E of the RMA will become redundant (after transition to the new regime).

60. The new framework for notification will be focused on the extent of information available, with notification rules / provisions largely driven by issues relating to:

    60.1 "uncertainty" in relation to the achievement of outcomes or limits;

    60.2 whether there are clear risks or impacts that cannot be mitigated;

    60.3 relevant concerns; and

    60.4 the scale / significance of a proposal.

61. We expect that these matters will attract the most attention in

19 For example see: *Bayley v Manukau City Council* [1999] 1 NZLR 568, (1998) 4 ELRNZ 461 (CA): a consent authority could only disregard such adverse effects that would certainly be de minimis - and so the consent authority had to require the applicant to produce a written consent from every person who may be adversely affected.

relation to notification, and at the time of plan making.

62. While the intention is for notification to be directed by the NPF or NBE Plans, decisions on limited notification can still be delegated or left to consent authorities. If that occurs, then the NBE Bill requires that a number of matters are taken into account when determining if a person is "affected", including:[20]

    62.1 weighing the positive effects of a proposal against the adverse effects on that person; and

    62.2 whether additional information is necessary for assessing the activity against relevant limits, targets and outcomes.

63. There is some scope for existing case law to remain relevant, including that stemming from section 95E(1) of the RMA, which could assist with determining whether a person is adversely affected: see for example, *Northcote Mainstreet Inc v North Shore City Council*.[21] This is particularly the case for subclauses 201(2)(a) and (b), which adopt similar wording as in the RMA.

64. The most significant change is that, where a notification decision is deferred to the consent authority, it will be possible to challenge decisions by seeking a declaration from the Environment Court, instead of by judicial review in the High Court as is the case currently.

65. Clause 696(g) provides for declarations to be sought in relation to "any issue or matter relating to notification status of an activity determined under section 200(1)(b)". In terms of relief, the Environment Court may make interim orders, or orders setting aside a part or whole of the decision of a consent authority, or direct that the consent authority reconsider the matter on certain terms.

66. This new power will inevitably be challenged, as it will involve the merits of notification decisions, rather than being solely focused on questions or errors of law.

Please call or email to discuss any aspect of this advice

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20 NBE Bill, clause 201(2).
21 [2006] NZRMA 137.

Appendix J: Legal Advice on Employment Law Considerations

Simpson Grierson
Barristers & Solicitors

Our advice

Prepared for	Kath Ross and Jen Coatham, Taituarā
Prepared by	Rebecca Rendle, Partner and Mary Breckon, Senior Associate
Date	7 February 2023

PRIVILEGED AND CONFIDENTIAL

Nature and Built Environment Bill - Employment Considerations

Background	On 15 November 2022, the Natural and Built Environment Bill (**NBE Bill**) and the Spatial Planning Bill (**SP Bill**) were introduced to the House. In conjunction with our advice to you dated 20 December 2022 about the structure of regional planning committees (**RPCs**), you have sought our advice on the employment considerations and implications of the NBE Bill to inform Taituarā in drafting its submission on the NBE Bill.
Question	**What are the employment law implications under the NBE Bill?**
Answer	The NBE Bill sets out the employment arrangements as summarised in the flowchart **attached** as Appendix A to this advice. The implication of these arrangements is that the host local authority would be the employer and have all legal responsibility over the director and secretariat of the RPC. The host local authority would also be potentially liable for any employment relationship problems (e.g. personal grievance claims) as it would be the legal employer. This would likely create issues for the host local authority, which has little ability to control or influence the director or the employees of the secretariat, as this is delegated under the NBE Bill to the RPC. The host authority could join the RPC as a party to any proceedings, but this could increase costs (which may ultimately fall on the local authorities within the region). In our view, it would make more sense for the employment relationship to be between the RPC and these individuals rather than the host local authority. This is because the RPC would be, in reality, the employer. Under the NBE Bill, the RPC has authority to appoint the director, and the director has authority to appoint the secretariat. In addition, the RPC and the director are delegated all rights, powers and duties of the host local authority to act as the employer. In our view it would be more logical for the NBE Bill to be amended so that the RPC (not the host local authority) is the employer.

Reasoning explained

Employment arrangements under the NBE Bill

1. Under the NBE Bill, the RPC has the power to appoint a director of the secretariat to support it in carrying out its functions, duties and powers.[1] The director would then appoint employees necessary to carry out the functions, duties and powers of the secretariat.[2] Both the director and employees of the secretariat would be the employees of the host local authority, not the RPC.

2. Under the NBE Bill the host local authority, as the employer, must be treated as having:

    (a) delegated to the RPC all rights, powers, and duties of the host local authority as employer of the director;[3] and

    (b) delegated to the director all rights, powers, and duties of the host local authority that are reasonably necessary to carry out their responsibilities, functions, and duties;[4] but

    (c) not having the rights and powers and duties as employer of the director and employees appointed.[5]

3. However, the NBE Bill also states that the host local authority, as the legal employer of the director, is responsible for ensuring that the director's legal obligations in that role are met.[6] We interpret this to include ensuring that the director meets the legal obligations owed to the employees of the secretariat. Therefore, this could provide for some level of accountability of the director to the host local authority, but we consider this may be limited to reporting requirements given the host local authority must be treated as not having the rights, powers and duties as the employer.

Implications

4. Therefore, one of the implications of the above arrangements could be that the host local authority would have legal responsibility to ensure that the RPC and the director comply with all employment legislation, but limited ability to direct compliance.

5. For example, the host local authority would be responsible to ensure compliance with:

    (a) the Employment Relations Act 2000 (**ERA**), including:

        (i) good faith obligations under section 4 of the ERA;

1 Schedule 8, clause 33(1).
2 Schedule 8, clause 33(2).
3 Schedule 8, clause 33(4)(a).
4 Schedule 8, clause 33(4)(b).
5 Schedule 8, clause 33(4)(c).
6 Schedule 8, clause 33(5).

(ii) ensuring that terminations and all actions are what a fair and reasonable employer could have done in all of the circumstances;

(iii) the requirement to undertake fair and impartial investigations; and

(b) statutory leave requirements under the Holidays Act 2003 and the Parental Leave and Employment Protection Act 1987;

(c) compliance with the Human Rights Act 1993, Health and Safety at Work Act 2015 and the Privacy Act 2020.

6. Despite this, because the employer duties are delegated to the RPC, the host local authority would not necessarily, under the proposed drafting, have the ability to provide reasonable instructions to the director and/or the employees of the secretariat.

7. An example of the host local authority's restricted powers is that the host local authority would have no input into decisions as to who to employ as the director (outside of the one member it may appoint to the RPC) or the secretariat employees (a decision which would sit with the director).

8. Further, given the intention is for the RPC to be independent of the host local authority (and all other local authorities within the region) we do not consider the host local authority would be able to intervene should it determine that there is legal risk in actions of the RPC in relation to the director or the director's actions in relation to the employees of the secretariat. This could include, for example, concerns identified in employment processes which could result in an unjustified disadvantage or dismissal claim. Overall, it appears that the host local authority's role is intended to be purely administrative (e.g. process payroll and implement employer policies).

9. However, as the employer, any proceedings filed in the Employment Relations Authority or the Employment Court would be against the host local authority. The host local authority may have limited knowledge of the events relating to the employee given the intended separation of the RPC and the host local authority. The host local authority would also incur costs to defend any proceedings, time and resources. Public proceedings could also reflect adversely on the host local authority's reputation.

10. There is the ability for the host local authority or the employee to join the RPC to the proceedings as the controlling third party under the ERA (discussed further below).[7] Any award of remedies for a personal grievance may be apportioned to reflect the extent of the causation or contribution of the employer and the controlling third party. However, this would not prevent any potential reputational

7 Clause 100 of the NBE Bill.

damage for the host local authority that may result from the proceedings.

11. An employee could also potentially argue that the real employer is the RPC, not the host local authority. In addition, there could potentially be claims against the host local authority for penalties (including, aiding and abetting any alleged breaches of the RPC) which the host local authority cannot apportion or seek an indemnity from the RPC for. Practically, however, as the NBE Bill requires that all local authorities in the region "jointly fund" the RPC and secretariat, the local authorities within the region may be required to meet the cost of the proceedings in any event.[8]

Secondments

12. The NBE Bill requires that all local authorities in the region second relevant staff to assist in planning processes when required.

13. The ERA covers 'triangular' employment situations where an employee is employed by one organisation but performs work for the benefit of and under the control and direction of another organisation (the controlling third party).

14. A controlling third party is defined in section 5 of the ERA as:

> A person —
>
> (a) who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
>
> (b) who exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee.

15. Under the ERA, employers and/or employees in a triangular employment relationship can apply to the Employment Relations Authority (**Authority**) or Employment Court to join the controlling third party to proceedings to resolve a personal grievance claim. The Authority may also, of its own motion, join a controlling third party to proceedings.

16. We consider that the RPC would likely be a controlling third party for the purposes of secondment arrangements. Therefore, an employee who is seconded to the RPC could potentially bring a personal grievance claim against both the local authority and the RPC for the actions of the RPC. However, this is a risk with any secondment arrangement, it is not unique to the arrangements proposed under the NBE Bill.

8 Schedule 8, clauses 29 and 30.

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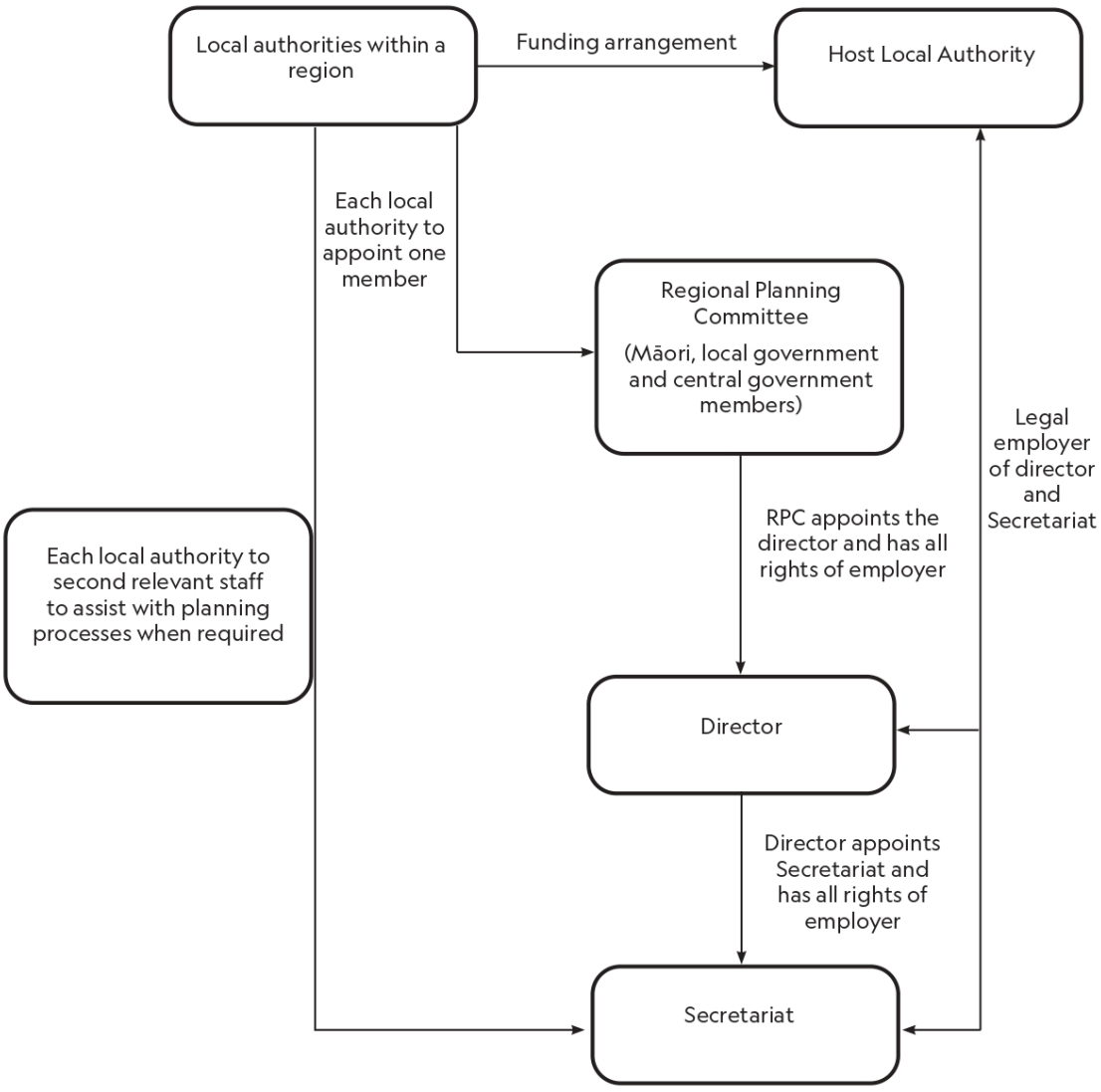
Appendix A

Simpson Grierson



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