Resource Legislation Amendment Bill 2015

Submission to the Local Government and Environment Committee

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

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Introduction

Thank you for the opportunity to make a submission on proposed amendments to the Resource Management Act (RMA).

The purpose of the RMA is contained in Part 2. It is *"to promote the sustainable management of natural and physical resources"*, that is, enabling social, economic, and cultural development **while** protecting the environment. I am pleased that the Government has decided against amending Part 2 of the RMA, apart from the sensible addition that councils must *"recognise and provide for … the management of significant risks from natural hazards."*

The RMA has become somewhat vilified in public discourse, and is often treated as a 'whipping boy' when people become frustrated with local government processes. Certainly, both the RMA and the way it is applied will never be perfect, but frequently it is other laws, such as the Building Act or the Public Works Act, that are causing frustration. Further, environmental legislation of any kind will by its very nature attract criticism because it will inevitably restrict individual freedom.

The RMA is now 25 years old. There are valid questions about how well it can be used to address two issues that have become great challenges for us today. The first is the accelerating need for housing that has begun to spread beyond Auckland. The second is the pressing need for us to make our cities low-carbon as well as liveable, and to plan for the effects of sea level rise and other consequences of climate change.

It is not surprising that people have begun to think about what might one day replace the much-amended RMA. One possibility that has been raised is two laws – one for environmental protection and one for urban development. I fully support examining this – we should always be thinking about how we can do things better.

But for now there is a set of proposed amendments to the RMA to consider.

The RMA established a system which largely devolved environmental decision-making to local government. The law also provided for central government to give direction to local government on matters of national importance. There is a natural tension between devolution and central direction in the Act.

I am supportive of further central direction in some areas. But it is my overall impression that the proposed amendments give powers to the Minister which are too broad. In a number of cases, this seems to be driven by the understandable concern about the need for affordable housing. But this should be dealt with directly through, for example, a national policy statement, rather than through wide-ranging amendments to the RMA.

I wish to speak to this submission.

This submission is focused on six sets of amendments.

The first three are concerned with the direction given by central government to local government. They are:

- National Policy Statements and National Environmental Standards could be developed together under a single process.
- A national planning template would be created to reduce 'unnecessary' variation in council plans.
- The Minister for the Environment would have a strong and wide power to make alterations to council plans.

The second three are focused on proposed changes aimed at speeding up local government processes and providing councils with more flexibility. They are:

- Councils would be given two new options for making or changing council plans – 'collaborative' and 'streamlined'.
- Councils would be able to limit notification of a plan change to those who would be directly affected.
- Notification of applications for resource consents would become more restricted.

1. Statements of national direction

A fundamental feature of environmental management in New Zealand is that most decisions are made at the regional or local level. Central government can choose to tell councils how they should make decisions on matters of 'national significance'.

The main way in which this direction is given is through national policy statements and national environmental standards.[1]

A national policy statement (NPS) contains objectives and policies that councils must *"give effect to"* in their plans.

A national environmental standard (NES) contains technical rules that councils must put into force in their regions or districts.

Direction from central government to councils is a major feature of the proposed amendments to the RMA. One proposed change is that a related NPS and NES can be developed together under a single process.

While this should be more efficient, it does not go far enough. For some time I have thought that NPSs and NESs should not be separate documents. Objectives, policies, and, if needed, technical rules should be fully integrated in one document. A rule should be linked directly to the reason for its existence, that is, the objectives and policies it serves.

These documents could be termed statements of national direction. In fact, the NPS on Freshwater Management is really such a statement – not only does it contain objectives and policies, it also contains numerical limits on water pollutants.

1. I recommend that the RMA be amended to replace national policy statements and national environmental standards with statements of national direction.

2. National planning template

The second issue I am concerned about is the proposal for a national planning template. In a 2013 speech, the previous Minister for the Environment, Hon Amy Adams, described the proposal in this way.

"Bring in a simplified planning framework with central government providing greater direction and consistency, in the form of a national planning template, leaving local decision makers to focus on how those frameworks should apply in their local communities."[2]

Anyone who has sought to compare elements of plans across jurisdictional boundaries, be it a business operating in different parts of the country or an environmental group seeking to understand variability in environmental protection, will support the development of a national planning template. During my 2014 investigation into the oversight and regulation of oil and gas production, my staff and I became frustrated with pointless variation between districts and regions.[3]

While I enthusiastically welcome the development of a national planning template, I am concerned that the proposed amendments go too far.

A template is *"something that is used as a pattern for producing other similar things"*.[4]

The pattern for council plans should begin with a standard format and structure, populated with standard definitions and measurement methods. Adding sets of optional objectives, policies and rules would make the wording of plans more consistent and help councils with limited resources.[5]

However, the proposal goes too far – well beyond a 'pattern' for council plans.

Clause 37 states that:

"The national planning template may specify … Objectives, policies, methods (including rules), and other provisions that must or may be included in plans."

What this clause appears to say is that central government can include any kind of direction in the template regardless of whether it is nationally significant or not. Moreover, direction added in this way could not be challenged in the Environment Court.

Central government direction should be delivered through the existing mechanisms of NPSs and NESs, and where appropriate, regulations.

2. I recommend that the national planning template be limited to matters of structure, definitions, methods, optional content, and content that automatically follows from existing central government direction.

3. Broadening of regulation-making power

The RMA currently contains a long list of matters, for which the Minister can make regulations that prescribe what councils must do. These matters are specified narrowly in section 360.

The Bill contains a proposal for much broader regulation-making powers in the form of a new section 360D.[6] It envisages four types of regulations – my focus is on the first three. Paraphrasing, the Minister would be able to:

a. permit a specified land use if it is reasonable;

b. stop councils making unreasonable rules that limit residential development; and

c. remove existing unreasonable rules that limit residential development.

Note that all three rest on the Minister's view of what is 'reasonable'.

In the departmental advice to Cabinet, both Treasury and the Ministry of Justice point out that this clause is inconsistent with the guidelines of the Legislation Design and Advisory Committee.[7] The Ministry for the Environment described it as *"in essence a Henry VIII clause"*.[8]

The first type of proposed regulation – the ability to permit a 'reasonable' land use – gives the Minister a very broad, potentially far-reaching power. Although it is to be used only *"for the purpose of avoiding restrictions on land use that are not reasonably required to achieve the purpose of the Act"*, there is no way to test what this means.

The second and third types of proposed regulations are less broad because they are restricted to residential development. I can see how such regulations could be used to improve the housing situation in Auckland. But regulations are most appropriate for dealing with matters that can be narrowly specified. The Government has other tools it can use, such as speeding up the preparation of the proposed National Policy Statement on Urban Development.

3. I recommend that the broad powers that would be given to the Minister under section 360D(1)(a), (b), and (c) not proceed.

4. Two new planning tracks

Under the RMA, councils must prepare plans – regional councils prepare regional plans and policy statements, and district councils prepare district plans. It is proposed in the Bill that councils be allowed to use two new processes for preparing plans or changing existing plans.

The first new process is the collaborative process pioneered in New Zealand by the Land and Water Forum. Under a collaborative process, engagement with stakeholders is 'front-loaded' – together a group works toward consensus decisions. Without 'buy-in' from stakeholders, the process cannot succeed. Amendments to Schedule 1 in the Bill outline the process in detail – these should be thoroughly examined in the light of the experience of the Land and Water Forum.[9]

The second new process is the streamlined process enabled by clause 52 and prescribed in amendments to Schedule 1. Currently, there is no flexibility in Schedule 1 for allowing a faster and simpler plan-making process for issues that are urgent or straightforward.[10]

To use the streamlined process, a council must first apply to the Minister for permission. A council can only apply if at least one of six criteria listed in the proposed new section 80C(2) is met.

Some of these criteria are open to different interpretations. What is seen as *"a significant community need"* (criterion (c)), for example, may be indisputably so or it may not be. Criterion (f) is particularly worrying – it is a catchall that allows the streamlined process to be used *"in any circumstance comparable to, or relevant to"* the other five criteria.

In granting permission for use of a streamlined process, the Minister can prepare a 'statement of expectations'. This must include a time frame, but may include *"any other matters that the responsible Minister considers relevant"*.[11] This means that the Minister is not limited to specifying process and timeframes.

At the end of the streamlined planning process, the Minister must approve or decline the council's proposed plan change. He or she can also refer the proposed plan change back to the council *"with specific recommendations for changes"*.[12]

While allowing the use of a streamlined process would be reasonable and indeed desirable in certain circumstances, the Bill goes too far. Both the criteria for its use and the power granted to the Minister are too wide-ranging. The Environment Court cannot act as a check since appeals are not allowed under the streamlined process. Thus, there is no legal oversight to ensure relevant evidence has been considered and interpreted correctly, and that decisions made are consistent with the purpose of the Act.

4. I recommend that:

a. the proposed new section 80C(2) be amended to substantially limit the circumstances under which the streamlined planning process can be used;

b. councils be able to withdraw from the streamlined planning process at any stage; and

c. the streamlined planning process allow submitters the right to appeal to the Environment Court on points of law.

5. Limiting notification of plan changes

Currently, when a council is considering changing a plan through the standard process, it must publicly notify the proposal.[13] Then any individual or organization can express their views on the proposal in a submission. Only those who have made submissions have the right to appeal the decision made by the council to the Environment Court.

The Bill provides a second option. A council would be able to limit notification of a proposed plan change, so only those who have been *"identifed as directly affected"* would be able to make a submission.[14]

The stated intent is to speed up plan changes – allowing everyone to make a submission on plan changes would be *"disproportionate and inefficient … in certain circumstances"*.[15]

It is not difficult to think of situations where a minor plan change that affects few people could be held up for years – the intent is both reasonable and desirable. The problem is that *"certain circumstances"* are not defined in the Bill. The only check on the use of this option is that those directly affected can be identified.

Commentary on the RMA often refers to the NIMBY (not-in-my-back-yard) problem. For example, a 2015 article by Bernard Hickey welcomed the expected RMA reforms because they will strip *"the NIMBYs … of their magical power to make housing unaffordable"*.[16]

However, those who are most clearly directly affected by a change to an urban zone would be those whose 'back yards' are within, or abut, the zone.

In contrast, those aspiring to become home owners and renters would not be identified as directly affected – they are invisible.

I am unable to see how the phrase *"directly affected"* could be defined to differentiate between those with a valid right to submit on a plan change and those without such a right.

5. I recommend that:

- **the circumstances when limited notification of a plan change is to be allowed be clearly defined and narrow in scope;**

OR

- **Clause 5A in Schedule 1 not proceed.**

6. More restrictive notification of consent applications

In contrast with proposed plan changes, limited notification of applications for resource consents has been allowed in the RMA for several years.

When someone applies for a resource consent, the council decides whether:

- to publicly notify the application so that anyone can make a submission; or
- to notify it to a limited group of individuals and organisations; or
- to not notify it at all.

Currently, the criteria that determine which of the three notification options councils must use are in sections 95A and 95B. Importantly, the public must be notified if the adverse effects on the environment are *"likely to be more than minor"*.

The Bill contains a new set of criteria that councils would have to use in making decisions about the notification of consent applications.

Applying the criteria in the Bill would be arduous. For instance, eight subsections in sections 95A and 95B would be replaced by 20 subsections.[17] Moreover, what many of the clauses mean is debatable.

Aside from the complexity, I have four major concerns about the proposed changes to the notification of consent applications.

First, clause 151 would create a new power for the Minister to make regulations in the form of a new section 360G. The clause would allow the Minister to regulate that certain activities or kinds of activities cannot be publicly notified or notified at all. Further, the Minister could effectively exclude *"particular persons or classes of persons"* from making submissions.

Second, clause 125 appears to rule out public notification of **any** kind of subdivision or residential development in many areas.[18]

Third, clause 127 amends the 'more than minor' test. When considering whether or not to publicly notify a consent application, a council would be able to sometimes ignore a major adverse effect on the environment.[19]

Finally, clause 120 allows councils to restrict the concerns submitters are allowed to cover in their submissions. This would stop a submitter presenting relevant information that the council is not aware of.[20]

All four of the above go too far in reducing the participation of the public and would risk leading to lower quality decisions.

6. I recommend that:

a. Clauses 151, 127, and 120 not proceed;

AND

b. Clause 125 not proceed in its current form, and that the subclauses relating to urban development be addressed in the National Policy Statement under preparation.

Notes

1. Since the RMA was enacted 25 years ago, only four NPSs and five NESs have come into force. The Ministry for the Environment is planning to create six new statements and amend four existing statements over the next three years. See Ministry for the Environment, 2015, *"A way forward for national direction"*.
2. Hon. Amy Adams, 10 August 2013, "Resource Management Act Reform". Speech to the National Party Conference.
3. Within Taranaki, for instance, the three district councils – New Plymouth, South Taranaki, and Stratford – regulate noise from well sites differently. In New Plymouth and South Taranaki, noise is measured with 'older' technical standards than in Stratford. In New Plymouth and Stratford, noise levels are measured 20 metres from the side of a dwelling; in South Taranaki, noise levels are measured at property boundaries. (Parliamentary Commissioner for the Environment, 2014, *"Drilling for oil and gas in New Zealand: Environmental oversight and regulation"*).
4. Cambridge English Dictionary, Cambridge University Press
5. Objectives, policies and rules that automatically follow from NPSs and NESs would also be helpful in a template.
6. Clause 360D(10) states that the power to make regulations under clause 360D(1)(a), (b), and (c) would expire a year after the first national planning template is established. Thus, it appears to be a 'stopgap' while the template is developed, although this is not explicitly stated in any documents.
7. Cabinet Paper: Second Phase of Resource Management Reforms: Batch 2 of policy decisions, page 71. Legislation Advisory Committee Guidelines, Section 13: Delegating law-making powers to the executive, pages 49-55.
8. Ministry for the Environment, 2015, Regulatory Impact Statement - Resource Legislation Amendment Bill 2015, p.17, para 65. In 1539, the Statute of Proclamations gave Henry VIII the power to legislate by proclamation.
9. The collaborative process is an 'import' from Scandinavia and has developed there over decades through "conscious design and consistent leadership" (Salmon, 2007, *"Sustainable issues in New Zealand Agriculture – and possibilities for collaborative resolution of them"*. Proceedings of the New Zealand Grassland Association, 69, p11-15). It will take time to learn how to do it well in New Zealand.
10. The description of streamlined planning on p.31 of the Regulatory Impact Statement appears to indicate that the streamlined process could be used not just for a plan change, but also for the development of a whole new plan.
11. Schedule 1, Part 5, clause 78(2)
12. Schedule 1, Part 5, clause 84(1)(iii). This clause refers to a mysterious new term – a 'planning instrument'. This is defined in Clause 52, proposed new section 80B(3).
13. Notification under a streamlined process is at the Minister's discretion. During a collaborative process, public notification must occur at a number of stages.
14. Schedule 1, Clause 5A.
15. Ministry for the Environment, 2015, Regulatory Impact Statement - Resource Legislation Amendment Bill 2015, p.29, para 142
16. Hickey, 25 January 2015, "Bernard Hickey welcomes Nick Smith's RMA reforms aimed at stripping the NIMBYs and BANANAs of their magical power to make housing unaffordable". Retrieved from www.interest.co.nz
17. Representing the new process of applying the criteria on a flow chart generated fierce competition within my office.
18. This applies to areas where subdivision or residential development have been classified as restricted-discretionary or discretionary.
19. The council could do this if the effect is addressed in some way in the objectives and policies of the plan. Suppose a plan has an objective to preserve wetland habitat. A council could choose to not publicly notify a consent application for an activity that would destroy a major wetland if that was the only significant effect.
20. Clause 120 would also give councils the ability to strike out all or part of a submission on a number of new grounds. (Proposed new section 41D(2).)