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

Submission on the Urban Development Bill

To the Environment Committee
14 February 2020

Submitter details

1 This submission is from the Parliamentary Commissioner for the Environment (**Commissioner**), Simon Upton.

2 The Commissioner is an independent Officer of Parliament established under the Environment Act 1986. The Commissioner has broad powers to investigate environmental concerns and is wholly independent of the government of the day.

3 The Commissioner wishes to appear before the Environment Committee to present his submission.

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Summary of Submission

5 This submission focusses on the interface between the Bill, the Resource Management Act 1991 (**RMA**) and the emissions reduction plans to be produced under the Climate Change Response Act. It makes the case that the linkages must be strengthened to ensure that urban development is not carried out in a way which breaches fundamental environmental bottom lines, or which compromises our ability to meet our obligations under the Paris Agreement.

Vague purpose statement and absence of environmental bottom lines

6 My principal concern with this Bill is that the effect of Part 1 is to limit, and thereby undermine, the core environmental purpose of the RMA set out section 5(2) of the Act. It does this by downgrading sustainable management from being the core purpose of decision-making to being a principle (along with a shopping list of various other matters to which particular regard must be had)[1].

7 The reasons why the purpose of the RMA has been circumscribed are unclear. The

[1] I note that even though the new provision uses the same language as the RMA, including an obligation to 'promote' sustainable management, the placement of the provision is likely to weaken the effect of that word.

Regulatory Impact Statement[2] (**RIS**) does not identify the purpose of the RMA as a barrier to achieving the Government's objectives. It is also notable that the Productivity Commission, which explored the idea of establishing an urban development authority in detail in its *Using Land for Housing* report[3], did not recommend supplanting the purpose of the RMA.

8 Further, the RIS recognises that there are risks involved in making changes of this nature. It states that[4]:

> [The] rewriting and merging of relevant purposes, principles and decision-making criteria into one Act creates legal uncertainty and risk [sic] of unintended consequences.[5]

9 Those risks are compounded by the unusually vague and uncertain wording that has been used in clause 3. For ease of reference, it provides:

> The purpose of this Act is to facilitate urban development that contributes to sustainable, inclusive and thriving communities.

10 The terms 'sustainable', 'inclusive' and 'thriving' are not defined. They mean different things to different people. Given that the purpose is the 'touchstone' for the exercise of a number of draconian powers, it is unacceptably ambiguous.

11 More particularly, it is clear that the term 'sustainable' does not mean the same thing as 'sustainable management', which is defined in section 5 of the Resource Management Act 1991 (RMA). In clause 5 the term 'sustainable management' is defined to have the same as in section 5 of the RMA, but that definition applies only 'in this section' [or, currently, clause]. It logically follows that the word 'sustainable' in clause 3 does not have the same meaning as 'sustainable management' in section 5 of the RMA. So, the word 'sustainable' in clause 3 is a new mysterious usage awaiting definition that will ultimately trump sustainable management in cases of conflict.

12 it is unclear why the Government is departing from the RMA framework in this regard. The environmental bottom lines set out in section 5(2) of the RMA should apply to any planning frameworks governing urban development. They are foundational and should not be compromised. For ease of reference, section 5(2) reads as follows:

> '…(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

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[2] https://www.hud.govt.nz/assets/Urban-Development/Housing-and-Urban-Development-Authority/RIS/c9d72cbf8a/Regulatory-Impact-Statement-Supporting-complex-urban-development-projects-with-dedicated-legislation.pdf

[3] https://www.productivity.govt.nz/assets/Documents/6a110935ad/using-land-for-housing-final-report-v2.pdf

[4] See paragraph 172 on p. 38 of the RIS. https://www.nzia.co.nz/media/5564601/regulatory-impact-statement-supporting-complex-urban-development-projects-with-dedicated-legislation.pdf

[5] Minister Parker has also made this point in the context of the work being done on the fundamental reform of the RMA, stating that:

> …the RMA … sets the objective of "sustainable management".
>
> Subsequent legal cases have helped clarify what it means. We will take care not to unnecessarily discard those legal precedents.

(See https://www.beehive.govt.nz/release/comprehensive-overhaul-rma)

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment'.

13 We can and should meet whatever needs we may have for urban development without breaching those rudimentary requirements. But the drafters of this Bill can apparently envisage urban development that should breach these fundamental environmental bottom lines, for they are only to be promoted to the extent that doing so will, '[achieve] the purpose'[6] set out in clause 3. No one has spelt out what sorts of urban development need to be exempted from the reach of section 5 RMA.

14 Finally in this regard, it is important to bear in mind that any development undertaken pursuant to this Bill will eventually need to be managed under the RMA. Requiring local authorities to administer and enforce consents granted to meet one purpose under legislation designed to achieve another one could well create challenges. It will certainly create complexity.

Change sought

1. Reword clause 3 to make it clear that the purpose of the new Act is subject to the bottom lines specified in section 5(2) of the RMA.

The almost unlimited scope of the new powers

15 It is concerning that the Bill provides for the Government of the day to make decisions which will effectively oust the RMA (and other legislation) without having to demonstrate why that should be necessary. For example, ministers will merely be required to 'have regard to' the statutory purpose of the new Act in making decisions on whether to establish a specified development project.[7] As such, they will be able to proceed even if the project involved could be delivered just as easily under the status quo.

16 By way of contrast, the Housing Accords and Special Housing Areas Act 2013 (which has some similarities to the Bill) was designed to ensure that the RMA is only set aside where there is evidence of a problem.[8]

17 The more permissive approach taken in the Bill is not acceptable, especially given the very broad definition of 'urban development' set out in clause 10. It goes far beyond housing to include anything that is part of, 'the development and renewal of urban environments'[9] and, 'related commercial, industrial, community, or other amenities,

[6] These are the opening words of clause 5.
[7] See for example clause 30(a).
[8] See for example section 9(2) of that Act, which requires the Minister to be satisfied that, "the region or district is experiencing significant housing supply and affordability issues" before exercising the power to add a region or district into that regime.
[9] See clause 10 (1)(b).

infrastructure, facilities, services or works'[10]. Virtually anything could be commenced in an urban setting under this expansive definition – for instance a new port, an oil refinery or a casino. If this Bill evacuates activities such as these from the surveillance of the RMA, it will not be long before a claim is made for similar legislative treatment outside urban areas. There are overtones here of the National Development Act 1979.

Change sought

2. Reword clause 30 so that a specified development project can only be established where the Government has first carried out an evaluation which shows that the powers sought are reasonably necessary to achieve the purpose of the new Act (as modified in accordance with recommendation 2 above); and,

Unduly weak obligations in respect of emissions reduction plans

18 In my role as an adviser to the Committee on the Climate Change Response (Zero Carbon) Amendment Bill (**ZCB**), I noted that emissions reduction plans should pervade decision making across all of government.[11] The Government must demonstrate leadership by delivering on its own plan.

19 This Bill is an improvement on the ZCB in that it makes the plans mandatory (rather than permissive) considerations. However, the obligation is still far too weak, especially given that decisions on urban form and the built environment will have long-lasting consequences for our emissions profile.

20 As currently drafted, clause 69 requires Kāinga Ora to merely, 'have regard to' emissions reduction plans. A 'have regard to' obligation would still allow decision makers to act in a manner which is inconsistent with the matter involved without even giving reasons. Kāinga Ora should instead be required to act in a way that is consistent with emissions reduction plans unless there is good reason not to.

Change sought

3. Reword clause 69 so that Kāinga Ora is required to provide a written explanation of how it has had regard to emissions reduction plans, including setting out the reasons for any inconsistencies between a development plan and an emissions reduction plan.

[10] See clause 10(1)(c).
[11] See my advice at: https://www.parliament.nz/resource/en-NZ/52SCEN_ADV_87861_EN19117/c3abe4c10ffa4302ff6f749a9d9169bfde7b00ae