

30 June 2022

Conservation Management and Processes
Policy Unit
Department of Conservation
Wellington

By email: cmap@doc.govt.nz

Re: Conservation Management and Processes – discussion document

1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Department of Conservation's (**DOC's**) *Conservation Management and Processes discussion document* (**Discussion Document**).
- 1.2 We have addressed each of the questions posed in the order that they appear in the Discussion Document.
- 1.3 This submission has been prepared with the assistance of the Law Society's Environment Law Committee.¹

2 Objectives of review

Question 1: Do you agree with the objectives listed above? If not, please explain why.

Question 2: Are there any other objectives you think we have missed? If so, please explain what additional objectives you think we should use and why.

- 2.1 The Law Society suggests that objective one ("to ensure processes enhance outcomes to protect conservation values") could be improved in the following ways:
 - (a) The objective could be better linked to the meaning of 'conservation' as defined in section 2(1) of the Conservation Act 1987, being the preservation and protection of natural and historic resources, providing for their appreciation and recreational enjoyment by the public, and safeguarding options of future generations.
 - (b) The objective also overstates the role of planning and consultation processes (as distinct from the substantive content of the strategies and plans concerned) on the eventual outcomes.

¹ More information regarding this committee is available on the Law Society's website: <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/environmental-law-committee/>.

(c) The reference to “processes” could also be misconstrued as having a much broader focus than appears to be intended (it could be read, for instance, to include ecological processes).

2.2 It is suggested that this objective might be more appropriately reframed along the following lines:

“To ensure that processes for management of public conservation lands and waters support the conservation of New Zealand’s natural and historic resources.”

2.3 The Law Society otherwise agrees with the objectives identified in the Discussion Document.

3 Conservation management planning

Question 3: Do you agree with how the three major challenges with the management planning system are described above?

Question 4: Do you think there are other challenges we should be aware of?

3.1 The Law Society agrees with how the three challenges have been described. However, these might be considered symptoms of broader issues with management planning under the Conservation Act and other conservation legislation.

3.2 As illustrated in the diagram at page 10, there are several distinct layers within the statutory framework for conservation management, flowing from policies, to strategies, to management plans. The backlog of statutory planning documents overdue for review or development might be considered a product of this demarcated approach. DOC could consider whether the number of statutory planning documents could be pruned by absorbing some higher-level direction provided in Conservation Management Strategies into the overarching General Policies. This would leave the Conservation and National Park Management Plans to provide detailed, location-specific direction. This may make the management planning process more efficient, while also making the documents easier to manage from DOC’s perspective.

4 Issue 1A – the requirement that CMSs, CMPs and NPMPs are fully reviewed every 10 years is contributing to the growing backlog of documents in need of full review or development

Question 5: Do you agree with how we have described the problem and its impacts?

4.1 The Law Society does not disagree with the description of the issues created by the status quo, but it would be helpful to focus on the reasons why full reviews are so time consuming and expensive. In part at least, that would appear to be because of the extent to which each process is “reinventing the wheel”, rather than focussing on the issues that are specific to the conservation areas or national parks concerned. As noted above, migrating more high-level direction to the overarching General Policies may reduce the number of generic issues covered by CMSs, CMPs and NPMPs. This would reduce the scope of those documents to location-specific issues, which may simplify the review process.

Question 6: Which of the above is your preferred option?

- 4.2 The Law Society supports the recommended option of replacing the current requirement for a full review every 10 years with a statutory ‘check-in’ over the same time period (option 1). However, greater clarity is required as to the basis on which the need for a review and the scale of review required would be assessed, to avoid a situation where resourcing constraints drive a conclusion that no review is required. One example of circumstances that would support the need for a review would be the identification of a new type of activity being carried out on public conservation lands and water and the need to manage any effects (for example, the increased use and availability of drones in recent times). Such guidance might also be helpful as much for identifying the situations where a review is not required, as for identifying those when it is.

Question 7: Do you think that these options would have an impact on the time and/or costs required for you to engage in planning processes?

Question 8: Do you think there are any impacts associated with the options for change that are not identified here?

- 4.3 The adoption of option 1 has potential to reduce the time and/or cost to engage in planning processes, but this is dependent on clear identification of the scope of any partial review. If the scope of a review is ambiguous, this will have the effect of requiring more time and cost to resolve what is inside and outside the scope of review, potentially opening the process up to legal challenge.

Question 9: Are there any further options you think DOC should consider that would meet the objectives set out above?

- 4.4 As above, consideration should be given to addressing more issues that are generic across national park or conservation area boundaries at a higher level, thereby reducing the scope of the existing strategies and plans, and the amount of time and cost reviewing them.

5 Issue 1B – once a planning document is approved it cannot be easily updated to reflect changing needs, new technology and evolving pressures

Question 10: Do you agree with how we have described the problem and its impacts?

- 5.1 We agree with the problems that have been identified.

Question 11: Which of the above is your preferred option?

- 5.2 The Law Society supports the recommended option to introduce a streamlined process for partially reviewing planning documents where there is limited public interest (option 1). However, it will be important to ensure that appropriate criteria are put in place for determining when a streamlined review is permitted, to limit any risk that the public are not able to provide their views on topics that matter to them. Even issues that at first appear confined can still be of relevance and importance to a wide range of people. A test of whether any persons and groups are “directly” affected by the proposed change has also proven difficult to apply in other contexts. We consider that a streamlined process is only appropriate for a confined issue of minor significance to people and to the conservation values of the land or waters concerned.

- 5.3 It is also submitted that the process should specifically require that when DOC provides a proposal to the Conservation Board(s) for consideration, it summarises:
- (a) the feedback it has received as part of the consultation process, to ensure that the decision-maker(s) understand the views of those consulted and in particular those who do not support the proposal;
 - (b) any changes made in response to feedback; and
 - (c) the reasons changes were or were not made.

Question 12: Do you think that all types of planning documents (CMSs, CMPs and NPMPs) should be addressed through the same options?

- 5.4 No – CMSs should be excluded from streamlined reviews. Logically, if a CMS is in fact providing for strategy, there should be fewer opportunities for minor changes. Changes to strategy are, by definition, likely to be significant. If that is not the case, that points to CMSs being too detailed, which should be addressed separately.

Question 13: Do you think there are any impacts associated with the status quo or the proposed options that are not identified here?

- 5.5 We consider that all relevant impacts have been identified in the Discussion Document.

Question 14: Are there any further options you think DOC should consider that would meet the objectives set out above?

- 5.6 It is suggested that some consideration be given to an intermediate option involving an opportunity for public submissions, without hearings. This would avoid the risk of relevant communities of interest not having the opportunity to participate, while streamlining the process. The fast-track consenting procedure under the COVID-19 Recovery (Fast-track Consenting) Act 2020 could potentially be used as a model in this regard, but with clarification that no hearings will be held.²

6 Issue 1C(i) – The requirement to publicly notify the intent to develop or review an NPMP is inefficient

Questions 15 to 18: Do you agree with how we have described the problem and its impacts?

- 6.1 The Law Society agrees with the problems that have been identified, and supports the recommended option to remove the requirement in the National Parks Act 1980 to publicly notify the intent to prepare or review a National Park Management Plan (option 1). In addition to the potential impacts for this option identified in the Discussion Document, we consider that the status quo of consulting both prior to and after a proposed plan has been drafted risks reducing the effectiveness of public participation through consultation ‘burn-out’. It may also reduce feedback on a draft plan, by individuals who believe they have already provided their views during the initial consultation.

² COVID-19 Recovery (Fast-track Consenting) Act 2020, sch 6 cls 17 to 21. Under that Act, consultation on specified resource consent applications can be carried out by inviting comments in writing from potentially affected individuals. There is no requirement for in person hearings, though these are still permitted at the discretion of the panel considering the application.

7 Issue 1C(ii) – The requirements for public notification and seeking public input on a notified draft planning document are outdated and overly prescriptive

Questions 19 to 21, 24 and 25

- 7.1 The Law Society agrees with the problems that have been identified.
- 7.2 Of the options identified, the Law Society considers that either option 1 or 2 would be an improvement on the status quo. The current requirements are clearly antiquated and are imposing unnecessary cost and delays on the process.
- 7.3 If option 1 is adopted, greater assurance is required around obtaining public feedback, and how that is communicated to the ultimate decision-maker(s). In particular, while not necessarily requiring a recommendation on every public submission, the representatives of the Director-General of DOC (**Director-General**) should both summarise public feedback and provide a reasoned discussion of why options for amendments suggested by submitters have not been adopted to provide decision-makers with a robust basis for their decisions. It is also submitted that the principles guiding the Director-General should include provision to seek clarification (in writing) from any submitters if required. As noted above the fast-track consenting procedure under the COVID-19 Recovery (Fast-track Consenting) Act could potentially be used as a model for efficient and targeted consultation.³
- 7.4 If option 2 is adopted, specific provision should be made for modernising the running of hearings. Practitioners have observed that policy and plan hearing processes under the Resource Management Act 1991 at both first instance, and on appeal to the Environment Court, have not involved participants reading their submissions to Hearing Panels for 10-15 years. Rather, hearings are run on the basis that the Panel pre-reads the submissions, submitters have the opportunity to highlight specific aspects of their submissions, with the bulk of the hearing devoted to any questions the Panel may have of submitters clarifying their submission and discussing alternative ways in which their submission might be addressed. Experienced RMA Hearing Panels have repeatedly proven their ability to adapt the procedure as required to ensure that submitters have a proper opportunity to be heard without wasting inordinate amounts of hearing time with submitters reading pre-prepared submissions aloud. This model is equally applicable in the conservation context. However, if adopted in the conservation context, this puts the responsibility on decision-makers to adequately prepare by reading the material in advance. If it is perceived that they have not done so, public confidence in the process would be rapidly eroded.

Question 22: Do you think that CMSs, CMPs and NPMPs should be addressed through different options?

- 7.5 The answer depends on the role of each document. If the CMS is in fact the instrument setting out high-level strategy, there is less of a case for having hearings about its content than the more detailed CMPs and NPMPs, where the verbal information and explanations provided by members of the public are likely to be more useful to decision-makers.

³ At paragraph 5.6.

Question 23: Would newspaper advertisements or online notifications be more effective in making you aware of opportunities to provide on planning documents?

- 7.6 Online notification is likely to be the most effective route for the vast majority of the population. However, it is also important to cater for the small minority of the population who are not comfortable with, or do not have the facility to undertake, online communication. Newspaper advertisements are likely an ineffective means of communicating with that minority. It is suggested that targeted consultation or direct notification is a preferable route to communicate with that sector (for example, by identifying and contacting potentially interested community groups).

8 Issue 1C(iii) – The requirements for publishing draft or approved planning documents do not reflect modern preferences for accessing information

Questions 27 to 32

- 8.1 The Law Society agrees with the problems that have been identified, and supports the recommended option to adopt a ‘digital-by-default’ approach to publication of planning documents, rather than the current hardcopy-based system (option 1). As noted in the Discussion Document, hardcopies of documents would still be available on request, which would continue to allow for participation of people who are not comfortable with, or do not have access, to the internet.

9 Implementation and monitoring – conservation management planning

Question 33: Are there any additional implementation, monitoring or evaluation measures that you think should be considered?

- 9.1 The Law Society agrees with the implementation, monitoring and evaluation plan set out in the Discussion Document.

10 Issue 2A: All activities require individual concessions, even when these activities are commonplace and have no or minimal adverse effects that can be appropriately managed

Questions 34 to 40

- 10.1 The Law Society agrees with the problems that have been identified, and supports the recommended option to provide the Minister of Conservation with the power to authorise specific activities by way of regulations, rather than each requiring an individual concession (option 1).
- 10.2 The Law Society also considers that it is appropriate for general authorisations to apply only to specific locations or specific people or organisations, and broadly agrees with the proposed eligibility criteria for such authorisation. However, we suggest that the second criterion should be amended to “The nature of the activity is not contrary to *the provisions of this Act or the purposes for which the land is held*”, to ensure this is consistent with section 17U(3) of the Conservation Act.
- 10.3 One key potential impact of this option is the removal of the ability for tangata whenua to be consulted on individual applications, which may impact the ability to give effect to the principles of the Te Tiriti o Waitangi – Treaty of Waitangi. To address this, the regulation-

making process should require robust consultation with tangata whenua and where appropriate mana whenua.

11 Issue 2B – DOC cannot make a concession for pre-approved activities available on demand

Questions 41 to 44

- 11.1 The Law Society agrees with the problems that have been identified, and supports the recommended option to amend the Conservation Act to allow DOC to pre-approve concessions where possible effects have already been assessed and understood (option 1).
- 11.2 In relation to the impact analysis that has been carried out in the Discussion Document, the Law Society considers that ‘public participation’ is a relevant objective that should be considered. Permitting pre-approved concessions would remove the ability for the public to be notified of individual applications and to provide their views.

12 Issue 2C – It is unclear whether a concession application can be returned if tendering the opportunity would be more appropriate

Questions 45 to 50

- 12.1 The Law Society agrees with the problems that have been identified, and supports the recommended option to provide the Minister of Conservation with the power to return a concession application if they were of the view that initiating a tender process would be more appropriate (option 1). The Law Society does not consider that having a statutory timeframe on initiating the tender process is necessary.

13 Issue 2D – The tender process does not allow a successful tender candidate to be offered a concession outright

Questions 51 to 54

- 13.1 The Law Society agrees with the problems that have been identified, and supports the recommended option to allow the Minister of Conservation to offer a successful tender candidate a concession directly provided the criteria in Part 3B of the Conservation Act are met (option 1).

14 Issue 2E – There is no statutory timeframe for when requests for reconsideration of a decision may be sought

Questions 55 to 59

- 14.1 The Law Society agrees with the problems that have been identified, and supports the recommended option of including a statutory timeframe within which an unsuccessful concession applicant can apply for reconsideration of a decision (option 1). In regard to whether the proposed timeframe of 15 working days is sufficient, this will depend on the procedure that would follow after a reconsideration is sought. For example, if an application has been declined due to a gap in the evidence provided, 15 working days would be unlikely to be sufficient to rectify this. However, that same period would be sufficient if application was treated as a kind of notice of appeal, with further information to follow within a reasonable timeframe.

15 Implementation and monitoring – concessions

Question 60: Are there any additional implementation, monitoring or evaluation measures that you think should be considered?

- 15.1 The Law Society agrees with the implementation, monitoring and evaluation plan set out in the Discussion Document.

16 Chapter 3 – Minor and technical amendments

Questions 61 to 110

- 16.1 The Law Society generally agrees with the problems that have been identified, as well as each of the recommended amendments set out in Chapter 3, subject to the following points:

- (a) In relation to the proposed amendment to ensure that NZCA and conservation board members cannot be held personally liable for decisions made in good faith,⁴ we note that an additional benefit not identified in the Discussion Document is the potential for such a change to widen the pool of individuals interested in serving on these bodies. This may improve the diversity, skills, and knowledge present on the boards, which may similarly improve their effectiveness.
- (b) In relation to the proposed amendments to the requirements for auditing of reserve boards and reserve administering bodies,⁵ the status quo of requiring audits in every case recognises the importance of proper financial management of reserves and public land. However, having a firm requirement to audit, which in reality cannot be complied with, serves no purpose.

The Law Society recommends that annual audits remain mandatory for reserve boards and reserve administering bodies that have an annual operating expenditure of over \$550,000.⁶ For bodies that are below this annual operating expenditure cap, there should be a discretionary power to audit. This will reduce the effort and expense associated with auditing, but still enable an efficient means of assessment where concerns have arisen out of the financial management of public land. For smaller reserves, the effect of these concerns may have a deeper impact where there is limited revenue.

- (c) In relation to the proposed amendments to the Wild Animal Control Act 1977 to allow Police to retain seized items that were used in the commission of an offence,⁷ the Law Society recommends that any amendment include a requirement for Police to notify DOC when an item has been seized, retained or returned .

⁴ Option 1, under issue 3A.

⁵ Option 1, under issue 3B.

⁶ As noted in the Discussion Document, this would be in line with the annual operating expenditure cap used in the Charities Act 2005, which the Law Society considers to be a useful comparator.

⁷ Option 1, under issue 3J.

17 **Next steps**

- 17.1 We would be happy to discuss this feedback further, if that would be helpful. Please feel free to contact me via the Law Society's Law Reform & Advocacy Advisor, Dan Moore (dan.moore@lawsociety.org.nz).

Nāku noa, nā

A handwritten signature in blue ink, consisting of several overlapping loops and horizontal strokes.

Ataga'i Esera
Vice-President