New Zealand Law Society
Te Kāhui Ture o Aotearoa

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4 August 2021

Committee Secretariat
Environment Committee
Parliament Buildings
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By email: en@parliament.govt.nz

Re: Natural and Built Environments Bill – Exposure Draft

1. Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Exposure Draft of the Natural and Built Environments Bill (**exposure draft**).

1.2 The concepts underlying the exposure draft have already been the subject of extensive examination in the Resource Management Review Panel's report[1] (**Randerson report**) dated June 2020. The Randerson report proposed how the purpose, principles, and definitions of the Natural and Built Environments Bill could be drafted. The exposure draft is significantly different from the drafting proposed in the Randerson report, and the differences between the two highlight key interpretation and implementation issues that will need to be addressed by the Select Committee.

1.3 The exposure draft does not cover the entire bill, containing select provisions only, and is high level in nature. As a result, the detail of how these high-level provisions would be implemented has not yet been published. The extent to which the provisions contained in the exposure draft will assist the efficiency and effectiveness in management of New Zealand's natural and physical resources will need to be tested against those more detailed provisions. The Law Society has made assumptions as to the likely direction of those more detailed provisions to provide useful comment on the provisions that are provided.

2. Clause 3 – Interpretation

2.1 Clause 3 of the exposure draft includes several definitions drawn from the Resource Management Act 1991 (**RMA**), as well as new and revised definitions. The Law Society has comments on the following definitions: 'coastal water', 'cultural heritage', 'land', 'natural environment', and 'person'.

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1 New Directions for Resource Management in New Zealand, report of the Resource Management Review Panel, June 2020

'Coastal water'

2.2 Coastal water is defined consistently with the RMA. This includes seawater in all estuaries, fiords, inlets, harbours or embayments. No guidance is given in the exposure draft on where an estuary, inlet or harbour stops, and a river begins. At present, the RMA provides some guidance in a separate definition for the coastal marine area, which sets quantitative limits (1km upstream from the mouth of a river, or the point upstream that is calculated by multiplying the width of the river-mouth by 5). While using limits has its limitations, incorporating limits provides a greater level of certainty and would ensure a consistent approach is followed across the country. It would we helpful if further guidance on coastal water was provided.

'Cultural heritage'

2.3 The definition of cultural heritage is a new definition that is not currently contained in the RMA. The definition is largely consistent with the types of cultural heritage recognised in the Heritage New Zealand Pouhere Taonga Act 2014. One matter it currently omits is wāhi tūpuna, which are places important to Māori for their ancestral significance and associated cultural and traditional values (section 6 of that Act). Given the purpose and principles of the Bill, and the desirability for consistency between legislation applying to cultural heritage, the Law Society considers it would be appropriate to add wāhi tūpuna to the definition of cultural heritage in the Bill.

'Land'

2.4 Land is defined in the exposure draft as "including the surface of water". However, unlike the RMA, this is not limited to "in a lake or river". This definition would include coastal waters as well. It would be useful if officials could clarify whether it is intended that the definition includes coastal waters. If not, then it may be appropriate to qualify the definition in a similar manner as presently occurs in the RMA.

2.5 Natural environment is defined broadly to include all resources, all forms of plants, animals, living organisms and their habitats. As the habitats of some species (for example some marine mammals, birds, etc) may include areas outside New Zealand, the Law Society queries whether some clarification is required as to whether the effects on habitats outside the territorial sea are relevant considerations.

2.6 The definition of "person" repeats the existing definition in the RMA but also adds "the successor of that person". At present no guidance is given as to the meaning of successor and whether it can include:

(a) more than one successor (i.e. two or more persons succeeding to a particular interest);

(b) a successor of a successor; and/or

(c) a body corporate composed of substantially similar members as an unincorporated body (as per section 2A of the RMA).

2.7 It would be useful if the exposure draft included more guidance as to the intention of this provision.

3. Clause 5 – Purpose of this Act

3.1 Clause 5 appears to be drafted to enhance the role of Te Oranga o te Taiao compared to the Randerson report, which recommended recognition of the concept of Te Mana o te Taiao:

> **5 Purpose of this Act**
>
> (1) The purpose of this Act is to enable—
>
> (a) Te Oranga o te Taiao to be upheld, including by protecting and enhancing the natural environment; and
>
> (b) people and communities to use the environment in a way that supports the well-being of present generations without compromising the well-being of future generations.

Given this enhanced role, the Law Society recommends the following changes:

(a) It is not clear what is meant by Te Oranga o te Taiao is "*to be upheld*" – stating that it "includes" protection and enhancement of the natural environment raises obvious questions as to what else it might include;

(b) Identifying what Ta Oranga o te Taiao "*incorporates*" requires clarification. Does incorporate in this context mean "*includes*" or "*means*"*?* In other words, is it an inclusive or exclusive definition?

(c) It is not clear whether Te Oranga o te Taiao is solely a cultural concept, to be viewed from the perspective of iwi and hapū, or whether it seeks to incorporate the perspectives of all elements of the community. For example, is the health of the natural environment solely to be viewed from an iwi and hapū cultural perspective, or are Pākehā perspectives relevant? The role of Te Oranga o te Taiao in the purpose of the Bill suggests that it should have a broader focus. If that is intended, this should be clarified.

3.2 Given the Bill has a dual purpose, is it necessary to address the situation where one purpose is achieved by a proposal, but the other is not? In other words, can a proposal be granted consent (or refused consent) if one of the two purposes is achieved, but the other is not? What outcome then best serves the purpose of the Bill? Further guidance on this issue will assist.

3.3 Clause 5 currently refers to outcomes for the benefits of the environment being "*promoted*". However, no guidance is provided as to what promotion involves and therefore how a person will know whether or not promotion has been achieved.

3.4 Other aspects of the draft purpose of the Act that should be clarified are:

(a) Reference to it being compulsory for use of the environment to comply with environmental limits raises questions as to what must occur in circumstances when environmental limits are not currently being met. The National Policy Statement for Freshwater Management 2020, for instance, has provisions governing limits not currently being met (termed 'targets'), providing a process for and timeline within which environmental limits must be met. At present, the natural and ordinary meaning of clause 5(2)(a) would be that all use of the environment must cease if a relevant environmental limit is not being met. The way in which this provision is framed also raises questions as to how it should be interpreted when many actions in many locations contribute to non-compliance with the relevant limit. It is unclear whether all such actions must cease or only some, and if so, how those judgements are to be made.

(b) Because the definition of environment means, among other things people and communities, the natural meaning of clause 5(2)(b) is that all outcomes that benefit people – by definition, one or more persons – must be promoted. It is unclear whether that is intended, because there will be an inevitable tension between the instruction to comply with environmental limits and to promote outcomes that benefit people;

(c) There is a requirement that *any* adverse effects on the environment "*must be avoided, remedied, or mitigated*." This invites debate as to the nature and scale of an effect. Those seeking to undertake a particular activity will likely seek to agglomerate its effects in order that all effects can be said to be, at least, "*mitigated*". Those seeking to oppose an activity will seek to divide up effects sufficiently finely that they can find an "*effect*" that is not in fact being mitigated. Arguments of this ilk were run in the early years of the RMA before case law was established to guide applicants and submitters that decision-makers would determine whether the extent of mitigation was reasonable, having regard to the nature and extent of adverse effects, not whether, as a matter of fact, every effect was mitigated to *de minimis*. It would be preferable if the Bill resolved the question without the need for a second round of litigation.

4. Clause 6 – Te Tiriti o Waitangi

4.1 The intent of this clause is clearly to give iwi and hapū a greater role in the implementation of the Bill than is currently the case under the RMA. The directive nature of clause 6, however, raises obvious questions as to what that might mean in practice. While case law gives guidance to the interpretation of a similarly worded direction in the Conservation Act 1987 (e.g. that it is heavily context-dependent and does not necessarily amount to a right of veto on the part of mana whenua), the much broader scope of the Bill and the fact that Treaty principles are not fixed means that it is desirable that some clarification is provided as to how this direction should be implemented, perhaps as an aspect of the National Planning Framework.

5. Clause 7 – Environmental Limits

5.1 As discussed in the Randerson report, environmental limits play a critical role in the structure of the Bill. Stating that environmental limits must be prescribed for environment domains is insufficient because it provides no sense of the extent to which environmental limits must be prescribed. A directive to prescribe environmental limits for "*air*" would be satisfied by prescribing, for instance, the minimum percentage of oxygen in the air. It would be helpful if the Bill specified both the environmental domain required to be the subject of environmental limits, and criteria which would provide a reference point, so that it is clear whether sufficient environmental limits have been formulated.

5.2 Clause 7(3) currently implies that environmental limits are quantifiable limits. If it is envisaged that environmental limits might be qualitative in nature, it is suggested that that should be made clear.

6. Clause 8 – Environmental Outcomes

6.1 Clause 8 is materially different from the equivalent recommended in the Randerson report.

6.2 Altering the focus of clause 8 from those exercising functions and powers under the Act to the planning process implies that the suggested environmental outcomes have no role in determining whether consents should be granted. While this might be workable once the proposed plans under the Bill are in place (applying reasoning analogous to that in the

Supreme Court's *King Salmon*[2] decision) it is clearly going to be some years before a full suite of plans will be in place. The exposure draft does not provide assistance on what transitional provisions are envisaged, so it would be helpful if consideration be given to the prescribed environmental outcomes having relevance to consent decisions until that point.

6.3 The equivalent provision in the Randerson report required that the prescribed outcomes be *provided for*. Clause 8 directs that they must be *promoted*. Some of the specified outcomes clearly lend themselves to promotion – it is difficult to see, for instance, how any plan under the Bill could ensure that an adequate housing supply is developed. In other cases, a requirement to promote a particular outcome represents a significant stepping back from the legislative instruction in the RMA, particularly for aspects of the environment that are not susceptible to specification of environmental limits. Obvious examples include: that section 6 of the RMA currently requires a number of matters to be recognised and provided for: preservation of the natural character of the coastal environment, wetlands and lakes and rivers and their margins (section 6(a)), the protection of outstanding natural features and landscapes (section 6(b)), the maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers (section 6(d)), the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga (section 6(e)) and the protection of historic heritage (section 6(f)). The Supreme Court in *King Salmon* said that protection of Outstanding Natural Landscapes, for instance, represented something in the nature of an environmental bottom line. If is not intended for the legislative direction to be softened, the Law Society suggests that the way clause 8 is framed should be reconsidered.

6.4 Some of the identified outcomes are expressed as seeking protection *and* restoration, for example clauses 13(f) and (g). The two outcomes are mutually inconsistent (unless 'protection' is qualified to explain when or why something is to be protected). The wording of outcomes currently expressed using the conjunction 'and' should be reviewed.

7. Clause 9 – National Planning Framework

7.1 Clauses 9 to 18 of the exposure draft state provide the requirements of the National Planning Framework (**NPF**). These clauses are general in nature. Given that the NPF is implemented by regulation, there is the potential for a change in government to materially change the direction of the NPF. While, in theory, the NPF should reflect the priorities of the Government of the day, those priorities are given effect through the planning process set out in Part 4. Given the Randerson report proposed that plans be combined regional and district plans, preparation of those plans will be a resource intensive process.

7.2 Previous experience demonstrates the difficulties that arise where detailed plans must be reopened each time there is a change of Government. For example, the successive changes to the National Policy Statement for Freshwater Management (four National Policy Statements in 9 years), which led to 'revolving door' regulation, confusion and wasted resource. The Randerson report sought to address this issue through a set of more detailed ministerial duties in relation to outcomes and environmental limits (refer section 9(3) of the Randerson report draft legislation). At present, clause 18 of the exposure draft is a set of general implementation principles and more detailed directions are not included. The Law Society

[2] *Environmental Defence Society Incorporated* v *The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38

submits that further consideration should be given to whether greater direction could be provided to manage this risk.

7.3 On a related point, clause 15(2) provides the different options by which the NPF may be given effect to through plans. No criteria are provided to direct which option should be taken in any given case. There should be clear criteria as to when it is appropriate that public plan change processes are not used.

7.4 More specifically, clause 9(1) states that there must at all times be an NPF. It anticipates that the NPF will be ready to be promulgated immediately upon the Bill being enacted. If that is not intended, there should be a specific provision describing the envisaged transition process.

8. Natural and Built Environments Plans

8.1 Clause 19 states that there must at all times be a plan for each region. Unless it is proposed that current RMA plans be deemed to constitute an initial Natural and Built Environments Plan, this will not be the case upon enactment of the Bill, and potentially for some years thereafter. As with the NPF, this provision should reference the proposed transition process.

8.2 Clause 22 prescribes the contents of Natural and Built Environments plans, however the section does not refer to plans containing rules. It is difficult to envisage how environmental limits can be effective if Natural and Built Environments plans do not contain rules.

8.3 The process for drafting and finalising the content of Natural and Built Environments plans will be highly complex and resource-intensive, given they will address the entire range of regional and district functions in each region, which are currently the subject of multiple plans in most regions.

8.4 Local authorities, particularly in smaller regions and districts, already find the plan-making process a challenge (for example, many plans are currently reviewed in stages). The process envisaged by the exposure draft will require much greater resourcing than has previously been allocated to plan formulation and processing. For the Bill to be effective, the necessary resources must be committed to implementing the legislation at the local authority level.

8.5 The way that the exposure draft is drafted means that individuals will have less ability in practice to meaningfully participate in the process due to the size and complexity of the process for Natural and Built Environments plans. The likely result is that well-resourced institutional participants in the process (including NGOs and corporations) will have an even greater role and influence than is currently the case with limited meaningful involvement from others.

8.6 More specifically, the statement in clause 24(4) that planning committees must assume that the NPF furthers the purpose of the Bill removes the ability (endorsed by the Supreme Court's decision in *King Salmon*) for decision-makers to consider if the purpose of the Bill if the NPF is viewed as incomplete, or uncertain. The Law Society queries whether, even if the intent is to preclude reconsideration of the legality of a Natural and Built Environments plan, there is merit in retaining the ability to consider the other exceptional situations the Supreme Court provided for.

8.7 These comments have been prepared by the Law Society's Environmental Law Committee. If further discussion would assist, please do not hesitate to contact the committee convenor, Bronwyn Carruthers, via the Law Society's Law Reform and Advocacy Adviser Emily Sutton (emily.sutton@lawsociety.org.nz).

Yours faithfully

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