NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Urban Development Bill

14/02/2020

Submission on the Urban Development Bill

1. Introduction

1.1 The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the Urban Development Bill (**Bill**).

1.2 The Law Society does not wish to be heard but is happy to assist the committee if there are any queries arising from this submission.

2. Summary

2.1 The Bill establishes a process for establishing special development projects and development plans for urban development projects, with the purpose of streamlining projects and bringing together multiple legislative processes. The Bill confers broad powers on the Minister of Finance and the Minister responsible for the administration of the new Act, and on Kāinga Ora. These powers include compulsory acquisition of private land interests, and plan-making, designation, consent, enforcement and monitoring powers for Kāinga Ora which are likely to require a duplication of resources with the existing local authorities.

2.2 While the Bill incorporates some of the checks and balances currently in the existing legislation (the Resource Management Act 1991 (**RMA**), the Public Works Act 1981 (**PWA**), the Reserves Act 1977 (**RA**) and the Local Government Act 2002 (**LGA**) etc), it does not incorporate all of them. Combined with more restricted public participation processes, strict decision-making timeframes and limited appeal processes, there is a risk that those materially impacted by developments will be unable to have their say.

2.3 The multiple steps and decision-making points within the process may introduce uncertainty and risk, and not meet the Bill's purpose to streamline projects. There are multiple points where decisions made by Ministers may be subject to judicial review.

3. Concerns the Bill may limit public input and appeal rights

3.1 The Law Society has identified the following concerns about limitations on public participation, appeal rights, and transparency in decision-making and recommends these are given further consideration. Specific additional recommendations are also included in the comments below where applicable:

Clause	Law Society Comments
Clause 47(2) Provides the ability for joint Ministers to not accept the recommendation to establish a specified development project even if all criteria are met.	This appears to allow the joint Ministers to make a decision based on factors other than the criteria set out in the Bill. This means decisions are open to other influences. It also does not require the joint Ministers to give reasons for not accepting the recommendation. The giving of reasons is important to allow those affected by a decision to understand why it has been made and imposes a discipline on the decision-making process.

Clause	Law Society Comments
Clause 70 Sets out consultation obligations associated with the draft development plan.	The consultation obligation does not extend to people who own land outside of the project area but are adjacent or in close proximity to it, and may be affected by what happens within the project area. The Law Society recommends that consideration be given to extending the consultation obligation to include all potentially affected landowners even if they are not located within the project area.
Clause 88 Provides that an appeal on a development plan is allowed on a question of law to the High Court, and then to the Court of Appeal.	It is not clear whether leave is required to appeal to the Court of Appeal as the wording "*may be made to the Court of Appeal*" could imply an appeal is as of right. In addition, clause 88 does not allow for an appeal to the Supreme Court. It is not clear why the Court of Appeal has been appointed the final appellate court, rather than the Supreme Court. It is not appropriate to exclude appeals to the country's highest court, which has the constitutional role of providing a supervisory role over other courts. The Supreme Court's leave criteria are sufficient to ensure that only appeals of genuine public importance are brought before that Court.
Clauses 179 – 184 Allows for Kāinga Ora to require changes to bylaws to be made by the relevant authority.	This provides for bylaws to be changed without requiring the usual special consultative procedure provided for in the LGA, and has limited timeframes for the relevant authority to make the required changes to bylaws. This clause removes the ability for the public to have input into the bylaws through the usual procedure, and would appear to be at odds with the purpose of the Bill of facilitating urban development that contributes to sustainable, inclusive and thriving communities.

Clause	Law Society Comments
Clause 129(2) Provides that for controlled or restricted discretionary activities there is no right to a hearing.	This limits the right for affected parties to participate in the process. It is not clear why a hearing cannot also be held for such activities, if Kāinga Ora considers one would be helpful. Nor is it clear whether an application must only involve subdivision or land uses that are controlled or restricted discretionary activities, in order for the provision to apply (i.e. if the application also involved a small amount of retail that required consent as a discretionary activity).
Clause 142 Allows for Kāinga Ora to seek for reserve status or conservation interest to be revoked.	The Reserves Act includes the right to object to a change in reserve status, including if the reserves status is to be revoked. There is no similar right of objection where Kāinga Ora requests that the reserves status of land is revoked. This will limit the rights for affected parties to object.
Clause 269 Deals with declarations made in accordance with section 52 of the PWA.	A feature currently encountered under the PWA and subject to court interpretation is the requirement for the Minister or local authority to act in good faith when dealing with issues of taking and disposal of property. Similar qualifications should be incorporated into the powers for Kāinga Ora when exercising the powers in the PWA.

4. Clarifications

4.1 Some clauses would benefit from clarification or further consideration, as discussed below:

Clause	Law Society Comments
Clause 3(1) The purpose of the Bill is to facilitate urban development that "*contributes to sustainable, inclusive, and thriving communities*".	This statement is unclear and does not provide certainty for decision-makers to determine if the project meets the purpose. It is not clear, for example, whether an urban development must achieve all three of the aspects (i.e. contributes to a community that is sustainable <u>and</u> inclusive <u>and</u> thriving) or just one or two. Consideration should also be given to how the purpose of the Bill is to be applied in relation to the sustainable management purpose of the RMA.

Clause	Law Society Comments
Clause 4 The Bill requires all persons exercising functions to "***take into account***" the principles of the Treaty of Waitangi.	Clause 4 is inconsistent with section 11(1)(b)(i) of the Kāinga Ora Ora–Homes and Communities Act 2019 which requires Kāinga Ora to "***uphold** the Treaty of Waitangi … and its principles*" (emphasis added). These are different levels of obligation and it is not clear whether both must be achieved, or whether one is intended to prevail.
Clause 5 Sets out the principles to be considered for specified development projects, which contain new matters that must be had "*particular regard to*" in addition to those currently contained in sections 6 and 7 of the RMA.	This is a very long list of considerations and no express hierarchy is stated, particularly between this clause and section 7 RMA. These factors may make it complex to apply in practice and the Law Society suggests further clarification would be helpful.
Clause 9: definitions of "*RFR*" and "*RSR*".	This definition could be clarified by referring to the acronym in full as the right of first refusal, or right of second refusal where relevant.
Clause 9: the definition of "*development contribution*" is a new definition for the purposes of the Bill.	There is an existing definition of this term in section 197 of the Local Government Act 2002 and it is questioned whether the clause 9 definition is intended to be different from the LGA definition.
Clause 9: the definition of "*former owners*" includes "*successors*".	There has been debate in the courts over the meaning of successors. A definition of *successors* for the purposes of this Bill should be considered.
Clause 9: the definition of "*planning instrument*" cross-references other definitions, and definitions from the RMA.	This could be clarified by referencing the relevant definitions in the RMA within the definition of "*planning instrument*", so that the separate definitions of district plan, combined planning instrument and regional policy statement could be incorporated into one definition, and the separate definitions deleted from the Bill.

Clause	**Law Society Comments**
Clause 10(1)(a) Development to be for housing, including "*public housing, affordable homes for first-home buyer and market housing*".	The terms *affordable homes for first-home buyer* and *market housing* are not defined and can have different interpretations. A definition would help clarify this.
Clause 10(1)(a) and (b) The definition of "*urban development*" refers to development and renewal of urban environments.	It is unclear whether the term development is intended to cover extensions to existing urban environments. The term *development* is coloured by the use of *renewal*, which suggests that development means only new urban environments.
Clause 10(1)(c) The definition of "*urban development*" refers to "*related commercial, industrial, community or other amenities, infrastructure, facilities, services, works*".	The use of "*related*" may create interpretation issues when considering what the commercial, industrial or community matters are related to. This raises the question whether they are intended to relate to each other or to relate to residential development.
Clauses 14 – 19 Sets out how the Bill relates to other legislation and which pieces of legislation take priority in the event of a conflict.	While guidance on these matters is welcome, given the number of Acts that the Bill is intended to interface with, the potential for conflicts between Acts is high. It would be useful for the Bill to clarify how it relates to the provisions of the Local Government Act 2002, especially as to the setting of development contributions and rating issues.
Clause 28(3) Land within a project area need not be contiguous.	A limitation may be needed as there is the potential for a project area to be on opposite sides of a town without including the town itself. Clarification is needed as to whether a geographic limit would apply, or whether land within a project area needs to be within the same general area.
Clause 30(b)(ii) Criteria for establishing a specified development project includes that the ministers are satisfied that the project objectives are consistent with the "*existing national directions*" under the RMA.	It would be helpful to clarify the meaning of *national directions* for the purposes of this provision. Does it include for instance the "national direction" in Part 5 of the RMA?

Clause	**Law Society Comments**
Clause 30(c) The criteria also include that the ministers are satisfied that the area contains only land that is in an "*urban area"* or that it is generally suitable for "*urban use*".	The phrases "*urban area"* and "*urban use"* are not otherwise defined in the Bill. These terms could be the subject of differing interpretations. Further clarification or definition should be included in the Bill.
Clause 33(a) and 34(1)(f) Both clauses refer to assessments or considerations made by Kāinga Ora at a "*high level*".	The term "*high level*" could be subject to dispute especially on judicial review.
Clause 77 Refers to submissions including an "*electronic address for service*".	The definition of *electronic address for service* needs clarification. The definition of "*electronic address"* in the Unsolicited Electronic Messages Act 2007 includes email, instant messaging and telephone accounts; instant messaging services and telephones are unlikely to be appropriate to be used as an address for service.
Clause 81(2) The independent hearing panel (which hears submissions on the development plan) is not required to make recommendations on each submission individually.	While the panel is not required to make recommendations or provide reasons on each individual submission, it could be clarified that the panel *may* make recommendations or provide reasons on a topic basis. This was an issue in the Auckland Unitary Plan process where submitters seeking relief on a site-specific basis (such as a rezoning request for their particular property) argued that reasons were required to be given for each individual submission in subsequent appeal and judicial review processes.
Clause 89 Kāinga Ora is the consent authority for resource consent applications within the project area.	Cross-boundary applications – applications that involve works partly within the project area (which are subject to the jurisdiction of Kāinga Ora) and partly outside the project area (which are subject to the jurisdiction of the local authority) – are not addressed in the Bill and should be considered.

Clause	**Law Society Comments**
Clause 95(2)(b)(iv) Kāinga Ora may reject a request for a private change to a development plan if the change requested is "*not within the scope of this Act*".	The provision "*not within the scope of this Act*" is ambiguous and is likely to cause confusion in interpretation and application. The phrase "*is not consistent with the purpose of this Act*" may be more appropriate to enable a proposed plan change to be rejected.
Clause 106 Kāinga Ora is given the power to veto consent applications or parts of an application or impose / vary conditions in certain circumstances.	This does not address how clause 106 would apply in a cross-boundary application. There may be circumstances where the local authority and Kāinga Ora have differing views on the application. Cross-boundary applications are not addressed in the Bill and should be considered. (This is referred to above in relation to clause 89.)
Clause 140 Kāinga Ora would be given the power to veto other Notices of Requirement within the specified development area, except those issued by a Minister or those relating to nationally significant infrastructure.	While a right of objection is provided, it is not clear if there is a subsequent appeal right.
Clause 146(3) This provides that if Kāinga Ora has the roading powers for a specified development, "… *Kāinga Ora has all of the roading powers (and not just some of them)*".	The wording of this clause is irregular and unclear. The text either needs to be amended to make the purpose of the provision clear, or the text in brackets should be deleted.
Clause 263(3) This refers to the right of resumption taking precedence over any other interest registered on the title (for example, a mortgage).	The use of "*precedence*" is inconsistent with other property law legislation. The term "priority" is used in other property legislation (such as in the Property Law Act 2007) and may be more appropriate for consistency.

5. Further consideration regarding the operation and implementation of some processes

5.1 **Clause 139** overrides section 176 of the RMA, meaning that Kāinga Ora does not have to obtain the consent of any other requiring authority within a specified development area, but every other requiring authority has to obtain Kāinga Ora's consent. To ensure the other

requiring authorities are aware of what is being proposed, it may be useful to require Kāinga Ora to notify the other requiring authorities of the works it is intending to undertake.

5.2 **Clause 230(a)(ii)** allows Kāinga Ora to prevent a resource consent commencing in accordance with the RMA if a development contribution it has required has not been paid. However, resource consents commence automatically by operation of section 116 RMA. It is therefore unclear how Kāinga Ora would be able to exercise that power, and further consideration of the interaction between the RMA and the Bill is required.

Independent Hearings Panel

5.3 Independent Hearings Panel (IHP) administration should be considered further, in relation to two points:

5.3.1 An IHP must be chaired by a current or former Environment Court Judge, or an alternate Environment Court Judge. **Schedule 3, clause 2(3)** requires the Minister to consult with certain parties before appointments are made to an IHP. This should be extended to include consultation with the Chief Environment Judge about the appointment of Environment Court Judges to an IHP (to address logistical matters such as resources and scheduling).

5.3.2 Membership of an IHP and when someone is no longer a member is referred to in **schedule 3, clause 4**. This does not address a situation where an IHP concludes its recommendations and its decision is appealed and then referred back to the IHP for reconsideration and/or reasons. The Law Society queries whether the panel can be reconvened if members have resigned or retired during the time that the panel was concluded, or whether members can be required to come out of retirement. This was an issue during Auckland Unitary Plan appeals where some members had retired or resigned by the time the appeals were determined.

Right of Resumption

5.4 **Clauses 262 – 266** address the right of resumption. This applies where the title to the land acquired by Kāinga Ora is transferred to a developer for specified work. The land will be subject to a notation that it is held for that specified work and is subject to the Crown's right of resumption. The following practical issues arise with the process relating to the right of resumption:

5.4.1 The Bill allows only Kāinga Ora to request that the right of resumption notation be removed from the title. It is suggested that the landowner should also have a process available to request removal where it is appropriate the notation should be removed. This could be by way of supporting evidence to be provided to the Registrar-General of Land.

5.4.2 The grounds for Kāinga Ora to exercise the right of resumption are subjective and there is no right of objection or appeal. The risks associated with the right of resumption create uncertainty (and may limit developers' ability to obtain funding).

5.4.3 Where the right of resumption has been exercised, it should be made clear that Kāinga Ora takes the land free of all registered and unregistered interests placed on the land in the interim. The Bill is silent on this aspect.

Potential omissions from the Bill

5.5 The Bill is silent on what occurs to existing private burdens on land acquired by Kāinga Ora (such as covenants in gross). The definition of land in the Bill is broad enough to include a covenant in gross. Further consideration is needed as to the consequences of this, including:

5.5.1 where these are acquired by Kāinga Ora, if separate compensation is required; and/or

5.5.2 whether Kāinga Ora would require the power to extinguish the existing burdens.

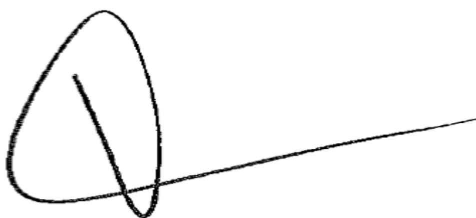
5.6 While some conservation burdens are addressed in the Bill and there are processes to be followed by the Minister for Conservation, the Bill does not mention what occurs if the land to be acquired is subject to a QEII covenant.

5.7 The term *"occupiers"* is used throughout the Bill but is not defined. Further consideration is needed of the meaning of occupier for these purposes as, for example, a residential tenant may not need to be notified of an intention to acquire the land but they should be notified of an intent to access the building.

6. The Bill's cross-references to processes in other Acts

6.1 The Bill relies heavily on cross-references to other legislation, such as the RMA, Public Works Act 1981, Reserves Act 1977, Utilities Access Act 2010 and the Local Government Act 2002. Many clauses in the Bill refer to provisions in other statutes as applying *with necessary modifications* which are then listed in the Bill.[1]

6.2 The frequent use of cross-references with modifications makes the Bill unwieldy and difficult to use. This could be improved by copying the statutory provisions into the Urban Development Bill and making the relevant modifications listed. (We acknowledge this would require the Urban Development Act to be amended if the other legislation is subsequently amended. However, that will be the case regardless, given the Bill's incorporation of the other statutory provisions via cross-referencing.)



Andrew Logan
Vice President
14 February 2020

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[1] For example, clause 65(5) refers to the application of the Local Government (Rating) Act 2002; clauses 66, 96, 107(3), 120, 127, 137(5), 138 (and others) refer to the application of RMA processes.