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Resource Management Review Panel
c/- Ministry for the Environment
Wellington

By email: rmreview@mfe.govt.nz

Re: Transforming the resource management system: opportunities for change – issues and options paper

Introduction

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Resource Management Review Panel's (Panel) *Transforming the Resource Management System: Opportunities or change – Issues and options Paper* (paper).

This submission provides some general observations and identifies aspects of the current system that work particularly well, or that could benefit from streamlining or clarification.

General observations

The Law Society encourages the Panel to carefully consider the information about alleged failings of the current system. The paper identifies a number of perceived failings in the current system. However, there are some policy positions that appear to be presented in the paper as generally accepted failings of the Resource Management Act 1991 (RMA), when that may not be the case.

For example, one failing is described as "a focus on managing the effect of resource use rather than planning to achieve outcomes". However, it is not an 'either/or' scenario – both are needed to sustainably manage resources. Despite the effects-based focus of the RMA, there is nothing in the RMA that prevents or precludes local authorities from planning to achieve desirable environmental and development outcomes.

The paper describes another failing as insufficient recognition of the Treaty and lack of support for Māori participation. However, there is a long-standing body of case law regarding the importance of the Treaty and Māori relationships with land, waters and other taonga. As the Privy Council in *McGuire v Hastings District Council* noted, sections 5, 6(e), 7(a) and 8 "are strong directions to be borne in mind at every stage of the planning process."[1] Further, and as the paper notes, there are provisions which would provide for greater participation of Māori in governance via the transfer of RMA functions to iwi, joint management agreements and/or appointment of iwi as a heritage protection authority. While the paper notes the provisions have not been (or only rarely) used, this does not necessarily mean the provisions themselves are ineffective. It may just mean that changes are required to better enable, encourage or require their use. In other words, it should not be assumed that failures in implementation are due (in whole or in part) to inadequacies in the provisions themselves.

1 *McGuire v Hastings District Council* [2002] 2 NZLR 577 at [21].

Some aspects of the paper contemplate significant changes to fundamental aspects of the resource management system. Examples include local decision-making, an effects-based enabling framework, and public participation. Changes to these or any other parts of the system are matters of policy on which the Law Society expresses no view. However, the Law Society encourages the Panel to carefully consider the interconnections between the different components of the resource management system, as changes to one part may have consequences for other parts of the system.

For example, while increased provision for spatial planning might be seen as a positive change, it would call into question the effects-based philosophy underpinning the Act generally (and Part 2 in particular). It is difficult to envisage how RMA plans could include spatial planning objectives and policies without reconsidering how the purpose of the Act is expressed, which would require, in turn, revision of sections 6 – 8.

Similarly, reducing opportunities for public participation might be seen as a positive change, but may call into question the adequacy of decentralised decision-making in the absence of the checks and balances provided by public participation.

The Law Society also encourages the Panel to consider the issue of access to justice. While the plan-making process is structured to be an inclusive public process, the reality has been that it is dominated by well-resourced private interests and non-governmental organisations. This has been even more pronounced for the one-stage hearing processes adopted recently in Auckland and Christchurch, which have involved tight timeframes and complex processes. It has also been evident in other hearing processes where submissions have been grouped into numerous topics requiring many attendances at council hearings even for confined submissions. If streamlining of the plan-making process is prioritised, for example by greater use of such one-stage processes, the corollary will likely be increased community dissatisfaction and reduced community participation. This in turn is likely to negatively affect public acceptance of the end result.

Parts of current system that function well

To assist the Panel, the Law Society has identified the following aspects of the current system that it considers function particularly well:

Section / Aspect	**Comment**
Part 3	
Division of obligations regarding resource use in ss9, 11-15	Clear division of council functions, with the exception of overlap of jurisdiction over beds of lakes and rivers and lack of clarity around treatment of diffuse discharges associated with land uses.
Provision for existing use rights in ss10 and 20A	These provisions have provided certainty for existing activities and the level of investment that they represent.

Part 4	
Accredited Commissioners	Significantly improved professionalism and quality of outcomes generally.
Division of functions and powers between regional councils and territorial authorities	Clear division of council functions, with the exception of overlap of jurisdiction over beds of lakes and rivers and lack of clarity around treatment of diffuse discharges associated with land uses.
Part 5	
Plan and rule structuring	Rule categories are well understood and a large body of expertise has built up around good practice plan drafting.
Ability to prepare combined regional and district documents (s 80)	This has been used to good effect on occasions (i.e. the ability to prepare a combined Auckland Unitary Plan).
Part 6	
Consideration of applications	There is a clear and consistent body of case law regarding the matters that need to be considered in determining a resource consent application under s 104. The Court of Appeal in *Davidson* has clarified the ongoing relevance of Part 2 in consent decisions, resolving the uncertainty created following the *King Salmon* Supreme Court decision.
Appeal rights	The ability to appeal first instance decisions to the Environment Court on a *de novo* basis provides an appropriate check and balance on the quality of council decision making.
Certificates of compliance and existing use certificates	The ability to apply for these certificates provides an appropriate safeguard for resource users in respect of proposed plan changes.

Part 8	
Designations	The designation process (including applying to become a requiring authority) is well understood and generally works. The ability to appeal the Requiring Authority's decision to the Environment Court on a *de novo* basis also provides an appropriate check and balance on decision making.
Part 10 Subdivisions	The subdivision process is well understood and generally works. There is also significant interplay between the RMA subdivision provisions and relevant property law statutes, such that any changes to the RMA in this regard could result in other unintended outcomes/issues.
Part 11	
Environment Court	The availability of a specialised supervisory Court is a substantial benefit to the existing Act that needs to be retained. If greater efficiencies are sought, consider reduction in subsequent avenues of appeal e.g. direct appeal to the CA and only one further right of appeal with leave.
Part 12	
Declarations	The process of applying for/the Environment Court making declarations to assist application of the Act works well. This could be expanded to allow the Environment Court to make declarations regarding notification decisions.
Schedule 1	The original First Schedule plan-making process is well understood and generally works.

Parts of the current system that would benefit from streamlining or clarification

To assist the Panel, the Law Society has identified the following aspects of the current system that could benefit from streamlining or clarification:

Section / Aspect	**Comment**
Part 3	
River and lake beds	The overlap in jurisdictions creates confusion.

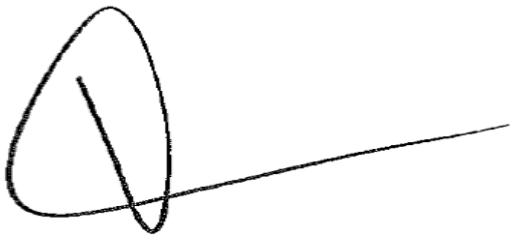
Section / Aspect	Comment
Diffuse discharges	Clarity required as to whether a diffuse discharge is a land use issue involving an effect on water quality or a discharge issue, or both.
Part 4	
Section 32	Could be pared back to its original rationale of requiring a robust justification for restrictions on land use, rather than requiring assessment of competing intangible values.
Powers over hearings	Could be updated with increased discretionary powers (e.g. to direct expert conferencing and provide greater scope for timetabling directions) and broadened so clearly covers Plan hearings.
Provision of an Environmental Ombudsperson	A form of independent local government regulator/auditor could provide an avenue for resource consent applicants to cost-effectively address situations where processing officers are unreasonably delaying the processing of an application (e.g. they are raising concerns based on their personal views or an incorrect interpretation of the RMA/relevant plan provisions).
Part 5	
National policy statements and national environmental standards	The number of mandatory national instruments could be increased, requiring certain NPS and NES to be produced (potentially covering all matters of national importance), either individually or perhaps as a single coherent "Government Policy Statement". Further, to remove any potential confusion or debate all NPS could include direction as to when each matter of national importance (or NPS) is to be given priority (e.g. when the provision of nationally significant infrastructure takes priority over the protection of outstanding natural landscapes or the coastal environment, or when the protection of highly productive land take priority over the need to provide for urban development).

Regional Policy Statements	If there is to be better use of national direction, the utility of the RPS may decline, unless focused on spatial planning. The current trend is for RPS to be increasingly detailed, leading to substantial duplication with regional and territorial authority plans with little of substance gained.
Plan-making process	The number of relevant documents requiring consideration during the preparation of every planning document could be pared back, to reduce complexity and repetition of plan provisions (particularly objectives and policies).
Part 6	
Remove deemed permitted activities	Deemed permitted activities (both boundary and marginal or temporary non-compliance) have not simplified the RMA and could be removed. Such matters can easily (and are likely) to be provided for as controlled activities (at worst) in plans, so these provisions add additional complexity to the RMA for little practical benefit.
Ability to reject applications and make further information requests	Consistent with the outcome in *NZKS v Marlborough District Council*, clarify that applications can only be rejected under s 88 when they are fundamentally deficient in basic supporting information (i.e. council officers should not be able to reject an application under s 88 simply because they want further information to better understand the proposal, which can be requested under s 92).
Notification	The revised notification tests remain problematic and could be reviewed again, preferably in a way that reduces the possibility for (protracted) debate with council officers as to whether notification is required and an avenue for challenge (such as a merits appeal to the Environment Court) that recognises the judgment inherent in decisions.

Lapse	Clarification could usefully be provided on when a consent has been given effect to and, if not, what is required for substantial progress or effort where multiple consents are involved and performance is provided for or expected to occur in stages. A process for confirming a consent has been given effect to, or forewarning a potential lapse (with a challenge process) could improve the workability.
Part 9	
Water Conservation Orders	The role of WCO in the policy framework should be reconsidered, given the potential duplication with the NPS Freshwater Management and the regional plan provisions for both water quality and quantity. Existing WCO could be transitioned into the relevant regional plan(s) in the event the tool is removed.
Part 11	
Schedule 1	
Plan and policy making processes	Having three separate processes creates confusion and unnecessary complexity. As noted above, the original process works well and could be improved with proactive case management.

We hope these comments are helpful to the Panel. If further discussion with the Law Society's Environmental Law Committee would assist, please do not hesitate to contact the committee convenor Bronwyn Carruthers, through the Law Society's Law Reform Adviser Emily Sutton (Emily.Sutton@lawsociety.org.nz).

Yours faithfully



Andrew Logan
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