New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Ministry for the Environment
Wellington

Re: Exposure draft of the National Policy Statement for Indigenous Biodiversity

1. Introduction

1.1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (the Law Society) welcomes the opportunity to comment on the exposure draft for the National Policy Statement for Indigenous Biodiversity (NPS-IB).

1.2. This submission has been prepared with input from the Law Society's Environmental Law Committee.[1]

2. Fundamental concepts

Maintenance of indigenous biodiversity

2.1. One of the fundamental concepts said to underpin the NPS-IB is the maintenance of indigenous biodiversity. This is stated to require no reduction in, among other things, the size of populations of indigenous species, indigenous species occupancy across their natural range, and the full range and extent of ecosystems and habitats.

2.2. In the Law Society's submission, it is important that the scope of this concept is clear so that its application accurately reflects the intention behind it. For example:

(a) a requirement that there be no reduction in the size of populations of each indigenous species would mean that the loss of a single species member would be regarded as important. While this would be the case in relation to species that are acutely threatened/near extinction, the Law Society queries whether the same is the case for common indigenous species which are not threatened. The implication is also that for every species, there may be one or more sub-populations. If intended, this raises the question as to how such sub-populations are to be identified, so as to permit analysis of whether maintenance of indigenous biodiversity has been achieved.

(b) A requirement that occupancy of indigenous species across their natural range not be reduced similarly could be read as requiring that occupancy be preserved at every

[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/.

location within their natural range, down to the size, for instance, of a single concrete pad foundation of a house or other building.

(c) Reference to the full range and extent of ecosystems and habitats, read in conjunction with the definition of "habitat" set out in clause 1.6, could similarly be interpreted to require no reduction in the locations where indigenous flora and fauna may be found.

2.3. If such outcomes are not intended, consideration should be given to introduction of a materiality test. This would act to ensure that indigenous biodiversity is indeed maintained where that is important (as provided for by policy 8), but not necessarily that it be required to be maintained in every instance at every location, if that does not have more than minor adverse effects on indigenous biodiversity.

2.4. The Law Society also considers that clarification is required as to how the populations are identified, if it is intended that something other than the entire population of a particular species is the reference point.

Effects management hierarchy

2.5. Clause 1.5(4) provides a hierarchy of actions to manage any potential adverse effects of an activity covered by the NPS-IB, ranging from avoiding adverse effects where practicable at one end, to avoiding an activity if adverse effects cannot be adequately minimised or compensated.

2.6. Step (c) provides that "where adverse effects cannot be demonstrably minimised, they are remedied where practicable." The Law Society notes that 'minimised' could be interpreted as meaning reduced to the lowest practicable level in the circumstances (as opposed to making any adverse effects minimal). Minimisation in this way is always possible and does not necessarily result in acceptable adverse effects. If there are no actions that can be taken to reduce adverse effects, then the adverse effects have still been minimised. In the Law Society's submission, step (c) could be reworded as:

> "To the extent that minimisation of adverse effects results in more than minor residual adverse effects, those effects are remedied where practicable."

This would place the focus on the effect, rather than the act of minimisation.

2.7. A similar point arises in relation to step (d) which provides that 'where more than minor residual adverse effects cannot be demonstrably avoided, minimised, or remedied, biodiversity offsetting is provided where possible." For the same reasons, this step could be reworded along the following lines:

> "Where avoidance, minimisation, or remediation in accordance with (a)-(c) above does not demonstrably result in minor or less than minor residual adverse effects, biodiversity offsetting is provided where possible."

2.8. Step (f) directs that if biodiversity compensation is not appropriate, the activity itself is avoided. This assumes that Steps (a)-(d) have not resulted in minor or less than minor residual adverse effects. This step could be reworded to make it clear that avoidance is

appropriate where no other forms of mitigation would result in minor or less than minor residual adverse effects.

3. Interpretation

3.1. In relation to the interpretation section of the NPS-IB, the Law Society makes the following submissions:

(a) *Biodiversity offset*: This definition requires, amongst other things, a measurable net gain in "type, amount, and condition" of indigenous biodiversity when compared to that lost. The rationale for requiring all three of these is unclear. In particular, a gain in the 'type' of indigenous biodiversity appears to be more in the nature of compensation rather than offsetting, because it provides something different to the status quo. A requirement for a measurable net gain in the 'condition' of indigenous biodiversity might similarly depend on the current condition at the location in question. If the condition of that indigenous biodiversity currently is very high, a measurable net gain in that condition might neither be possible nor required.

These issues might be addressed by framing the requirements as alternatives ("type, amount, or condition") or alternatively, reframing the requirement to refer to achievement of "a measurable net gain in indigenous biodiversity compared to that lost, having regard to the type, amount, and condition (structure and quality) of the resulting indigenous biodiversity".

The use of the term 'measurable' in this definition may also be challenging in practice. There will often be offsetting options available, but their benefits may not always be measurable, or it may be disproportionate to require measurement of the precise nature or extent of the offset. In addition, the policy rationale for considering a response which is not easily measured to be compensation (and consequentially assessed lower on the effects hierarchy), rather than offsetting, is not clear. The Law Society submits that the key consideration is whether the decision-maker has confidence that the benefits are likely to exceed the costs. This might be captured by utilising the terminology of the description of the effects hierarchy and referring to a "demonstrable" net gain and deleting the word "measurable" where it appears in the first line on the basis that point (b) describes the conservation outcome required.

(b) *Functional need:* This definition refers in two places to "environment". That term is given a broad definition in the Resource Management Act 1991 as including:

i. ecosystems and their constituent parts, including people and communities; and
ii. all natural and physical resources; and
iii. amenity values; and
iv. the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs [(i) to (iii)] or which are affected by those matters.

The NPS-IB appears to use 'environment' in a more limited way, to refer to a particular location. The definition of 'functional need' could therefore be reworded as meaning:

"… the need for a proposed activity to traverse, locate or operate in a particular area because the activity can only occur in a location of that kind."

This would equally apply to the definition of 'operational need', which similarly refers to 'environment'.

(c) *Habitat*: This definition refers to the area where an organism or ecological community lives or occurs naturally. Given the extent of indigenous biodiversity in New Zealand's urban communities, and well-known examples of indigenous flora and fauna living on or in urban structures, the Law Society queries whether this definition should refer to natural areas or environments.

(d) *Natural range*: This definition refers to the geographical area within which a particular species "can be expected to be found naturally (without human intervention)". The current range of a wide variety of species is the product of past human intervention. The definition of this term requires some clarification as to whether it is taking an historic perspective – identifying the area(s) within which particular species were present pre-human occupation – or a current perspective as to where species might currently be expected to be found in the absence of further human intervention.

(e) *Terrestrial environment*: This definition refers to land and associated natural and physical resources "above" mean high-water springs. It does not appear that the focus is on relative elevation. Consistent with the definition of 'coastal marine area' in the Resource Management Act, this definition might be clearer if it referred to areas "landward of" mean high-water springs. In the same definition, the reference to the coastal marine area being excluded is unnecessary. There are no areas of the coastal marine area landward of mean high-water springs that are not water bodies. Reference to the coastal marine area could therefore be deleted.

4. Objectives and policies

4.1. Clause 2.2 sets out a list of 17 policies. In the Law Society's view, the interrelationship between the policies and the more specific clauses focussed on implementation could benefit from being clarified. By way of example, policy 3 provides that a precautionary approach be adopted when considering adverse effects on indigenous biodiversity. This concept is further expanded on in clause 3.7, which provides that local authorities must adopt a precautionary approach where dealing with unknown or potentially significantly adverse effects. It is not clear whether the effect of policy 3 is to promote a precautionary approach being adopted in other undefined situations. If the objectives and policies are intended to act as a set of overarching or higher-level principles, we suggest that this be covered by an explanatory introduction at the beginning of Part 2. In relation to policy 3 in particular, the Law Society suggests that this be amended to include the more detailed requirement in clause 3.7. If this approach were taken, clause 3.7 could then be removed, as it would be sufficiently covered by policy 3.

4.2. Policy 4 provides that 'Indigenous biodiversity is resilient to the effects of climate change." As set out in *Auckland Regional Council v North Shore City Council*, a policy is a course of

action.[2] This distinguishes policies from objectives. As currently drafted, policy 4 is more appropriately seen as an objective, as it sets out an intended outcome rather than promoting a course of action to bring about this result. Alternatively, policy 4 could be redrafted to identify what course of action is required (for example, by importing the wording from clause 3.6 in regard to promoting the resiliency of indigenous biodiversity to the effects of climate change).

4.3. Policy 7 provides for protecting significant natural areas (**SNAs**) by avoiding and managing adverse effects from new subdivision, use and development. If avoidance is given the meaning identified by the Supreme Court noted in *Environmental Defence Society v The New Zealand King Salmon Company Ltd*,[3] it is not logically possible to both avoid and manage adverse effects. If adverse effects are avoided, there is nothing left to manage. The Law Society submits that these should be framed as alternatives (i.e., by rewording the policy to refer to "avoiding or managing").

4.4. Policy 15 relates to management of highly mobile fauna and directs that populations be maintained "across their natural range". This could be interpreted to refer to their geographical range. If that is not intended, and the intention is rather to refer to the population of such fauna being maintained, it is submitted that this policy should be reworded to refer to maintaining "populations within their natural range."

5. Implementation

Assessing areas that qualify as significant natural areas

5.1. Clause 3.8 directs that where a territorial authority becomes aware that an area may qualify as an SNA, it must assess the area and if a new SNA is in fact identified "include it in the next plan or plan change notified by the territorial authority". Plan changes notified by territorial authorities can be either broad ranging in extent or alternatively they can be geographically or topic specific. A plan change might also be notified by a territorial authority pursuant to a request from an individual for a change to a district or regional plan.[4] It may be neither efficient nor practicable to 'tack on' a new SNA to a plan change in such circumstances. The Law Society recommends that consideration be given to modifying this requirement to direct notification in the next Plan Change in which it might *practicably* be included.

Managing adverse effects on SNAs of new subdivision, use, and development

5.2. Clause 3.10(2) identifies a series of effects that must be avoided. Because of the direction in the Supreme Court's *King Salmon* decision, as above, it is important that a direction of this nature accurately captures the range of activities sought to be included, and does not unintentionally include other activities.

5.3. As currently drafted this clause would provide a blanket prohibition on certain activities that may go further than intended:

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2 [1995] 3 NZLR 18, at 23.

3 [2014] NZSC 38 at [92]-[97] "not allow" or "prevent the occurrence of".

4 See part 2, Schedule 1 to the Resource Management Act 1991.

(a) The first effect defined includes loss of ecosystem "extent". This could be read to preclude a situation where ecosystems cease to extend over quite small areas (e.g., the area covered by the concrete pad of a house or other building).

(b) The third identified effect refers to "fragmentation" of SNAs. Fragmentation is defined in the interpretation section to include "an altered spatial configuration of habitat for a given amount of habitat loss". It is unclear why an alteration in the configuration of habitat that does not cause a material adverse effect needs to be avoided, as such circumstances may be capable of being appropriately mitigated through applying the effects management hierarchy.

(c) The fifth identified effect to be avoided is a reduction in the population size "or occupancy" of threatened, at risk (declining) species that use an SNA "for any part of their life cycle". The policy rationale for constraining reduction in the population size of such species is obvious. The rationale for restricting occupancy that does not affect the population size is, it is submitted, less clear, particularly given that that could be read to preclude removal of a single tree, or even a single tree branch. The Law Society recommends consideration be given as to whether such outcomes are intended. One solution might be to clarify what is meant by 'occupancy', potentially excluding casual occupation in one location when there are multiple alternative habitats that could and would be used if that location is not available.

Exceptions to Clause 3.10

5.4. Clause 3.11(3) provides an exception to clause 3.10(2) for single dwellings on existing allotments. The exception is subject to a precondition that there is no alternative location where "a single residential dwelling" can be constructed in a way that avoids the relevant adverse effects. Single residential dwellings come in a variety of shapes and sizes. So called micro-homes could be less than 50m^2 in area. It is difficult to understand why availability of an alternative site for a micro-home should preclude construction of a larger dwelling if the latter is what is proposed.

5.5. In addition, a residential dwelling might be able to be constructed without adversely affecting the SNA on the property, but have unacceptable other effects (e.g., exacerbating a natural hazard risk), or alternatively be impractical (e.g., because of steep topography).

5.6. The Law Society suggests that the reference point should be a single residential dwelling of the same size as that proposed and the test be whether it can "practicably" be constructed in a manner avoiding the relevant adverse effects.

Geothermal SNAs

5.7. Clause 3.13 provides for the situation where a local authority has classified its geothermal systems. Geothermal systems and geothermal SNAs are managed by regional councils and there are currently such classifications in the regional policy statements and regional plans for the Waikato and Bay of Plenty regions. The relevant territorial authorities implement the applicable regional policy statement, but may not necessarily have geothermal system classifications of their own. The Law Society recommends consideration be given to referring

to a geothermal system classification applying in the region in which the geothermal SNA is located.

Plantation forests with SNAs

5.8. Clause 3.14 provides a separate management regime for SNAs within plantation forests. Clause 3.16 separately provides for indigenous biodiversity outside SNAs. If that indigenous biodiversity is located within a plantation forest, it would appear that more onerous management requirements might be imposed than those required by clause 3.14. This would appear to be counter intuitive. It is suggested that the regime specified in clause 3.14 should apply both to SNAs and to other indigenous biodiversity within (and adjacent to) a plantation forest.

Existing activities affecting SNAs

5.9. Clause 3.15 provides a limited exception for existing activities. One of the preconditions for continuation of existing activities in section 3.15(2)(b) is that there be no reduction in the "extent" of an SNA. There is no lower limit on the scale of change that is precluded. It would therefore appear that, for example, clearing or trimming indigenous vegetation to remove flammable kanuka or manuka around residential homes in accordance with Fire Service recommendations would not be permitted in future because it would reduce the 'extent' of the SNA within which that vegetation is located. Similar considerations would likely apply to the removal of vegetation required by regulations to ensure there is an appropriate buffer around electricity lines.

5.10. Actions that degrade the ecological integrity of the SNA are already precluded. The Law Society queries whether a second test based on 'extent' is required, or alternatively, whether a test of the materiality of the loss should be inserted (i.e., to allow for loss in extent that does not result in a material loss of indigenous biodiversity in the context of the SNA concerned).

5.11. If the specified pre-conditions do not apply, clause 3.15(3) directs that adverse effects are to be managed in accordance with clause 3.10. It would appear possible that existing activities might fall within one or more of the exceptions in 3.11 and that, accordingly, the direction in clause 3.15(3) produces an internal contradiction. That contradiction might be addressed by adding a reference to clause 3.11 at the end of clause 3.15(3) (i.e., that in the specified circumstances, adverse effects must be managed in accordance with both clauses 3.10 and 3.11).

5.12. In addition, the definition of existing activity refers to subdivision, use or development that is "lawfully established at the commencement date." It is unclear how this applies to subdivision, use or development that has been consented but not implemented, or only partially implemented. To address this uncertainty, the definition could be amended to refer to subdivision, use or development that is "lawfully established or authorised at the commencement date."

Maintenance of improved pasture

5.13. Clause 3.17 includes a definition of improved pasture that is identical to the definition in the National Policy Statement for Freshwater Management 2020. However, in parallel with release of the exposure draft for the NPSIB, the Ministry for the Environment has released an exposure draft of amendments to the NPSFM that deletes the latter definition and substitutes tests related to the percentage of exotic pasture species. The Law Society submits that these two National Policy Statements should have consistent language and consistent meanings in this regard.

5.14. More generally, the same logic that would suggest specific provision for maintenance of improved pasture might be considered to apply to lawns and gardens in both urban and non-urban areas that contain some indigenous biodiversity. The Law Society recommends consideration be given to broadening the ambit of this exception to include existing forms of cultivation not being managed for livestock grazing.

Restoration

5.15. Clause 3.21(2)(e) refers to "any national priorities for indigenous biodiversity protection" without identifying where and how such priorities might be specified. This would appear to be a gap in the exposure draft that should be remedied.

Information Requirements

5.16. Section 3.24 establishes a regime that requires resource consents sought "in relation to an indigenous biodiversity matter" to include an ecological report. The phrase "in relation to an indigenous biodiversity matter" is not defined in the NPS-IP. In the Law Society's view, this should be clarified to ensure it is clear when such a report should be required. Given obtaining an ecological report covering the matters covered in clause 3.24(2) is likely to impose costly requirements on resource consent applicants, it should be defined in a way that has regard to both the costs it imposes on private landowners and the potential benefits in terms of maintenance of indigenous biodiversity.

5.17. The Law Society also suggests that the word 'and' should be added to the end of clause 3.24(2)(f)(iii), to make clear that subclause (g) is in addition to subclauses (a)-(f).

6. Appendix 4: Principles for biodiversity compensation

6.1. Appendix 4 sets out a framework of principles to be applied when applying a biodiversity compensation scheme.

6.2. Principle 2(a) outlines that biodiversity compensation is not appropriate where the affected indigenous biodiversity is vulnerable. It is unclear what is meant by 'vulnerable', which has the potential to be construed broadly, making biodiversity compensation unavailable in a large number of cases. That could have significant implications, given that biodiversity compensation is the final option available for proposals to meet the effects management hierarchy. The Law Society suggests that the use of 'nationally vulnerable' status from the Department of Conservation's New Zealand Threat Classification System manual (or equivalent) would be appropriate. We note that this publication is already used in the NPS-IB to define the terms 'Threatened', 'At Risk' and 'At Risk (Declining)'.

6.3. Principle 2(b) outlines that biodiversity compensation is not appropriate where effects on indigenous biodiversity are uncertain, unknown, or little understood, but potential effects are significantly adverse. The terms "uncertain, unknown, or little understood" are themselves uncertain and consideration should be given to clarifying these terms, particularly given the implications if they apply. More broadly, the concept of adaptive management has been utilised by decision-makers, with guidance provided in the Supreme Court's *Sustain our Sounds Inc v New Zealand King Salmon Company Ltd* decision.[5] It is unclear how these principles may affect the use of adaptive management techniques.

7. Next steps

7.1. We are 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

David Campbell
Vice-President

[5] [2014] NZSC 40, paras [124] to [140]. Discussion of international jurisprudence at paras [109] to [123].