New Zealand Law Society
Te Kāhui Ture o Aotearoa

Resource Management (Freshwater and Other Matters) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

27 June 2024

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Resource Management (Freshwater and Other Matters) Amendment Bill (**Bill**).

1.2 This submission has been prepared with assistance from the Law Society's Environmental Law Committee and Climate Change Law Committee.[1] It reflects the Law Society's concerns with the Bill as drafted. It also comments on matters of workability and clarity in drafting. Where possible, amendments have been proposed to address these issues.

1.3 The Law Society **wishes to be heard** in relation to this submission.

2 Background

2.1 The Bill aims to reduce the regulatory burden on farmers by making targeted changes to the Resource Management Act 1991 (**RMA**).

2.2 The Bill targets the National Policy Statement on Freshwater Management 2020 (**NPSFM**), the National Policy Statement for Indigenous Biodiversity 2023 (**NPSIB**), and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020 (**NES-F**). The Bill also proposes changes to the Resource Management (Stock Exclusion) Regulations 2020.

2.3 We note that there are six key changes in the Bill. They are:

(a) Exclusion of the hierarchy of obligations in the NPSFM from resource consenting.

(b) Repeal of the low slope map and associated requirements from stock exclusion regulations.

(c) Repeal of the permitted and restricted discretionary activity regulations and associated conditions for intensive winter grazing from the NES-F.

(d) Alignment of the provisions for coal mining with other mineral extraction activities under the NPSIB, NPSFM, and NES-F.

(e) Suspension of the requirement for councils to identify new significant natural areas (**SNAs**) under the NPSIB for three years.

(f) Amendment of the process for developing or amending national direction.

3 Key concerns

Limited Consultation

3.1 The Departmental Disclosure Statement (**DDS**) notes that consultation has been limited on all of the proposals included in the Bill. Some proposals did not include a full range of options. Other proposals contained only a constrained analysis of options.[2]

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1 More information on the Law Society's Law Reform Committees can be found here: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/

2 DDS at 2.3.1 and 2.4.

3.2 While we acknowledge that there is a public consultation process available on the Bill via the select committee process, we consider that the limited opportunities for consultation on the proposals in the Bill, the lack of options analysis, and the constrained timeframes may affect the ability of submitters to understand and express their views on the impacts of the changes. This in turn may undermine the select committee process.

3.3 The Law Society supports legislative procedures that promote democracy and transparency by allowing select committees and the public to give proper consideration to legislation passed by the House. While urgency can be, in certain circumstances, necessary and justified, we are concerned about the limited consultation timeframes for scrutiny of this Bill.[3]

Treaty impact

3.4 Further, we note that a full assessment of Treaty impacts including the Crown's Treaty settlement commitments has not been possible due to the limited consultation and time frames.[4]

3.5 The Law Society considers that the lack of consultation with tangata whenua and the limited analysis of impacts on Treaty obligations and settlements means that there is a gap in the relevant information available to the select committee in making its report. While that information may come forward through the submission process, again the short timeframes and limited information and analysis, may mean only partial information is provided. This in turn may lead to litigation.

4 Significant natural area identification

Clause 21

4.1 Clause 21 inserts a new section 78 which modifies the obligations of local authorities under the NPSIB. These modifications are time-limited, for three years.

4.2 The Law Society considers that the relationship between section 6(c) of the RMA, and Subclause (5) is unclear. Section 6(c) requires that all persons exercising powers and functions under the RMA must recognise and provide for the protection of areas of significant indigenous vegetation or significant habitats of indigenous fauna (irrespective of whether they are currently included in an RMA plan).

4.3 Section 78(5) could be read as a direction that Plan provisions implementing section 6(c) through identification of SNAs should not be given legal effect. In addition, framing the legislative instruction in the negative means that it is not clear how such an area should be regarded. Further clarification is recommended to avoid the litigation that will otherwise almost inevitably result.

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3 We note that the repeated use of urgency has been raised as a concern by the Law Society several times recently, including in the Law Society's submission on the Resource Management (Extended Duration of Coastal Permits for Marine Farms) Amendment Bill submission filed two weeks ago (14 June 2024).

4 DDS at 3.2.

5 National direction development or amendment

Clause 7

5.1 Clause 7 inserts a new section 32AB. This section sets out how an evaluation report for a national direction is to be undertaken. The language used in the clause differs significantly from other evaluation report sections and includes requirements that are not specific, measurable, clear, or time bound.

5.2 For example, subclause (2) requires the analysis for the report to "begin early in the process of developing the proposal" and subclause (3) requires the report to be prepared and presented in a way that is "cost-effective" and "useful for decision-makers and the public". Such matters have a high degree of subjectivity, and it may be difficult to determine whether the obligations have been complied with. Without improved clarity, clause 7 would likely present a risk of unnecessary litigation.

5.3 The Law Society recommends rewording clause 7 or providing further clarification of what is intended.

Clause 10

5.4 Clause 10 inserts a new section 44(3) which expands the reasons for which the Minister is exempted from following the standard process for amending the national direction. Subclause (3) refers to amending the time frame for the implementation of any part of a national environmental standard.

5.5 No restriction is imposed on such amendments, meaning any time frame can be amended by any length, without having to first undergo a public process. The absence of limits or guidance on time frame amendments could potentially undermine the purpose of the standard.

5.6 The Law Society suggests that consideration be given to placing parameters or guidance around the Minister's amendment of a time frame.

Clause 13

5.7 Clause 13 repeals sections 47 to 51 of the RMA. These sections set out the requirement for an independent Board of Inquiry (**BoI**) process on a national direction proposal to amend or establish a national environmental standard or a national policy statement.

5.8 Instead, the Bill enables the Minister to make decisions on national directions the Minister has proposed. Having the Minister as both the proponent of, and decision-maker on, a national direction instrument puts the process at risk of politicisation, policy shifts with each change of government, and decreased public confidence in the process.

5.9 The Supplementary Analysis Report (**SAR**) discusses and discounts the potential loss of stakeholder engagement and does not acknowledge the advantage of a BoI process as an independent expert panel.[5] While iwi, local government, and the public will still have the opportunity to submit proposals under the 'alternative' section 46A process, and current practice allows for two to three months' notice for submissions on a proposal, it is

[5] SAR at paras 21 – 26.

suggested that stricter controls on the definition of an 'adequate' time frame are necessary if the BoI process is to be eliminated and Ministerial control given over decision-making.

5.10 In addition, if clause 13 is to proceed, the Law Society suggests that further consideration be given to including additional checks and balances to ensure it is clear what process must be followed, and what matters must be considered before the Minister makes a decision.

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