New Zealand Law Society
Te Kāhui Ture o Aotearoa

Resource Management (Consenting and Other System Changes) Amendment Bill

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

4 February 2025

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 (Consenting and Other System Changes) Amendment Bill (**Bill**). This submission has been prepared by the Law Society's Environmental Law Committee.[1]

1.2 The submission provides feedback in two parts:

(a) The Law Society's concerns about the workability and possible indirect consequences of a proposal in the Bill to limit hearings to where the consent authority considers that it lacks sufficient information.

(b) Tabulated comments on specific clauses.

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

2 Issues with limiting hearings to where further information is required

2.1 Section 100 of the Resource Management Act 1991 (**RMA**) relates to the obligation to hold a hearing and presently provides that:

> **100 Obligation to hold a hearing**
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> A hearing need not be held in accordance with this Act in respect of an application for a resource consent unless—
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> (a) the consent authority considers that a hearing is necessary; or
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> (b) either the applicant or a person who made a submission in respect of that application has requested to be heard and has not subsequently advised that he or she does not wish to be heard.

2.2 Clause 34 of the Bill would replace section 100 to provide that, except for a limited requirement to consult with iwi where a Treaty settlement has entitled them to a hearing, a consent authority *must not* hold a hearing if it determines that it has sufficient information to decide the application. This is a potentially significant change. The Law Society acknowledges the intentions behind the change; however, it is concerned that the proposed approach is not entirely consistent with well-established wider reasons for enabling participation (including by way of a hearing) in resource management decision-making, and that reducing hearings could have unintended risks.

2.3 There will be contending arguments about the purposes and necessity of conducting a public hearing, just as there are relating to public notification of resource consent applications. The drafting of the proposed change indicates a view that a hearing, where it occurs, does so to gather further information and as such may not be needed where information received by way of written submissions (or, if non-notified, by way of the application and supporting materials) is deemed 'sufficient'.

2.4 In the Law Society's view, a hearing assists in achieving two further, and equally important, purposes: to test information, in turn enabling the decision-maker to assess its reliability; and, further, to do so in a public forum, thereby enhancing public

[1] More information about the Law Society's law reform sections and committees is available on the Law Society's website: NZLS | Branches, sections and groups.

confidence that the decision-maker has before them all relevant information and that issues have been fully tested.

2.5 While the contexts differ slightly, extensive case law sets out well-established principles relating to notification. These have remained authoritative notwithstanding legislative amendment from time to time and, in the Law Society's view, are applicable by way of analogy to decisions as to whether to hold a hearing.[2] Authorities emphasise:

(a) The importance of not depriving others of the right to participate in the determination of a resource consent application: "[i]t is a significant step to preclude opposition to a resource consent application, particularly when the application is of a substantial kind". Notification has an important function in enabling public participation.[3]

(b) The principle that people should be able to participate in matters that affect them if they wish to do so requires that a broad or liberal approach should be taken in statutory interpretation.[4] Accordingly, where differing interpretations regarding a notification requirement are available, the interpretation that supports notification should be preferred.[5]

(c) For the consent authority, it is a matter not just of being satisfied that there is an "adequate informational basis" for the consent authority to arrive at an informed conclusion. Reliability of the information is as important: a matter which the hearing is designed to test. There will be a need to distinguish information from assertion.[6] In addition to the scope of the information (emphasis added):[7]

> The consent authority must necessarily be satisfied as well that the information is reliable, *especially so where an expert opinion is tendered*. The authority will need to consider whether the author of the opinion is both appropriately qualified to speak on the subject and sufficiently independent of the applicant so as to be seen as giving expert advice rather than acting as an advocate for the applicant.

2.6 The Law Society acknowledges the potential argument, for example, that the decision to hold a hearing should depend on whether submitters will add anything substantive,[8] and whether the matters that they have to raise are already adequately addressed by way of their written submission. The consent authority may consider itself readily able to

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2 See *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597, which remains the test for determining whether the available information is adequate: *Green v Auckland Council* [2013] NZHC 2364, [2014] NZRMA 1 at [92]; *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673, [2017] NZRMA 22 at [48].

3 *Discount Brands v Westfield (New Zealand)* [2005] NZSC 17, [2005] 2 NZLR 597; see particularly Elias CJ at [21] and Tipping J at [146].

4 *Auckland International Airport Ltd v Auckland Council* [2024] NZHC 2058 at [69]; *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZRMA 580 at [182]; *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673, [2017] NZRMA 22 at [80].

5 *Auckland International Airport Ltd v Auckland Council* [2024] NZHC 2058 at [69].

6 *Discount Brands v Westfield (New Zealand)* [2005] NZSC 17, [2005] 2 NZLR 597 per Tipping J at [146].

7 *Discount Brands v Westfield (New Zealand)* [2005] NZSC 17, [2005] 2 NZLR 597 per Blanchard J at [114]–[115].

8 See, for instance, *Associated Churches of Christ Church Extension and Property Trust Board v Auckland Council* [2014] NZHC 3405, 18 ELRNZ 237 at [67].

determine from written submissions that the matters they raise do not have a bearing on the questions it needs to decide, such as when the decision outcome rests on expert opinion and/or technical matters to such an extent that hearing from others cannot assist. However, it is perhaps *particularly* so where expert evidence is involved that principles stated by the Supreme Court underline the importance of testing reliability — a purpose which the hearing serves.[9] In the Law Society's view, in addition to such considerations, the right for submitters to be heard even when they do not have much to say of relevance is an important systemic safety valve. The alternative, in which people feel they have been denied the opportunity to be heard, risks both increasing the likelihood of appeals and bringing the law into wider disrepute. If denying hearings does eventuate in a higher likelihood of appeal or judicial review, this will undermine the objective of achieving efficient and effective decision-making as well as public confidence.

2.7 Taken together, these considerations may tend to lead consent authorities to take a conservative approach to the application of the proposed new provision. In the Law Society's view, this would be proper — in turn, affecting the extent to which the provision can be expected to result in significant change. Its intended significance may not materialise, in other words, due to cautious application.

2.8 On balance, these considerations and concerns lead the Law Society to doubt both the merits and the anticipated benefits of the proposed clause 34 change.

3 Comments on specific clauses

Clause	Provision	Issue	Recommendation
4	Definition of 'long-lived infrastructure'	The Law Society notes that this would include virtually every domestic roof-top solar generation unit (which are typically connected to the local grid and therefore "generate electricity for supply to any other person"), and queries whether that is intended.	Dependent on whether this is the intent.
4	Definition of 'Treaty settlement'	'Treaty settlement' has the meaning given to it by section 4(1) of the Fast-Track Approvals Act 2024. It would be better to define this term in the principal Act.	Define this term in cl 4 (amending s 2 of the RMA).
15	70(3) and 70(3)(a) and (c)	The effects referred to in s 70(1)(g) are "any significant adverse effects on aquatic life". A permitted discharge does not 'allow' such effects. It allows activities that may have such effects.	Amend the language in each case to refer to discharges "causing or contributing to" the effects described in s 70(1)(g).

9 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597 per Blanchard J, quoted above at [2.5].

17	77FA(2)(a)	The Council may want to progress some aspects of the intensification planning instrument (**IPI**) but not others.	Amend to refer to progressing its IPI "in its current form".
18	77G(8)	Repealing s 77G(8) would allow an RPS (potentially put in place under the current position of mandatory application of medium density residential standards (**MDRS**)) to direct application of the MDRS, contrary to the apparent intention that territorial authorities have a discretion whether or not to incorporate the MDRS.	Rather than repeal s 77G(8), amend it to read something like, "The discretion in subsection (1) to incorporate the MDRS into a relevant residential zone applies despite any inconsistent objective or policy in a regional policy statement."
20	80C(5)	A heritage area might not fall within the definition of 'heritage list' because, typically, it is defined as an area on a map, and any list specifies the relevant properties, not the buildings or structures on those properties other than generically. Is that intended?	If the intention is to include heritage areas, broaden the description to include buildings and structures within an identified area.
22	80E(2)	Why is it necessary to add reference to natural hazards, given the management of significant risks from natural hazards can already form the basis of a qualifying matter? In addition, new para (j) effectively supersedes all qualifying matters. More generally, if the intention of these amendments is to overcome the effect of the High Court decision in *Kāpiti Coast DC v Waikanae Land Company Ltd* [2024] NZHC 1654, it is unlikely to be effective, as that case turned on whether a particular provision supported or was consequential on the MDRS for the purposes of s 80E(1)(b)(iii), not whether it was on the list of related provisions in s 80E(2).	Delete proposed s 80E(2)(h). Consider whether the addition of s 80E(2)(j) means that other sub-sections might be able to be deleted. If the intention is to allow an IPI to contain any of the listed 'related' matters, irrespective of whether they support or are consequential on the MDRS, say that.
28	88(2AA) and (2AB)	Schedule 4 already states that information supplied with an application must be "specified in sufficient detail to	Clarify the purpose of these amendments.

		satisfy the purpose for which it is required" and that an assessment of effects must include "such detail as corresponds with the scale and significance of the effects that the activity may have on the environment". When these amendments reference the "nature and significance of the activity", from what perspective is this intended to be assessed that is not already covered by the Fourth Schedule?	
30	92(2B)(a)	The catch-all renders the specific reference to s 104(1)(b) and (c) unnecessary, since they are clearly provisions related to an application.	Delete specific reference to s 104(1)(b) and (c).
32	92AA(2)	This clause requires a consent authority to notify an applicant of its intention to return the application by writing to the "email address" used by the applicant. While most people these days have email addresses, there may be instances where an applicant does not have an email address or does not use email — preferring to use instead some other form of social media. The clause also appears to conflict with cl.67 which amends s 352 to refer to methods for serving notices as including but not being limited to email. Also, given the rapid pace at which means of communication are changing, if email is no longer the primary form of communication in a few years' time, a change to the legislation would be required.	Consider using a more generic reference such as electronic or other notified address for service or a reference to like effect.
34	100(1) and (2)	The references to "decide the application" could be read as relating only to the decision whether to grant or decline the application. Decisions also have to be made as to the conditions which should be imposed, and often identifying such conditions is the principal purpose of a hearing.	Amend to refer to making a determination under ss 104A–104D as applicable.
34	100(1)	An applicant may desire that a hearing be held (for example, to improve the quality	Consider qualifying this discretion so that an applicant can

		of the decision and/or reduce the potential for appeals).	require a hearing to be held.
34	100(1)	Typically, a hearing might need to be held because: a. the application has gaps that need to be addressed by evidence; b. while 'complete', aspects of the application need to be tested through a hearing; c. submitters have raised issues calling aspects of the application into question that need to be tested in a hearing. The third scenario can depend on whether submitters intend to call evidence in a hearing, particularly expert evidence. At present, a submitter is only required to give reasons for the position they take and it may not be apparent to the consent authority whether consideration of those reasons would benefit from a hearing being held.	Amend the regulations governing the form of submissions, to require submitters to state (in addition to whether they seek that a hearing be held) what additional material they intend to put before the decision-maker in a hearing and why the decision-making process would benefit from a hearing being held.
36	104(2E)	Reference to abatement notices and infringement notices should only be in cases where they were not the subject of a successful appeal to the Environment Court or the District Court, as applicable.	Amend to exclude reference to abatement notices and infringement notices that have been the subject of a successful appeal to the Environment Court or the District Court.
38	107G	Assuming reference to suspension of processing the application is to exclude the time taken while interested parties consider and respond to draft conditions from consent processing time-limits, it should say that. Decision-makers should not be precluded from working on their decisions over this period.	Amend accordingly.
38	107G(2)(b) and (c)	These subsections are contradictory. Submitters entitled to receive a s 42A report are a subset of submitters on an application that has been notified.	Delete s 107G(2)(c).

38	107G(3)	The section does not currently enable an applicant to respond to comments by a submitter on conditions. Often, however, it can be of assistance to the decision-maker if an applicant is given an opportunity to respond to such comments, as they can address workability issues, and also suggest alternate ways in which issues raised can be addressed.	Suggest including an opportunity for an applicant to respond to submitter comments.
39	108(2)(d)	What sort of condition is envisaged? Section 108 already provides for imposition of a bond, a covenant, and monitoring and reporting.	Clarify intention.
42	123B(2)	Requiring a consent term to be specified and making that term 35 years unless there is reason for a shorter term restricts the term of land use consents that are typically granted without any term (that is, for an unlimited period). Land use consents would typically be the principal consents a wind or solar farm would require, and would, under this provision, be constrained to a maximum 35 year term. From the regulatory impact statement, it does not appear this is intended.	Limit the application of this provision to resource consents of the type specified in s 123 (c) and (d), that is, those resource consents that currently have a maximum term.
44	127(3)(a)	The cross reference to subsection 3B is unclear.	Amend the words in brackets to "unless subsection 3B applies".
47	165ZZF(3)	Does the reference to a review not being undertaken in the manner specified relate to the process of review, or its substantive outcome?	Clarify the intention of this provision.
57	217KA(3)	Should this power include industry organisations previously approved by a regional council under the current provisions?	Consider whether an extension to the power of revocation is warranted.
57	217KA(5)	Assuming the reference to the extent of revocation is intended to relate to the possibility that revocation might relate to some regions but not others, suggest this be stated more clearly.	Clarify the intention of this provision.

59	314A(2)	The requirement that there be no adverse effects on the environment at all may be highly constraining. Cancellation of resource consents is likely to have adverse economic effects on the consent holder and its employees in almost all cases.	Clarify the nature and scale of adverse effects that would preclude cancellation.
59	314A(5)	This clause refers to a holder of the resource consent being given an opportunity to be heard, however no indication is given as to what such an opportunity may comprise. To ensure that there is flexibility to address fact-specific situations while ensuring natural justice rights are preserved, consideration could be given to qualifying that the opportunity should be "reasonable".	Consider amending to a "reasonable opportunity to be heard".
64	331AA(1)(b)	The reference to "assets" is very open-ended. What sort of assets?	Clarify the intention of this provision.
64	331AA(2)(a)	The reference to regulations being "necessary or desirable" is very broad. Is this intended? Or should this read "necessary and desirable", or simply "necessary"?	Clarify the intention of this provision.
64	331AA(6)(a)	The words "while noting" are ambiguous in this context. Is it intended that activities authorised by emergency regulations would never confer existing use rights, or that the regulations might state whether or not they do?	Clarify the intention of this provision.
Schedule (new Part 8)	50(3) and (4)	Clause 50(3) provides that the 35-year duration consent term will apply retrospectively to any applications for renewable energy and long-lived infrastructure that are not determined at the time the section commences. It is not clear how interim decisions would be treated under this clause. Clause 50(4) exempts clause 50(3) from applying if a hearing was held for an application and has "concluded". It is not clear what concluded means: that is, the last of the initially scheduled hearing	Clarify the intent of these provisions.

		days has been completed, or the hearing formally closed.	

Nāku noa, nā

Jesse Savage
Vice President