NEW DIRECTIONS FOR RESOURCE MANAGEMENT IN NEW ZEALAND

Report of the Resource Management Review Panel
June 2020

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Introduction

When the Resource Management Review Panel began its task last year no one anticipated the COVID-19 pandemic which has dominated our lives in recent months. Our response as a nation has taught us at least two important lessons. First, when faced with a crisis such as this we must set clear goals and priorities to deal with it. And second, we can achieve our goals through the carefully coordinated efforts of us all.

There is a proper case for short-term measures to expedite normal resource management processes in order to stimulate economic growth and employment. But it is more important than ever to set clear strategies for the long-term management of the system and establish processes necessary to implement the strategies agreed. In this report we recommend substantial changes to the present system with the aim of establishing more enduring solutions beyond the present crisis and bringing to an end the series of ad hoc interventions that have been an undesirable feature of legislative change.

We recommend two major new pieces of interrelated legislation:

- the repeal of the Resource Management Act 1991 (RMA) and its replacement with new legislation we have suggested be named the Natural and Built Environments Act (NBEA). This would have a substantially different approach but would incorporate some of the key principles of the RMA that remain appropriate
- new legislation which we have called a Strategic Planning Act.

The focus of the Natural and Built Environments Act would be on enhancing the quality of the environment and on achieving positive outcomes to support the wellbeing of present and future generations. This would include recognition of the concept of Te Mana o te Taiao which refers to the importance of maintaining the health of our natural resources, such as air, water and soil, and their capacity to sustain life. This new focus would be achieved through a system designed to deliver specified outcomes, targets and limits for both the natural and built environments. Significant changes to processes are recommended including stronger national direction and the introduction of combined plans for each region. We expect these changes to result in clearer direction, reduced complexity and opportunity for enhanced environmental quality.

The proposed Strategic Planning Act would set long-term strategic goals and facilitate the integration of legislative functions across the resource management system. These would include functions exercised under the new Natural and Built Environments Act, the Local Government Act, the Land Transport Management Act and the Climate Change Response Act. This legislation is also designed to integrate land use planning with the provision of infrastructure and associated funding and investment. Regional spatial planning will play a critical part in delivering the intended outcomes for the resource management system. The new legislation would include strategic planning for urban growth and responding to change, measures to respond to the effects of climate change, and the identification of areas unsuitable for development due to their natural values or importance to Māori.

Managing the effects of climate change has been a significant focus of our work. We have concluded that the complexities of the process of managed retreat (for example in coastal areas) require new discrete legislation we suggest be called the Managed Retreat and Climate Change Adaptation Act.

Our report identifies the importance of providing for a much more effective role for Māori throughout the resource management system and we make a number of recommendations about how this can be achieved. Given the unique relationship between the Crown and Māori under Te Tiriti o Waitangi, the Panel's firm view is that a future resource management system should provide a direct role for Māori in decision-making and in the design of measures and processes to give effect to the principles of Te Tiriti. We also recommend the creation of a National Māori Advisory Board with a range of functions including providing advice to government and oversight of the resource management system from the perspective of mana whenua.

While the legislative changes we propose are vital, we emphasise that the success of the new resource management system will depend critically on the capacity and capability of all those involved in it. It is essential that substantially increased funding and resources be provided by both central and local government if the objectives of the new system are to be realised. The failure to provide sufficient resources and build capability has been one of the more important reasons for the failure of the RMA to deliver the results intended.

There are two matters outside our terms of reference that we wish to briefly comment upon. The first relates to the reform of local government. It has become clear to us that the resource management system would be much more effective if local government were to be reformed. The existence of 78 local authorities in a nation of just five million people is difficult to justify. Much could be achieved by rationalisation along regional lines, particularly in improving efficiencies, pooling resources, and promoting the coordination of activities and processes. Reform of local government is an issue warranting early attention.

The second issue outside our terms of reference relates to the rights and interests of Māori in our freshwater resources. Our report makes a number of recommendations about the allocation and use of freshwater. We appreciate this is a difficult issue and we understand the Crown intends to take steps to resolve it by other processes subsequent to our review. During the course of our review, we have attended a number of hui throughout the country and gained an appreciation of the real level of concern in the Māori community on this and other topics. The Panel's view is that it would be desirable for the Crown and Māori to address and resolve this issue sooner rather than later. Without such a solution, we believe the allocation and use of water rights will continue to pose significant difficulties for all those involved in the system.

We expect our recommendations to result in better quality outcomes for both the natural and built environments and a more responsive system to meet the challenges we face as a nation. These include the need to respond to urban development pressures in our towns and cities, to reverse the deterioration of water quality in our streams and rivers, to address diminishing biodiversity and to deal effectively with the looming threat posed by climate change. Following the individual chapters of the report we have provided a summary of the principal reasons which led to the review and the main recommendations in our report, but note the report itself should be read for a full understanding.

Our report is a first step in a reform process and will be followed by widespread consultation to develop government policy and the form of future legislation.

We conclude by recording our thanks for the outstanding support we have received from the Ministry for the Environment and from all those who have taken the time to engage in the process of consultation and submissions which has accompanied the review. On a personal note, I also express my gratitude for the way in which panel members have given their time and valuable support throughout the review.

Hon Tony Randerson QC
Chair, Resource Management Review Panel
30 June 2020

Resource Management Review Panel members
Rachel Brooking
Dean Kimpton
Amelia Linzey
Raewyn Peart MNZM
Kevin Prime ONZM

About the review

Context

1. On 1 July 2019, Cabinet agreed to undertake a comprehensive review of the resource management system and the resource management review was launched by Hon David Parker, Minister for the Environment, on 24 July 2019. Minister Parker appointed Hon Tony Randerson QC as chair of the Resource Management Review Panel. Rachel Brooking, Dean Kimpton, Amelia Linzey, Raewyn Peart and Kevin Prime were appointed as members.
2. The Panel was tasked with the initial phase of the review and to work with officials to produce a report containing proposals to reform the RMA by the end of May 2020.

Aims of the review

3. The aim of the review, as set out in our terms of reference, is to improve environmental outcomes and better enable urban and other development within environmental limits. The review must design a system for land use regulation and environmental protection that is fit to address current and future challenges and should support the development of a system that delivers cultural and environmental outcomes for all New Zealanders, including Māori, and improves their wellbeing.

Principles to guide decision-making, objectives and outcomes

4. The Panel adopted principles to guide its decision-making, including fundamental assumptions underpinning how the system is designed as well as practical criteria. These are outlined in table 1.

Table 1: Principles to guide decision-making

Principle	Description
Stewardship and kaitiakitanga	Protecting and enhancing the environment for its own intrinsic value, as well as for the wellbeing of current and future generations
Fairness	The system promotes fair distribution of costs and benefits across generations, communities and iwi/Māori
Subsidiarity and capacity	Roles and responsibilities are assigned to the appropriate people and agencies in relation to issue scale and complexity, who is affected, and capability and capacity to effectively deliver roles and responsibilities
Wellbeing	The system enables effective use, allocation and development of the natural and built environment to provide for the wellbeing of current and future generations
Te Tiriti o Waitangi	The relationship between the Crown and Māori is given due recognition including through the principles of partnership and active protection
Well-informed decisions and public participation	Decision-makers are well informed about the impacts, including by input from people

Principle	Description
Flexibility and innovation	The system should be open and responsive to new technology and change, and enable innovation
Practical considerations	Proposals for reform achieve the review's objectives, are workable in practice and cost effective: *How effective is this option/choice likely to be in achieving objectives of reform and resolving problems? Is it consistent with the guiding principles?* *Is this option/choice likely to be workable in practice? What are the potential unintended consequences?* *How cost effective is this option likely to be?* This will include considering what time and support for local government and other participants may be required to adapt to new settings, the benefits of change to the system as a whole and where any costs may outweigh the benefits, or where change may not be warranted

5. The aim of the review is to improve outcomes across both the natural and built environments and address the underlying problems across the system that need to be resolved: legislation, institutions and implementation. The Panel identified objectives and outcomes it wanted to achieve, and the proposals for reform were developed to align with these. Table 2 outlines these objectives and outcomes.

Table 2: Objectives and outcomes of the review

Objective	Outcomes
1. A system that protects and enhances ecosystems and the natural environment	• Environmental limits are set, monitored and enforced • Proactive measures are in place to improve environmental quality • Ecosystems services and mauri are sustained and enhanced • Improved health and wellbeing from a better environment
2. A system that enables productive development of the natural and built environments and effective provision of public goods, within ecosystem limits	• Improved and more equitable urban outcomes • Efficient allocation of the natural and built environments • Flexibility for developers to make efficient investment decisions
3. A system that sets clear direction to guide decision-making	• Legislation and plans are clear and easy to understand • Roles and responsibilities are clear • Strong national direction
4. A system that establishes long term, strategic and integrated planning for development and the environment	• Decisions are aligned and coordinated and work for both the short and long term • Sufficient certainty for development and infrastructure • Better management of cumulative environmental effects
5. A system that provides greater recognition of the Te Tiriti o Waitangi and te ao Māori throughout	• Māori values incorporated in decision-making • More effective iwi partnerships • Iwi and hapū empowered to protect the environment and improve outcomes for people
6. A system that is responsive to change, risk and evidence	• Improved data collection, monitoring and use • Timely response to monitoring to improve effectiveness • Communities that are more resilient to change and risk

Objective	Outcomes
7. A system where functions and processes are efficient, effective and proportionate	• Processes are proportionate to the scale and significance of the issue • Effective regulation/more use of economic instruments • Better compliance, monitoring and enforcement • More agile and less litigious system
8. A system where decision-makers in the system are accountable, well advised and incentivised to achieve the system's purpose	• Institutions, iwi and Māori are well-resourced to carry out their role • Trusted institutions • Incentives are aligned towards purpose

Scope of the review

6. The review scope includes the RMA, the Local Government Act 2002 (LGA), the Land Transport Management Act 2003 (LTMA) and the Climate Change Response Act 2002 (CCRA) where the RMA intersects with these other Acts.

7. The review was asked to set the high-level framework for an improved resource management system and to consider a new role for spatial planning. A goal of the review was to improve planning responses to the pressures of urban growth, and better manage environmental effects.

8. The review was also invited to consider where relevant the potential impact of and alignment with other legislation (including the Building Act 2004 and Fisheries Act 1996), government programmes and regulatory reviews currently underway within the resource management system. In addition, the Panel has had to consider urgent legislation proposed to respond to COVID-19.

9. The Ministry for the Environment was tasked with providing secretariat functions to facilitate connections between the Panel and related policies and programmes. This included the use of the interagency working group made up of officials from a range of government agencies with functions or responsibilities across the RMA, LGA and LTMA.

10. Institutional reform was not a driver of the review, and it is expected that both regional councils and territorial authorities will endure. However, the Panel did actively consider which entities are best placed to perform resource management functions and how the relationship between the roles of these organisations has increased complexity.

11. Te Tiriti o Waitangi (Te Tiriti) settlement agreements will be carried over into any new resource management system and anything agreed to by the Crown through a settlement cannot be lost or changed as part of the review. The Panel's recommendations need to be consistent with the principles of Te Tiriti.

12. A number of matters were out of scope for the review such as the marine environment beyond the 12 nautical mile territorial sea outer limit; existing Tiriti settlements; issues with other Acts; and issues relating to Māori rights and interests in freshwater allocation.

13. A full copy of the Panel's terms of reference is attached as appendix 6.

Panel process and engagement

14. From 20 September 2019 the Panel met weekly until the delivery of its final report to the Minister for the Environment in June 2020. The Panel was supported by a secretariat and policy advice from the Ministry for the Environment.

Issues and options paper

15. The Panel released *Transforming the resource management system: opportunities for change – Issues and options paper* for feedback in early November 2019. The paper asked a series of questions about the existing resource management system and how issues with it could be addressed in a new system. Feedback on the issues and options paper closed in February 2020. In total, 187 submissions were received.

Engagement approach

16. The Panel had a significant engagement programme and met with stakeholders from industry, local government, the primary production sector, environmental non-government organisations and Māori organisations. Comments received informed both the development of the issues and options paper and the Panel's final report. These comments provided valuable insights into how different sectors view and interact with the resource management system.

17. A list of all groups the Panel met with is provided in appendix 8.

Reference groups and working groups

18. Three reference groups were established by the Minister for the Environment to assist the Panel: Te ao Māori, Natural and Rural Environments, and Built and Urban Environments. Members provided a range of personal and professional experience across all aspects of the resource management system. Each reference group met with the Panel to workshop and test ideas. Membership of the reference groups is provided in appendix 9.

19. The Panel also established a number of working groups coordinated by Ministry for the Environment officials. These working groups were asked to address specific topic and policy areas. They drew on the experience of other agencies, reference group members and other experts. Working groups were established for climate change, spatial planning, environmental outcomes and limits, te ao Māori and economic instruments. Each group worked collaboratively to produce a paper for the Panel's consideration.

Regional hui

20. During February, the Panel travelled around the country attending regional hui and engaging with iwi and hapū. Hui ranged in size from five to 50 attendees with the highlight being the attendance of school children in Gisborne who were keen to engage in better understanding the resource management system. Whether hui were large or small, the level of engagement was high and provided insights into key issues facing Māori in the resource management system. The feedback (both written and verbal) was valuable in informing the Panel's final recommendations.

21. The Panel also met with a number of iwi with unique Tiriti settlement arrangements that intersect with the RMA. Many settlements have provided a greater role for iwi and hapū in decision-making and can offer insights into new and unique working relationships. The Panel was mindful that proposals for reform should complement and enhance these unique relationships.

22. Throughout our report 'Māori' is used as a broad term that encompasses all of the indigenous people of Aotearoa including both mana whenua and mātāwaka. 'Mana whenua' is used when referring to whānau, hapū and iwi who have customary authority over an area, and 'mātāwaka' is used when referring to whānau, hapū and iwi Māori living in an area where they are not mana whenua. Other terms are only used when the context demands it, such as, in quotations or when referring to specific sections of the RMA. For example, the term 'tangata whenua' is used in the RMA in several places.

Issues and options feedback received

23. Overall, submissions were comprehensive in providing useful information and ideas.

24. Overwhelmingly submitters agreed the resource management system required change. Key themes were the desire to see a move away from an effects-based system, the need to maintain an integrated RMA, support for spatial planning and greater recognition of Te Tiriti and a move towards true partnership.

25. The Panel appreciated the time and effort of all those with whom it met as well as those who made submissions or participated in the reference and working groups. The feedback has all been considered and was a valuable part of the Panel's process.

26. A record of all submitters is provided in appendix 7.

What happens next?

27. This report represents the culmination of the Panel's process and is the result of nine months of intensive work. We appreciate and thank all those who have contributed their time, energy and expertise.

28. The Panel concludes its work with the delivery of this report to the Minister for the Environment. The Ministry for the Environment will then provide advice to the Minister on the recommendations in the report. Cabinet is responsible for making all decisions about how to progress the Panel's findings.

29. Cabinet has indicated a broad, open process of public consultation will follow its consideration of the Panel's proposals. In addition, Cabinet has directed officials to look for opportunities to collaboratively refine and co-design policy options with Māori during the next phase of the review, in line with Cabinet's agreed Guidelines for Engaging with Māori. The Panel has made recommendations to this effect.

30. Wide engagement with New Zealanders and stakeholders is anticipated before the introduction of any new legislation.

Overview of the proposed system

The opportunity for reform of the resource management system

1. The resource management system makes a significant contribution to the wellbeing of New Zealanders. It is at the heart of debate about crucial issues relating to the protection of the natural environment, such as freshwater quality and climate change. It is also fundamental to issues relating to built environments, including urban development, housing affordability and regional economic development.
2. The Government gave us the task of undertaking a comprehensive review of the resource management system. This was an opportunity to design a system that delivers better outcomes for the environment, people and the economy. In carrying out this review, we have completed a thorough analysis of issues with the RMA and its interaction with legislation across the resource management system. We have also looked to leading examples internationally.
3. Our proposals for reform are intended to provide a clearer and more positive focus for New Zealand's resource management system. This will be achieved by reorienting the system to focus on delivery of specified outcomes, targets and limits in the natural and built environments.
4. Our view is that the RMA should be repealed and replaced with new legislation. A Natural and Built Environments Act would focus on enhancing the quality of both environments to support the wellbeing of present and future generations. New and separate legislation should also be established to promote the strategic integration of functions across the resource management system through development of regional spatial strategies.
5. Important aspects of our proposals include:
    - a new focus on enhancing the quality of the natural and built environments to support the wellbeing of present and future generations
    - improved direction for central and local government decision-makers through the use of specified outcomes, targets and limits
    - greater use of mandatory national direction
    - improved recognition of Te Tiriti o Waitangi and te ao Māori
    - establishment of long-term strategic and integrated planning for resource management and infrastructure
    - a stronger focus on decision-making about resource use, development and protection in plans rather than consents
    - simplified and integrated regulatory plans, which are clearer and more directive, and ensuring they respond to changes in economic, social, cultural and environmental conditions through improved planning processes

- an improved consenting system that better differentiates between activities with significant and minor effects
- a wider range of approaches to resource allocation than just the 'first-in, first-served' approach, guided by principles of sustainability, equity and efficiency
- wider use of economic instruments such as permit trading and environmental taxes to complement regulation
- establishment of a nationally coordinated environmental monitoring system
- an emphasis on partnership in decision-making across central and local government and mana whenua
- ensuring the system as a whole is efficient and proportionate.

6. This overview contains:
   - a summary of challenges facing the resource management system
   - a summary of reasons why the system has not responded effectively to date
   - a summary of our proposals for reform and how they aim to improve outcomes for the natural and built environments
   - a summary of specific measures to address the review priorities
   - a note about the relevance of our findings to the Government's response to the impact of the COVID-19 pandemic on the New Zealand economy.

Significant challenges across the system

New Zealand's natural environment is under significant pressure

7. New Zealand's natural environment is unique and special. Not only does it provide us with a place to live, learn, work and socialise, it is part of our identity.
8. Our natural environment is under significant pressure.[1]
   - **Climate change:** climate change is occurring at an unprecedented rate. In New Zealand the impacts of climate change (increasing sea levels, droughts, floods and fires) are already affecting where people live and how we use our environment.
   - **Biodiversity:** our native plants, animals and ecosystems are under threat. Almost 4000 of our native species are threatened with or at risk of extinction. In our marine environment, 90 per cent of seabirds, 80 per cent of shorebirds and 26 per cent of indigenous marine mammals are classified as threatened with or at risk of extinction.

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[1] See Ministry for the Environment, Stats NZ. 2019. *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019*. Wellington: Ministry for the Environment and Stats NZ. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Environmental%20reporting/environment-aotearoa-2019.pdf (12 June 2020).

- **Wider environmental decline:** vegetation changes are degrading soil and water. We are continuing to see significant loss of native vegetation and wetlands and the reduction of benefits they provide (for example, flood and erosion control, water quality, carbon storage). Our heavy reliance on surface water and groundwater for drinking, domestic, industrial and irrigation uses is threatening the habitat of our freshwater species, increasing the concentration of pollutants and ultimately affecting our ability to use this resource. The way we use the land and sea is also putting pressure on our coastal marine area with harvesting, sediment, nutrients and plastics impacting marine habitats and species.

Degradation of our natural environment is reducing ecosystem resilience to system shocks that can radically alter the flow of ecosystem services, affecting associated livelihoods and the wellbeing of communities.

9. Degradation of our natural environment is reducing ecosystem resilience to system shocks that can radically alter the flow of ecosystem services, affecting associated livelihoods and the wellbeing of communities.

Urban areas are struggling to keep pace with population growth

10. New Zealand is becoming increasingly urbanised. Between 2008 and 2018 our population increased by 14.7 per cent. Ninety-nine per cent of population growth occurs in urban areas. Growth is expected to continue, with the highest rates in Tauranga, Auckland and Hamilton.[2]

11. People are drawn to cities because they offer the benefits of more job choices, social and cultural interaction, and higher-quality, more diverse amenities and services. However, our cities are under pressure with rising urban land prices and some of the highest housing costs relative to income in the developed world. Poorly managed urban growth has also led to increasing homelessness, worsening traffic congestion, increased environmental pollution, lack of transport choice and flattening productivity growth.

12. The social impact of ever-increasing housing costs has been significant, in particular for the most vulnerable New Zealanders. For example, work by the Ministry of Social Development shows that housing costs for low-income New Zealanders have doubled as a proportion of their income since the 1980s, leading to increased income inequality.[3] There have also been falling rates of homeownership and increased household debt.[4] According to the Reserve Bank, New Zealand's level of household debt is one of the most significant risks to our financial stability.[5]

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2 See New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission.

3 Ministry of Social Development. 2018. *Household Incomes in New Zealand: Trends in Indicators of Inequality and Hardship, 1982 to 2017*. Wellington: Ministry of Social Development.

4 Johnson A, Howden-Chapman P, Eaqub S. 2018. *A Stocktake of New Zealand's Housing*. Wellington: New Zealand Government.

5 Reserve Bank of New Zealand. 2019. *Financial Stability Report*. Wellington: Reserve Bank of New Zealand.

13. Many drivers have contributed to these pressures. However some councils, particularly in high-growth areas, are struggling to provide sufficient development capacity for housing in regulatory plans and supply enough infrastructure to support urban growth.

Rapid changes in rural land use have increased pressure on ecosystems

14. In addition to the pressure in urban areas, rapid changes in rural land use have increased stresses on ecosystems. Between 2002 and 2016 there was a 42 per cent increase in the proportion of farmland used for dairy, and a decrease in the area used for sheep and beef. There was also continued intensification of land use and a shift to higher stocking rates.[6]

Some councils, particularly in high-growth areas, are struggling to provide sufficient development capacity for housing in regulatory plans and supply enough infrastructure to support urban growth.

15. In farming areas, water pollution affects almost all rivers and many aquifers – which in turn affects the mauri of the water, human health and our ability to swim and enjoy our water for recreation. Land-based industries are critical to New Zealand's current and future prosperity, and to addressing global challenges like food supply, biodiversity loss and climate change. A transition is needed to achieve sustainable land use and ensure cumulative environmental effects are sustainable across generations.

Reasons why the system has not responded effectively

Lack of clear environmental protections

16. While a major improvement on the previous system, the RMA has not sufficiently protected the natural environment. The RMA had the ambitious purpose of sustainable management of natural and physical resources. However, the Act suffered from a lack of clarity about how it should be applied – taking over two decades for the courts to settle this through the *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* case.[7] As a consequence of this lack of clarity, as well as insufficient provision of national direction and implementation challenges in local government, clear environmental limits were not set in plans. Lack of clear environmental protections has made management of cumulative environmental effects particularly challenging.

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6 Ministry for the Environment, Stats NZ. 2018. *Our Land: Data 2017*. Wellington: Ministry for the Environment and Stats NZ. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Environmental%20reporting/Our-land-2018-at-a-glance-final.pdf (12 June 2020).

7 *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

Lack of recognition of the benefits of urban development

17. It is well established that the RMA has not achieved good outcomes for our urban areas. A shortage of housing in New Zealand, and the perception that RMA processes are overly cumbersome and provide insufficient certainty for major infrastructure, have seen a long series of official inquiries which identified shortcomings in the performance of the RMA.[8]

The RMA's focus on environmental effects can also mean the positive benefits of development and a long-term perspective are underemphasised.

18. Some argue that because the purpose and principles of the RMA do not sufficiently recognise the positive benefits of housing, infrastructure and other development, the Act has hampered planning for development. The lack of content about these issues left decision-makers with little guidance on how to plan for development in urban and other areas. Infrastructure funding constraints have encouraged rationing of available land for development in an effort to manage infrastructure cost burdens.

A focus on managing the effects of resource use rather than on planning to achieve outcomes

19. The RMA has been criticised for having too narrow a focus on managing the negative effects of resource use, rather than providing direction on desired environmental and development outcomes or goals.[9] The RMA is a framework law that enables rather than directs. It does not explicitly set out outcomes to be achieved, other than the high-level goal of sustainable management. Some argue this has made forward planning difficult. The RMA's focus on environmental effects can also mean the positive benefits of development and a long-term perspective are underemphasised, despite these being core aspects of 'sustainable management'.

A bias towards the status quo

20. The RMA has favoured existing uses and consents, protecting established activities from changes to plan rules and standards designed to promote better environmental outcomes. The range of protections of this kind in the system is extensive, which seriously impairs the ability to respond to the environmental challenges New Zealand is facing. The RMA is largely silent on allocation. As resource scarcity has increased, the 'first-in, first-served'

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8 Examples include the Minister for the Environment's Urban Technical Advisory Group in 2010 and the New Zealand Productivity Commission's Better Urban Planning inquiry in 2017.

9 For example, see Environmental Defence Society. 2018. *Reform of the Resource Management System: The Next Generation: Synthesis Report*. Auckland: Environmental Defence Society.

approach to resource allocation interpreted through case law has become unsustainable, inefficient and inequitable.

21. Furthermore, until recently there has been insufficient recognition of the importance of proactive and strategic planning in the system. Over the last decade, some councils have developed strategic plans and joint spatial plans for their regions, districts and communities to help fill this gap.[10] Central government has encouraged this form of planning by requiring Auckland to prepare a spatial plan, future development strategies through the National Policy Statement on Urban Development Capacity, and spatial planning partnerships under the Urban Growth Agenda. However, the lack of legal weight and disconnection with RMA plans mean that the full benefits of strategic planning are not being realised throughout the system.

Lack of effective integration across the resource management system

22. The RMA set out to achieve integrated management of natural and physical resources. It drew together statutory decision-making frameworks for management of land, freshwater, soil, air, noise and the coastal marine area, among other things. Despite this, some argue that New Zealand's resource management system remains insufficiently integrated.[11]

23. Plans and decision-making under the RMA, LGA and LTMA all affect one another, but there is poor alignment between land use and infrastructure plans, processes (including public participation) and funding. This results in inefficiencies, delays and additional costs. Furthermore, multiple plans and processes can make it difficult for the public and Māori to participate in the resource management system effectively. In addition, the system has been weak at managing effects across domains, such as the land and the sea, and cumulative environmental effects.

Plans and decision-making under the RMA, LGA and LTMA all affect one another, but there is poor alignment between land use and infrastructure plans and funding.

Excessive complexity, uncertainty and cost across the resource management system

24. Overall, the resource management system is unnecessarily complex. This complexity is a product both of the RMA itself and of its interface with requirements across the LGA, LTMA, Building Act 2004 and wider legislation.

25. Considerable variation across the country creates uncertainty for resource users. Processes are complex, litigious and costly, and frequently disproportionate to the decision being

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10 Many of these plans are developed on a voluntary basis under councils' general powers in the LGA.

11 For example, see Infrastructure New Zealand. 2015. *Integrated Governance Planning and Delivery: A Proposal for Local Government and Planning Law Reform in New Zealand*. Auckland: Infrastructure New Zealand.

sought or the risk or impact of the proposal. Matters that should be addressed in plans are left to the resource consenting process to resolve, generating needless uncertainty. There have been successive legislative amendments targeting aspects of the RMA, and a proliferation of new arrangements to work around it, such as the proposed Kāinga Ora Homes and Communities planning powers, and special housing areas. While the amendments sought to address deficiencies in the system, these workarounds have resulted in further misalignment between different pieces of legislation.

Lack of adequate national direction

26. Many commentators argue the main problem with the RMA has simply been a lack of national direction.[12] Under the RMA it was envisaged that central government would set national environmental bottom lines and policies through national policy statements and national environmental standards. However, for many years these powers were not exercised. Caroline Miller has described this as a failure of the government to participate in the co-operative mandate that the RMA created.[13] It has been argued that the absence of national guidelines and policies has left local authorities[14] and the Environment Court "to take bite-sized pieces rather than adopt a high level vision".[15]

Many commentators argue the main problem with the RMA has simply been a lack of national direction.

27. While national direction was slow to be developed for many years, since 2013 the number of national direction instruments has increased considerably. National planning standards were also gazetted in April 2019 and set a common structure for plans, and some content, including definitions.

28. Notwithstanding this increase in national instruments, taken as a whole the suite of national direction is not yet cohesive. A lack of strategic direction across the national direction programme has flow-on effects for council implementation and the management of interactions between instruments. This in turn compromises the ability of individual instruments to have their intended impact.

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12 Others have argued that even where there has been national direction or even standards, the rate at which councils have implemented these directives has been slow and inconsistent.

13 Miller, C. 2011. *Implementing Sustainability: The New Zealand Experience, Oxon: Routledge, 2011.*

14 Local authority is used throughout this report as defined in the RMA: a regional council or territorial authority.

15 Schofield, R. 2007. *Alternative Perspectives: The Future for Planning in New Zealand – A Discussion for the Profession.* Auckland: New Zealand Planning Institute.

Insufficient recognition of Te Tiriti and lack of support for Māori participation

29. Te Tiriti is an important part of New Zealand's unique constitutional arrangements. Better recognising Te Tiriti in resource management decision-making was a driver behind the introduction of the RMA. The Minister for the Environment at the time of the resource management policy development process, Sir Geoffrey Palmer, noted:

> the new law will be both practical and just. The principles of the Treaty form an important component for the decisions made in this review. The new Resource Management Planning Act will provide for more involvement of iwi authorities in resource management, and for the protection of Māori cultural and spiritual values associated with the environment.[16]

30. The RMA contains several provisions that are specific to Māori, including in its principles and consultation requirements. At the time of the passing of the RMA, many Māori were optimistic they would have a larger and more meaningful role in resource management issues.

31. In some areas, Māori participation in the resource management system has improved over the past two decades. The number of councils engaged with Māori, such as through formal consultation, relationship agreements and iwi management plans, has increased. However, since 1991 no RMA functions have been transferred to iwi authorities under section 33 of the RMA. Nor have any iwi authorities been approved as a heritage protection authority under section 188. Both capability and capacity issues within councils and iwi authorities, and legislative barriers, have limited use of provisions for joint management arrangements under section 36B.[17]

Since 1991 no RMA functions have been transferred to iwi authorities under section 33 of the RMA.

32. The Honourable Justice Joe Williams has argued that outside the Treaty settlement process, the RMA is the most sophisticated attempt in New Zealand law to bring together both Western and Māori concepts in the way envisaged by the Treaty. However, he also points out that the RMA is 'not pulling its weight'. Treaty settlements have been more successful in providing for Māori to become partners in decision-making about resources. According to Justice Williams, this is "a significant admission of failure in the RMA itself, since the mechanisms to achieve similar outcomes have existed in that Act for more than 20 years without being deployed".[18]

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16 Ministry for the Environment. 1988. *People, Environment, and Decision Making: The Government's Proposals for Resource Management Law Reform*. Wellington: Ministry for the Environment.

17 Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal.

18 Williams J. 2013. Lex Aotearoa: An heroic attempt to map the Māori dimension in modern New Zealand law. *Waikato Law Review* 21: 1–34.

Weak and slow policy and planning

33. Plans are regulatory instruments and should be clearly and unambiguously expressed. Some plans have been poorly drafted and many have not effectively managed cumulative environmental effects. There are also poorly designed and unnecessarily complex rules that have caused problems in urban areas. The proliferation of planning documents under the RMA has added complexity and cost, as both applicants and administrators must trawl through a multitude of policies to discern relevant direction. RMA policies and plans also lack integration and alignment.[19]

34. Plan-making under the RMA has been too slow, partly due to the multiple avenues to relitigate decisions. This means the planning system has struggled to respond to challenges as they have arrived – in particular the housing crisis, intensification of rural land use and climate change. In practice, a council will have difficulty changing a plan within its three-year electoral term.

Weak compliance, monitoring and enforcement

35. Weak compliance, monitoring and enforcement (CME) across the resource management system has undermined rules in plans that protect the environment. Problems with CME are rooted in both statutory provisions and institutional arrangements.

36. Penalties for non-compliance are weak in comparison with those of other Commonwealth nations. The cost-recovery mechanisms of the RMA are poor, especially in relation to permitted activity monitoring and the investigation of unauthorised activities. Many offences have significant elements of commercial gain, but recovery mechanisms, such as civil forfeiture orders, are rarely used in RMA offending. Penalties imposed by the courts at sentencing are sometimes dwarfed by the commercial gain to the offender.

Weak compliance, monitoring and enforcement across the resource management system has undermined rules in plans that protect the environment.

37. The devolution of CME functions to a large number of small local government agencies has also created a fragmented system. Many councils lack the economy of scale to properly resource CME and there is evidence from time to time of bias and conflicts of interest in implementation. Exacerbating this fragmentation is a long history of weak oversight and guidance from central government.

38. The fragmented system and limited economies of scale in our councils have held agencies back from investing in new technologies and tools. Information management across the sector is highly variable, and regulators have poor mechanisms for sharing data and intelligence about offences and offenders. Few councils have invested in new technologies such as remote sensing, latent devices, and drones for inspections or automated reporting systems.

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19 See discussion in New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission.

Capability and capacity challenges in central and local government

39. While the legislation has some clear problems, a significant contributor to the difficulties with the RMA has been insufficient capacity and capability in central and local government to fulfil the roles expected of them.[20]

40. Insufficient resourcing is considered one of the reasons for central government's failure to implement national direction. Capacity and capability limitations within local authorities are frequently cited as a root cause of delay, uncertainty and cost. Under-resourcing has particularly affected the ability of councils to undertake necessary research and monitoring.

Weak accountability for outcomes and lack of effective monitoring and oversight

41. Some argue that weak accountability arrangements and conflicts of interest have also contributed to the failure to properly implement the RMA. For example, the Environmental Defence Society (EDS) notes, "agency capture of (particularly local) government by vested interests has reduced the power of the RMA to appropriately manage effects on the environment".[21] Others argue locally elected decision-makers have insufficient control and oversight of resource management functions.

42. It is widely agreed there is insufficient monitoring and collection of data and information on the state of the environment, on environmental pressures at the local and national levels, and on the performance of the resource management system itself.[22]

43. Given both central government and local government have struggled to deliver a well-functioning system over many years, some argue that oversight of the system has been insufficient to hold both levels of government to account for delivering good environmental and urban outcomes.

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20 See New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission; p 400.

21 Environmental Defence Society. 2016. *Evaluating the Environmental Outcomes of the RMA: A Report by the Environmental Defence Society*. Auckland: Environmental Defence Society.

22 For example see Ministry for the Environment, Stats NZ. 2019. *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019*. Wellington: Ministry for the Environment and Stats NZ. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Environmental%20reporting/environment-aotearoa-2019.pdf (12 June 2020); Parliamentary Commissioner for the Environment. 2019. *Focusing Aotearoa New Zealand's Environmental Reporting System*. Wellington: Parliamentary Commissioner for the Environment; New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission.; Organisation for Economic Cooperation and Development. 2017. *Environmental Performance Reviews: New Zealand 2017*. Paris: OECD Publishing.

Proposals for reform

Legislative architecture and objectives

44. Our view is the RMA should be repealed and replaced with new legislation we suggest be named the Natural and Built Environments Act. While the RMA's approach to integrated management and many of its principles should be retained and built on, much of the rest of the legislation requires significant revision. We also consider new and separate legislation is required to provide for integration across the wider resource management system, including infrastructure planning and funding under the LGA and LTMA, and climate change mitigation and adaptation under the Climate Change Response Act 2002 (CCRA).

The RMA should be repealed and replaced with new legislation we suggest be named the Natural and Built Environments Act.

45. The purpose of the Natural and Built Environments Act would be to enhance the quality of the environment to support the wellbeing of current and future generations and to recognise the concept of Te Mana o te Taiao. It would have a positive focus on achieving high-quality outcomes. These outcomes would be specified in relation to the quality of the natural and built environments, rural areas, tikanga Māori, historic heritage, natural hazards and climate change.

46. Mandatory national direction would be required to guide how these matters must be reflected in plans, including through the use of targets. To provide greater clarity about biophysical environmental limits, the new legislation would also include a requirement to establish environmental limits or minimum environmental standards for certain resources (air, water, soil, biodiversity). Subject to compliance with environmental limits and binding targets, conflicts between outcomes would be reconciled through national direction and regional plans.

47. The reference to Te Mana o te Taiao in the purpose of the Natural and Built Environments Act is intended to ensure Māori views about the environment are reflected at the heart of a future system and align with the overall purpose of the Act. Te Mana o te Taiao refers to the fundamental importance of natural resources such as air, water and soil in sustaining all life.

48. The Natural and Built Environments Act would also require decision-makers to give effect to the principles of Te Tiriti o Waitangi, and mandatory national direction would specify how to do this.

49. A second piece of legislation, we have named the Strategic Planning Act, would be established to promote the strategic integration of legislative functions across the resource management system, including those exercised under the RMA, LGA, LTMA and CCRA, and wider infrastructure provision by central government. This legislation would require the

A second piece of legislation, we have named the Strategic Planning Act, would be established to promote the strategic integration of legislative functions across the resource management system.

development of long-term regional spatial strategies. These would be jointly developed and agreed by central government, councils and mana whenua (with a Ministerial decision-making power to resolve disputes). They would set high-level patterns of development and contain objectives and policies consistent with the purposes of the Natural and Built Environments Act, LGA and LTMA, national direction, the national adaptation plan under the CCRA and relevant government policy statements. Regulatory plans would be required to be consistent with regional spatial strategies.

Combined plans

50. Under the Natural and Built Environments Act, regional councils and territorial authorities would be required to work together to produce one combined regulatory plan for each region. As a result, over 100 RMA policy statements and plans would be consolidated into 14 combined plans, simplifying and improving integration across the system. Higher-level content for these plans would already be determined through national direction and regional spatial strategies, and the structure and format prescribed through national planning standards.

Over 100 RMA policy statements and plans would be consolidated into 14 combined plans.

51. The process for creating these plans would involve an independent hearing panel (IHP) to improve the efficiency of plan-making while ensuring high-quality planning documents. The process would involve a joint committee of delegates from all local authorities in the region, a representative from the Department of Conservation and representatives from mana whenua. The joint committee would have the authority to determine the form of the combined plan for notification and to decide whether to accept the IHP's recommendations. An independent audit of the proposed plan would be undertaken prior to notification to ensure quality and adherence to the requirements of the act and national direction. Local authorities, mana whenua and the public would have the right to make a submission on the combined plan, to be heard by the IHP and to appeal to the Environment Court along the lines of the model adopted for the Auckland Unitary Plan.

52. The consenting system would also better differentiate between more significant activities that require a robust environmental impact assessment and those with only localised effects that could be determined by a simpler alternative dispute resolution process. The direct referral and proposals of national significance tracks for more complex proposals would be retained but with some modifications. Councils would also have stronger direction on how they should specify activity classes and notification requirements would be reformed by a combination of new statutory presumptions and plan provisions for certain activities. The present focus of notification decisions on minor effects would be removed. Information requirements would be made proportionate to the nature and complexity of the activity.

53. The allocation of certain public resources would be guided by principles that emphasise considerations of sustainability, equity and efficiency. These principles would be developed on a resource-specific basis through national direction and regional plans. Improved allocation of resources would also be achieved through wider use of economic instruments.

A nationally coordinated environmental monitoring system would be developed to ensure systematic, coordinated and consistent monitoring across the country.

54. CME functions would be made more independent and better resourced in a future system. These functions would be consolidated into regional hubs with national oversight. Additional tools would be made available for low-medium risk enforcement action. Penalties would also be increased to deter high-risk behaviour. The provisions relating to commercial gain would be extended to deter businesses from undertaking environmentally harmful activities.

55. A nationally coordinated environmental monitoring system would be developed to ensure systematic, coordinated and consistent monitoring across the country in line with the recent recommendations of the Parliamentary Commissioner for the Environment (PCE). Stronger links would be made between the Environmental Reporting Act 2015 (ERA) and monitoring functions under the Natural and Built Environments Act, to ensure a policy response to the outcomes of state of the environment monitoring. The system would also emphasise monitoring both central and local government performance in regard to their Te Tiriti o Waitangi commitments. The PCE would provide an independent audit of the functioning of the resource management system.

Institutional changes

56. Councils would remain the main decision-makers in the future resource management framework. However there would be greater requirements for partnerships between central and local government and mana whenua in delivery of planning functions. These partnerships are intended to improve capability and capacity in the system, and to ensure decision-makers have incentives to achieve good environmental outcomes.

57. Central government would have a more active role in the system through provision of mandatory national direction and a direct role in development of regional spatial strategies. Mana whenua would also have an expanded role in decision-making processes for regional spatial strategies and plans. An integrated partnership process for mana whenua and local authorities would rationalise the RMA tools relating to Māori interests into one process, including Mana Whakahono ā Rohe, section 33 transfers and section 36B joint management agreements. This process would also include discussion of how information from iwi management plans would be incorporated into other plans.

The PCE would have an increased role in the new system including greater auditing oversight of systems for monitoring and state of the environment reporting.

58. The PCE would have an increased role in the new system including greater auditing oversight of systems for monitoring and state of the environment reporting.

59. Table 1 summarises the changes we anticipate will result should our recommendations be taken forward.

Table 1: The opportunity for reform

Current system – diagnosis	Future system – proposed reform measures and anticipated result
Lack of clear environmental protections	• Legislation specifies outcomes, targets and limits for both protecting and enhancing the natural environment • Stronger and better-focused regulation protects what matters
Lack of recognition of the benefits of urban development	• Legislation specifies outcomes for the built environment, including enhancing the quality of urban areas and ensuring sustainable use and development of urban land within environmental limits • Plans do not impede necessary housing and infrastructure development, provided it aligns with delivery of identified outcomes
A focus on managing the effects of resource use rather than planning to achieve outcomes	• The current focus on avoiding, remedying and mitigating adverse effects is supplemented with a focus on achieving positive outcomes • The focus of the system shifts to resolving disputes in plans rather than consents. As a result, cumulative environmental effects are better managed and there is greater certainty for development
A bias towards the status quo	• Improved planning processes and consenting provisions make the system more responsive to changes in the environment • The current protections for existing uses and consents are rebalanced to better align with delivery of environmental outcomes • A wider range of approaches to resource allocation, in addition to just the 'first-in, first-served' approach, guided by principles of sustainability, equity and efficiency
Lack of effective integration across the resource management system	• New legislation promotes the strategic integration of functions across the resource management system, including those exercised under the RMA, LGA, LTMA and CCRA, and wider infrastructure provision by central government • Regional spatial strategies developed jointly by central and local government and mana whenua set direction across the resource management system at a regional level
Excessive complexity, uncertainty and cost across the resource management system	• Local government is required to work together and with mana whenua to develop combined plans at the regional level • The quality of plans is improved by using a pre-notification audit and independent hearing panels • Complexity is reduced by consolidating more than 100 RMA policy statements and plans into 14 regional combined plans
Lack of adequate national direction	• Provision of national direction is mandatory, including on important environmental limits
Insufficient recognition of Te Tiriti and lack of support for Māori participation	• There is a requirement to 'give effect' to the principles of Te Tiriti, and national direction specifies how to do this • Māori have a greater role in decision-making and Māori interests and values are better reflected in decisions
Weak and slow policy and planning	• Use of the independent hearing panel model improves the quality and speed of regulation and reduces appeals on plans

Current system – diagnosis	Future system – proposed reform measures and anticipated result
Weak compliance, monitoring and enforcement	• Compliance, monitoring and enforcement functions are consolidated at the regional level but with national oversight. There are new tools for enforcement and increased penalties • There is a higher level of compliance with environmental rules and regulations
Weak accountability for outcomes and lack of effective monitoring and oversight	• The Parliamentary Commissioner for the Environment is given a strengthened audit function • A nationally coordinated environmental monitoring system is developed and emphasises monitoring the performance of both central and local government • A National Māori Advisory Board will assist in monitoring the performance of central and local government in respect of Tiriti obligations in the resource management system • The system works towards achieving the outcomes it is designed to deliver

Addressing review priorities

60. Specific measures to address review priorities are set out below.

Protecting and enhancing the natural environment

61. The following proposals are intended to deliver a system that better protects and enhances the natural environment:

- specify outcomes for the natural environment including maintenance, protection, enhancement and/or restoration
- establish a stronger system of environmental limits that incorporates a safety buffer to manage risks and uncertainty
- codify the precautionary principle, favouring protection where there is uncertainty about information but significant risk of irreversible harm
- include a strategic focus on achieving positive environmental outcomes, supported by a system of targets which help focus effort on achieving the outcomes

Increase mandatory national direction to establish environmental limits, guide the management of the most significant risks to the natural environment and provide direction to meet targets for improvement.

- increase mandatory national direction to establish environmental limits, guide the management of the most significant risks to the natural environment and provide direction to meet targets for improvement
- introduce a new spatial planning approach to provide opportunities for better-integrated management of environmental issues, and for cumulative effects to be addressed, including through programmes and projects managed under other legislation
- improve the quality of plans and their responsiveness to emerging environmental issues
- use regional combined plans to better integrate local government planning

- make consenting arrangements more flexible to enable review and readjustment if environmental conditions change
- establish a nationally coordinated environmental monitoring system
- strengthen the PCE's audit function.

Better enabling urban and other development within environmental limits

62. The following proposals are intended to deliver a system that better enables urban and other development within environmental limits:

    - specify outcomes for the built environment including enhancing the quality of urban areas, ensuring sustainable use and development of urban land and recognising the benefits of high-quality urban development
    - establish regional spatial strategies to provide for better-integrated management of land supply and the infrastructure and services to support growth
    - supply development capacity and simplify rules in existing urban areas to make it easier to undertake urban development and lower its cost, in particular the cost of new housing
    - make plan-making more efficient and responsive to change, so that it better accommodates the dynamic nature of urban areas
    - achieve better allocation of urban development capacity through regional spatial strategies and the use of economic instruments
    - create an alternative, more streamlined pathway to resolve localised disputes over consents.

Specify outcomes for the built environment including enhancing the quality of urban areas, ensuring sustainable use and development of urban land and recognising the benefits of high-quality urban development.

Addressing climate change

63. The following proposals are intended to deliver a system that better addresses climate change:

    - specify both mitigation of emissions and adaptation to climate change as outcomes to be pursued under the Natural and Built Environments Act, and require national direction for both
    - introduce regional spatial strategies that address both mitigation and adaptation

- improve the alignment between the Natural and Built Environments Act and the CCRA, including through consideration of national adaptation plans in regional spatial strategies and regional combined plans
- enable existing use protections to be modified or extinguished in specified circumstances relating to climate change adaptation
- make plan-making more efficient and responsive to change, so that it better accommodates the uncertainty associated with climate change adaptation
- introduce new legislation to deal specifically with the complexities of managed retreat and climate change adaptation which cannot be effectively addressed through the Natural and Built Environments Act.

Introduce new legislation to deal specifically with the complexities of managed retreat and climate change adaptation.

Better aligning the system with te ao Māori

64. The following proposals are intended to deliver a system that better recognises Te Tiriti and te ao Māori:
    - refer to Te Mana o te Taiao in the purpose statement of the Natural and Built Environments Act to recognise a bicultural New Zealand and acknowledge Māori world views
    - introduce a requirement to give effect to Te Tiriti o Waitangi, supported by mandatory national direction and the monitoring of performance
    - specify outcomes for Māori interests and values
    - develop better and more consistent partnerships between mana whenua and local authorities, including a greater role for Māori in planning, and appropriate funding and support.

Introduce a requirement to give effect to Te Tiriti o Waitangi, supported by mandatory national direction and the monitoring of performance.

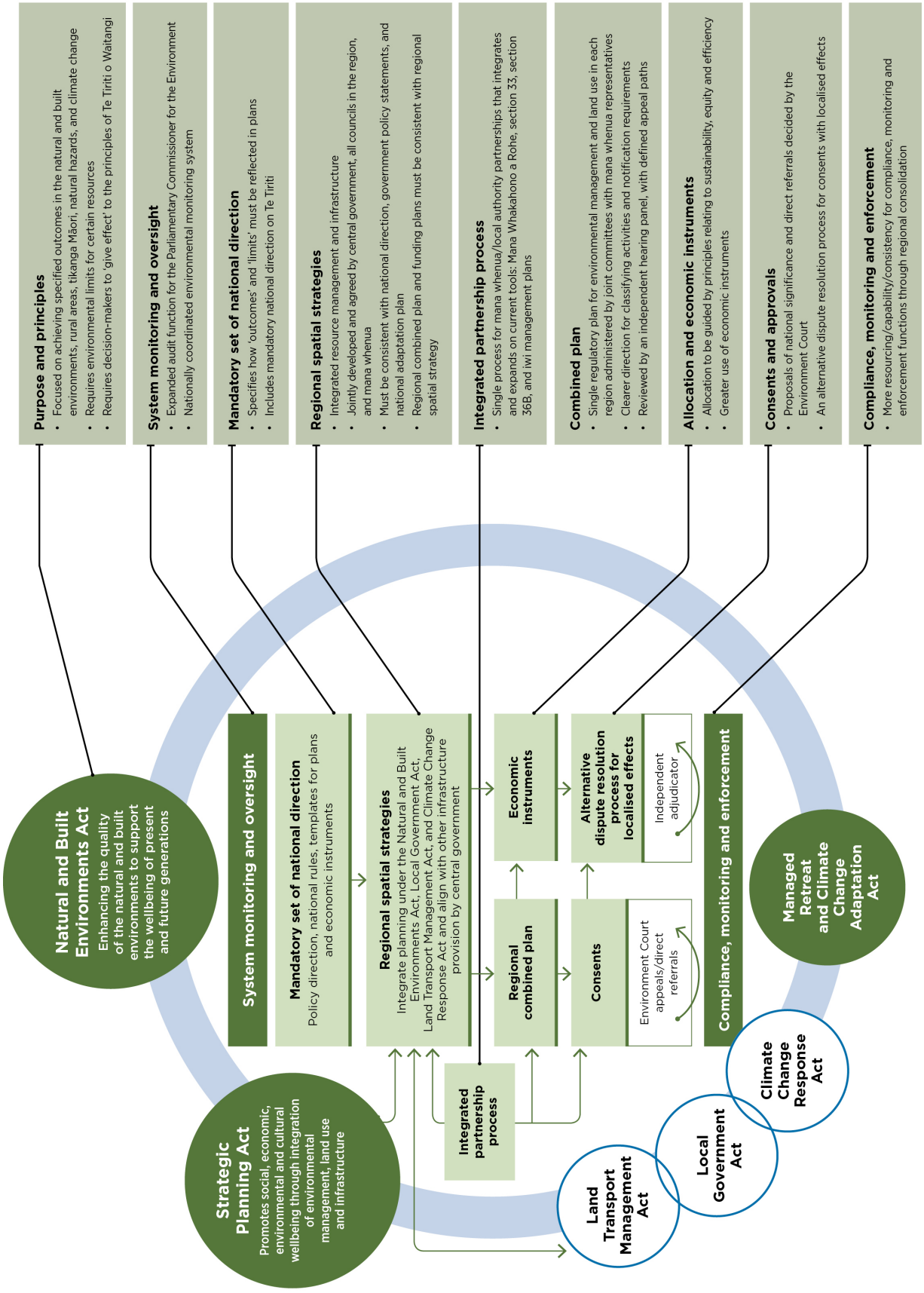
Facilitating the economic recovery in response to the COVID-19 pandemic

65. The world's attention is now focused on the COVID-19 pandemic and the resulting economic fallout. To facilitate the rapid large-scale development of infrastructure, housing and other projects needed to boost economic activity in the short-term, the Government intends to legislate for new fast-track resource consent processes under the RMA. We have a number of points to make in this regard.
66. First, as the Government has acknowledged, these are extraordinary times. New processes, including reduced opportunities for public input, are warranted in the short term, but our

proposals are intended to provide an enduring solution for the longer term beyond the current crisis.

67. Second, it is important to ensure that short-term measures to address the current crisis meet environmental standards and do not compromise the ability to achieve our longer-term goals of enhancing the quality of the natural and built environments or the ability to meet agreed targets to address climate change.

Figure 1: Proposed future environmental management system



Chapter 1 Integrating land use planning and environmental protection

1. This review is expected to resolve debate on key resource management issues, including possibly separating statutory provision for land use planning from environmental protection of air, water, soil and biodiversity. Our proposals relating to the overall structure of a future resource management system are addressed in the first four chapters of this report.

2. This chapter discusses the legislative architecture of the RMA and the integration of statutory provision for land use planning and environmental protection. Chapters 2, 3 and 4 discuss our proposals for refocusing the purpose and principles of the RMA, recognising Te Tiriti o Waitangi and achieving strategic integration across the resource management system. Taken as a whole, our recommendations address the main issues and will substantially reshape both the RMA and the wider resource management system.

Background and current provisions

3. The RMA is a broad framework for the management of natural and physical resources encompassing air, land, freshwater and marine areas out to the 12-mile limit of New Zealand's territorial sea. The goal of 'integrated management' of resources was central to the development of the RMA. Among the significant concerns the Act was designed to rectify were:

    - lack of a consistent set of resource management objectives
    - arbitrary differences in management of land, air and water
    - too many agencies involved in resource management with overlapping responsibilities and insufficient accountability
    - consent procedures that were unnecessarily complicated, costly and regularly delayed
    - pollution laws that were ad hoc and did not recognise the physical connections between land, air and water
    - insufficient flexibility and too much prescription with a focus on activities rather than end results
    - Māori interests recognised in Te Tiriti that were frequently overlooked
    - monitoring of the law that was uneven
    - enforcement that was difficult.[23]

4. In seeking to achieve integrated management, the RMA replaced 78 statutes and regulations, among them the Town and Country Planning Act 1977, Water and Soil Conservation Act 1967, Clean Air Act 1972 and Noise Control Act 1982.

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23 Identified in the explanatory note to the Resource Management Bill 1989. Retrieved from http://www.nzlii.org/nz/legis/hist_bill/rmb19892241210/ (15 June 2020).

5. Integrated management is provided for under the RMA through a hierarchy of policies and plans prepared at the national, regional and district levels. Policies and plans within this hierarchy are aligned by a common purpose to promote the sustainable management of natural and physical resources. Integration between decision-makers is facilitated through the requirement for joint hearings, in most cases, where an activity requires resource consents from more than one agency. Joint policies and plans may also be prepared by two or more councils.

6. Despite a strong emphasis on integrated management, the RMA's provisions continue to distinguish between the management of land and other natural resources in certain important areas. For example, while there is a presumption in favour of the development and use of land, the reverse applies to use of other natural resources and to discharges to the environment.[24] The functions of territorial authorities and regional councils are also largely split between land use planning and management of natural resources.[25] The approach taken to the recognition of existing uses and the duration of resource consents also differs between land and other natural resources.[26]

Issues identified

7. The RMA has been the subject of considerable scrutiny and debate over the last 30 years. While most of this debate has focused on implementation issues, some recent criticism has centred on its fundamental design, including its approach to integrated management. Here we summarise the main arguments for and against reverting to separate systems for land use planning and environmental protection. We also consider the related idea of separate planning frameworks for the built and natural environments.

The case for separate legislative frameworks for land use and environmental protection

8. Some argue the integration of statutory frameworks for land use planning and environmental protection under the RMA has led to poor outcomes both for development and for protection of the natural environment. Perhaps the most forceful advocate of this view is Infrastructure New Zealand which has developed a proposal to merge the RMA, Local Government Act 2002 (LGA) and Land Transport Management Act 2003 (LTMA) into two new Acts: an Environment Act and a Development Act.[27]

9. Infrastructure New Zealand's main criticism of land use planning as practised under the RMA is that it lacks focus on strategic outcomes and is instead oriented towards minimising the impacts of physical development on other residents, activities and the environment. While this management of 'effects' is important, it is considered insufficient to deliver a

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24 This is reflected in the duties and restrictions under Part 3 of the RMA.

25 This is reflected in sections 30 and 31 of the RMA.

26 For example, see sections 10, 20A, 123 and 123A of the RMA.

27 Infrastructure New Zealand. 2019. *Building Regions: A Vision for Local Government, Planning Law and Funding Reform*. Auckland: Infrastructure New Zealand.

coordinated approach to development. Infrastructure New Zealand also argues that land use planning under the RMA lacks integration with development planning, and in particular infrastructure provision under the LGA and LTMA. These shortcomings are thought to lead to a range of significant problems, including a lack of alignment between land use regulation and infrastructure provision, and processes that are unnecessarily complex and costly. This in turn is seen to contribute to constraints on regional development, including housing supply and affordability.

10. In its recent first principles review of New Zealand's urban planning system, the Productivity Commission put forward a different argument for reconsideration of integrated management under the RMA. The Commission found that the built and natural environments have different characteristics and each requires a distinct management approach. According to the Commission, "the natural environment needs a clear focus on setting standards that must be met, while the built environment requires assessments that recognise the benefits of development and allow change".[28] This finding mirrored previous work by the Minister for the Environment's Urban Technical Advisory Group (UTAG) in 2010. UTAG identified a potential advantage of developing separate legislation for urban planning, which would be to recognise "urban areas are generally heavily modified and dynamic environments, and therefore justify a more 'anthropocentric' set of assessments, processes and mechanisms for decision-making".[29] In the context of urban development, application of the RMA's current purpose and principles is seen to prioritise protecting the status quo, leading to constraints on housing supply and affordability.

11. In recent extensive work on the future of New Zealand's resource management system, the Environmental Defence Society (EDS) also reconsidered the RMA's approach to integrated management, this time including a focus on what is needed to improve protection of the natural environment. EDS argued that the 'broad overall judgement' interpretation of 'sustainable management' under the RMA contributed to a failure to set sufficiently protective environmental controls over the last 30 years. In response, EDS questioned whether greater clarity could be achieved for the role of environmental protection in the resource management system by developing separate legislation. This would leave 'planning' decisions to be made within the 'environmental limits' established under a separate environmental protection statute.[30]

12. Our own work over the course of this review has also identified other potential reasons why separate legislative frameworks for land use planning and environmental protection could be contemplated. These relate to transparency of processes and accountabilities in public administration. While in principle integration ought to be a good thing, challenges to this are conceivable. For example, processes and accountabilities in public administration may become blurred if failings in one part of the system are attributed to another part. We are also aware that many frustrations with the RMA relate to its role in urban planning and

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28 New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission; p 5.

29 Ministry for the Environment. 2010. *Urban Technical Advisory Group Report*. Wellington: Ministry for the Environment; p 83.

30 Environmental Defence Society. 2018. *Reform of the Resource Management System: The Next Generation: Synthesis Report* Auckland: Environmental Defence Society; p 145.

housing matters. It would be unfortunate if frustrations about these aspects of planning under the RMA led to less public acceptance of its necessary role in setting protections for the biophysical environment.

13. The main arguments for separating statutory provision for land use planning and environmental protection can be grouped as follows:

    - greater strategic focus and coordination of decision-making on land use and infrastructure is needed
    - a distinct purpose and tailored principles are required to guide decision-making about land use planning (or built environment matters) and environmental protection
    - greater clarity, transparency and accountability in public administration can be achieved through separate systems and processes.

The case against separate legislative frameworks for land use and environmental protection

14. On the other hand, others argue that integrated management under the RMA has not been the cause of poor outcomes for either the built or the natural environment. Rather, they point to a failure to implement the Act as intended. For example, Sir Geoffrey Palmer and Dr Roger Blakeley argue "one of the main reasons why the Resource Management Act has not worked as well as it should have, has been the failure of successive governments to use the tools that have been available since the Act's inception, to provide national policy statements and national environmental standards".[31] In their view, deficiencies identified in urban planning could be easily addressed through national direction under the RMA's broad umbrella of 'sustainable management'.

15. Others identify practical problems with a move away from integrated management. As land use and environmental protection issues are intertwined, a move away from integration would suffer from the difficulty of distinguishing between what should be dealt with in a land use planning framework and an environmental management framework respectively. For example, the Resource Management Law Association (RMLA) argues "any proposal to fundamentally split the planning regime based upon built and natural environments risks arbitrary distinction of those two environments and resultant planning which does not holistically provide for integrated and efficient management of all resources".[32] If separate frameworks were to be developed, care would need to be taken to avoid duplication and ensure interfaces are appropriately managed.

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[31] Palmer G and Blakeley, R., Submission on New Zealand Productivity Commission. 2016. *Better Urban Planning: Draft Report*. Wellington: New Zealand Productivity Commission.

[32] See the Resource Management Law Association of New Zealand submission on New Zealand Productivity Commission. 2016. *Better Urban Planning: Draft Report*. Wellington: New Zealand Productivity Commission.

16. Māori groups argue that separate decision-making frameworks for land use and environmental protection would be inconsistent with a te ao Māori understanding of issues and approach to decision-making.[33] In te ao Māori, the environment is not seen as a collection of resources to exploit for human benefit, nor as a separate entity to protect; rather, people and the environment are thought of as an integrated part of a cosmological system based on kinship, respect and reciprocity. The environment is family. Māori emphasise the need for holistic decision-making processes to reflect this world view.

17. Finally, others point out the potential for separate legislation for land use and environmental protection to exacerbate problems with the complexity and cost of the current system. For example, Local Government New Zealand (LGNZ) argues that "given the disintegration that has been identified between the RMA, LGA and LTMA, it is difficult to see how a new, separate statute splitting off the management of natural resources from the urban environment could help this mix".[34]

18. Despite its conclusion that the approach taken to the built and natural environments under the RMA had been unclear, the Productivity Commission recommended maintaining an integrated statute, albeit with the addition of separate principles to guide planning in the built environment. This was informed by legal advice from Dr Kenneth Palmer, who argued that while there had been lack of clarity in the approaches taken to regulation of the built and natural environments, "it is difficult to see any compelling or justifiable case for turning the clock back pre the RMA and reverting to the former separate regulatory statutes".[35]

19. Likewise, having considered separate legislation for setting biophysical 'environmental limits', EDS recommended maintaining an integrated approach to land use planning and environmental protection under the RMA. This was based on the simple observation that "how we use land has significant implications for the wider environment". EDS also points out that cross-cutting concepts like "landscape, ecosystem-based management, and catchment scale management" are as much land use as environmental protection issues.[36] Duplication and complexity would result if separate frameworks were developed.

20. The main arguments against separating statutory provision for land use planning and environmental protection can be grouped as follows:

    - integration of frameworks for land use and environmental protection is not the cause of poor outcomes
    - land use and environmental protection, and the built and natural environments, are inherently interconnected and should be approached through integrated decision-making

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33 For example, see submissions from Ngāti Whātua Ōrākei and Ngā Aho & Papa Pounamu on the New Zealand Productivity Commission. 2016. *Better Urban Planning: Draft Report*. Wellington: New Zealand Productivity Commission.

34 See LGNZ submission on the New Zealand Productivity Commission. 2016. *Better Urban Planning: Draft Report*. Wellington: New Zealand Productivity Commission.

35 Palmer K. 2017. *Legal Issues in the New Zealand Planning System*. Wellington: New Zealand Productivity Commission.

36 Environmental Defence Society. 2019. *Reform of the Resource Management System: A Pathway to Reform Working Paper 2: A model for the future*. Auckland: Environmental Defence Society; p 81.

- separate frameworks would be inconsistent with te ao Māori
- developing separate legislative frameworks is likely to result in further complexity and cost.

Options considered

21. Our issues and options paper put forward the following options:
    - retain the RMA as an integrated statute with enhanced principles for land use and environmental management
    - split the RMA into a land use planning statute and an environmental management statute.
22. As noted above, given the focus of debate on urban issues, we have also considered whether to develop separate legislation for the built or urban environment.

Discussion

23. While serious concerns have been raised with the approach taken under the RMA, our clear view is these concerns can and should be addressed while maintaining an integrated approach to land use planning and environmental protection.

While serious concerns have been raised with the approach taken under the RMA, our clear view is these concerns can and should be addressed while maintaining an integrated approach to land use planning and environmental protection.

24. An overwhelming majority of submitters opposed separate legislation for land use planning or for the built environment. All Māori submitters were also opposed. The concerns raised echoed much of the previous debate on this issue, including:
    - the integrated approach taken under the RMA has not been the cause of poor outcomes for our urban areas or the natural environment. Rather, this can be attributed to other problems, including implementation
    - the built environment is part of the natural environment and it would be impractical to develop separate planning or permitting approaches for land use and environmental protection
    - managing land use separately from environmental protection risks worsening environmental deterioration
    - in general, achieving greater integration of statutes and processes, rather than less, is desirable
    - separate legislation risks creating further complexity, including the need to reconcile how the new legislation would interact with a separate system more clearly focused on environmental protection

- a holistic approach to planning and decision-making is more aligned with Māori world views
- a change of this scale risks significant disruption and cost
- identified deficiencies can be addressed while maintaining an integrated statute.

An overwhelming majority of submitters opposed separate legislation for land use planning or for the built environment.

25. That said, a small minority of submitters considered separate frameworks for land use planning and environmental protection to be warranted as a possible solution to systemic failure. The main points made were:
    - many years of an integrated approach have not delivered desired outcomes
    - management of public resources and 'effects' on private property have become confused under the RMA and there is a need for greater clarity about the establishment of biophysical environmental limits, as distinct from other 'planning' matters
    - current RMA processes are too complex, expensive and litigious, and could be simplified through a more clearly differentiated approach.
26. Before addressing the arguments, it is worth revisiting why integrated management was thought useful in the first place. Sir Geoffrey Palmer articulated the original policy argument for the notion of integrated management under the RMA as follows: "In the past the rights of people to use water, air, the land or minerals have been dealt with by a myriad of laws. Not only do all the things these laws govern relate to each other but all have an impact on the wider environment. We have to look at all the issues in an integrated way."[37] In other words, decisions which impact on one another should be considered together to ensure they do not work at cross-purposes. Integration of decision-making was also thought needed to avoid "unnecessary delay and duplication".[38]
27. Both these factors remain as relevant today as they were 30 years ago with regard to the connections between land use and environmental issues. For example, recent state of the environment reporting identifies changes in land use as the primary driver of declining freshwater and marine environmental outcomes.[39] Likewise, process complexity and delays across the resource management system remain concerns for many developers.[40] This suggests both the continued relevance of the original policy argument for integrated management, and also that the RMA did not completely resolve the identified problems.

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37 Ministry for the Environment. 1988. *People, Environment, and Decision Making: The Government's Proposal for Resource Management Reform*. Wellington: Ministry for the Environment; p 3.

38 Ministry for the Environment. 1988. People, *Environment, and Decision Making: The Government's Proposal for Resource Management Reform*. Wellington: Ministry for the Environment; p 29.

39 See Ministry for the Environment, Stats NZ. 2019. *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019*. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Environmental%20reporting/environment-aotearoa-2019.pdf (12 June 2020).

40 For example, see Infrastructure New Zealand. 2019. *Building Regions: A Vision for Local Government, Planning Law and Funding Reform*. Auckland: Infrastructure New Zealand.

28. Internationally, integration of decision-making frameworks for economic development and environmental issues is seen as essential to advancing sustainable development, in particular in the context of the structural economic changes necessary to address climate change.[41] Land use planning and environmental protection are thought to be important types of decisions to consider together.[42] While fully integrated legislative frameworks for environmental protection and land use planning systems are uncommon, the likely reason for this is that other jurisdictions have not been able to achieve policy reform of this scale.[43] We are unaware of any country that has moved to make its land use and environmental protection decision-making frameworks less integrated. In fact, incorporating strategic environmental assessments and environmental impact assessments as part of land use planning is now considered essential in systems overseas.[44] International best practice suggests we should be cautious about discarding an integrated approach before being certain it is at fault.

Internationally, integration of decision-making frameworks for economic development and environmental issues is seen as essential to advancing sustainable development, in particular in the context of the structural economic changes necessary to address climate change.

29. We certainly agree with Infrastructure New Zealand that land use planning under the RMA has had insufficient focus on strategic 'outcomes' and has been poorly coordinated with infrastructure planning under the LGA and LTMA. We discuss measures to address these concerns in more detail in chapter 2 and chapter 4. Here we note that, by itself, this is not an argument that an integrated approach is no longer appropriate. A strategic outcomes focus is needed as much for our system of environmental protection as it is for our system of development planning. It is also possible to maintain an integrated approach to land use planning and environmental protection, while improving integration of land use and infrastructure provision. In fact, we consider this to be essential.

30. We agree to a certain extent with the Productivity Commission's conclusion that the built environment requires management principles that are distinct from those of the natural environment. This is discussed in more detail in chapter 2. Once again, however, this does not necessarily imply that integration of legislative frameworks for land use planning and environmental protection is no longer appropriate. It is possible to provide greater recognition of the particular characteristics of planning in the urban and other built environments within an integrated framework.

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41 For example, according to the OECD, although policies for "green growth" will differ across countries, in all cases they need to "integrate the natural resource base into the same dynamics and decisions that drive growth". See OECD. 2011. Policy framework for green growth. In: *Towards Green Growth*. Paris: OECD Publishing.

42 For example, see discussion of integrated management in OECD. 2017. *The Governance of Land Use in OECD Countries: Policy Analysis and Recommendations*. Paris: OECD Publishing.

43 For example, integration across environmental media is still seen as a worthy future goal in the United States. See Wyeth G. 2019. Modernizing environmental protection: A brief history and lessons learned. Paper presented at the EPA and The Future of Environmental Protection conference. Retrieved from https://www.american.edu/spa/cep/ (12 June 2020).

44 For example, see Stein L. 2012. *A Review of International Best Practice in Planning Law*. Sydney: New South Wales Department of Planning.

31. As noted above, many submitters on this review reinforced the conclusions of the Productivity Commission and EDS that an integrated approach should be retained. Submitters pointed out that an integrated approach taken under the RMA had not been the cause of poor outcomes for our urban areas or the natural environment. Rather, this can be attributed to other problems with the design of the RMA, and its implementation. A common refrain was that land use and environmental management are inextricably linked, and the built environment is part of the natural environment. Good decision-making therefore requires full and balanced consideration of impacts across these domains, and this is most easily provided for within an integrated statute. We agree.

32. We also heard a strong preference from Māori groups for an integrated approach to decision-making. We consider this an important point, as a significant aspect of our review is to ensure our approach to resource management better reflects te ao Māori.

33. Moreover, our view is that the nature of current and future resource management challenges which have been the focus of this review, in particular urban development, freshwater quality and climate change, suggests decision-making will require more rather than less integration in the future. Solutions to these challenges are complex and require identification of synergies or interdependencies between environmental protection and development outcomes. To take one example, an adequate response to climate change will require ensuring the trajectory of land use change in urban and rural areas delivers patterns of development consistent with national goals for climate change mitigation and adaptation. These synergies are more readily identified and acted on when making decisions under an integrated statute.

34. While there is something to be said for arguments made by some submitters that improvements in the transparency of processes and public accountability for environmental outcomes might result from separate land use planning and environmental protection frameworks, our view is that these possible benefits are outweighed by those of integrated decision-making. Separate statutes would inevitably create complex interface issues between purposes, processes, roles and responsibilities within the system. New principles would likely be needed to manage these interface issues. In practice, the possible benefits of improved transparency and accountability may prove illusory. We also consider that greater clarity of institutional responsibilities can be achieved in other ways, as discussed in chapter 14.

Expected outcomes

35. Our proposal that an integrated statute for land use and environmental protection should be retained addresses a key issue raised in our terms of reference and aligns with the objectives and principles adopted for our review. Although the RMA has not delivered the desired outcomes, our view is that its integrated approach is not at fault, and the case for integration remains strong. While important concerns have been raised with the fundamental design of the RMA, our view is these can be addressed while maintaining an integrated approach. We turn to these issues in the next chapters.

Although the RMA has not delivered the desired outcomes, our view is that its integrated approach is not at fault, and the case for integration remains strong.

Key recommendation

Key recommendation – Integrating land use planning and environmental protection	
1	An integrated approach for land use planning and environmental protection, encompassing both the built and the natural environments, should be retained in reformed legislation.

Chapter 2 Purpose and principles

1. We propose new legislation to be named the Natural and Built Environments Act to replace the RMA. In this chapter we discuss our proposals for the purpose and principles of the new legislation. The purpose of legislation defines its policy objective and shapes the design and interpretation of its underlying detailed provisions. Decisions and regulations made under primary legislation have to be consistent with its purpose. The purpose and principles in Part 2 of the RMA establish and define an overall objective of 'sustainable management' and provide a framework for decision-making under the Act. They are the most general articulation of this objective, which is then refined in more specific form in the hierarchy of policy and regulatory instruments and processes enabled under the Act.

We propose new legislation to be named the Natural and Built Environments Act to replace the RMA.

2. There was vigorous debate over many years about the meaning of sustainable management under the RMA and how it should be applied. Another longstanding concern has been that Part 2 of the RMA provided insufficient protection for the natural environment, and insufficient recognition and strategic focus for urban planning and development. Some argue this has resulted in a lack of stringency in how the natural environment is regulated as well as poor-quality regulation in urban and other areas.

3. A generation has now passed since the RMA was developed and new environmental challenges have emerged, in particular for freshwater, urban development and climate change. In responding to these challenges, our proposals to develop a new purpose and principles section for the Natural and Built Environments Act build on the latest thinking internationally. We propose to refocus our system of resource management on enhancing the quality of the environment through pursuit of a defined set of 'outcomes' and 'targets' within specified 'environmental limits'. This is intended to recognise what New Zealanders collectively value about our environment, including concepts from te ao Māori. Our proposals also respond to the complexity of natural and urban systems, and the need for a clear, rigorous and responsive management approach that recognises and provides for change.

We propose to refocus our system of resource management on enhancing the quality of the environment through pursuit of a defined set of 'outcomes' and 'targets' within specified 'environmental limits'.

Background and current provisions

Development of the purpose of the RMA

4. The background to the development of the purpose and principles of the RMA is relatively well documented.[45] The RMA was the culmination of the Resource Management Law Reform Project (RMLR). The first phase of the RMLR process ended in December 1988, when the then Minister for the Environment, Geoffrey Palmer, released *People, Environment and Decision Making: The Government's Proposal for Resource Management Law Reform.*[46] This proposed a single integrated resource management statute that would replace procedures existing in a number of separate statutes.

5. The report proposed that a new act would have a general purpose as well as principles covering a range of matters and values, such as balancing individual rights and public welfare, and eliminating or minimising conflicts between resource uses, environmental quality, ecosystem values, the needs of future generations, and economic and social factors. Significantly, the report proposed that no one value would be overriding.[47]

6. The report also spelled out what it saw as the main aim of the reform process:

> This law reform is dealing with resource management laws whose primary function is to limit the adverse spillover effects of people's activities and to allocate Crown resources. In doing both these things, in a way that promotes good environmental management, the laws can enable and encourage a positive approach which focuses on identifying and achieving desired outcomes rather than simply listing bad things.[48]

7. An extensive public consultation and bill drafting process then took place. The public consultation process revealed strong support for establishing priority among the principles and "a preference for sustainable development to be the basic principle for the law".[49]

8. Ultimately the Labour Government's Resource Management Bill, introduced into Parliament in December 1989, adopted sustainable management as its purpose. Sustainable management was defined in clause 4 of the Bill to mean "managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people

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45 See Palmer G. 2014. The Resource Management Act: How we got it and what changes are being made to it. *Resource Management Theory & Practice* 10; Gow L. 2014. The Resource Management Act: Origins, context and intentions. Paper presented to the Resource Management Law Association conference, Dunedin, 25 September 2014. Retrieved from http://www.rmla.org.nz/wp-content/uploads/2016/09/lindsay_gow_speech.pdf (12 June 2020); Upton S. 1995. Purpose and principle in the Resource Management Act. *Waikato Law Review* 3: 17–55; Randerson T. 2007. The beginnings of the Resource Management Act. In: *Beyond the RMA: An In-depth Exploration of the Resource Management Act*. Auckland: Environmental Defence Society; pp 83–104.

46 In all, the RMLR published and made publicly available 32 working papers. They can be found online at: http://www.nzlii.org/nz/other/lawreform/NZRMLawRef/.

47 Ministry for the Environment. 1988. People, Environment and Decision Making: The Government's Proposals for Resource Management Law Reform. Wellington: Ministry for the Environment; p 18.

48 Ministry for the Environment. 1988. People, Environment and Decision Making: The Government's Proposals for Resource Management Law Reform. Wellington: Ministry for the Environment; p 19.

49 See discussion in Upton S. 1995. Purpose and principle in the Resource Management Act. *Waikato Law Review* 3: 17–55.

to meet their needs now without compromising the ability of future generations to meet their own needs". Clause 5 covered the principles to have regard to in order to achieve the purpose of the Act. These included the broad range of factors encompassed by the 'good environmental management' approach.[50]

9. The Bill was not enacted before the October 1990 general election. During the election campaign the National Party indicated it was concerned about aspects of the Bill. Once elected, the new National Government appointed a review group to consider it. This group of five experts, appointed by the Minister for the Environment, invited and received submissions before producing a 200-page report recommending changes to tighten up aspects of the Bill, particularly its purpose and principles.[51] Regarding 'sustainable management', the review group acknowledged the concept in the Bill was narrower than the Brundtland Report's formula of 'sustainable development'. It noted the latter concept "embraced a very wide scope of matters including social inequities and global redistribution of wealth" and the Bill addressed only a part of these matters.[52]

10. The review group concluded the existing purpose and principles clauses (clauses 4 and 5 respectively) had an unclear relationship and would be difficult to apply, failed to recognise the built environment and failed to indicate priorities among matters to be taken into account.[53] Accordingly, clause 4 was redrafted to provide "a simple purpose of promoting the sustainable management of natural and physical resources". Provision was made for current generations to manage the use, development and protection of natural and physical resources to provide for their social, economic and cultural wellbeing subject to the need to:

    - safeguard the ability of future generations to meet their needs in relation to natural and physical resources
    - avoid, remedy or mitigate any adverse effects of activities on the environment.[54]

11. The review group's redrafted clause 5 spelt out the various dimensions of sustainable management. The principles were to "emphasise and explain the concept of sustainability and its biophysical dimensions".[55] In explaining its changes the review group considered that clause 4 contained "an unweighted balancing of socio-economic and biophysical aspects". Its recommended drafting rejected the balancing approach and "conceive[d] of the biophysical characteristics of resources as a constraint on resource use".[56]

12. Following the review group's report Environment Minister Simon Upton made two further amendments to clause 4: first softening the responsibility of the current generation to future generations in respect of resources; and second moving the reference to "safeguarding the life-supporting capacity of air, water, soil, and ecosystems" up to clause 5. According to

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50 Resource Management Bill (1989), No. 224-1, clause 5, pp. 18–19.

51 Review Group. 1991. *Report of the Review Group on the Resource Management Bill*. Wellington: Ministry for the Environment. Retrieved from http://www.nzlii.org/nz/other/lawreform/NZRMLawRef/1991/1.html (16 June 2020).

52 See Review Group, 1991, above note 51; p 4.

53 See Review Group, 1991, above note 51; p 5.

54 See Review Group, 1991, above note 51; p 8.

55 See Review Group, 1991, above note 51; p 11.

56 See Review Group, 1991, above note 51; p 8.

Minister Upton, a "reference to the biophysical limits of natural and physical resources was necessary if some reasonable basis for taking account of the needs of future generations was to be established".[57]

13. The changes recommended by the review group and Minister Upton were introduced into the House by way of a Supplementary Order Paper. A further 500 submissions were then considered by a second select committee, before the Bill was enacted in July 1991 and came into force on 1 October 1991.

The policy intent of sustainable management in the RMA

14. In summary, the original policy intent of the RMA underlying its sustainable management purpose, as set out in Part 2 of the Act, was as follows.

    - It departed from the Town and Country Planning Act approach that, according to Minister Upton, "encouraged almost limitless intervention for a host of environmental and socio-economic reasons".[58]
    - The Act moved to an approach based on the management of environmental effects or 'externalities'. It was "not designed or intended to be a comprehensive social planning statute".[59] The focus on outcomes to be actively sought was therefore "significantly narrower than the general welfare ambition of the old Town & Country Planning Act".[60]
    - The outcomes embodied in section 5(2)(a) to (c) were intended to provide "a framework to establish objectives by a biophysical bottom line that must not be compromised".[61]
    - They were to be treated as "high level constraints" that had to be met while enabling people and communities to promote their own welfare.[62] They could not be traded off in order to enable the community to pursue its wellbeing.[63]
    - They would be "progressively given specific content as rules or standards are promulgated under the Act" and it would be these, rather than the general guidance under section 5, that would be the yardstick against which particular case-specific matters would be measured.[64]
    - Sections 6 and 7 provided guidance on what the bottom lines comprised of and so had a biophysical focus.

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57 Upton S. 1995. Purpose and principle in the Resource Management Act. *Waikato Law Review* 3: 17–55, pp 36-37.

58 Upton S. 1991. In: Resource Management Bill: Third Reading. *New Zealand Parliamentary Debate*, 4 July.

59 Upton S. 1991. In: Resource Management Bill: Third Reading. *New Zealand Parliamentary Debate*, 4 July.

60 Upton S, Atkins H, Willis G. 2002. Section 5 re-visited: A critique of Skelton and Memon's analysis. *Resource Management Journal* X(3): 10–22.

61 Upton S. 1991. In: Resource Management Bill: Third Reading. *New Zealand Parliamentary Debate*, 4 July.

62 Upton S, Atkins H, Willis G. 2002. Section 5 re-visited: A critique of Skelton and Memon's analysis. *Resource Management Journal* X(3); p 13.

63 Upton S, Atkins H, Willis G. 2002. Section 5 re-visited: A critique of Skelton and Memon's analysis. *Resource Management Journal* X(3); p 15.

64 Upton S, Atkins H, Willis G. 2002. Section 5 re-visited: A critique of Skelton and Memon's analysis. *Resource Management Journal* X(3); p 15.

Development of the Treaty clause in the RMA

15. The RMA was developed during a time when the Government sought to give greater recognition to the Treaty. One of the Crown's objectives for the RMLR was to ensure that 'practical effect' would be given to Treaty principles.[65]

16. There was significant debate about the wording of the Treaty clause as the draft legislation was developed and then progressed through Parliament.[66] Among the ideas put forward were creating a duty to balance kawanatanga and tino rangatiratanga as referred to in the Treaty and following the approach taken in the Conservation Act 1987 that required decision-makers to 'give effect to' the Treaty of Waitangi.

17. The final clause required decision-makers to 'take into account' the principles of the Treaty of Waitangi. The weaker approach reflected nervousness about the impact of a Treaty section in general resource management legislation following the *Lands* case where the Court of Appeal had enforced the Treaty clause in the State-Owned Enterprises Act 1986.

The current purpose and principles of the RMA

18. The current purpose and principles of the RMA are stated here for ease of reference. The purpose of the RMA is in section 5 as follows.

> **Section 5 Purpose**
>
> 1. The purpose of this Act is to promote the sustainable management of natural and physical resources.
> 2. In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

19. The RMA also identifies matters that are of special significance for resource management, as set out in sections 6, 7 and 8. These principles give 'further elaboration' to the section 5 purpose of sustainable management by stating particular obligations for those administering the RMA.[67] The three sets of principles are:

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65 Ministry for the Environment. 1988. *People, Environment and Decision Making: The Government's Proposals for Resource Management Law Reform*. Wellington: Ministry for the Environment, p.12.

66 This history has recently been summarised in Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal; pp 47–49.

67 The Supreme Court used the words 'further elaboration' to explain how section 5 of the RMA relates to other aspects of the Act in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

- matters of national importance – which decision-makers must 'recognise and provide for'
- other matters – which decision-makers must 'have particular regard to'
- the principles of the Treaty of Waitangi – which decision-makers are required to 'take into account'.

20. The statutory hierarchy means that a 'stronger direction' is given in relation to matters of national importance in section 6 than for the other matters in section 7. The requirement to 'recognise and provide for' means the decision-maker must make actual provision for the listed matters. In contrast, the obligation to 'have particular regard to' requires the decision-maker to give those matters genuine consideration after which they may be rejected.

21. To meet the requirement to 'take into account' the principles of Te Tiriti, the decision-maker must consider the relevant Tiriti principles, weigh those up along with other relevant factors and give them the weight appropriate in the circumstances. Tiriti settlement legislation also prescribes matters for decision-makers to consider in the resource management system.

22. The RMA contains procedural principles which are set out in section 18A. Decision-makers are required to 'take all practicable steps' to:

- use timely, efficient, consistent and cost-effective processes that are proportionate to the functions or powers being performed or exercised
- ensure that policy statements and plans include only those matters relevant to the purpose of the Act and are worded in a way that is clear and concise
- promote collaboration between local authorities on their common resource management issues.

23. The matters of national importance specified in section 6 are set out below. There is no hierarchy between these principles. Therefore, where there is a conflict between matters of national importance, the decision-maker must weigh the significance of the competing interests in the circumstances of the particular case.

Section 6 Matters of national importance

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:

(e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga:

(f) the protection of historic heritage from inappropriate subdivision, use, and development:

(g) the protection of protected customary rights:

(h) the management of significant risks from natural hazards.

24. The 'other matters' that persons exercising functions and powers under the Act must 'have particular regard to' under section 7 are set out below. They tend to be more abstract than the matters set out in section 6 possibly because the direction to consider them is not as strong. Nevertheless, relevant matters in section 7 must be considered and carefully weighed when reaching a decision.

Section 7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) [Repealed]

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

25. Finally, the section 8 requirement that all persons exercising functions and powers under the RMA take into account the principles of the Treaty of Waitangi is set out below. When enacted, the RMA was a step forward for recognition of the Crown's responsibilities under Te Tiriti. Since the RMA was enacted much has happened in the relationship between the Crown and Māori, in particular through the process of Tiriti settlements. Māori have also repeatedly criticised RMA provisions and their implementation.

Section 8 Treaty of Waitangi

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Interpretation of the RMA's sustainable management purpose since 1991

26. It has been well documented that, despite the intent of the legislation, since the mid-1990s and until recently the courts adopted the 'overall broad judgement' approach to interpreting the sustainable management purpose of the RMA. This approach, according to

Judge Sheppard, "allow[ed] the comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome".[68]

27. Following the courts' approach, some observers argued that the purpose of the Act was intended to be wider than 'effects management' and that it gave no primacy to biophysical bottom lines.[69] Furthermore they contended:

> the definition of sustainable management encapsulates the fundamental underpinnings of the concept of sustainable development in the sense that it requires decision-makers to adopt an integrated perspective for managing natural and physical resources. Sustainable development has been defined, based on the Brundtland report, as a decision-making process that should take account of ecological, economic and social and cultural values. The attraction of sustainability defined in this way is that rather than elevating biophysical objectives above everything, it ensures the proper consideration of development in its environmental context.[70]

28. The courts' interpretation attracted criticism, including from the Act's authors, as undermining the original purpose of the RMA. They argued that the weighing of economic, cultural and social considerations alongside environmental ones has resulted in the inappropriate trading off of environmental bottom lines against actual or perceived economic or social benefits.[71]

29. Most recently the Supreme Court has provided greater clarity over the meaning of Part 2 of the RMA with the *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] decision. This "provided a significant qualification on the general application of the 'overall broad judgement' approach".[72] In particular, where a higher-level policy document (in the *King Salmon* case the New Zealand Coastal Policy Statement) makes directive policies such as creating an effective 'bottom line', and decision-makers are giving effect to that policy, there is usually no need to refer back to Part 2 of the RMA because these policies give substance to Part 2.

30. The judgment also stressed that sections 6 and 7 are an elaboration of the purpose contained in section 5; that the matters in section 6 contained stronger direction to decision-makers than those in section 7; and that while section 6 requires decision-makers to take steps to

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68 *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, p 46. For discussion of the development of the overall broad judgement approach see Armstrong B. 2014. Time for a more eco-centric approach to resource management in New Zealand. *Resource Management Journal* August: 7–16; p 9.

69 Skelton P, Memon A. 2002. Adopting sustainability as an overarching environmental policy: A review of section 5 of the RMA. *Resource Management Journal* X(1): 1–10; p 5.

70 Skelton P, Memon A. 2002. Adopting sustainability as an overarching environmental policy: A review of section 5 of the RMA. *Resource Management Journal* X(1): 1–10; p 4.

71 Upton S, Atkins H, Willis G. 2002. Section 5 re-visited: A critique of Skelton and Memon's analysis. *Resource Management Journal* X(3): 10–22; Palmer G. 2015. Ruminations on the problems with the Resource Management Act. Keynote address to the Local Government Environmental Compliance Conference, November. Retrieved from https://www.planning.org.nz/Attachment?Action=Download&Attachment_id=3538 (15 June 2020).

72 Hewison G. 2015. The Resource Management Act 1991. In: P Salmon, D Grinlinton (eds) *Environmental Law in New Zealand*. Wellington: Thomson Reuters. pp 584–592; p 587.

implement the protective element of sustainable management, the section itself does not give primacy to preservation or protection within the concept of sustainable management.[73]

31. Subsequent case law in *R J Davidson Family Trust v Marlborough District Council* [2018] has discussed the implications of the *King Salmon* decision for the role of Part 2 in consideration of applications for resource consents. The Court of Appeal found that *King Salmon* does not prevent recourse to Part 2 in the case of applications for resource consent where "planning documents may not furnish a clear answer as to whether consent should be granted or declined".[74] Therefore, whether or not Part 2 is relevant should be determined on a case-by-case basis.

> If a plan that (*sic*) has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to part 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so.[75]

The implications of *King Salmon* in this context are that genuine consideration and application of relevant plan provisions may leave little room for Part 2 to influence the outcome.

Issues identified

32. Issues identified with the purpose and principles of the RMA fall into five broad categories:
    - insufficient protection for the natural environment
    - lack of recognition and strategic focus for development
    - insufficient recognition of Te Tiriti and te ao Māori
    - insufficient focus on outcomes
    - lack of clarity in intent and implementation.

33. While these issues have made implementation of the RMA more challenging, planning and resource management practice has made progress nonetheless. Criticism of Part 2 of the RMA has included concerns that it neither sufficiently prioritises protection for the environment nor promotion of development. This is no accident given the RMA's role in defining and reconciling these objectives.

Criticism of Part 2 of the RMA has included concerns that it neither sufficiently prioritises protection for the environment nor promotion of development.

73 Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited [2014] NZSC 38 at [26] [148]–[149].

74 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [51].

75 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 at [75].

Insufficient protection for the natural environment

34. The outcomes achieved for the natural environment from the resource management system have been mixed. Some outcomes (for example, air quality) have improved but freshwater, climate change, biodiversity and marine outcomes have been poor. The most significant trends in the state of the New Zealand environment are set out in the reports *Environment Aotearoa 2019* and *Our Marine Environment 2019*.[76]

    - **Freshwater:** waterways in farming areas are polluted by excess nutrients, pathogens and sediment. This threatens our freshwater ecosystems and cultural values, and may make our water unsafe for drinking and recreation. Using freshwater for hydroelectric generation, irrigation, domestic consumption and other purposes changes the water flows in rivers and aquifers. This further affects freshwater ecosystems and the ways we relate to and use our waterways.
    - **Climate:** our per-person rate of greenhouse gas emissions is one of the highest for an industrialised country. Most of our emissions in 2016 came from livestock and road transport. Changes to our climate are already being felt in our land, freshwater and marine environments. We can expect further wide-ranging consequences for our culture, economy, infrastructure, coasts and native species.
    - **Biodiversity:** our unique native biodiversity is under significant pressure from introduced species, pollution, habitat loss, harvesting of wild species, and other factors. Almost 4000 of our native species are currently threatened with extinction.
    - **Marine:** high volumes of land-sourced sediment are impacting coastal areas, many biogenic habitats are decreasing in extent, plastics are now found throughout our marine area and harvesting marine species is having long-term and wide-ranging effects on species and habitats. Because we do not know the cumulative effects of fishing on the marine environment, it is unclear if the current levels of fishing are sustainable or where tipping points are.
    - **Land:** the activities of logging native forests, draining wetlands and clearing land have reduced the range of benefits provided by native vegetation, accelerated our naturally high rates of soil loss and affected our waterways.
    - **Urban:** growth of urban centres has led to land fragmentation and threatens the limited supply of versatile soils near Auckland and other regional centres. Some of our cities and towns have polluted air, land and water as a result of home heating, vehicle use, industrial activities, and disposal of solid waste, wastewater and stormwater. Pollution affects ecosystems, human health and enjoyment of nature. Limited knowledge of the full range of pollutants, their extent and cumulative effects, makes it challenging to fully understand the impacts of urban pollution.

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[76] Ministry for the Environment, Stats NZ. 2019. *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019*. Wellington: Ministry for the Environment and Stats NZ. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Environmental%20reporting/environment-aotearoa-2019.pdf (12 June 2020); Ministry for the Environment, Stats NZ. 2019. *New Zealand's Environmental Reporting Series: Our Marine Environment 2019*. Wellington: Ministry for the Environment and Stats NZ.

35. Management of some of these trends is outside the scope of the RMA. For other trends, the RMA is only one of many influences. Nonetheless, many would agree with the Environmental Defence Society (EDS) that "the environmental outcomes of the RMA have not met expectations" and that "it has largely failed to achieve the goal of sustainable management to date".[77]

36. One reason for this underperformance is that implementation of sustainable management proved difficult in practice. Implementation failures were largely the product of institutional issues rather than Part 2 itself. Resource management plans failed to set sufficiently strong environmental limits. This was partly because central government did not issue national direction for many years. Further, both central and local government lacked resources to adequately implement the RMA, including to undertake the necessary scientific work to monitor progress and inform regulation.

37. That said, the 'overall broad judgement' approach applied for most of the RMA's life weakened environmental limits.[78] Applying this approach in consenting decisions allowed environmental limits in plans to be set aside on the basis of advancing social, economic and cultural wellbeing. The failure of the RMA to deal well with cumulative environmental effects is therefore partly rooted in the misinterpretation of its purpose statement.

The 'overall broad judgement' approach applied for most of the RMA's life weakened environmental limits.

38. While the effectiveness of plans in setting environmental limits has been strengthened following *King Salmon*, EDS argues that the phrases 'recognise and provide for' and 'have particular regard to' in sections 6 and 7 leave considerable scope for interpretation and application of environmental protection. Moreover, we continue to lack national policy on most of the issues covered in sections 6 and 7. At the regional level, regional plans are not mandatory and rules are not required, let alone prohibited activity rules. According to EDS, "our laws may need to be more active and directive in terms of when, by whom, and under what normative umbrella we impose bottom lines".[79]

39. The former Parliamentary Commissioner for the Environment, Jan Wright, has pointed out a further problem with the RMA in that it does not encourage prioritisation based on scientific analysis of environmental trends. Given our effects on the environment are infinite in scope, and that we have limited resources available for environmental management, we need a logical process for determining where to focus efforts. She proposed the following questions as selection criteria:

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77 Environmental Defence Society. 2016. *Evaluating the Environmental Outcomes of the RMA: A Report by the Environmental Defence Society*. Auckland: Environmental Defence Society.

78 Palmer G. 2015. *Ruminations on the problems with the Resource Management Act*. Keynote address to the Local Government Environmental Compliance Conference, November. Retrieved from https://www.planning.org.nz/Attachment?Action=Download&Attachment_id=3538 (15 June 2020).

79 Environmental Defence Society. 2018. *Reform of the Resource Management System: Working Paper* 3. Auckland: Environmental Defence Society; p 63.

- is the problem cumulative? Do successive impacts keep stacking up or is there some natural mechanism that tends to restore the system?
- is the problem reversible? This is closely related to the 'cumulative' question, but allows for the possibility of human restoration of the system through technology and management practices
- is the size of the problem significant? Is it widespread and pervasive, or is it confined?
- is the size of the problem accelerating? Does it need to be dealt with urgently?
- is the problem approaching some kind of physical limit? Is there a tipping point – a level of the problem that tips the system into another state?[80]

40. The current poor state of some aspects of the environment has led to observations that sustainable management is an insufficiently ambitious objective.[81] The RMA's purpose does not address enhancing, restoring or regenerating the environment. Resources must be 'sustained', life-supporting capacity 'safeguarded' and adverse effects 'avoided, remedied and mitigated'. However some natural and physical resources are already over-allocated and their life-supporting capacity diminished. While the Act does allow authorities to pursue policies to restore the environment, it is fair to state as the Environment Court has done, that "the primary emphasis of the RMA is on consent-holders avoiding or mitigating the effects … *caused* by them" [emphasis added].[82]

The RMA's purpose does not address enhancing, restoring or regenerating the environment.

Lack of recognition and strategic focus for development

41. A second criticism of the RMA purpose and principles is they provide insufficient recognition of, and strategic focus for, necessary housing, infrastructure and other development. A growing shortage of housing in New Zealand, and the perception that RMA processes are overly cumbersome and provide insufficient certainty for major infrastructure, has seen a long series of official inquiries into the performance of the RMA. The initial focus of these inquiries was on 'streamlining' regulatory systems, but more recent reviews have sought to connect processes across the RMA, LGA and LTMA.

The RMA purpose and principles provide insufficient recognition of, and strategic focus for, necessary housing, infrastructure and other development.

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80 Parliamentary Commissioner for the Environment. 2014. *What matters most?* Resource Management Law Association Salmon Lecture. Retrieved from https://www.pce.parliament.nz/media/1659/salmon-lecture-2014-jan-wright-for-website.pdf (15 June 2020).

81 For example, see Environmental Defence Society. 2018. *Reform of the Resource Management System: Working Paper 3*. Auckland: Environmental Defence Society; p 73.

82 *J F Investments v Queenstown Lakes District Council*, EnvC Christchurch C48/2006, 27 April 2006 at [40].

- In 2008 the House Prices Unit was set up in the Department of the Prime Minister and Cabinet to investigate what it would take to slow house price inflation and lessen the volatility of New Zealand's house price cycles. It concluded that a focus on streamlining regulatory systems, especially under the RMA and building consents processes, might help.
- In 2008 the Sustainable Urban Development Unit was set up in the Department of Internal Affairs. It argued for streamlined RMA processes to better enable sustainable urban development, including the use of urban development authorities.
- In 2009 the Royal Commission on Auckland Governance addressed ownership, governance, funding and institutional arrangements for local government regulatory functions, public infrastructure, services and facilities in Auckland. The Government subsequently progressed reform of local government structures, provided for spatial planning in Auckland and set up a special process to develop the Auckland Unitary Plan under the RMA.
- In 2010 the Minister for the Environment's Urban Technical Advisory Group developed proposals for urban planning reform, including spatial planning to integrate and align the RMA with the LGA and LTMA. After this review, the Minister for the Environment's Building Competitive Cities report proposed reform of the urban and infrastructure planning system. This included recognising development objectives in the RMA, providing national direction on urban development, and utilising spatial planning and streamlined regulatory processes.
- In 2012 the Productivity Commission's Housing Affordability inquiry argued that: there should be an immediate release of land for residential development; councils should ensure their planning policies, such as height controls, boundary setbacks and minimum lot sizes, are not frustrating more efficient land use; councils should review regulatory processes with the aim of speeding up, simplifying and reducing the cost of consent processes; and central government should review planning-related legislation to reduce the cost, complexity and uncertainty associated with the interaction of the LGA, RMA and LTMA.
- In 2012 the Productivity Commission's *Better Local Regulation* report identified ways of improving how local regulation should be designed, implemented, evaluated and governed. It proposed a 'partners in regulation' protocol between central and local government.
- In 2012 the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group (Principles TAG) recommended reform of sections 6 and 7 of the RMA to include development objectives.
- In 2013 the Local Government Infrastructure Efficiency Expert Advisory Group recommended an increased focus on regional spatial planning for infrastructure.
- In 2015 the Productivity Commission's *Using Land for Housing* report argued for greater involvement of central government in local planning processes, in particular for infrastructure. It also proposed the use of spatial planning; more responsive rezoning including use of land price 'triggers' for plan changes; and stronger checks on regulatory quality.

- In 2017 the Productivity Commission's *Better Urban Planning* report proposed developing separate objectives and principles for urban planning and environmental management within an integrated statute.

42. While these reviews have generated an ongoing process of RMA and wider urban planning reform, Part 2 has remained largely unchanged.[83] The Principles TAG was appointed in 2012 to review Part 2 of the RMA. Importantly, this group was appointed prior to the *King Salmon* decision. The group noted that:

> if the Government were desirous of upholding the environmental bottom line approach formerly thought to be the correct interpretation of the Act then significant amendment should be made to the Act, because that is clearly not the law as established by judicial interpretation.[84]

43. From this starting point, the Principles TAG recommended reform of sections 6 and 7 to address what was then a mismatch between the 'overall broad judgement' approach adopted by the courts, the matters of national importance in section 6 and the hierarchy of matters provided for in sections 6 and 7. In particular, it argued sections 6 and 7 focused almost exclusively on the environmental factors that should be taken into account in decision-making, rather than acknowledging the full range of environmental, social, economic, cultural, and health and safety considerations raised in the Act's purpose statement.

44. This advice led to an attempt to include "the effective functioning of the built environment including the availability of land for urban expansion, use and development" and "the efficient provision of infrastructure" in sections 6 and 7 in 2013. However, this reform was perceived by the environmental sector to change the balance of priorities in Part 2 of the RMA, and there was not enough political support to enact it.

45. The lack of content on urban issues in Part 2 has not hindered the development of national direction or regional and district plan content on urban planning. However, the lack of such principles has left decision-makers with little guidance on how to create this plan content, for example how to balance the need for affordable housing with the desire to maintain urban environmental quality. The situation is further confused by consideration of urban environmental effects, such as loss of sunlight or traffic congestion, through a decision-making framework designed to consider effects on the natural environment. Perhaps most significantly, this has prioritised protecting the status quo, rather than recognising that urban development is a dynamic process and urban areas need to evolve.

Urban development is a dynamic process and urban areas need to evolve.

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83 The Resource Legislation Amendment Act 2017 did add "the management of significant risks from natural hazards" to section 6.

84 Minister for the Environment. 2012. *Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group*. Wellington: Ministry for the Environment. Retrieved from https://www.mfe.govt.nz/sites/default/files/tag-rma-section6-7.pdf (15 June 2020); p 18.

Insufficient recognition of Te Tiriti o Waitangi and te ao Māori

46. Part 2 of the RMA contains several provisions that are specific to Māori and Te Tiriti. Section 6(e) requires decision-makers to recognise and provide for "the relationship of Māori and their culture and traditions within their ancestral lands, water, sites, wāhi tapu, and other taonga". Section 7(a) requires decision-makers to have particular regard to kaitiakitanga. Section 8 requires decision-makers to take into account the principles of the Treaty of Waitangi. Other parts of the RMA provide for transfer of functions and joint management arrangements, iwi management plans, Mana Whakahono ā Rohe agreements and consultation with Māori, among other things.

While the RMA was designed to provide better recognition and protection of Māori interests in resource management, some consider it has not fulfilled this promise.

47. While the RMA was designed to provide better recognition and protection of Māori interests in resource management, some consider it has not fulfilled this promise. The Waitangi Tribunal notes, "it is disappointing that the RMA has almost completely failed to deliver partnership outcomes in the ordinary course of business when the mechanisms to do so have long existed".[85] The Tribunal also argues that Māori interests tend to be "balanced out" in the hierarchy of matters that decision-makers must consider in the RMA, and that lack of resourcing for Māori participation in processes has limited use of available tools.[86]

48. These issues are as much about processes available under the RMA as they are about the purpose and principles. All the provisions in the RMA relating to Māori are addressed more comprehensively in chapter 3.

Insufficient focus on outcomes

49. The issues identified with the performance of the RMA in relation to both the natural and physical environments partly results from its focus on managing the negative effects of resource use, rather than on providing direction on desired environmental and development outcomes or goals.[87]

50. As discussed, the RMA was intended to narrow the focus of 'planning' to regulation of environmental effects and facilitate a shift in planning practice in New Zealand away from the more 'dirigiste' system in place under the Town and Country Planning Act 1977.[88] Minister

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85 Waitangi Tribunal. 2011. *Ko Aotearoa Tēnei : A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*. Wellington: Waitangi Tribunal; p 279.

86 Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal.

87 For an example of this criticism, see Environmental Defence Society. 2018. *Reform of the Resource Management System: The Next Generation: Synthesis Report.* Auckland: Environmental Defence Society; p 108.

88 Minister Upton used the term 'dirigiste' to describe the Town and Country Planning Act 1977. See Upton S. 1995. Purpose and principle in the Resource Management Act. *Waikato Law Review* 3: 17–55.

Upton put it as follows in his third reading speech on the Resource Management Bill: "Unlike the current law, the Bill is not designed or intended to be a comprehensive social-planning statute … for the most part, decision makers operating under the Bill's provisions will be controlling adverse effects".[89]

51. The RMA was intended to be broadly enabling of development, subject to environmental performance standards. Economic benefits were expected to flow from having "fewer but more targeted interventions", while better environmental quality could be achieved with "fewer restrictions on the use and development of resources, but higher standards in relation to their use".[90]

Thirty years on it is clear the 'effects-based' approach was not implemented as intended in relation to both maintaining environmental standards and providing an enabling approach for development in urban areas.

52. Thirty years on it is clear the 'effects-based' approach was not implemented as intended in relation to both maintaining environmental standards and providing an enabling approach for development in urban areas. In particular, the continued use of detailed land use regulation suggests traditional town planning approaches continued in spite of the RMA, albeit without a useful guiding framework as to desired outcomes for urban development.[91]

53. It has also become apparent that greater emphasis on 'planning' itself is needed within our framework for land use regulation and environmental protection. This is evident in the challenges of implementing an 'effects-based' approach in the context of both environmental protection and development.

    - **Environmental protection**. Perhaps the most significant challenge for environmental management under the RMA has been controlling cumulative environmental effects – the result of activities that individually have a minor impact on the environment but collectively result in significant impacts over time and space. The RMA's focus on 'effects' has led to a system oriented around assessment of individual resource consent applications, at the expense of managing cumulative effects in plans and taking a wider view of the changes required to achieve sustainable management. As the Parliamentary Commissioner for the Environment noted as early as 1998:

      > the approach to promoting sustainable management being developed in New Zealand is reactive, based mostly on the management of environmental effects rather than on setting environmental performance targets and articulating visions to improve the nature and efficiency of resource use in line with sustainable development".[92]

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89 Upton S. 1991. In: Resource Management Bill: Third Reading. *New Zealand Parliamentary Debate*, 4 July.

90 Upton S. 1991. In: Resource Management Bill: Third Reading. *New Zealand Parliamentary Debate*, 4 July.

91 Ministry for the Environment. 2016. *Analysis of Efficacy of Effects-based Planning in Relation to the National Planning Template: Final Report*. Wellington: Ministry for the Environment.

92 Parliamentary Commissioner for the Environment. 1998. Towards sustainable development: The role of the Resource Management Act 1991. *PCE Environmental Management Review No. 1*. Wellington: Parliamentary Commissioner for the Environment.

The primary antidote to the 'death by a thousand cuts' that results from cumulative environmental effects, is to consider these strategically through planning processes and set firm controls that shape development in line with desired end goals. This requires a focus on the positive outcomes the system seeks to achieve in managing the natural environment, be it improved freshwater quality, enhancement and restoration of ecosystems or other goals.

- **Development.** The RMA's 'effects-based' approach has also been criticised for an insufficient focus on the positive outcomes that can be derived from planning for resource use and development. While the Act does require the management of resources to enable "people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety", the principles in sections 6 and 7 are largely focused on aspects of the environment in need of protection. There has been much discussion in recent times of the need for the system to set more specific goals for urban and infrastructure development to guide and encourage change. Primary sector industries like farming, forestry and mining also argue that the benefits of resource use and development are not given sufficient weight under Part 2 of the RMA.

Lack of clarity in intent and implementation

54. As discussed, it took over two decades for the courts to settle how and when to apply the RMA's purpose. This length of time is indicative of the lack of clarity that has permeated New Zealand resource management practice.

55. In its recent first-principles inquiry into urban planning in New Zealand, the Productivity Commission notes that "ambiguous language and broad language … led to regulatory overreach in urban areas, and a lack of stringency in how the natural environment is regulated".[93] In other words, a lack of clarity in the objectives of the RMA led to a poor management approach to both urban planning and environmental management.

It took over two decades for the courts to settle how and when to apply the RMA's purpose.

56. EDS makes a similar but distinct argument regarding lack of clarity in Part 2 of the RMA. It suggests the RMA conflates two different environmental management functions: setting environmental limits; and making trade-offs across multiple objectives above those limits. As noted, these separate functions were reflected in the debate in the courts about the purpose of sustainable management. EDS argues the system should more clearly differentiate between the core things that should be protected with environmental limits, for instance freshwater quality, and those things that we may be willing to 'trade off', such as urban amenity.[94] This is a similar argument to that of

93 New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission; pp 4 and 96.

94 Environmental Defence Society. 2018. *Reform of the Resource Management System: Working Paper 3*. Auckland: Environmental Defence Society; p 101.

the Productivity Commission, but avoids drawing a distinction between the domains of the 'built' and 'natural' environments.

57. While sections 6 and 7 of the RMA do provide for a hierarchy of matters to be considered in plans, how to interpret this hierarchy has also been a source of confusion. The Principles TAG argued that neither the current selection of matters specified, nor their allocation between sections 6 and 7, is based on a clear rationale. It identified lack of clarity as an issue in the following aspects of Part 2 of the RMA:[95]

    - difficulty interpreting Part 2 as a whole, including its role in facilitating the overall broad judgement approach required under section 5 (of course, this is unsurprising, given sections 6 and 7 were drafted on the basis of the biophysical bottom line approach)
    - difficulty interpreting each subsection and some key words within them, with many words and phrases lacking clear definitions
    - the complexity added by the large number of section 6 and 7 matters for decision-makers to consider, and lack of clarity in the approach to be taken to weighing matters within or between sections. According to the Principles TAG, this has been compounded by the increasingly "ad hoc nature of the list", as changes have been made over the years for particular purposes, but there had been no holistic review since the RMA was enacted.

58. Many commentators have pointed out that ambiguity in the meaning of sustainable management, including of the type identified by the Productivity Commission, EDS and the Principles TAG, might easily have been addressed by central government through earlier development of national policy, guidance or methodologies for decision-makers on how to decide what to assess under sections 6 and 7.[96] A large body of national direction currently under development aims to address this gap. However, this begs the question as to why the legislation itself did not set clearer objectives and a clearer hierarchy of considerations, or require national policy on important resource management challenges, as is the case with the New Zealand Coastal Policy Statement.

59. This lack of clarity on the concept of sustainable management has led to the following impacts on the system.

    - Development of a more uncertain, litigious, and costly system over the last 30 years than might otherwise have been the case.[97] The Supreme Court's *King Salmon* decision has now increased certainty by reducing the opportunity to contest the meaning of resource

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95 Minister for the Environment. 2012. *Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group*. Wellington: Ministry for the Environment. Retrieved from https://www.mfe.govt.nz/sites/default/files/tag-rma-section6-7.pdf (15 June 2020).

96 For example, see Memon A, Perkins H (eds). 2000. *Environmental Planning and Management in New Zealand*. Palmerston North: Dunmore; p 248.

97 The Principles TAG notes "Aspects of the current ss. 6 and 7 of the RMA lack clarity, resulting in uncertainty for RMA users and in final decisions being made in the Courts… Court decisions can provide greater clarity, but decision-making through the Courts is costly as well as reinforcing an adversarial approach. In addition, the case specific approach means decisions may have limited relevance for future situations." See, Minister for the Environment. 2012. *Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group*. Wellington: Ministry for the Environment. Retrieved from https://www.mfe.govt.nz/sites/default/files/tag-rma-section6-7.pdf (15 June 2020); p 37.

management plans on the basis of the broad test in Part 2. However, the corollary of this change is it reduces a 'check' provided by the courts on resource management decision-making by local government. The impacts of the *King Salmon* decision are still working their way through the system.[98]

- Increased discretion for local decision-makers and the courts. The Supreme Court pointed out in its *King Salmon* judgment that it is unlikely Parliament intended national policy to be simply a list of matters subject to an 'overall broad judgment', given the rigorous process required to create national policy statements.[99] In some cases, this discretion has enabled local government and the courts to interpret sustainable management in a way that avoids addressing difficult resource management challenges. Former Ministry for the Environment Deputy Secretary Lindsey Gow commented in 2014 that in some cases "devolution has resulted in local interests having an unacceptable dominance, leading to poor decisions; in other cases political differences and inertia have led to insufficient change."[100]
- Poor monitoring by central government of progress towards sustainable management. The Productivity Commission points out that central government's ability to monitor the performance of the planning system depends on the specificity of the objectives set.[101] Without clear objectives, it has been difficult for central government to hold local decision-makers to account for delivering sustainable management, despite significant oversight powers provided in the RMA. The Supreme Court makes a similar point in its argument for a more rigorous interpretation of the Act.[102]

60. In conclusion, while codifying the concept of 'sustainability' in law was undoubtedly a significant step forward for environmental management in New Zealand, lack of clarity about what this has meant in practice has hampered delivery of sustainable outcomes. Some of the problems outlined above may have been reduced with better implementation of national direction to set environmental standards, greater use of principles explaining how social, economic, and cultural wellbeing might be balanced with environmental protection, and the application of sustainable management to urban issues.

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98 A review of the Implications of the *King Salmon* decision notes: "As many lower order policies and plans were developed at a time when resort to Part 2 was understood to be acceptable, these provisions may not have been crafted with the precision that the Supreme Court is saying is needed to properly give effect to the direction of provisions higher up in the policy hierarchy." Department of Conservation. 2017. *Review of the Effect of the NZCPS 2010 on RMA Decision-making: Part 2: Background Information.* Wellington: Department of Conservation.

99 *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38.

100 Gow L. 2014. *The Resource Management Act: Origins, context and intentions.* Paper presented to the Resource Management Law Association conference, Dunedin, 25 September 2014. Retrieved from http://www.rmla.org.nz/wp-content/uploads/2016/09/lindsay_gow_speech.pdf (12 June 2020).

101 New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report.* Wellington: New Zealand Productivity Commission; pp. 371-399.

102 Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited [2014] NZSC 38.

Options considered

61. The options put forward in our issues and options paper were:
    - retain or change the sustainable management purpose under section 5(1)
    - retain or change the definition under section 5(2), for example by adding a positive obligation to maintain and enhance the environment
    - reframe sections 5, 6, 7 to more clearly provide for outcomes-based planning
    - strengthen sections 5, 6 and 7 to more explicitly require environmental limits and/or targets to be set
    - recognise the need to ensure there is sufficient development capacity to meet existing and future demands including for affordable housing
    - recognise other urban planning objectives
    - develop a separate statement of principles for the built environment
    - recognise Te Mana o te Wai, or its underlying principles in Part 2
    - require national direction on identified topics or methodologies
    - provide for new concepts to address climate change
    - strengthen the reference to Te Tiriti in section 8.
62. We received a broad range of suggestions for reform from stakeholders. Overall, the options considered can usefully be grouped as follows:
    - reconsidering sustainable management and the 'effects-based' approach
    - addressing concerns with management of the natural environment (climate change matters are discussed in chapter 6)
    - addressing concerns with management of urban and other development
    - recognising Te Tiriti and te ao Māori (discussed further in chapter 3).
63. We discuss each of these in turn below.

Comments received

64. Submitters put forward many suggestions for how Part 2 of the RMA should be amended. These largely echoed the public debate about the purpose of the RMA that has continued since its enactment. There was no clear agreement amongst submitters but some significant themes emerged.
    - Most submitters agreed the RMA's purpose of 'sustainable management' had not delivered intended outcomes and therefore warranted review.
    - Some submitters supported retaining the current section 5. Reasons given were the importance of existing jurisprudence, and support for the overall balance between environmental protection and development outcomes.

- Other submitters argued the current definition of sustainable management unfairly elevated environmental protection over development issues.
- Most submitters thought section 5 could be improved to address its effectiveness in achieving environmental protection, and to provide greater clarity on how to balance environmental and development outcomes.
- Most submitters agreed the RMA should be reoriented to focus on positive 'outcomes' in addition to managing adverse 'effects'. Reasons given included both the need to address cumulative environmental effects and better recognise the positive impacts of urban and other development on wellbeing.

Most submitters agreed the RMA should be reoriented to focus on positive 'outcomes' in addition to managing adverse 'effects'.

- Some submitters supported a new focus in Part 2 of the RMA on 'enhancing' the environment, including all Māori submitters.
- Māori groups argued greater weight should be given to Te Tiriti.
- Some submitters supported retaining a distinction and hierarchy between sections 6 and 7, others supported a combined list. There was also some support for a separate list of principles relating to the built environment (in both urban and rural areas).
- There was support for the existing matters specified in section 6. There were also requests to add a new reference to, or to place greater emphasis on, freshwater (Te Mana o te Wai), minerals, urban development, housing and infrastructure, climate change, heritage and property rights.

Discussion

Reconsidering 'sustainable management' and the 'effects-based' approach

65. Many serious criticisms have been made of the RMA's purpose and principles. That said, it is also apparent in state of the environment reporting and the wider public debate about environmental issues that much of the content underpinning Part 2 of the RMA is as relevant today as it was in 1991. In particular, the idea of 'sustainability' itself has only increased in prominence over the last 30 years as pressure on biophysical environmental limits has become more intense. We draw two broad conclusions from these observations that have guided our approach to reconsidering Part 2:
    - significant clarification of the policy objectives of the RMA and how they are to be achieved is required if we are to improve outcomes, both for the natural and built environments.
    - proposals for reform should build on, rather than discard, widely accepted principles.
66. Perhaps the most fundamental change contemplated in the options identified above is reorienting the system towards a positive focus on achieving 'outcomes' in addition to

managing 'effects'. As the New Zealand Law Society notes in its submission to us, there are significant interdependencies in the design of the resource management system. Substantial modification of section 5 would be required to focus measures under the RMA on achieving specified 'outcomes'. This would in turn require changes in how sections 6 and 7 are framed. A new focus on 'outcomes' would have broad impact across management of both the natural and the built environment.

67. The RMA's 'effects-based' approach was the subject of much comment in submissions. While some submitters discussed the value of a properly implemented and informed 'effects-based' approach, most supported the addition of a complementary focus on 'outcomes'. For example, from a development perspective Infrastructure New Zealand argues "the permissive, effects-based orientation of the current system heavily devolves resource management decisions down to affected parties and away from strategic public outcomes." In its view, the effects-based regime should be replaced with a system that "balances "top-down" public outcomes needs against "bottom-up" desires to exercise property rights and promote local aspirations." Fonterra and Federated Farmers made similar arguments that while an 'effects-based' approach remains relevant as a way of linking resource use with environmental outcomes, there is also a role for an outcome-based and more directive approach for priority resource management issues. In their view, this should be implemented through strategic spatial planning alongside an effects-based approach that provides flexibility in land use decision-making. From an environmental perspective, Forest & Bird points out that a focus on 'outcomes' in addition to effects could provide greater certainty about environmental limits and a necessary focus on restoration of the natural environment. We agree.

68. In light of the issues identified and the comments received, our view is that a new focus on 'outcomes' should be incorporated within the purpose and principles of the Natural and Built Environments Act. We note that the 'effects-based' approach under the RMA has not been implemented as intended. In practice, this has meant 'planning' has proceeded without a suitable guiding framework. In our view, this has been a significant underlying causal factor in the wide range of implementation challenges experienced under the RMA for the management of both the natural and built environments. As the New Zealand Planning Institute said in its submission on our issues and options paper, "an aspirational and forward-looking planning approach is needed to complement effects-based planning." This would provide greater clarity about what the system seeks to achieve in management of both the built and natural environments. In a complex system that involves multiple layers of decision-making, clarity of objectives is required to ensure results are delivered.[103]

Our view is that a new focus on 'outcomes' should be incorporated within the purpose and principles of the Natural and Built Environments Act.

[103] This is consistent with the direction of travel in public administration. For example, see the "results approach" developed in New Zealand's Better Public Services reform programme, or the recent approach to setting performance targets for child poverty reduction and climate change mitigation.

69. While the concept of sustainability should remain embedded within our environmental management system, our view is that implementing a new focus on outcomes requires the current definition of 'sustainable management' in section 5 of the RMA to be replaced with a more specific and positive purpose statement in the Natural and Built Environments Act. To support this the principles, as currently set out in sections 6 and 7 of the RMA, should be expressed as 'outcomes' the system is intended to deliver both in relation to the natural and built environments. The outcomes established in a new purpose and principles section of the Natural and Built Environments Act would inform the development of the full range of instruments used under the new legislation, including national direction (see chapter 7), regulatory planning (see chapter 8) and the use of economic instruments (see chapter 11).

70. Our proposals for reorienting the purpose and principles of the Natural and Built Environments Act to focus on outcomes are discussed in the recommendations at the end of this chapter.

Addressing concerns with management of the natural environment

71. Much of the debate about the development and interpretation of section 5 of the RMA focused on whether it established a biophysical environmental limit, and how this applied in practice. While Simon Upton stated his intention regarding Part 2 of the RMA was that "only sustainable outcomes were to be acceptable" and "whatever trade-offs in the circumstances of the case, a highest level trade-off in favour of sustainability had already been made in legislation in advance"; interpretation and implementation of the RMA did not bear this out.[104]

The deterioration of certain environmental outcomes suggests a new focus on restoration or regeneration of the environment is now needed to deliver the quality of the environment expected by New Zealanders.

72. The decline of environmental outcomes experienced over the last thirty years suggests a continued need for emphasis on environmental limits. However, as the Supreme Court has pointed out, Part 2 of the RMA is not a "primary operative decision-making provision."[105] Rather, section 5 simply provides a 'guiding principle' to be applied by those performing functions under the RMA. And, while the operation of section 5 has been clarified following the *King Salmon* decision, the process of developing detailed environmental controls at the national, regional or local levels continues to afford broad discretion to central and local government. An important question for our review has been how to ensure our system of setting protections for the natural environment is sufficiently active and directive.

73. The deterioration of certain environmental outcomes also suggests a new focus on restoration or regeneration of the environment is now needed to deliver the quality of the

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104 Upton S. 1995. Purpose and principle in the Resource Management Act. *Waikato Law Review* 3: 17–55.

105 *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [130].

environment expected by New Zealanders. The definition of sustainable management in section 5 of the RMA is a product of its time, and a new goal is now required to reflect New Zealanders' aspirations for a high standard of environmental quality. This is already evident in the ambition of the government's freshwater reform work programme, which aims to both stop further degradation and loss and reverse past damage.[106]

74. Finally, as the risks of climate change and environmental deterioration have become more immediate, the concept of 'resilience' has gained prominence in environmental management. Resilience is the capacity of a 'social-ecological' system to absorb a spectrum of shocks and stressors, and to sustain and develop its fundamental function, structure and identity through either recovery or reorganisation in a new context. Fragile environmental systems can be pushed over a threshold into a new degraded state from which recovery is slow or impossible. These system changes radically alter the flow of ecosystem services and associated livelihoods. The striking examples of collapse of fisheries – such as the North Atlantic cod fishery in the early 1990s which for the preceding 500 years had largely shaped the lives and communities of Canada's eastern coast – illustrates the potential for rapid and permanent regime change. New Zealand must avoid these types of tipping points if we are to maintain our livelihoods.

75. The concept of resilience can be seen as a component of sustainability that emphasises the need to plan for unexpected events and rapid changes in environmental states. This requires a precautionary approach to setting environmental limits that incorporates a 'buffer' of redundancy corresponding to risk and uncertainty, including in environmental data.

76. In order to address concerns about how New Zealand's natural environment is managed, a future environmental management framework must therefore ensure:

    - biophysical environmental limits 'have teeth' within a reformed system
    - limits are set in a way that ensures sustainability and resilience
    - instruments and incentives are available to deliver environmental improvement and restoration when needed.

77. This is as much about Part 2 of the Act, as it is the underlying institutions and processes used for setting and enforcing environmental rules and standards.

78. In response to these design challenges, our view is that our environmental management system should include a series of specified limits, outcomes and targets. These would be required under the Act to avoid the pitfalls of implementation failure experienced under the RMA. Figure 1.1 below is a visual representation of the conceptual relationship between five key environmental terms (bottom lines, limits, outcomes, targets and the precautionary approach).

79. Environmental *bottom lines* represent the boundaries or points at which significant and potentially irreversible harm to the environment and associated human health and wellbeing occurs. The use of bottom lines in this report conceives of them being a biophysical tipping point or threshold that is determined in accordance with the laws and interactions that exist in nature.

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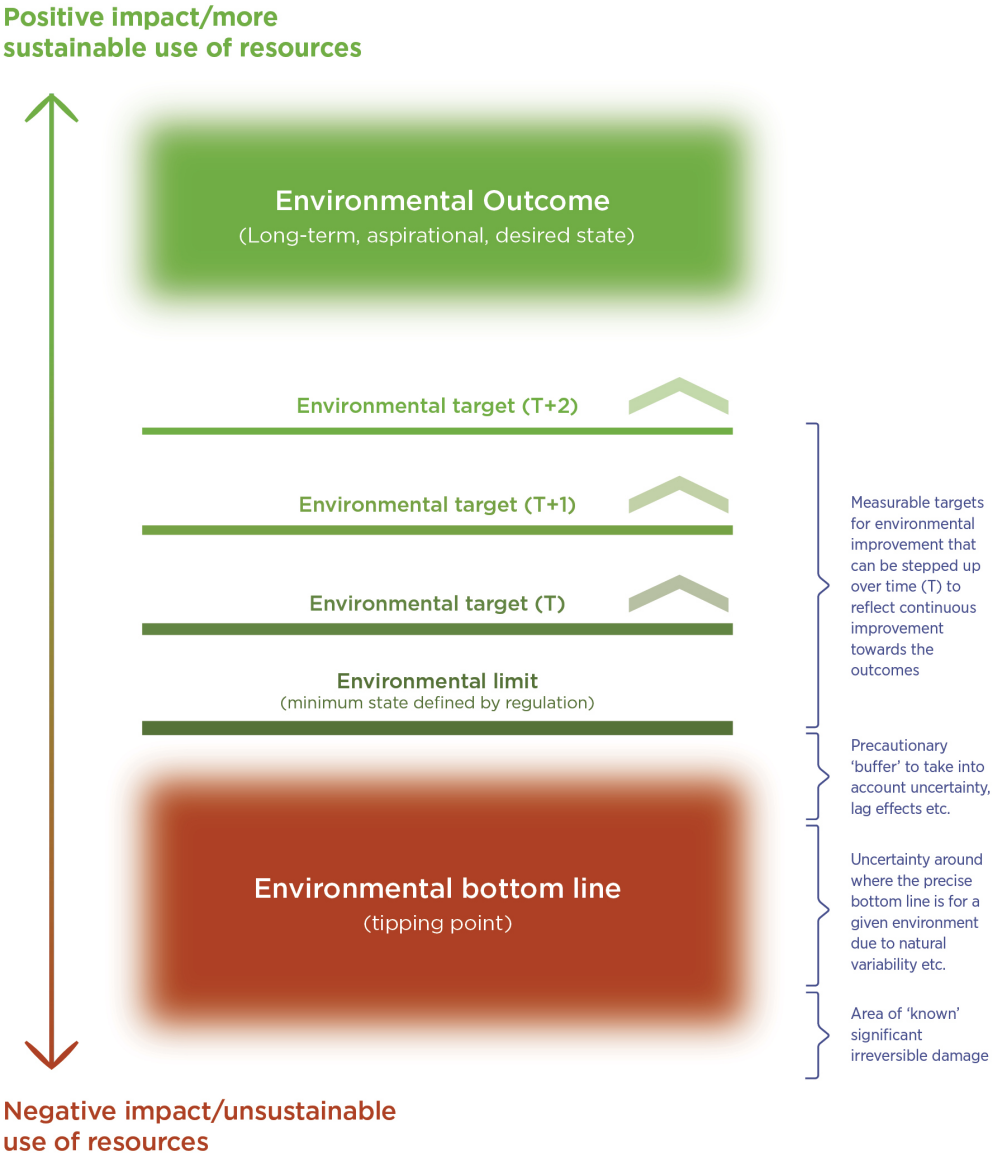
106 Ministry for the Environment. 2018. *Essential Freshwater: Healthy Water, Fairly Allocated*. Wellington: Ministry for the Environment.

80. Environmental *limits* are used to set the lower boundaries of a 'safe operating space' recognising that there could be several safe operating spaces, from pristine to degraded, above the bottom line. Limits could be quantitative or qualitative, but would be set at a level above the bottom line to serve as warnings that bottom lines are being approached, to provide triggers for remedial action and to establish cut-off points where damaging activities must cease.

Outcomes and targets are needed to orient the management approach towards continuous environmental improvement.

81. Reliance on limits alone risks creating a 'race to the bottom' mentality where exploitation of all available resources above the limit may be seen as acceptable. It may also mean that our environmental management system is not responsive to the need for positive change to improve and enhance the environment and long-term human health and wellbeing. And it creates more risk that cumulative effects will breach bottom lines and that buffers put in place to address uncertainty will come under pressure. As such, *outcomes* and *targets* are needed to orient the management approach towards continuous environmental improvement where a healthy and flourishing environment is sought, rather than one that can merely endure human modification. Outcomes are intended to be high-level enduring goals reflecting a desired future state. Targets are time-bound steps for improving the environment and moving towards achieving outcomes.

Figure 1.1: The conceptual relationship between outcomes, targets, limits and bottom lines



82. The enduring nature of environmental outcomes means they should be established in legislation. Given their significance as the overall goals which the resource management system aims to achieve, our view is that a set of 'outcomes' should be included in the purpose and principles of the Natural and Built Environments Act. The 'outcomes' would complement the overall purpose of the legislation as a series of statements that collectively create a vision of the better future that is to be desired and worked towards. For ease of interpretation, they should be grouped into the general domains in which the system operates:

- natural environment
- built environment
- tikanga Māori
- rural
- historic heritage
- natural hazards and climate change.

83. It would be less appropriate to express detailed environmental limits and targets within legislation itself. Limits and targets need to be set and expressed in such a way that they are able to accommodate a range of circumstantial, geographic, and temporal variations and changes. That said, to ensure appropriate protections for the biophysical environment are established, our view is that the Minister for the Environment should be obliged to set limits and targets through national direction for certain biophysical matters described in the Act.

84. To ensure a sustainable and resilient management approach, these limits would be required to provide a margin of safety above the conditions in which significant and irreversible damage may occur to the natural environment. Decision-makers would also be required to take a precautionary approach to setting limits where effects on the natural or built environment are uncertain, unknown or little understood but have potentially significant and irreversible adverse consequences.

The Minister for the Environment should be obliged to set limits and targets through national direction.

85. Limits and targets would also be expressed in various other planning documents. Depending on the content, coverage and detail of national targets and limits, combined plans would need to retain the ability to set targets and limits at local authority level (see chapter 8).

86. Our proposals under the purpose and principles section of the Natural and Built Environments Act to focus on specified outcomes, limits and targets are discussed in the recommendations section of this chapter.

Addressing concerns with management of urban and other development

87. The RMA enables use and development of natural and physical resources to support the wellbeing of people and communities. As discussed earlier, a long series of official inquiries has confirmed that the RMA has not provided a useful framework for urban planning and infrastructure provision. While section 5 of the RMA is sufficiently broad to encompass urban development, there is no particular reference in the purpose and principles of the RMA to the planning requirements of urban areas.

88. In its recent first principles inquiry into urban planning in New Zealand, the Productivity Commission argued that by applying an environmental management approach to planning for the built environment, Part 2 of the RMA led councils to pursue "land use regulations that have weak links to genuine externalities."[107] For example, under the broad definition of the 'environment', and in pursuit of 'amenity values', district plans prescribe rules such as minimum lot or apartment sizes and floor-to-ceiling heights on the basis of 'sustainable management'.[108]

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107 New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report.* Wellington: New Zealand Productivity Commission; p 96.

108 See the following reports by the New Zealand Productivity Commission: 2012. *Housing Affordability;* 2015. *Using Land for Housing;* 2017. *Better Urban Planning: Final Report.* Wellington: New Zealand Productivity Commission.

89. While there are different views about the extent of regulation needed in urban areas, it is clear that the link between these sorts of controls and 'sustainable management' is tenuous. In fact, these prescriptive rules are quite contrary to the original intention of the RMA. For example, in a 1997 speech Simon Upton argued similar rules "have absolutely no plausible foundation in the RMA and have nothing to do with environmental effects".[109] Rather, many of our detailed district plan rules are vestiges of plan-making approaches under the earlier Town and Country Planning Acts from 1953 and 1977 that have proved remarkably resistant to change.

We have sympathy with the view that the RMA has not provided a useful guiding framework for urban planning.

90. We therefore have sympathy with the view that the RMA has not provided a useful guiding framework for urban planning. The challenges of managing urban development are quite distinct to those of protecting the natural environment. According to 2018 population estimates, 86 per cent of New Zealand's population lives in urban areas, ranging from cities to small towns. However, our urban areas make up a small proportion of the country. In 2012, less than 1 per cent of New Zealand's total land area was classified as having urban land cover.[110] As a result, the vast majority of urban planning effort under the RMA is in fact directed at regulating the 'effects' of activities on property rather than the natural environment – be it through rules to protect access to sunlight and other amenities, or to manage impacts on infrastructure networks. Of course, this is not to say that biophysical environmental limits do not exist or should not apply in urban areas.

91. Many submissions pointed out that the RMA could be adapted to provide a more useful framework for urban planning. For example, Auckland Council argued the purpose and principles of the RMA should be expanded to promote the delivery of quality urban environments, ensure sufficient appropriate capacity for development, and recognise key infrastructure and community amenities. Similarly, the Resource Management Law Association argued that sections 6 and 7 of the RMA should be reframed to include the provision of urban development capacity and infrastructure. It also called for separate statements of principles for the natural environment and built environment/urban issues. To better enable urban development, the Property Council submitted that the purpose of the RMA should be amended to reflect that decision-making has "a preference towards change with clear enabling provisions, rather than favouring the status quo." In its view, sections 6 and 7 could either be removed entirely, or revisited with greater attention to the built environment.

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109 Speech quoted in New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission; p 107.

110 Ministry for the Environment, Stats NZ. 2019. *New Zealand's Environmental Reporting Series: Environment Aotearoa 2019*. Wellington: Ministry for the Environment and Stats NZ. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Environmental%20reporting/environment-aotearoa-2019.pdf (12 June 2020).

92. Recent efforts have already begun to build an urban planning framework inside the RMA. This has primarily been through development of national policy statements, first on urban development capacity[111] and now on urban development more generally.[112] These recognise the national significance of urban environments and provide direction to local authorities about when and how cities should plan for growth. However, there are some limitations to this approach. While this national direction will influence local plans, it does so within the RMA's 'effects-based' approach. This means that while some planning 'outcomes' have now been prescribed through national direction, and in particular the need to ensure sufficient development capacity is available for housing and business land, the overall structure of regional and local planning and consenting is still focused on the management of 'effects.'

The purpose and principles of new legislation should identify specific 'outcomes' for urban planning that correspond to the distinct environmental qualities of urban areas.

93. Our view is that more should be done to recognise and guide the distinct practice of urban planning under the Natural and Built Environments Act. The purpose and principles of new legislation should identify specific 'outcomes' for urban planning that correspond to the distinct environmental qualities of urban areas. This would ensure both that there is a clear mandate for urban planning within New Zealand's resource management system and there are some clear principles to guide good practice. The 'outcomes' set in the purpose and principles could then be used to guide combined plans that achieve greater clarity and certainty for development, while continuing to protect the natural environment.

94. Urbanisation is a complex process driven by the interaction of markets for housing and business development capacity, public investment in infrastructure and amenities, and land use regulation. Urbanisation is also dynamic. Economic and social forces drive continuous change in demand for land use, capital investment, infrastructure and neighbourhood social characteristics.

95. This complexity and dynamism underlies many of the benefits that urban areas offer through 'agglomeration economies'. The scale, density, diversity and opportunities for interaction that cities offer enable people to make connections, learn, specialise and improve their social and economic wellbeing.[113] However, as new uses come with new externalities, urban planning must resolve a continuous stream of disputes.

96. This complexity and dynamism challenges the feasibility of detailed land use plans beyond a certain point. It is important that, while protecting the environment, regulatory plans facilitate rather than prevent urban areas growing and changing. While the current shortage of housing and infrastructure to support urban growth is not only the result of the RMA, it is

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111 See Ministry for the Environment. 2016. *National Policy Statement on Urban Development Capacity 2016*. Wellington: Ministry for the Environment. Retrieved from https://www.mfe.govt.nz/more/towns-and-cities/national-policy-statement-urban-development-capacity (15 June 2020).

112 See Ministry for the Environment. *Planning for successful cities – our proposal, your views*. Retrieved from https://www.mfe.govt.nz/consultations/nps-urbandevelopment (15 June 2020).

113 For a review of complexity theories of cities, see Crawford R. 2016. *What can complexity theory tell us about urban planning?* Research Note 2016/2. Wellington: New Zealand Productivity Commission.

crucial that land use plans enable development capacity in urban areas. If this is not the case, increasing demand for access to the jobs and opportunities that urban areas provide will inevitably drive higher costs for housing and business land, with significant social and economic impacts.

97. That said, it would be a mistake to think urban planning should be entirely driven by market forces. There is a strong public interest in the overall pattern of development of urban areas that is not represented by individual developers. This includes:

    - natural environmental impacts – for example, impacts on highly productive soils and transport-related carbon emissions
    - economic impacts – for example, on the overall productivity of cities and the capacity and efficiency of infrastructure networks
    - social impacts – for example, ensuring broad community access to essential services
    - cultural impacts – for example, ensuring affordable housing is available where communities have existing ties.

98. Our view is that to achieve good environmental outcomes and make the greatest contribution to the overall wellbeing of communities, urban planning should be more focused on setting the high-level patterns of land use for urban development and less focused on developing the elaborate and overly complex regulatory controls that are characteristic of current district plans. In the words of Jane Jacobs, urban planning is a science of "organised complexity."[114] The best response to this complexity is to combine strategic direction with simple rules. The 'outcomes' set to guide urban planning should therefore recognise the dynamic nature of urban areas, ensure development capacity is available for growth and change, and ensure that the way in which overall urban form contributes to wellbeing is broadly understood. How our proposals for urban planning 'outcomes' are intended to flow though into regulatory plans is discussed in chapters 7, 8 and 11.

Urban planning should be more focused on setting the high-level patterns of land use for urban development and less focused on overly complex regulatory controls.

99. Of course, urban planning is as much about investment in infrastructure and public goods as it is about land use and environmental regulation. A second challenge for urban planning under the RMA has been its links with other important statutes relating to urban development, and in particular the LGA and LTMA. As enabling new capacity for development will often require changes to both land use rules and infrastructure investment, achieving integrated decision-making under these Acts is essential. The 'outcomes' set to guide urban planning should therefore also help ensure strategic integration of land use and infrastructure. We discuss additional proposals for new legislation to achieve better integrated strategic planning for urban and other development in more detail in chapter 4.

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[114] Jacobs J. 1961. *The Death and Life of Great American Cities*. New York: Random House; chapter 22.

100. While urban development has been a significant focus for our review, the RMA manages the environmental effects of a much broader range of activities including farming, forestry and extractive industries. We heard from some submitters that the benefits of this kind of development were not given adequate weight within the RMA. For example, the Petroleum Exploration and Production Association of New Zealand submitted that "Part 2 of the Resource Management Act ("RMA") currently has an unreasonable presumption in favour of environmental protection but without a clear framework to constrain what this management should relate to". In its view the 'overall broad judgement' interpretation of the RMA that applied before the *King Salmon* decision was more favourable towards development "but a strict interpretation of "avoid" directives has shaped the approach towards one favouring protection." Likewise, Straterra said the purpose of the RMA "sets up a hierarchy where social, economic and cultural well-being and health and safety are subsidiary to sustainable management." In its view this leads to "legitimate development activities facing barriers in achieving consents." New Zealand King Salmon's view was that "Part 2 as it is currently drafted, by in large, means all things to all people… What the Act needs to do is to provide a pathway to improve New Zealand's environment."

101. Other submitters representing the primary production sector contended that the purpose of the RMA broadly strikes the right balance between development and environmental protection. For example, Federated Farmers said "section 5(2) appropriately acknowledges that alongside environmental objectives and expectations, there should be provision for social, economic and cultural wellbeing (and health and safety) … A balanced view on resource use and benefits does not forestall aspirational and long-term goals for improved environmental outcomes." In its view, Part 2 of the RMA "should not be subject to a complete re-write". Instead, the primary focus should be on minor "amendments and better implementation" of what is already there, not wholesale change of existing contents. This may include "consideration of recent case law and guidance around interpretation."

102. There have been many years of debate about the hierarchy of environmental and development considerations in decision-making under the RMA. Our view is that this needs to be clarified through reform of Part 2. We have some sympathy with the view that development interests have not been well recognised under the RMA. In our view this is largely a product of the 'effects-based' framework that has pitted environmental and development interests against one another in resource consent processes. These issues are often contested when development proposals are at an advanced stage, leading to wasted effort if proposals are declined.

An 'outcomes-based' system can provide greater certainty for development interests if it provides for stronger and clearer plans so that decisions are not re-litigated through resource consent processes.

103. The better way forward is to plan to achieve better outcomes for both the natural and built environments in a way that is mutually beneficial. This can be achieved if plans provide adequate guidance on the kind of development that is appropriate. This requires a broad set of 'outcomes' to be specified in the purpose and principles of a future system to guide plans, including 'outcomes' for rural development. It also requires a resource management system that places greater emphasis on resolving resource conflicts in national direction and plan-making, rather than at the

consenting stage (as discussed in later chapters). An 'outcomes-based' system can provide greater certainty for development interests if it provides for stronger and clearer plans so that decisions are not re-litigated through resource consent processes.

Better recognising Te Tiriti and te ao Māori

104. The RMA recognises both Te Tiriti and Māori interests and values. However, as discussed earlier, the way the RMA has been implemented has not met the expectations of Māori.

105. Successive Waitangi Tribunal reports have now documented the shortcomings of the RMA's implementation. The recent stage 2 of the National Freshwater and Geothermal Resources inquiry was particularly critical.[115] The Tribunal noted that the requirement in section 8 to 'take into account' the Treaty principles is sometimes interpreted as a procedural requirement, implying only consultation is required. In other cases section 8 is interpreted in terms of sections 6(e) and 7(a), with the result that wider Treaty principles, including partnership and active protection, are not considered. In the Tribunal's view, "the reference to the Treaty principles in the Act should encompass all those principles and impose an obligation or duty upon RMA decision-makers. An amendment to section 8 … is required to make the RMA Treaty-compliant".[116]

Our view is that strengthened recognition both of tikanga Māori and Te Tiriti is warranted.

106. Other environmental legislation, such as the Conservation Act 1987, gives greater weight to the principles of Te Tiriti. More recently developed legislation is also more explicit about what the Crown's responsibility to give effect to the principles of Te Tiriti in a particular context entails.

107. The majority of submitters on our review supported strengthening recognition of te ao Māori and reference to Te Tiriti. We also heard this message directly during a series of regional hui.

108. Our view is that strengthened recognition both of tikanga Māori and Te Tiriti is warranted. Our proposals in this regard are discussed briefly in the section that follows, and in more detail in chapter 3.

Proposals for reform

109. Our proposals for reform are set out below with supporting commentary. Our proposals in relation to Te Tiriti and te ao Māori are discussed in more detail in the next chapter. We have also developed a number of supporting definitions that are included in appendix 1 of this report.

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115 Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal; pp 47–49.

116 Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal; p 51.

A new Natural and Built Environments Act

110. In light of the significant change in focus of the Act, we consider a new name to be appropriate. Our suggested title is the Natural and Built Environments Act.

111. Our view is that sustainable management should be replaced with a clearer and more positive focus on enhancing the quality of the natural and built environments. In order to capture the full range of protection and development issues, the environment would be defined broadly to include ecosystems, people and communities and the natural and built environments in both urban and rural areas. For the sake of clarity, we have suggested including this definition in the purpose statement of a new Act. The new focus on enhancing the environment will enable planning practice to be reoriented towards the pursuit of positive 'outcomes' in these various aspects of the environment. It will also put to bed the debate about the meaning of the word 'while' in the current definition of sustainable management.

Our view is that sustainable management should be replaced with a clearer and more positive focus on enhancing the quality of the natural and built environments.

112. Ultimately, resource management is about both protecting the environment and enabling development within clearly defined environmental limits. In doing so, it should support social, economic, environmental and cultural wellbeing now and in the future. Environmental and development interests should not be framed in competition with one another.

113. To reflect this approach, the concepts of wellbeing, sustainability and managing adverse effects on the environment that are present in the current definition of sustainable management have been supplemented with a new focus on restoring and enhancing indigenous biodiversity and ecosystems and promoting positive outcomes for the environment as a whole.

114. It should be noted that while we consider a broad definition of the environment to be necessary within an integrated system of resource management, our proposed definition excludes reference to 'amenity values' and the 'social, economic, aesthetic, and cultural conditions' associated with aspects of the environment. These are highly subjective matters which have led to considerable uncertainty and litigation. They are also commonly relied on by submitters as an argument for protecting the status quo. Our suggested way forward is to remove these references from the definition of the environment and to require the features and characteristics that contribute to enhancing the quality of the natural and built environments to be specified in mandatory national direction. This is discussed shortly.

Resource management is about both protecting the environment and enabling development within clearly defined environmental limits. In doing so, it should support social, economic, environmental and cultural wellbeing now and in the future.

115. An important aspect of our review has been to consider how New Zealand's resource management framework can better reflect te ao Māori. In some ways Part 2 of the RMA embodies New Zealand's common environmental ethic. In a bicultural New Zealand, we consider it important that the way in which Māori relate to the environment is at the heart of this story. We have therefore also proposed to add recognition of the concept of Te Mana o te Taiao to the purpose statement of the Natural and Built Environments Act. This is defined as the importance of maintaining the health of air, water, soil and ecosystems and the essential relationship between the health of those resources and their capacity to sustain all life.

We have also proposed to add recognition of the concept of Te Mana o te Taiao to the purpose statement of the Natural and Built Environments Act.

116. Te Mana o te Taiao expresses in te reo the concept of safeguarding the life-supporting capacity of natural resources which has been a longstanding part of section 5 of the RMA. Our intention is that this will help to promote a shared environmental ethic.

117. For convenience we have numbered the sections of our new purpose and principles section 5 to section 9, to roughly align with the section numbering in the RMA.

Section 5 Purpose of new Natural and Built Environments Act

(1) The purpose of this Act is to enhance the quality of the environment to support the wellbeing of present and future generations and to recognise the concept of Te Mana o te Taiao.

(2) The purpose of this Act is to be achieved by ensuring that:

  (a) positive outcomes for the environment are identified and promoted;

  (b) the use, development and protection of natural and built environments is within environmental limits and is sustainable; and

  (c) the adverse effects of activities on the environment are avoided, remedied or mitigated.

(3) In this Act **environment** includes–

  (a) ecosystems and their constituent parts;

  (b) people and communities; and

  (c) natural and built environments whether in urban or rural areas.

(4) In this Act **wellbeing** includes the social, economic, environmental and cultural wellbeing of people and communities and their health and safety.

Recognising Te Tiriti

118. Our view is that future resource management legislation should require decision-makers to 'give effect' to the principles of Te Tiriti. How this is to be done would be specified in a mandatory national policy statement. It will be important to make clear that giving effect to Te Tiriti is not intended to create a priority right for Māori to the allocation of resources, other than in respect of land or resources they own or as recognised by legislation or Tiriti settlements.

Our view is that future resource management legislation should require decision-makers to 'give effect' to the principles of Te Tiriti. How this is to be done would be specified in a mandatory national policy statement.

119. While the definition of 'Te Tiriti o Waitangi' in the new legislation would have the same effect as the current definition in the RMA, use of te reo is an important symbolic step. Our proposals in this regard are discussed in more detail in chapter 3.

Section 6 Te Tiriti o Waitangi

In achieving the purpose of this Act, those exercising functions and powers under it must give effect to the principles of Te Tiriti o Waitangi.

A defined set of planning outcomes to guide the system

120. To support the revised purpose statement, we have developed a set of planning outcomes to guide the development of instruments under the Act. These recognise that there should be some specific goals for planning in different contexts. The outcomes build on and more clearly define the existing principles in sections 6 and 7 of the RMA. They are intended to identify the particular aspects of the natural, built and rural environments that warrant protection and enhancement, or issues that require a specified management approach, as is the case with tikanga Māori, historic heritage, and natural hazards and climate change (discussed in greater detail in chapter 6).

121. In addition, in order to build flexibility into the framework, we have included a general requirement to enhance the features and characteristics that contribute to the quality of our natural and built environments. These would be identified by the Minister for the Environment through mandatory national direction.

122. It is important to note that within the 'outcomes-based' approach proposed, the matters specified will play a different role to that of sections 6 and 7 of the RMA. First, there is now a positive obligation to pursue specified outcomes. In our view, this will increase their influence over plans. Second, the purpose and principles section of the Natural and Built Environments Act is no longer intended to serve as a list of matters to consider in deciding resource consents. Rather, the outcomes will guide national direction and combined plans, which will in turn guide consideration of resource consents. This is intended to increase certainty in the system as a whole. Finally, to simplify the Act, there is no hierarchy among the outcomes specified. Any conflict in or doubt about the application of the matters specified is required to be reconciled and clarified through national direction and plans.

123. We emphasise that the specific outcomes identified are not intended to be exclusive to each category. For example, the outcomes identified for the natural and built environments are relevant to each of those categories. This reflects the simple truth that elements of the natural environment occur in the built environment and vice versa.

124. Many of the existing matters specified in sections 6 and 7 of the RMA have been reframed and refined.

- The current matters of national importance in sections 6(a), (b) and (c) regarding protection of the natural character of the coastal environment, wetlands, lakes and rivers, outstanding natural features and landscapes and significant indigenous vegetation and habitat, have been strengthened. There is now a focus on protection and enhancement of these aspects of the environment. There is also a new requirement for the Minister to identify targets to achieve continuing progress towards these outcomes. Finally, to achieve greater certainty for both environmental protection and development, there is a requirement on the Minister for the Environment to identify nationally significant features, landscapes, areas and habitats in national policy statements. Local authorities have similar functions as we discuss in chapter 8.
- The current matter of national importance in section 6(d) regarding the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers has been retained.
- The current matter of national importance in section 6(e) regarding the relationship of Māori and their culture and traditions with aspects of the environment has also been broadened and strengthened. There is now a requirement to protect and restore the relationship of iwi, hapū and *whanau* and their culture and traditions with their ancestral lands, *cultural landscapes*, water and sites. There is also a specific requirement to protect wāhi tapu and protect and restore other taonga. The recognition of protected customary rights under the Marine and Coastal Area (Takutai Moana) Act 2011 is retained.
- The current section 6(f) regarding the protection of historic heritage has been clarified and focused on *significant* historic heritage.
- The current section 6(h) regarding the management of significant risks from natural hazards has been clarified and focused on the *reduction* of risks.

125. To ensure a comprehensive approach, new outcomes have been added in relation to the natural environment, the built environment, rural matters and climate change:

Natural environment

- There is a general requirement to enhance features and characteristics that contribute to a quality natural environment. There is a corresponding requirement for the Minister for the Environment to identify these features and characteristics.
- A new focus on enhancement and restoration of ecosystems and viable populations of indigenous species has been added.

Built environment

- There is a general requirement to enhance features and characteristics that contribute to quality built environments. This reflects the broad role of the Natural and Built

Environments Act in managing the use and development of resources. There is a corresponding requirement for the Minister for the Environment to identify these features and characteristics.

- A new focus on sustainable use and development in urban areas including the capacity to respond to growth and change has been added. This reflects the important role of urban planning in setting the overall urban form of cities.
- A stronger focus on availability of development capacity for housing and business purposes to meet expected demand has been added. This reflects the important role of the resource management system in enabling competitive development and housing markets to operate.
- A new focus on the strategic integration of infrastructure with land use has been added. This reflects the importance of integrated planning for both urban and other development.

Rural

- A specific reference to sustainable use and development in rural areas has been added. This recognises the significance of primary production for rural communities and economic development more generally.
- There is a new requirement to protect highly productive soils to ensure their availability for primary production for future generations.
- There is also a requirement to accommodate land use change in response to social, economic and environmental conditions.

Climate change

- A new focus on the reduction of greenhouse gas emissions has been added.
- Support for promoting activities that mitigate emissions or sequestrate carbon has been included.
- The current section 7(j) has been strengthened and focused on promoting increased use of renewable energy.
- A new focus on improved resilience to the effects of climate change including through adaptation has been added.

126. We also consider some matters are no longer required:

- the current section 7(a) relating to kaitiakitanga is more appropriately recognised as an implementation principle (discussed shortly)
- the current section 7(h) relating to the protection of the habitat of trout and salmon should be removed. We see no good reason why these species are singled out over others in the RMA. In any case, we consider future legislation should not refer to particular species
- the other rather general matters in current section 7 are no longer needed in light of the new matters identified above.

Section 7 Outcomes

To assist in achieving the purpose of this Act, those exercising functions and powers under it must provide for the following outcomes:

Natural environment

(a) enhancement of features and characteristics that contribute to the quality of the natural environment;

(b) protection and enhancement of:

  (i) nationally or regionally significant features of the natural character of the coastal environment (including the coastal marine area), wetlands, lakes, rivers and their margins:

  (ii) outstanding natural features and outstanding natural landscapes:

  (iii) areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(c) enhancement and restoration of ecosystems to a healthy functioning state;

(d) maintenance of indigenous biological diversity and restoration of viable populations of indigenous species;

(e) maintenance and enhancement of public access to and along the coastal marine area, wetlands, lakes, rivers and their margins;

Built environment

(f) enhancement of features and characteristics that contribute to the quality of the built environment;

(g) sustainable use and development of the natural and built environment in urban areas including the capacity to respond to growth and change;

(h) availability of development capacity for housing and business purposes to meet expected demand;

(i) strategic integration of infrastructure with land use;

Tikanga Māori

(j) protection and restoration of the relationship of iwi, hapū and whanau and their tīkanga and traditions with their ancestral lands, cultural landscapes, water and sites;

(k) protection of wāhi tapu and protection and restoration of other taonga;

(l) recognition of protected customary rights;

Rural

(m) sustainable use and development of the natural and built environment in rural areas;

(n) protection of highly productive soils;

(o) capacity to accommodate land use change in response to social, economic and environmental conditions;

Historic heritage

(p) protection of significant historic heritage;

Natural hazards and climate change

(q) reduction of risks from natural hazards;

(r) improved resilience to the effects of climate change including through adaptation;

(s) reduction of greenhouse gas emissions;

(t) promotion of activities that mitigate emissions or sequestrate carbon; and

(u) increased use of renewable energy.

A clear requirement to establish environmental limits to protect the biophysical environment

127. The purpose and principles of the Natural and Built Environments Act should also include a specific section on environmental limits. As discussed earlier, we consider it important to provide for environmental limits as distinct from other planning 'outcomes'. The intention of this distinction is to recognise and circumscribe a safe operating space for human activity and to avoid significant biophysical tipping points in which irreversible harm and damage to the environment results in significant impacts on human health and wellbeing.

128. We propose a duty on the Minister for the Environment to set environmental limits for key biophysical domains: freshwater, coastal water, air quality, soil quality, and habitat for indigenous species. The limits would be required to be set within a margin of safety to ensure tipping points are avoided.

We propose a duty on the Minister for the Environment to set environmental limits for key biophysical domains: freshwater, coastal water, air quality, soil quality, and habitat for indigenous species.

129. We consider our proposed combination of specified planning 'outcomes' and 'environmental limits' responds to former Parliamentary Commissioner for the Environment Jan Wright's call to better prioritise what matters in environmental management based on scientific analysis and environmental trends, while also prioritising aspects of the environment that are particularly important to New Zealanders.

Section 8 Environmental limits

(1) Environmental limits are the minimum standards prescribed through national directions by the responsible Minister to achieve the purpose of this Act

(2) Environmental limits –

  (a) must provide a margin of safety above the conditions in which significant and irreversible damage may occur to the natural environment;

  (b) must be prescribed for, but are not limited to:

    (i) the quality, level and flow of fresh water:

    (ii) the quality of coastal water:

    (iii) the quality of air:

    (iv) the quality of soil:

    (v) the quality and extent of terrestrial and aquatic habitats for indigenous species:

  (c) may be quantitative or qualitative.

(3) Local authorities are not precluded from setting standards that are more stringent than those prescribed by the Minister.

Achieving clarity through specified implementation principles and duties

130. In light of the significant interpretation and implementation challenges experienced under the RMA, we also consider it necessary to specify implementation principles, duties and the approach to resolution of conflicts under the Act as part of the purpose and principles of replacement legislation. The intention of this section is threefold:

- **principles**: to set clear guidelines for processes and decision-making under the Natural and Built Environments Act. The principles are largely self-explanatory and relate to integrated management of resources, public participation, Māori participation, cumulative environmental effects and the precautionary approach.

We consider it necessary to specify implementation principles, duties and the approach to resolution of conflicts.

- **duties**: to establish mandatory requirements for the Minister for the Environment (and where applicable the Minister of Conservation) to develop the national direction necessary to make the system work as intended.
- **resolution of conflicts**: to provide a mechanism to resolve potential conflicts in outcomes through national direction and combined plans.

Our indicative drafting of these principles is set out below.

Section 9 Implementation

(1) This section states the approach to be adopted in implementing this Part but does not limit or affect the exercise of functions under this Act in any other respect.

Principles

(2) Those performing functions under this Act must do so in a way that gives effect to this Part and:

(a) promotes the integrated management of natural and built environments;

(b) ensures public participation in processes under this Act to an extent that recognises the importance of public participation in good governance and is proportionate to the significance of the matters at issue;

(c) promotes appropriate mechanisms for effective participation by iwi, hapū and whanau in processes under this Act;

(d) has particular regard to mātauranga Māori and provides for kaitiakitanga and tikanga Māori;

(e) complements other relevant legislation and international obligations;

(f) has particular regard to any cumulative effects of the use and development of natural and built environments; and

(g) takes a precautionary approach where effects on the environment are uncertain, unknown or little understood but have potentially significant and irreversible adverse consequences.

Ministerial duties: outcomes and environmental limits

(3) The responsible Minister must through national direction identify and prescribe:

- (a) features and characteristics that contribute to enhancing the quality of natural and built environments;
- (b) targets to achieve continuing progress towards achieving the outcomes specified in section 7;
- (c) the environmental limits specified in section 8(2)(b);
- (d) nationally significant features of the matters set out in section 7(b)(i);
- (e) outstanding natural features and outstanding natural landscapes under section 7(b)(ii) that are of national significance;
- (f) areas of significant indigenous vegetation and significant habitats of indigenous fauna under section 7(b)(iii) that are of national significance;
- (g) methods and requirements to give effect to the enhancement and restoration of ecosystems for the purposes of section 7(c);
- (h) methods and requirements to give effect to the maintenance of indigenous biodiversity and restoration of viable populations of indigenous species for the purposes of section 7(d);
- (i) how the principles of Te Tiriti o Waitangi will be given effect through functions and powers exercised under this Act; and
- (j) methods and requirements to respond to natural hazards and climate change for the purposes of section 7(q) to 7(u).

(4) The responsible Minister is the Minister for the Environment except in relation to the coastal marine area for which the Minister of Conservation is the responsible Minister in consultation with the Minister for the Environment.

Hierarchy: resolution of conflicts

(5) The use and development of natural and built environments must be within prescribed environmental limits and comply with binding targets, national directions and regulations.

(6) Subject to (5), any conflict in or doubt about the application of matters in section 7 must be reconciled and clarified as necessary in a way that gives effect to the purpose of this Act:

- (a) by the Minister through national direction or by regulation; or
- (b) in the absence of any such direction or regulation, by the provisions of policy statements and plans.

131. The new purpose and principles contain an expanded list of outcomes that must be provided for, including the matters that were treated as matters of national importance under section 6 of the RMA. It is intended to preserve key elements of the *King Salmon* decision including the rejection of the overall broad judgment approach and the recognition of the hierarchical approach under the RMA.

The new purpose and principles preserve key elements of the King Salmon decision including the rejection of the overall broad judgment approach and the recognition of the hierarchical approach under the RMA.

132. While the distinction between the relative weight to be accorded to the matters in sections 6 and 7 of the RMA has been removed, section 9(5) clarifies that the use and development of the natural and built

environments must first comply with prescribed environmental limits and with any applicable binding targets, national directions and regulations.

133. The strong emphasis on the prescription of environmental limits, the setting of binding targets to improve the quality of the natural and built environments, along with mandatory national direction, will provide direction to assist in resolving potential conflict between the outcomes in section 7. To the extent any remaining conflict or lack of clarity exists, section 9 (6) requires it to be resolved through national direction or, in the absence of any such direction, through combined plans. Again, to acknowledge the direction of *King Salmon* the intent is to address these matters in the plans rather than on an ad-hoc or case-by-case basis by way of resource consents. This is reinforced by our recommendation in chapter 8 to remove the consideration of Part 2 matters when determining resource consents.

134. The so-called cascading or hierarchical effect of the RMA from purpose and principles and national direction down to combined plans and consents remains under the National and Built Environments Act.

Expected outcomes

135. The objectives and principles for our review include ensuring our proposals for reform protect and enhance ecosystems and the natural environment, enable productive development, and set clear direction to guide decision-making. Our proposals for a new purpose and principles section in the Natural and Built Environments Act advance these objectives by refocusing New Zealand's system of resource management on enhancing the quality of the environment through pursuit of a defined set of environmental 'outcomes' and 'targets' within 'limits'. Our view is that this will set the clear direction needed to enhance the quality of both the natural and built environments.

Key recommendations

Key recommendations – Purpose and principles	
1	The RMA should be repealed and replaced with new legislation to be called the Natural and Built Environments Act.
2	The purpose of the Natural and Built Environments Act should be to enhance the quality of the natural and built environments to support the wellbeing of present and future generations and to recognise the concept of Te Mana o te Taiao.
3	The purpose of the Act should be achieved by ensuring: positive outcomes for the environment are promoted; the use, development and protection of natural and built environments is within environmental limits; and the adverse effects of activities on the environment are avoided, remedied or mitigated.

Key recommendations – Purpose and principles	
4	The environment should be defined broadly to include: (i) ecosystems and their constituent parts (ii) people and communities (iii) natural and built environments whether in urban or rural areas.
5	There should be a requirement to give effect to the principles of Te Tiriti o Waitangi.
6	Current matters of national importance should be replaced by positive outcomes specified for the natural and built environments, rural areas, tikanga Māori, historic heritage, and natural hazards and the response to climate change.
7	Mandatory environmental limits should be specified for certain biophysical aspects of the environment including freshwater, coastal water, air, soil and habitats for indigenous species.
8	Ministers and local authorities should be required to set targets to achieve continuing progress towards achieving the outcomes.
9	There should be greater use of mandatory national direction, including the identification of features and characteristics that contribute to the quality of both natural and built environments, and to respond to climate change.
10	Principles to guide implementation should be identified.
11	Any conflicts in achieving the outcomes should be resolved through national direction or, in the absence of such direction, in combined plans.
12	Indicative drafting of the new purpose and principles identified in this chapter along with associated definitions are provided in appendix 1 of this report.

Chapter 3 Te Tiriti o Waitangi me te ao Māori

Current provisions

1. The RMA has been recognised as "the first genuine attempt to import tikanga in a holistic way into any category of the general law".[117] However, it is widely recognised that the resource management system has failed to deliver on the opportunities provided in the legislation. Further the current provisions may not reflect the approach the Crown has taken to partnership under Te Tiriti in other areas.[118]
2. The RMA provides for Māori interests[119] in several parts.

Table 3.1: RMA provisions for Māori interests

Part of the RMA	Key provisions	Relevant section(s)
Purpose and principles	In achieving the purpose of the RMA, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall …	Sections 6(e), (f) and (g)
	recognise and provide for the following matters of national importance:	
	(e) … the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga.	
	(f) … the protection of historic heritage [as defined in section 2 to include sites of significance to Māori, including wāhi tapu] from inappropriate subdivision, use and development.	
	(g) … the protection of protected customary rights [as defined in section 2].	
	… **have particular regard to** kaitiakitanga	Section 7(a)
	… **take into account** the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) [referred to in this chapter as 'the Tiriti clause'].	Section 8

117 Williams J. 2013. Lex Aotearoa: An heroic attempt to map the Māori dimension in modern New Zealand law. *Waikato Law Review* 21: 1–34; p 18.

118 In this chapter, unless the context demands otherwise, we use Te Tiriti o Waitangi, Te Tiriti, the Treaty of Waitangi or the Treaty to refer to both its English and Māori versions, as per the current definition of 'Treaty' under the RMA and the Treaty of Waitangi Act 1975.

119 As noted earlier, in this report the term 'Māori' is used as a broad term that encompasses all of the indigenous people of Aotearoa including both mana whenua and mātāwaka. 'Mana whenua' is used when referring to whānau, hapū and iwi who have customary authority over an area, and 'mātāwaka' is used when referring to whānau, hapū and iwi Māori living in an area where they are not mana whenua.

Part of the RMA	Key provisions	Relevant section(s)
Relationship development and power sharing	A local authority may transfer any one or more of its functions, powers or duties under the RMA to another public authority (including an iwi authority), subject to some limitations.	Section 33
	A local authority may enter into a joint management agreement with a public authority, iwi authority, and group that represents hapū, subject to some limitations.	Section 36B
	Each local authority must keep and maintain a record of: (a) the contact details of each iwi authority and (on request of the hapū) any groups within the region or district that represent hapū (b) the planning documents that are recognised by each iwi authority [commonly described as Iwi Management Plans] and lodged with the local authority (c) any area over which one or more iwi or hapū exercise kaitiakitanga (d) any Mana Whakahono ā Rohe agreement. The Crown is required to provide information relating to (a) and (c) to local authorities, and currently does so through the Te Kāhui Māngai website, www.tkm.govt.nz.	Section 35A
	The Mana Whakahono ā Rohe (MWaR) provisions allow iwi authorities or local authorities to initiate a negotiation towards a relationship agreement between one or more iwi authorities and one or more local authorities. Local authorities must respond to an invitation from an iwi authority to enter into MWaR negotiations. Local authorities may initiate a MWaR with hapū but hapū cannot initiate a MWaR. The current provisions state a number of matters that **must**, and a number of matters that **may**, form part of the agreement. The parties are free to reach agreement on any other matter, but a MWaR agreement cannot be used to contract out of the RMA. The final MWaR agreement is binding and cannot be amended or terminated except by mutual agreement. Dispute resolution processes are available if the parties cannot reach agreement within the 18-month negotiation timeframe.	Sections 58L–58U
National direction	The Minister for the Environment may have regard to anything that is significant in terms of section 8 when deciding whether it is desirable to develop national direction.	Section 45(2)(h)
	The process for developing national direction includes giving iwi authorities notice of the proposed national direction and providing adequate time and opportunity to make a submission.	Section 46A
Planning	Regional policy statements must state the resource management issues of significance to iwi authorities in the region.	Section 62(1)(b)

Part of the RMA	Key provisions	Relevant section(s)
	When preparing or changing a policy statement or plan, the local authority concerned must take into account any relevant planning document recognised by an iwi authority if lodged with the local authority to the extent that its content has a bearing on resource management issues of the region or district relating to the policy statement or plan.	Sections 61(2A), 66(2A) and 74(2A)
	A regional council shall consider the desirability of preparing a regional plan whenever tangata whenua have or are likely to have any significant concerns for their cultural heritage in relation to natural and physical resources.	Section 65(3)(e)
	During the preparation of a proposed policy statement or plan, the local authority concerned shall consult with the tangata whenua of the area who may be affected, through iwi authorities.	Schedule 1, clause 3(1)(d)
	Membership of a hearing panel to consider a proposed or amended policy statement or plan must include at least one member who has an understanding of tikanga Māori and the perspective of tangata whenua. This appointment must be made after consultation with tangata whenua through the relevant iwi authorities.	Schedule 1, clause 65 (5)
Consenting	While section 36A states that neither an applicant for resource consent nor a local authority has a duty to consult any person, Part 6 does set out some requirements and limitations about applications that affect protected customary rights, areas covered by statutory acknowledgements and customary marine titles.	Part 6
	When appointing a board to consider a proposal of national significance, the Minister must consider the need for the board to have members with knowledge, skill and experience relating to tikanga Māori.	Section 149K
	In relation to coastal tendering (Part 7), the Minister must provide notice of an Order in Council and its effect to relevant iwi authorities.	Section 154
	An assessment of environmental effects as part of a resource consent application must address the effects on those in the neighbourhood and wider community. This includes any social, economic or cultural effects, and any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, cultural or other special value.[120]	Schedule 4

[120] In practice, this is the current mechanism that most frequently provides opportunities for mana whenua to participate in the resource management process.

3. Despite the large number of provisions in the RMA designed to provide for Māori interests, these have not been implemented to enable mana whenua to engage meaningfully in the resource management system. As the Waitangi Tribunal reported in *Ko Aotearoa Tēnei* in 2011, "Nearly 20 years after the RMA was enacted, it is fair to say that the legislation has delivered Māori scarcely a shadow of its original promise ...".[121]

Despite the large number of provisions in the RMA designed to provide for Māori interests, these have not been implemented to enable mana whenua to engage meaningfully in the resource management system.

Issues identified

4. Our terms of reference include:
   - ensuring Māori have an effective role in the resource management system consistent with the principles of Te Tiriti
   - ensuring appropriate mechanisms for Māori participation in the system, including giving effect to Tiriti settlement agreements
   - clarifying the meaning of 'iwi authority' and 'hapū'.
5. We have identified issues in the resource management system that prevent these aims from being achieved. These include:
   - lack of recognition and provision for te ao Māori in **the purpose and principles** of the resource management system. This also includes issues with the Tiriti clause in section 8 of the RMA
   - limited use of the **mechanisms for mana whenua involvement** in the RMA
   - Māori involvement in the resource management system has tended to be at the later stages of resource management processes, and there is an opportunity in a new system to provide for a **greater role for Māori at the strategic end of the system**
   - lack of **monitoring central and local government Tiriti performance**
   - capacity and capability issues for both government (central, regional and local) and Māori to engage on resource management issues, and lack of **funding and support** to address these issues
   - local authorities and applicants for resource consents can find it difficult to know who is mana whenua in an area and therefore **which mana whenua groups to engage with**. This often perpetuates the problems above.

[121] Waitangi Tribunal. 2011. *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Wai 262*, vol 1. Wellington: Waitangi Tribunal; p 285.

Māori interests are 'balanced out' in the purpose and principles

6. The purpose and principles of the RMA provide for some matters that are particularly important to Māori interests but some argue they are often 'balanced out' against other Part 2 considerations.

7. The Waitangi Tribunal's Wai 2358 report found no compelling evidence to dispute the claimants' notion that Māori interests were often 'balanced out' when RMA decision-makers must consider sections 6–8 of the RMA. Further, the Tribunal noted in the Whanganui River Report, "[section 8] does not require those with responsibilities under the Act to give effect to Treaty principles but only to take them into account. This is less than an obligation to apply them. When ranked with the competing interests of others this means that guaranteed Treaty rights may be diminished in the balancing exercise that the Act requires."[122]

8. In successive reports the Waitangi Tribunal has found the resource management system often falls short of fully adhering to the principles of Te Tiriti. In its recent Wai 2358 report, the Tribunal congratulated the Crown on "its commitment to address Māori rights and interests in a Treaty-compliant manner", but it ultimately found "the RMA had significant flaws in Treaty terms … and that the reforms the Crown has completed are not sufficient to make the RMA and the freshwater management regime Treaty compliant".[123]

In successive reports the Waitangi Tribunal has found the resource management system often falls short of fully adhering to the principles of Te Tiriti.

9. There has also been a lack of clarity about local government's role in the Tiriti partnership. As Hayward notes, "local government, historically and today, has exercised Crown kāwanatanga over resources of significance to Māori, without any legal obligation to meet the Crown's Treaty guarantees to Māori".[124]

10. The Tiriti partners are mana whenua and the Crown. The definition of the Crown in the Public Finance Act 1989 specifically excludes local government. Nevertheless the RMA delegates some Tiriti obligations to local government through section 8. There are concerns that some local authorities are not adequately fulfilling their delegated Tiriti roles and functions and are using their non-Crown status to justify this.

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122 Waitangi Tribunal. 1999. *The Whanganui River Report (Wai 167 report)*. Wellington: Waitangi Tribunal, p 330.

123 Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal; p 523.

124 Hayward J. 2011. In search of certainty: Local government policy and the Treaty of Waitangi. In: VMH Tawhai, K Gray-Sharp (eds) *'Always Speaking': The Treaty of Waitangi and Public Policy*. Wellington: Huia. pp 79–94; p 79.

Limited uptake of mechanisms for mana whenua involvement

11. There are mechanisms under the RMA for mana whenua involvement in the resource management system, but these have had extremely limited uptake.

12. The transfer of powers provision (section 33) has never been used to transfer powers or functions to an iwi authority,[125] and joint management agreements (section 36B) have only been used twice in relation to iwi authorities outside those required by Tiriti settlements.

13. Mana whenua groups consider iwi management plans to be an excellent tool[126] and many have been developed.[127] The Wai 262 report notes that iwi management plans "provide the only mechanism by which iwi authorities are able to exercise influence on resource management decisions by setting out their own issues and priorities without any council or applicant filter. It is the only instance where Māori can be proactive in resource management without needing the consent of a minister, a local authority, or an official."[128]

Iwi management plans have generally had a limited and inconsistent impact on the contents of policy statements and plans.

14. However, despite the requirements under the current provisions, iwi management plans have generally had a limited and inconsistent impact on the contents of policy statements and plans.[129] It is worth noting that, while the overall impact is low, some local authorities are better than others at taking iwi management plans into account and working with mana whenua generally.

15. Iwi management plans are just one of many matters that local authorities must consider when making policy statements or plans. However, certain matters (for example, national direction) are required to be 'given effect to', while others (for example, iwi management plans) only have to be 'taken into account'. These weak directing words may be one reason why iwi management plans have not had the desired impact.

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125 However a transfer of powers relating to specific water quality monitoring functions is being contemplated at the time of writing from Waikato Regional Council to Tūwharetoa Māori Trust Board. See Waikato Regional Council. 2020. *Proposal to transfer specified Lake Taupō monitoring functions to an iwi authority*. Available on the Waikato Regional Council website: www.waikatoregion.govt.nz.

126 The 2012 Kaitiaki Survey highlighted that kaitiaki groups consider that iwi and hapū management plans are an excellent RMA tool with 92 per cent of groups reporting that they were either "useful" or "very useful". Te Puni Kōkiri. 2013. *He Tiro Whānui e pā ana ki te Tiaki Taiao 2012: 2012 Kaitiaki Survey Report*. Wellington: Te Puni Kōkiri.

127 There are about 260 iwi management plans endorsed by iwi authorities and lodged with councils nationwide. See Ministry for the Environment. 2020. *Trends in Resource Management Act implementation: National Monitoring System 2014/15 to 2018/19*. Wellington: Ministry for the Environment.

128 Waitangi Tribunal. 2011. *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity: Wai 262*, vol 1. Wellington: Waitangi Tribunal; p 117.

129 Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal; pp 90–91.

16. In some cases capacity and capability constraints within local authorities and/or mana whenua have limited the impact of iwi management plans. For example:

    - some iwi management plans are not available online,[130] making them much more difficult to use and take into account
    - many local authorities do not have capability to take iwi management plans into account in their planning processes
    - many mana whenua groups lack the resourcing, capability or expertise to produce iwi management plans which have the content and evidential base to enable ready translation into regional and district plans.

17. Despite the strong obligations in the RMA and LGA, local authority engagement with mana whenua (and Māori generally) has often been inconsistent and ineffective.[131] Where engagement does occur, this is sometimes after policy has already been significantly developed and can be seen by some as a 'tick box' exercise. Mana whenua have consistently provided feedback[132] that consultation is not enough and partnership in the resource management system is required to give effect to Te Tiriti.

Participation is often focused on reactive, inefficient and labour-intensive processes such as responding to numerous resource consent applications, rather than on processes with strategic impact such as planning.

18. Central government has tried to address these issues through both non-legislative guidance[133] and legislative amendments, including the addition of Mana Whakahono ā Rohe (MWaR) to the RMA in 2017. However there has only been one MWaR arrangement to date with another in progress. These efforts have not achieved systemic change and both mana whenua and local authorities still face significant barriers when trying to engage with each other in resource management processes.

A more strategic role for mana whenua

19. In the absence of a strategic role for mana whenua, their participation is often focused on reactive, inefficient and labour-intensive processes such as responding to numerous resource consent applications, rather than on processes with strategic impact such as planning.[134]

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130 In 2016, of the 109 iwi management plans only 69 per cent were available online.

131 Te Puni Kōkiri, Ministry for the Environment. 2015. *Stocktake of Council Iwi Participation Arrangements*.

132 Consistent communication from Māori through Tiriti settlement negotiations, Waitangi Tribunal proceedings and submissions on the scope of the Arawhiti portfolio has been that the resource management system does not ensure their participation as Tiriti partners and kaitiaki.

133 For example, frequently asked questions about iwi management plans. See Ministry for the Environment. 2017. FAQs about iwi management plans. Retrieved from https://www.qualityplanning.org.nz/node/1005 (15 June 2020).

134 Te Puni Kōkiri. 2013. *He Tiro Whānui e pā ana ki te Tiaki Taiao 2012: 2012 Kaitiaki Survey Report*. Wellington: Te Puni Kōkiri.

20. Our terms of reference require the resource management system to ensure mana whenua have a more effective role to be consistent with Te Tiriti and its principles. This includes recognising and providing for their roles as rangatira and kaitiaki as well as their aspirations for sustainable resource use.

In some cases local authorities and applicants for resource consents find it difficult to know which mana whenua groups to engage with.

21. An important principle of Te Tiriti is partnership. There are opportunities to better reflect this principle in the relationships between mana whenua and local authorities throughout a future resource management system, especially at the strategic level. This could involve partnership arrangements between Māori and other agencies for the governance and management of resources, and better providing for rangatiratanga so Māori can be active in the protection of their taonga.

Difficulties knowing which mana whenua groups to engage with

22. To clarify the meanings of 'iwi authority' and 'hapū' we must address the underlying issue, that in some cases local authorities and applicants for resource consents find it difficult to know which mana whenua groups to engage with.

23. There are several problems with the current approach to this issue:

- engaging at the iwi or iwi authority level does not reflect the reality of kaitiakitanga, which may operate at the hapū or whānau level
- current provisions constrain local authority engagement with hapū. Hapū often approach local authorities seeking to engage on resource management matters but the willingness of local authorities to do so at this level varies
- local authorities should not be the body determining who represents an iwi for the purposes of the RMA
- central government has not provided sufficient support to local authorities or mana whenua groups to help resolve these issues.

24. The current approach in the RMA is designed to allow mana whenua groups to self-identify. This is because only Māori can define who has the mana over the whenua. However, this makes it difficult for local authorities to work out which groups represent mana whenua for any specific resource management matter. In addition, local authorities can refuse to engage with any group other than an 'iwi authority', even if the appropriate group to engage with on a particular matter is a hapū or whānau.

25. Determining which mana whenua groups should be engaged with is complex. The rohe of mana whenua do not follow local government boundaries and may overlap or be contested. Mana whenua within an area may have differing views, as may Māori within mana whenua groups. Input from these groups may be multifaceted and require considerable effort from government to understand and act upon. It is challenging to provide information and guidance on such matters.

26. As noted in the list of current RMA provisions set out above, the Crown is required to provide information to help local authorities identify the iwi authorities and hapū groups in their area. This is done through the Te Kāhui Māngai website administered by Te Puni Kōkiri. However, the groups identified on the website are based solely on a self-nomination process, meaning there is little confidence that these are necessarily the appropriate groups for local authorities to engage with. This lack of a robust identification process has slowed the development of partnerships between mana whenua and local authorities, and has made engagement difficult (and costly) for resource consent applicants.

Limited monitoring of Tiriti performance

27. Lack of oversight and limited monitoring of Tiriti performance means it is difficult to know how well local authorities (and central government) are upholding the principles of Te Tiriti and the obligations resulting from Tiriti settlements.

28. While numerous reports, submissions, feedback from hui and other evidence indicate significant issues for Māori in the resource management system, the lack of monitoring and evaluation makes it difficult to know to what extent outcomes important to Māori are being achieved and how Māori wellbeing is affected.

29. Improved system oversight and monitoring of Tiriti performance would help to ensure the outcomes of the Natural and Built Environments Act are achieved.

Lack of funding and support to build te ao Māori capacity and capability

30. A major barrier to better aligning the resource management system with te ao Māori is the difficulty of embedding Māori concepts, such as tikanga, mātauranga and te reo, into a primarily 'Western' framework particularly when these concepts are not well understood by non-Māori. This difficulty is more pronounced where there is a lack of will, funding and support to build te ao Māori capacity and capability in central and local government.

31. In addition, local authorities and mana whenua often lack the capacity and capability to meaningfully engage and meet the requirements of the RMA. Just over half of local authorities provide financial support for mana whenua participation in policy statement and plan-making processes.[135] But a lack of adequate resourcing continues to be a significant barrier to mana whenua participation in the resource management system.

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[135] Data collected by the Ministry for the Environment show 53 per cent of councils provide budgetary support for iwi/hapū participation in planning. See data from National Monitoring System 2018/19 available at www.mfe.govt.nz.

32. Overall, while tools to address the issues have been available in the RMA, they have not been implemented in a way that improves Māori wellbeing. Both legislative and non-legislative solutions will be needed to achieve real and long-lasting change.

Both legislative and non-legislative solutions will be needed to achieve real and long-lasting change.

Options considered

33. Options to address these issues have been drawn from our issues and options paper, the Tiriti and te ao Māori working group report, and suggestions from submitters and from our discussions with Māori at regional hui.

Purpose and principles

34. Options we have considered include the following.

- Incorporate a Māori framework into the purpose clause of the Natural and Built Environments Act, as part of the purpose statement itself and/or as a sub-clause, to better reflect and embed te ao Māori perspectives in the core of the system. Alternatively, include a Māori framework in a preamble to the new Act.
- Strengthen the Tiriti clause including:
  - increasing the weighting from 'take into account' to one of 'recognise and provide for', 'have particular regard to' or 'give effect to'
  - placing the Tiriti clause earlier in Part 2
  - referring to the principles of Te Tiriti, to Te Tiriti itself or to both
  - determining whether it is 'the Treaty of Waitangi' (the English language version), 'Te Tiriti o Waitangi' (the Māori language version) or both versions that should be referred to in the Tiriti clause and the related section 2 definition of 'Treaty'.
- Develop guidance on how to implement the Tiriti clause, including further sub-clauses and/or a national policy statement on Te Tiriti.
- Better align the RMA with other legislation, including the Te Ture Whenua Māori Land Act 1993, as well as the United Nations Declaration on the Rights of Indigenous Peoples.

Ways to improve mana whenua involvement

35. Options we have considered include:

- removing barriers to and encouraging the uptake of opportunities for joint management agreements and transfer of powers
- enhancing the MWaR provisions
- enhancing the role and status of iwi management plans, including considering the Wai 262 recommendations

- creating a legislative link between iwi management plan and the proposed regional spatial strategies
- rationalising the RMA tools related to mana whenua involvement into a single integrated partnership process between mana whenua and local authorities
- repealing and replacing the current definitions of 'iwi authority' and 'tangata whenua' with a new definition for 'mana whenua' that would provide for comprehensive involvement in a new resource management system
- encouraging partnership arrangements more generally, including by providing non-legislative guidance
- improving Māori participation in the resource consent process and encouraging further use of cultural impact assessments.

A role for mana whenua at the strategic end of the system

36. Options we have considered include:
    - making provision for new approaches and partnership arrangements in the management of resources, drawing on the experience of Tiriti settlements
    - establishing bodies to promote issues of significance to Māori and to develop capability and capacity, building on the examples of the Independent Māori Statutory Board (IMSB) in Auckland, and the Environmental Protection Authority's statutory Māori advisory committee, Ngā Kaihautū Tikanga Taiao
    - providing a role for mana whenua in spatial planning and/or combined planning
    - establishing a national co-governance institution, either for freshwater matters alone or with a wider focus
    - establishing an independent Tīkanga Commission that would have a watchdog and review role
    - establishing a National Māori Advisory Board
    - providing for regional co-governance committees for resource management matters
    - involving mātauranga Māori experts in the setting of limits and targets.

Monitoring and system oversight of Tiriti performance

37. We have considered providing for regular auditing of central and/or local government performance in meeting Tiriti requirements. This could done by a central government agency, mana whenua groups or an independent entity, or through self-monitoring.

Funding and support

38. Options we have considered include the following.

    - Utilising further funding mechanisms to assist with the development of iwi management plans and to fund Māori to undertake integrated partnership processes. The funding could come from a contestable fund, central or local government grants and/or enabling local authorities to fix charges payable on consumptive environmental uses.
    - Directly funding Māori engagement in spatial planning, combined planning and other resource management processes to ensure under-resourcing no longer prevents Māori from participating effectively. Funding could come from central government and local government.
    - Providing funding for advisors to build local authority capability and capacity to engage with Māori particularly in smaller local authorities.
    - Developing mechanisms for mana whenua with significant experience and success in the resource management system to share their knowledge with other groups. Some ways to facilitate this are already available[136] but further resources could be provided.
    - Developing guidance (or enhancing existing guidance) to help organisations meet their legal obligations relating to Māori and identifying areas for Māori engagement in resource management.
    - Undertaking targeted capacity and capability building for resource management practitioners. This could include: commissioner training and accreditation; iwi practitioner training; te ao Māori knowledge-building for central and local government staff; and assisting kaitiaki to develop technical expertise to participate effectively in resource management processes.

Discussion

39. The options recommended in this section to better align the system with te ao Māori are those we consider best address the issues identified, although we recommend these options be developed further in subsequent engagement with Māori.

[136] See, for example, Ngā Aho and Papa Pounamu. 2016. *Taonga Tuku Iho: Expression of Māori Values in 'Urban' Planning. Better Urban Planning Wānanga*. Wellington: New Zealand Productivity Commission; p 25.

Purpose and principles of a future system

The purpose of the resource management system

40. If the resource management system is to better align with te ao Māori and be consistent with Te Tiriti, recognition of te ao Māori should be specifically reflected in the purpose and outcomes of the Natural and Built Environments Act.

Recognition of te ao Māori should be specifically reflected in the purpose and outcomes of the Natural and Built Environments Act.

41. We acknowledge further engagement will be needed to develop the detail of a Māori framework, but it is important the new purpose and principles contain amended provisions to better reflect Māori values.

42. Some submitters specified terms they considered should be used in the purpose and outcomes of the Natural and Built Environments Act. Patuharakeke suggested 'Rangatiratanga' be included in section 5 and cascade down through sections 6 and 7.[137] Te Rūnanga o Ngāti Awa proposed the inclusion of 'mauri' in section 5, stating, "Mauri is in everything. Mauri is about life-supporting capacity. It needs to be recognised in the purpose of the Act." The IMSB proposed that the principles of rangatiratanga and partnership be included as matters of national importance.

43. Local government submitters supported efforts to bring te ao Māori into the purpose and outcomes of the Natural and Built Environments Act. Auckland Council supported new methods to elevate and recognise te ao Māori, and to refine this in partnership with Māori.

44. The New Zealand Planning Institute (NZPI) also suggested a normative influence for te ao Māori, stating, "Māori thinking should be a guiding principle (if not the guiding principle) towards sustainable management, particularly in respect of integrated management and generational outcomes". Beca thought the principle of partnership specifically needed strengthening.

45. We have considered several options for adding one or more te reo Māori phrases to either the purpose statement or its sub-clauses, or both.

Te Mana o te Taiao

46. In a recent report[138] Te Kahui Wai Māori proposed a kaupapa Māori hierarchy of obligations starting with the health and mauri of water, moving to the essential health needs of people, and then to other consumptive uses. The framework could be expanded to apply not only to wai but to the natural environment as a whole, as expressed by Te Mana o te Taiao.

47. The Panel discussed with Te Kāhui Wai Māori the possibility of Te Mana o te Taiao being part of the purpose of the Natural and Built Environments Act. Te Kāhui Wai Māori wished to

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137 Patuharakeke also suggested focusing on the articles of Te Tiriti rather than the principles.

138 Kāhui Wai Māori. 2019. *Te Mana o te Wai: The Health of Our Wai, the Health of Our Nation: Kāhui Wai Māori Report to Hon Minister David Parker*. Wellington: Ministry for the Environment. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Fresh%20water/kahui-wai-maori-report.pdf (15 June 2020).

include Te Mana o te Taiao as a fundamental concept embodied in the purpose of the Natural and Built Environments Act.

48. The view of the Tiriti and te ao Māori working group was that the hierarchy of obligations approach included in the proposed concept of Te Mana o te Taiao does not require that water or the environment be managed in a way that protects the environment at all costs. As with the concept of environmental limits, Te Mana o te Wai recognises water needs to be protected as the basis of life before other uses can occur, but this does not preclude development.

49. As Te Kāhui Wai Māori notes in its submission on the review:

> Tensions between use and development versus protection and restoration will remain when taking a whole of environment approach. Where the aforementioned settlement legislation has overcome that tension, it has done so by taking a stand, elevating one consideration over another, rather than relying on a balancing approach. Such an elevation does not have to be categorical.
>
> For example, initial feedback on Te Mana o te Wai was that the hierarchy of obligations risks dictating a return to a pre-human natural water state. This was never the intention so the feedback was helpful in recognising the need for greater clarity – that there must first be expectations of water being available for it to then meet the needs of people and communities.

50. The importance of safeguarding the life-supporting capacity of air, water, soil and ecosystems is already recognised in section 5(2)(b) of the RMA but we consider that including the concept of Te Mana o te Taiao in the purpose statement would better align the resource management system with te ao Māori. This would reflect the core value that the health of natural resources is integral to the health and wellbeing of people and communities, and give effect to the fundamental truth accepted in all communities that life itself depends on the health of our natural resources such as clean water and air, quality soils and uncontaminated oceans for food production. As already noted, the approach would not require environmental protection at all costs (a concern expressed by some submitters) but would enable development within environmental limits.

That including the concept of Te Mana o te Taiao in the purpose statement would better align the resource management system with te ao Māori.

51. Three submitters, Patuharakeke Te Iwi, Engineering New Zealand and Ngāti Tahu – Ngāti Whaoa Rūnanga Trust, supported using a Te Mana o te Wai type of framework in the purpose and principles and also suggested it was a way of elevating Te Tiriti.

52. Feedback from the regional hui supported a Te Mana o te Wai-type framework. Several hui emphasised the environment should be put above economic concerns through creating a deliberate hierarchy rather than balancing them against each other. For example, we received feedback from the Gisborne hui that the environment must be considered as a taonga, not as a resource to be used and abused.

53. In a literal sense, Te Mana o te Taiao would translate to the mana (in this context meaning importance, prestige and status) of the environment (with taiao generally being used to refer to the natural environment).

54. We recommend that the concept of Te Mana o te Taiao be included in the purpose statement of the Natural and Built Environments Act and be defined as:

> **Te Mana o te Taiao** refers to the importance of maintaining the health of air, water, soil and ecosystems and the essential relationship between the health of those resources and their capacity to sustain all life.

55. In an earlier draft of this definition we had included a form of hierarchy as supported by Te Kahui Wai Māori and other submitters but the definition we now propose makes no explicit reference to this. We have not included a hierarchy for three main reasons:

- first, we consider the underlying philosophy of Te Mana o te Taiao is sufficiently recognised by its inclusion in the purpose statement and the recognition of the mana of natural resources and their essential relationship to health and wellbeing
- second, the requirement in our revised purpose and principles for mandatory environmental limits is designed to ensure that the health of biophysical resources is protected and that the use of those resources may only occur within those limits
- third, to include a hierarchy in the definition of Te Mana o te Taiao would risk clashing with the general approach we propose in our revised purpose and principles which contemplates the resolution of conflicts between identified outcomes by ministerial direction and through plans.

Tikanga Māori outcomes

56. As discussed in chapter 2, while there are a number of outcomes Māori seek from the resource management system, we have made the decision to specify separate outcomes for tikanga Māori in our new purpose and outcomes section of the Natural and Built Environments Act.

57. These outcomes pick up and expand upon section 6(e) of the RMA with the new section 7(j) including the protection and restoration of the relationship (and tikanga and traditions) that mana whenua have with cultural landscapes. We propose cultural landscape to be "a defined area or place with strong significance for mana whenua arising from cultural or historical associations and includes connected natural, physical or metaphysical markers or features". This is an important change. Recognition of interconnections and that a cultural landscape can be 'more than the sum of its parts' will enable the multi-faceted relationships that mana whenua have with land and water to be adequately protected and restored.

We concur with the large number of reports, expert opinions and submissions on the Tiriti clause that the current "section 8 of the RMA is entirely inadequate for the degree of recognition and protection of Māori interests that is required by the Treaty".

The Tiriti clause

58. We concur with the large number of reports, expert opinions and submissions on the Tiriti clause that the current "section 8 of the RMA is

entirely inadequate for the degree of recognition and protection of Māori interests that is required by the Treaty".[139]

59. As briefly outlined in chapter 2, we propose a new Tiriti clause that would read as follows:

> To achieve the purpose of this Act, those exercising functions and powers under it must give effect to the principles of Te Tiriti o Waitangi.

60. Numerous organisations,[140] and Māori in previous feedback, have recommended the RMA should expressly give effect to the principles of Te Tiriti.

61. Most of the 46 submitters on our issues and options paper who addressed this question thought changes were required to the Tiriti clause. The most popular solution was to change the weighting to 'give effect to'. Iwi and hapū submitters frequently cited section 4 of the Conservation Act 1987, which has a 'give effect to' weighting, as an example of how to address the issue. Te Rūnanga o Ngāti Ruanui Trust thought it was not just about greater weight, but a matter of expressing full commitment to the principles of Te Tiriti.

62. Several submitters suggested putting the Tiriti clause into section 6 as a matter of national importance. NZPI suggested putting Te Tiriti into section 5 at the top of the hierarchy. Forest & Bird agreed the Tiriti clause should be elevated, but the environment should be at the top of the hierarchy: "… if giving effect to the Treaty could not be done in a way that was within environmental limits, which would prevail?"

63. Twelve submitters stated changes were not required to the Tiriti clause and considered the existing clause was already clear. Future Proof was concerned elevating the Tiriti clause would complicate the RMA's relationship to Tiriti settlement legislation.

64. Feedback from the regional hui also highlighted the need for greater recognition of Te Tiriti in the resource management system. There was support for a stronger clause than the current 'take into account'. Participants in the Nelson hui thought the obvious solution was a 'give effect to' weighting.

65. Overall submissions and other feedback indicates strong support for our proposed change to 'give effect to' the principles of Te Tiriti. The change will modernise the RMA Tiriti clause and send a strong signal that those performing functions under the Act should give greater weight to it. This change will place the Natural and Built Environment Act in the company of at least seven other pieces of legislation that use the directing words 'give effect to' in regard to Te Tiriti itself or Te Tiriti principles.[141]

66. We consider this change will have positive impacts including:

    - helping to address the lack of alignment between the Crown, local authorities and mana whenua on the role of local authorities in Te Tiriti relationship

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139 Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal; p 66.

140 Including the Waitangi Tribunal, the Environmental Defence Society and the Productivity Commission.

141 These Acts are the Climate Change Response Act 2002, Conservation Act 1987, Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, Hauraki Gulf Marine Park Act 2000, Heritage New Zealand Pouhere Taonga Act 2014, Ngā Wai o Maniapoto (Waipa River) Act 2012 and the Royal Society of New Zealand Act 1997.

- providing a lens through which other sections of Part 2 will be viewed and a catalyst for the partnerships needed to achieve te ao Māori outcomes
- helping to prevent future Tiriti breaches and claims.

67. We have also considered whether the Tiriti clause should refer to 'the Treaty of Waitangi' (the English language version), 'Te Tiriti o Waitangi' (the Māori language version) or both. As has been well established, the meaning of each version is different.

68. We propose to refer solely to Te Tiriti o Waitangi as an important symbolic step and also to acknowledge that Te Tiriti o Waitangi is now widely recognised. However we have defined 'Te Tiriti o Waitangi' as having the same meaning as the word Treaty as defined in section 2 of the Treaty of Waitangi Act 1975. This states the "Treaty means the Treaty of Waitangi as set out in English and in Māori in Schedule 1". This means our change in wording will not affect the legal application of the term which will still consider both versions of the document.

69. We have also considered whether the Tiriti clause should refer directly to Te Tiriti, or to the principles of Te Tiriti or to both.

70. Some consider the clause should refer directly to Te Tiriti, rather than to its principles, so particular attention is paid to the obligations set out in Te Tiriti's articles. For example, at the Tauranga hui participants queried the focus in the RMA and other legislation on the principles of Te Tiriti rather than on the articles.

71. The Cabinet Office Circular CO (19) 5: Te Tiriti o Waitangi / Treaty of Waitangi Guidance sets out guidelines agreed by Cabinet for policy-makers when considering Te Tiriti in policy development and implementation. This circular specifically requires attention to be given to the articles of Te Tiriti – that is, not just Te Tiriti principles.

72. Another view is that the articles are specific and limit what could be achieved in a modern society between two equal partners, while the principles are generic and can adapt and change to meet the needs of the Tiriti partners. For instance, a strict interpretation of the obligations in Te Tiriti may not result in partnership, as both versions of the document are silent on this important principle that has become the cornerstone of how the modern relationship between mana whenua and the Crown is described.

73. In many ways Te Tiriti has come to mean more than just the words on the parchment, and is considered by many to be the founding document of Aotearoa. Referring to the principles arguably enables the Tiriti partnership to go beyond the transaction that was made in 1840 and evolve. In other words, Te Tiriti should be treated as a living document. Hence, we consider it is preferable to refer to the principles of Te Tiriti.

74. As some have noted,[142] changing the words in the Tiriti clause is not in itself likely to resolve the current problems with Māori engagement in the resource management system. Further guidance on how to give effect to the Tiriti clause will be required.

Changing the words in the Tiriti clause is not in itself likely to resolve the current problems with Māori engagement in the resource management system.

75. There are two primary options for this: further sub-clauses in the Natural and Built Environments Act to direct how specific powers and functions under the Act are to be exercised and/or national direction. Either of these could provide greater specificity on how to give effect to the principles of Te Tiriti.

76. We consider the best option is to provide further guidance and direction on the Tiriti clause in a national policy statement.[143] A national policy statement would be at least as directive as additional sub-clauses, if not more so, because local authorities would need to give effect to it.[144]

77. A number of submitters supported national direction about how to give effect to the Tiriti clause. However, some local authority submitters wanted more information on whether this would be possible or appropriate.

78. In chapter 2 we noted that under section 9(3)(i) of our revised purpose and principles section, the Minister for the Environment must, through national direction, identify and prescribe how the principles of Te Tiriti will be given effect to through functions exercised under this Act. This is the same national direction instrument we are referring to here and would be the purpose of the national policy statement.

79. We consider it important that a proposed Tiriti national policy statement be developed through an appropriate process with Māori prior to it undergoing a board of inquiry process as outlined in chapter 7. While acknowledging that the content of the Tiriti national policy statement should be developed with Māori, we envisage that it could assist with or enable:

- a genuine partnership between Crown and Māori in resource management
- consistency and explicit identification of the key principles of Te Tiriti relevant to resource management issues
- linking Tiriti settlements to the resource management system including sharing innovative ideas developed through settlement processes
- Māori housing initiatives, papakāinga and other Māori residential developments, and recognition of Māori design values in planning and development

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142 For example, the Waitangi Tribunal in its 2011 Wai 262 report *Ko Aotearoa Tēnei*.

143 This chapter covers the specifics of this particular national policy statement; chapter 7 covers what we envisaged for national direction in general.

144 The Waitangi Tribunal, in its Wai 2358 report, recommended section 8 be amended to state that "the duties imposed on the Crown in terms of the principles of the Treaty are imposed on all those persons exercising powers and functions under the RMA" (second bullet point of recommendation 7.7.2).

- the adoption of mātauranga Māori, including integrated management of natural and cultural resources such as biosystems, water, urban areas and climate
- an integrated approach to climate change adaptation issues of relevance to Māori.

80. It will, however, be important to make clear that giving effect to Te Tiriti is not intended to create a priority right for Māori to the allocation of resources, other than in respect of land or resources they own or as recognised by legislation or Tiriti settlements.

81. It will also be important for the Tiriti national policy statement to link to our other recommendations in this chapter (particularly the integrated partnership process arrangements, the involvement of mana whenua in spatial and combined planning, and the monitoring of Tiriti performance) and to our recommendations in other chapters of this report where appropriate (including the need to review the national policy statement at least once every nine years).

Providing for mana whenua involvement

82. As identified above, there are processes in the RMA providing for mana whenua involvement including iwi management plans, Mana Whakahono ā Rohe (MWaR), transfers of power and joint management agreements. Each of these has the potential to provide better outcomes for mana whenua which are not being realised.

83. We recommend that the MWaR process be redesigned and renamed to provide greater opportunities for local authorities and mana whenua to discuss and agree upon a mutually beneficial partnership. We propose an integrated partnership process to provide a better avenue to use the current mechanisms. This process would be an opportunity to discuss how mana whenua aspirations for the transfer of powers and joint management agreements can be realised and how iwi management plans can influence spatial and combined planning through the mana whenua representation in those processes (discussed further in chapters 4 and 8 respectively).

84. Strengthening, or removing barriers to, the uptake of MWaR agreements was a common theme of submissions. Ngāti Whātua Ōrākei considered MWaR agreements should be mandatory and initiated by local authorities as did Barker & Associates. Ngāi Tahu supported legislative amendment and dedicated funding to better enable participation.

85. Heritage New Zealand Pouhere Taonga supported existing and new approaches to partnership, and thought the long planning cycles had delayed the use of MWaR agreements. It also noted there are barriers to iwi authorities becoming heritage protection authorities, but that these barriers also applied more generally.

86. All the regional hui highlighted the importance of moving to a true partnership at central and local government levels within the resource management system. They emphasised that mana whenua are not 'stakeholders' but Tiriti partners and the system needs to move beyond mere 'consultation' with mana whenua. For example, participants at the Whangarei hui emphasised that proper partnership involves local people who live and breathe the environment.

Changes are required to the current system to better enable partnerships between mana whenua and local authorities. Our proposed integrated partnership process would address the fragmentation and underuse of tools in the current RMA.

87. The Waitangi Tribunal's Wai 262 report made recommendations along the lines of an integrated process and we have considered its recommendations. The Tribunal in Wai 2358 considered while "Mana Whakahono a Rohe has the potential to improve relationships and to ensure that iwi are consulted on policy statements and plans", the Tribunal is "not convinced that the final version of the Mana Whakahono a Rohe mechanism, in the form that it was enacted in 2017, will have a material impact on the situation. For this new participation arrangement to be more than a mechanism for consultation, legislative amendment is required and resources must be found."[145]

88. We agree changes are required to the current system to better enable partnerships between mana whenua and local authorities. Our proposed integrated partnership process would address the fragmentation and underuse of tools in the current RMA as identified in Wai 262 and Wai 2358. It would also provide a consistent approach to settled and non-settled mana whenua and foster partnerships throughout the resource management system.

89. We suggest that ideally, before an integrated partnership process is initiated, a mana whenua group should have developed an iwi management plan. The iwi management plan does not need to be constrained to particular matters; it could cover a wide range of mana whenua aspirations including:

    - restoration and protection of the environment
    - papakāinga and other developmental aspirations
    - matters relating to article 2 of Te Tiriti, including tino rangatiratanga for whenua, kāinga and taonga katoa.

90. The key is for the iwi management plan to become a record of an agreed position within the mana whenua group, which then forms the basis of discussing a partnership with local government through the integrated partnership process. An iwi management plan should also identify the rohe or takiwā of the mana whenua group for resource management purposes. Many mana whenua groups already have iwi management plans that fulfil these functions. We support multiple mana whenua groups working together (should they wish) to develop an overarching iwi management plan for their combined rohe.

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145 Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal; p 315.

91. The ability to provide an iwi management plan, with evidence it has been mandated by the group it purports to represent, could be one way of identifying mana whenua groups with whom a local authority should be engaging (discussed later in this chapter). To be clear, we are not proposing an iwi management plan is needed to initiate an integrated partnership process. We are merely pointing out it would be a helpful way both to ensure the mandate of the mana whenua group and to outline their aspirations within their rohe.

92. We recommend that either one or more mana whenua groups or one or more local authorities may initiate an integrated partnership process. As the Tribunal in Wai 2358 noted, "the fact that a Mana Whakahono a Rohe can be initiated by iwi, and local authorities are compelled to negotiate and reach agreement if they do, is an important improvement over other RMA mechanisms".[146] For this reason it is essential any new process retains the ability for mana whenua to be the initiator.

We recommend local authorities be obliged to investigate opportunities to initiate integrated partnership processes with mana whenua.

93. Further, we recommend local authorities be obliged to investigate opportunities to initiate integrated partnership processes with mana whenua in their region, and local authorities be required to report on this though the National Monitoring System to a monitoring and oversight body (discussed later in this chapter).

94. We recommend the integrated partnership process follow the basic structure set out in the current MWaR provisions but provide for more flexible timeframes and funding. Both local authorities and mana whenua need to be able to defer or schedule discussions. Integrated partnership process arrangements would be legally binding and should only be amended or terminated by mutual agreement.

95. The integrated partnership process should also include a dispute resolution process similar to the current MWaR provisions which provide for binding or non-binding dispute mediation (by agreement) if a dispute arises among parties in the course of negotiating a MWaR. If the mediation is non-binding, and the dispute remains unresolved, the parties may seek the assistance of the Minister who can appoint a Crown facilitator to assist with resolving the dispute.

96. As with the current MWaR provisions, the integrated partnership process should be able to involve multiple mana whenua groups and local authorities who can jointly enter into agreements. This provides opportunities to work efficiently and maximise existing and new relationships.

97. We propose the integrated partnership process arrangement be required to include agreement on:

    - giving effect to Tiriti settlement obligations and commitments at local authority level, including providing for statutory acknowledgements and any other arrangements

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146 Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal; p 313.

- processes to provide for aspects of the iwi management plan(s) of one or more mana whenua groups to be taken into account in the spatial and/or combined planning processes
- processes to enable mana whenua groups to nominate candidates for mana whenua representation on spatial and/or combined planning committees
- opportunities for the parties to implement power-sharing mechanisms under the new resource management system, including transfers of power and joint management agreements
- how land owned by mana whenua will be identified and how the owners will be engaged when they may be affected by policy or plan changes
- how and when mana whenua will be engaged in resource management matters, including consenting decisions
- how mana whenua will be engaged in and informed about all the monitoring activities undertaken within the resource management system as described in chapters 12 and 13.
- how mana whenua can access opportunities for commissioner training, and how potential nominee(s) from mana whenua groups can be added to the list of nominees that the Principal Environment Judge will select from to appoint independent hearing panels (see chapter 8)
- how mana whenua group(s) can provide support to one or more local authorities in order to implement the requirements of the Tiriti national policy statement in their rohe
- what protections, if any, should be provided for wāhi tapu and whether mana whenua group(s) wish these places identified in the combined plan maps
- matters relating to climate change adaptation and natural hazards relevant to the rohe of the mana whenua group(s) and the area of the local authority(ies)
- what the relationship(s) should be with council controlled organisations within the rohe of the mana whenua group(s)
- a conflict of interest process
- a dispute resolution process for the implementation of the agreement
- funding for mana whenua participation in resource management processes
- mutual capacity and capability building, including mana whenua-led training and capability building for local authorities on the cultural connections and local Māori knowledge specific to their rohe
- timeframes for the implementation of matters in the integrated partnership process arrangement
- when and how a regular review of the effectiveness of the integrated partnership process arrangement will occur.

98. An agreement does not mean the parties will take action on these particular points immediately or even at all. Rather it means the parties must discuss these issues and confirm the partnership approach they wish to take in respect of the resource management matters

in their particular area. For example, parties could agree not to transfer functions or powers, or could agree to defer discussions for an agreed period.

99. Significant funding and support will be required for these processes. The Ministry for the Environment has provided guidance, funding and support to some iwi for the development of iwi management plans, and in 2018 the Ministry published comprehensive guidance on the MWaR process, but more will be needed. A consistent approach will be required to support the development of both iwi management plans and integrated partnership process so all mana whenua have the opportunity to use these processes.

100. One matter to address is how to respond when two or more mana whenua groups claim mana whenua in the same area and do not wish to work together. Ideally such issues would be resolved by the mana whenua groups themselves during development of iwi management plans. However, if mana whenua cannot reach agreement, there should be a graduated approach to resolving the issues. This would begin with a facilitated hui or wānanga, before moving to formal dispute resolution and ultimately referral to the Māori Land Court[147] as the final arbiter in disputes, in the unlikely event this is required.

101. The integrated partnership process we propose will have significant benefits and we envisage it will also reduce complexity in the system due to a wide range of matters being resolved up front.

102. We have also considered the current 'take into account' weighting for iwi management plans when local authorities are preparing or changing a regional policy statement, regional plan or district plan. We consider this weighting should remain. In our view, the main reason iwi management plans have failed to influence these policies and plans is the lack of relationships between local authorities and mana whenua. The governance roles mana whenua will have in the spatial and combined planning processes (discussed in chapters 4 and 8), as well as the integrated partnership processes, will help develop the relationships needed for iwi management plans to exert greater influence.

Improving transfer of powers and joint management agreement provisions

103. We consider the legislative mechanisms relating to mana whenua involvement should be grouped together in a new part of the Natural and Built Environments Act including transfer of powers and joint management agreement provisions as they relate to mana whenua. As with the current provisions, these should continue to be available for use by other public authorities.

104. Several iwi and hapū expressed frustration at the failure of local government to act in partnership under the RMA. For example, Te Kaahui o Rauru noted, "We, the Mana whenua of this land have continued to be disenfranchised by the non-delivery of the co-governance that was encapsulated in section 36B of the RMA". Te Rūnanga o Ngāi Tahu observed, "While section 33 has long held out the promise of iwi exercising a degree of rangatiratanga in their takiwā, to date there have been no instances of powers being delegated to iwi under that provision. Furthermore, iwi management plans are often not given sufficient weight or

147 The Māori Land Court has jurisdiction to advise on or determine representation on Māori groups under section 30 of Te Ture Whenua Māori Act 1993.

regard, or are misunderstood. Te Rūnanga also agrees with the Waitangi Tribunal that legislative amendment and dedicated resources are needed in order for Mana Whakahono ā Rohe agreements to be more than a mechanism for consultation".

105. We propose that the legislative barriers to the use of these mechanisms be removed. In particular, we recommend removing reference to the grounds under section 33(4)(c) of the RMA upon which both authorities must agree before powers are transferred. The three grounds are: the authority represents the appropriate community of interest; efficiency; and technical expertise. Similarly for joint management agreements we propose repealing the section 36B(1)(b) tests which are that: each party represents the relevant community of interest; each party has the technical expertise; and a joint management agreement is an efficient method.

106. Removing barriers to the use of these mechanisms received support from a number of submissions. Bay of Plenty Regional Council noted funding would help address the efficiency criteria, which is a significant barrier. Nelson and Wellington City Councils suggested the provision of guidance or national direction. Ngāti Whātua Ōrākei and Barker & Associates thought these tools should be mandatory for ancestral Māori land and land included in Tiriti settlements.

We also propose that a positive obligation be placed on local authorities to investigate opportunities to use the transfer of power and joint management agreement provisions.

107. We also propose that a positive obligation be placed on local authorities to investigate opportunities to use the transfer of power and joint management agreement provisions, and this be reinforced by their inclusion for discussion as part of an integrated partnership process. Further, local authorities would be formally required to give due consideration to any mana whenua requests to use these tools.

108. Local authorities should be required to report on their activities in this area via the National Monitoring System and also to a monitoring and oversight body (discussed further below).

109. Lastly, as per the Wai 2358 recommendation, section 33 should be amended so that transfers could be made to hapū where appropriate.

110. These changes would not by themselves address issues of risk and liability, which are potential barriers to the use of these sections. Issues of risk and liability are likely to be particular to the individual circumstances of the transfer of power or joint management agreement in question. Where risk and liability would lie should be a matter discussed and agreed between the parties involved.

An effective strategic role for mana whenua in the system

111. Our terms of reference include "ensuring that Māori have an effective role in the resource management system that is consistent with the principles of the Treaty of Waitangi". Our overall package of proposed options includes an enhanced role for mana whenua.

112. As discussed above, the resource management system tends to be 'bottom-heavy' in regard to Māori involvement. If mana whenua are more involved at the strategic end of the system, decisions should be more consistent with te ao Māori, and the burden on mana whenua to be

actively involved in lower-level decision-making should be reduced. This would be a more efficient approach.

113. This does not mean there should be no role for mana whenua in areas such as consenting (our views on this are in chapter 9). Rather a more effective role at the strategic end of the system may mean less onerous involvement in lower-level decision-making.

114. Local authority submitters provided examples of mana whenua involvement in decision-making, such as inclusion on hearing panels for plan-making and some consents.

115. Fletcher Building considered there was value in local authorities enabling greater decision-making for Māori at the plan-making stage, instead of leaving engagement to consent processes. Future Proof identified Ngā Karu Atua o te Waka, its own tangata whenua reference group, as an example of sustainable and successful participation.

116. Some submitters saw Tiriti settlements as good models for partnership. However Federated Farmers expressed concern that partnership could erode wider democratic principles: "Farmers would strongly oppose any reform of the RMA that led to the democratic principles by which the RMA is administered, and indeed the democratic principles on which the country is based, being undermined".

We consider it important to provide a more effective strategic role for Māori in the resource management system.

117. We consider it important to provide a more effective strategic role for Māori in the resource management system. Our recommendations on this are covered in other chapters, but in brief we recommend there should be mana whenua representation on regional spatial planning committees (chapter 4) and combined planning committees (chapter 8). We also consider mātauranga Māori experts should be involved in setting environmental limits and targets to complement biophysical science and impact analysis (chapters 6, 7 and 8).

Monitoring and system oversight of Tiriti performance

118. Central and local government performance in meeting our proposed obligation to give effect to the principles of Te Tiriti should be monitored.

119. This chapter only discusses monitoring in relation to Tiriti performance. However there are broader monitoring considerations including: monitoring the state of the environment at a national and local level; monitoring the effectiveness of policies in achieving environmental outcomes and targets and staying within limits; and monitoring compliance with consent conditions and rules (see chapters 12 and 13). There is a relationship between these other areas of monitoring and the monitoring of Tiriti performance, for instance when poor indicators from environmental monitoring become a Tiriti performance issue.

120. Monitoring of Tiriti performance could fulfil a number of purposes, for example:

- evaluating how local authorities are implementing the Tiriti national policy statement
- gauging progress in developing integrated partnership process arrangements

- identifying how well government agencies and local authorities are fulfilling obligations to mana whenua, and Māori more generally, in the resource management system. This would include identifying which methods are or are not effective, the 'pain points' and gaps in the system, and which agencies and/or local authorities need assistance. This would also highlight successful approaches and identify areas for greater investment or methods to be employed more widely.
- providing transparency and accountability to the Tiriti partners which in itself could improve performance.

121. Options relating to monitoring of Tiriti performance received fewer responses from submitters. Te Rūnanga o Ngāi Tahu summarised what it saw as the current state: "It is unacceptable that mana whenua must educate both councils and communities on their rights and concerns, and then use their already scarce resources to defend the need for these matters to be included and considered in planning processes".

122. Waikato Regional Council remarked "system custodianship need not be punitive" and measures should be crafted in collaboration with local government, focusing on quality and continuous improvement.

123. Ngāti Tahu – Ngāti Whaoa thought central government should take responsibility for regular audits of local authorities, and this approach could be more effective than amending legislation, as what is currently in the RMA is not being implemented properly. Waikato-Tainui suggested the group responsible for the auditing should have 50 per cent Māori governance. Te Korowai o Ngāruahine wanted iwi involvement in both Tiriti performance monitoring and state of the environment monitoring. Auckland Council supported having a national body that could monitor the efficiency and effectiveness of the RMA. Te Rūnanga o Ngāi Tahu were against the idea of a national body, unless they could run such a group in their own area.

124. Most regional hui touched on monitoring the performance of local authorities. However there was no consensus on whether this should be undertaken by a national body or regionally. Māori were looking for a role on any monitoring body.

125. The IMSB has had good success in achieving change at Auckland Council through its Tiriti audits which assess whether the Council is acting in accordance with its statutory Tiriti responsibilities.

126. In its submission on the review, the IMSB supported the establishment of "a new national body that includes a Māori Board (with members selected by an iwi selection panel) … that sets direction for the resource management system and undertakes audits of performance including meeting Treaty responsibilities".

127. We consider some form of National Advisory Board, broadly in line with options previously put forward by the Productivity Commission and Waitangi Tribunal, is the best option for monitoring Te Tiriti performance.

National Māori Advisory Board

128. We recommend a National Māori Advisory Board be established to monitor Te Tiriti performance from a Māori perspective.

129. Members of the Board should have a range of expertise including planning, law, tikanga and mātauranga Māori as well as technical and audit skills.

130. The Board should provide advice and recommendations but should not impinge on the Tiriti partners' rights to speak for their own Tiriti interests and undertake their own monitoring or other actions as needed. We suggest the duties and functions of the Board should include:

We recommend a National Māori Advisory Board be established to monitor Te Tiriti performance from a Māori perspective.

- a system oversight function that would focus on monitoring how the resource management system gives effect to the principles of Te Tiriti
- participating with the Crown in the development of the Tiriti national policy statement
- advising central government agencies with resource management functions or responsibilities and local government on policies, regulations, processes and methods that will best give effect to the principles of Te Tiriti
- considering ways to address resource management Tiriti issues of national importance and/or issues that are common to multiple regions
- maintaining records of mana whenua groups in the areas of local authorities, and a duty to assist local authorities and mana whenua to identify who to engage with on resource management matters
- regularly auditing central government agencies with resource management responsibilities and local government on their Tiriti performance and making recommendations for improvement

131. The audits could follow a six-yearly cycle during which each of the local authorities and central government agencies is audited once. The National Board should be required to report to Parliament and (depending on the report in question) central and/or local government should be required to respond. After receiving a report, bodies would report on what actions they propose to take in response to the recommendations and, where they propose not to act on a recommendation, outline the reasons why.

132. For the duty of maintaining records discussed above, this could include expanding the records kept on the Te Kāhui Māngai website and the information collected under the current section 35A of the RMA. The National Board would have a clear and active role to assist local authorities and mana whenua with identifying who to engage with. This would provide certainty and reduce costs to all parties involved.

133. To assist with this and other functions, National Monitoring System data and any other relevant monitoring data held by central or local government should be made available to the National Board to support the effective execution of its tasks.

134. Local authorities should be able to set up boards for their area, similar to the IMSB, to assist understanding of the particular Tiriti issues in their area and to proactively improve Tiriti performance before audit by the National Board. Mana whenua are best placed to articulate how obligations, particularly regarding article 2 of Te Tiriti, directly affect them in their area

and how they should be given effect to. We encourage large local authorities to give serious consideration to this approach.

135. Any boards established by a local authority should be required to report to the National Board and Ministry for the Environment on their monitoring activities and findings.

136. Audits can be adversarial, although this does not need to be the case. One of our objectives for the future resource management system is to move towards a positive outcomes-focused approach. We recommend that both the National Board and any local authority established boards adopt a positive approach where mana whenua and local authorities can collaboratively work together to improve performance.

Assisting local authorities to identify mana whenua groups

137. As noted above, local authorities and applicants for resource consents can sometimes find it difficult to know which mana whenua groups to engage with on resource management issues.

138. Eight of the local government submissions which referred to the option of clarifying the meaning of iwi authorities and hapū, cite a lack of clarity on who has a mandate to initiate agreements. Overlapping interests were a source of confusion, particularly for the Far North District Council which has a great number of iwi authorities, hapū and marae within its area. A further four responses from business/industry, infrastructure and agricultural interests[148] supported clarification, citing inefficiency, delay and extra expense.

139. Iwi and hapū groups were more circumspect in their responses on this matter. Ngāti Whātua Ōrākei acknowledged there was an issue with shared interests and lack of clarity and suggested that the meaning be co-designed. Ngāti Tahu – Ngāti Whaoa expressed concern that clarification would be done inappropriately and erode the rights of some Māori groups. Patuharakeke supported clarification but wanted to ensure the exercise recognised the importance of hapū in the resource management system.

140. Ngā Rangahautira thought such efforts may not be useful, as they would not move local authorities forward in meaningful engagement. They considered engagement should be based on relationships, and not on whether those relationships were with iwi or hapū.

141. We consider the policy solution is to provide for comprehensive involvement of mana whenua throughout the new resource management system. Our preferred approach is to use the term 'mana whenua' throughout the Natural and Built Environments Act, replacing the currently used terms including 'iwi authority' and 'tangata whenua'. The term 'mana whenua' would be defined as "an iwi, hapū or whānau that exercises customary authority in an identified area".

Our preferred approach is to use the term 'mana whenua' throughout the Natural and Built Environments Act, replacing the currently used terms including 'iwi authority' and 'tangata whenua'.

[148] Horticulture New Zealand, Fletchers, Telcos and Ports of Auckland.

142. There is a desire from all parties for certainty in resource management decision-making processes. The key to provide that certainty is a pathway for all parties to know who to engage with on particular resource management matters. In the first instance, mana whenua groups should self-identify and have a transparent mechanism for identifying mandate to discuss resource management matters on behalf of their group, for example through an agreed and mandated iwi management plan. As discussed in the previous section, we suggest that the National Māori Advisory Board should have an active duty to maintain records and assist local authorities and mana whenua groups to identify who to engage with on resource management matters. Where there is a dispute about who has mandate that cannot be resolved either by the mana whenua groups themselves or the National Māori Advisory Board, we suggest the graduated dispute resolution process outlined earlier for the integrated partnership processes should be used.

Where there is a dispute about who has mandate that cannot be resolved, the graduated dispute resolution process for the integrated partnership processes should be used.

143. There is a potential risk that a definitional change from the current terms used to 'mana whenua' could result in extensive engagement for local authorities with many hapū and whānau mana whenua groups which local authorities have neither the capacity nor capability to undertake. However, we consider the proposals we outline in this chapter and others will adequately mitigate this risk, as well as providing for the benefits associated with engagement occurring with the most appropriate mana whenua groups.

144. To be clear, our intention is not a widespread devolution of engagement activities in all circumstances from an iwi level to a hapū or whānau level. That being said, different engagement needs will call for different approaches and in some circumstances a hapū or whānau level mana whenua group is the appropriate group to be engaging with on particular matters. As a general principle, consistent with the implementation principles in section 9(2)(b) and (c) of our proposed Natural and Built Environments Act, engagement should occur at a scale, within timeframes and with a degree of effort that is commensurate to the scale and potential impact of the decisions being made.

145. Overall, there will be more opportunities for mana whenua engagement in the new resource management system and this will help clarify which mana whenua groups should be engaged with on particular resource management matters. Further, the system we propose has more direct opportunities for mana whenua involvement (see chapters 4 and 8) which should result in greater agreement on planning matters earlier in the process. Our proposed system should also result in fewer consents overall (see chapter 9). Both of these system shifts would mean there should be fewer matters to engage on in subsequent processes, and the current time and cost pressures of this engagement would be eased for local authorities, applicants and mana whenua groups.

Funding and support

146. A lack of adequate funding and support has been one of the main reasons why resource management outcomes for Māori have not been delivered (see chapter 14 for our broader discussion on institutions and capacity and capability in the resource management system).

147. We also note that better support for Māori involvement in the resource management system could have a number of broader public benefits. For example, better enabling Māori to fulfil their kaitiaki role could produce benefits for the natural environment as well as for Māori.

Where Māori undertake resource management duties and functions, and these duties or functions have public benefits, the reasonable costs incurred should be provided for.

148. We recommend a principle be added to the Natural and Built Environments Act and/or the LGA. This would specify that where Māori undertake resource management duties and functions, and these duties or functions have public benefits, the reasonable costs incurred should be provided for. We also recommend the funding and support options discussed earlier in this chapter be considered and acted upon.

149. We are mindful that public funding generally comes with the need for public accountability and a requirement to identify the public benefits that the funding will deliver, although public funding is also used to deliver benefits to targeted groups.

150. Funding should be provided by central government and/or local authorities on a case-by-case basis depending on the function. For example, involvement in combined planning would be funded by local authorities, involvement in developing national direction would be funded by central government, and involvement in spatial planning would be jointly funded by local authorities and central government.

151. There was widespread support from submitters for additional funding and support for Māori involvement in the resource management system. LGNZ noted it is not just financial resources, but more time, that is required for meaningful participation. Local authorities and mana whenua identify a lack of resourcing to support mana whenua engagement as a major access and equity issue and are looking to central government to provide those resources. For example, the Bay of Plenty Regional Council noted in its submission that success of both RMA-enabled participation and treaty settlement-mandated participation hinges on adequate funding.

152. Feedback from all regional hui also highlighted that a lack of funding and support made it more difficult for Māori to participate in the system. There was general consensus that the current model is resource-intensive for Māori and not effective. For example, the Auckland hui highlighted the need for dedicated funding for kaitiaki. Participants commented that Māori often work for free and are stretched thin without funding.

153. We agree with the view expressed at a number of hui that funds received through Tiriti settlements should not be expected to cover day-to-day resource management matters.

154. Alongside regulatory change, it is also essential to address the capacity and capability of Māori and local authorities to carry out their Tiriti-related functions within the new system. A

significant reason for the current issues in this area is the lack of resourcing. As Te Arawa Lakes Trust noted in its submission, "while the purpose, principles and processes of the legislation may be reviewed, reinforced and improved they are of little use unless hapū and iwi have the resources to engage effectively in the processes".

Expected outcomes

155. The objectives and principles for our review include ensuring our proposals for reform provide for greater recognition of Te Tiriti and te ao Māori and that due recognition is given to the relationship between the Crown and Māori. Our proposals in this chapter on Te Tiriti o Waitangi me te ao Māori advance these objectives through several mechanisms. We are proposing greater recognition of te ao Māori and Te Tiriti in the purpose and principles section of the Natural and Built Environments Act. The provision for partnerships through the integrated partnership process arrangements and a governance role for mana whenua in spatial and combined planning gives due recognition to the partnership relationship between the Crown and Māori. Our recommendations on resourcing and audit functions will improve implementation. Our view is that these changes will set the clear direction needed both for the greater recognition of Te Tiriti and for better aligning the system with te ao Māori.

Process for the next stage

156. Cabinet has noted "that the Minister for the Environment will direct officials to look for appropriate opportunities to collaboratively refine and co-design policy options with Māori during the next phase of the review in line with Cabinet's agreed Guidelines for Engaging with Māori".[149]

157. Any subsequent process will need to balance the value of engagement with Māori, with the need to maintain the constitutional role of the responsible Minister and that of Cabinet to make decisions on potential legislation to take to Parliament.

158. To assist the subsequent process between the Tiriti partners, we have identified some specific areas this process could explore further:

- the details for a national policy statement that provides guidance and direction on how to give effect to the principles of Te Tiriti and on the te ao Māori outcomes expressed in the purpose and principles section of the Natural and Built Environments Act, as recommended above
- specifics of the integrated partnership process we have recommended
- use and definition of Māori terms and kupu. This process could consider the pros and cons of defining Māori terms in statute and the value of greater clarity versus greater flexibility
- options not canvassed in this report, for example, a process for the creation of legal entity status for particular taonga.

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149 Cabinet. 2019. Minute of Decision. Comprehensive Review of the Resource Management System: Confirming the Scope and Terms of Reference. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/RMA/cabinet-minute-rm-review-confirming-the-scope-and-terms-of-reference.pdf (15 June 2020).

Key recommendations

Key recommendations – Te Tiriti o Waitangi me te ao Māori	
1	The concept of 'Te Mana o te Taiao', should be introduced into the purpose of the Natural and Built Environments Act to recognise our shared environmental ethic.
2	Specific outcomes should be provided for 'tikanga Māori', including for the relationships of mana whenua with cultural landscapes.
3	The current Treaty clause should be changed so that decision-makers under the Act are required to 'give effect to' the principles of Te Tiriti o Waitangi.
4	A national policy statement should be required on how the principles of Te Tiriti will be given effect through functions and powers exercised under the Act.
5	A more effective strategic role for Māori in the system should be provided for, including representation of mana whenua on regional spatial planning and joint planning committees.
6	A National Māori Advisory Board should be established to monitor the performance of central and local government in giving effect to Te Tiriti and other functions identified in the report.
7	The current Mana Whakahono ā Rohe provisions should be enhanced to provide for an integrated partnership process between mana whenua and local government to address resource management issues.
8	The current legislative barriers to using the transfer of power provisions and joint management agreements should be removed and there should be a positive obligation on local authorities to investigate opportunities for their use.
9	The current definitions of the terms 'iwi authority' and 'tangata whenua' should be replaced with a new definition for 'mana whenua'.
10	Provision should be made for payment of reasonable costs where Māori are undertaking resource management duties and functions in the public interest.
11	The funding and support options recommended in this chapter should be implemented.

Chapter 4 Strategic integration and spatial planning

1. Our terms of reference require the Panel to consider the integration of processes under the RMA, LGA and LTMA and to review opportunities to use spatial planning as a means of achieving better alignment of this legislation. This chapter discusses our proposals for achieving strategic integration across the resource management system including the use of regional spatial planning. The aim of these proposals is to embed a long-term, strategic and integrated approach to planning, the provision of infrastructure and associated funding and investment.
2. We propose mandatory regional spatial planning, which would substantially reshape the resource management system. Our proposals for achieving this are closely linked to topics discussed in other chapters of this report.

Current provisions

3. There is currently no consistent framework for spatial planning in New Zealand. Only Auckland Council is legally required to have a spatial plan.[150]
4. Some councils are making progress with developing integrated and long-term spatial plans without a legislative framework,[151] but there are barriers to achieving their full potential, including:
    - insufficient legislative mandate and weight, including formal links between spatial plans and detailed resource management and funding plans
    - fragmented governance and decision-making arrangements (within and between councils) and insufficient central government involvement and coordination
    - infrastructure funding and financing constraints and poor understanding of the costs and benefits of growth
    - poor incentives for councils to join forces to coordinate, provide for and fund infrastructure in order to efficiently respond to growth and change.

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150 Sections 79 and 80 of the Local Government (Auckland Council) Act 2009.

151 These include local government initiatives 'Future Proof' and 'SmartGrowth' and recent spatial planning partnerships involving central government in the Hamilton to Auckland corridor, Tauranga – Western Bay of Plenty, Wellington – Horowhenua and Queenstown Lakes. In addition the proposed National Policy Statement on Urban Development, which will soon replace the National Policy Statement on Urban Development Capacity, will strengthen the requirements for future development strategies to make them more like spatial strategies.

Issues identified

5. The review has identified a broad range of interrelated factors that hamper strategic integration of the resource management system.

- **Lack of an outcomes focus in the RMA:** many have argued that the 'effects-based' framework in the RMA has not provided a useful basis for strategic planning. It has also led to a 'culture' in planning with a focus on the negative rather than positive outcomes from good use of resources. For example, in its submission to the Panel, Infrastructure New Zealand notes "the permissive, effects-based orientation of the current system heavily devolves resource management decisions down to affected parties and away from strategic public outcomes".
- **Poor alignment of land use and infrastructure plans:** misalignment between land use plans under the RMA and infrastructure plans under the LGA and LTMA has led to poor outcomes both for development and the environment. For example, LGNZ argues "the current planning system (comprising RMA, LGA and LTMA) is unwieldy and not well integrated. There is little alignment between strategies, funding, regulation and decision-making to integrate land use and infrastructure development, set spending priorities, and manage growth".[152] This misalignment prevents decision-makers from addressing important challenges in a coordinated, effective and efficient way. For example, in the context of policy to address climate change, the Organisation for Economic Co-operation and Development (OECD) points out "reducing emissions from urban transport is most effective when transport and land use policies are integrated. A combination of policies are required to incentivise modal shifts, reduce emissions intensity per kilometre and reduce total distances travelled".[153]

Central government has generally not been an active participant in strategic land use planning.

- **Insufficient long-term focus:** there appears to have been a lapse in long-term land use planning in New Zealand. This is perhaps as a result of the shift, described in chapter 2 of this report, from the Town and Country Planning Act's approach of prescribing outcomes and activities to the 'effects-based' focus of the RMA. For example, evidence shows that since the major urban transport plans in the 1960s and 1970s, New Zealand has done little to protect and acquire future infrastructure corridors in advance of planning for development in those areas.[154]
- **Lack of engagement and coordination by central government:** central government's allocation of the National Land Transport Fund and decisions about education and health

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[152] Local Government New Zealand submission on New Zealand Productivity Commission. 2016. *Better Urban Planning: Draft Report*. Wellington: New Zealand Productivity Commission.

[153] OECD Working Party on Integrating Environmental and Economic Policies. 2018. *Decarbonising urban mobility with land use and transport policies: The case of Auckland*. Paris: OECD Publishing.

[154] Douglass M, Dryden JG. 2012. *Transportation Corridors and Community Structures*. New Zealand Transport Agency Research Report 496. Wellington: New Zealand Transport Agency.

infrastructure spending influence land use planning. However, with the exception of the New Zealand Transport Agency (NZTA), central government has generally not been an active participant in strategic land use planning. Central government's approach to infrastructure spending across health, education, transport, among other things, lacks coordination. The involvement of central government agencies in voluntary spatial planning for growth areas has increased recently under the Government's Urban Growth Agenda. There is an opportunity to formalise and strengthen this role through legislation.

- **Poor relationship between central and local government**: the Productivity Commission has identified the poor state of relations between central and local government as a recurrent theme across its inquiries. Its view is that "this failure arises from a lack of understanding of each other's roles and of the constitutional status of local government".[155]

6. A number of other issues relating to the RMA planning framework also hamper strategic integration of the system. In particular, the complexity driven by the number and variation of regulatory instruments under the RMA. This is discussed in chapter 8 of this report.

7. Many commentators have called for a new legislative framework for spatial planning in New Zealand to address these issues.[156] Stakeholders, including the Environmental Defence Society (EDS) and the Productivity Commission, have carried out a significant amount of work on spatial planning that has informed our considerations.

8. Our work has also been informed by international examples, such as the Greater Sydney Regional Plan and its relationship to sub-regional 'City Deals'. However, any option for improving strategic integration will need to reflect New Zealand's unique circumstances, including the roles of central and local government and Māori in the resource management system.

Three main planning statutes

9. New Zealand's resource management system has three main planning statutes. The RMA regulates the sustainable management of natural and physical resources. The LGA establishes our system of local democracy. The LTMA sets out requirements for the operation, development and funding of the land transport system.

10. Many other statutes either include or have implications for resource management functions. National policies for climate change mitigation and adaptation developed under the Climate Change Response Act 2002 (CCRA) will play an increasingly important role in the system. Other examples include the Conservation Act 1987, Public Works Act 1981 and Kāinga Ora–Homes and Communities Act 2019.

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155 New Zealand Productivity Commission. 2020. *Local Government Insights*. Wellington: New Zealand Productivity Commission.

156 Spatial planning has been included in proposals for reform from the Environmental Defence Society (2018–2019, *Reform of the Resource Management System* reports), New Zealand Productivity Commission (2015, *Using Land for Housing*; 2017, *Better Urban Planning*), OECD (2017, *Environmental Performance Reviews – New Zealand 2017*), LGNZ (2015, *A 'Blue Skies' Discussion about New Zealand's Resource Management System*), the Minister for the Environment (2010, *Urban Technical Advisory Group Report*) and more.

11. Improving strategic integration across the system requires an effective mechanism for integrating planning, the provision of infrastructure and associated funding, and investment under the RMA, LGA and LTMA. There is also a need to link spatial planning to plans and processes under other legislation, such as the CCRA.

Improving strategic integration across the system requires an effective mechanism for integrating planning, the provision of infrastructure and associated funding, and investment under the RMA, LGA and LTMA.

12. As described in table 4.1, the RMA, LGA and LTMA have different purposes and processes. For example, the RMA and LGA refer to 'social, economic, environmental and cultural wellbeing' in their purpose statements, while the LTMA does not, and only the RMA provides for appeals to a court.

Table 4.1: Comparison of RMA, LGA and LTMA

Act	Function	Purpose	Process
RMA	Regulation of the sustainable management of natural and physical resources	To promote the sustainable management of natural and physical resources. In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while— (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment	Submissions Appeals Judicial review
LGA	Functions of local government and its accountability to communities Includes planning and funding for infrastructure and services	To provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act— (a) states the purpose of local government; and (b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and (c) promotes the accountability of local authorities to their communities; and (d) provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural wellbeing of their communities, taking a sustainable development approach	Submissions Judicial review
LTMA	Land transport operation, planning and funding	To contribute to an effective, efficient, and safe land transport system in the public interest	Submissions Judicial review

13. There are good reasons for the differences in purposes and processes across the three statutes. However, we need aligned and coordinated decision-making to get good and timely outcomes. For example, enabling new capacity for urban development requires changes to land use regulation (under the RMA) and infrastructure investment (under the LGA and LTMA). A new large-scale urban development proposal will need decisions under the RMA (designations and consents), the LGA (infrastructure funding) and LTMA (transport funding). To facilitate this, decision-making criteria across the system need to be coherent and processes as streamlined as possible.

Options considered

14. Our issues and options paper put forward the following options to improve strategic integration across the resource management system:

    - new legislation setting overarching long-term policy goals that would sit above and direct decision-making under the RMA, LGA and LTMA, and potentially other legislation
    - new provision for strategic integrated planning (spatial planning)
    - expanding the scope and influence of regional policy statements under the RMA
    - strengthening and clarifying legislative links between the RMA, LGA and LTMA to improve the alignment of plans and processes across the three statutes.

Overarching long-term strategic goals

15. This option is for new legislation that sets out overarching long-term strategic goals, or requires the government to identify them, to provide focus and consistency across the resource management system and beyond. These overarching goals might address cross-cutting challenges beyond the sole remit of the RMA, LGA or LTMA (for example, urban development pressures, biodiversity loss and climate change adaptation).

16. The overarching goals could either direct or guide decision-making under other legislation.

    Strong approaches

    - **Legislation sets goals:** the legislation would require decision-making under relevant statutes, including the RMA, LGA and LTMA, to be in accordance with the overarching goals. These goals would flow through the existing cascade of plans under relevant statutes, effectively hard-wiring certain goals into the system.
    - **Legislation requires government to identify goals:** alternatively, the legislation could require the government to identify overarching goals for the system as a whole through a national priorities statement (similar to the role the Government Policy Statement on Land Transport plays in decision-making under the LTMA). This would provide more flexibility for the government of the day to shape the agenda.

Weak approach

- **Overarching goals**: these would not have any formal legal weight, but would be used as a monitoring framework to assess the performance of the system as a whole. An independent body might be given powers to make recommendations for changes to policies and plans to deliver the goals (similar to the roles of the Climate Change Commission or the Parliamentary Commissioner for the Environment (PCE)).

17. Our work on the overarching goals option was informed by international examples of similar approaches.

    - **Strong approach – legislation sets goals:** the Well-being of Future Generations (Wales) Act 2015 sets out seven wellbeing goals, which public bodies must take 'all reasonable steps' to meet. The goals are high level and relate to Wales being prosperous, resilient, healthier, more equal, having cohesive communities, having a vibrant culture and thriving Welsh language and being globally responsible.

      Welsh Ministers must set national indicators and milestones and publish annual reports on progress towards achieving the goals. Public bodies, including planning authorities, must set objectives to maximise their contribution to achieving the goals and report annually on progress. A Future Generations Commissioner is responsible for providing guidance, monitoring progress and reporting findings in a Future Generations Report released a year before the national election.

    - **Strong approach – goals set by government:** the United Kingdom Environment Bill 2019–21 requires the government (Secretary of State) to set long-term targets with respect to four priority areas – air quality, water, biodiversity and resource efficiency and waste reduction. A target must specify a standard, to be achieved by a certain date, which must be capable of being objectively measured. The government must set interim targets through environmental improvement plans and report annually on progress.

      The Bill also requires public authorities to prepare local nature recovery strategies relating to biodiversity. A new institution called the Office for Environmental Protection is responsible for monitoring and enforcing implementation of the new legislation.

New provision for spatial planning

18. This option would provide a legislative framework for spatial planning. 'Spatial planning' is a form of strategic integrated planning that ideally covers a large geographical area, such as a region or major urban centre, and looks out 30 years and beyond. Spatial plans typically provide a visual illustration at a high level of areas suitable for development, areas that should be protected from development, areas subject to constraints and the broad pattern of existing and future infrastructure.[157] We refer to 'spatial planning' as the process and a 'spatial strategy' as the key output of a spatial planning process.[158]

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[157] Some submitters on our issues and options paper (Resource Management Review Panel. 2019. *Transforming the Resource Management System: Opportunities for Change: Issues and Options Paper*. Wellington: Resource Management Review Panel) noted the importance of clearly defining 'spatial planning' because it means different things to different people.

[158] This is consistent with the terminology used by the New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission.

19. The spatial planning process is as important as the resulting spatial strategy. A good process can establish partnerships and build consensus amongst decision-makers and communities. In the New Zealand context, spatial planning provides an opportunity to improve the relationship between central and local government and provide a stronger role for mana whenua in strategic planning. Elements of a good process include information and data sharing, an agreed evidence base, involvement of stakeholders as participants and engaging with a diverse range of people in the community.

20. Our work has focused on terrestrial spatial planning that also considers the impact of land use on the marine environment and activities within the coastal marine area (to the 12 nautical mile limit) that are currently regulated under the RMA.

21. Internationally, marine spatial planning is well established, with *Sea Change – Tai Timu Tai Pari* for the Hauraki Gulf providing a New Zealand example. However, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act) and the Fisheries Act 1996 are out of scope for this review. Providing a legislative framework for terrestrial and limited marine spatial planning would not preclude the introduction of a fully integrated marine spatial planning framework in the future that incorporates functions under the RMA, EEZ Act, Fisheries Act 1996, Marine Reserves Act 1971, and potentially other legislation.

22. As discussed later in this chapter, there are many design choices for a spatial planning framework.

Repurposed regional policy statements

23. This option would repurpose regional policy statements to make them more like regional spatial strategies, including strengthening their links to funding plans under the LGA and LTMA.

24. Some submitters on our issues and options paper put forward this option as a way of avoiding the addition of a new layer of planning to the system. For example, NZPI submitted that regional policy statements should provide a regional spatial plan that contains direction for resource management and the delivery of objectives; maps key development and infrastructure projects; coordinates objectives and activities of key stakeholders including central and local government agencies; and integrates funding for central and local government agencies.

25. In the current system, regional policy statements perform an integration role. They provide an overview of the resource management issues of the region, and policies and methods to achieve integrated management of the natural and physical resources of the whole region.[159] Regional policy statements must be 'given effect to' in regional and district plans under the RMA,[160] and they must be 'taken into account' in the development of regional land transport plans under the LTMA.[161] There is no specific legal link between regional policy statements

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159 Section 59, RMA.

160 Sections 67 and 75, RMA.

161 Section 14, LTMA.

and infrastructure strategies or long-term plans under the LGA. However, councils are required to identify any significant inconsistencies between a decision under the LGA and a strategy or plan required by another Act.[162]

26. Regional policy statements must 'give effect to' national direction under the RMA but central government has no role in their development.

Improved links and alignment between RMA, LGA, LTMA

27. This option would improve horizontal integration across the resource management system by focusing on the interaction of the RMA, LGA and LTMA. It would include one or more of the following.

    - **Strengthened legislative links:** links across the RMA, LGA and LTMA are weak and approached differently in the three statutes. There is an opportunity to strengthen the links and make them more consistent. In general, the direction of any weighting should be from the RMA to the LGA and LTMA, and not the other way around, because resource management decisions have a more robust process (are subject to appeals). However, resource management decisions should not be binding on funding decisions under the LGA and LTMA because investment is a political budgeting decision. The desired policy ambition should be that the various plans across the system are working towards a common strategic direction, and national policies should set the direction for regional and local plans.
    - **Aligning time horizons:** a problem identified in the resource management system is a bias towards the status quo. One aspect of this is the time horizon of planning across the RMA, LGA and LTMA. There is an opportunity to increase the long-term focus of planning under the RMA and LTMA to align it with the 30 year approach to infrastructure strategies under the LGA.
    - **Aligning review periods:** review periods under the LGA and LTMA are currently aligned with the three-yearly electoral cycle, while RMA plans must be reviewed 'at least every 10 years'. As discussed in chapters 7 and 8, we recommend a nine-year review period for national direction and combined plans under the Natural and Built Environments Act.
    - **Aligning consultation provisions:** consultation processes under the LGA and LTMA are already well aligned. Both Acts use the special consultative procedure in the LGA and consultation on a long-term plan or annual plan (under the LGA) and a regional land transport plan (under the LTMA) can be combined. RMA processes prior to notification could provide greater recognition of consultation undertaken under the LGA or LTMA to avoid duplication.

[162] Section 80, LGA.

Design challenges

28. There are broadly three ways in which strategic integration can be improved across the system:

    - **strategic direction:** ensuring environmental protection and development goals are clearly stated so we know what we want the resource management system to achieve for New Zealand
    - **vertical integration:** ensuring objectives set nationally flow through local government plans to influence what happens on the ground
    - **horizontal integration:** clarifying the intended interaction of plans for development, protection and funding across the RMA, LGA and LTMA (and the wider resource management system).

29. We identified a number of important design challenges.

    - **Different decision-makers for different processes:** as noted, only the RMA provides appeal rights to a court. Land use regulation directly affects private property rights, although these rights have never been unhindered, particularly with regard to external effects from the use of property. Electoral accountability provides insufficient protection for individuals, and appeals are therefore required for natural justice reasons. In contrast, electoral accountability is both important and sufficient for decisions on strategic direction and funding that affect the community generally. This has implications for the legal weight of a spatial strategy that is not subject to appeals over RMA plans that are.
    - **Changing political priorities:** the resource management system needs to strike a balance between setting long-term outcomes in the public interest and enabling a response to new political priorities, particularly for funding decisions. Enduring goals should be set in legislation. More flexible tools should enable new governments (central and local) to determine priorities within the legislative goals informed by current circumstances.
    - **Incentives on decision-makers:** decision-makers in the resource management system are accountable to different geographic communities of interest (central, regional or local). Careful allocation of decision-making roles is needed to ensure incentives for good decision-making and accountability. In general, decision-makers on plans should be those responsible for the later decisions required to implement those plans.
    - **Limitations with regard to budget processes:** central and local government budget processes consider a broad range of issues, including those beyond the scope of the resource management system. It is undesirable to reduce the flexibility of these budget processes. That said, a strategic planning process could usefully identify the high-level funding needs of infrastructure networks that are likely to endure over time. This would inform investment priorities and funding requirements as an input to budget processes. The final decisions on the quantum and timing of commitments would be left to budgets to confirm.

Discussion

Options assessment

30. Our assessment of whether the options identified above will address the issues and improve strategic integration across the system is summarised in table 4.2.

Table 4.2: Options assessment

Option	Description	How would this improve strategic integration?
Overarching long-term policy goals	**Strong approach** – legislative goals set across the resource management system	**Pros** Would provide unified direction for all Acts and decision-makers and recognise the cross-cutting nature of issues and planning across the resource management system **Cons** Risks adding complexity through an additional layer of outcomes over and above the requirements of existing legislation Legislative overarching goals would be high level and would not necessarily address integration problems on the ground. Mechanisms, such as national direction and spatial planning, would still be required to interpret and apply the goals at national, regional and local levels There may be challenges agreeing a set of goals that would be enduring over political cycles
	Strong approach – legislation requires government to set goals across the resource management system	**Pros** Would provide unified direction for all Acts and decision-makers and recognise the cross-cutting nature of issues and planning across the resource management system Would maintain flexibility for government to amend the overarching goals, in response to significant issues and change, without the need for legislative amendment **Cons** Risks adding complexity through an additional layer of outcomes over and above the requirements of existing legislation Goals may not be enduring over political cycles
	Weak approach – outcomes monitoring framework for the resource management system	**Pros** Would improve transparency by setting direction and enabling progress to be measured and tracked over time An independent body could improve accountability by providing a trigger for a policy response to address poor outcomes **Cons** May be largely symbolic, as overarching goals would have limited legislative weight (although an independent body could potentially recommend changes to plans to improve alignment) Overlaps with the existing Environmental Reporting Act 2015

Option	Description	How would this improve strategic integration?
New provision for spatial planning	Pros and cons are partly dependent on the design of the spatial planning framework	**Pros** Provides a platform for all three layers of government and mana whenua to agree a shared strategic direction Provides a basis to integrate land use planning, environmental management and infrastructure provision and funding Spatial strategies could be required to be consistent with environmental limits and targets set under the RMA Spatial strategies with legal weight would flow into detailed regulatory and funding plans, making the system more cohesive and streamlined Would result in more efficient and cost-effective infrastructure investment and delivery through better coordination between central government agencies, councils and other infrastructure providers Potential to improve relationships between central and local government, mana whenua and stakeholders **Cons** Would add an additional layer of planning as regional policy statements (RPSs), infrastructure strategies and regional land transport plans would still be required. However, as discussed below there are ways of reducing duplication While spatial strategies would improve the efficiency of infrastructure planning and investment, they would not address underlying funding constraints and political incentives[163]
Repurposed RPS	RPSs with expanded scope, spatial component and strengthened links to LGA and LTMA funding plans	**Pros** An existing instrument, so would not add an additional layer of planning Fits within the current RMA planning hierarchy. Regional and district plans would be required to 'give effect to' the RPS **Cons** The RMA is focused on regulation and lacks direct linkages with central and local government funding, including infrastructure investment. As an RMA instrument, a repurposed RPS would therefore have limited ability to influence infrastructure provision and associated funding and investment under the LGA and LTMA RPSs are currently developed by regional councils. To improve vertical integration between tiers of government, central government and territorial authorities would need to have a strong role in the development of repurposed RPSs

[163] For example, councils do not have strong incentives to accommodate growth as funding sources are weakly correlated to economic performance and the scale and pace of urban growth.

Option	Description	How would this improve strategic integration?
Amendments to RMA, LGA, LTMA	Strengthening links between the Acts and improving alignment between plans and processes	**Pros** These measures have the potential to improve integration across the system without an additional layer of statutory objectives or planning This option could complement any of the other options **Cons** Unlikely to make a significant difference on its own as decision-makers would still be operating under separate processes and different decision criteria

31. Both the options for overarching policy goals and spatial planning have the potential to improve integration across the resource management system by providing ways for government to set long-term policy direction. Depending on how a spatial planning framework is developed, it has the additional benefit of improving the integration of decision-making between central and local government and mana whenua.

32. The repurposed regional policy statement and strengthened legislative links options are likely to be less effective in achieving integration as decision-makers would still be operating under separate processes and different decision criteria. A repurposed RPS would therefore have limited ability to influence infrastructure provision and associated funding and investment.

33. In terms of practical considerations, both the overarching goals and spatial planning options are fundamental changes to the system and would have significant associated costs. However, the overarching goals option is more likely to add additional complexity to the system than new provision for spatial planning. For example, the Government Policy Statement on Land Transport is currently required to 'give effect' to the purpose of the LTMA. Under the overarching goals option, the Government Policy Statement would presumably be required to 'give effect' to both the overarching goals and the purpose of the LTMA, with the overarching goals prevailing in the case of conflict. This is a significant change to the LTMA that may both be controversial and lead to unintended consequences for the land transport management system. Further consideration would be needed of this option's potential implications for the LTMA in its entirety. As we note below[164] we recommend a change to the purpose of the LTMA to better integrate it with the Natural and Built Environments Act and the LGA but we do not expect this change to be controversial.

34. Most submitters on our issues and options paper supported a stronger role for spatial planning in the system, and many referred to it as an important tool in an outcomes-focused approach. Some submitters on our issues and options paper were concerned about the additional complexity that overarching goals could add to the system. For example, Otago Regional Council submitted: "ORC does not support creating an integrated planning statute above the RMA... The RMA's purpose and principles, along with other relevant legislation, should be written in such a way that they are the primary legislation for their subject and where issues straddle legislation, the legislation is horizontally integrated. Creating a further level of planning above them would only add unnecessary duplication, complexity and exacerbate existing resourcing issues".

[164] See paragraph 73 below.

35. In our view, regional spatial planning, together with a comprehensive set of national direction could achieve the same outcomes as overarching goals while being less disruptive to the system. The costs of introducing a new spatial planning framework can be offset by rationalising other aspects of planning under the RMA (see discussion of our proposal for regional combined plans in chapter 8).

Our preferred option is a new legislative framework that embeds spatial planning as the key mechanism for improving strategic integration across the resource management system.

Preferred option

36. Our preferred option is a new legislative framework that embeds spatial planning as the key mechanism for improving strategic integration across the resource management system. Spatial planning has the potential to improve strategic integration in a number of ways:
    - across statutes (RMA, LGA, LTMA and CCRA, and potentially others)
    - across functions (by integrating land use regulation, environmental protection, restoration and enhancement, infrastructure provision and associated funding and investment)
    - across outcomes (social, economic, environmental, cultural)
    - between different tiers of central and local government including asset managing agencies (eg, NZTA) and council controlled organisations (eg, Watercare).
37. The advantages of spatial planning relative to other options are summarised in table 4.2 above. Other significant benefits of spatial planning include:
    - it can facilitate more efficient land and development markets to improve housing supply, affordability and choice
    - it has an obvious potential use in relation to the regulation of land use to address climate change, including both adaptation and mitigation measures
    - a major strength will be its ability to better address the cumulative effects of land use and other activities impacting the environment
    - long-term strategic planning is essential to avoid or reduce ad hoc decision-making in response to perceived issues as they arise.
38. As discussed in the overview of the proposed system, the response to COVID-19 will require a strategic and integrated approach to infrastructure and development that helps achieve New Zealand's emission reduction targets and other important goals. Greater collaboration will be required between central and local government and mana whenua. As noted in a recent *McKinsey Quarterly* article about addressing climate change in a post-pandemic world, there is a need to "reinforce national and international alignment and collaboration on sustainability, for inward-looking, piecemeal responses are by nature incapable of solving systemic and global problems".[165]

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165 Pinner D, Rogers M, Samandari H. 2020. *Addressing climate change in a post pandemic world. McKinsey Quarterly* April. Retrieved from https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Sustainability/Our%20Insights/Addressing%20climate%20change%20in%20a%20post%20pandemic%20world/Addressing-climate-change-in-a-post-pandemic-world-v3.ashx (15 June 2020).

39. A legislative framework for spatial planning will build on existing voluntary spatial planning processes, providing more consistency and increasing their weight in the resource management system. In its submission on our issues and options paper, the SmartGrowth Leadership Group stated that: "Spatial planning is already underway in a number of local government jurisdictions. Despite this, because it is not directly aligned to the RMA or LGA, its mandate is weak. This needs to be fixed and spatial planning become a core part of the RM regime".

Design choices for a spatial planning framework

40. The extent to which strategic integration across the resource management system is achieved will depend on the design of the spatial planning framework. Examples of design choices we considered are set out in table 4.3.

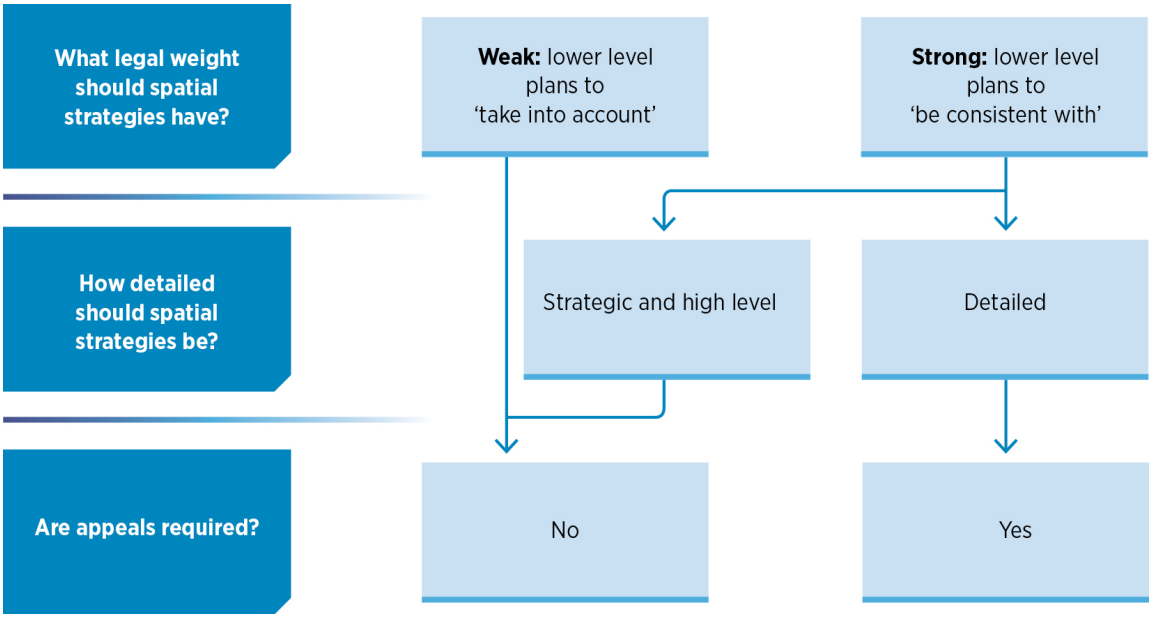
Table 4.3: Key choices for the design of a spatial planning framework

Design parameter	Choice
Purpose and scope	Broad or narrow?
Geographical scale	National, inter-regional, regional and/or sub-regional?
Regional application	Mandatory for all regions or targeted?
Legislative design	New Act, RMA or LGA?
Legal weight	Strong or weak influence on regulatory land use and funding plans?
Focus and level of detail	Strategic and high level or detailed?
Accountability and governance	Partnership between central and local government and mana whenua, central and local government partnership, or local government led?
Decision-making	Consensus or voting? Independent review?
Public participation	Appeals or not?

Interdependencies

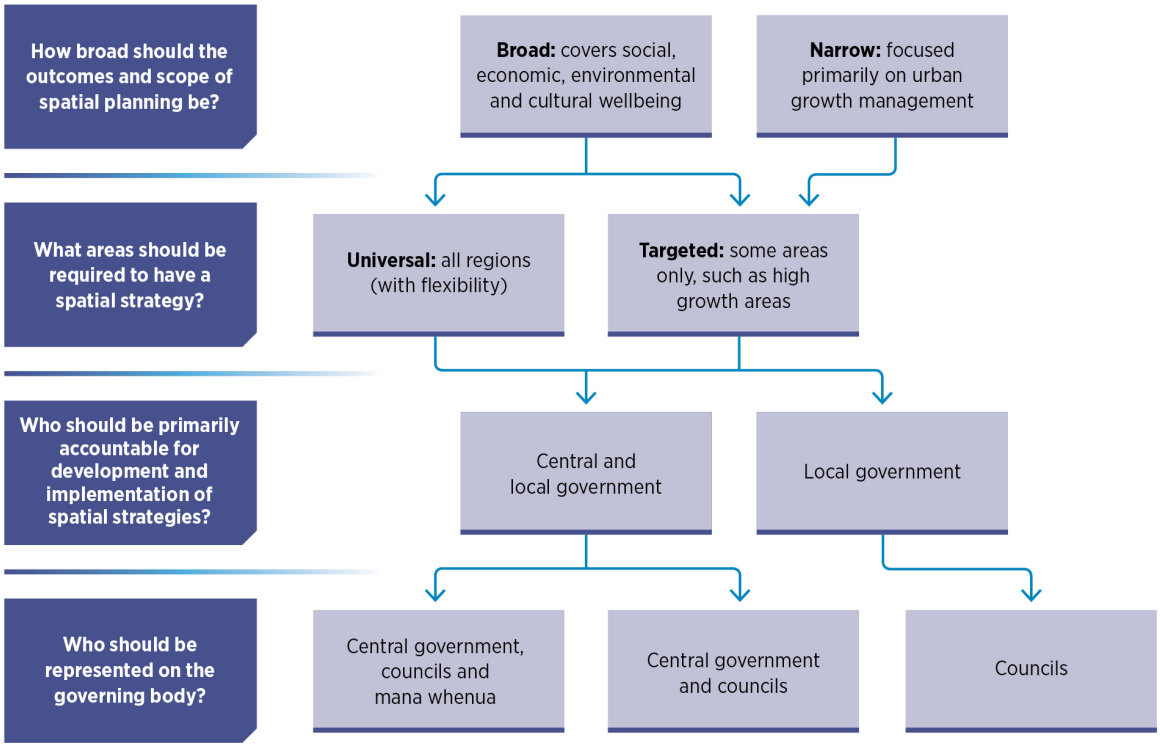
41. There are significant interdependencies between the design choices. For example, as discussed above, decisions about the level of detail and legal weight of regional spatial strategies have implications for the decision-making process, including whether appeal rights are required. These interdependencies are shown in figure 4.1 below.

Figure 4.1: Decision tree for legal weight, level of detail, appeals



42. As shown in figure 4.2 below, there are also interdependencies between the design choices for the scope of spatial planning, where it is required, and governance.

Figure 4.2: Decision tree for breadth, application, accountability, governance



43. The following section discusses these design choices in more detail.

Purpose and scope of spatial planning

44. The purpose of spatial planning as we envisage it is to promote the social, economic, environmental and cultural wellbeing of current and future communities by improving strategic integration across the resource management system. The purpose of spatial planning should be broadly framed because every region in New Zealand will face a different mix of opportunities and challenges.

45. Most submitters on our issues and options paper supported a broad approach to spatial planning. It was described as a way to establish a vision for a region or other area and achieve a range of social, economic, environmental and cultural outcomes. The matters put forward for inclusion in spatial planning included aspirations of Māori, the built environment, urban growth, social and network infrastructure, transport, environmental protection, identification of areas of significant biodiversity and landscape value, climate change mitigation and adaptation, potential renewable energy sites, and more. Ngāti Whātua Ōrākei submitted that "in order to maximise the true potential of spatial plans… spatial planning as part of a plan led system needs to consider at least place making, urban design, urban growth, infrastructure, environmental issues, iwi aspirations, transport, protection of heritage and funding".

The purpose of spatial planning as we envisage it is to promote the social, economic, environmental and cultural wellbeing of current and future communities by improving strategic integration across the resource management system.

46. In our view, spatial planning should encompass functions of the RMA, LGA and LTMA in relation to the regulation of the use of land and activities in the coastal marine area, and the provision of infrastructure with associated funding and investment. It should also link to other relevant legislative functions, including under the CCRA and Conservation Act 1987. This breadth of scope is necessary if spatial planning is to address the issue of poor alignment of land use and infrastructure plans.

47. A potential purpose statement and associated definition for spatial planning legislation is set out below.

Purpose

The purpose of this Act is to promote the social, economic, environmental and cultural wellbeing of present and future generations through the long-term strategic integration of functions exercised under specified legislation in relation to:

(a) the use, development, protection and enhancement of the natural and built environments;

(b) the provision of infrastructure and services and associated funding and investment;

(c) the relationship of iwi, hapū and whānau and their culture and traditions with natural and built environments; and

(d) responses to climate change including the reduction of greenhouse gas emissions, reduction of risks from natural hazards and the use of adaptation measures.

Specified legislation means enactments specified in Schedule 1.

Schedule 1

Enactments subject to this Act

The Natural and Built Environments Act

Local Government Act 2002

Land Transport Management Act 2003

Climate Change Response Act 2002

Timescale

48. One of the issues with the current resource management system is insufficient long-term focus across the system. Long-term spatial planning is an important tool to avoid or reduce ad hoc decision-making in response to perceived issues as they arise. As articulated by international cities and spatial planning expert, Greg Clark, spatial planning "looks into the future in ways which go beyond the usual vision of governments and public bodies and seeks to express the future demand for a wide range of public goods that can then be anticipated better in the present".[166]

Spatial strategies should set a strategic direction for at least the next 30 years, informed by longer-term data and evidence as appropriate (such as 100 plus year projections for climate change).

49. Spatial strategies should set a strategic direction for at least the next 30 years, informed by longer-term data and evidence as appropriate (such as 100 plus year projections for climate change). The level of detail could vary across the time horizon of the spatial strategy as certainty reduces over time. For example, the high-level vision and objectives for the region might look out 100 years and beyond, while proposals (such as a new transport corridor) could have an indicative timeline of 30–50 years. The separate implementation agreement (discussed below) could provide project-level detail about steps to be undertaken in the first three, six and 10 years.

Geographical scale

50. We support provision for spatial strategies at a regional scale, with a Ministerial power to direct two or more regions to prepare a joint strategy or to collaborate on cross-boundary issues. Inter-regional spatial planning may be appropriate, for example, where two regions (or parts of regions) function as a single metropolitan area with significant commuter movement across the regional boundary or where two regions cut across a single marine area such as the Kaipara Harbour.

51. We also considered provision for sub-regional spatial planning. There are many current and emerging examples of this, such as Future Proof and the Urban Growth Agenda partnership for Queenstown. Requiring spatial strategies to be regional or inter-regional does not mean that a spatial planning process needs to consider all parts of a region in the same amount of detail. The focus could be on those parts of a region where significant change is happening, anticipated or required.

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166 Clark G. 2013. The future of cities: The role of strategic planning: Working paper. *Future Studies Research Journal: Trends and Strategies* 5(1): 3–32.

52. The legislation should provide flexibility to tailor a spatial strategy to the region's circumstances provided it complies with requirements specified in the legislation, including core content requirements (discussed below) and provides sufficient strategic direction for the combined plan for the region (discussed in chapter 8).

Regional application

53. We considered three options for the application of a spatial planning framework:
    - mandatory for regions containing a large and/or fast growing urban area (voluntary for other regions)
    - mandatory for regions where specified criteria are met (voluntary for other regions)
    - mandatory for all regions, with provision for prioritisation and sequencing by the responsible Minister or Ministers.

54. Our assessment of these options is set out in table 4.4.

Table 4.4: Options assessment for regional application options

Option	Pros	Cons
Large and/or fast growing urban areas only	• Recognises there are significant costs to participants in preparing a spatial strategy and imposes those costs on areas likely to get the highest net benefit • Councils in these areas are likely to have greater capability and capacity to carry out spatial planning effectively, compared with small rural councils • Recognises capability and capacity constraints within central government and the need to prioritise agency effort • Other areas could use the framework on a voluntary ('opt in') basis	• Risk of missing opportunities to provide significant benefits through spatial planning for other areas that are facing significant change (eg, vulnerability to coastal inundation) • Potentially less focused on natural environment outcomes (however, urban development would need to occur within environmental limits) • It may be difficult for other councils to 'opt in' to spatial planning processes where the council's share of the cost would fall on existing ratepayers but the benefits would be realised over a 30-year (or longer) timeframe • Assuming there is some link between spatial strategies and subsequent central government funding plans, a targeted option may be seen as neglecting the regions • Would not provide a consistent approach across regions to the relationship between spatial strategies and resource management and funding plans • Would not provide a mechanism for mana whenua outside large or fast growing urban areas to partner in spatial planning processes
Where criteria or triggers are met	• Could provide significant benefits through spatial planning for all areas facing significant change (eg, vulnerability to coastal inundation)	• An additional process is required for Ministers and councils to assess whether the criteria are met • Would not provide a consistent approach across regions to the relationship between spatial strategies and resource management and funding plans

Option	Pros	Cons
All regions (universal)	• All regions would benefit from spatial planning (acknowledging that the extent and type of benefits will differ depending on regional circumstances) • Provides a mechanism to improve relationships between central and local government and mana whenua throughout New Zealand • Supports a consistent and cohesive approach across regions to links between spatial strategies and resource management and funding plans. For example, every region will have both a spatial strategy and a regulatory combined plan that is 'consistent with' the spatial strategy	• Possibility that, for some regions, the costs of preparing a spatial strategy would outweigh the benefits (may apply only to the first spatial planning process) • Would require the most capability and capacity building for central and local government and mana whenua

55. Most submitters who commented on the issue supported spatial planning being required for all regions in New Zealand. However, a small number of submitters considered that spatial planning should either be optional or should only be mandatory for some regions. For example, Federated Farmers of New Zealand submitted that spatial planning should not be a requirement for all regions but based on a need, with a trigger point such as high urban growth or significant housing shortages.

56. Our view is that spatial planning should be mandatory for all regions. Some of its potential benefits apply specifically to urban areas experiencing growth. For example, spatial planning could facilitate an abundance of urban development opportunities, while avoiding areas that are vulnerable to coastal inundation or natural hazards or which have special environmental, cultural or economic value. However, other benefits could apply equally to urban, rural and coastal areas. For example, climate change is increasingly going to be a driver of land use change and that will affect all regions of New Zealand. Also, spatial planning could be an important tool to improve the management of cumulative impacts of land use on waterways and harbours.

Our view is that spatial planning should be mandatory for all regions.

57. Significant resourcing will be required from central and local government and mana whenua if spatial planning is to be effective and the required capability and capacity will take time to build. We therefore support provision for the prioritisation and sequencing of the first regional spatial strategies under the new Act. This could be achieved through a national priorities statement (discussed below) and an ability for the responsible Minister to extend the default timeframe for developing the first spatial strategy for some regions. The initial focus would be on regions with the most pressing needs. Transitional provisions could also provide that existing spatial plans, agreements between central government and councils and current spatial planning processes are deemed to meet requirements of the new legislation as appropriate. One region should be selected to develop the first regional spatial strategy, followed by

development of the combined plan, to provide a model for other regions. This process should be led by the Ministry for the Environment and could be advanced alongside development of the legislation and updates to guidance in the national planning standards.

Application of spatial planning to the coastal marine area

58. Current regional boundaries include the coastal marine area (CMA), which is the area between mean high water springs (MHWS) and the 12 nautical mile limit of the territorial sea.[167] It is a given that regional spatial strategies should include the coastal environment to MHWS, however there is a choice about whether spatial strategies should extend into the CMA.

59. Differences in the way the RMA regulates the CMA compared with land use are relevant to the design of a spatial planning framework. For example:

    - while terrestrial land is mostly privately owned, most land in the CMA is managed as a public resource
    - the New Zealand Coastal Policy Statement (NZCPS) and regional coastal plans are compulsory[168]
    - there is strong central government oversight of regional coastal planning with a requirement for regional coastal plans to be approved by the Minister of Conservation[169]
    - regional councils do most of the planning work for the CMA and territorial authorities only have a minor role
    - existing tools, including the NZCPS, could be used to identify suitable locations for ports, navigation routes and marine aquaculture, for example.

60. There are, however, barriers to achieving an integrated approach to the CMA through the NZCPS and regional coastal plans. For example:

    - the NZCPS covers the 'coastal environment', but that does not include all areas that generate impacts on the CMA (for example, land uses generating sediment that flows down rivers to estuaries) or that depend on good infrastructure provision at the coast (such as forestry developments that rely on good shipping infrastructure)
    - many relevant matters (such as subdivision) are regulated through district plans rather than regional coastal plans
    - allocation of space is often driven by individual applicants not the national interest

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167 Clause 1, Part 3 of Schedule 2, LGA.

168 Sections 57 and 64, RMA.

169 Clause 19 of Schedule 1, RMA. The Minister can override decisions of the Environment Court, provided the Minister submitted on the matter.

- biodiversity planning and decision-making is carried out under multiple statutes (fisheries, marine species, marine protection)[170]
- the RMA does not directly influence active management/restoration work in the CMA, such as estuary or shellfish bed restoration, which require public funding. The RMA can, however, protect areas from most activities for non-fisheries management reasons, control effects of fishing on values other than fish stocks,[171] and reduce impediments to active restoration.

61. Our view is regional spatial strategies should extend into the CMA as this will promote integration between land use, the coastal environment and water quality. The extent to which they do this will vary depending on regional circumstances. Spatial strategies will be required to be 'consistent with' the NZCPS, which will continue to be the main tool to regulate activities within the CMA, along with regional coastal plans. Regional coastal plans will be required to 'give effect to' the NZCPS and be 'consistent with' spatial strategies. As discussed in chapter 8, regional coastal plans will be incorporated into combined plans but will still require the approval of the Minister of Conservation.

Our view is regional spatial strategies should extend into the CMA as this will promote integration between land use, the coastal environment and water quality. The extent to which they do this will vary depending on regional circumstances.

62. This would not represent a fully integrated approach to the management of the coastal and marine environment. The spatial strategies could cover matters currently regulated under the RMA, such as aquaculture in the CMA, but they would not extend beyond the 12 nautical mile limit or cover functions under the EEZ, Fisheries or Marine Reserves Acts. EDS has supported comprehensive reform of legislation and institutions relating to the marine environment, including the establishment of an Oceans Agency, a national Oceans Plan and national and regional marine spatial planning that extends into the exclusive economic zone and is integrated with terrestrial-based spatial planning.[172]

63. A number of submitters on our issues and options paper also supported provision for a fully integrated marine spatial planning framework. For example, New Zealand King Salmon submitted: "New Zealand should institute a comprehensive marine spatial planning regime. Marine spatial planning regimes should extend into the exclusive economic zone. It should better integrate environmental protection and the human uses of the coastal environment including aquaculture".

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170 This fragmentation is the reason for the emergence of marine spatial planning initiatives that sit alongside regional coastal plans. Examples to date vary in terms of scope and scale, spanning high-level objectives to specific rules.

171 The exact relationship between fisheries and resource management has been uncertain and controversial. The recent Court of Appeal decision, *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2019] NZCA 532 has provided further clarity; however, the relationship is likely to remain subject to debate.

172 Environmental Defence Society. 2019. *Reform of the Resource Management System: A Model for the Future: Synthesis Report and Healthy Seas: Implementing Marine Spatial Planning in New Zealand*. Auckland: Environmental Defence Society.

64. The EEZ and Fisheries Acts are specifically excluded from the scope of this review. However, providing a legislative framework for regional spatial planning that includes limited marine spatial planning for the CMA would not preclude the introduction of a fully integrated marine spatial planning framework in the future.[173]

Provision for a national priorities statement

65. Many stakeholders have called for a national approach to spatial planning. For example, in its submission on our issues and options paper the Canterbury Mayoral Forum stated that "a national spatial strategy could help coordinate nationally significant strategic infrastructure projects and help integrate regional spatial strategies, particularly the relationship between major urban centres and national infrastructure". Similarly, Infrastructure New Zealand submitted that central government should provide guidance to regions through a national development plan.

66. While our preference is for spatial planning at the regional level, as this is the scale that best lends itself to tangible decision-making about land use and infrastructure provision, we recommend providing for a national priorities statement as both a coordination and communication tool.

67. A national priorities statement for spatial planning could be used to set out:

    - the sequence in which central government intends to engage in regional spatial planning processes (noting that resource constraints are likely to mean engagement in all regions concurrently may be difficult)
    - particular nationally significant issues central government wishes to resolve at a regional level (for example, housing supply issues, certain infrastructure corridors or networks that may be of interest, suitable locations for renewable energy generation, or certain environmental concerns)
    - how any cross-boundary issues might be accommodated through the design of an inter-regional process (for example, through use of flexible governance arrangements for particular issues).

68. While a national priorities statement would not be a national 'plan', as considered necessary by some submitters, it would go some way to addressing these concerns by providing a tool for central government to signal its intention to address certain nationally significant issues through regional processes.

Legislative design

69. We considered three options for the location of a spatial planning framework: the RMA, LGA or a new act. The LTMA was not considered because the land transport focus of that Act is too narrow to be a good fit for spatial planning.

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[173] If a fully integrated marine spatial planning framework is introduced in the future, changes may be required to the framework for regional spatial planning to clarify the interface between the two types of spatial planning and avoid duplication.

70. Of the submitters who commented on where spatial planning should sit within the legislative framework, most supported a new act. However, submitters also supported including it within the RMA or LGA, or within regional policy statements or the proposed National Policy Statement on Urban Development. Regardless of which option submitters preferred their priority was for improved integration across the RMA, LGA and LTMA.

A new act would not override other legislation but regional spatial strategies prepared under it would have strong influence on policies and plans developed under the Natural and Built Environments Act, LGA and LTMA.

71. A new act would not override other legislation but regional spatial strategies prepared under it would have strong influence on policies and plans developed under the Natural and Built Environments Act, LGA and LTMA. A new act is our preferred option for the following reasons:

    - it would send a strong signal about the important role of spatial planning in the new system and allow for a specific purpose statement focused on strategic integration (such as the example set out above)
    - neither the RMA nor LGA are a straightforward fit for spatial planning. The RMA is regulatory-focused and lacks direct linkages with central and local government funding decisions, including infrastructure investment. The LGA is about local government and its accountability to communities; it therefore has few provisions that apply to central government. In addition, the LGA does not have a strong focus on land use planning (beyond infrastructure) or environmental management
    - it may be more straightforward to amend a separate act over time, for example, to apply lessons from the development of the first spatial strategies or to provide for fully integrated marine spatial planning
    - as noted above, submissions on our issues and options paper indicated the strongest level of support for locating a spatial planning framework in a new act.

72. A new act would require a Treaty of Waitangi clause – this could be aligned with the new Tiriti clause discussed in chapter 3. Consequential changes to the LGA and LTMA, and potentially other legislation, would also be required.

Amendment to the purpose of the LTMA

73. We recommend amending the purpose of the LTMA to refer to social, economic, environmental and cultural wellbeing. This would establish the four wellbeings as a common thread across the spatial planning legislation, Natural and Built Environments Act, LGA and LTMA, promoting strategic integration of decision-making across the system.

Links between spatial strategies and national instruments

74. To embed regional spatial strategies into the existing system, they should be required to be 'consistent with' the purposes of the Natural and Built Environments Act, LGA and LTMA. In our view, they should also be 'consistent with' national instruments, including:

- national policy statements and national environmental standards including environmental limits (this is discussed in more detail in chapter 7)
- the national adaptation plan (which is informed by the National Risk Assessment) under the CCRA
- the Government Policy Statement on Land Transport under the LTMA
- the Government Policy Statement on Housing and Urban Development under the Kāinga Ora–Homes and Communities Act 2019.

To embed regional spatial strategies into the existing system, they should be required to be 'consistent with' the purposes of the Natural and Built Environments Act, LGA and LTMA.

75. Spatial strategies should also be required to 'take into account' other national strategies and plans, including the Emissions Reduction Plan under the CCRA and the national 30-year infrastructure strategy to be developed by the recently established New Zealand Infrastructure Commission – Te Waihanga.

76. Together with the proposed national priorities statement (discussed above), these linkages from national instruments to regional spatial strategies will ensure the national interest is reflected in regional spatial planning and reduce the potential for disputes between central and local government during the development of spatial strategies. The system would also provide for feedback loops where regional spatial planning processes could inform the development or review of national instruments.

Linkages from national instruments to regional spatial strategies will ensure the national interest is reflected in regional spatial planning.

Legal weight of spatial strategies on lower level plans

77. An important question is the level of influence that regional spatial strategies should have on combined plans under the Natural and Built Environments Act, LGA infrastructure strategies, long-term plans and annual plans, and LTMA regional land transport plans.

78. Of the submitters who commented on the issue, most considered that spatial strategies should be legally binding. For example, Ngāti Whātua Ōrākei submitted that:

> … requiring compulsory regional spatial plans, with strong legal weight over environmental management and land use plans, is key to ensuring a more strategic focus is taken within land use and environmental planning. Requiring Spatial Plans with strong legal weight is potentially the most powerful of all things that could be done to improve planning in New Zealand. Properly undertaken spatial planning could be the core solution to address many of the current problems, inequalities and inefficiencies identified in the issues and options paper.

79. Some submitters expressed concern that requiring legally binding spatial plans would add another 'layer' to the planning framework, which has the potential to add complexity. We agree and consider it important to streamline the resource management system where possible (options are discussed in subsequent chapters).

80. We considered options for regional spatial strategies with weak legal weight. For example, where detailed regulatory plans are required to 'have regard to' or 'take into account' the spatial strategy. We also considered options for spatial strategies with strong legal weight where resource management and funding plans are required to 'give effect to' or 'be consistent with' the spatial strategy.

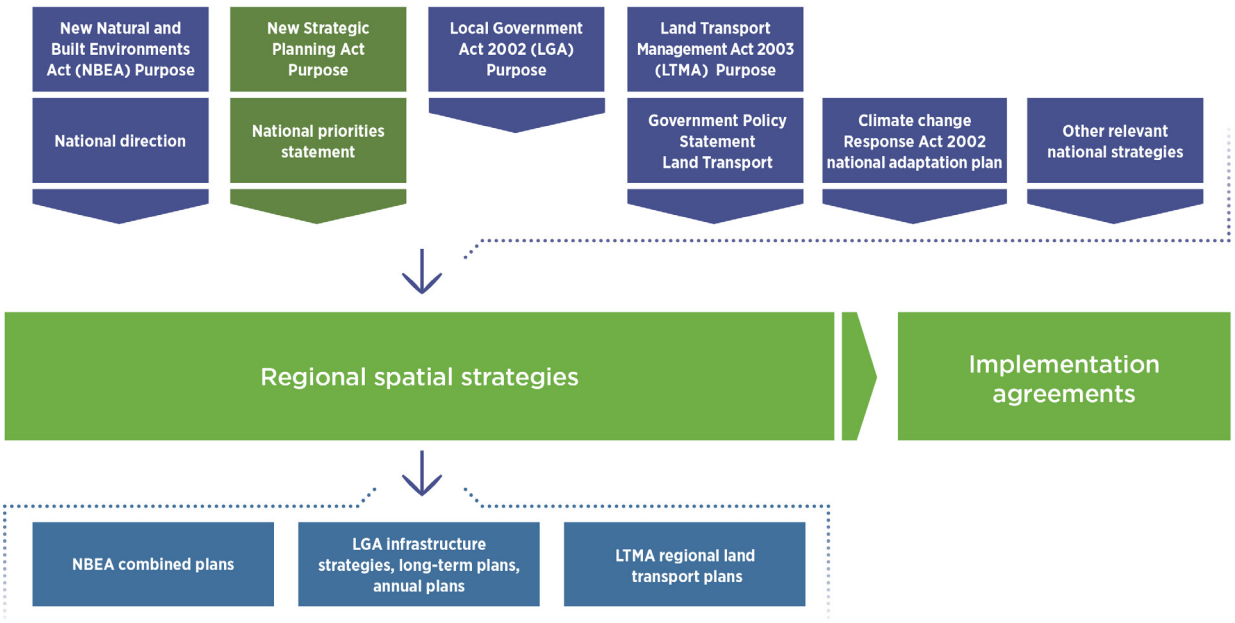
81. A spatial strategy that guides rather than directs other plans and processes would likely be more easily agreed between central and local government and mana whenua. However, our view is that spatial strategies with stronger legal weight will do more to improve strategic integration across the system.

82. Unlike RMA plans, spatial strategies under the new act could not reasonably bind individual land owners in the absence of a formal process for participation and appeal. Accordingly, we consider that a requirement for regulatory combined plans to 'give effect to' spatial strategies would be inappropriate. We prefer a requirement for combined plans to be 'consistent with' spatial strategies. This gives clear guidance and broad direction but provides councils with some flexibility when translating spatial strategies into detailed land use rules.

We prefer a requirement for combined plans to be 'consistent with' spatial strategies.

83. We also recommend requiring LGA infrastructure strategies, long-term plans and annual plans, and LTMA regional land transport plans, to be 'consistent with' spatial strategies. This would provide better integration but still retain flexibility for central and local government budget processes to consider a broad range of issues, including those beyond the scope of the resource management system. Figure 4.3 illustrates the legislative structure we propose.

Figure 4.3: System linkages



Other legislative links

84. Regional spatial strategies should be informed by other regulatory instruments as relevant, such as:

- any national or regional risk assessments or adaptation plans (discussed in chapter 6)
- iwi management plans developed by mana whenua groups and incorporated into combined plans (discussed in chapter 3)
- conservation management strategies and plans under the Conservation Act 1987
- civil defence emergency management plans under the Civil Defence Emergency Management Act 2002
- heritage listings under the Heritage New Zealand Pouhere Taonga Act 2014
- regulations and plans under the Marine and Coastal Area (Takutai Moana) Act 2011.

Specified content for regional spatial strategies

85. The spatial planning legislation should set out core content that must be included in spatial strategies, to the extent applicable to the particular region. This will ensure consistency in approach across New Zealand, while providing flexibility to tailor the spatial planning process to a region's circumstances. As discussed above, the content of regional spatial strategies will need to be consistent with national direction, the national adaptation plan under the CCRA and relevant government policy statements.

86. Specified content for regional spatial strategies should include:

- long-term objectives and strategies to improve the quality of the natural and built environments, provide sufficient development capacity, promote Māori interests and values, promote the sustainable use of rural land, protect historic heritage, address natural hazards and climate change
- indicative future transport corridors
- major existing and future infrastructure such as ports, airports, wastewater treatment plans, water treatment plants, and opportunities to make better use of existing infrastructure networks
- additional development capacity required to accommodate growth, and scenarios for how the region may develop in the future
- indicative locations for new social infrastructure needed to support population growth, including hospitals and schools
- indicative costs and timing of future infrastructure and growth scenarios
- indicative locations for regionally significant new recreational or community facilities
- nationally significant natural features in the region (as identified through national direction)
- regionally significant ecological areas, landscapes and recreational space that should be protected or enhanced

- areas of historic heritage value and areas or resources of significance to mana whenua that should be protected or enhanced
- areas where significant change in land use is required to reduce impacts of land use and development on lakes, rivers, wetlands and the marine environment
- areas for enhancement and restoration, such as wetlands and green corridors
- areas that may be affected by climate change or other natural hazards, and measures that might be necessary to address such issues.

Level of detail

87. Given their intended long-term focus, our view is that regional spatial strategies should concentrate on the major strategic issues and opportunities for a region, including significant anticipated changes in land use, environmental management and major infrastructure. They should not attempt to comprehensively address all resource management or infrastructure issues, because less significant or non-spatial issues can still be planned for under Natural and Built Environments Act, LGA and LTMA processes.

Regional spatial strategies should concentrate on the major strategic issues and opportunities for a region, including significant anticipated changes in land use, environmental management and major infrastructure.

88. That said, to be effective in setting direction and achieving integration, spatial strategies should include some detail regarding these strategic issues. For land use and environmental management, spatial strategies should set long-term measurable objectives and milestones and provide a visual illustration of their implications for the region (at a high level).

89. As discussed in chapters 7 and 8, national environmental limits and targets will be set in national direction, and regional limits and targets to give effect to national direction will be set through combined plans for each region. However, spatial strategies could describe graphically at a high level how limits and targets set through Natural and Built Environments Act processes might be implemented through the regional spatial strategy. For example, the *Shared Spatial Intent for the Hamilton to Auckland Corridor* identifies the "development and implementation of a blue green open space and recreational networks programme for the corridor that has restorative, protective, cultural and recreational aims" as a significant initiative.

Regional spatial strategies should identify major social and network infrastructure and future transport corridors needed to accommodate projected growth.

90. Regional spatial strategies should identify major social and network infrastructure and future transport corridors needed to accommodate projected growth, along with ways to make better use of existing networks. Spatial strategies should include indicative costs and timing of future infrastructure needs and corridors. Detailed information about project design, costs and timing would be provided in subsequent documents, including separate implementation agreements.

91. Spatial strategies that are focused on the major strategic issues and opportunities for a region and avoid getting into project or site-level detail would be quicker to develop and agree than detailed spatial plans. This would allow the strategic direction for a region to be set in a timely way to guide more detailed processes, including the development of combined plans under the Natural and Built Environments Act.

Separate implementation agreement to address project-level detail

92. A challenge for the design of a new spatial planning framework is the risk of misalignment between spatial strategies agreed at the regional level and changes in government direction at the national level. For example, this might occur in cases where a new Government Policy Statement on Land Transport is put in place that represents a significant change in direction from the previous Government Policy Statement, but spatial strategies are yet to be revised to be consistent with it. This may result in two inconsistent sources of direction for the development of regional land transport plans under the LTMA.

93. Our view is that this challenge is best addressed in two ways.

    - **Long-term focus of spatial strategies:** the long-term and evidence-based assessment of land use change, environmental trends and infrastructure demand that forms the basis of spatial strategies is less likely to be affected by changes in government direction. Likewise a focus on planning for infrastructure corridors, rather than particular projects, is less likely to be affected by changes in government priorities.
    - **Provision for a separate implementation agreement to address project-level detail:** the agreement to particular projects to implement a spatial strategy should be contained in a separate document. This would enable central and local government, and potentially mana whenua, other infrastructure providers and stakeholders, to agree to:
        a. advance more detailed project planning for certain infrastructure or environmental remediation projects
        b. begin business case processes and apportion funding responsibility across central and local government (subsequent to detailed project planning).

94. An implementation agreement would be more easily updated in response to changes in government direction. It could also be progressed by central and local government through standard budget processes, without the need to provide a direct legislative link to long-term plans or regional land transport plans. This would avoid the need for rapid revision of spatial strategies themselves in response to changes in short-term priorities.

95. This approach is similar to the 'City Deals' and associated implementation plans that implement the Greater Sydney Regional Plan. The following extracts relating to a new 'North South Rail Link' show the differing levels of detail between the regional plan (spatial strategy) and implementation plans.

SYDNEY EXAMPLE

Greater Sydney Region Plan 2018	Western Sydney City Deal 2018	Implementation plan for Western Sydney City Deal 2018
Signals the intention for the national and state governments to deliver the first stage of the rail link from St Marys to the airport.	States that the first step is to protect corridors in Western Sydney, provides detail of locations to be investigated. Provides indicative information about cost sharing for the business case process and a high-level goal for delivery of the first stage of the rail link.	Provides further information about timing of the business case and cost sharing.
"New city-shaping transport and the airport will make the city the most connected place in Australia. The Australian and NSW Governments will deliver the first stage of the North South Rail Link from St Marys to the Western Sydney Airport and Badgerys Creek Aerotropolis."	"The Australian and NSW governments will deliver the first stage of a North South Rail Link from St Marys to Western Sydney Airport and the Badgerys Creek Aerotropolis. As a first step, the NSW Government will protect suitable corridors for future rail connections in Western Sydney. Both governments will contribute up to $50 million each to a business case process, in consultation with local government. This will include investigation of integrated transport and delivery options for a full North South Rail Link from Schofields to Macarthur and a South West Rail Link to connect Leppington to the Western Sydney Airport via an interchange at the Badgerys Creek Aerotropolis. The Australian and NSW governments will be equal partners in funding the first stage of the North South Rail Link and have a shared objective to connect rail to Western Sydney Airport in time for opening, informed by the business case."	"Q4 2019 – Completion of the final business case for the first stage of the North South Rail Link to inform governments' investment decision Opening of Stage 1 of the North South Rail Link from St Marys via Western Sydney Airport to the Aerotropolis, in time for the opening of the airport. $100 million equally shared contribution from the Australian and NSW governments towards the business case process. Funding from the NSW and Australian governments for local government staff (two full time equivalents) in the business case development process."

96. The establishment of the Infrastructure Commission and the national 30-year infrastructure strategy it is required to develop,[174] may lead to a more enduring approach to government infrastructure planning and investment over time. The Commission seeks to lift infrastructure planning and delivery to a more strategic level and, by doing so, improve New Zealanders' long-term economic performance and social wellbeing. The national 30-year infrastructure strategy is required to:

    - include a statement as to the ability of existing infrastructure to meet community expectations for the next 30 years
    - identify the priorities for infrastructure for the next 30 years.

    It may also include any other matters the Commission considers relevant.

97. The infrastructure strategy could both inform and be informed by regional spatial strategies.

Accountability and governance

Who would be responsible for the development and implementation of spatial strategies?

98. An important question for the design of a spatial planning framework is who should be responsible for the development and implementation of regional spatial strategies. We considered three high-level options:

    - a partnership between central and local government and mana whenua
    - a partnership between central and local government
    - local government led.

99. Our view is that regional spatial strategies should be jointly developed and agreed by central government, councils and mana whenua.

100. Reasons to provide a strong role for central government include:

    - **national interests are at stake:** the challenges of urban growth, environmental management and climate change are nationally significant and require a partnership between central and local government to address
    - **central government resources are needed to address the challenges:** central government is already a major player in the transport and social infrastructure funding decisions needed to support growth. What is needed is a more deliberate spatial process for coordination of this investment.

Our view is that regional spatial strategies should be jointly developed and agreed by central government, councils and mana whenua.

101. Reasons to provide a strong role for mana whenua are discussed in chapter 3. They include the opportunity to improve the quality of spatial strategies through the incorporation of mātauranga Māori; the principles of Te Tiriti; existing co-governance arrangements

[174] Sections 12 and 13, New Zealand Infrastructure Commission/Te Waihanga Act 2019.

developed through Tiriti settlements; and existing agreements between iwi and local authorities.

102. In feedback on our issues and options paper, there was strong support for spatial strategies being developed in collaboration between central and local government and mana whenua. For example, Foodstuffs supported a requirement for "regional spatial planning to facilitate greater collaboration between councils and the relevant national agencies and to provide a more integrated, strategic, and consistent approach to resource management planning at a regional level. Spatial planning should be required for all regions, be led by central government, and be developed in a collaborative process involving central and local government, the developer community, and Māori".

103. Many submitters noted that spatial planning provides an opportunity to better reflect Te Tiriti partnerships and incorporate mātauranga Māori knowledge by providing for mana whenua to participate in spatial planning processes as partners. For example, Ngāti Whātua Ōrākei submitted that: "Crucially, spatial planning provides an ideal vehicle to enable a true partnership approach to planning, fulfilling local authorities' obligations under Te Tiriti o Waitangi and giving effect to its principles. Ngāti Whātua Ōrākei sees active and meaningful engagement in spatial planning, undertaken with a true partnership approach, to be fundamental in enabling a step change in Māori participation".

How would accountability be assigned?

104. For central government, the spatial planning legislation could provide that a responsible Minister or Ministers is accountable for delivery.[175] It would not be necessary to specify the responsible Minister or Ministers in the legislation.[176] The responsible Minister or Ministers could be required to consult with other Ministers affected by the spatial planning process at key points in the process. In practice, ministerial consultation would happen in any event through the Cabinet process.[177]

105. For local government, accountability would sit with all councils in the region (or regions in the case of a joint strategy).[178]

106. Unlike central and local government, mana whenua do not have access to the funding and regulatory tools required to implement a spatial strategy, so could not be accountable for implementation. However, as discussed above, our view is that mana whenua should be partners in the development of spatial strategies. They should be provided with an

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175 Currently there is no obvious lead Minister. In some cases, the Minister for the Environment would have the strongest interest, in others it might be the Minister for Urban Development or the Minister of Local Government.

176 For example, section 5 of the LTMA defines the responsible Minister as "the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act or the relevant Part or provision of this Act".

177 For example, the Minister for Treaty of Waitangi Negotiations seeks Cabinet decisions at key stages of the process for settling historical claims. Examples of key stages are: determining the approach and parameters for the negotiation, recognising the mandate of the iwi entity, entering into various legal documents including terms of negotiation, agreement in principle and deed of settlement, and the introduction of a settlement bill. Other decisions, such as making offers within approved parameters for the negotiation are delegated by Cabinet to the Minister, or to the Minister jointly with other Ministers.

178 Similar to section 79 of the Local Government (Auckland Council) Act 2009, which provides that Auckland Council is accountable for the delivery of the Auckland (Spatial) Plan.

opportunity to invest in infrastructure and other initiatives to support implementation of the spatial strategy on a voluntary basis. They could also potentially play a role in monitoring the implementation of spatial strategies.

How would the spatial planning process be governed?

107. Some form of governing body such as a joint committee would need to be established at the start of a spatial planning process. The governing body would be responsible for overall leadership of the process, consulting with Ministers, central government agencies, councils and mana whenua, and making decisions, including to approve the spatial strategy.

The governing body would be responsible for overall leadership of the process, consulting with Ministers, central government agencies, councils and mana whenua, and making decisions, including to approve the spatial strategy.

108. The governing body would have members from central government, the councils of the region and mana whenua and be independently chaired. All members would need to be suitably skilled and experienced and have the confidence of the bodies they are representing. Good collaboration and communication skills would be essential, for example. The central government member should be a senior official appointed from an agency that serves the responsible Minister or Ministers, or another relevant agency. The council members should generally be senior executive officers.

109. The members would be required to consult with the bodies they are representing, for example:

- the lead central government official would be responsible for consulting with the responsible Minister or Ministers and all relevant central government agencies
- council representatives would be responsible for consulting with the councils of the region, including relevant committees, council-controlled organisations and other council entities
- mana whenua representatives would be responsible for consulting with mana whenua using their preferred processes, such as hui.

110. For regions with large numbers of territorial authorities and mana whenua, selection processes may be required to keep the body to a practical size. For example, the Independent Māori Statutory Board and the Mana Whenua Kaitiaki Forum (both in Auckland) have processes to identify nominations and appoint members from a substantial number of iwi.[179]

111. Where selection processes are used, territorial authority members would be responsible for representing the views of all councils that selected them. Similarly, the mana whenua members would be responsible for representing the views of mana whenua generally, rather than the views of their particular iwi and hapū.

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179 Schedule 2 of the Local Government (Auckland Council) Act 2009 provides a process for selecting members of the Independent Māori Statutory Board. The Minister of Māori Affairs notifies each mana whenua group that it is required to nominate one representative for a Selection Body. The Selection Body then follows a specified process to appoint the nine Board members (seven from mana whenua and two from mātāwaka).

112. We do not consider that a selection process should unduly delay the development of a spatial strategy. Having fixed timeframes and 'circuit breakers' embedded into the process could be one method for ensuring this does not occur. We discuss below a dispute resolution process to address this issue.

113. Before approving the spatial strategy, the governing body should make best endeavours to satisfy itself that:

- the responsible Minister or Ministers and the regional council (or unitary authority) support the draft spatial strategy
- territorial authorities in the region support the draft spatial strategy as it relates to or affects their district
- mana whenua support the draft spatial strategy as it relates to or affects their rohe and their relationship with it.

Decision-making

114. Important to successful spatial planning will be the processes used to bring parties together and obtain buy-in to the spatial strategy and underpinning decisions. We considered two options for decision-making: consensus[180] or majority vote (either a simple majority vote of 51 per cent or some other percentage).

115. The advantages of a consensus decision-making model are that:

- consensus and approval of spatial strategies by central government, councils and mana whenua will be promoted to ensure the right incentives for implementation of the strategy
- as noted above, in regions with large numbers of territorial authorities and mana whenua, a process to nominate and select members of the governing body may be required. Selection processes are easier to apply to consensus decision-making as voting rights are not at stake
- it is more easily adapted to provide for cross-boundary issues.

116. The disadvantages of consensus decision-making are the potential for game playing, delays and failure to reach consensus.

117. The advantage of majority voting is that decisions can be made quickly. The disadvantages are that:

- voting creates winners and losers, which can lead to implementation challenges (for example, central government may not want to invest in a transport corridor it voted against)
- it would be difficult to specify representation requirements that are equitable for all regions
- it would be difficult to apply selection processes to keep governing bodies to a manageable size.

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[180] Where all members of the governing body (for example, joint committee) support or stand apart from the decision.

118. In our view, a consensus approach to decision-making is the best option for the reasons noted above, but it will be important to have dispute resolution processes to cover any dispute relating to the functions of the governing body, including disputes over membership, process, funding, content and approval of the spatial strategy. This could involve facilitated mediation in the first instance, and ultimately a final decision by the responsible Minister or Ministers to resolve disputes.

In our view, a consensus approach to decision-making is the best option for the reasons noted above, but it will be important to have dispute resolution processes.

Incentives

119. Collaborative processes work best where the parties share a common goal and the incentives are right. Central government would be incentivised to reach agreement on regional spatial strategies because they are an important mechanism for implementing national direction and government policy statements. Spatial strategies could also result in more efficient and effective infrastructure investment due to better coordination between central government agencies and between central and local government and other infrastructure providers.

120. Councils would be incentivised to reach agreement on regional spatial strategies because of the link to the LTMA funding process and the potential for central government to fund or co-fund other initiatives in the region through the implementation agreement. There may be an opportunity for new central government funding streams, such as those associated with the post-COVID-19 recovery, to be linked to spatial planning processes. Consideration could also be given to whether other new tools or incentives might be desirable to encourage agreement.

Stakeholder involvement

121. The legislation should require the spatial planning partners (central government, councils and mana whenua) to:

- involve stakeholders, including district health boards, mātāwaka, infrastructure providers, the development community and environmental groups in the development of the spatial strategy. We envisage that stakeholders would be involved, alongside the spatial planning partners, in working groups and/or stakeholder reference groups that would develop the spatial strategies in accordance with the guidance and direction of the governing body
- consult with the councils and mana whenua of neighbouring regions to ensure cross-boundary issues are addressed
- seek advice from relevant organisations, including the Infrastructure Commission, the Climate Change Commission, the PCE, the Earthquake Commission, the Ministry of Civil Defence and Emergency Management and Kāinga Ora Homes and Communities during the development of the strategy.

Public participation

122. We consider that public participation should be robust but should not include appeal rights to a court (spatial strategies should be subject only to judicial review). The special consultative procedure in section 83 of the LGA is a good starting point as it provides suitable flexibility to tailor consultation to the circumstances of the region. It would need to be modified for the spatial planning legislation because all spatial planning partners would consult, not just councils. The use of innovative engagement tools should be encouraged, in order to reach a diverse range of people within the region.

Monitoring and review

Independent review of draft spatial strategies

123. Given spatial strategies will have strong legal weight, we support a requirement for draft strategies to be independently reviewed by a suitably qualified expert appointed by the governing body, with the reviewer to make recommendations to the governing body. The legislation should require both the review and the governing body's response to be made public, to promote transparency in decision-making.

Review frequency and process

124. We recommend spatial planning partners be required to complete a full review of their spatial strategy at least every nine years, with flexibility to review the strategy in full or in part within the nine-year period to make adjustments in response to significant change. For example, reviews within the nine-year period could be triggered by significant changes to national direction or other national policy, or by sudden changes to the environment, such as a significant earthquake or pandemic. The nine years would be counted from the date the strategy was approved by the governing body. Reviews should be carried out in accordance with the consultation requirements that apply to the development of the first spatial strategy, including use of the modified special consultative procedure.

We recommend spatial planning partners be required to complete a full review of their spatial strategy at least every nine years.

125. In our view, this approach provides a good balance of certainty and responsiveness. A shorter review period may discourage long-term strategic planning and be unnecessarily onerous on central and local government and mana whenua. We prefer nine years to 10 years as it promotes alignment with councils' three-year long-term planning cycles, although this may be more achievable from the second generation of spatial strategies. It is also consistent with our recommended review periods for national direction and combined plans. As discussed in chapter 8, reviews of combined plans should follow reviews of spatial strategies.

Monitoring and oversight requirements

126. Regional spatial strategies should be monitored and reviewed in line with international best practice. For example, the legislation should:

- require a spatial strategy to include measurable objectives and milestones that can be monitored and reported against
- provide that the spatial planning partners have an ongoing responsibility to monitor implementation of the regional spatial strategy and keep it under review
- require a spatial strategy to describe how monitoring will be undertaken[181]
- require the spatial planning partners to jointly prepare and publicly release a report within three years of the approval of the spatial strategy on progress towards meeting the objectives and milestones in the strategy
- provide for the Ministry for the Environment to monitor and report to the Minister for the Environment on the effectiveness of spatial strategies as part of the Ministry's oversight of the resource management system
- provide for the PCE to audit the effectiveness of spatial strategies as part of the PCE's expanded auditing and reporting role as discussed in chapter 12.[182]

Opportunities to streamline the system

127. The reformed resource management system needs to be simpler and more streamlined than the current system. The proposed requirement for combined plans under the Natural and Built Environments Act (see chapter 8), LGA infrastructure strategies, long-term plans and annual plans, and LTMA regional land transport plans, to be 'consistent with' regional spatial strategies will help achieve this.

128. Strategic directions agreed through spatial planning processes will flow into detailed regulatory and funding plans. This will focus appeals on the implementation of spatial strategies through combined regulatory plans (such as the proposed location of a new transport corridor) and discourage relitigation of agreed strategic directions (such as the need for a new transport corridor between two areas).

129. We have also considered options to reduce potential duplication between regional spatial strategies and other policies and plans, including:

- replacing or narrowing the scope of regional policy statements, infrastructure strategies and/or regional land transport plans
- providing for the content of approved spatial strategies to be included in regional policy statements, infrastructure strategies and regional land transport plans as relevant.

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181 This could be based on section 16 of the LTMA relating to regional land transport plans.

182 We also considered giving the Auditor-General an audit and reporting role in relation to regional spatial strategies. The Office of the Auditor-General would have the necessary expertise to assess whether spatial strategies are resulting in more efficient and effective infrastructure investment, for example. However, we decided in favour of giving the PCE an auditing role because of our proposal for an expanded audit and reporting role for the PCE across the resource management system, discussed in chapter 12, and the broad purpose and outcomes for spatial planning. Empowering the PCE to audit spatial strategies would not prevent the Auditor-General from exercising its functions under the Public Audit Act 2001, including examining and reporting on whether public entities (including central government agencies and councils) are carrying out their activities effectively and efficiently.

130. Regional policy statements, infrastructure strategies and regional land transport plans cannot be replaced in their entirety by regional spatial strategies. The existing instruments contain both strategic aspects that would be suitable for inclusion in spatial strategies and more detailed methods and operational aspects that would not. In addition, infrastructure strategies are prepared by all councils individually as a significant element of their long-term planning (budgeting) process rather than on a regional basis.

We prefer the approach of retaining existing policies and plans but we would expect the content of approved regional spatial strategies to be reflected in regional policy statements, infrastructure strategies and regional land transport plans as relevant and they would all be required to be consistent with spatial strategies.

131. We considered narrowing the scope of regional policy statements and regional land transport plans by removing the strategic elements that would be covered in regional spatial strategies. This would remove potential duplication. However, it would weaken the coherence and effectiveness of regional policy statements and regional land transport plans and raise natural justice issues by removing appeal rights on aspects of regional policy statements. Care would also need to be taken to retain the current legal weight of any strategies or plans provided for under Tiriti settlement legislation, such as the Vision and Strategy for the Waikato River that is deemed to be part of the Waikato Regional Policy Statement.[183]

132. On balance, we prefer the approach of retaining existing policies and plans but we would expect the content of approved regional spatial strategies to be reflected in regional policy statements, infrastructure strategies and regional land transport plans as relevant and they would all be required to be consistent with spatial strategies. Further as discussed in chapter 8 we recommend incorporating regional policy statements and regional plans into combined plans. This is expected to result in very significant improvements by simplifying and streamlining policy and plan-making processes under the new Natural and Built Environments Act.

Implementation support and funding

133. A number of submitters on our issues and options paper expressed concerns about potential barriers to spatial planning, including designation processes that may not be fit for purpose to protect corridors or strategic sites far in advance of project design, infrastructure funding and financing constraints, and insufficient capacity and capability within central and local government and mana whenua.

134. Submitters emphasised the importance of addressing implementation challenges if spatial planning is to improve system outcomes. For example, Infrastructure New Zealand submitted:

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183 Section 11, Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. Te Heke Ngahuru (the strategy) for Te Awa Tupua (the Whanganui River) may be incorporated into a regional policy statement, either wholly or in part. However, in contrast to the Vision and Strategy for the Waikato River, this is discretionary and the RMA plan-making process must be followed.

> For spatial planning to be effective, spatial plans must be delivered. To be delivered, spatial plans need to be funded. To be funded, bodies overseeing investments need to benefit from investments made and have the ability to raise resources. If entities responsible for delivering plans and elements of plans are not incentivised or capable of performing their role then implementation will fail and so will plans. We strongly encourage the Panel to consider whether, in their preferred model, public institutions have both the willingness and the ability to ensure plans, and therefore public outcomes, can and will be delivered.

135. New provision for spatial planning will need to be complemented by central government guidance, measures to improve capability and capacity within central and local government to carry out spatial planning effectively, consideration of what support is needed for mana whenua to participate in spatial planning processes, and effective supporting tools (including infrastructure funding and financing tools and designations). Designations are further discussed in chapter 10.

136. The new spatial planning function will need to be funded. Relevant considerations include the need to:

- build capability and capacity within central government agencies and councils to participate effectively in regional spatial planning processes
- support mana whenua and potentially mātāwaka to participate effectively in spatial planning processes (as discussed in chapter 3).

137. Attention will need to be given to:

- options for the sequencing and timing of spatial planning processes
- transitional provisions (as discussed in chapter 16).

Expected outcomes

138. An important objective of our review was to establish strategic and integrated planning for development and the environment. Our view is that this is best advanced through our proposal for a new Strategic Planning Act. The new Act will allow a broad range of matters to be reconciled in pursuit of social, economic, environmental and cultural wellbeing. This will provide a powerful tool for advancing the long-term planning that is vital to both environmental protection and development.

Key recommendations

Key recommendations – Strategic integration and spatial planning	
1	There should be a new Strategic Planning Act to promote the social, economic, environmental and cultural wellbeing of present and future generations through the long-term strategic integration of functions exercised under the Natural and Built Environments Act, LGA, LTMA and CCRA.
2	The Strategic Planning Act should provide a framework for mandatory regional spatial planning for both land and the coastal marine area.
3	Regional spatial strategies should set long-term objectives for urban growth and land use change, responding to climate change, and identifying areas inappropriate to develop for reasons such as their natural values or their importance to Māori.
4	There should be flexibility for: (i) the responsible Minister to determine sequencing, timing and priorities for preparation of these strategies (ii) spatial strategies to cover two or more regions or to focus on sub-regions in response to particular issues.
5	Regional spatial strategies should set a strategic direction for at least the next 30 years, informed by longer-term data and evidence as appropriate, such as 100 year plus projections for climate change.
6	Regional spatial strategies should be strategic and high level with project and site-level detail provided through separate implementation agreements and subsequent combined planning and funding processes.
7	Regional spatial strategies should be prepared and approved by a joint committee comprising representatives of central government, the regional council, all constituent territorial authorities in the region, mana whenua and an independent chair.
8	There should be significant stakeholder and community involvement in the preparation of these strategies, including through public submissions and a process similar to the special consultative procedure under the Local Government Act.
9	Joint committees should seek consensus, but dispute resolution procedures should be provided including a facilitated mediation process and power for the Minister to resolve any remaining disputes.
10	Regional spatial strategies should be consistent with national direction under the Natural and Built Environments Act.
11	Combined plans and regional and local funding plans should be consistent with spatial strategies.
12	Regional spatial strategies should be fully reviewed at least every nine years with flexibility for review within that period when required.

The parameters of the recommended spatial planning legislation are summarised in appendix 2 of our report.

Chapter 5 A more responsive system: addressing status quo bias

1. The resource management system has long favoured existing uses and consented activities, protecting them from changes in plans, rules and standards designed to promote better environmental outcomes and to effect change for the benefit of communities. The range of protections of this kind in the system is pervasive with the result that the ability to respond to urban growth and the environmental challenges and opportunities we face is seriously impaired.

The resource management system has long favoured existing uses and consented activities, protecting them from changes in plans, rules and standards designed to promote better environmental outcomes and to effect change for the benefit of communities.

2. The inability of the resource management system to effect necessary change is a serious impediment to achieving better outcomes such as restoring degraded water bodies, responding to the effects of climate change and providing sufficient development capacity in areas experiencing significant population pressures.
3. In this chapter, we identify the provisions in the resource management system which protect existing uses and consented activities and propose options to support a more responsive system.[184]

Background and current provisions

4. The RMA's protections relating to existing uses were established under the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967. They have therefore been part of the law for over 50 years. These protections were developed at a time when our knowledge of the state of the environment and our impact on it were very different. The pressures that exist today, including climate change, resource scarcity, urbanisation, pollution and biodiversity loss were not well understood 50 years ago.
5. The RMA provides protection for existing uses and consented activities in a variety of ways. Some protections arise from presumptions underpinning the Act, such as the distinction between the use of private property and the public estate. Other protections are explicit and collectively allow certain existing uses to continue (either indefinitely or until a resource consent application is decided) even when a new use for the same activity would require consent.[185] There are constraints on the ability to modify or extinguish existing resource consents through national direction or reviews of consent conditions. The permitted baseline test we discuss in chapter 9 is a further indirect contributor to system bias in favour of the status quo.

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184 This chapter is informed by a report we commissioned: France-Hudson B. *RMA flexibility to effect change in existing uses*. Unpublished.

185 Sections 10, 10A, 10B and 20A, RMA.

Presumptions regarding land and resource use

6. The protections afforded by the RMA differentiate between the use of land and the use of public estate resources such as air, water and the coastal marine area. This reflects differing presumptions underpinning the use of these resources.

7. For the use of land, the RMA reflects the common law presumption that owners should be able to do what they wish with their land, unless explicitly constrained. This presumption underpins section 9, which effectively provides that any use of land is allowed if it does not contravene a national environmental standard, a regional rule or a district rule. It reflects the classical liberalism theory of private property, which suggests that people should be able to do what they wish with what they own.[186] This presumption was a reversal of the position under the Town and Country Planning Act 1977 where "all uses of land were prohibited, unless they were expressly provided for under a district scheme, a resource consent, or an existing use protection".[187]

8. In contrast, for the use of 'public estate' resources the underlying presumption is that an activity is prohibited, unless expressly allowed.[188] Users cannot presume a right to private use of public resources.

Explicit protection of existing uses

9. Section 10 of the RMA provides for the continuation of a lawfully established land use that contravenes a new rule in a district plan, subject to the activity not having been discontinued for more than 12 months and the effects of the use remaining "the same or similar in character, intensity, and scale". If these requirements are met, there is very little ability for a territorial authority to modify that activity or require it to cease through use of a district plan rule.[189] This protection of existing land uses was carried over from section 90 of the Town and Country Planning Act 1977 on the basis that most land is privately owned[190] and fairness requires existing uses of land to be recognised when rules and plans change.[191]

10. In contrast to land uses affected by new district plan rules, the RMA provides limited protection to lawfully established activities that contravene a new rule in a regional plan. Section 20A allows existing activities to continue but only until any application for a resource

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186 Grace ES, France-Hudson BT, Kilvington MJ. 2019. *Reducing Risk through the Management of Existing Uses: Tensions under the RMA*. Lower Hutt: GNS Science; p 17.

187 Ministry for the Environment. 1990. *Departmental Report on the Resource Management Bill.* Wellington: Ministry for the Environment; p 56.

188 Sections 12-15, RMA.

189 Section 17 of the RMA imposes a duty to avoid, remedy or mitigate any adverse effect of activities on the environment whether or not the activity is being carried out in accordance with a national environmental standard, a rule, a resource consent, a designation or an existing use protection.

190 Ministry for the Environment. 1990. *Departmental Report on the Resource Management Bill.* Wellington: Ministry for the Environment; p 57.

191 Explanatory note to the Resource Management Bill 1989. Retrieved from http://www.nzlii.org/nz/legis/hist_bill/rmb19892241210/ (15 June 2020); p viii.

consent has been determined.[192] Existing activities can therefore be modified (through conditions) or extinguished (if the consent is not obtained or the activity is given prohibited status). Section 20A applies to all uses and activities regulated by regional councils. This includes some types of land use, including for the purpose of the avoidance or mitigation of natural hazards.[193]

11. The rationale for this approach is that regional plan rules should be able to override existing activities, however existing users should be given the opportunity to have their interest accommodated and to test the reasonableness of the rule before their investment is affected.[194]

Resource consents and certificates of compliance

12. In addition to existing use protections, a number of resource consent provisions collectively operate in favour of existing resource users. These are discussed in chapter 11 and include:

    - the power under section 128 of the RMA to review the conditions of a consent granted by a regional council is tightly constrained and the decision-maker must have regard to the continued viability of the activity controlled by the consent. Cancellation of a consent is only possible if the activity has significant adverse effects on the environment and either there were material inaccuracies in the original consent application or the consent holder is convicted of an offence that contravenes the consent

    Territorial authorities have virtually no ability to modify consents granted and implemented for land use activities within their jurisdiction.

    - territorial authorities have virtually no ability to modify consents granted and implemented for land use activities within their jurisdiction. In contrast to consents granted by regional councils, land use consents by district councils are not generally time-limited
    - consent authorities must have regard to the value of the investment of an existing consent holder when considering an application to renew a consent,[195] and existing consent holders are prioritised in certain circumstances when there is more than one applicant seeking to use the same resource.[196]

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192 As with existing land uses there are also caveats about the length of time the activity can be discontinued and a requirement that the effects of the activity stay the same or similar in character, intensity and scale.

193 Section 10(4) of the RMA provides that the "section does not apply to any use of land that is controlled under section 30(1)(c) (regional control of certain land uses)".

194 Existing uses were not protected under the Soil Conservation and Rivers Control Act 1941 because regulation was aimed at achieving public safety purposes, such as flood control, as well as dealing with water quality and soil erosion. Likewise, existing uses were not protected under the Harbours Act 1950 because a consent holder was occupying and using publicly-owned land in the coastal area.

195 Section 104(2A), RMA.

196 Section 124B, RMA.

13. As discussed in chapter 11, the 'first-in, first-served' approach to allocation hinders the ability to allocate resources to uses which offer the greatest environmental, social, cultural or economic value. It can also disadvantage mana whenua and small rural communities, for example where they are unable to draw water from a local source that is already over-allocated.

The 'first-in, first-served' approach to allocation hinders the ability to allocate resources to uses which offer the greatest environmental, social, cultural or economic value.

14. Certificates of compliance are used to safeguard an activity that is permitted at the time of application for a certificate (but not yet established) from a change to plan rules that would require a resource consent for the activity. If the activity is subsequently established it benefits from the existing use protections described above.[197] Certificates of compliance may also be granted for activities already established and provide additional protection from future plan changes. They are commonly obtained as part of the due diligence process on the sale of a business or other activity.

Protections under section 85 of the RMA

15. Section 85 of the RMA provides that an interest in land shall be deemed not to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for. This means that those with interests in land cannot claim compensation as a result of planning restrictions imposed under the RMA. This includes plan provisions that would modify or extinguish existing uses. However, provisions can be challenged on the basis they would make land 'incapable of reasonable use' and place 'an unfair and unreasonable burden' on a person who has an interest in the land. If these tests are met, the remedies available to the local authority are to modify, delete or replace the provision or, with the agreement of the person with the interest in the land, to purchase that land under the Public Works Act 1981.

In our view, the function of section 85 generally, and in the context of managed retreat and natural hazards, should be reviewed.

16. We are aware of some difficulties in the application of this section. In particular, we consider the tests and associated remedies may hinder the proactive responses needed to address climate change issues, such as managed retreat. For example, if the section 85 tests are met, a person with an interest in the land must agree to it being purchased. If they do not agree the local authority must modify, delete or replace the relevant plan provision. This could undermine local authorities' ability to enforce retreat from an area through use of planning rules (as discussed in chapter 6).[198] In our view, the function of section 85 generally, and in the context of managed retreat and natural hazards, should be reviewed.

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197 Certificates of compliance can have a lapse period of up to five years from being issued.

198 This is compounded by limitations on the use of the compulsory acquisition powers of the Public Works Act 1981 in circumstances where land is sought to be used for something other than a public work.

Relationship between national direction and existing uses and consents

17. Under the current system, existing uses and resource consents can present a barrier to the implementation of national direction. Most resource consents prevail over national direction. However, national environmental standards can trigger a review of regional consents.[199] The relationship between national direction and existing uses and consents is discussed in chapter 7.

Discussion – creating a more responsive system

18. There are inevitable tensions between private interests in land use and development and the wider interests of communities and all New Zealanders in a high-quality environment. There is also a tension between providing for the needs of current residents and ensuring future generations will be able to meet their needs. These tensions increase in cases of rapid change or scarce resources.

19. Submitters on our issues and options paper expressed a range of views about existing use protections and the ability to change or cancel resource consents. Many submitters acknowledged the need for a more responsive system, particularly in relation to climate change adaptation. However, there was also significant concern about the potential impact on holders of existing use protections and consents. Forest & Bird captured this tension in its submission:

> We agree that the current strong expectation that use rights will continue in perpetuity needs to change. Such an approach cannot continue while using a limits/outcomes approach. However we do have sympathy for users who have invested time and money etc based on a resource consent. Some kind of a priori rights are likely to be appropriate, within the framework of outcomes/limits still being met.

20. Some submitters supported increased reviews of regional consents, such as within a set time period after a relevant rule in a regional plan becomes operative. The New Zealand Fish & Game Council submitted that:

> Consents need to be reviewed regularly. This is permissible under the current RMA, but Councils show reluctance to review existing consents and are particularly reluctant to review complex groups of consents for one activity, or groups of individual consents that are linked (for example all the water takes in a particular catchment). Consents that are inconsistent with limits set in national direction or in plans should not be able to persist. Councils should be required to (rather than having the option to, as is the current situation) to review consents (and this must be done collectively where appropriate) to ensure compliance within a limit. That review ought to be able to go so far as to collectively reduce the amount of the resource used, if that is necessary, without concerns about derogation holding sway over environmental outcomes.

21. The Resource Management Amendment Bill[200] proposes to amend section 128 of the RMA to make it easier for regional councils to review conditions of water consents to support

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[199] Section 43B, RMA.

[200] At the final meeting of the Resource Management Review Panel, the Bill was yet to be passed.

implementation of regional plan rules. The proposed changes include a power for regional councils to review the effects of multiple consents on maximum or minimum flows, rates or standards for water quality stated in a regional rule. Regional councils will also be able to review consent conditions as soon as the relevant rule is operative, rather than waiting until the plan as a whole is operative. The intent is to facilitate faster implementation of the National Policy Statement for Freshwater Management.

There needs to be greater ability for existing uses and activities, including regionally significant land uses, to change over time to respond to significant environmental issues.

22. In our view, the distinction in the RMA between the use of land and the use of public estate resources such as air, water and the coastal marine area generally remains appropriate. However, there needs to be greater ability for existing uses and activities, including regionally significant land uses, to change over time to respond to significant environmental issues. This is particularly relevant to climate change adaptation, including managed retreat.

23. A more responsive approach would also align the resource management system and the obligations on existing users and consent holders to address changing standards in a similar way to which building owners under the Building Act and building code are required to address earthquake strengthening work.

Principles for creating a more responsive system

24. We have identified the following principles, informed by submissions on our issues and options paper, to guide our consideration of options to make the system more responsive:

    - resources should be used **sustainably** to ensure the reasonably foreseeable needs of future generations can be met
    - **fairness and equity** should be considered when making changes to existing uses. This applies to both existing resource users, and potential users of the resource (particularly where a resource is over-allocated)
    - existing resource users should be provided with **early notice and adequate transition** time to make required changes
    - the need for a **responsive** system should be **balanced** with the need for **certainty** for resource users to invest.

Existing use protections

25. Our view is that the current protection in section 10 of the RMA for existing lawfully established land uses that contravene a new rule in a district plan should be retained. This is consistent with the principle of fairness and equity, particularly given the presumption in favour of land use in section 9 of the RMA which we consider should be retained.

26. However, we consider there should be two limited exceptions to the general rule to enable existing land use rights to be modified or extinguished:

    - where necessary to adapt to the effects of climate change or to reduce risks from natural hazards as we discuss in chapter 6
    - where there is high risk of significant harm or damage to health, property or the natural environment, for example by the breach of an environmental limit.

We consider there should be two limited exceptions to the general rule to enable existing land use rights to be modified or extinguished.

Changes to consents

27. We take a similar view in respect of land use consents granted by territorial authorities. These are not generally time-limited and should not be disturbed except in the two circumstances described above.

28. As noted, different presumptions apply to consents or permits granted by regional councils. As discussed in chapters 7 and 11, the existing powers to modify or extinguish consents or permits granted by regional councils should be strengthened where necessary to achieve agreed outcomes and be more responsive to change.

Changes in consequence of national direction

29. In chapter 7, we discuss the impact of new national directions on existing use rights and existing consents. Our recommendations in chapter 7 align with the approach we have described in this chapter and draw similar distinctions.

30. For matters relating to air, water and the coastal marine area, we recommend that new national direction should automatically trigger a review of any existing resource consents that may be inconsistent with it.

31. We recommend a number of changes to make consenting arrangements more flexible, including enabling review and readjustment if environmental conditions change. These changes are discussed in chapter 11 and include stronger powers to review and change consent conditions.

More strategic direction for development and urban growth capacity

32. As discussed in chapter 2, one of the frequent criticisms of the RMA is that it has been too slow to respond to increased demand for housing. This has led to higher housing costs and poor social outcomes. The current system's bias towards the status quo is a barrier to dynamic urban environments that provide for the needs of current and future residents.

33. Factors we have identified as contributing to this include:

    - a lack of strategic focus for development (discussed in chapter 4)
    - more weight being placed on existing community values over future community needs

- plan-making being slow, litigious and unresponsive to change thereby limiting local authorities' ability to provide development capacity in a timely way (discussed in chapter 8).

The current system's bias towards the status quo is a barrier to dynamic urban environments that provide for the needs of current and future residents.

34. In chapter 11 we discuss in detail ways in which better provision for urban growth could be made and a combination of recommendations covered in other chapters will also help address these issues and improve responsiveness. Most notably, our recommendation in chapter 2 to include specific outcomes for urban growth and development in the new Natural and Built Environments Act, and our recommendation in chapter 4 to develop a new Strategic Planning Act to mandate regional spatial planning for land use, infrastructure and associated funding. These will be complemented by changes recommended in other chapters to improve plan-making, designations and consenting.

Key recommendations

Key recommendations – A more responsive system	
1	The principles that should guide the design of a more responsive resource management system are: (i) sustainability (ii) fairness and equity (iii) early notice and adequate time for transition (iv) balancing responsiveness with certainty for investment. These principles are reflected in the recommendations in chapter 6 Climate change and natural hazards, chapter 7 National direction, chapter 8 Policy and planning framework, chapter 9 Consents and approvals and chapter 11 Allocation of resources and economic instruments.
2	The protections generally afforded to existing uses and consented activities should be retained except that: (i) the powers of regional councils to modify or extinguish regional consents should be strengthened to achieve agreed outcomes and be more responsive to change (ii) the powers of territorial authorities should be extended to enable them to modify or extinguish existing land uses and land use consents in specific circumstances. These should be confined to: (a) where necessary to adapt to the effects of climate change or to reduce risks from natural hazards or (b) where there is high risk of significant harm or damage to health, property or the natural environment, for example by the breach of an environmental limit.

Chapter 6 Climate change and natural hazards

1. Climate change is often described as the defining issue of our time. Limiting global warming to 1.5 degrees Celsius above pre-industrial levels will require rapid, far-reaching and unprecedented changes in all aspects of society. We are already experiencing the effects of climate change, including through flooding and coastal erosion that threaten our essential infrastructure and the safety of whole communities. We need to respond with urgency.

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2. New Zealand's resource management system has an important role to play in ensuring that we both mitigate our impacts on the climate by reducing greenhouse gas emissions and adapt to the effects of climate change through well-informed decision-making about land and other resource use. As climate change will exacerbate a range of natural hazards, this chapter also addresses the distinct but related issue of how the resource management system can improve the country's resilience to these hazards more generally.
3. A comprehensive approach is needed for central and local government decision-makers to address climate change and natural hazards as a matter of priority. Our proposals include:
    - setting outcomes in the Natural and Built Environments Act to prioritise reducing greenhouse gas emissions, increasing resilience to the effects of climate change and reducing the risks from natural hazards as important goals for decision-makers
    - providing the necessary mechanisms to achieve these outcomes, including mandatory national direction, the use of strategic spatial plans, and new legislation and powers to address the particular challenge of managed retreat from areas subject to climate change and natural hazard risks
    - establishing clear mandates, roles and responsibilities for central and local government and relationships with other legislation including the Climate Change Response Act.

Background and current provisions in legislation

4. Emissions of greenhouse gases will cause warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems.[201] Surface temperatures will rise over the

[201] Intergovernmental Panel on Climate Change. 2014. *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*. Geneva: Intergovernmental Panel on Climate Change; p 8.

21st century under all assessed emission scenarios. It is very likely that heat waves will occur more often and last longer and that extreme precipitation events will become more intense and frequent in many regions. The ocean will continue to warm and acidify and global mean sea level will rise.[202]

5. A future resource management system should anticipate and respond to these challenges. Furthermore, good decision-making will require integration across broader climate change and natural hazard legislative responses. We discuss the relevant legislative frameworks below.

Climate Change Response Act 2002

6. The Climate Change Response Act 2002 (CCRA) sets a legal framework to enable New Zealand to meet our domestic and international climate change obligations (mitigation) and adapt to the effects of climate change (adaptation).

7. In 2019 the Climate Change Response (Zero Carbon) Amendment Act committed New Zealand to reducing greenhouse gas emissions by 2050[203] in line with global commitments under the Paris Agreement. To meet this target, central government must set a series of five-yearly emissions budgets and an emissions reduction plan showing how these will be met.[204]

8. The Emissions Trading Scheme (ETS) is one of the tools for meeting these emissions budgets. Within the scheme, emissions units are tradeable at a price set by the market. It aims to encourage businesses to reduce emissions and incentivise planting carbon-absorbing forest sinks.

9. There is also a requirement for the Government to develop a national adaptation plan in response to a national climate change risk assessment. The national adaptation plan is a strategic document that sets out objectives, strategies, plans and policies for climate change adaptation.

10. The Climate Change Commission advises the Government on these emissions budgets and tracks the Government's progress towards achieving them and the 2050 target to ensure political accountability. It also monitors progress on implementation of the national adaptation plan and will be responsible for delivering national climate change risk assessments (after the first one which is being developed by the Government).

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202 Intergovernmental Panel on Climate Change. 2014. *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*. Geneva: Intergovernmental Panel on Climate Change; p 10.

203 The target for 2050 is to reduce greenhouse gas emissions other than biogenic methane to 'net zero', and emissions of biogenic methane emissions by 24 per cent to 47 per cent below 2017 levels (including to 10 per cent below 2017 levels by 2030), meeting our global commitments under the Paris Agreement to limit the global average temperature increase to 1.5 degrees Celsius above pre-industrial levels.

204 The emissions budgets set a maximum quantity of emissions for each five-year period, and will generally be set 10–15 years in advance.

Resource Management Act 1991

11. The RMA is limited in its approach to climate change mitigation. Amendments introduced by the Resource Management (Energy and Climate) Amendment Act 2004 removed the ability of local authorities to consider discharges of greenhouse gas emissions, unless a national environmental standard was developed.[205] Central government has never developed such a standard.

12. Subsequently, the Supreme Court has interpreted the statutory bar on considering greenhouse gas emissions under the 2004 amendments as also precluding local authorities from considering greenhouse gases which result indirectly from activities under the RMA.[206] This is the case except when the use and development of renewable energy enables a reduction in the discharge of greenhouse gases into air. The Court's interpretation of the renewable energy exemption also limited its scope.[207] The net effect of the Court's interpretation and its impact on the perceptions and practices of councils and resource management practitioners is arguably more restrictive than Parliament's original intent.

13. The purpose and principles of the RMA (Part 2) require decision-makers to have particular regard to 'the efficiency of the end use of energy' and 'the benefits to be derived from the use and development of renewable energy. These matters are relevant, as achieving greater energy efficiency and use of renewable energy is an important aspect of reducing greenhouse gas emissions. The National Policy Statement for Renewable Electricity Generation 2011 has also been developed to promote a consistent approach to planning for renewable electricity generation in New Zealand.

14. The RMA addresses climate change adaptation and natural hazard risk management in several ways, some explicit and some implicit. The purpose and principles of the RMA include the management of significant risks from natural hazards as a matter of national importance that must be recognised and provided for. Those exercising RMA functions and powers must have particular regard to the effects of climate change.[208]

15. Through policy statements and plans, regional councils set objectives, policies and methods for controlling the use of land to avoid or mitigate natural hazards. In district plans, territorial authorities control the effects of land use to avoid or mitigate natural hazards through zones or overlays, rules and performance standards for land use and subdivision. There are no explicit functions in sections 30 and 31 with respect to climate change adaptation.

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205 The relevant provisions are sections 70A and 104E.

206 The majority found, with the Chief Justice dissenting, that the legislative scheme under which climate change arguments are excluded in relation to the use of a power station would be subverted if the same arguments could be deployed in relation to its zoning. Such an outcome, the Court found, would subvert the whole scheme of the RMA as amended in 2004. The majority in *Buller* was satisfied that in s 104(1)(a) the words "actual or potential effects on the environment" in relation to an activity which is under consideration by a local authority do not extend to the impact on climate change or the discharge into air of greenhouse gases that result indirectly from that activity. See *West Coast ENT Incorporated v Buller Coal Ltd* [2013] NZSC 87 at [168] – [175].

207 The majority found, with the Chief Justice dissenting, that this exception only applies to applications involving the use and development of renewable energy. It is not open to local authorities to consider the dis-benefits of non-renewable energy, in other applications, outside of this explicit exception. See *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112 at [62].

208 Section 7(i), RMA.

16. The New Zealand Coastal Policy Statement 2010 (NZCPS) states policies on issues including preservation of natural character, and coastal subdivision, use and development, as well as coastal hazard risks. The National Policy Statement for Freshwater Management requires councils to consider the foreseeable impacts of climate change in water-take decisions. No other national direction considers natural hazards and risk management specifically. However, the Ministry for the Environment has developed guidance for local government on coastal hazards and climate change.

Other important legislation

17. The LGA sets out the administrative and management responsibilities of regional councils and territorial authorities covering land management, utilities and provision of services. Local government must have regard to avoiding and mitigating natural hazards and develop 30-year infrastructure strategies to identify infrastructure issues and solutions. Funding for local government activities (including their RMA functions) is determined through LGA processes and is allocated through long-term plans and annual plans.

18. The Local Government Official Information and Meetings Act 1987 holds councils responsible for identifying and making information known (such as about potential erosion, falling debris, subsidence, slippage or inundation) through Land Information Memoranda, which apply to individual properties.

19. The Civil Defence and Emergency Management Act 2002 encourages communities to achieve acceptable levels of risk, managing hazards across the '4 Rs' – risk reduction, readiness, response and recovery – and is responsible for local-level hazard management among other matters. The Act also defines risk as "the likelihood and consequences of a hazard".

20. The Building Act 2004 manages natural hazards in relation to construction and modification of buildings, and contains provisions relating to building on land subject to natural hazards. The Building Act sets standards for minimum floor heights for flooding, and contains earthquake-strengthening provisions that are relevant to adapting to climate change and natural hazard risk management.[209]

Climate change and natural hazard risk issues

21. The Panel has identified four main issues in regard to climate change and natural hazards. These are:

    - insufficient focus on reducing greenhouse gas emissions and planning for a low-emissions economy (mitigation)
    - insufficient focus on addressing the effects of climate change (adaptation) and the risks from natural hazards
    - poor integration across the system, in particular between the RMA and the CCRA
    - capacity, capability and funding barriers.

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[209] The provisions relating to surface water are in the Building Code, not the Building Act 2004. Provisions relating to earthquake strengthening are in the Act itself.

Insufficient focus on reducing greenhouse gas emissions and planning for a low-emissions economy (mitigation)

22. Although reducing greenhouse gas emissions has been identified as an important policy goal since at least the 1990s, New Zealand has still not developed comprehensive policy tools to support emissions reduction goals.[210] The recent and proposed changes to the CCRA have resulted in legally binding targets to reduce greenhouse gas emissions. The ETS now aligns with this target through caps on emissions that reduce over time. However, a broad range of policy tools will be needed if New Zealand is to become a low-emissions economy over the next decade and meet the ambitious targets set under the CCRA.[211]

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23. As discussed above, the 2004 amendments to the RMA removed the direct control of greenhouse gas emissions from regional councils. At that time, the Government made a number of arguments supporting the conclusion that the RMA was not a useful policy tool for addressing climate change mitigation. Its main points are listed below.

    - Climate change is an international issue and should be dealt with consistently at a national level. As greenhouse gas emissions have the same effect irrespective of where they occur, it would be inappropriate to have different emission standards in different regions. A price on carbon would provide a uniform incentive across the whole country to reduce emissions where that could be done at least cost.
    - The national instruments available under the RMA, including national policy statements and national environmental standards, are unlikely to be cost-effective for controlling greenhouse gases because of the time and expense of developing and implementing them (particularly given the current RMA process).
    - Rules in regional and district plans under the RMA do not in themselves encourage best-practice activities; rather they identify the thresholds above which a consent is required. This means that rules in plans are generally ineffective in encouraging best practice although, for those activities requiring a resource consent, best-practice outcomes could be achieved through a consent condition.
    - It can be argued that, under the RMA, climate change effects of a particular activity seeking consent are de minimis and/or are part of the existing or permitted baseline.

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210 New Zealand has had international commitments to take such action under the Kyoto Protocol since 1997.

211 New Zealand Productivity Commission. 2018. *Low-emissions Economy: Final Report*. Wellington: New Zealand Productivity Commission. Retrieved from https://www.productivity.govt.nz/inquiries/lowemissions/ (15 June 2020).

- There is some uncertainty as to the ability of councils to impose consent conditions related to effects on climate change. For example, it is uncertain whether a council can consider 'effects' outside the boundary of the region and impose conditions requiring third-party involvement. [212]

24. When these arguments were made, it was anticipated a carbon tax would shortly be introduced in 2007. Notwithstanding recent positive moves by the Government, an effective and comprehensive emissions pricing scheme is yet to be established and still appears some years away.[213] In hindsight, while the arguments made in favour of emissions pricing rather than a regulatory approach in the early 2000s had some merit, focusing almost exclusively on developing a pricing approach to reduce carbon emissions may have been a mistake.

25. Even if New Zealand were to achieve a comprehensive price on greenhouse gas emissions, a single price alone is unlikely to be an efficient or effective way to deliver the broad change required for New Zealand to transition to a low-carbon economy. As argued by the Productivity Commission and others, "a single emissions price cannot … reflect the varying range of co-benefits and co-harms associated with different land uses".[214] Additional incentives or regulation to secure benefits or avoid harms are required.[215] Others believe that plan rules and/or consents for activities which emit substantial quantities of greenhouse gases should consider the climate change effects in order to prevent additional damage or to agree a time-limited transition.

Even if New Zealand were to achieve a comprehensive price on greenhouse gas emissions, a single price alone is unlikely to be an efficient or effective way to deliver the broad change required for New Zealand to transition to a low-carbon economy.

26. A future system of environmental and land use planning and regulation has the potential to play an important role alongside emissions pricing. To be efficient, the approach developed would need to address the concerns above. It would also need to work alongside any pricing mechanism in place under the ETS. We discuss how this might be done shortly.

27. Land use planning also has an important role to play in enabling and supporting the land use change and infrastructure needed for a transition to a low-emissions economy. This is likely to include significant afforestation, further development of wind and other renewable electricity generation, changes in the way transport networks operate to reduce reliance on fossil fuels, and more efficient use of existing urban infrastructure, among other things. All of

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212 See Ministry for the Environment. 2006. *Departmental Report on the Resource Management (Climate Protection) Amendment Bill*. Wellington: Ministry for the Environment.

213 The Government has announced its intention to develop a farm-level pricing mechanism separate from the ETS by 2025.

214 New Zealand Productivity Commission. 2018. *Low-emissions Economy: Final Report*. Wellington: New Zealand Productivity Commission. Retrieved from https://www.productivity.govt.nz/inquiries/lowemissions/ (15 June 2020); p 284.

215 Modelling done by the Ministry for the Environment suggests that emissions pricing will only deliver approximately half of the abatement needed to meet our targets.

these matters intersect with resource management plans and will need to be provided for in one way or another. For example, the Productivity Commission's recent low-emissions economy inquiry recommended councils "review and if justified remove, barriers to higher-density development, particularly in inner suburbs and in areas close to public transport routes. Councils should also ensure that infrastructure charges reflect the full costs of dispersed development."[216]

Insufficient focus on addressing the effects of climate change and the risks from natural hazards

28. In 2017 the Climate Change Adaptation Technical Working Group (CCATWG) built a comprehensive picture of the impacts of climate change on New Zealand. The following are some important impacts it identified in relation to natural and built environments.

    - **Physical infrastructure:** Most of New Zealand's major urban centres and the majority of our population are located on the coast or floodplains of major rivers. Many of our communities, homes, marae, commercial assets and infrastructure will experience increased flooding and erosion from storm surge effects or rising groundwater levels from sea-level rise. Local Government New Zealand (LGNZ) estimated that $2.7 billion of council road, water and building infrastructure is at risk from 0.5 metres of sea-level rise, and $14.1 billion of that infrastructure from 3.0 metres of sea-level rise.[217]
    - **Biodiversity:** The range of ecosystems and species will change, as will the timing of annual and seasonal events (for example, beech masting) and ecosystem functions (for example, food webs). Climate change will increase the range and abundance of many invasive species, which are currently a key driver of extinction of indigenous species.
    - **Fresh water:** Higher temperatures and lower rainfall, along with increased frequency and intensity of droughts, are expected to reduce soil moisture, groundwater supplies and river flows in some areas. Changes in seasonal rainfall patterns and extreme weather events will create secondary effects of erosion and sedimentation to waterways, affecting freshwater and marine ecosystems. Climate change related floods and droughts have cost the New Zealand economy at least $120 million for privately insured damages from floods and $720 million for economic losses from droughts over the last 10 years.[218]

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216 New Zealand Productivity Commission. 2018. *Low-emissions Economy: Final Report*. Wellington: New Zealand Productivity Commission. Retrieved from https://www.productivity.govt.nz/inquiries/lowemissions/ (15 June 2020); p 542.

217 Local Government New Zealand. 2019. *Vulnerable: The Quantum of Local Government Infrastructure Exposed to Sea Level Rise.* Wellington: Local Government New Zealand. Retrieved from https://www.lgnz.co.nz/our-work/publications/vulnerable-the-quantum-of-local-government-infrastructure-exposed-to-sea-level-rise/ (15 June 2020).

218 Frame D, Rosier S, Carey-Smith T, Harrington L, Dean S, Noy I. 2018. *Estimating financial costs of climate change in New Zealand: An estimate of climate change-related weather event costs*. New Zealand Climate Change Research Institute and NIWA.

- **Oceans and coasts:** Ocean warming and acidification caused by climate change pose a risk to many ecologically important species in the New Zealand region, including deep-water coral reefs that form habitat for many marine species.[219] They will also affect marine-related industries including aquaculture and commercial fisheries.

29. While the effects of climate change will exacerbate some natural hazards like flooding and landslides, addressing the effects of climate change is clearly a much broader exercise than management of these hazards alone. The likely impacts of sea-level rise on physical infrastructure are now well known with significant costs anticipated. Climate change will also have a large impact on New Zealand's biodiversity. Changing temperature and precipitation patterns are already shifting habitats and species distribution. Our efforts to protect biodiversity will need to be calibrated to these dynamic processes and will require research into the risks and impacts of climate change to native species.[220] Overall, climate change adaptation will require a central focus in future environmental management and land use plans. It would be fair to say this task has only just begun.

Climate change adaptation will require a central focus in future environmental management and land use plans. It would be fair to say this task has only just begun.

30. As discussed above, Part 2 of the RMA includes the management of significant risks from natural hazards as a matter of national importance to be recognised and provided for when carrying out RMA functions and powers. Those exercising such functions and powers must only 'have particular regard to' the effects of climate change, as an 'other matter' in Part 2. Given the scale of the risks discussed above and the fact that climate change will exacerbate natural hazards, it seems anomalous that they are accorded different priority within the current RMA.

31. There is also a broader issue of how 'risk' is understood and planned for in the resource management system. The effects-based orientation of the RMA framework is a poor fit for risk management methods. This is because managing risks requires a proactive approach rather than a focus on the effects of activities. There is also no clear framework for how decision-makers should consider risk in the RMA, and the meaning of 'risk' is not defined, which further hinders development of a clear policy approach.

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219 Climate Change Adaptation Technical Working Group. 2017. *Adapting to Climate Change in New Zealand: Stocktake Report from the Climate Change Adaptation Technical Working Group*. Wellington: Climate Change Adaptation Technical Working Group. Retrieved from https://www.mfe.govt.nz/publications/climate-change/adapting-climate-change-new-zealand-stocktake-report-climate-change (15 June 2020).

220 The impacts on and measures identified to protect the Manuherikia River alpine galaxias (a genetically distinct threatened native freshwater fish species) are just one example of the sort of work needed. The intensity of extreme storm events is projected to increase with climate change, as are extreme drought events, which could cause extinction of this fish species through contraction and loss of habitat. Adaptation measures identified to date include research into the distributional extent of the species, identification of colder springs in the upper Manuherikia River catchment where the species is most likely to survive, and installation of built barriers to remove competition from salmonid species. For discussion, see Department of Conservation. Forthcoming. *Climate Change Adaptation Plan*. Wellington: Department of Conservation.

32. In addition to the issues in relation to Part 2 of the RMA, the planning framework has presented some difficulties in addressing the challenges of climate change adaptation and natural hazard risk management in recent years. We can only expect these problems to become more acute as risks increase and become more widespread. Important issues include those listed below.

    - **A lack of national direction and guidance from central government.** While the NZCPS does address adaptation within the coastal environment, there is no national direction on adaptation or natural hazard risk management outside this area. The effects of climate change and natural hazard risks are locally specific; however the science, data and information needed, as well as best-practice planning approaches, could be developed at a national level to improve efficiency and ensure consistency and fairness around the country. (Our proposed improvements in national direction are discussed in more detail in chapter 7.)
    - **Difficulties addressing contentious issues in the development of local plans.** Planning to address the effects of climate change and risks from natural hazards is contentious for local communities and expensive for those who are paving the way. This is because such planning often limits what people can do with their land and impacts property values. The effects of climate change and some natural hazards are also inherently uncertain in timing, magnitude and spatial distribution. When it comes to translating hazard information into risk-based plan rules through the RMA Schedule 1 process, uncertainties about what range of climate change scenarios to use for planning have led to a fear of (and actual) litigation. For example, in the Kāpiti Coast District, the translation of hazard maps into provisions in the district plan was legally challenged. Alongside greater direction and guidance from central government, improvements in planning processes would make it easier for local government to progress these issues. (Our proposed improvements in planning processes are discussed in more detail in chapter 8.)
    - **Lack of clarity in regard to roles and responsibilities.** There are no explicit RMA functions for local government in regard to climate change adaptation. The functions of regional councils and territorial authorities in regard to the avoidance or mitigation of natural hazards are subtly different. In some cases, this has led to disputes about where the primary responsibilities lie, including in relation to sharing of costs. (Our proposals in relation to planning functions are discussed in more detail in chapter 8.)
    - **Planning for managed retreat.** In order to address climate change adaptation and natural hazard risks, central and local government need to be confident in their ability to alter existing land uses in certain limited circumstances. For example, when risks are significant and occupation of a site is either no longer safe or likely to become unsafe. The RMA presumes land uses can occur unless specifically regulated otherwise, and land use consents have an indefinite duration by default. Even if district rules change over time, existing land uses (with effects that remain the same or similar in character, intensity and scale) and consented land use activities are generally protected.[221] Some limited risk reduction measures may be possible through designations and the Public

[221] Except when a plan has changed, the existing use has been discontinued for a period of time and no attempt has been made to re-establish that use before the time period (or an extension to it) expired.

Works Act 1981, but only where the risk coincides with existing designation or public works purposes such as river or flood management. These avenues are not available for adaptation and natural hazard risk reduction as such. While the protection for existing uses does not apply to land uses governed by regional rules for the avoidance or mitigation of natural hazards, the combination of RMA provisions, along with the ambiguity in roles and responsibilities described above, does not provide a clear pathway for local government to address risks.[222]

Experiences in the Christchurch red zone, Matatā in the Bay of Plenty and Haumoana in Hawke's Bay have shown that many communities will opt to stay and defend their community and infrastructure. In Matatā this has proved to be the case, even where there is a clear natural hazard-related risk to life and compensation has been offered to the owners of affected properties.

- **Particular issues in relation to risks for Māori.** Managed retreat from the coast will be a significant issue for Māori. Coastal erosion and sea-level rise can affect cultural values, damaging wāhi tapu or causing difficulty for Māori access to traditional land, coastal urupā or mahinga mātaitai. It is important to consider the ability of Māori to determine how taonga and whenua are managed in response to climate change. (Chapter 3 discusses our proposals for ensuring mana whenua views inform and share in decision-making.)

33. Many of these issues overlap with problems identified with the RMA more generally and are also addressed through proposals discussed in other chapters.

Poor integration across the resource management system and particularly between the CCRA and RMA

34. The CCRA now provides for an emissions reduction plan and a national adaptation plan. While the Natural and Built Environments Act we propose has the potential to provide important means to advance both emissions reduction and adaptation, little attention has been given to the alignment of these legislative frameworks.

35. There is also a range of other legislation relevant to climate change and natural hazard risk management – each with its own scope, objectives and mechanisms. Under the current approach, it appears likely efforts to establish and implement coherent policy responses will be hampered by the lack of connection between the various instruments.

36. Central and local government plans for resources and infrastructure need to be informed by anticipated risks from the effects of climate change. Given the permanence of most development and infrastructure, such risks should be considered over a period of at least 100 years. Without this long-term view, decisions on development and infrastructure location and resource use do not adequately consider the future conditions that will affect them.

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222 The combination of sections 10, 20A, 32 and 85 of the RMA has caused considerable confusion. See discussion in Grace ES, France-Hudson BT, Kilvington MJ. 2019. *Reducing Risk through the Management of Existing Uses: Tensions under the RMA*. Lower Hutt: GNS Science.

37. Current RMA plans have a 10-year lifespan. The LGA requires local government to make infrastructure strategies over a period of 30 years and to take into account the need to provide for the resilience of assets through natural hazard risk management, including by making financial provision for the risks. Some natural hazard risks will be climate-related. However, there is no similar requirement to plan for climate change adaptation independent of infrastructure, and no requirement to include climate change adaptation in long-term planning.

38. Under the CCRA, planning to address risks from the effects of climate change is provided for at the national level, but there is no framework for undertaking regional climate change risk assessment or developing regional adaptation plans. While some regional adaptation planning is occurring, it is on an ad hoc basis.

39. National mechanisms will not provide enough detail to use for local adaptation or natural hazard risk management. The choices that need to be made for adaptation and risk management can impact heavily on local communities, particularly if they lead to decisions on managed retreat, protection of infrastructure, rezoning or significant increases in rating, so need to be addressed locally.

Lack of direction and funding is a contributing factor to policy inertia and uncertainty about the future of vulnerable communities.

40. Pursuing a policy of managed retreat, for example from the coast or in floodplains, does not sit easily in the CCRA, LGA or RMA given the likely components of such a framework and the differing objectives and scope of each Act. In particular, a comprehensive approach to managed retreat is likely to require consideration of both regulatory changes and funding, and require participation of both central and local government.

Capacity, capability and funding barriers

41. Current funding support from the Crown is largely limited to disaster relief after an event rather than being aimed at reducing risks and adapting to climate change. Lack of direction and funding is a contributing factor to policy inertia and uncertainty about the future of vulnerable communities.

42. Much of New Zealand's urban development and infrastructure is located in coastal areas and along floodplains.[223] This means that a resource with both economic and physical significance is vulnerable to natural hazards like coastal erosion, inundation (flooding) by

[223] Two-thirds of our population live in areas prone to flooding, and 75 per cent live within 10 km of the coast. See Climate Change Adaptation Technical Working Group. 2017. *Adapting to Climate Change in New Zealand: Stocktake Report from the Climate Change Adaptation Technical Working Group*. Wellington: Climate Change Adaptation Technical Working Group. Retrieved from https://www.mfe.govt.nz/publications/climate-change/adapting-climate-change-new-zealand-stocktake-report-climate-change (15 June 2020).

the sea and sea-level rise, and pluvial/flash flooding.[224] Local government responses will vary depending on their planning, capability and capacity to obtain research and to undertake meaningful engagement.

43. Ultimately, the scale of response required and the ability to fund some decisions are likely to be beyond the means of local authorities. This is particularly the case when they are also faced with existing infrastructure and residential and commercial uses on the sites involved. In its 2019 report on local government funding and financing, the Productivity Commission concluded, "a mismatch exists between resources and capability at the local level, and the scale of the adaptation challenges that exposed communities face".[225] Central government will need to assist if decisions are to be made in a timely way.

Ultimately, the scale of response required and the ability to fund some decisions are likely to be beyond the means of local authorities.

CASE STUDY: HAWKE'S BAY ADAPTATION PLANNING

Three Hawke's Bay councils have worked with iwi and a wide range of technical experts in developing the Clifton to Tangoio Coastal Hazards Strategy 2120.[226] They have also undertaken a collaborative approach that draws on community views to set out short-, medium- and long-term adaptation pathways (including managed retreat) for addressing coastal hazards affecting the most populated stretch of their coastline, in accordance with the NZCPS.

This is the type of work that is needed throughout New Zealand. However, the Hawke's Bay councils have identified that, in addition to the time and costs involved in running robust processes, the total cost of the works proposed to implement the coastal hazard strategy is likely to be very large, with high-level estimates at $130–285 million over the Strategy's 100-year planning horizon. Furthermore, Hawke's Bay – like many other regions – faces many other natural hazards and climate change issues, which will also demand significant funding. The questions of how funding is to be shared between councils and who should be rated for the 'public benefit' part of the costs, as well as what central government's responsibilities are to assist, are as yet unanswered.

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224 As an example of the scale of the issue, the Parliamentary Commissioner for the Environment notes the cost of replacing every building within half a metre of the spring high-tide mark could be $3 billion, and within 5 metres it could be as much as $20 billion. LGNZ found the quantum of local government roads exposed to 1.5 metres of sea-level rise is more than 2000 kilometres and almost 2000 local government buildings and facilities are exposed nationally. See Parliamentary Commissioner for the Environment. 2015. *Preparing New Zealand for Rising Seas: Certainty and Uncertainty*. Wellington: Parliamentary Commissioner for the Environment; LGNZ. 2019. *Vulnerable: The Quantum of Local Government Infrastructure Exposed to Sea Level Rise.* Wellington: Local Government New Zealand. Retrieved from https://www.lgnz.co.nz/our-work/publications/vulnerable-the-quantum-of-local-government-infrastructure-exposed-to-sea-level-rise/ (15 June 2020).

225 New Zealand Productivity Commission. 2019. *Local Government Funding and Financing: Final Report*. Wellington: New Zealand Productivity Commission. Retrieved from https://www.productivity.govt.nz/inquiries/local-government-funding-and-financing/ (15 June 2020).

226 Hawke's Bay Regional Council, Hastings District Council and Napier City Council.

Options considered

44. Our issues and options paper suggested the following options in relation to climate change (both mitigation and adaptation) and natural hazards.

    - Maintain the current focus on the ETS as the main policy tool to address climate change mitigation.
    - Add reference to climate change mitigation to Part 2 of the RMA.
    - Develop national direction to encourage the types of activities needed to facilitate New Zealand's transition to a low carbon economy. This includes renewable energy, carbon capture and storage, uptake of low emissions technologies and efficient urban form.
    - Use spatial planning for land use and infrastructure as a tool for addressing climate change mitigation.
    - Develop a national environmental standard with controls on greenhouse gas emissions under the RMA. This might be targeted at particular emissions-intensive activities for which emissions pricing is unlikely to be effective.
    - Require the Minister for the Environment to develop or amend national direction under the RMA in response to the carbon budgets determined by the CCRA.
    - Develop national direction to provide clearer planning restrictions for development in high-risk areas.
    - Use spatial planning processes to identify future adaptation responses (in the context of the national adaptation plan) that connect with regulation, infrastructure provision and adaptation funding.
    - Improve implementation of risk assessments.
    - Clarify what changes might be needed to existing use rights in the context of managed retreat.
    - Introduce new planning tools such as 'dynamic adaptive policy pathways' and other measures.
    - Require the Minister for the Environment to develop or amend national direction under the RMA in response to the national adaptation plan developed under the CCRA.

45. We received a broad range of feedback on these options and further suggestions for reform from submitters and stakeholders. In the discussion below, we have grouped the full range of options considered as follows:

    - using the Natural and Built Environments Act to reduce greenhouse gas emissions and plan for a low-emissions-economy
    - improving the planning framework for climate change adaptation and natural hazards
    - increasing integration across the resource management system
    - addressing managed retreat under the proposed Natural and Built Environments Act
    - new legislation, funding and implementation support for climate change adaptation and managed retreat to reduce risks from natural hazards.

Discussion

Using the Natural and Built Environments Act to reduce greenhouse gas emissions and plan for a low-emissions economy

46. Our issues and options paper sought comment as to whether the current focus on the ETS as the main policy tool to address climate change mitigation should be retained, or whether a reformed RMA should also be used to address greenhouse gas emissions, supported by national direction.

47. Maintaining the focus on the ETS had some support, largely from submitters in industry sectors, who felt that it remains the most efficient way to achieve emissions reductions. There was also a concern that a reformed RMA would regulate emitters twice by requiring consents when emissions had already been paid for under the ETS.[227] Finally, there were concerns about considering emissions locally, given the national level of emissions obligations, impacts and information. For instance, Federated Farmers of New Zealand submitted, "there should be no amendments where these duplicate, contradict or circumvent the CCRA. The focus should be on alignment and better use of national direction."

48. A large majority of submitters supported an expanded role for a reformed resource management system in climate change mitigation, complementing the CCRA. Supporters maintained that the ETS alone is not effective in motivating resource users to pursue emissions reductions. The Environmental Protection Authority made the point that:

> The NZ ETS interacts with businesses. It is less able to provide direct signals to consumers about steps they could take to reduce their climate change impact … Similarly, the NZ ETS is less able to provide direct signals to local government about taking action for climate change mitigation. Using instruments under the RMA as a way of providing complementary signals to the NZ ETS, in these circumstances, would be desirable.

49. There was a range of views on which mechanism within a reformed act should be used for climate mitigation, whether the effects on climate change should be considered at the national or local level, and whether individual consent applications should be assessed for their emissions impacts. Generally, submitters recommended the removal of the current statutory barriers in the RMA (sections 70A and 104E).

50. Emissions pricing is widely accepted internationally and in New Zealand as an important tool for enabling a transition to a low-carbon economy.[228] We agree with this conclusion. However, the ETS has not yet had a significant impact on domestic emissions. While increasing carbon prices as a result of recent amendments to the Climate Change Response

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227 It is worth pointing out that government use of a range of policy tools to address environmental and other issues is the norm, rather than the exception. For example, in the transport system, taxes, funding, regulation and information are used as a package to deliver efficient, effective and safe land transport.

228 The evidence in this regard has recently been assessed in New Zealand Productivity Commission. 2018. *Low-emissions Economy: Final Report*. Wellington: New Zealand Productivity Commission. Retrieved from https://www.productivity.govt.nz/inquiries/lowemissions/ (15 June 2020).

Act are expected to make the ETS more effective, it is also accepted that the scale of the challenge will require complementary mechanisms to be developed. These include sector-specific policies such as emissions standards for vehicle imports. They also include government-wide initiatives such as improved accounting for the emissions impacts of investment decisions. As the Productivity Commission put it in their recent inquiry "An effective system of emissions pricing should form the centrepiece of a strategy to reduce emissions. Yet the strategy needs other elements to back up pricing and take the lead in some situations where pricing is not powerful enough because of market or government failures, or distributional considerations."[229]

51. Our view is that greater policy coherence and effectiveness will be achieved if a future Natural and Built Environments Act includes a focus on reducing greenhouse gas emissions and planning for a low-emissions economy. The current Resource Management Amendment Bill proposes removing the statutory barriers to RMA consideration of greenhouse gas emissions. At the time of writing our report, the Bill is still before Parliament, but we support this proposal.

52. The way national direction and plans are used to reduce greenhouse gas emissions in a future system will need to be carefully considered. We see two distinct roles:

    - imposing direct controls on activities to prevent greenhouse gas emissions in certain limited and nationally prescribed circumstances
    - planning for the land use change and infrastructure required to transition to a low-emissions economy.

53. Some of the rationale behind the 2004 amendments that limited the RMA's role in reducing greenhouse gas emissions remains valid. The case for a nationally consistent approach to the *direct* control of greenhouse emissions remains strong, given the effects of emissions are not locally specific and most sources of emissions are mobile. Moreover, we agree that rules can be a blunt instrument and will not incentivise the most efficient behaviour in the same way as an effective price. Finally, it would expend unnecessary time and resources for a system to require local authorities, applicants and submitters to consider the potential implications for greenhouse gas emissions of every application, when most activities have relatively few emissions.

A regulatory approach to the direct control of greenhouse gas emissions should be designed to align with and work alongside emissions pricing.

54. Our view is that a regulatory approach to the direct control of greenhouse gas emissions should be designed to align with and work alongside emissions pricing. To avoid the pitfalls identified above, it should be developed at the national level and targeted at addressing issues in which pricing is unlikely to be effective. Given an emissions price will only be effective if it is set at a high enough level and addresses all emissions, and this has not been achieved by successive governments, a regulatory approach could be considered to prevent

[229] New Zealand Productivity Commission. 2018. *Low-emissions Economy: Final Report*. Wellington: New Zealand Productivity Commission. Retrieved from https://www.productivity.govt.nz/inquiries/lowemissions/ (15 June 2020); p 513.

new activities with significant emissions impacts until such time as an effective price is in place. For example, as part of transitioning to a low-emissions economy, New Zealand needs to phase out fossil-fuelled process heat. It is uncertain what level of reduction in coal use there will be by 2030 in response to a rising emissions price. A national environmental standard could be used to set rules requiring adoption of low emissions technologies which could be specific to particular industries. This would set clear direction for industry, and act as a regulatory backstop to support emissions pricing. These provisions would need to be designed in a way that did not impose unreasonable costs or deter new investment.

There is a role for plans to consider the indirect impacts that decisions about land use and infrastructure will have on emissions and to ensure they promote a transition to a low-emissions economy.

55. There is also a role for plans to consider the indirect impacts that decisions about land use and infrastructure will have on emissions and to ensure they promote a transition to a low-emissions economy. This includes planning for renewable energy infrastructure, urban intensification, afforestation, and changes in the way transport networks move people and freight (including through the uptake of electric vehicles and ride-sharing technology), among other things. An emissions price set through the ETS is not a matter to be addressed by the central and local government decision-makers with responsibilities for land use and infrastructure, but rather by businesses and consumers downstream. This suggests the need for a clear obligation for planning decisions to take full account of these downstream emissions impacts.

56. To provide the basis for these types of approaches to be developed, our view is that our proposed Natural and Built Environments Act should specify the following outcomes in its purpose and principles:

    - reduction of greenhouse gas emissions
    - promotion of activities that mitigate emissions or sequestrate carbon
    - increased use of renewable energy.

57. To ensure consistency in the approach taken to these issues, and in light of the point made that climate change is a global issue, mandatory national direction should be used to prescribe and guide the approach taken in plans. To address the concerns raised by submitters about duplication of regulatory methods, our view is that national direction for the direct control of activities with greenhouse gas emissions should be developed on the following basis. It should be:

    - aligned with and complementary to the CCRA, including the emissions reduction plan and the ETS
    - targeted at activities in which emissions pricing is considered insufficient or too slow-moving to deliver the desired transition
    - implemented through clear provisions that do not require a case-by-case assessment of the emissions impact of an activity in resource consents.

Mandatory national direction should be used to prescribe and guide the approach taken in plans.

58. National direction to guide planning for a transition to a low-emissions economy should also be developed to guide how the indirect effects of planning decisions on emissions are considered and to promote the necessary infrastructure development and land use change needed. This would ensure local government identifies areas for development (eg, for renewable energy and transport infrastructure) consistent with the needs of the country as a whole, and provides flexibility in land use plans to accommodate necessary changes in land use (eg, urban intensification and afforestation).

59. Finally, our view is that strategic spatial planning will also be a vital means of assisting the transition to a low emissions economy. Our proposals for this are discussed shortly.

Improving the planning framework for climate change adaptation and natural hazards

60. Our issues and options paper made several suggestions about how the planning framework for climate change adaptation and natural hazard risk might be improved, including through development of national direction, use of strategic spatial plans, adaptive planning techniques and better implementation of risk assessments.

61. Submitters were generally in favour of these ideas and, in particular, the use of national direction to address climate change adaptation and natural hazard risks. The reasons given were that: all communities will need to adapt to climate change; national consistency will ensure equitable treatment of different communities; leaving individual councils to deal with the issue is inefficient and costly; and it is an advantage to lift consideration of these issues out of the local political arena, where they may be trumped by competing priorities.

62. Methods for determining the suitability of areas for future development was a particular area where submitters suggested national direction could assist. For example, Greater Wellington Regional Council views national direction as "critical to ensure that new use and development (both urban and rural) avoids areas presently at high risk from natural hazard and those places that are increasingly becoming high risk from the unfolding impacts of climate change." Some councils also put forward preferred approaches for community engagement in relation to these issues.

Our proposed Natural and Built Environments Act is an opportunity for a much-needed reset of the planning framework for climate change adaptation and natural hazard risks.

63. Our proposed Natural and Built Environments Act is an opportunity for a much-needed reset of the planning framework for climate change adaptation and natural hazard risks. In particular, the shift to an outcomes-based approach better lends itself to planning for risk. Our view is that this new legislation should specify the following outcomes:

    - reduction of risks from natural hazards
    - improved resilience to the effects of climate change, including through adaptation.

64. Our proposals are intended to provide a more proactive approach to the management of risk than has been taken to date. We have therefore strengthened the RMA's current reference to natural hazards by specifying that risks are to be reduced. Of course, this is not an absolute or site-specific direction, but rather a way of setting overall expectations for combined plans at a regional level. We also propose that risk should be defined to include reference to both the likelihood and consequences of a hazard, as is the case under the Civil Defence Emergency Management Act 2002. The principle of the precautionary approach that we have included in our proposal for reform of Part 2 of the RMA is also relevant to planning for climate change adaptation.

65. Local government has called for national direction to clarify the planning approach needed for these matters for many years, and our view is that this should be mandatory under a future system. National direction would reduce unnecessary duplication of effort, ensure fairness in outcomes around the country through consistency and bolster the mandate of local government to progress needed plan changes. National direction and supporting guidelines could be used to provide:

- adaptation and natural hazard risk assessment methods and priorities for risk reduction
- specific risk information and mapping to be relied on (for example, projected sea-level rise)
- preference for nature-based solutions for climate change adaptation (see box below)
- approaches to facilitating the adaptation of indigenous species
- best practices for accommodating uncertainty, for example dynamic adaptive policy pathways planning (see box below)
- other technical specifications.

NATURE-BASED SOLUTIONS

Nature-based solutions to climate change adaptation aim to achieve resilience in ways that enhance ecosystems, their capacity for renewal and their provision of services. For example, to address sea-level rise, nature-based defences are increasingly being used as complements or substitutes to grey infrastructure. These defences mimic or enhance natural features, such as barrier islands, vegetated dunes, coastal wetlands, mangrove forests and reefs.

Nature-based solutions are not feasible everywhere that adaptation is required, and there are more uncertainties about their effectiveness than engineered solutions. However, they also have a number of advantages. Ecosystems are dynamic and responsive to physical changes and are able to regenerate if damaged, in contrast to hard infrastructure. As these solutions enhance biodiversity while also enabling adaptation to the impacts of climate change, they provide other ecosystem benefits like tourism, recreation and cultural benefits. Strategies like managed retreat or limiting development in at-risk areas can be paired with leaving a natural landscape in place or allowing one to regenerate in order to limit the impact of climate change.

66. Within the context of national direction, the planning framework for climate change adaptation and natural hazards could also be improved through better enabling and supporting the use of adaptive planning techniques. Adaptive planning involves the use of scenarios with specified thresholds, signals and triggers which are used to determine when a change in policy response within a pre-determined pathway is required. Once an adaptation pathway has been approved for an area, a less involved process would be required to undertake the actual works in the future, as long as they are within the approved parameters. This has the potential to better enable regulation to respond as circumstances change, for example, if a predicted climate impact occurs sooner or later than expected, or has more significant consequences. Building adaptive management into plans can make the resource management system more responsive by allowing response pathways to be embedded in plans as they are developed, instead of requiring multiple subsequent plan change processes. We recommend future legislation provides the flexibility needed for these sorts of approaches. We discuss one example of this type of planning that has been promoted by the Ministry for the Environment in recent years in its guidance on coastal hazards and climate change in the box below on Dynamic Adaptive Policy Pathways.

Building adaptive management into plans can make the resource management system more responsive by allowing response pathways to be embedded in plans as they are developed, instead of requiring multiple subsequent plan change processes.

DYNAMIC ADAPTIVE POLICY PATHWAYS

The Dynamic Adaptive Policy Pathway (DAPP) is a framework for identifying and assessing planning options in environments where there is uncertainty about the rate and magnitude of future change (such as in the coastal area). Planning using DAPP does not prescribe a single pre-determined solution, but helps to develop agreed responses when a predetermined threshold is crossed. Public and mana whenua engagement throughout the process is an important component in order to build broad local consensus about pathways and thresholds. For example, in the case of sea-level rise, a pre-determined amount of coastal erosion could be used to trigger a management response.[230]

The method holds promise for developing planning provisions that are responsive to changes in the environment without the need for a plan change. It enables local authorities to invest in the agreed pathways and act quickly and decisively when hazards arise, knowing they are understood and supported by mana whenua and the wider community.

[230] For further guidance on the use of DAPP in natural hazards planning, see Ministry for the Environment. 2017. *Preparing for Coastal Change: A Summary of Coastal Hazards and Climate Change Guidance for Local Government.* Wellington: Ministry for the Environment. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Climate%20Change/coastal-hazards-summary.pdf (15 June 2020).

67. An important aspect of improving the planning framework for climate change adaptation and natural hazards is clarifying roles and responsibilities. We considered limiting responsibility for these issues to regional councils only, as matters of regional significance. However, our preference is to:

    - assign responsibility for policy for climate change adaptation and reducing risks from natural hazards to both regional councils and territorial authorities (in the combined plan development process), given the broad implications of the issues for both levels of local government
    - clarify the current role of territorial authorities in implementing land use controls as they relate to these issues (our approach to this division of responsibilities is discussed further in chapter 8 on the policy and planning framework).

68. We acknowledge that joint functions in the current sections 30 and 31 of the RMA have led to some confusion; however our view is that this is best addressed through development of regional spatial strategies (discussed in chapter 4) and regional combined plans (discussed in chapter 8). These processes will ensure agreement on policy is reached among the relevant decision-makers. It is also addressed by clarifying that implementation of land use controls is the responsibility of territorial authorities alone, rather than a joint function. We also consider climate change and natural hazard risk management responsibilities should be made explicit in the LGA through requirements to plan for these matters in long-term plans, to ensure infrastructure and transport plans are integrated with climate change adaptation and natural hazard risk reduction planning.

69. The 2018 report of the Climate Change Adaptation Technical Working Group identified the importance of building Māori views into how to respond to climate change, and having a platform for expressing values and preferences for adaptation.[231] Our proposals for Māori participation in the system generally discussed in chapter 3 include recommendations to ensure this can happen.

Increasing integration across the resource management system, and particularly with the CCRA

Addressing climate change mitigation and adaptation under our proposed Strategic Planning Act

70. Our issues and options paper sought feedback on the idea of using spatial planning for land use and infrastructure as a tool for addressing climate change mitigation, and for identifying adaptation responses to connect regulation with infrastructure provision and adaptation funding.

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[231] Climate Change Adaptation Technical Working Group. 2018. *Adapting to Climate Change in New Zealand: Recommendations from the Climate Change Adaptation Technical Working Group*. Wellington: Climate Change Adaptation Technical Working Group. Retrieved from https://www.mfe.govt.nz/climate-change/climate-change-and-government/adapting-climate-change/climate-change-adaptation (15 June 2020).

71. For climate change mitigation, some submitters saw opportunities to use spatial strategies to ensure infrastructure planning does not lock in long-term transport or energy emissions. Moving towards 'green infrastructure' and prioritising land suitable for use in generating carbon credits under the ETS were also suggested. Te Whakakitenga o Waikato Incorporated considered:

> there is a role for high-level spatial planning to complement the NZ ETS in reducing greenhouse gasses. The panel should recommend that spatial planning specifically prioritise and target the type of land that should be utilised for the purpose of generating carbon credits under the NZ ETS.

72. For climate change adaptation, submitters saw opportunities to use spatial planning to ensure development does not occur in high-risk areas, including areas at risk of coastal erosion or on floodplains, and to provide for habitat and species migration protection.

73. Our proposal for a new Strategic Planning Act to improve integration across the resource management system is discussed in chapter 4. Our view is that this has the potential to be a valuable way to address climate change mitigation, adaptation and natural hazards. An important aspect of strategic planning under this new legislation is to integrate the provisions of the CCRA with regional combined plans under the Natural and Built Environments Act.

74. For mitigation, regional spatial strategies will be informed by emissions reduction budgets set under the CCRA so that long-term decision-making about land use and infrastructure is aligned with goals to reduce greenhouse gas emissions. In particular, this includes the need to ensure future transport and energy infrastructure supports the country's transition to a low-carbon economy. This might be through identification of new sites for renewable energy generation, such as wind turbines. It might also be through planning for future transport infrastructure (roading, rail and ports, among other things) that will enable the efficient flow of people and goods in ways that are consistent with emissions reduction goals.

75. The value of our proposal for regional spatial strategies is to provide a platform for central and local government and mana whenua to reach agreement on these issues in a way that integrates competing priorities, including climate change mitigation, urban development, regional development and other environmental goals. Regional spatial strategies will then inform detailed planning for land use and infrastructure in our proposed Natural and Built Environments Act, under the LGA, and through central government budget processes.

Regional spatial strategies under the Strategic Planning Act will allow a long-term and risk-informed lens to be used in strategic planning for climate change adaptation and natural hazards.

76. For adaptation, regional spatial strategies will allow the national adaptation plan developed by central government under the CCRA to be translated into regional-level decisions in partnership with local government and mana whenua. To achieve communities and ecosystems that are resilient to the effects of climate change and natural hazard risks, comprehensive information over long timeframes (of 100 or more years) and integrated decision-making is needed. Regional spatial strategies under the Strategic Planning Act will allow a long-term and risk-informed lens to be used in strategic planning for climate change adaptation and natural hazards. This might include identification of areas where residential

land use will no longer be possible in coming decades or where alternative servicing infrastructure will be needed. It might also include ensuring new habitats are available to support biodiversity in response to evolving ecosystems.

77. As in the case of climate change mitigation, our view is that adaptation and natural hazards planning is best pursued in a way that integrates competing priorities. Regional risk assessments consistent with the national risk assessment methodology under the CCRA should form an important aspect of regional spatial strategies and regional combined plans in a future system.

Improved legislative links

78. Our issues and options paper asked how the RMA should be amended to align with the CCRA. The New Zealand Planning Institute and some councils suggested formal links should be established between the RMA and CCRA, but also with the LGA and LTMA, to ensure that land use planning is consistent with infrastructure investment.

The Panel agrees there should be better alignment between the CCRA and a reformed RMA.

79. The Panel agrees there should be better alignment between the CCRA and a reformed RMA.[232] Future national direction on climate mitigation and adaptation developed under our proposed Natural and Built Environments Act should be informed by the emissions reduction plan and national adaptation plan under the CCRA. This would ensure combined plans work towards our national climate change goals. That noted, addressing integration issues will require more than one plan connecting with another. In particular, improved integration requires bringing together important decision-makers in relevant areas. This is an important aspect of our proposal for regional spatial strategies discussed above.

Addressing managed retreat under the Natural and Built Environments Act

80. Managed retreat is a particularly challenging adaptation and risk management response that is likely to be required in limited circumstances both for climate change adaptation and to respond to natural hazards risks more generally. Our issues and options paper raised the possibility that changes may be needed to how existing use rights and consented activities are provided for under the RMA to better enable managed retreat (including for natural hazard risk reduction for non-climate related hazards).

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[232] The Resource Management Amendment Bill proposes that plan-making under the RMA must consider the national adaptation plan and the emissions reduction plan produced under the CCRA. This report does not assume the bill has become law.

81. Many submitters supported developing a clear pathway for resolving these issues. For example, Auckland Council notes national direction about managed retreat would "provide certainty to affected communities, clear pathways and options for resolving issues, and better enable equitable outcomes for affected parties at a regional and national level."

82. We have considered a range of ways managed retreat might be better facilitated under relevant legislative frameworks. In our view, while changes will be required to provide for existing uses and consented activities under the RMA, this will be insufficient by itself. A more comprehensive approach is required to allow a range of regulatory and funding mechanisms to be used concurrently. We first discuss the provisions in the RMA that will need to change to address managed retreat. We then discuss why a more comprehensive approach is necessary and our proposal for a new Managed Retreat and Climate Change Adaptation Act.

Changes to RMA protections for existing uses and consented activities in our proposed Natural and Built Environments Act

83. Developing a strategy for managed retreat will require consideration of a spectrum of possible changes to established uses. This includes imposing conditions on the use of land, such as requirements to adapt residential uses through relocatable housing. It also includes decreasing the intensity of land use, for example, to replace commercial and residential uses with temporary and other activities which are less vulnerable. And it includes consideration of different land tenure mechanisms, such as sunset clauses to provide for transition periods. As discussed earlier, there is no clear pathway for developing these types of options under current RMA provisions.

Developing a strategy for managed retreat will require consideration of a spectrum of possible changes to established uses.

84. To ensure central and local government have the necessary powers, our view is that following tools should be available under the Natural and Built Environments Act.

    - National direction should have power to modify or extinguish existing use protections and consented activities in circumstances relating to climate change adaptation and natural hazard risks. This will enable central government to address these issues when a centrally driven solution is thought necessary (this is discussed further in chapter 7 on national direction).
    - Regional councils should also have a role in setting policy for the avoidance or mitigation of natural hazards and for climate change adaptation. Powers for regional councils to review and modify consents and conditions should also be strengthened (as discussed in chapters 5 and 11).

National direction should have power to modify or extinguish existing use protections and consented activities in circumstances relating to climate change adaptation and natural hazard risks.

- Territorial authorities should also be able to modify or extinguish established land uses in these circumstances as discussed in chapter 5. As noted above, there is no power at the territorial authority level to modify or extinguish existing activities or consents through use of a district land use rule. This can frustrate the ability to manage activities that are no longer considered appropriate in a particular location. Addressing this requires an extension of the current powers of territorial authorities and an associated amendment to the protections for existing land uses provided under section 10 of the current RMA. Our view is that this is warranted in these limited circumstances if territorial authorities are to have responsibilities for land use regulation for climate change adaptation and natural hazards.

Territorial authorities should also be able to modify or extinguish established land uses in these circumstances.

- Section 85 of the RMA will also require clarification in these circumstances. Under section 85, provisions in plans can be challenged on the basis they would make land 'incapable of reasonable use' and place 'an unfair and unreasonable burden' on a person who has an interest in the land. Conditions that may lead to the need for managed retreat, such as inundation from sea level rise, are inherently uncertain in magnitude and timing even if the eventual outcome is inevitable. The current section 85 creates what has been termed a "timing conundrum"[233] as, in the absence of a risk reaching a certain level, it may not be possible to act proactively through imposing planning provisions. And yet when the risk is realised the opportunity to take proactive (and more cost-effective) action has passed. In chapter 5 we note that section 85 should be reviewed more generally but in the specific context of managed retreat, the operation of section 85 (or its replacement in the Natural and Built Environments Act) should be addressed in the proposed separate legislation for managed retreat which we discuss below.

85. These changes will ensure that the necessary powers are available under the RMA. However, we anticipate they will be used in conjunction with a more comprehensive response involving central and local government developed under the separate legislation we propose.

A Managed Retreat and Climate Change Adaptation Act

86. Many complex matters need to be addressed in cases of managed retreat. These include issues relating to funding, land acquisition, compensation, liability, and insurance, both for land owners and local authorities. There is also a need to consider the obligations on local government to maintain infrastructure services in areas under threat.

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[233] Grace ES, France-Hudson BT, Kilvington MJ. 2019. *Reducing Risk through the Management of Existing Uses: Tensions under the RMA*. Lower Hutt: GNS Science; pp 102–103.

87. While the changes we propose to land use planning will assist, we consider that discrete legislation is required to specifically address managed retreat where it is required for climate change adaptation or to reduce risks from natural hazards. We suggest this be called the Managed Retreat and Climate Change Adaptation Act. In summary, we reach this conclusion for these main reasons:

We consider that discrete legislation is required to specifically address managed retreat where it is required for climate change adaptation or to reduce risks from natural hazards.

- it is necessary to address an array of complexities that are beyond the powers available under the Natural and Built Environments Act and the capacity of local government alone to deliver. These include the issues we have discussed in the preceding paragraph
- there is a need for a consistent approach developed at a national level
- issues associated with land acquisition in affected areas and the potential for compensation are likely to arise and should be addressed by both national and local government
- the definition of a 'public work' under the Public Works Act 1981 and its valuation approach appear to be an awkward fit as we discuss below
- section 85 of the RMA (or its replacement under the Natural and Built Environments Act) is not well adapted to the managed retreat context as we have noted above.

88. Perhaps the most significant issues are funding and compensation for affected communities. In many cases the cost of responding to climate change and natural hazard risks exceeds the ability of the local population base to fund and deliver solutions, particularly in coastal areas.

There is a strong case for establishing a national funding mechanism for pre-emptive adaptation and risk-reduction measures.

89. LGNZ, EDS and the Productivity Commission have all recommended a central fund to assist with climate change adaptation, including the redesign, relocation and rebuild of three-waters, flood protection, and local infrastructure and assets. LGNZ estimated in 2013 that $1 spent on risk reduction saves at least $3 in future disaster costs (but there will be a limit to this).[234]

90. Our view is that it is untenable to let adaptation costs lie where they fall, and a systematic approach is preferable to ad hoc solutions. Given the scale of the challenges and the current constraints on local government, there is a strong case for establishing a national funding mechanism for pre-emptive adaptation and risk-reduction measures.

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234 Cited in Boston J, Lawrence J. 2018. Funding climate change adaptation: The case for a new policy framework. *Policy Quarterly* 14(2): 40–49; p 42.

91. We agree with Boston and Lawrence[235] that funding should have the goals of long- term cost-minimisation and equitable burden sharing. Relevant underlying principles to guide decision-making include:

    - avoidance of 'moral hazard'
    - the 'benefit' and 'subsidiary' principle (balanced against considerations of the ability to pay)
    - fairness and equity including across generations, and
    - the principles of the Treaty of Waitangi.

92. Decisions would need to be context specific and based on local risks, the vulnerability of local communities and assets and ability to pay. This will require cost-sharing arrangements between central and local government and private or commercial agencies to be developed.

93. The definition of a public work under the Public Works Act 1981 and its approach to the valuation of land appear are not well suited to climate change adaptation and natural hazards. This is because in many cases, the response to these issues will not come within the definition of a public work. Further, in the high-risk situations in which managed retreat is likely to be needed, the land in question is likely to have lost much of its value. The Public Works Act requires payment at market value, and in cases where this is significantly diminished, it will likely be insufficient to enable affected people to move on with their lives by re-establishing themselves elsewhere.

94. The new legislation we propose could establish principles that are better tailored to these circumstances than those in the Public Works Act and would also address the application of the equivalent to section 85 in our proposed Natural and Built Environments Act where severe restrictions on land use are necessary.

Consideration should also be given to the use of economic instruments that can provide incentives to modify behaviour over time, in addition to the use of regulatory controls.

95. Finally, the complexity of the issue suggests consideration should also be given to the use of economic instruments that can provide incentives to modify behaviour over time, in addition to the use of regulatory controls. For example, targeted rates might be used to fund local adaptation solutions for those willing to bear the costs in cases where risks are not yet deemed unacceptable.

96. In our view, the main issues new legislation would need to address are therefore:

    - a fund to support climate change adaptation and reducing risks from natural hazards, including principles for cost-minimisation and burden sharing, and cost-sharing arrangements
    - power under the proposed Natural and Built Environments Act to modify existing land uses and consented activities

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[235] Boston J, Lawrence J. 2018. Funding climate change adaptation: The case for a new policy framework. *Policy Quarterly* 14(2): 40–49; p 42.

- power to acquire land, with potential compensation determined through specified principles rather than market-valuation
- power to use taxes, subsidies or other economic instruments to incentivise changes in land and resource use
- engagement with affected communities
- engagement with Māori to address cultural ties to land
- impacts on insurance arrangements for land owners and local authorities
- obligations on local authorities to provide infrastructure
- liability issues for local authorities
- the potential role of the Environment Court for aspects of the proposals.

Implementation support for local government

97. Finally, the capability and capacity of local government to lead a response to climate change adaptation and certain natural hazards risks was a significant concern for local government submitters. Considerable efficiencies can be achieved by developing a centralised pool of expertise to assist local government with policy development for climate change adaptation, including the ability to apply experience, broker partnerships, and supply templates, information and other common resources. For example, the Climate Change Adaptation Technical Working Group recommended incorporating consideration of the future costs of climate change into current investment criteria to help manage risk.[236] This would promote better long-term thinking. Central government is well placed to develop mechanisms and practice guidance to take this forward.

98. Our proposals for national direction for climate change adaptation and natural hazard risk is one vehicle through which assistance can be provided. However, our view is that implementation support, and guidance on a broader range of matters beyond environmental management and land use regulation will be needed.

Expected outcomes

99. Our proposals in relation to climate change mitigation, adaptation and natural hazards address key issues raised in our terms of reference and align with the objectives and principles adopted for our review. They will ensure climate change and natural hazards are given sufficient focus and attention within a future system, are addressed in ways that integrate with broader land use and infrastructure planning by central and local government, and that the necessary range of regulatory and funding tools are available to decision-makers.

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[236] Climate Change Adaptation Technical Working Group. 2018. *Adapting to Climate Change in New Zealand: Recommendations from the Climate Change Adaptation Technical Working Group*. Wellington: Climate Change Adaptation Technical Working Group. Retrieved from https://www.mfe.govt.nz/climate-change/climate-change-and-government/adapting-climate-change/climate-change-adaptation (15 June 2020).

Key recommendations

Key recommendations – Climate change and natural hazards	
1	Outcomes should be introduced for the following matters in the purpose and principles of the proposed Natural and Built Environments Act: (i) reduction of risks from natural hazards (ii) improved resilience to the effects of climate change, including through adaptation (iii) reduction of greenhouse gas emissions (iv) promotion of activities that mitigate emissions or sequestrate carbon (v) increased use of renewable energy.
2	Mandatory national direction should be required for: (i) climate change mitigation consistent with the emissions reduction plan under the CCRA and in a way that aligns with and supports emissions pricing (ii) climate change adaptation and reduction of risks from natural hazards consistent with the national climate change risk assessment and national adaptation plan under the CCRA.
3	Regional spatial strategies developed under the proposed Strategic Planning Act should be used to address at a strategic level: (i) climate change mitigation, informed by the emissions reduction plan under the CCRA (ii) climate change adaptation and natural hazard risk reduction, informed by the national adaptation plan under the CCRA.
4	Reducing greenhouse gas emissions, climate change adaptation and reducing risks from natural hazards should be included in the functions and powers of both regional councils and territorial authorities under the proposed Natural and Built Environments Act.
5	Combined plans should be used to regulate land and resource use to give effect to the national direction and implement spatial strategies. This would include provisions under the proposed Natural and Built Environments Act to allow for adaptive planning measures.
6	Powers under the Natural and Built Environments Act to modify established land uses should be clarified to address climate change adaptation and reduction of risks from natural hazards.
7	A Managed Retreat and Climate Change Adaptation Act should be introduced to: (i) provide for managed retreat, powers to change established land uses and to address liability and options for potential compensation (ii) establish an adaptation fund to enable central and local government to support necessary steps to address climate change adaptation and reduction of risks from natural hazards.

Chapter 7 National direction

1. The RMA devolves decision-making about resource use to local authorities but central government is able to provide guidance by setting policies on issues of national significance and environmental standards. These policies and standards are collectively called 'national direction'. They include national policy statements (NPSs), national environmental standards (NESs), national planning standards and regulations.
2. This chapter discusses how national direction in a reformed RMA may be used more effectively to achieve intended outcomes.
3. Our proposals in this chapter should be read in conjunction with chapters 2 and 3, which relate to the purpose and outcomes to be achieved through a new resource management system, and recognising Te Tiriti. However, there are also linkages to chapters 4, 8, 9 and 13 as national direction is intended to be influential in guiding the preparation of plans, decisions on resource consents, and monitoring.

Background and current provisions

Origin and current role of national direction

National policy statements and national environmental standards

4. The RMA provisions for national direction were developed as part of a response to problems identified by the Resource Management Law Reform Project (RMLR) in the late 1980s, which eventually led to the RMA.
5. The RMLR identified a need for central government to determine priorities and make clear decisions about the overall outcomes it wanted to achieve for resource management. The RMLR considered there was a lack of an effective mechanism for identifying, expressing and resolving matters of national interest, and this had contributed to a failure of the resource management system operating at the time.
6. The types of issues identified by the RMLR thought to have significance at the national level were those that no one region or sector group would provide for. It was argued "if the Crown does not represent the national interest, who will?" The issues fell into four categories:[237]
    - broad objectives in law to guide the overall resource management regime
    - global or national environmental policy requiring recognition in the decision-making process
    - projects or proposals for consents having a 'national importance' dimension
    - first order allocation decisions such as the designation of land in the Crown conservation estate.

[237] Ministry for the Environment. 1988. *Resource Management Law Reform: National Policy Matters in Resource Management*. Working Paper No. 31. Wellington: Ministry for the Environment.

7. Examples included national responses to global environmental problems, the preservation of wetlands, and the protection of indigenous forests. The RMLR's findings provided the rationale for listing some broad environmental management objectives as matters of national importance in section 6 of the present RMA, as well as for the development of the NPS mechanism.

8. In designing the RMA, a balance was needed between over prescription of national policy and avoiding ad hoc decision-making. It was decided a distinction would be made between matters of national importance specified in resource law, and matters of national policy emerging from time to time.[238] The law would specify how these matters would be taken into account by decision-makers.[239]

9. By the time the Resource Management Bill was introduced in 1989, the purpose of NPSs was being described as guidance or the expression of the government point of view on matters of national significance.[240]

10. The development of minimum environmental standards (which became NESs) and statements of national policy (now called national policy statements (NPSs)) was intended to be closely linked. The review group appointed to review the bill envisaged detailed NESs, which were technical and prescriptive in nature, would not be suitably expressed through NPSs. These were intended to be more narrative.[241] NPSs could be used to establish objectives and policies relating to NESs and to support prescriptive standards laid down by other means such as regulations or rules in local authority plans.

11. NESs and NPSs were therefore intended to be complementary, with the NPS providing the overarching narrative, and the NES providing the national 'rules'. This, along with the way in which NPSs and NESs would need to be implemented (the former having to be translated into plans by way of plan changes, while the latter could have direct effect as a regulation), was the reason for separating NPSs and NESs. Although standards could be prescribed in regulations, it was recognised this would not always be feasible.[242]

12. Although the purpose and expression of NESs and NPSs are still different today, the passing of the Resource Legislation Amendment Act 2017 saw the introduction of a single consultation and board of inquiry process for both NPSs and NESs. This change was intended to increase flexibility in developing national direction and improve the integration of NPSs and NESs related to the same topic. The amendments also enabled NPSs to provide more

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238 Ministry for the Environment. 1988. Legal mechanisms form implementing sustainability. In: *Resource Management Law Reform: Implementing the Sustainability Objective in Resource Management Law.* Working paper No. 25. Wellington: Ministry for the Environment. Part A.

239 Ministry for the Environment. 1988. *Resource Management Law Reform: National Policy Matters in Resource Management.* Working Paper No. 31. Wellington: Ministry for the Environment; p 11.

240 Explanatory note to the Resource Management Bill 1989. Retrieved from http://www.nzlii.org/nz/legis/hist_bill/rmb19892241210/ (15 June 2020); p vii.

241 Review Group. 1991. *Report of the Review Group on the Resource Management Bill*. Wellington: Ministry for the Environment; p 29.

242 Review Group. 1991. *Report of the Review Group on the Resource Management Bill*. Wellington: Ministry for the Environment; p 26.

specific direction on how objectives and policies were to be given effect to, that is, through methods, or by setting constraints or limits.

Regulations

13. Regulations are a form of delegated legislation subject to primary legislation and were part of the design of the RMA from the start (appearing as clause 390 in the Resource Management Bill). Regulations are generally intended to be for matters of detail and the implementation of policy, and not the means of making policy itself.[243] The original regulation-making powers in the RMA were consistent with this approach and were intended to prescribe administrative matters but they also allowed for the setting of some standards.

14. Section 360 of the RMA sets out the matters for which regulations may be made. Between 1993 and 2017 this section has been amended on more than 12 occasions, doubling its length. Over this time, section 360, and later sections including 360A and 360D, have become an ad hoc collection of administrative matters and more substantive powers (such as the exclusion of stock from waterways, placing aquaculture provisions into plans and prohibiting or permitting discharges from ships).

Planning standards

15. National planning standards were introduced into the RMA in 2017.[244] These are a standardised national framework for RMA policy statements and plans intended to provide greater national consistency, reduce complexity and cost, and help make plans more user-friendly. Before the introduction of the national planning standards there was very little national guidance on how councils should structure or format planning documents.[245]

16. The first set of national planning standards, gazetted in 2019, was on the structure and form of plans, some common definitions and required plans to be made accessible online.

17. Sections 58B–58J of the RMA set out the purpose, scope, contents and process for developing the national planning standards. They enable further national planning standards to be developed for any matter the Minister considers requires national consistency, or is needed to support the implementation of national direction.

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243 McGee D. 2005. *Parliamentary Practice in New Zealand.* Palmerston North: Dunmore; p 400.

244 Clause 50 of the Resource Management Amendment Act 2017 inserted new sections 58B to 58K.

245 Some tentative guidance was available through the Ministry for the Environment supported Quality Planning website from 2008 onwards (still available today at https://www.qualityplanning.org.nz/node/591).

Summary of the types of national direction

18. As shown in table 7.1, each of the four types of national direction available under the RMA has its distinct characteristics but overlap in terms of content.

Table 7.1: Overview of current RMA national direction instruments

	National policy statement	National environmental standards	Section 360 regulations	National planning standards
Purpose	To state objectives and policies for matters of national significance relevant to achieving the purpose of the Act	To prescribe any or all of the technical standards, methods, or requirements relating (but not limited to) contaminants, water, air, soil quality, noise and monitoring	Various (not always stated) purposes, to support the administration of the Act	To set out requirements as to structure and format of planning documents in order to achieve national consistency and support implementation of NPSs, NESs or regulations
Key features	Implemented through council plans. Sets objectives and policies that must be given effect to in council planning documents. Councils must have regard to a NPS when making decisions on consents. Does not set rules, but can include constraints or limits.	A form of regulation which takes immediate effect from commencement date Sets technical standards, methods and/or rules NES rules override local authority plan rules Rules can prohibit, permit, restrict, and/or place conditions on activities	Regulations which take immediate effect from the commencement date. Best used for administrative matters (eg, fees and forms) but has expanded to include the ability to direct outcomes and processes for more substantive policy matters (eg, aquaculture)	A standard structure and form for policy statements and plans Provides standard definitions Requirements for electronic usability and accessibility of plans and policy statements
Development process	The Minister may follow the process set out in sections 47 to 51 (which set out notification, submission, hearing and board of inquiry requirements) **OR** establish an 'alternative process' including: • public and iwi being notified • those notified being given adequate time and opportunity to make submissions		No process prescribed in legislation. Process set out in the Government Cabinet Manual and includes a requirement for a regulatory impact assessment (RIA).	A draft national planning standard and section 32 report is prepared, and these are notified. Submissions are received, reported on and recommendations made to the Minister.

	National policy statement	National environmental standards	Section 360 regulations	National planning standards
	• a report and recommendations being made to the Minister on the submissions and the subject matter of the NPS or NES • the Minister makes decisions on the recommendations against prescribed criteria and matters (under section 51(1))		Minister makes a recommendation to the Governor-General that a regulation be made	Minister makes final decisions and gives notice via the Gazette
Legal status	A disallowable instrument[246] Not a legislative instrument	A disallowable instrument A legislative instrument[247]	A disallowable instrument A legislative instrument	A disallowable instrument Not a legislative instrument

Issues identified

Insufficient national direction

Historic lack of national direction

19. The lack of national direction to support the purpose and principles of the RMA has been a key issue in the implementation of the Act. As noted by the Environmental Defence Society (EDS) in 2016, it "left the 78 regional and local government agencies to formulate their policies and plans in the absence of any clear notion of the end game".[248] This resulted in inconsistencies in the way the environment is managed, and created duplication of effort among councils and additional litigation (along with the associated costs and diversion of scarce resources from other priorities).

20. Until 2013 central government was slow to develop NESs and NPSs. Only the mandatory New Zealand Coastal Policy Statement (NZCPS) was in existence prior to 2004. Explanations as to why the government has been slow have ranged from lack of will to lack of resourcing to prepare national direction and to cumbersome NPS development mechanisms.[249]

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246 Although not subject to the full scrutiny associated with legislation, disallowable instruments are scrutinised by Parliament's Regulations Review Committee. The committee can recommend Parliament amend or revoke a disallowable instrument for various reasons set out in Standing Order 319 (which include failure to comply with consultation requirements; having retrospective effect; being inconsistent with the authorising Act; or having an undue impact on personal rights).

247 A legislative instrument in accordance with the Legislation Act 2012.

248 Environmental Defence Society. 2016. *Evaluating the Environmental Outcomes of the RMA: A Report by the Environmental Defence Society*. Auckland: Environmental Defence Society; p 57.

249 Guerin K. 2005. *Central Government Guidance and the Resource Management Act*. Wellington: New Zealand Treasury. Retrieved from http://treasury.govt.nz/publications/ppp/central-government-guidance-and-resource-management-act-pp-05-02-html (15 June 2020).

21. Although there has been an increase in national direction since 2013, the historic lack of national direction is still commonly cited as a reason why the RMA has not been as efficient or effective as it should have been. Submitters on our issues and options paper largely supported this view and made comments such as:

> Until recently, the lack of national direction has been a considerable issue with the RMA. This has led to poor environmental outcomes and long and expensive processes dealing with resource management matters that could have been resolved by national direction. (Canterbury Mayoral Forum)
>
> …a lack of national direction has led to duplication and inconsistency with RMA policy and planning documents developed by local authorities. This has resulted in increased cost for councils, communities and resource users which has not necessarily led to better environmental outcomes. (Fonterra)

Gaps in national direction

22. Sections 6 and 7 of the RMA set out matters of national importance and other matters decision-makers must have regard to in making decisions. While the existing set of national direction topics covers some matters of national importance, there are clear and notable omissions. These include biodiversity, landscape, historic heritage, the effects of climate change, and the management of significant risks from natural hazards.

The historic lack of national direction is still commonly cited as a reason why the RMA has not been as efficient or effective as it should have been.

23. A particular gap in national direction identified by the Productivity Commission was how local authorities should put provisions relating to Te Tiriti into practice.[250] This theme was also picked up by a number of submitters on our issues and options paper, such as the Albert-Eden Local Board and the Independent Māori Statutory Board in Auckland, Te Korowai o Ngāruahine Trust, Patuharakeke Te Iwi Trust Board Incorporated and Forest & Bird.

24. Other submitters also made suggestions as to what they saw as gaps in national direction. Those gaps included climate change adaptation, urban form, spatial planning, infrastructure, noise controls, food production and assessing cumulative effects.

Lack of strategic oversight and coordination

25. Since 2013 the number of national direction instruments promulgated or under development has increased considerably. However, it is not clear when national direction should be developed, and in what order it should be prioritised.

26. The approach to deciding which issues to prioritise for national direction has tended to be ad hoc and reactive. At times, this has resulted in the development of national direction driven by the priorities of particular groups or agencies, rather than what is in

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[250] New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission; p 203.

the best interests of the resource management system, the environment or what is most needed to implement the RMA successfully.

27. Some submitters on our issues and options paper commented that the current system is heavily influenced by the wider political environment, which results in frequent changes in direction and priorities.

28. There are currently 21 national direction instruments with a further 11 under development (this includes 4 amendments or replacements of existing instruments). Taken as a whole, the current collection of national direction instruments is neither cohesive nor functioning effectively or efficiently. As more national direction is released and comes into effect the risk of conflict and increasingly complex interactions between and within national direction instruments increases.

The approach to deciding which issues to prioritise for national direction has tended to be ad hoc and reactive. At times, this has resulted in the development of national direction driven by the priorities of particular groups or agencies, rather than what is in the best interests of the resource management system, the environment or what is most needed to implement the RMA successfully.

29. Local authorities and others trying to comply with RMA requirements have said the ad hoc approach to developing national direction has made it difficult to balance competing requirements (for example, those in the NPS on Urban Development Capacity and the proposed NPS on the protection of highly productive land). Both EDS and the Productivity Commission argue councils are finding it difficult to balance important and less important environmental and resource management matters, and a lack of guidance on prioritisation in the system exacerbates this confusion.[251]

30. The need for alignment was a particularly strong theme in submissions on our issues and options paper from industry groups, local government and resource management professionals. Some submitters said although national directions should not conflict, where they do, there should be clear guidance in national direction on which takes precedence. An overarching national direction framework, possibly in the form of a Government Policy Statement, was suggested as a possible solution. An example of comments received from submitters included:

> In our view, issues are now with a lack of coordination, alignment, consistency and clarity within the overall government programme of national direction. We consider there is a place for greater clarity and certainty through defined additional matters of national direction, and greater coherence and consistency between existing matters, but that is not to say we support an influx of additional direction. It is about getting the programme itself right, rather than an inundation of new matters.

[251] Environmental Defence Society. 2018. *Reform of the Resource Management System: The Next Generation: Synthesis Report.* Auckland: Environmental Defence Society; p 99; New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission; p 265.

> We are open to further considering the Environmental Defence Society's suggestion for the set of national policy statements to be delivered through a single Government Policy Statement. We agree that there is potential for this to enable strategic direction across the programme and better enable councils to translate these into lower level planning instruments. (Federated Farmers)

National direction is slow to develop and insufficiently directive

31. The development of NPSs and NESs is fragmented and slow[252] and as a result these instruments become unresponsive to emerging issues, technologies and trends.

32. As noted, the 2017 amendments to the RMA enabled a single consultation process to be undertaken for NPSs and NESs and removed the need for a two-step process for national policy statements. The policy intent of the changes was to speed up the development of national direction instruments, improve integration and reduce costs where instruments are developed concurrently.[253]

The development of NPSs and NESs is fragmented and slow and as a result these instruments become unresponsive to emerging issues, technologies and trends.

33. As a result of these amendments, both a NPS and a NES can be developed using either a board of inquiry process or following an alternative process which incorporates a requirement for iwi and public input to proposals.

34. We received comments from some submitters raising concerns over the robustness of the alternative process for developing national direction, which has not traditionally seen submitters being heard (as there is no explicit legislative requirement for hearings). A number of submitters suggested national direction should be developed using a board of inquiry process that includes a hearing.

35. The 2017 RMA amendments also made changes to allow NPSs to provide more specific direction on how objectives and policies are to be given effect by local authorities. For example, by methods or specific requirements councils must apply or by direction requiring a council to monitor and report on matters relating to the NPS.

36. These provisions were used in the 2017 amendments to the NPS for Freshwater Management 2014 and enabled the NPS to set a national objectives framework and require regional councils to use specific methods for monitoring freshwater.

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252 OECD. 2017. *Environmental Performance Reviews: New Zealand 2017*. Paris: OECD Publishing; p 96.

253 Ministry for the Environment. 2015. *Departmental Report No 2 on the Resource Legislation Amendment Bill 2015*. Wellington: Ministry for the Environment; p 39.

Time and cost to implement and effect change

37. In a devolved system, implementation of national direction is by local authorities through plan documents and making decisions on resource consent applications.

38. Local government submitters raised concerns with the constant cycle of change to implement new or amended national direction and the significant costs involved. An example was given of national direction for freshwater, which was promulgated in 2011, amended in 2014 and 2017, with another set of amendments now being considered.

39. NPSs must be 'given effect to' through local planning documents. In almost all cases this requires a full plan change process, although some objectives and policies can be inserted directly into plans. Plan-making is time consuming, and this results in significant delay before the effects of NPSs are seen. This is particularly concerning for issues where the environment is already under pressure.

40. NESs are regulations and take effect on commencement. These directly override existing local authority rules (unless specified otherwise), and are able to require some types of existing consent to be reviewed. However, a NES does not override the existing objectives and policies in local authority plans. This can create inconsistencies that can only be resolved by the local authority changing their plan to better align with the NES provision.

41. The impact of national direction is further hampered by the concept of existing use rights in the RMA. Generally existing consents prevail, although a NES can trigger a review of certain types of consents. National directions have little power to override existing use rights for many types of permitted land use, except if a land use has been discontinued for a period and plan provisions have changed during that time.

42. Fast developing societal or environmental challenges require a faster response than can be provided using the current national direction tools.

43. A number of submitters on our issues and options paper referred to the significant costs for local authorities to implement national direction and the impact of the number of amendments and changes occurring in national direction. Smaller local authorities in particular have found these changes burdensome and consider greater support should be given to local authorities. For example:

> Horowhenua District Council also seek that national direction be accompanied by a greater level of central government support, both in the form of implementation guidance and assistance and in the form of financial support. The extent of national direction being imposed on local government at present has the potential to have a significant cost impact for local communities and in instances where these costs reach the point of being unaffordable, and will likely come at the expense of locally focused action that responds to more pressing local issues.

Insufficient monitoring, evaluation and feedback loops

44. Current practice for monitoring and evaluation of individual national direction instruments is variable and inconsistent. The national direction programme does not have clear, measurable overall outcomes against which its performance can be assessed. Monitoring of individual instruments is irregular and it is difficult to source data and evidence on a national basis.

45. Section 24(f) of the RMA is one of the few provisions in the Act indicating the Minister for the Environment has the function of monitoring the effect and implementation of national direction. However, this provision is worded very generally, and is complemented by the even more generally worded section 24(ga), which enables the Minister to monitor and investigate any matter of environmental significance as the Minister sees fit.

46. Neither section 24(f) nor section 24(ga) specifies a duty for national direction to be reviewed within a set timeframe. As such, monitoring is not generally prioritised by central government. This has meant important feedback needed to evaluate the effectiveness of existing national direction, or inform future national direction, has tended to be ad hoc. In our view, this is a risk to achieving good environmental outcomes and is inconsistent with the purpose of the RMA.

Options considered

47. From consultation and submissions on our issues and options paper, we have identified options under the following topics:

- clarify the role of national direction and improve the distinction between the different types of national direction
- improve the efficiency and effectiveness of national direction
- require a mandatory set of national direction including a NPS on Te Tiriti
- deliver aspects of national direction through a single combined instrument
- improve the processes for developing and reviewing NPSs and NESs.

Discussion

Clarify the role of national direction and improve the distinction between the different types

A single, clear purpose statement for national policy statements and national environmental standards

48. National direction under the RMA has various purposes which either differ slightly in wording or, for some instruments, appear to be absent or must be implied from the sections relating to their content or development.

49. National direction should help guide decision-making at all levels of the system on matters of national significance that are best addressed at national level for consistency and efficiency.

There should be a single purpose for national direction in a reformed RMA to set objectives, policies, limits, targets, standards and methods in respect of matters of national significance.

50. In our view there should be a single purpose for national direction in a reformed RMA. For NPSs and NESs, that purpose should be to set objectives, policies, limits, targets, standards

and methods in respect of matters of national significance to achieve the purpose of the Natural and Built Environments Act and give effect to our proposed principles. Indicative drafting for this purpose is provided in appendix 3 to this report.

Clearer distinctions between the role of national direction instruments

51. Since the enactment of the RMA in 1991 the number, role and content of national direction instruments has expanded and they increasingly overlap with each other, for example:
    - the breadth of content able to be included in NPSs has expanded, and the provisions have taken on more directive forms
    - the scope of the content able to be included in NESs has also broadened
    - regulation-making powers have been added progressively which move beyond administrative matters into more substantive issues
    - new national planning standard provisions have been added which enable standards to cover some of the same material as NPSs and NESs.

52. The Panel considers a clearer distinction should be made between the respective roles of NPSs and NESs, including roles in setting environmental limits and environmental targets.

The Panel considers a clearer distinction should be made between the respective roles of NPSs and NESs, including roles in setting environmental limits and environmental targets.

53. We are concerned the current use of regulations and national planning standards is taking them well beyond the administration and implementation support functions for which they were originally intended. Unless the role of these instruments is narrowed and more clearly defined there is a risk they will be used as a substitute for NPSs and NESs whenever the more intensive analysis and scrutiny associated with these appears inconvenient.

54. We recommend the four existing types of national direction be retained, but their roles and use be should more distinctly defined as outlined in table 7.2.

Table 7.2: Proposed roles of national instruments under a reformed RMA

	National policy statement	National environmental standards	Section 360 regulations	National planning standards
Role	Should generally be used where the direction will be narrative in style. NPSs should be the premier form of national direction and should play a much stronger role in providing direction than they do now. Therefore,	Used for technical or complex matters. Although able to be used independently of NPSs, they will often complement them by providing the 'rules' and standards to help implement the objectives and policies of the NPS.	Administrative matters to support the implementation of the Act, NPSs and NESs. Temporary management of environmental matters that need to be addressed quickly while more	Used to support the implementation of a reformed RMA and NPSs and NESs made under it by setting out requirements for matters such as plan format, plan structure, common definitions, standards for the presentation of

	National policy statement	National environmental standards	Section 360 regulations	National planning standards
	they should be able to be directive in nature when needed May set environmental targets	May set environmental targets and limits	appropriate management tools are put in place	maps and plan usability and accessibility requirements
	Primary national direction instruments		**Supporting** national direction instruments	

55. We emphasise the array of national direction instruments is intended to be complementary. For example, an NPS should be able to be accompanied by a NES when desirable. This would ensure rules, limits and standards are accompanied by objectives, policies and narrative important to guide local policy and decision-makers.

56. We consider having a clear purpose for national direction and making the roles of all four national direction instruments more distinct will:

- set a clearer direction for decisions as to which form of national direction should be used
- help ensure functions and processes for setting national direction are efficient, effective and proportionate to the significance of the matter at issue
- reduce the risk of unintended consequences arising out of using the wrong national direction instrument
- make better use of existing national directions, so avoiding the disruption associated with substituting an entirely new set of national directions.

Improve the efficiency and effectiveness of national direction

Greater use of directive national policy statements and national environmental statements

57. A range of submitters on our issues and options paper, such as resource management professionals, Fletcher Building Limited and Ngāti Whātua Ōrākei, broadly supported greater use of directive national instruments. However there were differing views on how far these should go. For example, Auckland Council supported more directive instruments for matters where scientific measurement is required while other submitters considered there should be provision for local flexibility.

58. However some submitters (West Coast Regional Council, Kāpiti Coast District Council) raised concerns the use of more directive instruments will increase the broad-brush approach, which does not necessarily achieve good outcomes for all regions. National direction tends to be a blanket 'one size fits all approach'. Regional differences need to be incorporated into any national direction approach.

59. There are different ways to provide for greater use of directive instruments in any new system and a balance is needed between setting clear direction to guide decision-making and maintaining appropriate levels of subsidiarity.

60. The 2017 amendments to the RMA enabled NPSs to be more directive, but to date the provisions have only been used once for the 2017 NPS for Freshwater Management (and are currently being considered for the amendments to the NPS on Urban Development Capacity). These changes allow for greater specificity within NPSs and better support councils to implement national direction. We consider more use could be made of directive instruments in future.

Clarifying the scope of regulations and their development process

61. The Panel notes the scope and complexity of regulations within the RMA have grown significantly since the Act first came into force. In our view, the use of regulations under the RMA has become incoherent and prone to misuse or overreach. While regulations may be quicker to make and change than a NPS or NES, we are concerned:

    - the content of regulations has crept beyond the scope of the subject matter for which regulations are generally intended
    - the process for making them can often circumvent opportunities for public input on what can be important matters of policy.

62. Under the Natural and Built Environments Act, regulations should be returned to the more traditional role of supporting the implementation of legislation through prescribing the detail of administrative matters. These are not substantive policy issues so do not require the more complex and robust processes associated with the preparation of legislation, NPSs or NESs.

Regulations should be returned to the more traditional role of supporting the implementation of legislation through prescribing the detail of administrative matters.

63. The matters we envisage should be covered by regulations include:

    - forms and notices associated with various processes under the Natural and Built Environments Act
    - fees and administrative charges (including how they are to be calculated and the circumstances under which they may be waived, postponed or refunded)
    - infringement fees for minor offences (but not the offences themselves)
    - coastal occupation charges and charges for the occupation of the beds of lakes and rivers.

64. However there are still some circumstances where regulations should be able to cover more substantial policy issues, for example where quick action is needed to meet international obligations, manage an immediate risk of significant environmental damage or risk to safety, and legislative, NPS or NES processes would take too long to come into force.

65. The making of regulations on any of the more substantive environmental policy matters should provide for public input as the regulations may have significant implications for the environment and the rights of people to undertake activities or enjoy the use of their property.

66. It is important the use of regulations to address urgent environmental policy matters does not complicate the administration of the Natural and Built Environments Act or confuse the distinction between regulations and NPSs and NESs, by becoming a convenient and permanent substitute for a more fulsome policy process. We therefore consider regulations on any substantive policy matters should incorporate a sunset clause or review clause tied to the time it would take to complete legislative changes or a NPS or NES to replace the regulation.

67. Assuming the above approach is taken, the Panel considers the regulation-making powers of the type found in sections 360A to 360H of the RMA are too broad and not necessary. If national direction is required on the subject matter of those sections then it should be provided for either in principal legislation or in a NPS or NES.

Making the role and development process for national planning standards clearer and more robust

68. Submitters on our issues and options paper gave general support to the use of planning standards to facilitate nationally consistent plan content. A number of submitters recognised the national planning standards could be used to achieve greater consistency in interpretation, implementation and application of national direction, and can support addressing issues that are common across the country. Auckland Council noted the planning standards are useful as they allow councils and communities to focus on more strategic issues.

69. The RMLA submitted that greater vertical and horizontal integration is needed across planning documents. Better horizontal integration can be achieved, for example, through the use of consistent structure and definitions. The first tranche of national planning standards was useful in this regard. The RMLA would support more national direction, particularly on rule structure and the status of particular activities.

70. We agree national planning standards serve a useful purpose in supporting the implementation of resource management legislation but are concerned:

    - their scope is too broad[254] and they risk straying into substantive policy matters more appropriately addressed through other national direction instruments
    - the provisions related to them (currently sections 58B–58J) are overly complex and detailed.

[254] By way of example, section 58C(2) enables national planning standards to set objectives, policies and methods as though it were a national policy statement, but also rules as though it were a plan, potentially without public input.

Clarifying the content of national planning standards

71. We consider NPSs and NESs should be the primary instruments for substantive policy matters, with the national planning standards and regulations supporting implementation of primary legislation, NPSs and NESs.

72. The content of national planning standards should be limited to match the supporting role and purpose we envisage for them, which is to:

    - set standards to achieve a common plan structure, format and layout
    - provide for consistent expression of terminology through a set of common definitions
    - set standards to achieve consistency in map presentation (from example, size, colours and symbols)
    - set out requirements as to plan availability and accessibility.

73. We also consider national planning standards have a worthwhile role in specifying the use of common standards or rules that are minor and technical in nature, and for which there appears to be no benefit in having local variations.

74. Technical national planning standard provisions could include matters such as the approach to measuring noise or light spill. We believe these could replace the practice of individual local authorities having to go through a full plan preparation or plan change to incorporate material that exists in New Zealand Standards such as NZS6802:2008 (which relates to noise) or NZS4282:2019 (which relates to lighting). As we discuss in chapter 8, national planning standards could provide guidance on evaluation methods in the assessment of policies and plans.

NPSs and NESs should be the primary instruments for substantive policy matters, with the national planning standards and regulations supporting implementation of primary legislation, NPSs and NESs.

75. Flexibility should be provided in national planning standards to incorporate non-regulatory guidance to enable the provision of additional assistance and direction to councils. This could follow a variation of approaches used overseas, such as the *South Australian Planning Policy Library*.[255] Such guidance could be useful in helping councils understand what is expected of them when drafting plans, or indicating where provisions from NPSs or NESs may be relevant to a particular matter.

A clearer, robust process for developing national planning standards

76. Provided national planning standards do not venture into more substantive policy matters and rules which have a material impact, their development does not need to follow a board of inquiry process. However, oversight by an independent expert panel should be an essential component of the development process to ensure what is produced reflects best practice and is objective in both approach and content.

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[255] Government of South Australia. 2011. *South Australian Planning Policy Library Version 6.* Retrieved from https://www.sa.gov.au/__data/assets/pdf_file/0014/13055/SA-Planning-Policy-Library-Version-6.pdf (15 June 2020).

77. The process for developing national planning standards should be made clearer, quicker and more certain. Our view is the following process should be followed.

    - The Minister for the Environment establishing the need for and purpose of any new national planning standards. In making this determination, the Minister should not make a planning standard unless it:
        - is required to support the administration or implementation of the Act, a NPS or NES
        - relates to plan accessibility, plan presentation (format, structure, layout or mapping standards), or technical or minor policy matters which are not more appropriately managed through principal legislation, a NPS or NES
        - will promote a nationally consistent approach to the matter to which the standard applies.
    - Development of the national planning standard being overseen by an advisory group with appropriate knowledge and expertise in the matter to which the national standard will relate and representatives of the main stakeholder groups.
    - An ability to invite stakeholder comments on a discussion document.
    - An evaluation such as a section 32-type report or regulatory impact statement being prepared in relation to the content of the national planning standard.
    - The advisory group making recommendations to the Minister for the Environment that a planning standard be made and gazetted and those recommendations being made public.
    - The Minister for the Environment making a decision whether to accept, reject or accept in part (or with modifications) the recommendations of the advisory group.

The process for developing national planning standards should be made clearer, quicker and more certain.

78. We are of the view that planning standards should be in place before plans are reviewed to comply with the Natural and Built Environments Act.

79. Development and use of national planning standards along the lines we recommend will:

    - help provide clearer national direction under the Natural and Built Environments Act by better supporting the implementation of NPSs and NESs
    - provide for efficient responses to issues through the ability to standardise approaches to plan structure and definitions where the use of a board of inquiry is unnecessary
    - be workable, cost-efficient (in terms of reducing duplication and unnecessary processes for central government and local government) and will avoid disruption as they build on an existing approach which submitters have said works well.

A mandatory set of national directions

80. The term 'mandatory national direction' used in this report refers to national direction instruments which a Minister must, by law, prepare and issue. Legislative requirements regarding mandatory national direction take different forms around the world, but a notable example is the requirement for the Secretary of State in the United Kingdom Environmental Bill 2019 to issue and report on targets for defined environmental matters.

81. The only mandatory national direction under the RMA has been the NZCPS prepared and administered by the Minister of Conservation. The first NZCPS was issued in 1994, a review was completed in 2010, and a further review is currently under way.

We recommend a mandatory set of national directions on the matters listed in section 9 of our proposed purpose and principles. We also recommend retaining the Minister's ability to issue national directions at his or her discretion on other matters of national significance where a need has been demonstrated.

82. The concept of mandatory national direction was one of the more popular options supported by submitters on our issues and options paper. Most of those who chose to submit on this option supported it, for example:

> Providing for mandatory national direction would streamline and reduce complexity across the resource management system and would complete the framework architecture of the RMA by putting in place a suite of national planning instruments designed to set standards and maintain and enhance environmental quality. Absent mandatory national direction, the RMA is unlikely to deliver sustainable outcomes in a timely way. The relative absence of national direction under the RMA has left a policy vacuum that has been filled by experimentation by local authorities via regional and district plans. (Dr Trevor Daya-Winterbottom)

> It is critical that there is more mandatory national direction and setting of environmental standards at the highest level to aid in environmental protection. The failure of the RMA over the past 30 years to protect the environment is in large part due to a lack of mandatory national direction. There needs to be strong NPS's, on all domains covering matters of national importance. (New Zealand Fish & Game Council)

83. Overall, we consider a set of mandatory national directions would:

- set clear direction to guide decision-making
- provide greater recognition of Te Tiriti and te ao Māori
- make functions and processes more efficient and proportionate by ensuring more matters of national importance are determined at the national level, and by reducing unnecessary duplication of effort by local authorities.

84. We recommend a mandatory set of national directions on the matters listed in section 9 of our proposed purpose and principles. We also recommend retaining the Minister's ability to issue national directions at his or her discretion on other matters of national significance where a need has been demonstrated.

85. We discuss two important cases of mandatory national direction briefly below: A mandatory New Zealand Coastal Policy Statement and mandatory national direction on Te Tiriti o Waitangi. Mandatory national direction for climate change is discussed in chapter 6.

A mandatory New Zealand Coastal Policy Statement

86. We recommend that preparation of the NZCPS should continue to be mandatory in the Natural and Built Environments Act.

87. The Minister of Conservation would retain responsibility for the NZCPS in recognition of the role of the Minister in the management of the coastal marine area, and the Minister's role in approving regional coastal plans (or the equivalent provisions in a future combined planning document).

88. To better recognise and provide for integrated management and the overall responsibility of the Minister for the Environment for the resource management system as a whole, we recommend the development and monitoring of the NZCPS be the responsibility of the Minister of Conservation in consultation with the Minister for the Environment.

89. As the NZCPS represents an overarching statement of the government's environmental priorities and management approach to nationally important coastal issues, we are of the view the NZCPS must include environmental limits for the matters listed in section 8 of our proposed purpose and principles.[256] We consider limits should be set by the Minister of Conservation in consultation with the Minister for the Environment.

Mandatory national direction on Te Tiriti o Waitangi

90. The principle of partnership between Māori and the Crown inherent in Te Tiriti is well established. The development of a NPS should, amongst other things, enable more effective contribution and participation of Māori in environmental policy, planning and management, and monitoring.

91. We consider it is important a NPS on Te Tiriti be developed with Māori and this should be provided for in the Natural and Built Environments Act. This is discussed further in chapter 3.

Deliver aspects of national direction through a single combined instrument

All national policy statements and national environmental standards in one document

92. This option would consolidate national direction into a single instrument, and has previously been considered by the Productivity Commission and EDS.

93. Submissions on our issues and options paper expressed broad support for a single combined instrument. Submitters considered this could be used to coordinate topics of national importance and provide a long-term approach, while reducing the number of documents. For example:

> … council believes the preparation of a combined instrument such as a Government Policy Statement would assist central government in tackling the integration challenge/opportunity previously mentioned, and therefore sees potential merit in

[256] See chapter 2.

> such a document. Council supports central government further exploring the option of delivering national direction through a single combined instrument. (Auckland Council)
>
> …further consideration should be given to the adoption of a Government Policy Statement to provide an integrated understanding of the key resource management directives of the Government. This approach would be preferable to a selection of national policy statements that create unresolvable tensions for decision-makers on resource consent applications and district / regional planning documents to resolve. (Tilt Renewables)

94. Conversely some submissions raised concern with a single combined NPS and NES instrument, namely that it would result in a more high-level document that would lose its purpose and value.

95. In its *Better Urban Planning* report[257] the Productivity Commission investigated whether a single government policy on environmental sustainability could replace the existing NPSs and NESs. The Commission concluded a single document could become unwieldy and would not be an appropriate model for setting environmental standards.

96. Our work has been informed by the United Kingdom's National Planning Policy Framework (NPPF). This replaced the previous set of guidance with one document which sets the overall direction for the planning system and introduced the concept of sustainable development. The NPPF has been criticised for being too high-level, overly focused on housing delivery and providing insufficient direction to guide the system long term.

97. We consider the delivery of all national direction through a single document creates notable drawbacks by:

    - creating an overly lengthy and complex document
    - delaying some provisions from coming into effect as they may be dependent on the preparation of provisions in other parts of the document that are not yet developed
    - creating a situation where a challenge to one part of the combined document would hold up provisions that would have been beyond challenge if they were in a separate document.

98. Transpower Limited, drawing on its experience of national planning standards, said consolidating national direction into one government policy statement would result in a more high-level and less helpful document. Transpower noted efforts to address a range of matters through national planning standards were pared back to a bare minimum in the face of opposition.

Instead of replacing all existing national direction instruments with a single instrument the Panel considers many of the benefits of a single document could be replicated through having all NPSs and NESs in the same place so they can be viewed together.

99. However we agree better integration is needed across the set of national directions. National direction should form a coherent package and provide the link between the outcomes, targets and environmental limits set out in the

[257] New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission; p 266.

purpose and principles of the Natural and Built Environments Act and their implementation by local authorities.

100. Instead of replacing all existing national direction instruments with a single instrument the Panel considers many of the benefits of a single document could be replicated through having all NPSs and NESs in the same place so they can be viewed together. A non-regulatory commentary could be provided to give guidance on how they are to be read as a whole.

A combined national policy statement and national environmental standard instrument

101. We considered whether a new system should enable NPSs and NESs to be developed together as one instrument. This option would allow national direction to be developed that could set targets and limits (including in relation to the same subject matter) and contain objectives, policies, methods, technical standards and rules.

102. In 2015 the then Parliamentary Commissioner for the Environment, Dr Jan Wright, detailed in her submission to the 2015 RMA amendment bill why in her view there should be a national direction instrument that contained both NPSs and NESs:[258]

> For some time I have thought that NPSs and NESs should not be separate documents. Objectives, policies and if needed, technical rules should be fully integrated in one document. A rule should be linked directly to the reason for its existence, that is, the objectives and policies it serves. These documents could be termed statements of national direction.

103. A single instrument that sets out the high-level policy and subsequent technical standards and environmental limits would help address some of the issues in the current system regarding timeliness of implementation and the mismatch between environmental standards and the underlying objectives and policies. A single instrument may also help reduce overall complexity and implementation costs faced by local authorities in implementing the Act where they would otherwise be faced with multiple, overlapping national direction instruments on the same subject matter.

104. We envisage a single combined NPS and NES instrument would complement, rather than replace, individual NPSs and NESs. The ability to combine NPSs and NESs into a single document would add flexibility to the expression of national direction where a high degree of integration and cohesion of national direction is essential to effective and efficient implementation. Where integration is not essential, or national direction requires only a narrative or standard, then the existing NPS or NES instrument options should be used.

The ability to combine NPSs and NESs into a single document would add flexibility to the expression of national direction.

[258] Parliamentary Commissioner for the Environment. 2016. *Resource Legislation Amendment Bill 2015: Submission to the Local Government and Environment Committee*. Wellington: Parliamentary Commissioner for the Environment; p 5.

105. However, we are also mindful that the power to issue a combined instrument would need to include appropriate checks and balances to ensure appropriate use and limitation on ministerial powers of intervention.

106. Consideration would also need to be given to the timing and implementation mismatch currently experienced between NPSs and NESs. The latter can have immediate effect whereas NPSs generally require translation and modification into local plan provisions. We consider this could be addressed within each instrument by identifying those parts of the combined instrument that are to have immediate effect and those that would follow the plan process at local level. Transitional policies could also be stated in the instrument to help with implementation.

107. We acknowledge having a third option for the expression of NPSs and NESs risks adding complexity to the national direction provisions of the Natural and Built Environment Act. However, we consider these risks are outweighed by the benefits in being able to comprehensively provide direction on complex issues in one instrument, especially for matters such as climate change and the management of land–water interface. Indicative drafting for a combined instrument is in appendix 3.

108. Overall we consider the ability to issue a single combined NPS and NES instrument would:

- provide clarity for decision-makers on the intent and reason for the subsequent rules and/or limits as these are directly supported by relevant objectives and policies
- support a more efficient and effective system, reducing duplication of effort by agencies
- help ensure national direction is able to be more responsive to change and may better support innovative approaches to providing direction on outcomes, targets and environmental limits
- reduce complexity, both in the legislation itself and for those implementing and using it.

Improve the processes for developing and reviewing national direction

109. National direction has the force of regulation (either directly or indirectly through RMA plan rules) and so can have important legal implications for those who may be affected as well as the sustainable management of the environment. However, unlike primary legislation, national direction is not subject to the full scrutiny of parliamentary processes such as select committees and debate in the House.

110. Submitters on our issues and options paper raised a number of concerns about the process for developing national direction. These concerns primarily relate to the robustness of the alternative process, issues with integration between differing pieces of national direction, and the potential for processes to be designed that do not provide for sufficient input and participation in the process. For example, Fletcher Building Limited's submission considered greater transparency was needed and the current process was considerably less open to challenge and refinement than processes for developing regional or district plans (a view shared by LGNZ and Transpower Ltd).

National policy statements and national environmental standards

Preparation and review process

111. In our view NPSs and NESs should only be prepared by the Minister for the Environment (with the Minister of Conservation being the Minister responsible for the NZCPS). We consider the development of NPSs and NESs by other Ministers risks undermining the integrity and cohesion of national direction and the outcomes they seek to achieve.

We recommend there be a single process for the preparation and review of both NPSs and NESs. That process should be by independent board of inquiry.

112. We recommend there be a single process for the preparation and review of both NPSs and NESs. That process should be by independent board of inquiry. This would ensure a robust process, allow for a full range of views from participants to be expressed and provide an independent safeguard against the risk of abuse of process. The 'alternative process' should only be available for less significant or technical changes to existing national direction between reviews (which we term 'intermediate changes').

113. We recommend the board of inquiry be chaired by an independent judicial officer, being a sitting or retired Environment Judge. Other members would be appointed by the Minister according to their expertise in the subject area of inquiry, with the number of members dependent on the nature, scale and significance of the inquiry. We consider three to five members in addition to the Chair would be appropriate.

114. To provide for greater Māori involvement, consistent with the principles of partnership in Te Tiriti, we recommend the board of inquiry makes provision for Māori in the development of, and decision-making on, a NPS or NES. Dependent on circumstances this could take the form of membership of the board, being part of a team developing the national direction or being an expert adviser to the board (or some combination of these).

Use of mātauranga Māori in the development of national direction

115. The participation of Māori in the development of national direction will be particularly relevant and useful where national direction sets environmental limits or targets that need to incorporate and reflect te ao Māori outcomes, Māori values or take an approach consistent with mātauranga Māori.[259] In these circumstances, we recommend the national direction process not only makes provision for but encourages the input of experts in mātauranga Māori.

116. To action this, a pool of persons with relevant knowledge and expertise in mātauranga Māori could be employed or contracted by central government[260] and be available to work on national direction limits and targets.

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259 Examples of where this has been tried are the draft national policy statements on indigenous biodiversity and freshwater.

260 The Ministry for the Environment or Department of Conservation, or both.

Matters the Minister should take into account before preparing national direction

117. Although we consider increased mandatory national direction is necessary, it remains important for the Minister to have the power to issue other national direction at his or her discretion. However we consider there should be guidelines to ensure national direction is exercised for proper purposes. National direction:

    - should be confined to matters of national significance
    - should not be used where other more appropriate means are available
    - should not unnecessarily constrain the ability of local authorities to determine what is appropriate according to their circumstances.

118. We recommend the Minister should take into account a list of matters broadly similar to the current RMA section 45(2). This would apply to the preparation of both NPSs and NESs. Our indicative drafting is in appendix 3. It covers both mandatory and discretionary national direction.

Application of section 32 or equivalent

119. The Panel is concerned about the potential for national direction processes to be used to manage issues not of national significance or that, given close scrutiny, would not justify the use of national direction. Making both NPSs and NESs subject to a section 32-type process[261] from the outset and at key stages of their development would serve as a useful check on the need for the instrument and improve the transparency and robustness of national direction development. We discuss evaluation methods of this kind in chapter 8.

120. We recommend there be an evaluation for each NPS or NES and any review, similar to the process proposed in chapter 8 for evaluation of plans. This should include interim evaluations at critical stages of developing the policy or standard:

    - decisions to manage any matter through national direction and the choice of national direction instrument
    - provisions in a proposed national direction on which public submissions are sought
    - decisions on recommendations
    - final decisions made by the Minister.

    These analyses should be made publicly available.

Review of national policy statements and national environmental standards

121. Submitters on our issues and options paper supported national directions being reviewed on a regular basis, although there was no consensus on what an appropriate review timeframe should be. For example, Beca, Transpower Ltd and Greater Wellington Regional Council suggested a review period of 10 years, Auckland Council suggested 15 years and the New Zealand Planning Institute suggested three years.

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[261] This assesses the need for the instrument, asks where there are other practicable options to achieve the same desired outcome, and assesses the benefits and costs of the preferred option (and compares them against alternative courses of action). Consideration of alternatives generally includes consideration of the status quo and the risks of not taking action.

122. We agree the Natural and Built Environments Act should include specific and stronger duties for the Minister for the Environment (and Minister of Conservation in respect to the NZCPS) to monitor, report on and review NPSs and NESs.

123. We considered various review cycle timeframes and concluded a nine-year review period is the most appropriate because:

We considered various review cycle timeframes and concluded a nine-year review period is the most appropriate.

- nine years better synchronises with three-year central government electoral cycles and three-year local authority electoral and planning cycles
- it provides sufficient time to establish whether policy on matters with lengthy lead-in or lag times is having the desired effect and ensures there is good evidence to determine what, if any, changes may be needed
- a nine-year review cycle provides greater certainty and consistency in policy direction than a three- or five-year review cycle, which can be important for general confidence in the resource management system and for investment decisions (such as large urban developments, which can sometime take a decade to come to fruition)
- it will be less resource intensive for central and local government to administer and to respond to (given multiple national direction instruments would almost be in a continuous review cycle if review periods were shorter).

124. If circumstances, such as changing environmental conditions, require a review of national direction earlier than nine years then we are confident this can be accommodated through providing legislative flexibility to hold an earlier review (requiring there to be a review 'within nine years of the national direction instrument coming into force', for example).

We recognise changes will need to be made to NPSs and NESs outside regular, scheduled review cycles.

125. We envisage the review process being the same as for the preparation of national direction, including the application of a section-32-type duty and process.

Intermediate changes to national policy statements and national environmental standards

126. We recognise changes will need to be made to NPSs and NESs outside regular, scheduled review cycles. The need for changes may arise from the results of monitoring that indicates a NPS or NES is failing to achieve the results desired, on in response to a change of circumstances or an emergency situation (as occurred with the contaminated land NES following the Canterbury earthquake in 2011[262]). Such changes may be substantive or minor.

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[262] Known as the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011. Retrieved from http://www.legislation.govt.nz/regulation/public/2011/0361/latest/096be8ed807ade6e.pdf (15 June 2020).

127. Where an 'intermediate change' is substantive in nature (requiring a major change in policy direction or a re-write of the NPS or NES) then the board of inquiry process should be followed, as though the change were a review.

128. Where an intermediate change is minor, then an alternative process may be used. This alternative process should be overseen by a panel chosen for their expertise, be chaired by an independent person, and should provide the opportunity for public participation to ensure the preparation of the change to the NPS or NES is fair and robust. The panel would have the role of scrutinising the proposed change, considering what changes should be made in response to external feedback, and making recommendations to Ministers on any changes.

129. To reduce the risk the alternative process is used inappropriately we consider Ministers should not be able to use the alternative process unless it can be demonstrated the following have been considered:

- the advantages and disadvantages of preparing changes to national direction quickly, including the consequences of not acting
- whether the scale and nature of the proposed change would represent a significant departure from, or require substantial amendments to, an existing NPS or NES
- whether the proposed changes could have been achieved by another national direction instrument
- the extent and timing of public debate and consultation that has already taken place
- any other relevant matter.

Corrections of errors and minor alterations to a national policy statement or national environmental standard

130. We are of the view it is appropriate and efficient for a reformed RMA to continue to provide for the correction of minor errors and to accommodate minor updates without the need to follow either the board of inquiry process or the alternative process.

131. To ensure this power is not misused, its use should be limited to changes of a minor and technical nature or changes which have no material effect on the rights of parties who may be affected.

We recommend all existing NPSs and NESs be reviewed to resolve all known and potential conflicts between them.

Providing greater cohesion and coordination between national policy statements and national environmental statements

132. To provide greater cohesion and coordination between NPSs and NESs we recommend:

- all existing NPSs and NESs be reviewed to resolve all known and potential conflicts between them, or provide guidance on how those conflicts may be resolved, before the Natural and Built Environments Act comes into force

- the preparation of any new NPS or NES should identify and resolve conflicts with any existing NPS or NES, or provide direction on how the conflicts are to be resolved.

133. The Panel considers the Ministry for the Environment should make all NPSs and NESs available to be viewed in one place and provide a short, non-regulatory, explanation of how they are to be read as a whole.

Monitoring and reporting the effect of national direction

134. The Panel recommends there be a duty on the Minister for the Environment and Minister of Conservation to monitor and review the effectiveness of the NPSs and NESs for which they are responsible. We consider this is crucial to knowing whether national direction is achieving the outcomes desired and whether changes are required.

135. More detail on our proposed approach to monitoring and oversight in a reformed RMA is contained in chapters 12 and 13.

136. We consider improving the clarity and robustness of NPS and NES processes in these ways will help:

- ensure national direction is more responsive to risk, change and evidence
- keep decision-makers in the system accountable, well informed and incentivised to achieve the purpose of the system
- lessen the risk of unintended consequences and ensure there are more appropriate levels of public participation.

Relationship with spatial strategies

137. The concept and content of spatial strategies is covered in chapter 4 (Strategic integration and spatial planning).

138. We recommend spatial strategies be consistent with NPSs (including the NZCPS) and NESs under the Natural and Built Environments Act.

Relationship with combined plans

139. Under the RMA, sections 44A and 55 deal with the way in which local authorities must respond to national direction. Depending on the circumstances, provisions must be inserted into plans at local authority level without following the usual plan change process. We consider a more responsive system is needed to ensure that long delays do not occur in implementing national directions designed to enhance environmental outcomes. We recommend that these existing provisions should be reviewed with that objective in mind.

A more responsive system is needed to ensure that long delays do not occur in implementing national directions designed to enhance environmental outcomes.

140. Local authorities should be able to set environmental limits and targets of their own through normal plan change processes where they are not the subject of national direction and where the local authority wishes to set a higher target or a more stringent limit than specified in a national direction.

Relationship with existing consents and existing uses

141. We have discussed in chapter 5 the principles that should apply to improve responsiveness and the circumstances in which existing consents and existing uses may be modified. For similar reasons to those discussed above in relation to plans, a reformed RMA needs to deal effectively with what happens to existing consents when a new national direction is issued. Currently section 43B of the RMA contains a complex set of provisions prescribing what is to happen when a national direction is made. This provision differentiates between land use consents (which are generally to prevail) and allows for the continuation of regional consents until they are modified or reviewed.

There should be a mandatory requirement to review conditions of existing regional permits and consents when a national direction is issued.

142. Section 128(1)(ba) of the RMA enables, but does not require, the conditions on permits and consents granted by a regional council to be reviewed when a NES or national planning standard is made. This includes coastal, water or discharge permits and regional land use consents. Under the RMA there is no similar ability to review land use consents granted by a territorial authority.

143. There should be a mandatory requirement to review conditions of existing regional permits and consents when a national direction is issued. This is needed to ensure, for example, that the restoration of degraded water bodies is not impeded by the existence of consents with conditions that do not meet more stringent standards set by a national direction.

144. The review of conditions would need to take into account the benefits and costs of activities controlled by the consent and should allow a transition period where significant change is required. We recommend that the national direction should stipulate how the new direction is to be implemented and relevant principles to guide the review process. This should be part of the board of inquiry process in which all affected parties would be able to participate. We view this as an important safeguard.

145. Land use consents granted by a territorial authority fall into a different category to those granted by regional consents. Under the RMA, implemented land use consents granted by a territorial authority are not generally time limited. There are few provisions enabling such consents or their conditions to be reviewed. We consider it would be a major and very disruptive step to allow the review of land use consents granted by territorial authorities whenever national direction occurs. We recommend review of land use consents should only occur in exceptional circumstances where:

- it is necessary to address the effects of climate change or to reduce risks from natural hazards as we discuss in chapter 6
- there is a high risk of significant harm or damage to health, property or the natural environment, for example by the breach of an environmental limit.

146. We take a similar view in relation to the ability to review or override existing use rights in relation to the use of land. The ability to rely on existing use rights for land uses is currently subject to criteria designed to ensure that the nature and effects of the activity are maintained at a broadly similar level. We recommend national direction should not

be able to modify or override existing rights for land use except in the two circumstances described above. The circumstances in which this could occur should be included in the national direction.

Expected outcomes

147. We consider our proposals for reform of national direction provisions address the key issues in our terms of reference and align with the objectives and principles we adopted for our review. They ensure the necessary powers are available for central government to act. They also ensure these powers are appropriately constrained with the right checks and balances. As such, they will contribute to a more robust and coherent system as a whole.

Key recommendations

Key recommendations – National direction	
1	The current forms of national direction should be retained: national policy statements, national environmental standards, national planning standards and regulations.
2	The present functions of the Minister for the Environment and the Minister of Conservation should be continued, including the mandatory requirement for a New Zealand Coastal Policy Statement.
3	The purpose for national direction should be setting objectives, policies, limits, targets, standards and methods in respect of matters of national significance to give effect to the purpose and principles in the Natural and Built Environments Act and to resolve any conflicts between these matters.
4	Mandatory national direction should be required on the topics specified in section 9(3) of the purpose and principles of the Natural and Built Environments Act.
5	The power for the Minister for the Environment to issue discretionary national directions should be retained with some modification of the matters to be taken into account before deciding whether to do so.
6	There should be a single board of inquiry process for the preparation and review of both national policy statements and national environmental standards, except for minor changes for which an alternative process can be adopted.
7	All existing and new national direction should be brought together into a coherent combined set and any conflicts between them resolved.
8	National directions should be reviewed every nine years but intermediate changes should also be allowed for as necessary.
9	The respective roles of national policy statements and national environmental standards should be clarified and provision should be made for them to be issued separately or in a single instrument.
10	The making of regulations should generally be confined to their traditional role of dealing with administrative matters but regulations to address substantive issues should be allowed in limited circumstances and subject to appropriate safeguards.

Key recommendations – National direction	
11	National planning standards should have a more confined role and should be established by a process overseen by an expert advisory group which would make recommendations to the Minister for the Environment.
12	To improve responsiveness to national direction: (i) the ability to review existing regional permits and consents should be strengthened (ii) land use consents granted by territorial authorities and existing land use rights should be able to be reviewed but only in exceptional circumstances. These should be confined to: (a) where necessary to adapt to the effects of climate change or to reduce risks from natural hazards, or (b) where there is high risk of significant harm or damage to health, property or the natural environment, for example by the breach of an environmental limit.

Chapter 8 Policy and planning framework

1. The policy and planning framework administered by local authorities holds a critical place in the resource management system overall. Regional and district plans interpret the purpose and principles of the Act and apply national direction in the context of their area's priorities and issues. Regulation is developed from this policy framework to clarify what activities are managed in the environment and how consent applications are to be considered. Clear, well-considered rules should ensure the system is implemented in an efficient, effective and fair way.

2. In this chapter we propose two important changes in the policy and planning framework. The first is to clarify the functions of regional councils and territorial authorities to minimise unhelpful overlap. The second is to provide for combined plans prepared and determined by joint committees with a hearing process similar to the independent hearing panel model used in the Auckland unitary plan process.

3. We also propose a significant shift in the way plans and resource consents interrelate as we discuss in chapter 9.

4. Our chapter on allocation of resources also discusses issues important to the policy and planning framework, in particular with regard to freshwater, aquaculture and urban development capacity.

Current provisions

5. The policy and planning framework under the RMA consists of regional policy statements, regional plans and district plans. These plans must also give effect to national direction, including the NZCPS. They must also adhere to any relevant national planning standards.

Regional policy statement

6. The regional policy statement (RPS) sits at the top of the hierarchy. Its purpose is "to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".[263] It is the part of the framework that relates most closely to the recognition of matters of national importance in section 6 of the RMA and sets the overarching objectives and policies that provide for them within the region.

[263] Section 59, RMA.

Regional plans and regional coastal plans

7. Regional plans provide the policy framework for regional councils to carry out their functions under the RMA. Regional coastal plans help regional councils to carry out the purpose of the RMA over the coastal marine area, in conjunction with the Minister of Conservation.[264]

8. The regional plan includes objectives, policies and rules for aspects of the broader environment including soil conservation, water quality and quantity, air quality, ecosystem functioning as well as management of natural hazards. Regional plans also include provisions for managing allocations of water extraction, discharge rights, the use of the coastal marine area and geothermal resources.

District plans

9. A district plan provides the policy framework for a territorial authority to carry out its functions under the RMA. District plans contain objectives, policies and rules: "to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district". The Resource Legislation Amendment Act 2017 (RLAA) added to this framework, "objectives, policies, and methods to ensure that there is sufficient development capacity in respect of housing and business land to meet the expected demands of the district".[265]

10. In addition to integrated management, district plans contain provisions to avoid or mitigate natural hazards, manage the development of contaminated land, and maintain indigenous biological diversity. They also address the effects of noise and activities in relation to the surface of water in rivers and lakes. These functions overlap with regional councils to some degree.

Integration of regional and district plans

11. Local authorities have the ability to produce combined plans under section 80 of the RMA. The legislation allows for a broad scope of combinations, so long as the plan includes two or more of the three main elements of the policy framework (RPS, regional plan, district plan). This allows councils to create joint regional or district plans in areas that cross a shared boundary, or to encompass the whole of their combined districts. It enables a regional council and all territorial authorities in their region to prepare, implement and administer a combined RPS, regional and district plan (either one for each district or one combined district plan).

12. The joint committees set up under section 80 to prepare, implement and/or administer combined planning documents are subject to clauses 30 and 30A of Schedule 7 of the LGA, meaning they are subordinate to the local authorities and/or public bodies they represent.

13. To date, there has been limited use of the combined plan provisions of section 80, with only one plan combining multiple districts. Table 8.1 shows seven combined RMA plans in

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264 Section 63, RMA.

265 Section 31 (1)(a) and (aa), RMA, respectively. A similar provision was inserted for regional councils.

existence as at 2014. Significant barriers to greater use include lack of political support for a combined plan, concerns about loss of autonomy and local representation and the fair and equitable sharing of costs. [266]

14. One other combined plan, the Auckland Unitary Plan was created under the Local Government (Auckland Transitional Provisions) Amendment Act 2013. We address its influence on our proposed reforms later in the chapter.

Table 8.1: Combined RMA plans across New Zealand, as at 2014

Local authorities involved	Name of plan	Plans combined
Horizons Regional Council	One Plan	Regional policy statement (RPS), regional plan (RP), regional coastal plan (RCP)
Hawkes Bay Regional Council	Regional Resource Management Plan	RPS, RP
Marlborough District Council (unitary authority)	Marlborough Sounds and Wairau/ Awatere Resource Management Plans	RP, RCP, district plan (DP) for each area[267]
Tasman District Council (unitary authority)	Tasman Resource Management Plan	RP, RCP, DP[268]
Nelson City Council (unitary authority)	Nelson Resource Management Plan	RP (part), RCP, DP[269]
Gisborne District Council (unitary authority)	Tairāwhiti Resource Management Plan	RPS, RP, RCP, DP[270]
Masterton/Carterton/South Wairarapa District Councils	Wairarapa Combined District Plan	DP covering all three districts

New plan and plan change process

15. Rules in regional and district plans have the force and effect of regulations.[271] Given this legal significance, councils are required to undertake an extensive process for making and changing plans. This process is set out in Schedule 1 of the RMA. Among other things Schedule 1 sets out requirements for consultation, decision-making and rights of review and

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266 Boffa Miskell Limited. 2014. *Combined Plan Study: Section 80 of the Resource Management Act 1991*. Report prepared by Boffa Miskell Limited for Ministry for the Environment. Wellington: Ministry for the Environment. Plan details updated to 2020. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/RMA/Combined_Plan_Study_Report_Final_20140627%20%283%29.pdf (15 June 2020).

267 Marlborough District Council recently released decisions for the Marlborough Environment Plan, a combined RPS, regional plan, regional coastal plan and district plan for the entire district.

268 Tasman District Council is developing the 'Tasman Environment Plan', which is bringing together the RPS and the existing combined plan.

269 Nelson City Council is preparing this year to release the draft 'Whakamahere Whakatū Nelson Plan', which is a combined RPS, regional plan and regional air quality plan.

270 In 2017 Gisborne District Council amalgamated its combined regional and district plan with two other regional plans, the regional coastal plan and the RPS. This amalgamation is being formalised through Plan Change 1.

271 Sections 68(2) and 76(2), RMA.

appeal. These various processes are central to the way plans and policies are prepared and changed under the RMA.

16. Anyone can request changes to a regional or district plan,[272] but not to a RPS where only changes instigated by the Minister, the regional council or territorial authorities within the region are permitted.[273] Private plan changes are the most common method for accommodating these requests, though councils can also choose to adopt the proposals of a private plan change as their own. These kinds of changes can be useful when they address an aspect of the plan that has not kept up with the higher order issues addressed by the plan. However, they can also be disruptive to the land use and environmental outcomes in the plan, particularly when it is newly operative.

Issues identified

17. The Panel's issues and options paper identified problems with the RMA's current policy and planning framework, listed below. We based our initial assessment on a number of relevant reports commenting on this issue:[274]

    - the system has not provided sufficient protection to the natural environment against inappropriate resource use and development
    - the plans produced by councils are often of poor quality
    - plans are often not well integrated
    - the effects-based approach has not worked
    - planning processes are slow, litigious and unresponsive.

18. These problems relate to several parts of the resource management system, linking problems with the policy framework to issues with a lack of strategic direction, resource consenting and system monitoring.

19. The responses we received on the issues and options paper show broad consensus on these issues, which we have grouped into three to address in this chapter:

    - **inefficiency of the plan-making process:** including lack of coordination between planning agencies on shared issues, potential for disruptive, ad hoc planning, and an overall slow, litigious and unresponsive process

272 Sections 65(4) and 73 (2), RMA.

273 Section 60(2), RMA.

274 Sources having particular influence included Ministry for the Environment. 2013. *Improving Our Resource Management System: A Discussion Document*. Wellington: Ministry for the Environment; New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission; OECD. 2017. *Environmental Performance Reviews: New Zealand 2017*. Paris: OECD Publishing; EDS. 2018. *Reform of the Resource Management System: The Next Generation: Synthesis Report*. Auckland: Environmental Defence Society.

- **complexity and ineffectiveness of plans:** particularly their lack of vertical integration, tendency to get more complex and fragmented over time, poor system stewardship, and lack of data to support good decisions in plan review
- **tensions in the system go unresolved:** creating too much reliance on consenting processes and the Environment Court to set precedents.

Inefficiency of the plan-making process

Lack of coordination on shared issues

20. Many of the big problems faced in New Zealand have national, regional and local dimensions. The declining quality of freshwater, for example, is a national issue that affects our environment, quality of life, cultural wellbeing and livelihoods. Standards for freshwater are set nationally to reflect this. Freshwater is managed by regional councils under regional plans that give effect to national standards. Regional councils process consents related to water allocation and discharges into land and water. Local land use is managed by district councils. This includes the approval of uses or practices that can degrade the quality and availability of freshwater through increased runoff of polluted stormwater, erosion of soils, increased water use, and cumulative discharges that are not individually regulated. Freshwater catchments and the lakes and rivers they flow into are divided between districts and sometimes between regions as well.

21. The proliferation of Te Tiriti settlements legislating for co-managed cross-jurisdictional partnerships on freshwater taonga suggests that freshwater management through the RMA has not achieved good outcomes for mana whenua. In its submission to our issues and options paper, Te Rūnanga o Ngāti Ruanui Trust noted:

> Māori have been marginalised by the current systems and approach by Local Government even when participation is entered into. Joint decision making roles are the only way a partnership approach required by the Treaty can work.

22. It is useful to see this issue through the perspective of Māori because their rohe often cross territorial authorities and multiple plans. They seek an integrated approach, *ki uta ki tai*, from the mountains to the sea. Yet what they encounter is a poorly coordinated response and difficulties holding polluters to account.[275]

23. Housing is another well-known issue that affects us nationally but is managed regionally and locally. National interventions such as special housing areas, the National Policy Statement on Urban Development Capacity, and Kāinga Ora–Homes and Communities legislation have been required in high-growth regions to provide greater development capacity. Some local authorities have responded through increased coordination on growth corridors and planning for greater intensification, but this is still not an integrated approach.

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[275] Te Puni Kōkiri. 2013. *He Tiro Whānui e pā ana ki e Tiaki Taiao 2012: 2012 Kaitiaki Survey Report*. Wellington: Te Puni Kōkiri. Te Puni Kōkiri He Tiro Whānui e pā ana ki e Tiaki Taiao 2012 – 2012 Kaitiaki Survey Report.

Disruptive, ad hoc planning

24. Because plan-making is slow and plans cannot anticipate everything there will always be a role for plan changes. There are many beneficial reasons for carrying out a plan change. Fixing errors in the plan, staying responsive to changes in the environment, identifying additional natural and physical resources worth protecting, giving effect to spatial planning, and responding to national direction are some. These seek to keep a plan true to its own strategic vision and the purpose of the Act.

25. Private plan changes can be developed for these beneficial reasons, especially when a plan has not been substantially reviewed for a long time. However, sometimes private plan change proposals seek new development that is out of sequence, far from supporting infrastructure, or is at odds with other outcomes sought in the plan. A private plan change may start out as a resource consent that appears destined to be declined under the plan as it is, and seeks to gain approval by becoming part of the plan.

Slow, litigious and unresponsive process

26. Council plan-making is often criticised for being slow, prone to litigation and unresponsive to changes in technology, community values and economic drivers. This also affects plan quality. The Organisation for Economic Co-operation and Development states it can take up to eight years to prepare and complete a land use plan and up to four years to change one.[276] Trends from the National Monitoring System over the past five years show that while most plan changes are completed well within the two-year statutory time limit, a few take far longer. These lengthier plan change processes are attributed to the complexity associated with particular topics, including genetically modified organisms, zoning, freshwater, subdivision, heritage, utilities, biodiversity and traffic.

Council plan-making is often criticised for being slow, prone to litigation and unresponsive to changes in technology, community values and economic drivers.

Complexity and ineffectiveness of plans

Lack of vertical integration

27. The hierarchy in the policy framework is intended to flow from the regional to the local, the high level to the specific, and from strategic to regulatory in nature. Issues articulate what is happening and prompt the need for intervention. Objectives set the high-level outcome to be achieved by policy intervention. Policies provide the legal framework for the interventions needed and the rules are themselves the interventions. From there the framework identifies how to know whether the intervention is working, by specifying environmental results and establishing a monitoring regime.

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[276] OECD. 2017. *Environmental Performance Reviews: New Zealand 2017*. Paris: OECD Publishing; p 46.

28. However, in practice, plan development does not necessarily end up this way. Political intervention may introduce policies resulting in an outcome never sought in the objectives or which sometimes do not address the issue. Rules that once cascaded from higher order policies but have since been revised may be carried forward as 'tried and true' in a plan review.

29. Councils can be resistant to changing other parts of a policy framework for the purposes of vertical integration as it introduces the risk of relitigating settled matters and 'losing ground' on contentious local issues. Conversely, councils may address an important but difficult issue in their plan by creating objectives and policies that are not followed through with rules, or are actively stymied by rules preventing the policies from being carried out.

30. A related criticism is that plan-making has a poor focus, which has been attributed to the limited, and often end-of-process, application of section 32 assessments of policies and plans. Judge Hassan of the Environment Court proposes section 32 should be used more purposefully within policy- and plan-making as well as ensuring a greater focus on the strategic direction expected of policies and plans.[277]

Greater complexity and fragmentation over time

31. Plan reviews rarely result in the complete revision of an operative plan. Even the Auckland Unitary Plan, an entirely new document, contains text inherited from the operative district plans preceding it. This is not an issue if the old and new are well integrated, logically consistent, and achieve the vertical integration described earlier. But incentives exist to retain rules that 'work' and text that everyone considers settled, adding any new policy as a 'bolt on' that must work around fragments being retained.

Plan reviews rarely result in the complete revision of an operative plan.

32. Another source of complexity and fragmentation is agreements between council and land owners that carve out special provisions just for their land. Better system stewardship by ongoing monitoring of plan development and implementation could be beneficial in ensuring policies are given effect and that policy intent comes through implementation. Fewer plans would make this easier to achieve.

33. One aspect of the Town and Country Planning Act 1977 was the highly directive nature of its purpose and the level of control retained by central government over planning. All regional planning schemes were required to be approved by the then Minister of Works and Development, who could direct amendments to the plan. However, along with that

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277 Hassan J. 2017. RLA17: *A new planning paradigm?* Paper presented at New Zealand Planning Institute Canterbury/Westland branch, 31 August. Retrieved from https://environmentcourt.govt.nz/decisions-publications/speeches-papers (15 June 2020).

came the obligation of all parties, including central government, to adhere to the provisions of the scheme.[278]

Lack of data used in plan review

34. Section 35 of the RMA requires, among other things, every local authority to monitor the state of the environment in its region or district, as well as the efficiency and effectiveness of the policies, rules and other methods in its plan. They must also take appropriate action on this data "where this is shown to be necessary".[279]

35. The provisions of section 35 are not always followed by most local authorities, at least not to the extent that would create a link between the data it has a duty to collect and critical evaluation of the efficiency and effectiveness of plans. This problem is explored more in chapter 12 however it is worth emphasising the connection between good data and quality plans.

Tensions in the system go unresolved

36. A critical problem with plans is the failure to resolve the tensions within them between important resource management issues. Tension is created to some degree in the purpose of the RMA, including the requirement for sustainable management. This tension has been elevated in recent years with the introduction of national direction requiring greater planning for urban development capacity alongside other national direction for greater environmental protection, continued provision for matters of national importance under section 6, and existing rules in plans managing effects on neighbours and local amenity.

A critical problem with plans is the failure to resolve the tensions within them between important resource management issues.

37. Although greater intensification of the urban environment can take pressure off resources in the rural and natural environments, these environments are not completely separate places. Plans have a more important role than ever to address these tensions in a way that fits within their local context and reflects community values.

38. The consequence of not addressing these tensions is that rules in plans fail to express any resolve, leaving resource consents to assess adverse effects under multiple conflicting objectives and policies without expressing what an acceptable balance would involve. Consent planners are left having to make 'apples and oranges' comparisons of different effects to reach a decision.

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278 Randerson T. 2019. Environmental justice: The wheel turns full circle. In: S Mount, M Harris (eds) *The Promise of Law: Essays Marking the Retirement of Dame Sian Elias as Chief Justice of New Zealand*. Auckland: LexisNexis; pp 179,185.

279 Section 35(2), RMA.

39. The balance is shaped instead by successive resource consent cases and resort to decisions from the Environment Court. Good decisions can come of these processes, and plans cannot anticipate every difficult resource management decision. However, plans should as much as possible seek to resolve their own internal tensions and reduce pressure on downstream decision-making.

Options considered

40. Our issues and options paper included the following options to improve the resource management policy framework:

- require regional spatial strategies with effect across the RMA, LGA and LTMA
- require combined plans for a region
- reconsider the functions of regional and district councils under the RMA and the effect they have on the content of plans
- provide for an 'outcomes-based' approach to the content of plans
- provide for a more flexible plan-making process (greater ability to choose steps and timeframes) so that minor plan changes can be progressed using a streamlined process
- adopt a 'single stage' plan-making process or retain the Schedule 1 process with or without modification
- if a 'single stage' process is developed, require:
  - the decision-making body to reach a final decision, or the decision-making body to make recommendations to the initiating council
  - plan changes to be determined by the Environment Court, with appeal rights limited to questions of law only to the High Court, or plan changes to be determined by an independent hearing panel, with appeal rights limited to questions of law, either to the Environment Court or to the High Court
  - further rights of appeal to the Court of Appeal and Supreme Court with leave or special leave of the appellate court
- if an Independent Hearing Panel (IHP) model is used, require:
  - the members to be appointed by the Minister for the Environment
  - the members to be appointed jointly by central and local government, with iwi participation
- require draft plans to be approved by a Minister or central government authority prior to notification, and/or prior to finalisation
- give greater status to iwi management plans in Part 5 of the RMA
- establish a central mechanism to provide assistance to councils with plan-making
- expand or restrict the ability to apply for a private plan change.

Discussion

41. We received some useful comments on these options from submitters. Specific feedback is included in the following discussion of the preferred approach. General comments were as follows:

    - submitters agreed the plan-making process can be lengthy and costly for everyone involved. Several submitters supported the concept of combined plans and agreed more are needed. Many submitters were open to a single-stage planning process (or a different process in some form) and a simplified process for minor plan changes.
    - Iwi and hapū submitters frequently called for co-governance in plan-making, and supported greater status for iwi management plans. Most submitters highlighted the importance of early consultation in the plan-making process.
    - submitters appeared open to national level oversight at the planning level but many did not agree with draft plans being approved by a Minister or central government agency.

Functions of regional councils and territorial authorities

42. Sections 30 and 31 of the RMA set out the respective functions for regional councils and territorial authorities.

43. Both regional councils and territorial authorities have responsibility for integrated management, but over different matters. The function of a regional council is to achieve "integrated management of natural and physical resources of the region". A territorial authority is to achieve "integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district". To achieve these functions, both regional and territorial authorities are required to establish, implement and review objectives, policies and methods – essentially to produce a statutory plan.

44. Overall, regional council functions relate to natural resources or the natural environment – air, land, freshwater and the coastal marine area. This differs from territorial authorities where the focus is on the use, development or protection of land including subdivision. Regional functions are extensively listed and include resource allocation, whereas territorial functions are more generally reflected in the term 'land use and subdivision'.

45. Several functions are listed for both regional councils and territorial authorities but include subtle differences that create a lack of certainty regarding primary responsibility or where the split between regional and territorial occurs. These double-up functions include:

    - development capacity
    - natural hazards
    - contaminated land
    - indigenous biodiversity
    - noise
    - surface water.

46. The reasons for sharing of functions were dependent in part on which council had the expertise or historical knowledge. Part 3 of the RMA[280] establishes restrictions of resource use and directs where the responsibilities lie, consistent with the functions in sections 30 and 31. The RMA anticipated that where there was overlap, RPSs would specify where management responsibility should lie for natural hazards and indigenous biological diversity.

Current issues with local government functions

47. Different roles and responsibilities not clearly articulated can create tensions in resolving resource management issues and achieving integrated outcomes. The two most common sources of tensions are:

    - dual consents from regional and district councils for similar activities (for example, earthworks) creating extra costs
    - conflicting regional and district policies.

48. Ambiguity also exists about responsibility for several of the existing Part 2 matters such as outstanding natural features and landscapes. This is because management of these resources is not explicitly reflected in the functions of regional councils or territorial authorities. Therefore these resources tend to be determined differently across the country and may be addressed by either or both councils.

49. Currently the only function identified in sections 30 and 31 that relates to climate change mitigation or adaptation is the responsibility to respond to natural hazards. Other provisions of the RMA relating to climate change place significant constraints on the ability of councils to deal with this problem, as we discuss in chapter 6.

50. The RMA enables land use controls at both a regional and district level.[281] Section 30 enables regional councils to control the use of land for the purpose of managing natural resource issues. For example, earthworks or land disturbance are often managed by both regional councils and territorial authorities. Control of land for the purpose of managing water quality leads regional councils to manage earthworks to mitigate the effects of sediment on water quality, often with a focus on areas of bulk earthworks rather than small-scale earthworks. Territorial authorities often require resource consents to address the impact of earthworks on amenity and landscapes, and to control nuisance effects like noise and dust, and traffic movements from off-site disposal. The split between responsibilities is not always clear and both regional and district consents are often required for a large project.

51. Flooding is another matter where both regional councils and territorial authorities are able to include rules that address the effects of surface water (flooding) on other properties.[282] This has been an issue recently, where regional rules that allow for the extinguishing of existing use rights are being used in preference to district-level controls where a managed retreat is considered necessary.

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280 Sections 9–16, RMA.

281 Section 9, RMA.

282 Sections 68 and 76, RMA.

52. Another issue is contaminated land. Currently, regional councils are required to investigate issues for the purpose of identifying and monitoring, but territorial authorities are responsible for management of land use to prevent or mitigate adverse effects. Regional councils monitor old contaminated land sites such as landfills. The national environmental standard for managing contaminated land currently focuses on health and safety rather than environmental impacts.

53. Many submitters voiced concern over the continuing ambiguity about the responsibilities of regional, district and city councils and suggested a new planning framework could eliminate some of this.

Many submitters voiced concern over the continuing ambiguity about the responsibilities of regional, district and city councils and suggested a new planning framework could eliminate some of this.

Options considered

Option one: functions determined by combined plans

54. The first option we considered is plan-led allocation of functions. Here the primary responsibility for most functions would be assigned to the regional council, with a requirement for further allocation of functions to be determined through the RPS. This approach would ensure no functions fall through the gaps because regional councils would remain responsible for them until determined otherwise.

55. Although this approach would enable functions to be allocated based on the scale and expertise of local government, it would introduce too much variability between plans and their implementation. Potential confusion might be created for stakeholders that operate across multiple regions due to the inconsistencies across the country, making it harder to realise the wider benefits of the reformed system.

Option two: split the functions between the natural and built environments

56. One way of splitting functions to avoid duplication is by identifying regional councils as having primary responsibility for all elements of the natural environment and district councils as having primary responsibility for all elements of the urban environment.[283] The exception to this rule would be infrastructure where both levels of local government would need to have responsibilities to ensure integration with land use planning.

57. The suggestion is that a sharper delineation between the built and natural environments and between local government functions, along with clearer objectives (outcomes) would promote greater resilience within the system as well as better environmental and economic outcomes.

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283 This approach is proposed by Williams M. 2018. Resource management system – reform or transform? *Resource Management Journal* May: 3–10.

58. An important issue with splitting responsibility between natural and urban is how the rural environment would fit. This is identified in our proposed purpose and principles in the Natural and Built Environments Act, where the rural environment, and the role it plays, would be explicitly recognised as would the opportunities that rural areas provide for future urban capacity. In addition, issues or resources such as heritage, climate change and Māori cultural values all occur throughout the natural, rural and urban environments. Splitting their management would be problematic.

59. A natural/urban environment split of responsibilities may set in place tensions that are not easily resolved during plan preparation and implementation unless there is a combined plan. Expansion of an urban area into an area of environmental value may be seen to be efficient from a transport and infrastructure point of view, yet conflict with environmental values. If responsibilities were split, then there is the potential for a 'yes' from one consent authority and a 'no' from the other unless the outcomes are at a regional level. As we concluded in chapter 1, the built and natural environments are inherently interconnected, and should be approached through integrated decision-making. Option two clearly does not support this approach.

Option three: rationalisation of roles

60. The third, and preferred, option considered by the Panel, is rationalising the roles to minimise duplication and overlapping functions. This option also seeks to provide greater clarity about the division between policy setting and implementation responsibilities.

61. The starting point for considering how functions are allocated is to consider the delivery of the outcomes specified in our proposed purpose and principles and the appropriate division of roles between policy setting and implementation.

Principles for allocating functions

62. The following principles were considered to help determine the allocation of functions.

- **Significance and scale:** where an outcome identified in our proposed purpose and principles of the Natural and Built Environments Act (or other regionally significant issue affecting the environment) needs to be addressed at a regional level, or the scale is such that it has a regional impact, this should be a regional function.
- **Integration and coordination:** where achieving an outcome or target or complying with an environmental limit requires regional direction to achieve a consistent approach across a region, where an environmental issue crosses a regional boundary, or where one system may impact on another such as water catchment and the coastal marine area, this should be a regional function.
- **Regional resources and allocation:** where public resources exist at a wider or catchment-based level and require approvals for allocation, including for competing users, then these should be addressed by regional councils such as for air and water resources.
- **Capacity and capability:** where capacity and capability are located across the local authorities may guide a decision on allocating function but will not be determinative.

- **Implementation:** the extent to which a responsibility needs to be allocated in a way that ensures the outcomes and targets will be implemented so that policy does not lose touch with implementation.
- **Built environment:** where resources are related specifically to the built or urban environments and outcomes are controlled by land use and subdivision, this should be a district function.
- **Local impacts:** where an outcome is localised control should be achieved at the district council level.

Recommended approach to functions

63. In a broad sense all local authorities are to perform their functions in a way that gives effect to our proposed purpose and principles in the Natural and Built Environments Act. All councils will have to give effect to national directions, environmental limits and binding targets.

64. Some functions will be purely policy setting while others will have control functions requiring the making of rules. In general we propose a similar division of control functions to the allocation currently under the RMA. There is good reason for regional councils to continue dealing with domains such as water and air since these transcend district boundaries and regional councils have developed considerable expertise in these fields. Territorial authorities are better equipped in the preparation of detailed land use provisions.

65. Applying the principles we have developed for the allocation of functions, some control functions will be exclusively the responsibility of regional councils and others exclusively within the functions of territorial authorities. Functions exercised by territorial authorities will have to give effect to the RPS and any relevant regional outcomes, targets, policies or rules.

Both levels of local government should continue to be involved in issues, such as climate change and development capacity.

66. It is inevitable that some functions will need to be shared because both levels of local government should continue to be involved in issues, such as climate change and development capacity. Our proposal for combined plans described in this chapter and the provision of an 'open portal' for resource consents described in the next chapter will support these shared functions and reduce the potential for conflict.

67. Although some of the finer detail should be the subject of further consultation we would see the broad division of the main responsibilities as follows.

Regional councils

- setting policies on matters of regional significance to achieve the purpose of the Act and to promote integrated management
- identifying the regionally significant matters included in section 7(b)(i), (ii) and (iii)

- setting policies for, and the control of, water, air, the coastal marine area and flood protection
- setting policies for the maintenance of indigenous biological diversity and restoration of viable populations of indigenous species, and supporting territorial authorities in respect of land use controls to implement these policies.

Territorial authorities

- setting policies on matters of district significance to achieve the purpose of the Act and to promote integrated management
- setting policies for, and the control of, land use (in urban and rural areas), subdivision, noise, contaminated land, hazardous substances, and heritage.

Joint responsibilities of regional councils and territorial authorities

- setting policies for measures to address natural hazards and climate change, urban growth capacity (including integration of infrastructure with land use), soil conservation, the natural environment outcomes and tikanga Māori outcomes identified in proposed section 7
- control of these matters as they apply to land use is by territorial authorities.

Combined plans

68. We have developed a new approach to plan-making that will help address the problems identified and reinforce other parts of the new resource management system. This approach follows on from joint spatial planning for each region described in chapter 4, and feeds directly into better consenting processes and outcomes recommended in chapter 8. Plan contents are influenced by the national direction recommended in chapter 6, including national planning standards.

Features of the preferred approach

- Each region should be required to have a combined plan that includes the regional policy statement, regional plans (including a regional coastal plan) and district plans.
- These combined plans will be prepared and notified by a joint committee, with membership from the constituent local authorities, mana whenua and a representative of the Minister of Conservation.
- The joint committee will have authority to act on behalf of their constituent agencies with no need for further approval or ratification of plan contents.
- The constituent councils and mana whenua would be entitled to make submissions on the plan once it is notified.
- An independent hearing panel would be set up to conduct a hearing and make recommendations to the joint committee.
- The joint committee would have authority to accept or reject recommendations of the independent hearing panel without seeking further approval from their constituents.

Features of the preferred approach

- For recommendations accepted, appeal rights to the High Court would be limited to points of law.
- For recommendations rejected, the joint committee's decision would be open to merits appeals by submitters to the Environment Court.
- This approach would be used for plan changes as well, with some variation to account for the nature, scale and complexity of the plan change.

69. The thrust of our reform proposals was supported by the Resource Management Law Association:

> The RMLA generally supports a single stage plan making process with restricted appeal rights, such as that used for preparation of the Auckland Unitary Plan and Christchurch Replacement District Plan. That is, Independent Hearings Panels (IHP) being established to facilitate plan making, with merits appeals to the Environment Court only where the Council rejects the IHP's recommendation. This should replace the current Schedule 1 process (i.e. there should only be the one plan making process, rather than three as there are currently), while retaining the ability to apply for private plan changes.

Main benefits of this approach

70. The most compelling benefit of jointly developed combined plans is the reduction of resource management plans from over 100 to just 14, one for each planning region in New Zealand.[284] This change alone will greatly simplify coordinated planning within a region and create efficiencies. It will also increase the capacity of central government to provide better system stewardship because there are fewer plans to monitor. The Environment Court can likewise build its expertise in regions through its judges and commissioners assigned to IHPs and appeals.

The most compelling benefit of jointly developed combined plans is the reduction of resource management plans from over 100 to just 14.

71. Another important benefit is the greater efficiency in hearing processes resulting from the removal of the initial local authority hearing and providing instead for IHPs and a more limited appeal process. We envisage this will take less time than the current process of hearings and appeals, meaning more of these plans will be operative sooner. IHPs should develop methods for ensuring the process retains a high level of rigour, inclusiveness and accessibility for all parties who participate. We expect the expertise provided by IHPs and a robust process prior to notification will produce better quality plans. As a result, fewer appeals are expected to reduce cost and delay without a significant reduction of access to justice.

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284 This approach considers Te Tau Ihu, the area containing Marlborough, Tasman and Nelson district councils, to be one region for the purposes of plan-making. We note there are 6 unitary authorities having responsibility for the preparation of unitary plans, including Marlborough, Tasman and Nelson.

72. Lastly, combined plans will require regional councils and territorial authorities to work together, in partnership with mana whenua, to resolve resource management issues across the region and develop an integrated approach to issues that cross jurisdictional boundaries. This is the kind of integrated management needed to respond to local context and deliver on broader mandates for the environment.

Combined plans will require regional councils and territorial authorities to work together, in partnership with mana whenua.

Governance models for preparation of combined plans – options considered

73. In developing this approach, we considered two options for the joint committee developing, notifying and ultimately deciding on IHP recommendations for the new combined plans. Most of the key features of the approach are the same, but the defining difference is the level of autonomy the joint committee has to make decisions about the form and content of the plan. The two options within the overall approach are:

    - a **fully autonomous joint committee** which decides all matters related to the making of the combined plan and any later changes to it
    - a **LGA type joint committee**, where members remain beholden to their constituent councils.

74. We have considered the two options in light of the problems we identified in the current system, as well as other key differences such as which is better for community buy-in. Table 8.2 includes the results of this consideration.

75. We have concluded that a fully autonomous joint committee is essential to address the problems the current system has and to achieve the benefits we see for our overall approach. The disadvantages of the system, namely the loss of autonomy and potentially lower commitment to local implementation can be mitigated to a satisfactory degree in the approach we are taking. Councils will lose the ability to approve their local plans, but this will be offset by their continued role in the spatial planning process we have discussed in chapter 4 and in the IHP process, through submissions and appeals. Of course we expect councils will work very closely with their delegates on the joint committee to ensure their point of view is advanced.

We have concluded that a fully autonomous joint committee is essential.

76. The fundamental risk in using LGA-type committees is that a single council could reject the combined plan and defeat the purpose of the combined planning process.

Table 8.2: Side-by-side comparison of the two governance options

	Fully autonomous joint committee	LGA type joint committee
Effectiveness	More effective – the committee has well-defined powers and duties which enable it to direct effort and resources as and where required	Less effective – the committee relies on constituent bodies to define its powers and duties
Efficiency	More efficient – the committee has the ability to make decisions on its own, limiting consensus building to internal disagreements; politics are less likely to influence decisions, leading to greater acceptance of IHP recommendations, making more of the plan operative sooner	Less efficient – disputes from outside the committee have greater opportunity to stymie progress, and the ability of any one council to refuse to approve the combined plan would effectively defeat its entire purpose; politicised decision-making at the end could result in more rejected recommendations and appeals
Collaboration	About equal – both options are committees, which necessarily confines the number of decision-makers, but can be collaborative at the plan-making stage through engagement with the public and stakeholders	
Local autonomy	Less local autonomy – councils will not have ultimate decision-making powers, but can influence the IHP through submissions and appeals and spatial strategies	More local autonomy – councils keep ultimate decision-making
Commitment to implementation	Potentially less commitment – local councils and some of their constituents may not buy into the model	Potentially more commitment – councils and their constituents will implement what they consider is their creation
Resolving tensions and integrating outcomes	Most potential – a strong autonomous committee can better build consensus and make hard choices	Least potential – less commitment to having hard conversations, as councils will ultimately decide for themselves
Quality of resulting plan	Better quality – the committee can focus more on the horizontal and vertical integration of the plan	Variable quality – still better than status quo, but more potential for fragmented policies and unsupported rules to stay in the plan

Constitution of joint committee

77. We believe it is important that any combined planning process is led by a joint planning committee which is closely representative of the region's constituents and has a strong mandate. Joint planning committees are not joint committees under the LGA; they will be established for the purpose of preparing, changing and administering combined plans under the Natural and Built Environments Act.

78. We recommend joint planning committees include a representative of the Minister of Conservation and appointees from:

    - the regional council
    - constituent territorial authorities
    - mana whenua within the region.

79. The Minister of Conservation is represented on the committee due to his or her role in managing resources in the coastal marine area and approving regional coastal plans. We considered including a representative of the Minister for the Environment, but concluded that other responsibilities of the Minister (including resolving disputes within joint committees and ministry audit of plans) created a conflict for committee membership.

Joint planning committees include a representative of the Minister of Conservation and appointees from:

- *the regional council*
- *constituent territorial authorities*
- *mana whenua within the region.*

80. For unitary councils, the composition of joint planning committees will vary from this slightly, as regional and territorial council functions are already combined. However, Department of Conservation and mana whenua inclusion is still required. Appendix 5 shows the regions and combination of regions we suggest for the purpose of creating combined plans. We recommend the Nelson, Tasman and Marlborough unitary authorities jointly produce a combined plan for their regions.

81. We are aware that, for some regions, having a representative from every iwi or hapū with mana whenua in the region will mean committees are simply too large to function. The representatives on a joint committee cannot be so numerous that the committee is impeded in carrying out its task. We recognise this will sometimes mean delegates will have to represent the interests and perspective of more than one group.

82. To recognise these committees are not always fully representative of every iwi and hapū in the region, we consider it is important to use consensus-based decision-making as much as possible, so voting rights are not at stake. We envisage this as the same approach taken for the regional joint committees for spatial strategies, as described in chapter 4 and summarised below.

83. Each constituent group will continue to be entitled to make submissions on the notified plan and be heard by the IHP on points where they do not agree or request amendments to the approach taken by the joint committee. They will also continue to have standing for appeal, within the limits of the overall approach.

84. We note that local authorities have a dual role as regulator and infrastructure provider. Because the combined plan is a regulatory plan it is important that these different roles are clearly articulated. As infrastructure provider a local authority, council controlled organisation, or central government agency should be able to submit and provide information or evidence. It may be appropriate at the start of a combined plan process that local authorities specify how their role as asset manager (including through council-controlled organisations) will be separated from their role as regulator (and constituent of the joint committee).

Resourcing joint planning committees

85. Each committee will need a secretariat for administration, plan drafting, policy analysis, coordination of public engagement and commissioning expert advice. Funding for this secretariat would need to be agreed between the constituent councils. Setting the budget each year would depend on the scope of work anticipated for the committee, whether it is the initial combined plan process, subsequent plan changes, or effectiveness monitoring for future plan review. Mana whenua will need to be resourced to enable them to participate effectively.

Dispute resolution

86. During the formation of the committee and the plan development process, the committee may encounter contentious issues that it cannot progress using its regular consensus approach. We propose a dispute resolution process that can be used for disputes over funding, representation, processes to be adopted by the committee, the form and contents of the plan for notification, and the decision to accept or reject IHP recommendations. This is envisaged to be by facilitated mediation but if this does not resolve the issue, then the Minister ultimately decides.

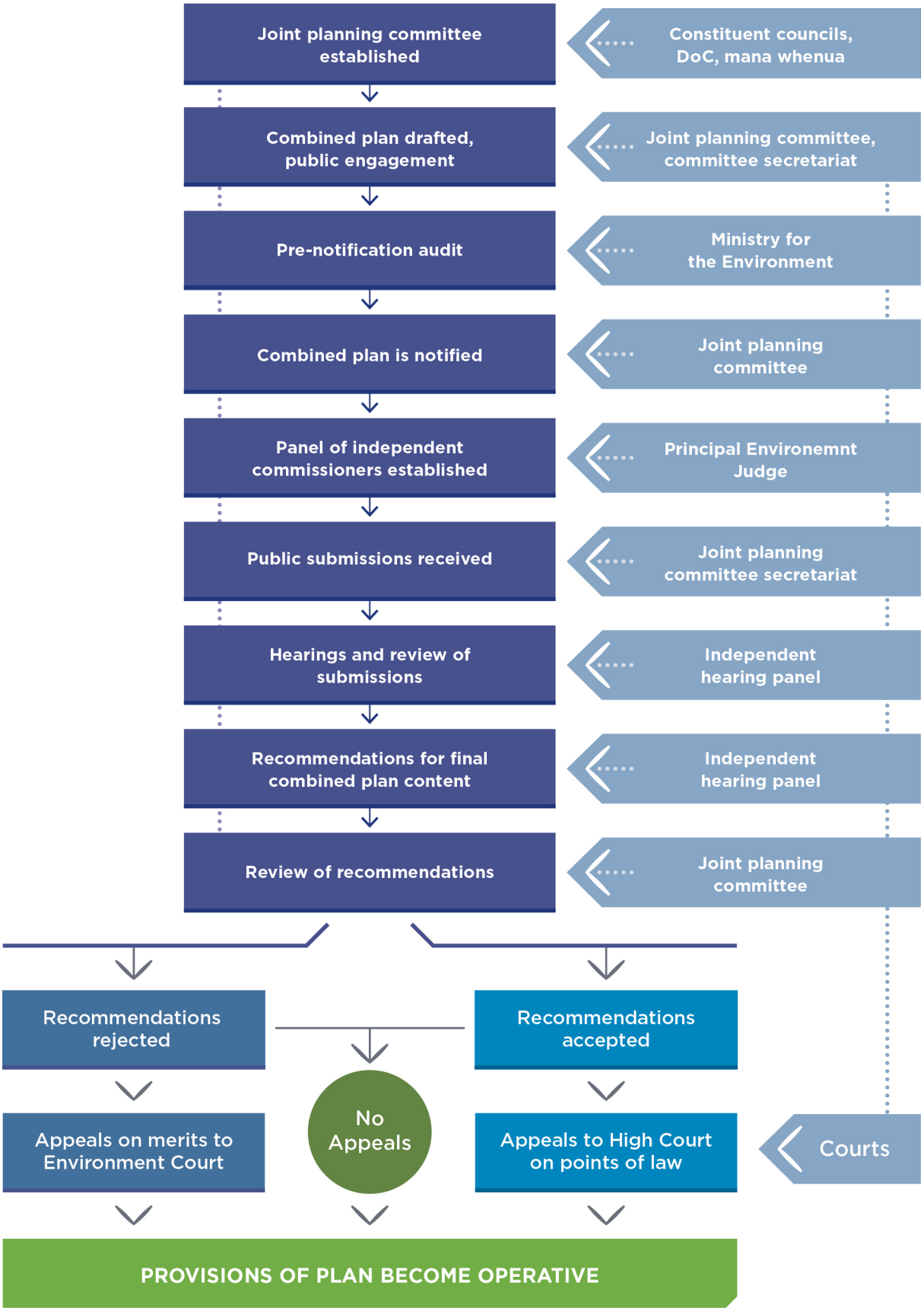
Process for preparation of combined plans

87. The process for combined plan preparation would be contained in a schedule of the Natural and Built Environments Act with greater detail than we recommend here. It is based largely on the Auckland Unitary Plan process.

88. Figure 8.1 below shows a visual representation of this approach. It includes the following steps:

    - joint planning committee drafts the proposed plan, drawing from extensive community and stakeholder engagement
    - Ministry for the Environment facilitates an audit of the proposed plan prior to notification
    - joint planning committee notifies the proposed plan for submissions
    - hearings are held by an IHP, which includes pre-hearing mediation and expert conferencing
    - IHP releases recommendations, which are approved or rejected by the joint planning committee
    - rejected recommendations are open to appeal to the Environment Court on their merits, while accepted recommendations are open to appeal to the High Court on matters of law
    - the provisions in the combined plan not subject to an appeal become operative.

Figure 8.1: Proposed process for creating combined plans



Influence of the Auckland Unitary Plan model

89. Our approach is based on the experience of and lessons learned from the Auckland Unitary Plan process. This amalgamated eight district plans with the combined regional plan, regional coastal plan and regional policy statement. It integrated district plan objectives, policies and rules over an entire region. Its early drafting happened concurrently with the development of the first 30-year spatial plan for Auckland and it was heard by an IHP with limited appeal rights as we propose. We have concluded this process provides a good upper limit for scale and complexity, given it occurred in our most populous region and was the first time employing the entire approach in the sequence we consider ideal.

Components of the plan-making process

Joint planning committee prepares the plan

90. The joint planning committee commissions its secretariat to develop a discussion document for the new combined plan, drawing from:

    - national direction
    - the purpose and principles of the Act
    - outcomes established by the regional spatial strategy
    - existing policy effectiveness and state of the environment data for the region and districts, and additional data and analysis commissioned as needed
    - mana whenua planning documents and 'scene-setting' hui.

91. Once approved for release, the discussion document becomes the subject of widespread engagement with the public and stakeholders. It is not a draft of the plan, but explains what it needs to contain, the issues and outcomes it will address, and highlights where tensions will need to be resolved.

92. Engagement should be done in a way that is inclusive, respectful of different perspectives and contexts, and results in clear feedback from members of the community on their preferences.

93. We considered the release of a draft plan for public comment, as was done in Auckland prior to the Auckland Unitary Plan. There are issues with this approach, including the risk of confusing members of the public, who may think they are making submissions on the actual plan. Our preference is to use something that does not look like a plan and lends itself to targeted discussions and community debate across the region.

94. The results of engagement on the discussion document provide the joint committee with the information needed to draft a plan that is responsive to local communities. The secretariat produces a proposed combined plan for the joint committee's approval.

Ministry for the Environment facilitates an audit

95. The joint committee forwards the proposed plan to the Ministry for the Environment, which commissions an expert reviewer to review the plan. The purpose of the audit is not to exercise approval powers over the plan but to provide an opportunity for system stewardship. The audit could focus on three questions to be addressed only at a broad level.

    - Is the proposed plan aligned with national direction, targets and environmental limits?
    - Is the proposed plan consistent with the outcomes provided by the regional spatial strategy?
    - Is the policy logic of the plan sufficiently robust?

96. While councils supported early central government involvement in plan-making, they were concerned with the option to require ministerial approval of plans. Auckland Council did not support it, and Christchurch City Council saw it as an unnecessary "second merits assessment" that would make the process less efficient.

97. Te Rūnanga o Ngāti Awa saw the value in an audit role for central government:

> Central government agencies must audit district and regional plans. To do so they must be more than ministries – they must be departments – that deliver guidance and advice on the mandatory directions required by the Act, and check and report on whether they have been given effect.

98. The Panel agrees that an audit is an important way to help ensure national direction and guidance is borne out in the form and content of plans. We see this as a middle approach between the current 'manage by exception' approach in the RMA and the direct control exercised by central government under the Town and Country Planning Act 1977.

An audit is an important way to help ensure national direction and guidance is borne out in the form and content of plans. We see this as a middle approach between the current 'manage by exception' approach in the RMA and the direct control exercised by central government under the Town and Country Planning Act 1977.

The joint planning committee notifies the proposed combined plan

99. Notification is a statutory boundary in the development of the plan that shifts the focus from plan development to a formal call for submissions. At this point, parts of the plan will have immediate legal effect, though operative plans will still carry substantial weight in resource consent decisions.

100. We anticipate the details of the phase immediately leading up to and including notification will have similar rules to those currently contained in Schedule 1 of the RMA, including pre-notification consultation with mana whenua, submissions and further submissions. The pre-notification consultation could happen concurrently with the Ministry for the Environment audit.

Appointment of independent hearing panel

101. The Panel envisages the IHP would be chaired by an Environment Judge appointed by the Principal Environment Judge. The Principal Judge would also appoint three to five environment commissioners or other accredited people to serve as IHP members. The joint planning committee could nominate candidates for consideration. At least one appointee should have an understanding of tikanga and mātauranga Māori. Establishing the IHP and the appointment process would be authorised by provisions under the Natural and Built Environments Act.

The Panel envisages the IHP would be chaired by an Environment Judge appointed by the Principal Environment Judge.

102. In our issues and options paper we considered whether IHP commissioners should be appointed by either the Minister or jointly by central and local government and mana whenua. Submissions supported joint appointments over appointments by the Minister. Forest & Bird raised a concern over political appointments more generally:

> We would be comfortable with a single stage process. However we would be concerned if local authorities had the ultimate responsibility. Nor would we want to see decisions on plans being passed to other politicised people (Independent Hearings Panel members can be selected according to their political views). We strongly suggest that the Environment Court should have a central role in any single stage planning process. Appeal rights to the High Court on points of law should be retained.

103. We agree with submitters; political appointment of IHPs is not a desirable approach. The IHP should be free from political interference and embody sound independent legal and technical expertise.

104. It is important for each IHP to have access to technical and professional advice on the plan, which is independent from the advice that prepared a draft combined plan. They will also need administrative staff to manage the details of hearings and liaise with the joint committee and submitters, the public and the media. Each IHP should be supported by its own secretariat, which we suggest should be funded through local government rates.

The IHP should be free from political interference and embody sound independent legal and technical expertise.

105. Over time, Environment Judges and commissioners will be able to build up expertise in conducting IHP processes. As a result their approaches to hearing submitters and developing recommendations will become more effective and rely on lessons from previous IHPs. Rather than hear appeals on aspects of plans, they will understand plans in their entirety, with benefits for future plan changes and resource consent appeals.

Independent hearing panel process

106. IHP hearings will be similar in structure to those of the Environment Court, but with changes to make them less formal for the benefit of lay submitters. Legal representation would not be necessary for anyone who wishes to be heard by the IHP. Parties should be encouraged to provide evidence to support their views beforehand, and some limited cross-examination may be allowed. The desired result is a process that is rigorous but encourages everyone to participate without regard to legal representation or resources. Creative opportunities to improve access to justice such as the use of process advisers should be encouraged as well as informal processes to mediate disputes.

107. The presiding judge would have sole authority to determine all matters relevant to procedure and the processes of the Panel. For reasons discussed in the chapter on consents, it is inappropriate to place time limits on judicial officers serving on IHPs. We are confident the IHP process will be given appropriate priority and that hearings will be conducted efficiently so long as sufficient resources are provided.

IHP hearings will be similar in structure to those of the Environment Court, but with changes to make them less formal for the benefit of lay submitters.

108. The secretariat of the joint committee will remain involved in the IHP process, helping the IHP through advice on their approach to plan drafting and addressing disputes directly with submitters where directed by the presiding judge. Their continued participation will enable them to help the joint committee reconsider their approach in the face of new evidence and ensure the evidence supporting plan revisions remains robust.

109. Recent experiences with IHP processes in Christchurch and Auckland have yielded several lessons already for good practice guidelines for IHP processes.[285] These would be developed by the Environment Court and applied to ensure a uniform approach for IHPs.

110. The IHP's recommendations may be broad and include consequential amendments to preserve the policy structure, but they should not depart from the scope of submissions to the degree that natural justice issues could arise.

Joint planning committee decides on independent hearings panel recommendations

111. On receipt of recommendations from the IHP, the joint planning committee decides whether to accept or reject them, in whole or in part. The dispute resolution procedures described earlier may be used as well to help the committee with contentious decisions.

112. When deciding to reject a recommendation, the committee will have to decide what changes they will make to give effect to their decision. This could be different from the notified plan, provided it is within the scope of submissions and consistent with any amended position the committee took in the course of the hearings.

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285 See, for example, the account of Judges Kirkpatrick and Hassan of IHP's work for the Auckland Unitary Plan and the Christchurch Replacement District Plan. Hassan J, Kirkpatrick D. 2016. Effective lawyering in the new plan-making paradigm. In: *Environmental Law Intensive*. Wellington: New Zealand Law Society. pp 39–49. Retrieved from https://environmentcourt.govt.nz/decisions-publications/speeches-papers/#year-2016 (16 June 2020).

Appeals

113. Our approach follows a similar model to the Proposed Auckland Unitary Plan process set out in legislation.[286] Where the joint planning committee accepts a recommendation of the IHP, then appeals are limited to the High Court on points of law.

114. Where the committee rejects a recommendation, then an appeal on the merits to the Environment Court is available to anyone who has standing to appeal. In both cases, there are further rights of appeal to the Court of Appeal and Supreme Court, but only with the leave of those courts. We do not consider these further rights of appeal would lead to significant delay overall. Any parts of the plan that are not appealed will become operative, and we expect appeals to be few in number, as is currently the case.[287]

Limiting the scope of appeals is justified by the more robust IHP process, which makes broad rights of appeal to the Environment Court less necessary.

115. We have considered whether any difficulty is likely to arise from the Environment Court hearing an appeal from an IHP chaired by an Environment Judge. We are satisfied that procedures can be established within the Court to ensure any perceived conflict of interest is avoided. We have been advised that no difficulty of this kind occurred in respect of appeals in the Auckland Unitary Plan process.

116. In our view limiting the scope of appeals is justified by the more robust IHP process, which makes broad rights of appeal to the Environment Court less necessary. If there is a dispute about how the IHP has interpreted the law in carrying out its duties, then appeal to the High Court on points of law is still available.

Submitter views

117. The Panel's recommendations here respond to feedback from submitters, who supported IHP administered hearings, the streamlined planning approach, and combined plans. Many complained about the length of time it took to compile and complete plans and that delays meant plan-making was cumbersome and unresponsive. No comprehensive proposals were put forward on how plan-making could be speeded up, but most expressed support for some or all of the aspects of this approach. Opposition to an IHP planning process was greatest from industry groups.

118. The idea of an IHP process, with appeal rights being more constrained, was attractive to some submitters, although others warned this may discourage public participation and mean complex issues were not properly considered. Nelson Marlborough District Health Board related an experience from Christchurch:

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286 Sections 156 and 158, Local Government (Auckland Transitional Provisions) Act 2010.

287 Chapter 9 (Consents and approvals) notes the small number of appeals on Environment Court issues that are subsequently appealed to the Court of Appeal and Supreme Court.

> Whilst the use of independent meditators was accessible for lay people, the hearing process was run akin to High Court proceedings which were difficult for lay submitters to navigate. Organisations such as Health Boards and non-profit organisations were directed by the Hearing Panel to have legal representation which brought unnecessary cost barriers to participation.

119. We acknowledge that many submitters who are concerned may not have had an opportunity to see Auckland's unitary planning process unfold. The IHP in that case was especially concerned with public participation and encouraged the Council to meet with submitters to discuss issues directly, to engage in mediation and to focus the views of experts through caucusing.

120. These methods helped to resolve hundreds of submission points on the plan, and many submitters did not even need to attend the hearing to have their concerns addressed. At the hearing, submitters were not required to have a legal representative, but could engage with the Panel members directly.

Purpose and content of combined plans

121. The overall purpose of combined plans is to achieve the purpose of the Act. A combined plan will achieve integrated management by better coordination and alignment of policy, both vertically and horizontally.

122. Combined plans will cover the same range of policy and planning functions as at present. They will include a regional policy statement, a regional coastal plan (where relevant), a regional plan and district plans that include both common content for all territorial authorities as well as specific local content. The structure and layout of the combined plan could follow the structure and format established in the national planning standards, but we consider it is likely the first combined plan would establish a model for others.

Content of a combined plan

123. As part of the integrated nature of this proposed policy and planning framework, some of the content of the combined plan would be determined or guided by higher order documents; national policy statements, NESs, national planning standards (in relation to definitions) and the regional spatial strategy.

The structure and layout of the combined plan could follow the structure and format established in the national planning standards, but we consider it is likely the first combined plan would establish a model for others.

124. The regional policy statement gives effect to these higher-order components of the system, putting them in a regional context. It translates the purpose and principles of the Natural and Built Environments Act and regional spatial planning goals into strategic outcomes that cascade to regional and district plan outcomes, policies, and rules. It is critical that the regional policy statement is developed first, and although the whole plan should be notified at once, it is likely that IHPs will consider the regional policy statement as the first stage in the hearing process to guide later stages of the hearing process.

125. Regional and district plans need to give effect to the regional policy statement, so we expect that changes made within the drafting or IHP processes at that level will require consequential change to regional and district plan provisions.

126. We anticipate that combined plans will include district plans with consistent objectives, policies and methods for the territorial authorities where the issues and outcomes are common. Local variation is expected where land use patterns, resource pressures or ecological values are unique to the area. Local variability might also arise where a community supports higher environmental standards than those set at a national or regional level.

127. The standard content for the combined plan should follow a similar format already provided for in the RMA.[288] However it will need to reflect the proposed emphasis on outcomes, stronger national direction with environmental limits and targets, and the role the regional spatial strategy has in developing long-term strategic direction for land use.

128. Combined plans should also contain information that identifies the mana whenua groups present within the region and which groups local authorities will engage with in particular parts of the region and on what resource management issues those groups will be engaged on. Combined plans should also provide sufficient information to outline how mana whenua will be engaged in consenting processes, consistent with any integrated partnership process arrangements that have been made.

Combined plans will include district plans with consistent objectives, policies and methods for the territorial authorities where the issues and outcomes are common. Local variation is expected where land use patterns, resource pressures or ecological values are unique to the area.

129. In chapter 11 we discuss methods and options to improve the allocation of resources in respect of both built and natural environments. This includes the use of economic instruments either alone or in conjunction with regulation through rules. With our proposed shift to an outcomes approach for the resource management system, we anticipate that use of these methods will be increasingly important. One key example of this is in delivery of competitive land markets to address outcomes for quality built environments, capacity for urban growth and integration of land use and infrastructure.

130. Table 8.3 shows the mandatory content currently specified in the RMA compared with the proposed changes.

[288] Sections 62(1), 67(2) and 75(2), RMA.

Table 8.3: Comparison of current mandatory plan content with proposed content

Mandatory content under RMA for regional policy statement (section 62)	Proposed changes to legislation	Proposed procedural content for a regional policy statement
Significant resource management **issues** for the region Resource management **issues of significance to iwi** authorities in the region **Objectives** sought to be achieved by the statement **Policies** for those issues and objectives and an **explanation** of those policies **Methods (excluding rules)** used, or to be used, to implement the policies **Principal reasons** for adopting the objectives, policies and methods of implementation set out in the statement **Environmental results** anticipated from implementation of those policies and methods The processes to be used to deal with **issues that cross local authority boundaries**, and issues between territorial authorities or between regions The **local authority responsible** for the control of the use of land: (i) to avoid or mitigate natural hazards or any group of hazards; (iii) to maintain indigenous biological diversity The **procedures used to monitor** the efficiency and effectiveness of the policies or methods contained in the statement	Providing for **outcomes** **Targets** (goals or objectives for achieving the outcomes) are prescribed in national direction **Environmental limits** (minimum standards) are prescribed in national direction to achieve the purpose of the Act A requirement to **reconcile and clarify conflicts** between outcomes, limits, targets and national direction Long-term **objectives and strategies** are identified in the regional spatial strategies	The **strategic outcomes** for the region that give effect to Part 2, national direction and are consistent with the regional spatial strategy The **mandatory targets** specified in national direction for achieving the section 7 outcomes A statement of the **issues of significance** that affect the region's ability to achieve the outcomes and targets **Strategic action** required for reconciling conflicts between outcomes The **strategic policies** that specify a course of action for addressing the identified issues to achieve the outcomes **Other methods** outside the combined plan, including economic instruments, to be used in order to implement the policies The **indicators** to be measured to determine the extent to which the outcomes are being achieved
Mandatory content under RMA for regional plans (section 67) and district plans (section 75)	**Proposed changes to legislation**	**Proposed procedural content for regional and district plans**
The **objectives** for the region The **policies** to implement the objectives	**Environmental limits** (minimum standards) are prescribed in national direction to achieve the purpose of the Act	Specific **outcomes** that give effect to the national direction and the regional policy statement

Mandatory content under RMA for regional plans (section 67) and district plans (section 75)	Proposed changes to legislation	Proposed procedural content for regional and district plans
The **rules** (if any) to implement the policies	**Targets** (goals or objectives for achieving the outcomes) are prescribed in national direction A requirement to **reconcile and clarify conflicts** between outcomes, limits, targets and national direction	The **mandatory targets and limits** specified in national direction for achieving the section 7 outcomes Directive **policies** that help the regulatory framework in achieving the outcomes **Other methods** to implement the policies, including economic instruments **Rules** to implement the policies and achieve outcomes

Shifting to outcomes

131. The starting point for preparing a regional policy statement should be the identification of strategic outcomes. These should address the outcomes specified in section 7 of the Natural and Built Environments Act and environmental targets specified in national direction, and be consistent with regional spatial strategies.

132. The move from an effects-based system to an outcomes-focused planning framework is supported by most submitters. Submitters felt an outcomes approach would better frame development and allow communities to engage on what can be achieved in environmental terms. Some submitters felt a focus on outcomes would provide more certainty for development and be better able to deal with cumulative effects. Reservations were expressed at the scale of effort required to modify the effects-based approach and some submitters suggested any new planning framework requires both effects- and outcomes-based approaches.

The starting point for preparing a regional policy statement should be the identification of strategic outcomes.

133. RMA objectives were always intended to focus on environmental outcomes[289] but this did not often happen in practice and instead the tendency was to repeat the provisions in the Act. The Panel proposes that throughout the combined plan 'outcomes' should replace 'objectives' to reinforce the intent of these provisions, particularly to align with the section 7 outcomes, and to change the focus of plans.

[289] Ministry for the Environment. 1994. *Issues, Objectives, Policies, Methods and Results under the Resource Management Act 1991.* Working Paper 1. Wellington: Ministry for the Environment.

134. To achieve the strategic outcomes, problems or issues of significance should be identified. These should include known or anticipated issues, those of significance to iwi, as well as issues that cross regional boundaries.

135. To achieve the purpose of the Natural and Built Environments Act, the regional policy statement should clearly provide the guidance decision-makers need to resolve conflicting policy choices. The Panel considers a specific section be included in the combined plan to ensure this happens.

136. The explanation of the policies and principal reasons for adopting objectives, policies and methods has generally been regarded as a repeat of the section 32 assessment that is required before deciding on a provision. These provisions, therefore, should stay outside the regional policy statement.

137. Generally, 'environmental results anticipated' were not expressed well in regional policy statements. Often these provisions simply restated the objectives, creating an unhelpful tautology. To make a stronger link with monitoring we propose there be strategic indicators included that are measurable and able to be evaluated when assessing whether outcomes are achieved.

138. Policies in plans should be more directive and contain parameters, or clear limits, that define the extent of an effect or activity. These policies should be implemented by rules that clearly link the management of activities to whether they support plan outcomes, and set out clear parameters for consenting issues such as notification. The rationale for each activity status within combined plans is described further in chapter 9.

Plan review

139. At present, plans must be reviewed every 10 years, although this timeframe has already accelerated due to the recent introduction of national planning standards. Submitters such as Heritage New Zealand Pouhere Taonga noted these long planning cycles are harmful to the environment where knowledge about significance and risks is continually improving. Their example was the lag between the time places go on their list[290] and are then subsequently protected by district plan heritage schedules. This also resonates with aspects of the environment that have prompted national direction, such as freshwater quality, air quality and indigenous biodiversity.

140. Our reformed system will require time for the development of legislation, national direction and regional spatial strategies, ideally ahead of combined plans. However, as discussed in chapter 15 the first generation of combined plans may proceed without all of these elements fully in place. In this case, it will be important to complete the transition in second-generation plans.

[290] This is the New Zealand Heritage List/Rārangi Kōrero, which holds information on New Zealand's significant heritage places and historic landmarks.

141. To find the ideal review schedule it is useful to consider the other timeframes at work in our proposed resource management system, and the appropriate sequencing of activities. Elements of the system that provide the strategic foundation for plan-making include integrated partnerships with mana whenua, regional spatial strategies and national direction.

    - The development of integrated partnership processes discussed in chapter 3 will be ongoing, but ideally councils and mana whenua would try to have the relevant parts of them agreed before the start of spatial planning and combined planning. It is likely these agreements will influence the rest of the system in an iterative way, with increasing effect over time as more councils and mana whenua develop their integrated partnership processes.
    - Regional spatial strategies are proposed to be reviewed in full at least every nine years, with flexibility to review in full or in part within the nine-year period to make adjustments in response to significant change.
    - National direction is proposed to be reviewed every nine years, with allowances to review earlier if circumstances require it.

142. The reliance of the higher order provisions of the plan on the regional spatial strategy means it would logically be reviewed soon after the nine-yearly review of the regional spatial strategy. The two processes together represent a significant region-wide investment in setting up forward-looking integrated outcomes and the policies and rules that will help to achieve them.

143. The main benefit of this approach is the combined plan would never be more than a few years behind the regional spatial strategy, and the link between strategic and plan outcomes would remain strong and relevant. More frequent reviews of the combined plan could be of benefit to accommodate updated national direction and ensure the plan is more responsive to changing environmental conditions and development capacity needs.

144. Linking spatial planning and review of the combined plan would also focus monitoring activities on measures needed to improve performance on the most current outcomes, and drive reassessment of rules in the plan that are not linked to higher-order outcomes. This focus is needed to bring greater discipline to the gathering and use of monitoring data by giving it a clear driver in the system.

Plan changes will take less time than they do currently and could address changes to multiple district plans at once.

Plan changes

145. We envisage the process for plan-making proposed in this chapter would apply to plan changes as well. The variable scale, nature and complexity of plan changes will necessarily require details of the process and timeframes to be adjusted to suit. Plan changes will take less time than they do currently and could address changes to multiple district plans at once. This is why we recommend the joint committee be a standing committee to provide continuity of process and decision-making when plans are reviewed and changed.

146. The joint committee should propose changes to the plan where they are necessary:

- to give effect to national direction
- to respond to changes in environmental conditions that threaten environmental limits
- to address new evidence or issues as they arise where they should not wait for a general review.

147. Plan changes can also be proposed to the joint committee by the constituent councils or mana whenua. The joint committee would consider matters such as:

- whether the proposed change supports the achievement of plan outcomes
- whether the proposed change needs to be modified, for example to maintain vertical and horizontal integration in the plan
- whether the proposed change is sufficiently discrete and/or localised that it can be developed without requiring changes to other parts of the plan.

148. Where changes are discrete and localised, the constituent council involved could be responsible for the preparation of the change subject to joint committee oversight. The joint committee would remain responsible for notifying the plan change and would determine how the process would be funded and all other matters in the plan change process.

149. A joint committee should have the power to make minor changes to combined plans as is currently available under Schedule 1, clauses 16 and 20A of the RMA.

Private plan changes

150. Submitters, especially business submitters, continue to support retaining provisions for private plan changes. Some submitters thought acceptable private plan changes could be aligned with the proposed regional spatial strategies. We agree a role remains for private plan changes in the system but restrictions are needed to ensure the integrity of plans is maintained.

151. First, there should be a general moratorium on private plan changes for three years after the relevant provisions become operative. We see this as necessary to ensure the integrity of the newly operative plan remains intact to allow for good implementation practice to develop. An exception to this moratorium could be an error in the plan or where a development or change has been agreed with a council as being beneficial. In such a case the joint committee would consider adopting the private party's proposal or allowing the plan change to proceed on a cost recoverable basis.

We agree a role remains for private plan changes in the system but restrictions are needed to ensure the integrity of plans is maintained.

152. Once the moratorium period has passed, private plan changes would be considered by the joint planning committee using the same considerations as proposals from constituent councils. If the proposal is aligned with the outcomes of the plan, does not require broader vertical or horizontal changes to the combined plan, and is sufficiently discrete, then the private plan change could be accepted on a cost-recoverable basis.

153. We acknowledge some private plan change proposals could introduce beneficial broader changes that support plan outcomes. This could especially be true of development proposals in areas that have been anticipated by regional spatial planning and help the region to upgrade infrastructure where needed. Private parties should consider how their proposal affects the wellbeing of the region, and proposals that truly add value should be adopted by the joint committee.

Evaluating proposed plans and changes to plans

154. The current RMA provides a prescriptive process and reporting structure for the evaluation of policy statement and plan provisions, including whether the proposal is the best way of achieving the Act's purpose and the costs and benefits that are associated with it. Specifically, section 32 in the current RMA provides for an evaluation of proposals to create or amend any proposed standard, national policy statement, national planning standard, regulation, regional policy statement, plan or plan change. Section 32AA provides for a further evaluation report where a change to the proposal evaluated under section 32 is needed.

The Panel recognises the general importance of the assessment required by section 32 but considers the requirements are now too complex and have departed from their original purpose.

155. The Panel recognises the general importance of the assessment required by section 32 but considers the requirements are now too complex and have departed from their original purpose. The original section 32 established a duty to consider alternatives, assess costs and benefits, and adopt the most efficient means. The intention was the evaluation would be undertaken at the outset and followed through the policy development process. However current practice has tended to result in the process and documentation of it after the policy decisions have already been made.

156. In our view and from the comments made by submitters, we see four issues with the current processes as provided for by the RMA:

- the legislation is overly complex and prescribes requirements rather than evaluation commensurate and appropriate to the matter being considered;
- reporting has been used as justification of the end result, rather than supporting good decision-making
- there is often insufficient data to inform the consideration of options and development of statement and plan provisions
- the process of assessing costs and benefits can be difficult especially assessing non-monetary elements.

157. We recommend a process in which policy statements and combined plans are informed by an even-handed examination of the issues that might otherwise prevent the resource management system from delivering the strategic outcomes of the Natural and Built Environments Act. Options should be identified and include consideration of whether there are methods other than regulation which could achieve the outcomes, including the

use of economic instruments to provide land capacity for example, as we discuss in chapter 11. We also consider the assessment should not be undertaken at the end of the process but should commence at the beginning of the policy development process and continue at key later stages.

158. The process we recommend would identify:

- **expected outcomes:** how the proposed provisions will achieve the purpose of the Act and higher-order outcomes expressed in the Act and spatial strategies
- **options:** what options have been considered, including regulatory or non-regulatory measures and the option of doing nothing or the minimum necessary
- **reasoning:** identifies the reasons for and against adopting any particular approach.
- **justification**: for the option chosen.

Assessment should not be undertaken at the end of the process but should commence at the beginning of the policy development process and continue at key later stages.

159. Our proposed changes are to some extent a return to the original principles set out by the RMLA Review Group on the Resource Management Bill 1991, which led to the creation of the section 32 duties.[291] Principles for the above process should provide for:

- robust analysis informed by data to deliver early analysis of issues and identification of options with the relevant subject-matter experts
- assessment proportionate to the scale, nature, and complexity of the provisions being assessed
- scope for development of the analysis in response to the emergence of new evidence, feedback from mana whenua, and input from submitters in the overall plan-making process.

160. We consider the process of evaluating plans and proposing change to be part of an ongoing review process informed by high-quality data on progress toward strategic outcomes, examinations of system failure, and in response to the state of the environment. Good quality proposals rely on datasets that are unfortunately largely afterthoughts in the current system. Our chapters 12 and 13 on system oversight and compliance, monitoring and enforcement underscore the value of good monitoring and compliance data, and make the case for central and local government investment in maintaining long-term datasets that support plan review.

161. The Panel is supportive of the use of evaluation methods for option assessment. In many instances cost-benefit analysis is a useful method to support good decision-making. However, there are other instances where such a method is limited particularly where the use of mātauranga Māori alongside western science will be essential to improve the holistic nature of assessment. The Panel recommends that the Natural and Built Environments Act require an evaluation process for combined plans (and changes to them) that embodies the

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[291] Review Group. 1991. *Report of the Review Group on the Resource Management Bill*. Wellington: Ministry for the Environment; pp 84–90. Retrieved from http://www.nzlii.org/nz/other/lawreform/NZRMLawRef/1991/1.html (16 June 2020).

approach we have described and deals with evaluation methods by providing national guidance on the principles and practice to be adopted through national planning standards.

Streamlined plan process and collaborative planning

162. The current streamlined planning process allows councils to seek dispensation from various requirements set out in Schedule 1 of the RMA "in order to achieve an expeditious planning process" for changing plans and considering notices of requirement. Such dispensations are sought from the Minister for the Environment under provisions in sections 80B and 80C of the RMA. We note the collaborative planning provisions are proposed to be repealed by the Resource Management Amendment Bill 2019.

Our proposals for joint planning committees and combined plans mean the streamlined and collaborative planning provisions will not be necessary.

163. Our proposals for joint planning committees and combined plans mean the streamlined and collaborative planning provisions will not be necessary. We do not recommend retaining these provisions.

Expected outcomes

164. We consider our proposals for reform of plan-making provisions address the key issues in our terms of reference and align with the objectives and principles we adopted for our review. They provide for an appropriate balance of central and local government decision-makers, involvement of mana whenua and the use of the independent expertise of the Environment Court. They will result in major efficiencies across the planning system while improving the quality and integration of plans.

Key recommendations

Key recommendations – Policy and planning framework	
1	There should be a mandatory plan for each region combining regional policy statements and regional and district plans.
2	The functions of regional councils and territorial authorities should be clarified in the way described in this chapter.
3	The combined plans should be prepared by a joint committee comprising a representative of the Minister of Conservation and representatives of: (i) the regional council (ii) each constituent territorial authority in the region (iii) mana whenua.

Key recommendations – Policy and planning framework	
4	The role of combined plans in the new system should be to demonstrate how the outcomes set out in the purpose of the Natural and Built Environments Act will be delivered in a region, including resolution of any conflicts or tensions between outcomes (if not resolved through national direction).
5	The joint committee should have authority to prepare and notify the combined plan and to make all decisions relating to the plan and subsequent processes without the need for ratification by the constituent local authorities.
6	The joint committee and the secretariat supporting it should be funded by the constituent local authorities.
7	The evaluation process currently undertaken under section 32 of the RMA should be retained under the Natural and Built Environments Act but should be modified in the way described in this chapter.
8	Prior to notification the Ministry for the Environment should undertake an audit of the plan.
9	After notification and receipt of submissions by interested parties, including the constituent local authorities and mana whenua, a hearing should be conducted by an independent hearing panel chaired by an Environment Judge.
10	The independent hearing panel should make recommendations to the joint committee which should have authority to decide which recommendations to accept or reject.
11	In respect of any recommendation rejected by the joint committee there should be a right of appeal to the Environment Court on the merits by any submitter. Where recommendations are accepted by the joint committee the right of appeal should be to the High Court and limited to questions of law.
12	This process should also apply to plan changes with some variation to account for the nature, scale and complexity of the change.
13	The preparation of combined plans should usually be undertaken after the preparation of a spatial strategy for the relevant region and reviewed at least every nine years with flexibility to review more often.
14	Private plan changes should still be possible but with greater constraints on when and in what circumstances that may occur.
15	These new provisions should replace all plan-making processes available under current legislation including the current Schedule 1 process, and streamlined processes and collaborative planning.

Chapter 9 Consents and approvals

1. This chapter discusses opportunities to reform resource consenting processes. For many New Zealanders, the resource consent process is their primary interaction with the resource management system.

2. Under the RMA, effective implementation of the purpose and principles of the Act relies on high-quality plans and clear, consistent and efficient decision-making at the consent stage. These downstream functions are devolved to 78 local authorities with variable capacity, politics, pressures and local environments. It relies on the knowledge of the Court, planners and technical experts; the resources of applicants and ratepayers; iwi and hapū; and the vigilance of affected people and groups who represent the public interest. The challenge is to ensure the consenting process is on the whole efficient and fair, while carrying out the purpose of the new legislation we propose to replace the RMA.

The changes we propose bring about a fundamental shift in the way activities are managed in plans.

3. As described in chapter 8, the changes we propose bring about a fundamental shift in the way activities are managed in plans. We envisage that plans will be clearer and more directive with the result that the categories of activities will be more clearly delineated. This is expected to lead to greater use of permitted activity status with performance standards as well as prohibited activity status to reinforce environmental limits. Fewer consents should be needed overall and for those activities that require consent, we expect a shift from the relatively undefined discretionary activities towards more tightly defined controlled and restricted discretionary activities. Fewer full discretionary consents will be required but those that remain can expect to be fully notified.

Background and current provisions

4. Resource consents are a key instrument for achieving 'sustainable management' under the RMA. A resource consent allows a person to carry out an activity that would otherwise contravene section 9, 11, 12, 13, 14, 15, 15A or 15B of the RMA, as long as it complies with any conditions attached to the consent. A resource consent is required for any activity regulated by a rule in a district or regional plan or a national environmental standard. It is common for a project to include multiple activities requiring multiple resource consents from more than one resource consent authority.

Brief history

5. Prior to the RMA, the Town and Country Planning Act 1953 was the first New Zealand planning law to introduce specific types of resource use permits. These were "predominant uses, conditional uses and specified departures, and included requirement for notification

of developments other than predominant uses".[292] This Act encouraged town and regional planning, conferring additional responsibilities on local government. District-wide schemes were then required for every urban area and these had to meet a wide variety of provisions including for zoning, heritage interests, recreational, amenity, public infrastructure and building design. Only directly affected land owners had a right to object to development proposals.

6. There was a shift towards more strategic and policy focussed planning in the 1960s and 70s which led to the creation of the Town and Country Planning Act 1977. The formative process of this Act provided an opportunity to comprehensively rework the existing planning framework. Matters of national importance were added to assist consideration of environmental and social matters, which broadened planning considerations. The Act also directed local government to give consideration to Māori culture and traditions. Under this Act, public consultation was simplified and streamlined, but also widened. A consultation process was established for district schemes and planning applications, where the public could express their views as objectors.

7. Whereas the purpose of the Town and Country Planning Act 1977 had been the "wise use and management of resources" and the "direction and control of the development of regions, districts, or areas",[293] the RMA has focused on the sustainable use and management of natural and physical resources. Relevant to consenting, the RMA:

    - introduced the 'effects-based' assessment
    - included a hierarchical relationship between the RMA, national direction, policy statements and plans
    - enabled, but did not require, traditional urban planning
    - provided for consideration of social and amenity impacts
    - clearly set out the requirements for consent applications and developed a consistent process for all applications
    - included provisions for public participation and determining whether an application should be notified.

8. Since 2001, numerous amendments have been made to the RMA, with many rounds of substantive reform. Each of these reforms has dealt with aspects of the resource consent system, focusing especially on notification requirements and consent timeframes. Some notable changes to the consents process include introduction of limited notification in 2003, strict statutory timeframes in 2009, and limitations to the scope of objections and consent conditions (2009 and 2017). Notification requirements have changed with each successive reform, narrowing the use of public notification and becoming more prescriptive about when it can and cannot be required.

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[292] Miller C, Beattie L. 2017. *Planning Practice in New Zealand: A Practical Guide to Planning Practice in New Zealand*. Wellington: LexisNexis; p 10.

[293] Section 4, Town and Country Planning Act 1977.

Components of the resource consent process

9. The provisions of Part 6 can be broken into component parts of the resource consent process including: lodgement; assessing if further information is needed; determining whether it is notified; the notification, submission and hearing process; decision-making, including drafting conditions; and appeals. Table 9.1 identifies these parts in bold along with their corresponding sections in the RMA. Pre-application meetings, while not provided for in the RMA, also form an important voluntary first step in the process.

Table 9.1: Component parts of the resource consent process

RMA sections	General description
87A, B, BA and BB	The types of consents, classes of activities and how the classes should apply in some cases
87AAB, AAC and AAD	Provisions relating to fast-track applications
87C–I	Provisions for direct referral of applications to Environment Court
88–91	The application **lodgement** process, timeframes, and grounds for deferral
92	When **further information** is needed
95	Deciding on public and limited **notification**, including who an **affected person** is
96–98	**Submissions** on notified applications
99	Pre-hearing meetings and mediation
100	Rules for **hearings**
104–107	How decisions are determined for different activities and conditions, including discharge of greenhouse gases, national environmental standards and aquaculture activities
108–116	Other details on decisions, including consent **conditions**, financial contributions, bonds, covenants and procedural matters
117	Applications for restricted coastal activities
120–121	Right to **appeal** and the procedure for appeal
122	Consents are not real or personal property
123–127	Duration of consent, extensions, lapsing and cancellations
128–133A	The review of consent conditions by consent authority
134–138A	The transferability of different types of consents
139	Certificates of compliance

10. Part 3 of the RMA sets out the need to obtain resource consent, and Part 6 contains the provisions for processing resource consents, from application to decision. It also includes provisions for different consenting tracks in different circumstances, from the issue of 'consent waivers' for boundary and marginal and temporary activities, to the direct referral of resource consents to the Environment Court. Part 6AA contains special provisions for proposals of national significance.

Consent types

11. Section 87 outlines five different types of resource consents:
    - land use consent (sections 9 and 13)
    - subdivision consent (section 11)
    - coastal permit (sections 12 and 14–15B in the coastal marine area)
    - water permit (section 14 other than in the coastal marine area)
    - discharge permit (section 15).
12. Many applications need more than one type of consent to proceed. The most common example is where both a land use and a subdivision consent are needed to on-sell a new dwelling. Other examples such as jetties, emitting factories, farm irrigation schemes and farm culverts all frequently generate the need for more than one consent, usually from two or more different authorities with completely separate processing tracks. Joint hearings are required under section 102 where two or more consent authorities are involved, with limited discretion to depart from this.

Activity status, notification and public participation

13. Rules in regional and district plans determine the category within which an activity falls (permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited). Each has a corresponding consenting pathway, which may be more or less restrictive. Permitted activities do not require a consent and prohibited activities cannot receive a consent.
14. Public participation in resource consenting processes has changed through amendments to the RMA over the years. The original presumption in favour of notification has been reversed and the scope of who can participate in the process has narrowed. Only 710 resource consents of a total of 35,539 (2 per cent) were publicly notified last year.[294] Another 1.8 per cent of resource consents were limited notified, meaning participation is limited to a few affected parties. As a result of this low rate of notification, there are no rights to make a submission or appeal for the large majority of resource consents.

Decision-making

15. Although all consents have their own matters to consider, they follow similar application and decision-making processes, which are intended to be proportionate to the activity being considered. All consents are considered under section 104, which includes assessing, subject to Part 2, any adverse effects and relevant planning documents.
16. Local authorities decided the majority (96 per cent) of resource consents over the previous five years, with the rest being decided by independent commissioners, elected representatives or the Environment Court.[295] A small number of consents follow one of the

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[294] National Monitoring System (NMS) data 2018/2019.

[295] NMS data 2014/15 – 2018/19. Calculation from complete datasets of all section 88 applications where a decision was made.

different tracks provided, including direct referral to the Environment Court or as proposals of national significance.

17. Most resource consent applications are granted (around 99 per cent of the approximately 38,000 decided each year).[296] The majority (approximately 80 per cent) of consents are for section 9 or 11 matters (land use or subdivision).

18. Less than 0.5 per cent (147 last year) of resource consent decisions are appealed to the Environment Court, and the Court estimates that only 5 per cent of these end in a hearing (that is, around seven last year). Appeal rights are only provided for applicants and submitters on limited or fully notified resource consents. There is currently no avenue to challenge councils' resource consent notification decisions in the Environment Court. The only legal avenue is to challenge the decision through judicial review in the High Court.

Nationally significant proposals and direct referrals

19. The proposals of national significance and direct referral processes are two pathways available for large-scale, complex or potentially contentious applications. Generally proposals of national significance are used for public infrastructure applicants, such as in energy, infrastructure and roading-related applications. Cases heard through the direct referral process tend to comprise proposals for larger commercial or infrastructure proposals.

20. The provisions for proposals of national significance enable the Minister for the Environment (or Conservation if in the coastal marine area) to determine whether a project is a matter of national significance and, if so, to put it on an elevated and time-limited processing track. The proposal is heard by a board of inquiry or the Environment Court instead of the local authority, with rights of appeal limited to points of law. The Environmental Protection Authority (EPA) has a role in processing the application and making recommendations to the Minister on whether a proposal should be 'called in', as well as in administering the board of inquiry.

21. The direct referral process was introduced into the RMA in 2009. It allows applicants to request direct referral to the Environment Court from their local authority. It is different from the proposals of national significance process as central government does not have a role, and no statutory criteria apply to how a local authority determines whether an application should be directly referred.

Issues identified

22. Issues identified with the resource consent process are:

- the resource consent process continues to be complex, costly and slow
- the need to balance efficiency with access to justice, as well as reflecting Te Tiriti o Waitangi

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[296] An additional 2300 applications on average over the past 5 years are found incomplete, withdrawn by the applicant, or returned. See Table S3, *Trends in Resource Management Act Implementation. National Monitoring System 2014/15 to 2018/19.* Available online: https://www.mfe.govt.nz/sites/default/files/media/RMA/trends-in-rma-implementation-national-monitoring-system.pdf.

- unnecessary debate, litigation and process involved in notification
- the impact of existing use rights and the permitted baseline test
- the process does not effectively address cumulative effects
- the capacity and capability of all parties in the process, including the capacity of mana whenua
- monitoring of environmental change through consent approvals and enforcement of consent conditions.

23. The scope and magnitude of each of these issues varies between councils. But one central theme emerges overall: too many decisions impacting on the wider direction of environmental management are happening at the resource consent level, rather than being addressed at the plan-making stage. More effort needs to be directed towards improving the quality of plans and, in this way, reducing the room for debate during consent processes.

The process is complex, costly and slow

24. That resource consents are complex, costly and slow has been a constant refrain throughout the life of the RMA.[297] The data shows this widespread perception is true, at least for a good portion of consents. Central and local governments alike have made popular political promises to speed up the system and make consents easy, which has led to the imposition of strict timeframes and discounted fees when those timeframes are exceeded.

That resource consents are complex, costly and slow has been a constant refrain throughout the life of the RMA. The data shows this widespread perception is true, at least for a good portion of consents.

25. Recent measures of the time it takes to obtain consent show that half of consents are granted within 31 working days (about six weeks), 34 per cent take 27–100 working days (about five months) and 16 per cent take over 100 days to be granted (figure 9.1).[298] Notification and information requests are the most common factor in extending timeframes beyond 20 working days, in some cases doubling or tripling the time a consent takes to be processed.[299]

26. While timeframes can be slow, over 96 per cent of all consents were approved non-notified last year, and only 1.4 per cent of all consents went to a hearing. For the half of consents that ran well over 31 working days, other factors were clearly at work besides participation in the hearing process. For some consents it may be that the length of time represents an iterative process of improvement, where the applicant makes changes to the project in order to get a non-notified consent. For others it may be that the consent authority requires further

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297 News articles illustrate the common perceptions of the resource consent process. For example, see Hayward M. 2018. The rise and rise of council costs. *Stuff* 11 August. Retrieved from https://www.stuff.co.nz/business/106065042/the-rise-and-rise-of-council-consent-costs (16 June 2020).

298 Finding 1, Trends in Resource Management Act Implementation. National Monitoring System 2014/15 to 2018/19.

299 Finding S1, Trends in Resource Management Act Implementation. National Monitoring System 2014/15 to 2018/19.

technical reports from the applicant to make its own assessment. Both these factors can contribute to better-quality outcomes, but they can also be sources of unexpected costs and delays for the applicant.

Figure 9.1: Distribution of the number of working days to grant new resource consents, 2018/19

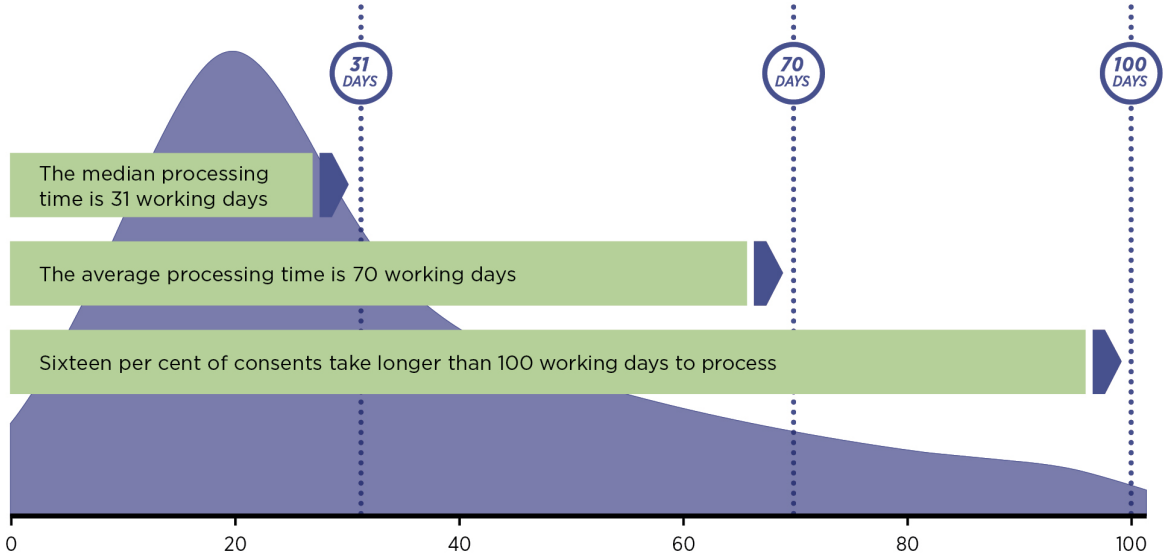
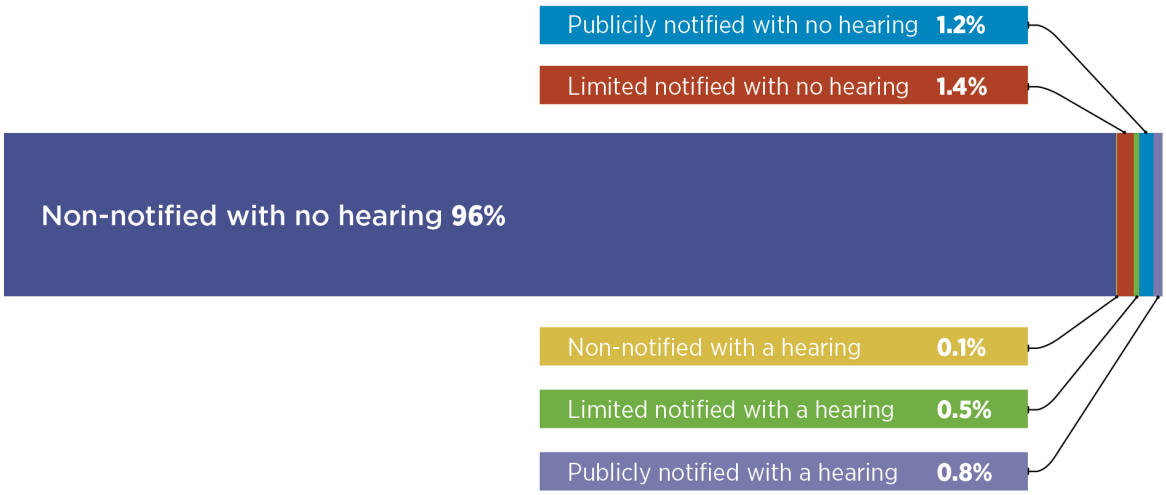


Figure 9.2: Percentage of consents granted in 2018/19 by the type of notification and if hearing was held[300]



27. Reforms to the RMA over the past 20 years have attempted to improve the efficiency of consent processing and reduce their cost to applicants. Direct referral, streamlined consent provisions, statutory timeframes and attempts to narrow the scope of public notification were all introduced to address the issue. However, these provisions have added to the complexity of the consenting system overall.

[300] Figures 9.1 and 9.2 are from Trends in Resource Management Act Implementation. National Monitoring System 2014/15 to 2018/19.

28. Complexity also impacts on the costs of the application. The median council processing fee of a non-notified resource consent in 2018/19 was $2,143, while the median fee for a notified consent with a hearing was $18,414.[301] This does not include the applicant's own costs for planning and technical advice, which is needed more than ever to navigate an increasingly complex system that can potentially end in court. In addition, where a consent is limited or publicly notified, each party engaged in the process may be obliged to hire their own professionals to avoid the risk of being disadvantaged in negotiations or at a hearing.

29. Although the large majority of consents are not appealed or judicially reviewed, the perception that this could occur is powerful enough to drive risk-averse behaviour from both councils and applicants.[302] The Productivity Commission has noted that council planners spend around 20 per cent of their time deciding whether to notify an application, either publicly or to limited affected parties.

The need to balance efficiency with access to justice

30. Some experts have argued the focus on efficiency in consenting has come at the expense of access to justice. Environment judges Newhook, Kirkpatrick and Hassan note:

> there was emphasis in the early stages [of the RMA's implementation] on an expectation that applications for resource consent would be notified, something that has changed since.
>
> Perhaps understandably, Parliament has since felt the need to balance rights of public participation against the desirability of timeliness of delivery of processing applications and decisions. It was widely believed that the sheer breadth of open standing to participate in the early stages often resulted in inefficient and costly delays for proponents of development and other activities. Subsequent reforms of the RMA have made changes to that situation and could be argued to have sought to find a balance between public participation and efficiency of decision making.

They also point out that recent amendments have led some commentators to question:

> whether efficiency might in many instances have been better served by enhancing access to justice and balancing that with more streamlined procedures rather than emphasising the latter to the virtual exclusion of the former.[303]

31. As with other parties, Māori have very limited ability to influence decisions on resource consents when a consent application is non-notified or limited notified. Mana whenua are not always included in a limited notified application, although section 95E(2)(c) requires the consent authority to consider statutory acknowledgements when determining who is an affected person. Where mana whenua are included and express an interest, a cultural impact assessment is sometimes commissioned, which can stretch time and resources for both the applicant and mana whenua. The resulting document often has limited influence because it is considered too late in the process and is not translated into relevant conditions.

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301 Finding 8, Trends in Resource Management Act Implementation. National Monitoring System 2014/15 to 2018/19.

302 Risk-averse planning culture is discussed in chapters 8 and 14 of *Better Urban Planning:* New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission.

303 Newhook L, Kirkpatrick D, Hassan J. 2017. Issues with access to justice in the Environment Court of New Zealand. *Resource Management Theory & Practice* 29–59; p 52.

32. The choices under the RMA for public participation in consents are limited to either having no information and no involvement in a consent or having full rights to a hearing and appeal to the Environment Court. The system lacks a middle process, whereby affected parties, mana whenua and groups that represent the public interest can participate in the assessment of a consent without the formalities of a hearing or the potential cost and uncertainty of an appeal.

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Unnecessary debate, litigation and process involved in notification

33. Sections 95A–G provide a multitude of matters to consider to determine whether an application should be publicly or limited notified. Each reform has added complexity to the determination. There are two decision trees to follow that help the consent authority decide whether an application should be publicly notified or limited notified. The steps set out in section 95A are:

    - **step 1:** determine whether there are mandatory reasons for public notification
    - **step 2:** determine whether it is in a category of activities that are precluded from notification
    - **step 3:** determine whether notification is required by a national environmental standard or the effects are 'more than minor'
    - **step 4:** determine whether, even if public notification is precluded or not 'more than minor', special circumstances exist that require public notification.

34. Following the steps for determining limited notification, some sections are intended to help the consent authority determine who is an affected person, whether an effect is more than minor and who are affected customary marine title and protected customary rights groups. The determination hinges on two factors: whether a party is entitled to be called an 'affected person' and whether the effects on them are 'minor or more than minor (but not less than minor)'.

35. This summary simplifies an overly complex collection of matters to consider, with years of caveats added on both sides of the 'must notify' and 'cannot notify' ledger. The consent authority has a limited time to make this determination and its decision is open to judicial review.

For all parties a lot can be at stake in the decision to notify or not. Notification has in the past dramatically increased the costs, timeframe and uncertainty of an application, but non-notification or excluding a party that believes it is affected can mean a breach of natural justice.

36. For all parties a lot can be at stake in the decision to notify or not. Notification has in the past dramatically increased the costs, timeframe and uncertainty of an application, but non-notification or excluding a party that believes it is affected can mean a breach of natural

justice. Decisions without public input can miss critical matters that would reframe the consequences of a decision. Excluding mana whenua from engaging on an application that affects their taonga causes avoidable damage, both physically and to local relationships.[304]

37. Notification can result in a longer and more expensive process, but it also makes for a better-informed process. Mana whenua and organisations that represent the public interest have contributed to numerous landmark decisions over a half-century of environmental management. The Environment Court values their participation in appeals.[305] More hearings and appeals do not necessarily follow from greater participation by mana whenua and public interest groups; proposals can be improved through direct discussions and mediation and may be granted without ever going to a hearing.

Existing use rights and permitted baseline test

38. An approved consent gives the applicant a right to use resources or pursue development in accordance with the conditions of the consent. This right is transferable to the applicant's successors for a set period of time (in some cases, like subdivision, in perpetuity). In addition, existing uses of land are 'grandfathered' in, enabling a use to continue even if it is contrary to plan objectives and policies and would be declined if an application were made today. A permitted activity can become an existing use right for someone through the issue of a 'certificate of compliance', enabling them to carry out an activity managed in a plan as though it were still permitted.[306] An existing use right can also allocate exclusive rights to use a scarce resource over other potential users.

39. Existing rights are an important surety for a rights-holder, protecting investments they have made for the social, cultural and/or economic wellbeing of their family or society. They enable important public infrastructure to proceed and insulate small operators from shocks due to changes in the system. The problem arises when these existing rights enable the holder to use and develop land in ways that are at odds with community objectives or are now understood to be harmful to the environment. The recommendations we have made in chapters 5, 7 and 11 are intended to address these problems.

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304 One example is the decision of Hastings District Council to approve on a non-notified basis the construction of a track to the summit of Te Mata Peak. See RNZ. 2019. *Te Mata Peak track: Hastings Council apologises to iwi.* Retrieved from https://www.rnz.co.nz/news/national/391781/te-mata-peak-track-hastings-council-apologises-to-iwi (16 June 2020).

305 Randerson T. 2019. Environmental justice: The wheel turns full circle. In: S Mount, M Harris (eds) *The Promise of Law: Essays Marking the Retirement of Dame Sian Elias as Chief Justice of New Zealand.* Auckland: LexisNexis; pp 179, 185.

306 Section 139 sets out provisions for obtaining a certificate of compliance.

40. The principle of the permitted baseline under the RMA is to take the effects of a permitted activity and effectively discount them in considering consent applications. It derives from section 104(2), which allows the consent authority "to disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect". This principle is relevant not only to the assessment of effects but also to the decision whether to notify an application or who may be an affected person, and to how cumulative effects are managed.

The effect of the permitted baseline on consenting is that the focus is on the additional effects of any activity that requires the consent, as it explicitly seeks to disregard those effects that would be permitted as of right.

41. The effect of the permitted baseline on consenting is that the focus is on the additional effects of any activity that requires the consent, as it explicitly seeks to disregard those effects that would be permitted as of right. Case law has established that the permitted effects of one activity can be used as a baseline for the effects of another that requires consent.

Process does not effectively address cumulative effects

42. Cumulative environmental effects result from a number of effects that are minor on their own but, when combined with each other or other factors, lead to poor environmental outcomes. While cumulative effects are often thought of in terms of effects on the natural environment, the concept is also applicable to accumulated decisions in a social, economic, aesthetic and cultural sense. The fact that RMA decisions are accumulating to degrade the environment is a plan-wide issue, but several factors relate specifically to resource consents:

    - there are gaps and broken feedback loops between environmental data and plan provisions, making rules in plans ineffective at holding use and development to environmental limits
    - permitted activities can lead to unmonitored 'environmental creep'
    - approved applications move the threshold for what is acceptable change in the environment (the permitted baseline)
    - unimplemented consents are not always factored in to assessments of the existing environment
    - consent conditions are sometimes poorly drafted and monitored for compliance, meaning even well-intentioned attempts to mitigate effects can fail
    - existing use rights, consent lifespans and lengthy planning processes allow harmful practices to continue unchecked, and make it hard to act on new information.

Capacity and capability of all parties in the process

43. Recent data on consent processing suggest that another key driver of inefficiency is the capability and capacity of councils. Councils in high-growth areas struggle to keep up with the volume of consents required to support the pace of development.[307] Smaller councils often do not have access to technical experts needed to assess criteria in their plan, leading them to rely on technical reports supplied by the applicant.

Where iwi and hapū have the ability to influence resource consent decisions, it is frequently in an unpaid capacity as an affected party or a submitter on a publicly notified application.

44. Affected parties, and parties that would represent the public interest in a limited or notified consent, often lack capability and capacity as well. Many of these parties are laypeople or volunteers with no professional background in planning or resource management. Some parties may not participate because they cannot take time off from other obligations in their life to attend hearings.

45. Where iwi and hapū have the ability to influence resource consent decisions, it is frequently in an unpaid capacity as an affected party or a submitter on a publicly notified application. In a 2012 survey, half of kaitiaki rated their capacity to engage in RMA processes as 'poor' or 'very poor'.[308] While an increasing number of iwi authorities have professional staff to assist with RMA work, only 42 per cent of councils have a budgetary commitment to help mana whenua participate in resource consents.[309] When a council does pay for such assistance it must decide whether to pass that cost on to the applicant or absorb the cost into its own budgets. Māori also cite a lack of capability among consent planners to translate their cultural values into the terms required for justifying decisions and consent conditions.[310]

Monitoring and enforcement

46. Consents are usually approved with a number of conditions intended to guide how the activity is carried out. Conditions can include mitigation measures, requirements from mana whenua, protocols for accidental discovery of archaeological sites and effects/compliance monitoring during phases of work. Conditions can involve reporting data generated by the activity, such as noise, vibration or water pollution, with the ability to modify the activity if any thresholds are breached. Consent conditions should be drafted in a way that is enforceable and the consent authority should have the capacity to monitor them and enforce compliance. However, this is often not the case in practice, with the result that the activity harms the environment in ways that it was supposed to avoid, remedy or mitigate.

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307 In 2018/19 for example, Auckland Council processed 58.5 per cent of consents within statutory timeframes. See *Trends in Resource Management Act Implementation. National Monitoring System 2014/15 to 2018/19.*

308 Te Puni Kōkiri. 2013. *He Tiro Whānui e pā ana ki te Tiaki Taiao 2012: 2012 Kaitiaki Survey Report.* Wellington: Te Puni Kōkiri. In this context kaitiaki are the staff or volunteer whānau who engage in RMA work on behalf of an iwi or hapū.

309 NMS data 2018/19.

310 Otter J, Rootham E, Mears C. 2019. *Te kā mai rawa, te ti taihara: mana whenua cultural values and the Auckland Council resource consent process.* Auckland: Auckland Council Research and Evaluation Unit.

47. Additionally, permitted activities are difficult to monitor because there is not necessarily a record of where and when they are undertaken. Proxy measures, such as tracking building consents and other consents triggered alongside the activity, are crude methods that cannot capture the full consequences of all activity that changes the environment. Councils also have no charging mechanism to recover the cost of such monitoring from the party undertaking the activity.

48. State of the environment measuring and reporting can capture the effects of environmental change, but is disconnected from causal factors. Poorly drafted conditions, untraceable activities and poor compliance, monitoring and enforcement break the feedback loop between policy effectiveness monitoring and the state of the environment monitoring, making the entire system less effective in achieving its purpose.

Options considered

49. The options we advanced in the issues and options paper included:

    - simplify the categories of activities
    - reduce the complexity of minor consent processes by only requiring certain applications to conduct a full assessment of environmental effects
    - establish a separate permitting process and dispute resolution pathway for residential activities with localised or minor effects (building on the current process for marginal or temporary non-compliance or boundary activities)
    - more clearly specify permitted development rights for residential activities
    - simplify notification decisions by:
        - notifying all activities but removing automatic requirements for hearings and appeals, or
        - requiring that plans specify the activities that must be notified, or
        - more clearly defining who an 'affected party' is or when 'special circumstances' that require notification would apply
    - maintain a separate consent pathway for nationally significant proposals
    - improve transparency by requiring all applications and consents issued to be electronically available to the public
    - facilitate lower-cost consent processes by mandating online systems.

Discussion

50. We received a significant amount of feedback on the consents and approvals section of the issues and options paper. Most submitters agreed with the issues the paper identified, including:

    - the need to protect certain environmental bottom lines
    - the RMA should have greater focus on environmental outcomes.

51. Submitters also expressed a variety of opinions on the current consenting and approval system, including:

    - a reduction in complexity in general is required
    - consenting types are generally fit for purpose but may require some review
    - a need for more central government involvement or national direction
    - there are issues with the current system for the notification of consents
    - the current dispute resolution process and the role of the Environment Court raise some challenges
    - public participation in the system has certain costs but also brings certain benefits
    - there is a need for a centralised, accessible, electronic database of consents and for greater standardisation in the system
    - there may be scope for expanding the role of national planning standards and notification provisions
    - the concept of deemed permitted activities is currently fit for purpose
    - capacity and capability issues are affecting the quality of resource consents
    - environmental bottom lines could be a useful tool in addressing the cumulative impact of multiple resource consents.

52. Our proposals in regard to consents need to be considered in the context of our overall recommendations for resource management reform. The intent is that these options cascade from higher-order changes; including new purpose and principles, a focus on specifying outcomes and targets, provision for combined plans, use and development within prescribed environmental limits and increased mandatory national direction. The resource management system as a whole should improve plan quality, support appropriate participation in the process and reduce the time and effort involved in obtaining and administering resource consents.

The resource management system as a whole should improve plan quality, support appropriate participation in the process and reduce the time and effort involved in obtaining and administering resource consents.

Retain or reduce the types of consents

53. The consent types outlined in the RMA have been part of the RMA from its outset and add some complexity, due to both the different process provisions and the need for multiple types of consent for some proposals. We have considered whether in an outcomes-based system all five types of consents are necessary or whether there is benefit in combining them.

54. The Panel did not see any merit in removing any of the consent types. These focus on distinct systems within natural and urban environments, and continue to support our proposals for Part 2. They are effective in practice and free of any unintended consequences. We do not propose that the RMA should cease managing any of the activities defined by these types.

55. The option of combining two or more of the consent types was also considered, but is not recommended by the Panel. One key difference between them is that the presumptions in the RMA differ between restrictions on property development (land use and subdivision consents) and use of the natural environment and 'the commons' (water, coastal and discharge permits). The presumption for property development is to permit land owners their private property rights unhindered, except where broader public interest matters are at stake. For the natural environment, the emphasis is on proactively managing activities that could pollute or over-allocate aspects of a shared environment. We consider this distinction remains important.[311]

A single 'open portal' for lodging consents could simplify the applicant's experience and require local and regional authorities to coordinate more closely on related consents.

56. Other ways to address these complexities became apparent through the Panel's consideration of other parts of the resource management system. For example, combined plans would consolidate the planning framework for regional and locally-administered consent types. We propose a single 'open portal' for lodging consents, which could simplify the applicant's experience and require local and regional authorities to coordinate more closely on related consents. For more detail see the section below on the 'open portal' for resource consents.

57. In general, the Panel's view is that these categories remain necessary and appropriate, and that combined plans and online consenting will help address the complexity issue.

In our view, the permitted, controlled, restricted discretionary, discretionary and prohibited activities remain useful activity classes. However, we recommend the removal of non-complying from the list of activities.

Retain or reduce activity classes

58. It is noteworthy that the RMA prescribes what the consent authority may and may not do in relation to the various activity classes but does not provide any guidance on when to use any of them. As a result, plans do not use them in a way that is consistent with their higher-order provisions and, by extension, with the purpose and principles. The development of an outcomes-based framework provided the Panel with an opportunity to consider how activity classes should be used and whether they were all necessary.

59. We think some guidance should be given as to the circumstances in which it is appropriate to use each of the categories. The nature of the different classes of activities has an important bearing on whether and to what extent applications need to be notified.

60. In our view, the permitted, controlled, restricted discretionary, discretionary and prohibited activities remain useful activity classes. However, we recommend the removal of non-complying from the list of activities. Our rationale for continuing with some categories and not others is discussed below.

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311 We note support for this view in the proposal for subdivision to revert to a more restrictive approach in the Resource Management Amendment Bill 2019.

Permitted activities

61. Permitted activities are not only generally acceptable and anticipated but are sometimes encouraged to achieve the outcomes expressed in the plan. Permitted activities enable active maintenance and management of the environment, allow for acceptable use and enjoyment of resources and provide certainty for what a property owner can do as a matter of right.

62. Performance standards put clear boundaries on these activities so they are limited only to those actions that are acceptable without further control.

63. No resource consent is needed to undertake these activities and, as a result, they can be difficult to monitor. Enforcement of performance standards is usually limited to obvious compliance issues and complaints. This is addressed further in chapter 13.

Controlled activities

64. The controlled activity class is appropriate where the proposed activity is generally acceptable and anticipated in the locality, but where the local authority or other consent authority wishes to keep control of the performance standards.

65. Consent must be granted, but the consent authority wishes to retain the ability to impose conditions over matters for which it has reserved control. (Note that these matters may include conditions that differ from those offered by the applicant.)

66. Because consent must be obtained, there are records of these activities that can be monitored.

Restricted discretionary activities

67. The restricted discretionary activity class applies where:

    - the proposed activity is generally appropriate, but the council wishes to retain the discretion to refuse consent, because in specific circumstances the activity may be inappropriate
    - there is certainty over the matters on which the local authority wishes to reserve discretion such as building height, height in relation to boundary and site coverage.

68. The consent authority may decline the application and, if granted, conditions would be limited to those matters over which control was reserved in the relevant plan.

Discretionary activities

69. The discretionary activity class is appropriate for all other applications, including many currently identified as non-complying activities. For discretionary activities, the local authority would have the ability to grant the application and to impose conditions or to decline it. No restriction would apply to the matters a local authority could consider and impose by way of condition, in contrast to the restrictions placed on controlled or restricted discretionary applications.

Prohibited activities

70. Prohibited activities are those identified in plans that should be avoided to meet the outcomes of the plan and/or national direction. The Supreme Court has clarified that policies requiring certain activities or adverse effects to be avoided must have prohibitions to give effect to that requirement.[312]

71. Consent applications cannot be made for these activities, because it is never considered appropriate to give consent. This provides a clear boundary and greater clarity on what is not acceptable. However it is also highly restrictive and the use of this activity type in plans can be contentious. With our recommendation to move towards clearer and more directive plans we envisage that the prohibited activity category will be used more often in a future system.

Removal of non-complying activities

72. Generally, non-complying activities are activities that are not anticipated in the plan, triggering a 'gateway test' in section 104D.[313] Their use in plans, however, has led to unintended consequences.

    - The restrictions in section 104D result in substantial and unnecessary debate on what constitutes a minor adverse effect.
    - Because the gateways are expressed in the alternative, an application considered to have only minor adverse effects may be granted, despite it being contrary to the objectives and policies of the relevant plans.
    - The real focus should be on the extent to which the grant of the application would contribute to the positive outcomes contemplated by the relevant plans. This could be better achieved through a discretionary activity.
    - Non-complying status has been used in plans to signal that an activity is discouraged to a greater degree than a discretionary activity, without going as far as justifying a prohibited activity. Because of the gateway test, this status is not necessarily borne out in practice, and the activity can often effectively be treated in the same way as a discretionary activity.

Removal of the non-complying activity class will reduce complexity, while retaining activity classes that are clear, necessary and proportionate to supporting assessment processes.

73. Submissions received on the non-complying activity class support either refocusing or removing it. One of those seeking its removal is Auckland Council, which considers discretionary and non-complying activity classes overlap. Its submission also suggests that if objectives and policies are robust enough, there should be

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312 *Environmental Defence Society of New Zealand v The New Zealand King Salmon Company Limited* [2014] NZSC 38; further interpretation in RMLA's *Resource Management Journal*, April 2017, pp. 20–23.

313 Section 104D: Particular restrictions for non-complying activities states that when dealing with non-complying activities, before granting an application a council must be satisfied that either the adverse effects of the activity on the environment will be minor (section 104D(1)(a)), or the proposed activity will not be contrary to the objectives and policies of a proposed plan and/or plan (section 104D(1)(b)).

little difficulty in declining a discretionary activity where it is considered undesirable relative to the plan's intent. Bay of Plenty Regional Council also expressed support for removing the non-complying consenting category as it has become indistinguishable from a discretionary activity in practice.

74. Those submitters promoting the retention and refocus of non-complying activity suggested making the section 104D gateway test more distinct from discretionary activities, or including statements within the RMA to clarify non-complying activities are generally considered inappropriate.

75. We are also aware of the 2009 Technical Advisory Group (TAG) findings that for the gateway test:

> It would be unusual that a council would decline consent for an activity the effects of which were indeed no more than minor; and to grant consent to an activity which was "repugnant" (for that is the sense in which the Courts have interpreted the words of the Act) to the plans objectives and policies.
>
> Yet, much staff time and consideration is given in the early stages of consent processing, and much greater attention given at the later hearing, to the issue as to whether the activity meets either or both of the gateway tests. In the TAG's view nothing is gained by this analysis that would not be gained merely by undertaking the same sort of consideration that is given to discretionary activities under section 104. We therefore recommend the abolition of the non-complying consent category.[314]

76. In considering these suggestions and previous reviews and reflecting on our recommended new purpose and principles, we take the view that the non-complying activity class should be removed. The removal of the non-complying activity class will reduce complexity, while retaining activity classes that are clear, necessary and proportionate to supporting assessment processes.

Applications and information requirements

77. Application and information requirements are set out in sections 88–92B and Schedule 4 of the current RMA. These include the method for lodging applications, the timeframes for consent authorities to determine whether the application is complete, timeframes for processing and exceptions to those timeframes, including the request for further information. The request for further information is the one point at which a consent authority can unilaterally 'stop the clock' on the processing of a consent.

78. A decade ago, the TAG reported that information requirements were "one of the more frequent complaints as regards the complexity of the processes". Its concern was that consent authorities were using the request as a way to stay within their statutory timeframes, rather than to fulfil a genuine need for further information. Its recommendations included limiting the halt of the statutory timeframe only to the first request for further information, rather than allowing it for each successive request.

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314 Minister for the Environment. 2009. *Report of the Minister for the Environment's Technical Advisory Group.* Wellington: Ministry for the Environment. Retrieved from https://www.mfe.govt.nz/sites/default/files/tag-report.pdf (16 June 2020); p 22.

79. At the time of the TAG's recommendations, 40 per cent of all applications were reported as having further information requirements.[315] In 2018/19 it was 45.3 per cent. An information request can make a resource consent take 2.6 times longer than it would under a non-notified land use consent.[316] Disproportionately complex information requirements for lower-order consents were a risk the TAG had acknowledged but did not address beyond hoping that consent authorities would apply a sense of proportion to their dealings with minor applications.

80. Submitters who commented on information requirements generally agree that those requirements need to be proportionate to the scale and complexity of the issue. Christchurch City Council suggested amending the present Schedule 4 to limit the assessment of plan objectives and policies to discretionary and non-complying activities, leaving controlled and restricted discretionary activities to the matters of control or discretion outlined in the plan.

81. The Panel considers the statutory timeframes introduced in earlier reforms have generally functioned well and are still appropriate. The information requirements for resource consent applications are also still appropriate, but should be proportionate to the nature, scale and complexity of the issue. The present Schedule 4 will have to be revised to focus on how the application would help achieve the outcomes in a reformed RMA and the proposed combined plans, as well as dealing with adverse effects.

82. In regard to proportionate information requirements, our view is there is a good case for limiting the information requirements for controlled activities. However, some care would be needed with respect to restricted discretionary applications, because they may involve a wide range of impacts from small to large.

83. In addition, local authorities need to work proactively with mana whenua to determine appropriate information requirements and assessment of effects for resource consents where mana whenua are affected, including in their statutory acknowledgement areas, as customary marine title holders and protected customary rights groups. As a starting point, iwi management plans could be an authoritative source of relevant outcomes to assess applications against. Making these requirements clear, consistently used, efficient and mutually beneficial should be a key point of discussion within the integrated partnerships process discussed in chapter 3.

Notification of consents

84. Notification is an important issue to resolve. The reform of notification relates to a number of the issues identified, including the following:

    - whether or not an application should be notified has led to a great deal of contention and litigation through the courts, including applications for judicial review in the High Court where the consent authority proposes to proceed on a non-notified basis

315 Minister for the Environment. 2009. *Report of the Minister for the Environment's Technical Advisory Group.* Wellington: Ministry for the Environment. Retrieved from https://www.mfe.govt.nz/sites/default/files/tag-report.pdf (16 June 2020).

316 Findings 5, and S1, Trends in Resource Management Act Implementation. National Monitoring System 2014/15 to 2018/19.

- the notification provisions of the current RMA have led to numerous amendments that have not allayed public concerns or reduced the scope for debate
- the balance between efficiency and public participation in resource management processes continues to be a matter of deep concern in the community
- applicants and local authorities focus too much time and effort on addressing notification issues, rather than considering the merits of the application.

Many submissions consider that the current notification provisions are complicated and fraught with issues. A number emphasised the importance of clarity over when notification is required and requested the system change to ensure certainty.

85. Many submissions consider that the current notification provisions are complicated and fraught with issues. A number emphasised the importance of clarity over when notification is required and requested the system change to ensure certainty.

> Given the risk averse nature required through the RMA, under the current RMA legislation it is considered that full reviews of all consent[s] need to be undertaken. The current Consenting process is thought to [be] very litigious at the present time. In particular the s95 and notification process is an overly complex and time consuming process. It is not uncommon for Resource Consent reports to be 40 - 60 pages long, even for simple applications such as Restricted Discretionary Activities. Much of the complexity of these reports are due to the notification assessment. (Hastings District Council)

86. Others expressed concern that the lack of clarity in the system disenfranchises community groups.

> In our view, if s95 of the RMA is allowed to stand in its current form, then groups such as ours and communities generally will continue to be disenfranchised from the planning processes; in short it is an anti-democratic part of the legislation that serves to undermine the principles and integrity of that Act. Without public participation, local authorities may often simply not be in a position to determine who is affected and whether the effects are more than minor. (Russell Protection Society)

We agree that notification requirements should be modified. We expect in a future system they will be dealt with at the plan-making stage rather than in every resource consent.

87. A number of submissions made the point that consenting pathways must be matched to the scale and risk of the activity, and that in practice many of these are currently inappropriate. Development of more appropriate consenting pathways was a key element of feedback.

88. We agree that notification requirements should be modified. We expect in a future system they will be dealt with at the plan-making stage rather than in every resource consent. In summary, our proposals are:

- the current statutory focus on whether the activity is likely to have adverse effects on the environment that are more than minor should be abandoned
- for controlled activities, the presumption would be no notification unless special circumstances exist (such as where the proposal has aroused widespread community concern)

- restricted discretionary applications could be notified or not, but the local authority would specify in its plan whether this was the case. For notified restricted discretionary activities, the local authority would also identify the circumstances for limited or full notification and in the case of limited notification, the parties subject to such limited notification
- all discretionary applications would be fully notified.

The current statutory focus on whether the activity is likely to have adverse effects on the environment that are more than minor should be abandoned.

89. We note this position, though clear, is not supported by all submitters. Councils may see this as oversimplification, as expressed by Greater Wellington Regional Council (GWRC):

> GWRC does not support a requirement for plans to specify the activities that must be notified. GWRC supports the current approach in the RMA (Section 77D) whereby plans may make a statement as to whether a rule is to be publicly notified, limited notified or non-notified. There are many instances with the Proposed Natural Resource Plan where activities with vastly different scales of effect would require consent under the same rule. Requiring plans, and thereby rules, to specify activities that must be notified would increase the complexity of plans. There would have to be additional rules, carefully crafted to only be triggered by activities of a notifiable scale.

90. We acknowledge the concern some submitters expressed over requiring all discretionary activities to be fully notified. Under the current system this would result in more public notifications each year, because only about seven per cent of applications for discretionary activities are notified in practice.[317] However, our system aims to reduce the number of consents through a clearer focus on strategic outcomes and environmental limits in regional spatial planning and national direction. Furthermore, by applying our rationale for the status of activities above, plans under the new resource management system will have far fewer discretionary activities and more prohibited, restricted discretionary, controlled and permitted activities.

Plans under the new resource management system will have far fewer discretionary activities and more prohibited, restricted discretionary, controlled and permitted activities.

91. We also understand that the scale, nature and severity of effects can vary for activities that require consent under the same rule. We expect that our recommended shift to whether an activity achieves the outcomes in the plan will guide plan-makers in drafting new rules that can draw these distinctions more clearly. Ultimately, we are seeking a system that better anticipates these issues and plans for them.

[317] NMS data 2018/19. A total of 11,540 s88 applications for discretionary activities were processed non-notified, while only 433 were limited notified and 469 received full public notification.

Specifying affected parties

92. The circumstances in which limited notification is appropriate and what form limited notification should take have also given rise to much debate. Under the current legislation (section 95 and following), the decision as to whether to order full or limited notification depends on matters such as: whether or not the activity would be likely to have adverse effects on the environment that are judged with some confidence to be more than minor; and consideration of who an 'affected person' is.

Limited notification should only occur where it is possible to identify in advance the neighbours, statutory agencies and mana whenua and others who may be potentially affected.

93. This leads to further debate about who an affected person is. Our recommendation is that limited notification should only occur where it is possible to identify in advance the neighbours, statutory agencies and mana whenua and others who may be potentially affected by the matters over which the local authority has reserved discretion under the plan.

94. The local authority's plan should specify for each restricted discretionary activity the categories of persons who may be potentially affected by the relevant application. If it is not possible to identify in advance the categories of persons potentially affected by the relevant application, then there should be full public notification.

95. The 2017 RMA reforms introduced the term 'neighbour', which section 87BA describes as the owner of an allotment with an infringed boundary. In this context, a proposal that would require consent due to an infringed boundary could be deemed a permitted activity if the neighbours provide their written approval. This same definition applies to a potentially affected party who might be notified of a resource consent under section 95B(7)(a).

Our preference is to clarify in plans who is a neighbour for the purposes of adjudicating boundary infringements.

96. Though it seems straightforward, determining adjacent boundaries does involve issues and inconsistencies. The process can miss neighbours across the road as affected parties and needlessly include adjacent roads. Rural landholdings may be quite large and adjacent land owners may be far from the activity, and for some activities (such as those that generate odour or noise) a different measurement that accounts for a radius of potential affect is needed.

97. Our preference is to clarify in plans who is a neighbour for the purposes of adjudicating boundary infringements. National planning standards can help with this by using principles that address the issues and inconsistencies identified above.

Role of mana whenua in consent applications

98. Mana whenua have broad interests in their rohe that relate back to RMA plans in a variety of ways. However, RMA provisions for determining whether full or limited notification is appropriate are, despite their complexity, a crude approach to determining whether and how they should be involved. Mana whenua could be part of the process as an affected person, as a submitter, as a technical expert required by rules in a plan, as an applicant or through

relationships (with either the consent authority or the applicant). But in practice they are not involved in decisions that determine their status in the process.

99. Some plans are better than others at identifying when mana whenua views or values form part of the matters of discretion, and some local authorities have worked with mana whenua to clarify an acceptable approach. We think this is where the recommendations made in chapter 3 could assist, including the recommendations for national direction on giving effect to Te Tiriti and the development of integrated partnerships that include agreed protocols for mana whenua participation in resource consents.

Consent processes

100. We have addressed consent processes, including for hearings and appeals, in chapter 15. Our proposal is for a comprehensive schedule in a reformed RMA to house all procedural matters for both plan changes and resource consents. We do not go into further detail on consent processes in this chapter, but recognise they need to be reorganised and reviewed.

Permitted baselines and cumulative adverse effects

101. There is currently a tension between the permitted baseline and the rules in plans. In a plan, establishing permitted activities involves a balance of the potential positive and negative effects (benefits and costs) of that activity on the environment, and considering whether it is necessary for the intended use of the land. For example, a barn and a bach in a rural area may be of a similar size and have a similar relative effect on the wider landscape, but one is necessary to support rural production in the zone while the other is not.

We see the permitted baseline test as wholly incompatible with a system that is focused on outcomes.

102. We see the permitted baseline test as wholly incompatible with a system that is focused on outcomes. The reasons for this are twofold.

- Assessing whether a resource consent proposal achieves the outcomes in a plan is a fundamentally different exercise from just assessing adverse effects. Achieving outcomes is about determining an appropriate balance of the social, economic, cultural and environmental effects in resource management. As a result, the potential adverse effects of an activity may be deemed appropriate because of the activity's overall contribution to an outcome. That conclusion does not mean a different activity with the same effects that does not contribute to plan outcomes should be granted. An effect that is acceptable in one case is not necessarily acceptable in another.
- An increased focus on plan-making will require plans to address any conflicts in the outcomes identified in section 7 of our proposed purpose and principles and to ensure plan policies and rules reflect local context. As such, we expect more permitted activities in plans. These will need tightly written performance standards that limit cumulative effects, and more robust compliance monitoring as described in chapter 13. As noted above, permitted activities do not necessarily create a baseline for other activities, because they have not been viewed through the outcomes lens.

103. The management of cumulative effects is a system-wide issue we expect to be addressed by regional spatial planning and the setting of appropriate environmental targets and limits. A critical review of plan effectiveness through data on consents and state of the environment reporting is also important. Plans usually recognise the need to avoid, remedy or mitigate cumulative adverse effects in their higher-order policies, but it is the rules that must stay current with data on approaching environmental limits and 'course correct' for achieving outcomes. Chapter 12 addresses this critical link.

104. Existing uses and consents that are not yet implemented may not be taken into account in the assessment, meaning the receiving environment may go past its environmental limits with the exercise of existing rights before the impacts of a new application are considered. There is the potential to exploit this problem by stringing together several small consents over time, so that each stays beneath a threshold of significance for adverse effects whereas the full proposal will cause significant change overall. The "Open portal" for resource consents' section later in this chapter discusses an opportunity to curtail this 'gaming of the system' through a requirement to bundle related activities into consents using an 'open portal'.

A shift to decision-making that focuses on outcomes and environmental limits will help to reduce or eliminate the permitted baseline and consider cumulative adverse effects.

105. Ways to limit the unrealised harm that could be caused by existing use rights are addressed in chapter 5. Finally, a shift to decision-making that focuses on outcomes and environmental limits will help to reduce or eliminate the permitted baseline and consider cumulative adverse effects. This is discussed in the next section.

Decisions – matters to be considered

106. As the result of higher-order changes to the resource management system, the Panel found a number of changes to the current section 104 would be necessary. The purpose of these changes is to:

- shift decision-making from assessing the magnitude of effects to focusing on whether the proposal contributes to outcomes in the relevant plan, which will by extension give effect to the purpose and principles of the Natural and Built Environments Act
- remove the reference in current legislation to the assessment being 'subject to Part 2'[318]
- limit the influence of a permitted baseline test on effects on the natural and built environments
- introduce environmental limits and binding targets
- remove references to non-complying activities
- remove redundant references and needlessly complex clauses.

[318] This is to recognise the decisions in *Environmental Defence Society v New Zealand King Salmon Limited* [2014] NZSC 38 and *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

107. We have prepared the following indicative redrafting of a new section defining the matters to be considered on a resource consent application.

Consideration of applications

(1) When considering an application for a resource consent the consent authority must have regard to—

  (a) whether, and to what extent, the activity would contribute to the outcomes, targets and policies identified in any relevant operative or proposed policy statement or plan;

  (b) any effects on the natural and built environments of allowing the activity;

  (c) any relevant provisions of—

    (i) a national environmental limit or standard;

    (ii) other regulations;

    (iii) a national policy statement;

    (iv) a New Zealand coastal policy statement;

    (v) a regional policy statement or proposed regional policy statement; and

    (vi) a plan or proposed plan;

  (d) the nature and extent of any inconsistency with any policies and rules in any relevant operative or proposed plan; and

  (e) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) When considering an application for a resource consent, the consent authority must not have regard to—

  (a) trade competition or the effects of trade competition; or

  (b) any effect on a person who has given written approval to the application.

(3) The consent authority must not grant a resource consent—

  (a) that is contrary to—

    (i) an environmental limit;

    (ii) a binding target;

    (iii) a national environmental standard;

    (iv) any regulations;

    (v) a water conservation order;

    (vi) the restrictions on the grant of a discharge permit and a coastal permit;

    (vii) wāhi tapu conditions included in a customary marine title order or agreement; and

    (viii) section 55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011;

  (b) if the application should have been notified and was not.

(4) The consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, or a discretionary activity, regardless of what type of activity the application was expressed to be for.

(5) The consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

Direct referral

108. Currently, under sections 85D–I an applicant may request a consent authority refer an application for a resource consent directly to the Environment Court for decision. The direct referral process is intended to save time and costs for both the applicant and submitters where the application is likely to be appealed to the Environment Court in any event. Recent examples include proposals for the America's Cup in Auckland, a runway extension for Wellington International Airport, and Marine Spatial Planning in the Bay of Plenty. Five cases were lodged with the Court through direct referral in 2018 and four in 2019.[319]

The Panel considers the applicant should be able to apply directly to the Environment Court for direct referral if the consent authority refuses to refer their application.

109. The consent authority may agree or refuse to refer an application directly to the Environment Court. Under 87E(9), the consent authority must provide its reasons for declining the request, but there are no substantive criteria for making the decision. The applicant can object to the consent authority's decision, in which case an independent commissioner must decide on it under section 357A(1)(e), but there is no further recourse.

110. Section 87 instructs the consent authority to determine whether the application is complete and whether it should be notified. If a consent authority agrees to refer the application, it is done after the application is publicly notified.

111. Section 87E requires a council to grant a request for direct referral for a resource consent application if the value of the investment in the proposal is likely to meet or exceed a threshold amount, unless exceptional circumstances exist. However, the threshold to be used for this requirement has not been set in regulations, leaving full discretion to the consent authority. In its 2018 annual review, the Environment Court stated, "Members of the court consider that the Court and parties would not be overwhelmed if the need for Regulations were removed in any amending legislation". We can reasonably assume that the number of direct referral cases would increase if our proposals are accepted.

112. The Panel considers the applicant should be able to apply directly to the Environment Court for direct referral if the consent authority refuses to refer their application. There ought to be criteria to guide decisions by the consent authority and the Court on an application for direct referral. These could include, for example:

- the scale, significance and complexity of the proposed activity
- whether there is any particular need for urgency
- whether participation by the public would be materially inhibited if the application were granted
- any other relevant matter.

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319 Environment Court of New Zealand. 2019. *Annual Review: Calendar Year 2018 by Members of the Court*. Wellington: Environment Court; personal communication between the Panel Chair and Judge Newhook, 2020.

113. Because the grant of an application for direct referral would remove a first-stage hearing that would normally be available, it is important to ensure removal of the first-stage hearing does not significantly prejudice submitters. Section 285(5) of the RMA contains a presumption that costs will not be awarded against submitters or section 274 parties in direct referral cases. The Natural and Built Environments Act should continue to provide for this, unless the submitter has acted in a vexatious manner or has needlessly or unreasonably prolonged the hearing.

Alternative dispute resolution process for minor disputes

114. A number of minor issues could be resolved more simply, quickly and cheaply than through normal consent hearing processes. This view was echoed by submitters, including Nelson City Council, which supported an alternative process for minor disputes. Submitters identified a need for an approach to mediating disputes that is more inquisitorial than adversarial and suggested that the system should focus on desired outcomes, rather than on rules that must be followed. Others pointed out that the approach will need to address dispute resolution methods and costs.

A number of minor issues could be resolved more simply, quickly and cheaply than through normal consent hearing processes.

115. The Panel recommends alternative processes to resolve such disputes. We envisage that the alternative process would be available in the case of controlled activities and restricted discretionary activities. Where, for example, neighbours were in dispute over minor infringements of development controls, such as height or height in relation to boundary, the alternative process could be used. It might also be appropriate where there is a localised or discrete public interest in the design of an activity, such as the landscaping plan for a development or a modification to a heritage building. We will not identify every potential activity for this process, but suggest that plans should identify where this alternative process may be appropriate. We have two potential options.

The Panel recommends alternative processes to resolve such disputes. We envisage that the alternative process would be available in the case of controlled activities and restricted discretionary activities.

- The first option would be for the parties to agree to submit the issue to an independent adjudicator, who would decide the issue by a simplified process with no further right of appeal. The lower costs and certainty of no appeals may act as an incentive for parties to choose this option freely.
- The second option is for the local authority to specify in its plan the types of activities to be decided by an independent adjudicator, who would decide the issue after considering the views and information provided by all parties. The right of appeal to the Environment Court would be preserved, but the parties would have to seek leave to appeal. Should it be granted, the outcome of the adjudication would be a factor to be taken into account.

116. Authority to use the alternative process should be provided in the Natural and Built Environments Act and guidelines could be included in national planning standards. Where alternative processes are proposed in combined plans, their application can be tested by submitters and considered by the Independent Hearings Panel before they are operative. Criteria for using them include cases where:

- a limited number of parties are involved
- the dispute is of a discrete or localised nature
- the alternative process would be proportionate to the nature, extent and significance of the matters at issue.

117. We envisage an accredited panel of adjudicators from which a single member would be appointed to each dispute. The adjudicator would be at liberty to determine how to resolve the dispute fairly and in accordance with natural justice principles. An oral hearing would not be essential and the matter could be dealt with by written submissions. Potentially the legislation could provide that legal practitioners could not appear, as is the case with the Disputes Tribunal. The independent adjudicator would be bound to apply the provisions of the legislation in the same way as a normal hearing (other than as to process).

118. These options could help create an alternative process for minor disputes that is faster, simpler and less expensive.

119. Some submissions supported the removal of automatic hearings and appeal rights, and for them our proposal might still not go far enough. However, others emphasised the importance of these rights for good decision-making and public participation, and we agree they should not be removed without very good cause. We anticipate that the requirement to seek leave to appeal presents a slightly higher barrier but does not disadvantage any party whose argument truly merits the opportunity to appeal.

Standing of submitters

120. Under the current RMA, anyone may make a submission on an application for a resource consent. This was the recommendation of the 1991 review group appointed to consider the Resource Management Bill.[320] Given only a tiny proportion of resource consent applications is publicly notified, the Panel considers that open standing should remain. Debates over how to limit standing are likely to generate dispute and there is little to suggest that open standing has caused any major concerns to the extent that the present rule should be changed.

Appeals

121. The Panel considers the Environment Court should deal with *de novo* (full rehearing) appeals on resource consent applications in the same way as under the current legislation. This includes standing to appeal (section 140) and the circumstances in which others may join

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320 Review Group. 1991. *Report of the Review Group on the Resource Management Bill*. Wellington: Ministry for the Environment. Retrieved from http://www.nzlii.org/nz/other/lawreform/NZRMLawRef/1991/1.html (16 June 2020); p 102.

the appeal (section 274).[321] Appeals to the High Court on points of law would also continue as they are currently.

122. While we understand that concerns about a potential appeal drive risk-averse behaviour by consent authorities and applicants, we consider the extremely low rate of appeal for resource consents shows that the fear of appeal need not drive curtailment of appeal rights.

123. Judicial review should not be permitted unless the applicant has exercised a right of appeal on a question of law as is currently the case. Any appeal to the Court of Appeal should require leave as at present under section 308.[322] There should be a further right of appeal to the Supreme Court, but only with the leave of that Court.[323]

The extremely low rate of appeal for resource consents shows that the fear of appeal need not drive curtailment of appeal rights.

124. In terms of section 74 of the Senior Courts Act 2016, the Supreme Court may only grant leave if the appeal involves a matter of general or public importance; or a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard; or the appeal involves a matter of general commercial significance. The Supreme Court has delivered landmark decisions on resource management law and we consider it appropriate that Environment Court cases continue to have access to this rarely needed but important avenue for appeal.

125. We are aware of concerns about delays through appeals but the number of appeals is very low. The average number of appeals to the High Court from cases originating in the Environment Court over the last five years is only 17 and it is likely a significant proportion of these were settled by agreement or withdrawn.[324]

126. Chapter 14 includes further recommendations on processes and procedures in the Environment Court.

'Open portal' for resource consents

127. The Panel notes a combined plan would already provide for an integrated and simplified process. There also needs to be a downstream change to the consent process, in which the system treats an application as a cohesive whole rather than breaking it up into components of effects to be assessed.

128. An assessment of effects examines several different issues within the context of an application but the current system focuses too much on discrete aspects of each issue. This tendency is driven by myriad standards and assessment criteria set out in multiple sections of multiple plans. The concept of an 'open portal' is to bring these issues together across consent authorities when an application is made.

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321 We recommend some modification of the current section 274 to accommodate public interest groups in chapter 14.

322 It is also a requirement under section 303 of the Criminal Procedure Act 2011.

323 Section 309, Criminal Procedure Act 2011.

324 Figures from the Ministry of Justice. Average is over five years and includes cases that originated in the Environment Court and appeals on points of law regarding the RMA.

129. While we acknowledge the technical aspects of an online consenting system still need to be dealt with, the concept of an open portal is based on coordination between agencies to address applications holistically under one planning framework. This would be achieved through:

The concept of an open portal is based on coordination between agencies to address applications holistically under one planning framework.

- requiring applicants to bundle applications for a proposal to the greatest extent practicable, acknowledging that some activities are predicated on the approval of others
- making one local authority responsible for administering the portal in a region, ensuring all relevant consent authorities receive the application and facilitating a joint process
- presuming the application, if notified, will receive a combined hearing, unless there are good reasons (such as those currently outlined in section 102 of the RMA) to proceed with portions of applications ahead of others.

Interaction with the Building Act

130. The relationship between the RMA and the Building Act has given rise to some difficulties which we consider should be addressed. In part, these difficulties arise from the different purposes of the two pieces of legislation.

131. The Building Act is primarily concerned with compliance with the building code and the performance of buildings as designed and constructed. But the legislation has wider purposes as well, including the health and safety of those using buildings, wellbeing and ensuring that the design and construction of buildings promotes sustainable development.[325]

132. Despite this wide purpose, the main focus of the Building Act is on the internal quality of buildings and there is little to address the effects of buildings beyond their footprint. The focus of the Building Act on the internal quality of buildings stems from the building code, which provides minimum standards for buildings without incentives to encourage building to higher standards. If the building code does not provide an appropriate minimum for achieving the wellbeing or sustainable development purpose, then there are no other mechanisms within the Building Act to provide for that purpose. Requirements for performance above the building code cannot be imposed on a building by other legislation.[326]

133. A number of resource management cases as well as the Independent Hearing Panel for the Auckland Unitary Plan have considered the relationship between the building code and the RMA. An example of this relates to minimum floor levels where Auckland Council wanted a minimum floor level included in the Unitary Plan under the RMA, but the Hearing Panel recommended (on the basis of lack of evidence to justify regulation) that this is a matter that should be more appropriately controlled by the building code. However, there are other

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325 Section 3, Building Act 2004.

326 Section 18, Building Act 2004.

cases where regulation has been identified as appropriate under the RMA, such as the relationship of windows facing adjoining buildings and the potential impacts on privacy between these buildings. Generally, the determination appears to be based on whether or not the control relates to the internal effects of the building (usually considered building code matters) or to the external effects of that building on others in the environment (which can be considered under the RMA).

134. This distinction between internal effects and externalities is generally reasonable. However, this approach does not address the issue of the impacts of a building form (as part of the built environment) on the wider context, which is often related to urban design and street appearance factors. These are matters that have more regularly been the domain of the resource management system, but have led to concerns the system is being used to police design rather than to manage effects. The Panel considers this matter could, at least in part, be addressed through the proposed focus on planning for outcomes in the planning system (which would, for example, set outcomes for the quality of a built environment at a community level). However, such a change does not address the relationship between the building code and the resource management system.

135. There are issues that could potentially cross the boundary between the internal and external effects of buildings that need consideration. For example, should the Natural and Built Environments Act regulate for increased shade in urban environments, recognising future increases in temperature expected from the effects of climate change? It would be helpful if the matters that potentially relate to both the internal and external environment were identified by central government and guidance provided on which Act is best to regulate them.

136. In addition, the Panel generally supports approaches and incentives to encourage building standards above the minimums set in the building code; such as a rating from the New Zealand Green Building Council or similar. The building code has been slow to change and could also be reviewed more frequently to respond to new issues such as increased density and commensurate requirements for more noise insulation to protect mental health and wellbeing.

137. We consider that the relationship between the Building Act and the Natural and Built Environments Act is generally appropriate but recommend that the Building Act should be reviewed to improve its alignment and minimise conflicts with the new legislation we propose. We also suggest that consideration be given to the need to modify the Building Act and building code to address the effects of climate change and improving environmental outcomes and, in such response, to consider a code that incentivises buildings that go beyond minimum standards.

We also suggest that consideration be given to the need to modify the Building Act and building code to address the effects of climate change and improving environmental outcomes.

Proposals of national significance

138. The provisions for proposals of national significance (currently in Part 6AA) are an important way to ensure nationally significant proposals are heard and decided within one clear, independent process. Like direct referral, the assumption is the proposal is likely under normal circumstances to be appealed to the Environment Court and it would be better to begin at that level rather than start with a local process. But in contrast to direct referral, the Minister has the power to authorise the use of the process

The Panel supports the continued provision for proposals of national significance because it is an important way to address proposals that might not otherwise be handled with the level of expertise, timeliness and attention needed to decide them.

139. The EPA reports 16 completed proposals of national significance processes since 2010. Examples include the New Zealand Transport Agency (NZTA) Waterview connection and Transmission Gully, expansion of Queenstown Airport and most recently the East West Link in Auckland. All of these applications were lodged between 2010 and 2016. We note that those submitters who offered an opinion on the direct referral and proposals of national significance processes expressed support for retaining them.

140. The Panel supports the continued provision for proposals of national significance because it is an important way to address proposals that might not otherwise be handled with the level of expertise, timeliness and attention needed to decide them. However, we consider the approach is overly complex and that provisions could be simplified.

141. The first issue is the criteria for identifying a proposal of national significance. The Panel recommends revisions to these as follows.

Matters to which the Minister must have regard before making a direction on a proposal of national significance

In deciding if a matter [defined at present under section 141] is or is part of a proposal of national significance and whether to invoke the process under this Part the Minister must have regard to—

(a) the nature, scale and significance of the proposal:

(b) its potential to contribute to achieving nationally significant outcomes for the natural or built environments and the social, economic, environmental and cultural wellbeing of people and communities:

(c) whether there is evidence of widespread public concern or interest regarding its actual or potential effects on the natural or built environment:

(d) whether it has the potential for significant or irreversible effects on the natural or built environment:

(e) whether it affects the natural and built environments in more than one region:

(f) whether it relates to a network utility operation affecting more than one district or region:

(g) whether it affects or is likely to affect a structure, feature, place or area of national significance including in the coastal marine area:

(h) whether it involves technology, processes or methods that are new to New Zealand and may affect the natural or built environment:

(i) whether it would assist in fulfilling New Zealand's international obligations in relation to the global environment:

(j) whether by reason of complexity or otherwise it is more appropriately dealt with under this Part rather than by the normal processes under this Act:

(k) any other relevant matter.

142. The Panel considered whether 'urgency' should be included in the criteria but decided against it. While the process would be more streamlined than the standard process, the emphasis for a proposal of national significance is its national context, not whether it is urgent. Direct referral exists for any urgent proposals that are not otherwise of national significance.

143. The second matter relates to the methods for accepting and hearing the proposal. Current provisions require referrals for proposals to go through a consent authority or the EPA. Proposals are heard by an independent board of inquiry usually chaired by a retired Environment Judge, with secretarial and administrative support provided by the EPA. Because of the episodic nature of the proposals of national significance process, the EPA does not routinely have staff assigned permanently to supporting it, but commissions staff and consultants to address applications as they arise.

144. In a 2015 review of the effectiveness of the EPA, the Ministry for the Environment evaluated the involvement of the organisation in supporting proposals of national significance. While considering EPA support was responsive overall, the review identified issues with the board of inquiry process and EPA's role in supporting it. Among these issues were:

- lack of process consistency, as noted by board of inquiry members who heard multiple proposals of national significance[327]
- variable quality and expertise among board of inquiry members
- variable quality of internal reports
- the need to work efficiently to minimise costs (which are passed along to the applicant)
- challenges working within the nine-month timeframe.[328]

145. The Panel questioned whether the role of the EPA to receive requests and administer the hearing is a good use of the EPA's institutional capabilities, given the issues cited above and opportunities to expand the EPA's role elsewhere in the system. Furthermore, there does not seem to be benefit in having a choice between a board of inquiry process and the Environment Court. We are satisfied the Court has capacity to hear proposals of national significance cases and would provide an approach that is independent, consistent and accessible to submitters. We discuss the potential roles of the EPA and the Environment Court in chapter 14.

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327 Our informal inquiries suggest that one reason for these variances may have been that each BOI tailored the approach to the number, resources and professional capacity of submitters.

328 Suckling S. 2005. *Cabinet Mandated Review of the Efficiency and Effectiveness of the Environmental Protection Agency*. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/About/review-of-the-efficency-and-effectiveness%20-of-the-epa.pdf (16 June 2020).

146. The Panel recommends simplifying the process for accepting and hearing proposals of national significance in the following ways:

- a proposal of national significance could be called-in by the Minister on his or her initiative, or it could be referred to the Minister by a relevant local government agency or directly by the applicant
- the Ministry for the Environment would provide support to the Minister in assessing and recommending whether a proposal should be accepted
- the Environment Court would hear the proposal
- the relevant local authority would provide secretariat services on a cost-recoverable basis.[329] This would ensure the administration had an understanding of local processes and values
- as with the current provisions, all of the costs would be recovered from the applicant.

There does not seem to be benefit in having a choice between a board of inquiry process and the Environment Court. We are satisfied the Court has capacity to hear proposals of national significance cases.

Timeframes and appeals

147. We are satisfied the nine-month time limit currently applying to the proposals of national significance process is much too short and places intolerable and unjustified pressure on all participants. We also consider it constitutionally inappropriate to impose time limits of this kind on the judiciary who can be relied on to give the case appropriate priority. Undue speed is not conducive to sound decision-making. Appeal rights on a proposal of national significance decision would be the same as under any other decision by the Environment Court.

We are satisfied the nine-month time limit currently applying to the proposals of national significance process is much too short.

Expected outcomes

148. We consider our proposals for reform of resource consent provisions address the key issues in our terms of reference and align with the objectives and principles we adopted for our review. Overall, the proposals will ensure environmental objectives are met while increasing certainty and reducing costs for applicants. Fewer consents will be required, notification will be addressed in a more systematic manner, and processes will be better tailored to the circumstances.

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329 If the proposal spanned the jurisdiction of multiple local authorities, the relevant authorities would decide by mutual agreement which one would provide administrative support. Where a local authority is not capable of providing or contracting a secretariat, the Environment Court could give directions as to how this was to be provided.

Key recommendations

Key recommendations – Consents and approvals	
1	Current resource consent types should remain: land use and subdivision consents, and water, discharge and coastal permits.
2	The current list of activities should remain, except for the non-complying category which should be removed.
3	The current rules on notification of consent applications should be substantially changed by removing the 'no more than minor' effects threshold and replacing existing provisions with a combination of presumptions and plan provisions specifying when notification is to occur and in what form.
4	Information requirements should be proportionate to the nature, scale and complexity of the issue.
5	The matters to be considered on an application for resource consent should be amended in various respects including shifting the focus to identified outcomes and removing the 'subject to Part 2' reference and the permitted baseline test.
6	The direct referral process should be modified. Where the relevant consent authority declines to consent to the referral the Environment Court should be permitted to approve direct referrals on stated criteria.
7	An alternative dispute resolution process should be established for controlled or restricted discretionary activities in prescribed circumstances. Parties to the process should still be able to exercise rights of appeal but only by leave of the Environment Court.
8	An 'open portal' for consent applications should be established to coordinate agency responses and encourage the bundling of applications.
9	Proposals of national significance should remain but with a simplified process involving Ministerial referral to the Environment Court in accordance with prescribed criteria.

Chapter 10 Designations, heritage and water conservation orders

1. This chapter addresses designations, heritage and water conservation orders, currently provided for in Part 8 of the RMA.

Designations and infrastructure

2. Infrastructure is a critical feature of our built environment and delivers a range of essential services to all New Zealanders including electricity and telecommunication services, freshwater and wastewater, schools and prisons, roads, cycleways and airports.

The reformed resource management system should ensure infrastructure is adequately planned for in advance, well integrated with land use, and delivered and operated efficiently so it can support improving wellbeing outcomes.

3. When they have access to the right level of public transport, space at local schools, and other necessities relative to their density, communities can achieve positive social, economic, cultural and environmental outcomes. The reformed resource management system should ensure infrastructure is adequately planned for in advance, well integrated with land use, and delivered and operated efficiently so it can support improving wellbeing outcomes. This is particularly provided for through the development of spatial strategies (see chapter 4).

4. The reformed system should recognise the need to enable route protection and the construction and operation of public-good infrastructure. This chapter makes recommended changes to designation provisions in our proposed Natural and Built Environments Act.

Current provisions

5. The RMA enables delivery of infrastructure primarily through designations instigated by requiring authorities (the Crown, local authorities and network utility operators). The designation provisions in the RMA were largely taken from the Town and Country Planning Act 1977.

Designation powers

6. A designation is a form of district plan zoning that applies to a particular site, such as a current or future prison location, or route, such as a transport corridor. Under the RMA, designations can only apply to land. The designation zoning replaces the district plan zoning meaning district plan resource consents are not required, although regional consents, such as discharges to water, are.

7. Significant powers which impinge on private property rights are available under the Public Works Act 1981. In particular, powers of compulsory acquisition and compensation are available for land in a designated area.

8. Owners of land subject to a designation can still use their land until the infrastructure needs to be built or while the infrastructure is operating. However, that use must not impact on the purpose of the designation without express permission from the requiring authority.

Who is eligible to obtain designation powers?

9. Designation powers may be used by Ministers of the Crown and local authorities with financial responsibility for the infrastructure, and network utility operators approved by the Minister for the Environment as requiring authorities.

10. Historically, almost all public-good infrastructure was delivered by public agencies but this has changed over time with regulatory and institutional reform. Some infrastructure is now delivered by publicly owned commercial operators or private companies (eg, telecommunications companies).

What is the designation process?

11. The designation process generally involves two stages: obtaining a designation; and then preparing to carry out works on the designated land.

12. The first step is for a requiring authority to serve a notice of requirement. The notice protects land for the designated purpose until the designation is confirmed or withdrawn. Unless public notification is sought by the requiring authority, decisions on whether to publicly notify notices of requirement are made by territorial authorities in the same way as for resource consents.

13. Generally, notices of requirement are heard by the relevant territorial authority which then makes a recommendation to the requiring authority (or approves it if the council itself issued the notice). Under this process, the requiring authority is the 'decision-maker' on the designation. A requiring authority can ask for the notice to be directly referred to the Environment Court for a decision. Or, if the Minister considers the designation to be of national importance, then it may follow a board of inquiry process where a specific board is established to hear and decide on the designation, and appeal rights are limited.

14. Once a designation is in place, subsequent processes enable the requiring authority to undertake the proposed works without further land use consent approvals. Unless such a requirement is waived by the territorial authority, the requiring authority submits an outline plan which describes the works to be carried out. This contains information on the form and nature of the project. Specific conditions of a designation may require management plans to be prepared for defined aspects of a project. Outline plans are not publicly notified. Management plans required by conditions of a designation can stipulate specific consultation requirements to be met during their preparation. As with the notice of requirement, the outline plan is decided by the requiring authority after referral to the territorial authority.

15. Both notices of requirement and the subsequent outline plans can be appealed to the Environment Court. In the case of an outline plan, such an appeal can only be filed by the territorial authority.

Issues identified

16. Over 40 submissions on the issues and options paper made comments on designations. Feedback overwhelmingly supported the use of designations and considered that the designations system works reasonably well. Substantial feedback was also received on how to improve the system, which has helped to identify a number of issues:

    - eligibility criteria, the types of projects that can use designations, and who can be requiring authorities
    - the inability to use designations in the coastal marine area
    - inadequate 5-year default timeframes for lapse of designations
    - inefficiencies and problems with the 2-stage designation process (notice of requirement and outline plan of work)
    - opportunities are missing to jointly plan for infrastructure, integrate it with land use, and co-locate where practicable
    - difficulty aligning with other standards and processes.

Options considered

Eligibility for designation powers and process

17. As noted, designation powers are used by the Crown and territorial authorities for 'public works' defined in the Public Works Act 1981 and by requiring authorities approved as network utility operators.

18. Network utility operators are defined in section 166 of the RMA which includes a list of projects, works and networks eligible for this status. There are inconsistencies in these provisions, both as to who is eligible to become a requiring authority and for what works or projects. For example, some parts of networks are not eligible (eg, electricity generators and some connections to the national grid), some commercially operated sites are eligible (eg, airports and irrigation) while others are not (eg, ports), and some publicly-funded infrastructure is not eligible (eg, fire stations). For works other than 'project works' the application of the criteria is also unclear (eg, environmental service infrastructure such as coastal dune systems managed to reduce coastal erosion).

19. In general, infrastructure providers who made submissions wanted to see the eligibility criteria for designations widened, including the types of infrastructure eligible for designations (eg, ports, electricity generation, petroleum refining) and corresponding bodies eligible to become requiring authorities. Some suggested using designations to address other issues such as climate change adaptation and mitigation, and large developments.

20. We have considered how designation eligibility criteria can help achieve the outcomes we are seeking through the new system, in particular 'strategic integration of infrastructure with land use' and 'enhancement of features and characteristics that contribute to quality built environments'. We concluded eligibility for designation powers should be limited to, and centred on, public-good infrastructure. We consider the current approach of including a list of qualifying requiring authorities should be continued and the Minister should also have the power to approve other requiring authorities subject to considering criteria centred on public-good outcomes.

Eligibility for designation powers should be limited to, and centred on, public-good infrastructure.

21. A list of qualifying requiring authorities included in the legislation should include:
    - Ministers of the Crown
    - local authorities
    - the network utility operators listed in section 166 of the RMA which, after review, are found to meet the suggested criteria for approving additional requiring authorities as set out below.
22. Suggested criteria for the Minister to consider in approving other requiring authorities should include whether the activity, projects or works of the applicant are intended for a public purpose and not predominantly for private benefit.

We have concluded that designations, with their accompanying Public Works Act acquisition powers and compensation provisions, should be one method available to address the effects of climate change or to reduce the risks of natural hazards.

23. The need to plan for and manage the effects of climate change may mean there is a public-good interest in some projects and works that has not, to date, been provided for. We have concluded that designations, with their accompanying Public Works Act acquisition powers and compensation provisions, should be one method available to address the effects of climate change or to reduce the risks of natural hazards. We consider this could be achieved through broadening the definition of 'work' for designations to include reducing risks from natural hazards and adapting to climate change.
24. The Panel also considers the current RMA definition of infrastructure should be broadened (see appendix 1). However, the infrastructure that may be delivered by designation is a more confined subset of this broader definition.

Designations and the coastal marine area

25. Submitters sought expansion of designation provisions to include the coastal marine area. There have been instances where major infrastructure providers have been unable to secure consent under the RMA for an infrastructure work, such as electricity transmission, due to existing rights to coastal space. Unlike on land, there is currently no way to extinguish coastal permits or to override permitted activity provisions in a regional coastal plan in order to provide for a public work, even if it is for a wider 'public good'.

26. In chapter 4 we propose that regional spatial strategies extend into the coastal marine area to promote integration between land use, the coastal environment and water quality. The coastal marine area is largely managed as a public resource, and designations for public works and infrastructure are one way to deliver such works for the public good.

The Panel recommends that consideration be given to extending the designation process to the coastal marine area.

27. The Panel recommends that consideration be given to extending the designation process to the coastal marine area, acknowledging there are some complexities that would need to be worked through. In particular, there are implications for the Marine and Coastal Area (Takutai Moana) Act 2011 and protected customary rights as well as Tiriti settlements including for aquaculture and fisheries (although it is noted that some of these issues are common for public works affecting Māori land or land subject to Tiriti settlement).

Designation default timeframes

28. Considerable input was received on the default five-year lapse period for designations. Infrastructure takes considerable time to plan and fund with large and complex infrastructure often taking decades. Infrastructure providers have consistently found the five-year default lapse period for designations inappropriate for planning and funding cycles.

29. The New Zealand Infrastructure Commission – Te Waihanga submitted:

> The RMA currently provides designations for five years, extendable to ten years in certain circumstances (section 184). However, this timeframe does not always allow for the fact that some infrastructure requires decades of planning in advance. The time limit on designations was set to prevent land being blighted for development if not used by the requiring agency within the time period. However, section 185 (Environment Court may order taking of land), which enables the Court to order a requiring authority to pay a lease or to acquire designated land, provides adequate disincentive to agencies to hold land unnecessarily. We recommend that the Panel consider options that allows for long infrastructure lead times, such as extending designations to a minimum of ten years.

30. In 2010, the Infrastructure Technical Advisory Group[330] found in most cases initial extensions to the timeframe were accepted, but there was reluctance to extend this timeframe beyond 10 years for longer-term projects. It also found the Environment Court had generally accepted a 10-year period even though longer periods were often sought. For existing designations, where extensions to lapse periods were sought, the Group suggested that the test of substantial progress or effort was not arduous and extensions were usually granted.

31. While the five-year default timeframe is often extended, we consider there is unnecessary cost and increased uncertainty created by the short timeframe and in the process of repeatedly seeking extensions. These have little benefit to land owners or to planning outcomes.

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330 Minister for the Environment. 2010. *Report of the Minister for the Environment's Infrastructure Technical Advisory Group*. Wellington: Ministry for the Environment. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Extra%20downloads/Source%20file/Itag-Report-Final.pdf (16 June 2020).

32. We propose a new default lapse period of 10 years for all designations, with extensions available of up to another 10 years subject to defined criteria or principles. Twenty years would be the maximum timeframe available. These longer timeframes provide for what some submitters described as 'concept designations' for matters such as route protection.

33. Principles for consideration in the extension of a designation beyond the default 10-year period would include:

    - a regional and national significance test
    - an expectation that the infrastructure is identified in a regional spatial strategy
    - that the designation facilitates co-location of infrastructure (which may necessitate longer delivery timeframes)
    - consideration of uncertainty or risk management responses.

We propose a new default lapse period of 10 years for all designations, with extensions available of up to another 10 years subject to defined criteria or principles. Twenty years would be the maximum timeframe available. These longer timeframes provide for what some submitters described as 'concept designations' for matters such as route protection.

34. The full Public Works Act powers would be available from the lodgement of a notice of requirement, as is the current situation. Current appeals to the Environment Court would also be retained.

Two-stage process: notice of requirement and outline plan

35. Submitters consider designations are becoming like consents due to the detail that local authorities require at the notice of requirement stage, and because often the requiring authorities do not seek notices of requirement until close to construction. Significant detail is usually not appropriate or available at early stages of infrastructure planning.

36. In other cases, submitters seek a process that allows them to design and build infrastructure with less time needed to plan. These submitters see the two separate stages as unnecessary within their shorter timeframes.

37. As a result submitters considered designations are restricting design options and potentially losing innovation, hindering the uptake of new technology and foregoing better environmental and community outcomes. The outline plan is also less meaningful due to the detail already considered and for some it is seen as a chance to re-litigate issues.

The Panel considers it appropriate to maintain flexibility in the implementation of designated works to suit the different types of projects and practical situations that arise.

38. Submitters have suggested considerable improvements to the two-stage process, particularly to clarify requirements at each stage and ensure they are appropriate for infrastructure project timeframes. Some submitters proposed different types of designations for different types of protections or projects, including 'concept designations' (noting there were differing views on what 'concept designations' were).

39. When looking at this process, we want to ensure a full assessment of environmental effects occurs for designated infrastructure projects before works start. However, the Panel considers it appropriate to maintain flexibility in the implementation of designated works to suit the different types of projects and practical situations that arise.

Notices of requirement

40. Our proposal to extend the default timeframe to 10 years will likely have little impact if requiring authorities are compelled to issue notices of requirement with detail that is usually only available close to the start of construction.

41. The Panel has considered what the appropriate level of information and assessment is for a notice of requirement and when that information is needed.

We have concluded that at this first stage of the process the assessment should be kept at a high level.

42. Section 171(1) of the RMA requires territorial authorities to assess environmental effects and to make a recommendation to the requiring authority. This assessment includes consideration of national direction, regional policy statements and plans, alternative sites, routes or methods, and whether the designation is reasonably necessary for the work. We generally consider the matters for consideration appropriate, given the ability for such processes to compel the taking of land through Public Works Act mechanisms. We also propose the addition of consideration of any relevant regional spatial strategy.

43. We have concluded that at this first stage of the process the assessment should be kept at a high level, focused on considering the designation's impact on the outcomes set out in the Natural and Built Environments Act, and the environmental effects of the designation footprint, rather than on the detail of potential impacts of the works within the footprint. There would be a subsequent process to address the potential effects of works within the footprint through construction and implementation plans discussed below.

We propose that notices of requirement be publicly notified due to their public-good benefits and impacts on private property.

44. We propose that notices of requirement be publicly notified due to their public-good benefits and impacts on private property. When making alterations to the geographic extent of a designation, the panel considers there should also be a presumption of full notification, with the ability to reduce notification depending on the significance of the alteration. As an example, if a requiring authority seeks to alter the designation boundary, and owns the affected land, notification requirements could be waived.

Outline plans – construction and implementation plans

45. With the recommended extension of the timeframes for notices of requirement, the second stage for some designations (currently the preparation of an outline plan) will come a considerable time after the notice of requirement is confirmed. Our recommendations

seek to focus subsequent processes on managing the construction effects of a designated work and its operational effects, where those effects extend beyond the designation boundaries. Detail on operational effects and their mitigation (eg, vibration effects on a close building) will therefore be in a new 'outline plan' type process. For this reason, we recommend renaming outline plans as 'construction and implementation plans' to better convey their purpose.

We recommend that the scope of matters set out in section 176A(3) for an outline plan be broadened.

46. We recommend that the scope of matters set out in section 176A(3) for an outline plan be broadened, as much of this detail will not have been considered at the time the designation was confirmed. The process will focus on the detail of what is being constructed, how it will be constructed, and how the specific effects of operating the designated work will be managed. In preparing these plans, it is expected the requiring authority will identify specific controls and conditions for construction and operation to address the potential adverse effects of the works. It is anticipated the territorial authority, if considering these plans, would be able to make recommended changes.
47. With these proposed changes, it is also acknowledged that new information will be provided at the time a construction and implementation plan is prepared. As such, the Panel considers that adequate time and opportunity should be given for public submissions and territorial authority recommendations prior to construction commencing. However, this requirement and process should not be used to relitigate the notice of requirement and should be limited to matters associated with the construction and operational effects.
48. We propose that construction and implementation plans could be submitted in stages, to enable progressive implementation of designated works.

Flexibility to have a one-stage process

We recommend a one-stage process is provided for so that the 'why and where' (notice of requirement) and the 'how' (construction and implementation plan) can be undertaken together if appropriate and if sufficient information is available.

49. Different infrastructure projects can have a variety of different needs and circumstances affecting them. Submitters wanted approval processes that also suited a 'design and build' approach to infrastructure which may eventuate from particular tender, contract and partner financing arrangements.
50. The RMA already provides for outline plan detail to be included in the notice of requirement or for outline plans to be waived (when they are often replaced with management plans). Nationally significant proposal processes also apply to eligible projects.
51. Building on the existing requirements, we recommend a one-stage process is provided for so that the 'why and where' (notice of requirement) and the 'how' (construction and implementation plan) can be undertaken together if appropriate and if sufficient information is available.

Enable co-location of infrastructure

52. The Panel considers that enabling the appropriate co-location of infrastructure is an important factor in achieving integration of infrastructure and land use, efficient use of land and quality built environments.

53. Regional spatial strategies will help identify opportunities for co-location of infrastructure, particularly for regionally and nationally significant projects.

54. Section 177 of the RMA provides for multiple designations on the same land to enable co-location, but the process effectively gives primacy (veto rights) to the first designation holder. This does not always enable good integration and efficient use outcomes. It can potentially create perverse outcomes if requiring authorities seek to avoid overlapping designations to simplify matters for themselves.

55. The Panel recommends adding co-location to the considerations relevant to a notice of requirement.

Alignment with other processes

56. Submitters sought to clarify the relationship between national environmental standards and designations, and the effect of district plan rules. Some infrastructure providers consider the operation of their infrastructure is not sufficiently protected and claim they are needing to participate in plan reviews throughout the country just to maintain the status quo.

57. We consider the balance of our reforms will help to address this issue, including the ability to include infrastructure in regional spatial strategies and combined plans, the longer default timeframes for designations, and clarification throughout the entire suite of national direction. In a reformed system, infrastructure providers will need to engage with fewer plans and will have clarity on where their designations sit within the overall system.

58. Some submitters also suggested there is a duplication of the designation process with some other legislation. For example, Transpower stated the

> Public Works Act process largely repeats aspects of the designation process, so similar issues arise and need to be reconsidered. Streamlining the application processes for these complementary statutory approvals, aligning the legal tests, and providing for concurrent joint hearings would minimise the cost and delay caused by this duplication. This approach is consistent with overseas jurisdictions, which generally provide for all relevant approvals to be obtained through the same process.

59. The Panel recognises the efficiencies that can be gained by aligning processes and legal tests (if appropriate), and notes the Urban Development Bill's independent hearing panel processes that cover multiple pieces of legislation for urban development projects. However, the scope of this review limits recommendations on other pieces of legislation.

60. We consider there is merit in looking at the better alignment of processes and legal tests further but there are a number of considerations that would need to be worked through.

Heritage protection

61. Historic heritage is valued by the public. It makes an important contribution to quality urban environments, our sense of place and nationhood, and wellbeing. Historic heritage values, once destroyed, cannot be replaced. They are a non-renewable resource.

62. Statutory heritage protection mechanisms have been part of New Zealand's resource management system for some time. Prior to the RMA, the Historic Places Act 1980 empowered the New Zealand Historic Places Trust to classify buildings, having regard to their heritage values. Once classified, the Trust could issue protection notices in accordance with the Town and Country Planning Act 1977.

63. The current RMA plays an important role in the identification, protection, and ongoing management of historic heritage. This chapter focuses on the wider system of heritage management and the potential for using heritage orders in a reformed system. The Panel notes that the Ministry of Culture and Heritage is currently undertaking a review of the heritage protection system – Strengthening Heritage Protection. We recommend that this process should continue and offer some suggestions to be considered as part of that process.

Current provisions

Heritage scheduling under the RMA

64. Under the RMA, historic heritage is defined as "those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures" deriving from archaeological, architectural, cultural, historic, scientific and technological qualities. It includes historic sites, structures, places and areas; archaeological sites; sites of significance to Māori including wāhi tapu; and surroundings associated with the natural and physical resources.

65. The matters of national importance within Part 2 include the protection of historic heritage from inappropriate subdivision, use and development; and the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga.

66. Local authorities usually give effect to these obligations by identifying historic heritage in district and regional plans, often through listing in schedules, and including associated rules to provide for its management and protection.

Heritage orders

67. Legal protection for heritage places is also available through the heritage order mechanism under Part 8. Heritage orders provide immediate protection for specific places and may be sought by a heritage protection authority (HPA). Heritage orders are seen as a last-resort option to protect historic heritage that has not been listed in relevant planning documents. They have been infrequently used.

68. Under the RMA, Ministers of the Crown, local authorities and Heritage New Zealand Pouhere Taonga (HNZPT) have HPA status.[331] A 'body corporate' having an interest in protecting a place may also apply to the Minister for the Environment to become an HPA. This encompasses a wide range of entities including a company, incorporated society, state owned enterprise, charitable trust, incorporations and trusts set up under the Te Ture Whenua Māori Act 1993 and Māori Trust Boards.

69. Before approving a body corporate as a HPA, the Minister must be satisfied that:

    - such approval is appropriate for protecting the place that is subject to the application
    - the applicant is likely to satisfactorily carry out all the responsibilities (including financial responsibilities) of a HPA under the RMA.

70. Any body corporate seeking status as a HPA must demonstrate that it is fully aware of the responsibilities and potential costs involved including ongoing maintenance costs and the possibility of defending appeals.

71. To date, only four body corporates have been recognised as HPAs under the RMA. None of them is mana whenua.

72. The process for obtaining a heritage order is similar to the process for designations, and in broad terms involves:

    - the HPA issuing a notice of requirement which has immediate effect
    - the territorial authority (which could also be the HPA) determining whether to notify the requirement and to hold hearings
    - the territorial authority making recommendations to the HPA
    - the HPA confirming the heritage order and the territorial authority including it in a plan
    - provisions for appeal to the Environment Court and, where the heritage order renders the land incapable of reasonable use, powers of the Court to direct the HPA to either withdraw the order or compensate the owner for their interest in the land.

73. Once a heritage order is in place, activities that would wholly or partially nullify the effect of the heritage order can only be undertaken with the written consent of the HPA.

74. Where a heritage order is placed on a site that has an existing resource consent, certificate of compliance or notice of requirement, it has the potential to constrain the authorised activities. The holder of those existing use rights must seek written agreement from the HPA for any activity that would nullify the heritage order. This empowers the HPA to immediately halt potentially harmful activities and require the redesign of projects to avoid or minimise harm to an important heritage place. It therefore provides a strong protective mechanism.

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331 The HNZPT has this status by virtue of section 13 of the Heritage New Zealand Pouhere Taonga Act 2014.

Wider legislative landscape

75. While the RMA provides for the protection of historic heritage, other legislation also provides for heritage protection.

76. Under the Heritage New Zealand Pouhere Taonga Act 2014, HNZPT is the government's technical advisor on historic heritage and has several statutory roles. It administers the New Zealand Heritage List / Rārangi Kōrero which provides statutory recognition for heritage places and is a source of information for councils identifying heritage sites under the RMA. However, the inclusion of a place on the New Zealand Heritage List / Rārangi Kōrero does not provide protection unless it is given effect to through relevant RMA planning documents.

77. The Heritage New Zealand Pouhere Taonga Act also provides a statutory framework for the protection of archaeological sites which include any place in New Zealand that was associated with human activity occurring before 1900, or the site of the wreck of any vessel that was wrecked before 1900; and provides or may provide, through investigation by archaeological methods, evidence relating to the history of New Zealand.

78. Under section 42 of the Act, no person may modify or destroy an archaeological site without an authority if that person knows, or ought reasonably to have suspected, that the site is an archaeological site. HNZPT administers the archaeological authority process which operates in addition to any resource consent requirements under the RMA.

79. Other statutory provisions for heritage protection are located in the Building Act 2004, which includes as a relevant principle the need to facilitate the preservation of buildings of significant cultural, historical, or heritage value, and the Conservation Act 1987, which includes a responsibility to conserve, and advocate for the conservation of, historic resources.

Heritage Issues

80. The issues and options paper did not specifically seek feedback on heritage protection, but some submitters provided input on this topic. The working group on reducing complexity also provided suggestions on how heritage order provisions could be improved.

81. Submissions from the International Council on Monuments and Sites New Zealand (ICOMOS), HNZPT, the New Zealand Archaeological Association, Christchurch City Council, Historic Places Aotearoa, Historic Places Wellington and Historic Places Canterbury all raised heritage as an issue needing to be addressed through the review. All of these bodies submitted in favour of strengthening (or at least not weakening) and clarifying existing provisions for heritage – particularly the matters of national importance in Part 2 of the RMA.

82. Christchurch City Council wanted to ensure the Panel maintained a broad definition of heritage, stating:

> A review of the definition of Historic Heritage should be considered in order to fully provide for the broad aspects of heritage of New Zealand, including the multiple cultures and communities who have contributed to our heritage over time. It needs to recognise that Historic Heritage includes the built and natural environment, urban and rural landscapes, tangible and intangible heritage, stories, memories and traditions, and movable heritage. Further, that multiple values are associated with individual places, and that the heritage of cultures and values is often intertwined and interconnected.

83. Many of these submissions note the importance of heritage – ICOMOS New Zealand linked protection of heritage to a range of important areas of wellbeing:

> Historic heritage in both the built and natural environment is a finite resource that brings wellbeing benefits to present and future generations. Heritage places contribute to the resilience of our communities in the face of significant change by providing a focus for community sentiment and sense of place; they also provide opportunities for emissions reduction through adaptive reuse and sustainable development.

84. All submitters on this topic raised concerns about the effectiveness of heritage protection under the current system. ICOMOS suggested that the heritage protection system had gone backwards in recent years.

85. Most submissions supported the use of spatial planning and suggested it would support heritage protection by enabling strategic consideration of what should be protected and how this should be achieved.

All submitters on this topic raised concerns about the effectiveness of heritage protection under the current system.

86. Submissions and advice from the working group on reducing complexity noted significant issues in the following key areas:

- roles and functions in heritage protection and variable historic heritage provisions in plans
- lack of protection for Māori heritage
- jurisdiction over heritage in the coastal marine area
- demolition by neglect
- operation of heritage order provisions.

87. The Strengthening Heritage Protection project began in 2018 with an extensive stakeholder outreach to identify problems with the system for protecting heritage. This led to an agreed work plan covering the regulatory system, funding and incentives, and the government's role as custodian of heritage assets. The scope of the regulatory work includes investigating national direction for heritage, reviewing heritage order provisions and exploring options for dealing with 'demolition by neglect'. We make some recommendations for this ongoing project later in this chapter.

Discussion

88. There is a range of ways to improve New Zealand's approach to heritage protection. Our broader proposals for reform are intended to strengthen and clarify the protection of built and natural environments, including significant historic heritage.

89. The suggestions we discuss below are designed to assist the Strengthening Heritage Protection project in its ongoing work.

Roles and functions in heritage protection and variable historic heritage provisions in planning and consents

90. Local authorities have varied approaches to heritage in their plans. Several district plans have no separate criteria for evaluating significant historic heritage. A number of local authorities only schedule historic heritage already entered on the New Zealand Heritage List/ Rārangi Kōrero, meaning sites that are of local and regional significance can go unprotected. Not all HNZPT-listed sites are scheduled, including 25% of all listed archaeological sites. Rules for heritage vary between plans, with some plans offering far less protection than recommended standards. [332]

91. HNZPT underscored the importance of both archaeological authorities and scheduling in plans to protect significant archaeological sites. Other submitters raised concerns about the duplication between the two processes, where a site is managed through a resource consent and also requires an archaeological authority. In their view this creates unnecessary delay, uncertainty, and complexity.

92. While archaeological authorities are successful at managing the retrieval of information through archaeological investigation, they do not usually result in the protection of archaeological sites and in fact are issued for the purpose of modification or destruction of such sites. [333] Authorities are valuable as a precaution because the location, extent, and relative significance of archaeological sites is often not known, and can therefore be difficult to identify when scheduling in plans. However, systematic protection of significant archaeological sites is more effective through rules in plans, provided the values and extent of the site are well understood.

We agree there needs to be better coordination in the implementation of heritage approvals.

93. We agree there needs to be better coordination in the implementation of heritage approvals. We see a potential role here for the 'open portal' for resource consents described in chapter 9. There is a need to minimise regulatory overlap between resource consents and archaeological authorities for scheduled historic heritage, while ensuring significant historic heritage is protected.

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332 Heritage New Zealand Pouhere Taonga. *National Assessment RMA Policies and Plans – Heritage Provisions.* Wellington: Heritage New Zealand Pouhere Taonga. Retrieved from https://www.heritage.org.nz/protecting-heritage/local-government (16 June 2020).

333 Heritage New Zealand Pouhere Taonga. 2019. *Annual Report Purongo ā Tau 2019*. Wellington: Heritage New Zealand Pouhere Taonga; p 31. Retrieved from https://www.heritage.org.nz/resources/annual-report (16 June 2020). The proportion of authorities declined is generally in the 0–5 per cent range, though authorities to modify or destroy pā sites are increasingly declined. HNZPT notes that this figure does not include negotiations to protect sites to the extent that no authority is required.

Lack of protection for Māori heritage

94. Several submitters noted that Māori heritage is poorly protected under the current system. ICOMOS noted that archaeological sites and sites of significance to Māori are particularly vulnerable to the effects of projected sea level rise.

95. Many plans do not adequately recognise and protect Māori heritage. HNZPT noted in a recent audit that while 72 per cent of plans met the Heritage New Zealand Pouhere Taonga standard for rules controlling the demolition of built heritage, only 23 per cent of plans had rules for Māori heritage that met the standard, and seven plans (11 per cent) had no rule protecting Māori heritage.[334]

96. We see a number of avenues for improvement here. Methods for identification and recognition of Māori heritage could be advanced in national direction as both a heritage matter and part of giving effect to Te Tiriti. Mana whenua will be partners in the creation of spatial strategies and combined plans, and can also agree specific tikanga for places through the integrated partnership process discussed in chapter 3. As well, our inclusion of cultural landscapes in the recommended new purpose and principles better recognises the breadth and scale of Māori heritage.

Methods for identification and recognition of Māori heritage could be advanced in national direction as both a heritage matter and part of giving effect to Te Tiriti.

Jurisdiction over heritage in the coastal marine area

97. Protection of historic heritage in the coastal marine area is split between regional councils and territorial authorities, with the line of the mean high-water springs providing the jurisdictional boundary. Many historic heritage sites – such as jetties, wharves, archaeological sites and sites of significance to Māori – span the land-sea divide and lack of coordination can mean inconsistent management and gaps in protection for such heritage places.

98. We see regional spatial strategies, regional combined plans and the 'open portal' for consents described in chapters 8 and 9 as improving the integrated management of these places.

99. The damaging of heritage sites through coastal erosion is a significant issue and a concern for the Panel. Our recommended reform places a much greater emphasis on planning for a changing climate and mitigating the effects of sea-level rise, which will in turn provide greater opportunities to proactively protect heritage threatened by coastal erosion.

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334 Heritage New Zealand Pouhere Taonga. 2018. *National Assessment RMA Policies and Plans – Heritage Provisions.* Wellington: Heritage New Zealand Pouhere Taonga. Retrieved from https://www.heritage.org.nz/protecting-heritage/local-government (16 June 2020).

Demolition by neglect

100. Submitters raised concerns about 'demolition by neglect'. Neither the RMA nor the Building Act 2004 support local authorities to deal proactively with demolition or degradation of historic heritage places through neglect. RMA plans manage heritage through controlling activities initiated by the owner of a site. But they have no way to manage inactivity that could result in irreversible decay or damage through a failure to secure the site. While many of these issues come from an owner's lack of capacity to address the complex and sometimes expensive requirements of a heritage site, there are also cases of intentional neglect where the ambitions of the land owner for the site conflict with stewardship of the heritage place they possess.

We agree there is a gap in the regulatory system for protection of heritage and the issues of demolition by neglect.

101. We agree there is a gap in the regulatory system for protection of heritage and the issues of demolition by neglect. There are opportunities for this to be addressed as part of resource management reform, especially with our proposed shift to achieving outcomes rather than the less proactive approach of managing effects.

Operation of heritage orders

102. Submitters generally supported the concept of heritage orders but have found the mechanism hard to use. ICOMOS New Zealand stated that it sees value in having the ability to provide interim protection for a heritage site given how long a plan change can take. Feedback received by the Strengthening Heritage Protection project indicates that the provisions of section 198 of the RMA create a degree of financial and/or reputational risk that is deterring HPAs from considering the use of heritage orders. The lack of guidance or criteria to assist potential HPAs in using the provisions in the RMA is another limiting factor.

103. The working group on reducing complexity noted that the heritage order process is particularly convoluted, mostly because it is based on the designations process and the drafting in the RMA is heavily cross referenced. The working group suggested that the process for obtaining heritage orders is too complex for the likely scale of the impacts, which is generally restricted to one or several land parcels. Designations are likely to have much greater effects and a wider range of interested parties, so the use of the same process for both processes was not considered appropriate.

104. In 2017, changes to the RMA removed the ability of body corporates operating as HPAs to place a heritage order on private land, and to allow the Minister to transfer heritage orders to another HPA. This change has limited the use of heritage orders for mana whenua and the Waitangi Tribunal has advocated for their expanded use.[335]

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335 Waitangi Tribunal. 2011. *Ko Aotearoa Tēnei : A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*. Wellington: Waitangi Tribunal; p 117.

105. As noted above, heritage orders have been used infrequently. Their function is to provide case-by-case protection for places that are at risk because they have not been sufficiently protected through planning documents. If heritage orders are retained, they could have a role in protecting significant heritage places that have not been assessed or have otherwise slipped through the system. There are several situations where this might occur:

As part of the Strengthening Heritage Protection project, consideration could be given to the use of heritage orders to provide interim protection.

- where the heritage values of a place have been recognised (either under the Heritage New Zealand Pouhere Taonga Act or similar) but there has not yet been an opportunity to consider the place for protection in a plan
- where a site or place is protected in a plan, but this has not delivered protection for the full range of the heritage values of the place or the full extent of the heritage site
- where immediate intervention could result in the avoidance or minimisation of harm to a heritage place, and thus achieve the purpose of the Act.

106. As part of the Strengthening Heritage Protection project, consideration could be given to the use of heritage orders to provide interim protection. The period of interim protection could apply:

- until the heritage place is appropriately protected in the district plan's heritage schedule
- for a period fixed by the HPA to enable another form of permanent protection (such as a covenant) to be put in place
- for a period needed to address an immediate risk to the integrity of the place (such as remedial works or changes to a project).

107. If a heritage order is used as an interim measure, to allow adequate time to consider protection and possibly negotiate a solution with the property owner, the basis for providing compensation to the owner of the heritage place changes. We consider this is relevant to addressing the other impediment to the use of heritage orders - the potential financial liability for HPAs.

Water conservation orders

108. Water conservation orders are provided for in Part 9 of the RMA. They were introduced by an amendment to the former Water and Soil Conservation Act 1967 in 1981. The conservation order approach was developed in response to New Zealand's 'think big' hydroelectric power projects undertaken during the 1970s. Water conservation orders were intended to provide a counterbalance to major development proposals affecting waterways, and particularly to protect wild and scenic waterways from being dammed. Water conservation orders were carried over when the RMA was introduced in 1991. The provisions have remained largely unchanged since their introduction into the RMA.

Current provisions

109. The purpose of a water conservation order is to recognise the outstanding amenity or intrinsic values of water bodies. It does this by restricting the grant of resource consents that would affect the outstanding values identified in the order and by requiring regional plans to be not inconsistent with their provisions. Case law has established that, in order to warrant protection by a water conservation order, the water body must be outstanding on a national basis.

110. Water conservation orders may be made over rivers, lakes, streams, ponds, wetlands or aquifers and over freshwater or geothermal water. A conservation order may provide for any of the following:

- the preservation as far as possible of the water body's natural state
- the protection of characteristics which the water body has or contributes, to:
  - as a habitat for terrestrial or aquatic organisms
  - as a fishery
  - for its wild, scenic, or other natural characteristics
  - for scientific and ecological values
  - for recreational, historical, spiritual, or cultural purposes
- the protection of characteristics which any water body has or contributes to and which are considered to be of outstanding significance in accordance with tikanga Māori.

111. Anyone may apply to the Minister for the Environment for a water conservation order. The applicant must pay a nominal application fee. If the Minister accepts the application he or she will appoint a special tribunal to consider it. More recent applications have included significant specialist evidence to demonstrate that the water body meets the criteria for protection – the expectation of this standard of application means that applications are expensive to prepare and defend.

112. The special tribunal is responsible for publicly notifying the application, calling for and hearing submissions, considering the evidence presented and providing a report with recommendations on whether the application should be accepted or declined. Anyone may submit on the application. If the application is accepted the special tribunal report will include a draft water conservation order.

113. Anyone who made a submission has a further right of submission to the Environment Court on the special tribunal's report. The Environment Court must hold an inquiry if it receives one or more submissions. Once it has completed its inquiry, the Environment Court makes a report to the Minister recommending that the special tribunal's report be accepted or rejected with or without modifications. Thus far, Environment Court inquiries have almost always been held for water conservation order applications.

114. The Minister then decides whether or not to make a recommendation to the Governor-General. If the Minister decides to make a recommendation, it must be in accordance with the report of the special tribunal or, if the Environment Court has held an inquiry, the report of the Environment Court. If the Minister decides not to recommend making the order he or

she must provide a written statement to Parliament setting out the reasons for the decision and also serve it on parties to the proceedings. If an order is recommended, it is then created by order in council.

115. A water conservation order can prohibit or restrict a regional council from issuing new water and discharge permits but it cannot affect existing permits. Regional policy statements, regional plans and district plans cannot be inconsistent with the provisions of a water conservation order.

116. Water conservation orders can be revoked or varied. The process is the same as for making an application, except where the effect would be no more than minor or of a technical nature, in which case the Minister can directly recommend the change.

117. There are currently 15 water conservation orders in place around New Zealand and 2 active applications. The following water bodies are protected by a water conservation order:

- Motu River (1984)
- Rakaia River (1988 – amended 2013)
- Lake Wairarapa (1989)
- Manganuioteao River (1989)
- Lake Ellesmere (1990)
- Ahuriri River (1990)
- Grey River (1991)
- Rangitikei River (1993)
- Kawarau River (1997– amended 2013)
- Mataura River (1997)
- Buller River (2001)
- Motueka River (2004)
- Mohaka River (2004)
- Rangitata River (2006)
- Oreti River (2008)

118. Applications are currently being heard for Te Waikoropupū Springs in Golden Bay and the Ngaruroro and Clive Rivers in Hawke's Bay. Both applications have been heard by a (separate) special tribunal and submitters on both processes have challenged the tribunal's report in the Environment Court. The Environment Court will now conduct public inquiries for both applications.

Issues identified

119. The *Next Steps for Fresh Water* (2016) discussion document contained proposals to amend Part 9 of the RMA. The proposals fell into two tranches: those aimed at improving the involvement of Māori; and proposals aimed at integrating water conservation orders into

the contemporary resource management framework. The integration proposals received largely negative feedback – submitters perceived that the changes would potentially weaken the mechanism. It was decided that additional policy work and further consultation was required and the proposed amendments did not form part of the Resource Legislation Amendment Act 2017. This reform process provides an opportunity to complete this work.

120. The following issues have been identified.

- Many outstanding areas have not been the subject of water conservation order applications, or otherwise suitably recognised (eg, none of the six wetlands recognised under the Ramsar Convention on Wetlands is protected).
- The cost and the lengthy, complex process for obtaining an order have been cited as barriers to application.
- Mana whenua engagement is not required in the application or decision-making processes.
- Applications take too long to decide. The time taken reflects the extensive considerations involved in each application, the significance of the resource management issues at stake and the two-stage process involved. Because the water body lacks conservation order-level protection during the process, it may degrade to the point where outstanding values may be lost while waiting for an order to be made.
- Water conservation orders are not well integrated with regional plans. In some areas land use rules do not appear to provide for those outstanding features recognised in water conservation orders and councils do not recognise the role orders play in catchment management.

121. Some commentators have questioned the need for water conservation orders given there are now opportunities provided to protect significant water bodies through objectives A2(a) and B4 of the National Policy Statement for Freshwater Management.

Comments received

122. The Panel received only two submissions touching on water conservation orders, but they were comprehensive and came from differing viewpoints, so help to illustrate the breadth of issues relating to water conservation orders. We have also received advice on the topic from the working group on reducing complexity.

123. Key themes of the submissions and advice were:

- effectiveness of water conservation orders
- their role in the system
- the process
- integration with planning and consents.

Effectiveness of water conservation orders

124. The New Zealand Fish & Game Council observed that few waterbodies that would fit the purpose of water conservation orders are protected by them, and noted that "decisions have been made in respect of several of the supposedly protected water bodies, that have degraded and undermined the outstanding values the WCOs are meant to protect". Water bodies do not receive protection under the water conservation order until the order is made, meaning a wait of years between application and protection, during which time the water body may be degraded. Fish & Game stated:

> Clarification of the interim status of proposed WCOs would also assist in improving the effectiveness of WCOs. This needs to be done, for example, by … requiring that once notified or in a draft state, no person may do anything to contravene the draft order or requirement except by express provision.

125. Fish & Game also noted the need for positive engagement and support on both the application for and implementation of water conservation orders, as well as the lack of ownership over the process and the orders once gazetted.

126. Fish & Game suggested adopting a model similar to that of heritage protection authorities, to ensure that areas protected by water conservation orders have a body to monitor and advocate for them.

Role of water conservation orders in the system

127. Federated Farmers provided comprehensive comment on water conservation orders, primarily focusing on their role in a planning system which has changed considerably since the process was originally developed:

> … the RMA's provisions for WCOs have largely remained static over the 30 years since the Act was first enacted, whereas other local planning has progressed considerably in understanding and requirements over that time. Much has been learned about how to fine-tune environmental resource management within NZ's multi- level governance system.

128. Federated Farmers suggested that the water conservation order is inappropriately strong compared with instruments such as regional policy statements, regional and district plans and national environmental standards which are developed strategically and involve broader community engagement:

> This situation carries an in-built assumption that top-down planning instruments should trump more integrated planning instruments. This is outdated thinking in an age where water resource use may involve many interrelated factors and many resource users, in complex ways.

129. The submission raised concerns that water restrictions can be more easily imposed in water conservation orders than in regional plans:

> Under the current RMA statutory framework, a WCO (that is defined by a narrow scope of applicant interest) can be used to simply 'wade in' and intervene in regional plan water management processes in a catchment.

130. The National Policy Statement for Freshwater Management has introduced other opportunities to identify and protect significant water bodies. Fish & Game supports consideration of the role of the water conservation order in the policy framework, given the potential duplication with the national policy statement and the regional plan provisions for both water quality and quantity. However, it does not agree with Federated Farmers that water conservation orders are no longer fit for purpose in the context of contemporary resource management planning.

Process

131. The reducing complexity working group supported bringing the water conservation order process into the reformed system, but suggested the special tribunal and Environment Court process is unnecessarily time-consuming and complex. The working group suggested a single level of decision-making, potentially a special tribunal chaired by a sitting Environment Judge or retired judge, a board of inquiry or the Environment Court. The group also noted there can be some confusion over who should be notified of an application.

132. Fish & Game did not support substantially changing the process:

> Fish and Game would not support a material alteration to the current process by which a WCO is processed and recommended. The ability to have WCO applications determined by an independent body, separate from local political influence is critically important.

133. Fish & Game stated that the costs and process for water conservation orders are similar to that of a private plan change or a substantial application for resource consent: "fundamentally the process is no more expensive and complex than comparative processes under the RMA". It did not see this aspect as a priority for reform.

134. Federated Farmers raised concerns about the ability of communities to engage in the development process and the difficulty of revoking orders once they have been made.

Integration with planning and consenting

135. The reducing complexity working group suggested greater clarity is needed on how water conservation orders are reflected in other planning documents.

136. Fish & Game submitted that better integration between water conservation orders and plans is required to provide the intended protection. It suggested that regional and district councils should actively incorporate the status and recognition that a conservation order imparts to a water body in regional policy statements and plans. It considers regional policy statements and plans should be required to give effect to orders (rather than not be inconsistent with them). In its submission it said:

> A requirement to 'give effect to' WCOs would be entirely consistent with the fact that WCOs recognise and protect water bodies that have been found to be outstanding. Subordinate plans have to 'give effect to' NPS and RPS according to section 67 (3) and 75 (3). It is logical that WCOs, which sit high in the hierarchy, should be given at least the same treatment, and have similar effect on Plans as NPS and RPS.

137. Fish & Game noted there is currently nothing in section 104 of the RMA to trigger consideration of water conservation orders in consent decisions. While section 217 makes it explicit that water permits cannot be granted in a way that would be contrary to the explicit restrictions and prohibitions in a water conservation order, the relevance and effect of an order to other consents is not clear. This makes it hard to know how much weight should be given to the consideration of the order, if an activity is likely to impact a recognised outstanding value, but is not in direct contravention of the restrictions and prohibitions in the water conservation order.

138. Fish & Game suggested that:

> amendments to Part 9 to enable WCOs to provide for restrictions on land use resource consents and territorial functions under section 31, which have an effect on the outstanding values and water bodies identified in the order, are definitely required to improve the effectiveness of WCOs.

Options considered

Effectiveness of water conservation orders

139. The Panel sees water conservation orders as a valuable mechanism in the resource management system which should be carried through to the new system. We see the difficulty in revoking a water conservation order as its strength, and suggest that the tool should be made more effective rather than weaker.

140. The water conservation order approach differs from almost all other mechanisms under the RMA because it has a conservation purpose. One option would be to move it into the Conservation Act 1987 which is more focused on conservation matters. However, the Panel sees value in keeping water conservation orders within a reformed RMA because to be effective, water conservation orders should have a close interface with planning and consenting.

The Panel sees water conservation orders as a valuable mechanism in the resource management system which should be carried through to the new system. We see the difficulty in revoking a water conservation order as its strength, and suggest that the tool should be made more effective rather than weaker.

141. The Panel acknowledges the historical context for the development of water conservation orders and this review provides an opportunity to reconfigure the mechanism so it is fit for the future. The water conservation order was developed at a time when protecting the natural flow of water was of paramount importance. New Zealand's freshwater bodies now face more pervasive and increasing challenges, not only from potential development for renewable energy but also from more intensive land use and climate change. Water conservation orders should take a more holistic approach to protection.

142. We acknowledge that there are differing views on what constitutes an outstanding water body, and that many people would like to see greater protection for water bodies that are significant to them. Early water conservation order applications were introduced or

supported by the Minister of Conservation, but more recent ones have been made by Fish & Game, iwi and non-government organisations. There have been prior attempts to identify water bodies of outstanding significance but these have not been successful.[336]

Role of water conservation orders in the system

143. Objectives A2(a) and B4 of the National Policy Statement for Freshwater Management protect outstanding freshwater values. As these provisions share the same intent as water conservation orders, promoting the work programme to implement the national policy statement could be an alternative way to support the management of outstanding freshwater bodies.

144. However, while they have a similar aim, the national policy statement provisions differ from water conservation orders:

- they protect values as defined by communities, rather than specific characteristics of water bodies outlined in water conservation orders
- outstanding values in the national policy statement are determined based on regional significance rather than national significance
- they do not offer the permanent protection provided by a water conservation order
- decisions under the national policy statement are made within the context of the general purpose of the RMA (as contained in Part 2 of the Act), whereas the orders have their own unique conservation purpose, which overrides Part 2.

145. These differences mean that promoting the National Policy Statement for Freshwater Management as a means to protect outstanding freshwater bodies is not as strong as the protection provided by water conservation orders.

146. Our recommendations for reform strongly support providing opportunities for mana whenua to participate in resource management processes. The water conservation order was developed at a time when there was scant attention paid to the importance of recognising the significance of water to Māori. This aspect needs to be addressed.

The National Policy Statement for Freshwater Management as a means to protect outstanding freshwater bodies is not as strong as the protection provided by water conservation orders.

147. Submitters on other topics in our issues and options paper expressed support for a process that would establish legal entity status for water bodies. Thus far this type of protection has only been provided through Tiriti settlements. A water conservation order could be amended

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336 Attempts have included the Ministry of Agriculture and Fisheries. 1984. *Inventory of Wild and Scenic Rivers of National Importance*. Wellington: Ministry of Agriculture and Fisheries; Department of Conservation. 2004. *Identifying Freshwater Ecosystems of National Importance for Biodiversity: Criteria, methods and candidate list of nationally important rivers.* Wellington: Department of Conservation; Ministry for the Environment. 2004. *Water Programme of Action: Potential Water Bodies of National Importance.* Wellington: Ministry for the Environment; The Catalyst Group, 2016. *Outstanding Freshwater Bodies and the NPS-FM.* Palmerston North: The Catalyst Group.

to provide this status. The practical implementation of legal entity status requires establishing individuals or groups to speak on behalf of the water body. This arrangement is somewhat analogous to the suggestion that a body be established to monitor and advocate for the order once made.

Process

148. We agree that the process for considering and determining a water conservation order needs to be simplified. Moving to a one-stage decision-making process will reduce the time and cost to reach a final decision and is in line with our other recommendations. Applications should be heard by the Environment Court which has the advantage of independence not available to a politically appointed body. The Environment Court should largely follow the current process for hearing an application for a water conservation order – specifically the Environment Court should follow a public hearing process and provide a report with recommendations on whether the application should be accepted or declined to the Minister for the Environment. If the application is accepted the report will include a draft water conservation order.

The process for considering and determining a water conservation order needs to be simplified. Moving to a one-stage decision-making process will reduce the time and cost to reach a final decision.

149. Hearings on water conservation order applications are currently held close to the water body in question. We see value in this approach because it enables interested parties to attend hearings and gives the decision-makers a sense of place. This is particularly important for mana whenua who wish to be involved in the process.

150. Applicants bear a significant evidential burden to establish that the water body they seek to protect meets the water conservation order criteria. At the moment only well-resourced groups can provide the level of evidence and expert advice required. This indicates that additional support and resources are needed to enable applications to protect important water bodies to be progressed effectively.

Integration with planning and consenting

The integration of water conservation orders with planning documents could be improved in two ways.

151. The integration of water conservation orders with planning documents could be improved in two ways. The first would be to require regional policy statements and regional plans to 'give effect to' water conservation orders. The second would be to develop required changes to regional documents as part of the application, and for these to be considered by the decision-making body as part of the process. If, after hearing an application, the Environment Court recommends an application is accepted its report should include changes to the relevant planning documents which would be required

to give effect to the order. These changes should be made consequential upon the application being granted. This would enable the changes to have immediate effect without going through a further plan change process and would reduce cost and complexity.

152. The current provisions are unclear as to how water conservation orders are to be considered and provided for in broader land use and water consenting decisions beyond the explicit restrictions and prohibitions in the RMA. This should be addressed through legislative change. Once an order is made it should be a matter to be considered in any future consent applications that may impact on the water body.

Further matters to investigate

153. In its submission, Fish & Game provides examples of water bodies protected by water conservation orders that have degraded despite this protection. It recommends investigation of these cases with a view to working out why the order has not been effective and what changes are needed to remedy this. Agencies have advised they do not have the information to know whether water conservation orders are working effectively and if not, why not.

We recommend further work should be carried out to develop policy on the effectiveness of water conservation orders.

154. We recommend further work should be carried out to develop policy on the effectiveness of water conservation orders. This should include:

- the Ministry for the Environment and Department of Conservation working together to gather information on whether the values being protected under existing water conservation orders are degrading or improving, and whether local authorities are in fact implementing the requirements set out in the orders
- considering whether the water conservation orders should be able to provide legal entity status for water bodies
- considering the role of spatial strategies in identifying water bodies that merit protection through water conservation orders
- considering whether central government should initiate or support applications for water conservation orders over specific water bodies, including those representative of currently unprotected ecosystems (eg, wetlands) or recognised sites (eg, Ramsar sites)
- considering whether resourcing or support should be provided to reduce the burden on applicants seeking a water conservation order
- investigating other ways to encourage increased use of water conservation orders. This could include providing national direction on how orders should be implemented and/or fostering awareness of the opportunity to apply for a water conservation order.

Key recommendations

Key recommendations – Designations	
1	Eligibility to exercise designation powers should be centred on public-good purposes.
2	Those eligible should include: (i) a list of approved requiring authorities in the legislation: Ministers of the Crown, local authorities, and network utility operators that meet specified criteria (ii) other requiring authorities approved by the Minister for the Environment based on specified criteria.
3	A new default lapse period of 10 years should be available for all designations, with extensions of up to another 10 years subject to specified criteria.
4	There should be two stages in the designation process: (i) a notice of requirement defining the designation footprint (ii) a construction and implementation plan confined to addressing construction and operational effects.
5	Flexibility to combine these two stages should be provided.
6	The relevant considerations for a designation requirement should be modified to also include: (i) consistency with the regional spatial strategy (ii) its contribution to the outcomes identified in the Act, any national direction and the combined plan (iii) the opportunity for co-location of infrastructure within the designation.
7	Requiring authorities should prepare a construction and implementation plan. This should consider the environmental effects of the construction and implementation of the work and the appropriate controls to manage those effects.
8	Notices of requirement should continue to be publicly notified with appeal rights retained.
9	The construction and implementation plan should be available for public and territorial authority comment prior to construction works commencing.
10	Consideration should be given to extending designations into the coastal marine area.
Key recommendations – Heritage orders	
11	The Ministry of Culture and Heritage should continue its Strengthening Heritage Protection project as part of resource management reform. This work should include: (i) investigating potential provisions for national direction on heritage (ii) reviewing heritage order provisions (iii) exploring options for dealing with 'demolition by neglect' issues.

Key recommendations – Heritage orders	
12	This work should also investigate the interface between the Natural and Built Environments Act and the Heritage New Zealand Pouhere Taonga Act 2014 to provide greater clarity about which agency has primary responsibility for which aspects of heritage protection.
13	Subject to the outcomes of the review above one option for heritage orders could be to provide interim protection for a heritage site while more enduring solutions are explored.
Key recommendations – Water conservation orders	
14	The water conservation order process should be included in the Natural and Built Environments Act, retaining the current purpose, but with the following changes: (i) applications should be heard by the Environment Court in a one-stage process, with a draft order and recommendations made by the Court and referred to the Minister for the Environment for final decision-making (ii) applications should include a statement of proposed changes to the relevant planning documents which would be required to give effect to the order (iii) the Court's recommendations should include changes to relevant planning documents to give effect to the order (iv) ministerial approval of the order would include changes to planning documents which would give direct effect to the order without further process (v) hearings should be held at the closest practical location to the water body in question (vi) the application and hearing process should include mana whenua (vii) any relevant planning documents should 'give effect' to any order (viii) once an order is made it should be a matter for consideration in any consent applications that may impact on the water body.
15	Further work should be undertaken by the Ministry for the Environment and the Department of Conservation to investigate and develop policy on the effectiveness of water conservation orders as discussed in this chapter.

Chapter 11 Allocation of resources and economic instruments

1. This chapter discusses our proposals for improving the allocation of resources within the Natural and Built Environments Act, including through the use of a broader range of economic instruments. Our terms of reference identified the following key issues to be addressed:
    - considering principles, systems, roles and processes for resource allocation
    - considering how to allocate marine space
    - improving the range and use of funding mechanisms and economic instruments.
2. We are aware the Government is separately considering Māori rights and interests in freshwater, including the findings of the Waitangi Tribunal in Wai 2358. Consideration of those issues is outside the scope of this review, but we understand the freshwater allocation work programme will proceed in tandem with the RMA reform process. The intention is that this will inform Government about how any generic approach to resource allocation might function within a reformed resource management system, as well as issues relating to Māori rights and interests.
3. In a world in which we are increasingly challenged to manage resources within environmental limits, allocation of the right to use those resources will need to be more systematically approached to ensure it contributes to the overall wellbeing of people and communities. In our view, any future allocation system should be consistent with the purpose, outcomes, targets and limits of the Natural and Built Environments Act as discussed in chapter 2. It should also ensure resources are allocated in ways that are both efficient and equitable.

In a world in which we are increasingly challenged to manage resources within environmental limits, allocation of the right to use those resources will need to be more systematically approached to ensure it contributes to the overall wellbeing of people and communities.

4. Existing resource management processes such as national direction, plans, rules and consents affect how resources are allocated. Improving allocation will require a future system to more explicitly acknowledge and manage those impacts to ensure the best tools are used for the circumstances. In some cases, greater use of economic instruments using price signals and willingness to pay to determine the highest value use of a resource may be preferred. The Panel has concluded overall that a combination of regulation and the use of economic instruments is best suited to achieving the identified outcomes of the resource management system.

Current provisions

5. The RMA plays an important role in allocating rights to develop and use some resources. Significant examples in which this occurs are allocation of permissions to take, and discharge to, fresh water and to occupy coastal marine space, and allocation of new capacity for development of urban land. Other resources allocated by the RMA include the assimilative capacity of the environment more generally; navigation rights on the surface of rivers, lakes and in the sea; and river and coastal marine area materials (for example, gravel and sand).

6. In the broadest sense, all plans and regulations developed under the RMA play a role in allocation to the extent they place constraints on the development and use of resources. These constraints establish a boundary between matters of interest to the public and the private use of resources. This can be thought of as allocating the benefits of some resource use to the public and future generations.

7. That said, allocation issues under the RMA are most often thought of in the context of determining competing private uses of resources within established environmental limits. The RMA provides a mechanism for this through the issue of permits to take and use resources. In some cases, resources are not allocated under the RMA, but under separate legislative frameworks, including minerals, fisheries, and rights to discharge greenhouse gas emissions.

8. The key provisions that guide decision-making about allocation and economic instruments in the RMA are set out below.

Purpose and principles

9. The RMA does not contain specific principles to guide decision-making about resource allocation among competing private interests. As discussed in chapter 2, once environmental limits were established, it was anticipated this type of allocation would largely be determined by market forces. The RMA was also developed at a time in which there was a relative abundance of the resources it allocates. It is therefore perhaps not unreasonable that the original RMA did not include more specific allocation principles.[337]

10. Despite a lack of specific principles on allocation, the general purpose and principles in Part 2 provide some guidance. An important aspect of the RMA's purpose is enabling "people and communities to provide for their social, economic, and cultural well-being and for their health and safety while sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations". Within the umbrella provided by section 5, section 7 (b) also specifies that "efficient resource use and development" is a matter that should be taken into account in decision-making.

11. Perhaps of more significance is the principle of 'first-in, first-served' or what has commonly been referred to as the 'priority rule'. This principle is not explicitly stated in the RMA but rather has been developed through case law in response to a lack of more substantive

337 Although as discussed shortly, an aquaculture 'gold rush' closely followed the development of the RMA from the mid-1990s, and tensions in overall freshwater allocation were already apparent in the early 2000s.

guidance. In *Fleetwing Farms Ltd v Marlborough District Council*, the Court of Appeal held that the scheme of the RMA requires decision-makers to hear appeals in the order in which they are lodged. Following this decision, the priority rule has come to mean that when two resource consent applications are processed for the same resource, the first application received by the local authority must be heard and decided first. Although the first-in, first-served approach determines the order in which decisions are made, it does not provide a basis for comparison of competing or contemporaneous applications. Each application must be assessed at that point in time in isolation from other potential users.[338]

National direction

12. National direction has also begun to develop a policy framework for allocation of different types of resources. Examples include:

    - **National Policy Statement for Freshwater Management:** this requires that regional councils both set environmental limits and ensure plans state criteria by which applications for approval of transfers of water take permits are to be decided, including to improve and maximise the efficient allocation of water
    - **New Zealand Coastal Policy Statement (NZCPS):** the emphasis on strategic planning in the NZCPS is intended to ensure councils provide direction on allocation of coastal space in policies and plans to help manage adverse cumulative effects and the incremental loss of important coastal values
    - **National Policy Statement on Urban Development Capacity:** this directs local authorities to provide sufficient development capacity in their resource management plans, supported by infrastructure, to meet demand for housing and business space. Development capacity refers to the amount of development allowed by zoning and rules in plans that is supported by infrastructure. This development can be 'outwards' (on greenfield sites) and/or 'upwards' (by intensifying existing urban environments). Sufficient development capacity is necessary for urban land and development markets to function efficiently to meet community needs. The National Policy Statement on Urban Development will soon replace this policy statement to provide more direction on how development capacity can meet demand and create well-functioning urban environments.

Plans and consents

13. Since 2005, regional council functions have explicitly included allocation of the taking or use of freshwater, heat or energy from water, the assimilative capacity of air and water, and space in the coastal marine area.[339]

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338 Both the Supreme Court and the Court of Appeal have expressed dissatisfaction with this approach. For discussion, see Makgill R. 2010. A new start for fresh water: Allocation and property rights. *Lincoln Planning Review* 2(1): 5–10.

339 Sections 30(fa) and (fb), RMA.

14. Rights to use natural resources are granted through plans (permitted activities) or permits (consents, certificates of compliance and mining permits). As discussed in chapter 8, permits can be granted for up to 35 years, or for five years if no period is specified.[340] They may be cancelled by a regional council if not exercised for a continuous period of two or more years.[341] Permits may lapse if not given effect to within five years of the grant, unless the consent specifies a different period or an extension is granted.[342]

15. While there is no explicit guarantee of renewal, common practice has been for this to occur, although conditions to address environmental effects or efficiency requirements may be modified or added. The most recent annual data from the National Monitoring System shows that out of 2145 resource consent renewals (most are discretionary), only three were declined. A further 126 were returned incomplete or withdrawn. Some of these may be effectively declined, but it is too early to tell if this is the case.

16. Subject to various qualifications,[343] when applying for a resource consent, existing consent holders have priority over new applications (over the same resource) on expiry of a consent, although the consent authority must consider:

    - the efficiency of the existing consent holder's use of the resource
    - the use of industry good practice by the existing consent holder
    - if the existing consent holder has been served with an enforcement order or convicted of an offence under the RMA.[344]

17. The consent authority must also have regard to the value of the investment of the existing consent holder.[345]

18. The RMA provides for the transfer of consents. These can be transferred to a new owner or occupier of the site on application by the consent holder. They can also be transferred to another site in either of the following circumstances:

    - where the transfer is expressly allowed by a regional plan
    - where the regional council specifically authorises the transfer following a joint application by the parties involved, having considered the environmental effects of the transfer and the other matters set out in section 104 of the RMA.[346]

19. The review of consent conditions is provided for in section 128. A consent authority cannot change the duration of a consent as part of a review process. Under section 131, when reviewing conditions, a consent authority:

    - must have regard to the matters considered when determining a resource consent application
    - must have regard to whether the activity will continue to be viable after the change

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340 Section 123(d), RMA.

341 Section 126, RMA.

342 Section 125, RMA.

343 Section 124A, RMA.

344 Section 124B, RMA.

345 Section 104, RMA.

346 Section 136(2)(b)(ii)), RMA.

- may have regard to the manner in which the consent has been used
- if the review was ordered by the Court, must have regard to the reasons for the order.

20. Cancellation of a consent is only possible if the activity has significant adverse effects on the environment and either there were material inaccuracies in the original consent application or the consent holder is convicted of an offence that contravenes the consent.

Economic instruments

21. Under the RMA the Minister for the Environment is empowered to consider and investigate the use of economic instruments (including charges, levies and other fiscal measures and incentives) to achieve the purpose of the RMA.[347]

22. A range of specific instruments is also available under the Act.

- **Financial contributions:** section 108(2)(a) of the RMA allows regional councils and territorial authorities to include a financial contribution as a condition on a resource consent. Financial contributions can be money and/or land to mitigate the environmental effects of proposals and incentivise good environmental design. The RMA requires councils to specify in their plans the circumstances under which financial contributions will be imposed.[348]
- **Administrative changes:** section 36 of the RMA allows councils to set administration charges for a range of plan change, resource consent, heritage protection and notice of requirement activities, including monitoring and compliance. Charges are generally dependent on the complexity of the task and the time taken to complete it. Discounts also apply if processing times do not meet statutory deadlines.
- **Bonds:** section 108A allows councils to include a bond as a condition of a resource consent. This legally binding promise, or upfront cash payment which is held in trust, can incentivise developers to comply with the conditions of consent or enable the council to complete the conditions. The bond can be designed to ensure construction or maintenance is completed and/or environmental harm is minimised. For instance, an upfront bond is imposed on marine farms to ensure the farm is not abandoned for commercial or other reasons.
- **Coastal occupation charges:** section 64A enables but does not require regional councils to set a coastal occupation charge. Any charge must be spent by councils on the sustainable management of the coastal marine areas. Section 64A(1)[349] provides principles to guide councils when setting coastal charges.

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347 Section 24(h), RMA.

348 Financial contributions were removed from the RMA in the Resource Legislation Amendment Act 2017; however, a transition period of five years applied, and the forthcoming 2019 RMA amendment bill will repeal the 2017 provisions.

349 When setting a coastal occupation charge, councils must have regard to the extent to which: a) public benefits from the coastal marine area are lost or gained; and b) private benefit is obtained from the occupation of the coastal marine area.

- **Royalties on consented removal of sand and shingle:** section 112 of the RMA requires the holder of a resource consent to extract sand, shingle, shell or other natural materials from the coastal marine area to pay a royalty to the Crown. Regional councils collect these royalties on behalf of the Crown under section 359 of the RMA.
- **Geothermal energy royalties:** as with sand and shingle, the RMA allows regional councils to collect on behalf of the Crown a royalty for the use of geothermal resources. To date, the Crown has not exercised its power to charge a royalty.
- **Tendering process for coastal space:** the ability to tender for rights to take, remove, reclaim and drain in the coastal marine area has existed since 1991. The RMA provides a process whereby the Crown can sell exclusive rights to apply for coastal permits where there is likely to be competition. This has happened only a few times and in the context of aquaculture.

Issues identified

23. Many criticisms have been made of the way resources have been allocated under the RMA. These issues have played out differently for different resources. Here we note relevant background in relation to the three significant resources allocated under the RMA: freshwater, coastal marine space for aquaculture, and new capacity for development of urban land.

As water resources have become scarce, the RMA's approach to allocation through first-in, first-served has proved both unfair and inefficient. This is both because it prioritises those with an existing allocation at the expense of potential new users, and because it provides little incentive to maximise value from a resource.

Freshwater allocation

24. Improving the allocation of permissions to take, and discharge to, freshwater has been a national policy goal since at least 2004.[350] As water resources have become scarce, the RMA's approach to allocation through first-in, first-served has proved both unfair and inefficient. This is both because it prioritises those with an existing allocation at the expense of potential new users, and because it provides little incentive to maximise value from a resource. The first-in, first-served approach has particularly disadvantaged Māori in cases where they own under-developed land and cannot access water to improve production capacity, for example, when land is returned through Tiriti settlements. Māori see water as whakapapa with access confirmed by Te Tiriti.
25. The total opportunity cost of failure to make good economic use of freshwater is undoubtedly significant. Freshwater is fundamental to New Zealand's economy, including the primary sector, tourism and power generation.

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350 See Ministry for the Environment. 2004. *Water Programme of Action: Water Allocation and Use*. Retrieved from https://www.mfe.govt.nz/publications/rma-fresh-water/water-programme-action-water-allocation-and-use (16 June 2020).

26. Factors that have made better allocation of water resources difficult include little strategic planning to set limits, uncertainty in process and science, high transaction costs of permit trading due to the need for councils to compare environmental effects, tensions between certainty and flexibility in length of consent terms, and stalled discussions between the Crown and Māori with regard to rights and interests in freshwater.

While the work of the Land and Water Forum was a useful step forward in identifying the issues that must be resolved, it was unable to reach consensus among participants on some important issues, including how to determine initial allocations and how best to reduce existing allocations.

27. Recent extensive work by the Land and Water Forum has begun the complex task of developing the policy parameters of a future allocation system both for water takes and discharge rights. Aspects of this include:
    - establishing environmental limits
    - addressing iwi rights and interests
    - developing better accounting tools for contaminant sources, and systems for monitoring and enforcing compliance with limits
    - ensuring initial allocation decisions provide recognition of existing investments and also acknowledge and respond to the underlying natural capital of the land
    - ensuring land owners have flexibility to change land uses
    - providing incentives to achieve good management practices
    - developing a nationally consistent procedural framework to guide regional decisions and allow transfers between users
    - considering the costs and complexity of administrative aspects of the system
    - considering the length of time for any transition to a future framework.[351]
28. While the work of the Land and Water Forum was a useful step forward in identifying the issues that must be resolved, it was unable to reach consensus among participants on some important issues, including how to determine initial allocations and how best to reduce existing allocations. A future environmental management system will need to have the mechanisms and processes for these issues to be resolved.
29. The government is yet to resolve Māori rights and interests in freshwater, although this is considered to be an important element in reform.

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[351] See Land and Water Forum. 2018. *Advice on Improving Water Quality: Preventing Degradation and Addressing Sediment and Nitrogen*. Wellington: Land and Water Forum; Land and Water Forum. 2015. *The Fourth Report of the Land and Water Forum*. Wellington: Land and Water Forum.

Allocation of space in the coastal marine area for aquaculture

30. While we acknowledge that space in the coastal marine area is used for a wide range of purposes[352], we have focused our discussion of allocation issues on aquaculture, as this has received the most attention and criticism under the RMA. The rising economic potential of aquaculture development in the early years of the RMA prompted what is known as a 'gold rush' in some regions. This was driven by the fact that use of space in the coastal marine area was essentially free (subject only to minimal application costs for coastal permits), with applications decided on a first-in, first-served basis.

31. The government responded by placing a moratorium on the further grant of consents for marine farms within Marlborough District between 1996 and 1999, and nationwide in 2002. Amendments to the RMA were introduced in 2005 to provide for a more systematic planning and allocation system alongside settlement of Tiriti interests through the Māori Commercial Aquaculture Claims Settlement Act 2004. These provisions required planning for aquaculture management areas.

32. Further amendments to the RMA were introduced in 2011 to encourage development and streamline planning and approvals. These removed the requirement for aquaculture management areas, as councils had been slow to create them, and they were seen to complicate and delay matters.

33. After these changes, the present system allows for any applications to be made for any part of the coastal marine area subject to the provisions of the regional coastal plan. The current NZCPS requires regional policy statements and regional coastal plans to recognise "the significant existing and potential contribution of aquaculture to the social, economic and cultural well-being of people and communities" by planning for aquaculture activities in appropriate places. Provisions of regional coastal plans relating to aquaculture can also be amended directly by regulation on recommendation of the Minister of Aquaculture.

34. Concerns remain, however, that the aquaculture management regime is still not fit for purpose. Ideas floated for improving allocation of coastal space for aquaculture include:

    - **marine spatial planning** to identify areas appropriate for aquaculture development within environmental limits
    - **flexible licensing** in which permits are attached to biomass, rather than specific locations. This means aquaculture activities might be moved between different aquaculture areas depending on environmental conditions and market requirements
    - **a more developed allocation framework** including principles for determining competing applications and charges for the use of public space in the coastal marine area.[353]

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352 For example, port and marine activities, public wharves, jetties, boat ramps, pipelines, dumping zones, submarine cables, etc.

353 Peart R. 2019. *Farming the Sea: Marine Aquaculture within Resource Management System Reform*. Auckland: Environmental Defence Society.

Allocation of new capacity for development of urban land

35. Given the private ownership of land, and extensive land use controls in district plans, allocation of new capacity for development occurs primarily through planning processes when new capacity is made available through rezoning. There has been much debate over the past 30 years with regard to the role of RMA plans in limiting capacity for development of housing and business land in urban areas, and how price signals in urban land markets may be better reflected in district plan controls. Relevant government inquiries have been summarised in chapter 2. Perhaps unsurprisingly, the issues have been most significant and controversial in relation to the development of Auckland, New Zealand's largest city.

There has been much debate over the past 30 years with regard to the role of RMA plans in limiting capacity for development of housing and business land in urban areas, and how price signals in urban land markets may be better reflected in district plan controls.

36. Important aspects of the debate include the overall amount of development capacity needed to enable efficient urban land markets to operate, the appropriate balance between 'greenfield' and 'brownfield' areas, and the role of regulatory tools in guiding allocation, such as the rural–urban boundary. Significant policy developments include the Auckland Unitary Plan and the National Policy Statement on Urban Development Capacity.

37. A significant proposal for improving the allocation of new capacity for development of urban land is better strategic and integrated planning. This is discussed in chapter 4.

38. We now turn to the main factors that have contributed to poor allocation across the system.

Lack of principles

39. A first-in, first-served allocative system works well when there is no resource scarcity. It provides for sufficient access to resources and the certainty necessary to make investments in order to use them. As we have begun to set environmental limits, it has led to issues with environmental quality, economic efficiency and fairness. When a resource is becoming scarce, the first-in, first-served system does not guarantee that it is allocated to current or future uses which offer the greatest environmental, social, cultural or economic value. Historic uses may not make best use of the resource, and their privileged and uncontested access may limit the interest of users in doing better. Further, where there is a looming shortage, or a sense this will occur, a 'gold rush' effect can emerge where parties rush to claim a resource use right without any plans to use it in the immediate future.

40. While extending access to a resource for long periods has enhanced the ability to invest in long-lived capital equipment that can maximise use of that resource, it has limited the ability of the resource management system to respond to change and new environmental pressures. As discussed in chapter 5, a more responsive system is now needed to address cumulative environmental effects and pressures arising as a result of climate change. It is also needed to provide access to resources for new users and Māori.

Issues in relation to plans and permits

41. In cases where resources are scarce, clear environmental limits (minimum flows, minimum air quality standards, etc) and/or property rights are a prerequisite to development of more efficient resource allocation. These limits allow the overall amount of resource available for allocation to be determined.

42. As discussed in other sections of this report, the RMA's approach to environmental limits has not been sufficiently clear or well developed. Aspects of this include insufficient strategic planning in response to increasing demands for resource use or resource scarcity (discussed in chapters 2 and 4), inefficient planning processes (discussed in chapter 8), and insufficient investment in necessary science and data (discussed in chapter 12).

In cases where resources are over allocated, to ensure environmental limits are met, plans will need to apportion reductions in access to resources. This is likely to require a complex balancing exercise based on the existing allocation of permissions to take and use resources, potential new users, and the assimilative capacity of the environment for different types of resource use. The RMA provides little guidance on how this might be achieved.

43. Once a total allocable amount of resource has been determined, a systematic approach would require plans to guide allocation. Plans should reflect the public interest in resource allocation. However, perhaps as a result of the effects-based orientation of the RMA, or perhaps due to underlying local political incentives, plans under the RMA have provided limited guidance on where some resources would be most valued for environmental, social, cultural and economic reasons; what types of development are appropriate and where; and what forms of mitigation best address the effects of such development.

44. In cases where resources are over allocated, to ensure environmental limits are met, plans will need to apportion reductions in access to resources. This is likely to require a complex balancing exercise based on the existing allocation of permissions to take and use resources, potential new users, and the assimilative capacity of the environment for different types of resource use. The RMA provides little guidance on how this might be achieved.

45. Finally, current resource consent settings do not provide incentives to make best use of resources. A number of factors feed into this.

    - **Consents tend to be set with firm conditions and for lengthy periods, sometimes for up to 35 years.** While this supports capital investment and consequential benefits, this means that such permits are difficult to adjust in response to increasing scarcity or other changes in the environment. Section 108 does not support councils to use consent conditions to monitor and change course in order to address cumulative adverse effects, or to require an ongoing financial contribution to account for opportunity costs. As already noted, the ability to review consent conditions is subject to significant constraints tending to favour the status quo.

- **Existing users are prioritised in consent processes.** Again, as noted above, subject to various qualifications, existing consent holders are first in the queue and the first-in, first-served principle effectively prevents consideration of the merits of other proposed uses. This makes reallocation to higher value uses less likely.
- **Limited use of transfer provisions.** Facilitating trade in the use of resources, and allowing price signals to determine allocation within environmental limits, are important ways of achieving highest value use of a resource. How this is achieved is likely to be specific to different types of resources and contexts. In the case of freshwater, for example, the OECD notes that although section 136 of the RMA enables transferability of water permits, there is limited uptake of these provisions. Barriers identified include:
  - not all regional councils have expressly permitted water trading in their regional plan
  - high transaction costs
  - regulatory constraints that can limit transfers (eg, trading water allocations requires a new permit, or change to the permit, and an assessment of the environmental effects of that change, which takes time for regional councils to process).[354]

46. The Land and Water Forum recommended that "once limits have been set, holders of authorisations to take water should be able to easily transfer those authorisations (or a portion of those authorisations) to other users with minimal regulator involvement so long as the act of doing so does not breach a limit, frustrate efforts to reach targets (interim limits) or derogate the rights of others".[355]

Within the context of increasing scarcity, and limits set through plans, consent authorities will need to play closer attention to how much resource is allocated for use and for how long.

47. Within the context of increasing scarcity, and limits set through plans, consent authorities will need to play closer attention to how much resource is allocated for use and for how long. Improved provision for the review and transferability of permits by mutual agreement might better enable improvements in efficiency. That said, such measures would need to be carefully thought through, and developed on a case by case basis for different resources in different contexts.

Underuse of other economic instruments and alternative allocative methods

48. An important aspect of the 'effects-based' approach to environmental management introduced by the RMA was the intended use of economic instruments as an alternative to regulation. The use of economic instruments, it was argued, could provide greater flexibility and efficiency in the use of resources and therefore make a greater contribution to wellbeing through a 'pricing mechanism'.

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354 OECD. 2017. *Environmental Performance Reviews: New Zealand 2017*. Paris: OECD Publishing; p 182.

355 Land and Water Forum. 2015. *The Fourth Report of the Land and Water Forum*. Wellington: Land and Water Forum.

49. In the years since the RMA was enacted, some notable progress has been made by central government in the development of economic instruments for environmental management, including allocation issues. Two important examples are climate emissions pricing under the Climate Change Response Act 2002 and the introduction of the waste disposal levy under the Waste Minimisation Act 2008. In both cases, separate legislation was thought necessary notwithstanding the intention of the RMA to provide an enabling framework.

50. Some progress has also been made in the development of local economic instruments, most notably a nitrogen cap and trade system designed to improve water quality in the Lake Taupō catchment. This was developed as a partnership between central and local government and iwi. Many regional councils have developed policy on financial contributions.

Economic instruments and alternative allocative methods remain underused.

51. Despite this progress, economic instruments and alternative allocative methods remain underused, in particular for managing the diffuse pollution of waterways from agriculture. For example, the OECD's Environmental Performance Reviews of New Zealand in 1996, 2007 and 2017 all call for expanded use of economic instruments. The Tax Working Group's final report also notes New Zealand is ranked 30th out of 33 OECD countries for environmental tax revenue as a share to total tax revenue.[356]

52. The underlying reasons for this include:

    - **lack of central government support for councils:** many commentators believe that lack of national direction and support for the design and implementation of economic instruments and alternative allocative methods is a key road block for overcoming the knowledge, capacity and coordination constraints of local government[357]
    - **political headwinds:** despite making good sense, introducing new economic instruments and allocative methods as an alternative to regulation has proved controversial. A possible reason for this is the strength of vested interests to preserve and enhance their rights, and the lack of any coordinated support for the interests of potential new users, or the long-term efficiency gains possible for the country as a whole. Recent reform measures that have seen financial contributions removed and reinstated in the RMA are indicative of this.

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356 Tax Working Group. 2019. *Future of Tax: Final Report*. Wellington: Tax Working Group. Retrieved from https://taxworkinggroup.govt.nz/sites/default/files/2019-03/twg-final-report-voli-feb19-v1.pdf (16 June 2020).

357 Environmental Defence Society. 2016. *Evaluating the Environmental Outcomes of the RMA: A Report by the Environmental Defence Society*. Auckland: Environmental Defence Society; Greenhalgh S, Water S, Lee B, Stephens T, Sinclair RJ. 2010. *Environmental Markets for New Zealand: The Barriers and Opportunities*. Lincoln: Manaaki Whenua Press; Guerin K. 2004. *Theory vs reality: Making environmental use rights work in New Zealand. New Zealand Treasury Working Paper 04/06*. Wellington. The Treasury; Waikato Regional Council. 2016. *Waikato regional fresh water discussion: A framework for getting the best use allocation through time*. Hamilton. Waikato Regional Council.

Māori rights and interests

53. Of course, questions of allocation of public resources raise issues about Māori rights and interests under Te Tiriti. As noted above, the subject of Māori rights and interests in freshwater allocation is excluded from the scope of this review by our terms of reference. Here we make two points:

    - many submitters pointed to the need for issues relating to Māori rights and interests in freshwater to be addressed before policy reform is advanced in relation to allocation issues
    - the recommendations in our report in relation to the wider role of Māori in processes under the RMA will go some way towards addressing Māori concerns about current RMA processes, including addressing important recommendations in the Waitangi Tribunal's report on stage 2 of the inquiry into national freshwater and geothermal resources.[358]

Options considered

54. Our issues and options paper identified the following options in relation to allocation:

    - retain or modify the first-in, first-served principle
    - provide for new resource allocation methods and criteria to be developed nationally or locally
    - consider the role of specific tools in resource allocation such as spatial planning, transferable rights, tendering or auctioning
    - modify the duration of consents
    - change the basis upon which the holder of a consent may obtain a renewal
    - give greater (or more restricted) power to the consent authority to vary or cancel a consent.

55. Our issues and options paper identified the following options to improve the use of economic instruments:

    - broaden and strengthen provisions for financial contributions
    - require mandatory charges for use of public resources, such as coastal space
    - develop national direction and guidance on use of economic instruments
    - offer councils a broader range of economic tools to support the resource management system such as emissions taxes, tradeable emissions permits, transferable development rights, tools for environmental offsetting, and congestion charges
    - allow or require councils to use revenue from economic instruments to protect, restore and maintain natural resources
    - enable easy short and longer-term transfers of consents to facilitate markets for resources.

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358 Waitangi Tribunal. 2019. *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims: Wai 2358*. Wellington: Waitangi Tribunal.

56. We received a broad range of suggestions for reform from stakeholders. Overall, the options considered can usefully be grouped as follows:

    - whether a reformed RMA be used to address allocation issues
    - new principles which could apply to allocation decision-making
    - new tools for allocation relating to freshwater, coastal marine space and aquaculture, and urban development capacity
    - enabling wider use of economic instruments by local authorities.

Discussion

57. We received useful comments from submitters in relation to resource allocation issues. The main points made were:

    - clearer national guidance on allocation is necessary
    - there are deficiencies with the 'first-in, first-served' approach
    - allocation of resources should continue to be dealt with under the RMA to ensure consistency of legislative application, rather than outside the RMA as is the case with minerals and fisheries
    - a variety of alternative approaches to the allocation of rights were raised, including trading and spatial planning.

58. The main points raised in relation to economic instruments were:

    - there was general agreement that economic instruments should play an important role in a reformed resource management system, including to achieve environmental goals, allocate resources and fund local government
    - submitters were divided on whether the RMA was the best place for economic instruments, with a number believing these should be located elsewhere. There was a some agreement among submitters, from local government in particular, that the RMA was the appropriate place for these instruments
    - there was some acknowledgment from submitters that existing instruments have been underutilised or misapplied and that a consistent national approach is necessary, including guidance from central government.

There was general agreement that economic instruments should play an important role in a reformed resource management system.

59. We address these points in the discussion that follows.

Whether future environmental management and land use legislation be used to address allocation issues

60. Given the issues that have arisen in relation to allocation under the RMA, it is worth questioning whether a reformed RMA should continue to have an allocative function.

61. In the case of some resources, allocation issues have been dealt with under separate legislative frameworks. This left the RMA to focus on managing the environmental effects of those activities. A separate legislative framework was also developed for the allocation of discharge rights for climate change emissions. Similar approaches could be contemplated for freshwater or coastal allocation issues, or to provide ways of using tradeable development rights alongside regulatory plans for urban development capacity. In its work on reform of the resource management system, EDS put forward the bold idea of general resource allocation legislation, with principles that would apply across the resource management system.[359]

62. The reason resource allocation issues are often addressed in separate legislation appears to be simply that policy has been developed by government on a resource specific basis. The complexity of allocation issues, including those relating to Tiriti interests, also lends itself to a separate approach. It is worth noting that interface issues with the RMA often arise as a result. Some examples are provided below.

    - **Crown Minerals Act 1991:** this allocates rights to prospect, explore or mine Crown-owned mineral resources and provides for the financial return the Crown receives in exchange for those rights. It was developed alongside the RMA and was initially intended to be part of the same legislation. It was separated at the third reading stage of the Resource Management Bill due to perceived difficulty in having the crown minerals provisions subject to the principle of sustainable management.
    - **Fisheries Act 1996:** this allocates access to fisheries resources while also providing for the management of the environmental effects of fishing activity. In particular, the legislation provides for the operation of the quota management system which includes the allocation of individual transferable quota. These grant perpetual rights to harvest a share of the total allowable commercial catch of a stock. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 provided for the allocation of 20 per cent of commercial fishing quota to Māori. Recent Court decisions have discussed the interface between the Fisheries Act and the RMA.[360]
    - **Climate Change Response Act 2002:** the New Zealand Emissions Trading Scheme was enacted in 2008 after successive governments had spent more than a decade considering emission pricing. It uses trading of discharge rights as an alternative to regulatory means of controlling emissions, with the intention of promoting more efficient means of addressing climate change. The reasons for the development of the Emissions Trading Scheme separately from the RMA are discussed in chapter 6.

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359 Environmental Defence Society. 2018. *Reform of the resource management system: The next generation: Synthesis report*. Auckland: Environmental Defence Society.

360 See *Attorney-General v The Trustees of the Motiti Rohe Moana Trust & ORS* [2019] NZCA 532.

63. Our issues and options paper asked whether allocation of resources, such as water and coastal marine space, should continue to be dealt with under the RMA. There was general consensus this should be the case. For example, the Forest & Bird notes in its submission that "the lack of integration between environmental effects under the RMA and minerals and fisheries management under the separate Acts is already a problem. Allocation needs to be considered as part of an integrated management response which puts the natural environment first, in accordance with the revised Part 2." Federated Farmers also notes "we consider these are ultimately matters that should sit within the RMA, to ensure plan cohesion and consistency, from consultation through to implementation and enforcement."

64. We agree there are good reasons to continue the current allocative functions of the RMA in future legislation. The nature of resources allocated under the RMA, in particular freshwater, coastal marine space and urban development capacity, necessitates close integration of regulatory and allocation processes. For example, further developing allocation policy for the discharge of nutrients to freshwater will require close coordination with the environmental controls developed through Natural and Built Environments Act processes at the regional level. This includes the provisions for decision-making, and the accounting systems and baseline data needed to make a more sophisticated allocation approach possible. Likewise, the allocation of new urban development capacity occurs directly through regulatory plan changes.

We agree there are good reasons to continue the current allocative functions of the RMA in future legislation.

65. While a separate approach to allocation of these resources is conceivable, it would need to be so closely linked with the multi-layered planning arrangements of the Natural and Built Environments Act, that there appears to be little benefit in taking this approach. We also see no reason why allocation policy should not also seek to deliver the overall outcomes sought from the Natural and Built Environments Act.

New principles for resource allocation

66. If the Natural and Built Environments Act is to continue its role in allocating certain resources, the question then becomes whether it should provide a more developed policy framework for allocation issues. This might address the shortcomings identified with the first-in, first-served approach, and provide clarity and consistency in respect of decision-making by local government.

67. There was strong support among submitters for including new principles on resource allocation in the Natural and Built Environments Act. For example, Auckland Council submitted "establishing outcomes and principles at the national level, supported by guidance for local decision making, would assist in providing an alternative to the 'first in first served' approach. Elevating the importance of future generations, health of the natural environment, and the impact of climate change in the allocation system is critical." Horticulture New Zealand also noted "the RMA should provide principles for allocation. The allocation methods must reflect the local environment (at the appropriate spatial scale), however common principles could be developed at a strategic level." In its view, "… resource

allocation frameworks must ensure that allocation occurs within environmental and cultural bottom lines and at minimum, provides for basic human needs. Trade-offs required to maintain and achieve strategic environmental, cultural, social, and economic outcomes over time, should consider both economic efficiency and alignment with the strategic outcomes."

68. On the other hand, Meridian Energy notes that "whether principles for allocation would be helpful or not very much depends on what they might contain". It submitted that "it would be very unhelpful if providing principles to local authorities was to advance an administrative allocation approach whereby local authorities use allocation decisions to pick winners and losers."

Including principles in legislation would define the outcomes sought from allocation policy and provide a framework within which the tensions between competing interests could be addressed. These principles could then be used to guide the development of detailed policy and tools in national direction and combined plans.

69. Our view is that a reformed RMA should state principles for the design and application of policy and tools for allocation, including some economic instruments. However, application of these principles should be carefully targeted. Including principles in legislation would define the outcomes sought from allocation policy and provide a framework within which the tensions between competing interests could be addressed. These principles could then be used to guide the development of detailed policy and tools in national direction and combined plans.

70. Our view is that these principles should not apply generally to all resource domains, as is the case with our proposals for a new purpose and principles section for the Natural and Built Environments Act. As discussed earlier, a range of different allocation frameworks already exist for some resources, notably minerals, fisheries and greenhouse gas emissions. Rather, the new principles should be used to address outstanding allocation issues for specific domains currently under threat and those that may become so in future. This is likely to be the case when a resource becomes scarce, and straightforward allocation methods such as first-in, first-served are no longer workable.

71. Given questions of allocation arise in different ways for different types of resources, these principles should be generally stated in the Natural and Built Environments Act. In our view, the principles should provide a clear expectation that public resources should not be allocated for substantial periods without proper provision for environmental limits or future needs. They should also clearly state the importance of efficient use of resources for the wellbeing of people and communities. As noted at the beginning of this chapter, relevant principles can usefully be grouped into the following three categories:

    - **sustainability:** this includes providing for the needs of present and future generations and consistency with the purpose and principles of the Natural and Built Environments Act
    - **efficiency:** resources should be used efficiently to improve the overall wellbeing of people and communities. This includes enabling re-allocation of resources. All the benefits and costs of resource use should be considered, including their use and non-use value (see text box on total economic value below)

- **equity:** the balance struck between recognising the investment of existing users and providing for new opportunities should improve the overall wellbeing of people and communities. Allocation systems should meet obligations under Te Tiriti. Users should pay a fair return for their use of scarce public resources.

72. The following sections discuss how these principles could be taken forward in development of mechanisms to address the current allocation issues for freshwater, the coastal marine area, and urban development capacity. While we discuss different options for how these issues might be addressed, in our view these options are best developed and implemented through subsequent national direction and regional planning processes, rather than future legislation itself. However, as noted, a reformed RMA should state the general principles we have identified above.

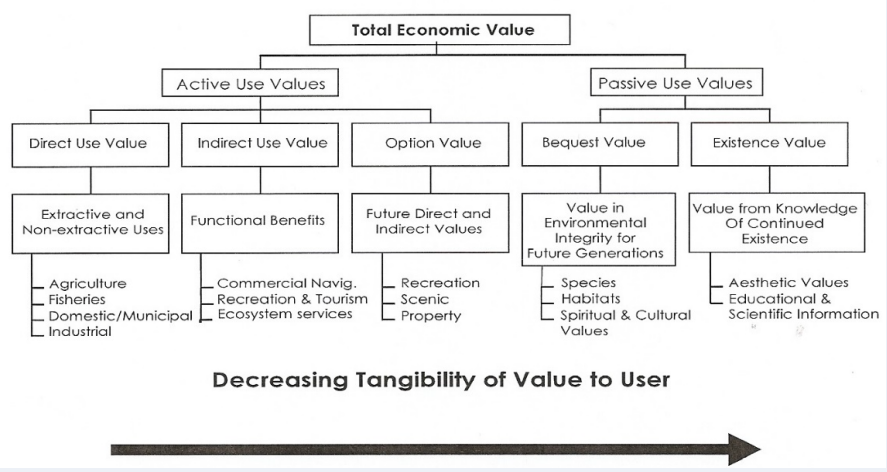
MEASURING THE VALUE OF DIFFERENT RESOURCE ALLOCATIONS

Along with considerations of equity, deciding how much of a natural resource to allocate to different uses involves determining which use is relatively more valuable and resolving trade-offs between them, both in the present and future. It is desirable for this valuation to be undertaken on a consistent basis.

The most obvious indicator of economic value is the value at which things are bought or sold. However, many natural and environmental resources are not routinely exchanged in markets. Economists have long recognised that things have value beyond what they realise in markets. The Total Economic Value (TEV) framework has been developed to illustrate this and comprises:

- **current use value** from environmental services consumed **directly** by firms and people, which may be extractive (eg, mining) or non-extractive (eg, recreation) resource use
- **current use value** from services consumed **indirectly** by people, including environmental regulatory effects felt far from where they are created (eg, the benefits of upstream tree planting for moderating river flows and reducing flood risk downstream)
- **future use value** in retaining the option to use an environmental resource and its services in the future, that can cover both direct and indirect uses
- **non-use or passive use** value, which is principally existence value that comes from knowing an environmental feature will continue to exist in the future, irrespective of any expectation of use; and bequest value in retaining resources for future generations.

The figure below illustrates these values for water.



Source: Nimmo-Bell 2011 for MAF Biosecurity New Zealand

MEASURING THE VALUE OF DIFFERENT RESOURCE ALLOCATIONS

The Total Economic Value framework can be supported by techniques for inferring how people value outcomes that are not amenable to market trading, recognising different people and cultures have different values. Non-market value estimates in New Zealand for specific environmental attributes of interest to public policy have been derived over many years, with varying degrees of sophistication. However, they are still too few and varied to infer much about the generic value of environmental changes, or how locality affects value. Ideally, further work would be undertaken as part of a future environmental management system to develop and standardise non-market valuations for natural resources, including monetary and non-monetary measures, to support more consistent decision-making.

New mechanisms for allocating resources

Addressing allocation issues in relation to freshwater

73. As discussed earlier, the first-in, first-served approach is at the root of issues associated with the allocation of natural resources under the RMA, including freshwater. There are several ways in which it could be improved or replaced:
    - more flexible regulatory permissions
    - developing an administrative allocation system based on assessing the merit of uses
    - moving to a market-based approach by better enabling trading of permits within the current system, or using auctions and tenders
74. These are not mutually exclusive. We discuss each in turn.

More flexible regulatory permissions

75. Permits can be designed to provide a more responsive allocation regime. More flexible permitting provisions could be developed with reference to the allocation principles discussed above.
76. Shorter durations allow more permits to be re-considered more often, if necessary. More frequent allocation opportunities mean councils can alter permits based on how successful they have been in meeting freshwater objectives. Consideration could also be given to the flexibility of the provisions for review of consent conditions, including the possibility of 'clawback' provisions that give councils the option to retain a certain percentage of the existing water use as part of the permit renewal process. Using the same expiry date for permits also enables councils to make adjustments to water use based on a holistic and simultaneous assessment of different users.
77. However, more flexible permit options come with trade-offs. Shorter terms need to be balanced carefully against providing sufficient business certainty for investment decisions and managing risks for a future consent renewal. It also costs more to be more frequently considering applications.
78. Longer permit durations increase the ability to invest in long-lived capital equipment that can also achieve greater value from the use of water. The optimal term depends on many factors including the type of industry and investments required to use the resource. For

example, hydroelectric schemes will need a longer period to make a return on their larger investments than small scale irrigation schemes. Despite concerns about business certainty, our view is that the current maximum permit term of 35 years is now only appropriate in very limited circumstances.

A regulatory approach based on the merit of uses

79. While developing more flexible permit provisions can reduce some of the negative impacts of the first-in, first-served approach, it does not address them entirely. In particular, significant equity and efficiency concerns are likely to remain.

80. One option for replacing the first-in, first-served approach is to employ allocative approaches based on administrative judgment and/or criteria. These criteria could be developed on the basis of the allocation principles above, namely sustainability, efficiency and equity. They might include objective measures, such as the land's productive potential and ability to leach nitrogen, as well as more subjective measures, such as environmental performance, and the potential for a resource use to contribute to the wellbeing of people and communities. Phasing in common expiry dates could make this merit-based selection process more effective as it would allow councils to identify the 'best' uses when multiple applicants are viewed together.

81. This process would allow communities to maintain an active role in decision-making on how their local water is used, and it may require less infrastructure than market-based approaches. It also provides one mechanism to help prioritise access to water for Māori to address Tiriti interests.

82. However costs to councils and land users are likely to increase in order to prepare and assess applications and supporting evidence. Although these additional administration costs are likely to be less than the extra benefits gained from water being used in a more efficient and fair way, they would still be significant.

83. Another potential challenge of moving to this type of system is relying on local authorities to assess the net wellbeing impact of competing uses, even with criteria. It would be very difficult for councils to foresee how different enterprises will use their unique combinations of resources to create value from water. There is also the potential challenge of considering beneficiaries who extend across jurisdictions, so it may be appropriate for a more centralised evaluation.

84. One way to reduce the administration and decision-making costs of local authorities is to harness the collaborative power of New Zealand's numerous water user groups. Here, a shared water permit can be issued to a water user group to manage on behalf of its members. This effectively outsources some of the decision-making to a third party. As the case study below shows, water user groups are an example of small-group governance models in action, and provide councils with a complementary allocation mechanism.

CASE STUDY: SMALL GROUP, COMMUNITY SELF-GOVERNANCE OF RESOURCES

Small-group, community self-governance of resources, although not an economic instrument, is an institutional instrument that allows community management of common pool resources, such as water.

Advocated by Nobel economist Elinor Ostrom, this small-group governance model works best when there are strong rules for allocation and compliance, the group is small and similar, and there is a high degree of trust amongst members. In larger, more diverse groups, transaction costs increase and there is an incentive to 'free ride' or take more than one's agreed share.

Other considerations for this management model include how to allocate water outside the community so it benefits society as a whole (ie, higher user value) and the management of any impacts (ie, downstream pollution). However these concerns could be overcome with clear and transparent allocation rules and the ability to transfer water within and outside the community management group.

Given New Zealand contains many small (rural) communities, there is the potential for this governance model to be used more in the future, and for it to include co-governance with Māori.

Moving to a market-based approach by better enabling trading of permits within the current system, or using auctions and tenders

85. While an administrative approach may be useful in some situations, there are limits to the extent to which it can promote efficient use of resources. This is because public decision-makers are not necessarily best placed to evaluate the highest value use of a resource.

86. The trading of use or discharge permits (or parts of permits) is another tool that can promote efficient allocation by allowing water to move to its highest and best use across a wider range of users, including newcomers. It is important to note, however, that simply moving to a trading system without addressing whether or not to reallocate existing entitlements would be inequitable.

Simply moving to a trading system without addressing whether or not to reallocate existing entitlements would be inequitable.

87. Trading could be informal, with or without a price, or formalised through a more sophisticated market registry and trading software. Due to the fragmented and varied nature of New Zealand's water catchments, small trading or transfer markets are most likely to be practical, similar to those managed by the water user groups around the country. In other circumstances, more established water markets could exist like the Opuha Dam in South Canterbury, which we illustrate in the case study below.

CASE STUDY: OPUHA DAM WATER ALLOCATION

The Opuha Dam in South Canterbury[361] is an example of a tradeable water allocation scheme subject to environmental bottom lines. The principles of this scheme could provide a model for how water allocation schemes might be applied elsewhere in the country.

The dam was commissioned in 1999 and provides water for irrigation to the surrounding catchments, water for town and industrial supply, and for hydroelectric energy generation. Ensuring a minimum flow to maintain the downstream health of the waterway is the top priority for water release, although downstream waterways have suffered some environmental degradation along with other waterways in Canterbury.

The dam generates electricity with the water released from lake storage, such that the best price is obtained for electricity while maintaining flows into the river at a natural and consistent rate. Water for the Timaru town supply is allocated via contract and is separate from the water share-trading regime.

Shares in the dam are able to be sold or leased for access to water for irrigation in the surrounding catchments. This ensures that water for commercial purposes is priced on a local market, and that the price is subject to change based on demand factors, while maintaining minimum flows necessary to ensure catchment health. This in turn helps ensure that water available for irrigation in general goes to the highest value use – in practice a majority to dairying, with significant portions for drystock, mixed cropping and other uses. Allocation through shares also helps the local community to have a strong interest in the management and operation of the dam and catchment, and that community support in turn improves operation of the asset.

A 2006 study by the Ministry of Economic Development evaluated the economic impact of the Opuha Dam over two years and found the dam added roughly $124m to the South Canterbury economy. The impact of the project on waterway environmental health has not been thoroughly evaluated, but there is capacity for schemes of this kind to respond effectively to environmental degradation through modifying environmental bottom-lines in response to monitoring.

88. The Lake Taupō nitrogen market is another example where trading helps allocate limited pollution permits to land uses that deliver the highest return. In the Taupō catchment this could be dairy farming, forestry or ventures that capture a consumer premium from sustainable farming practices and marketing. The Taupō scheme, set up under the RMA, shows that a cap and trade scheme at farm level is technically feasible but requires a diverse and active trading market for efficient allocation to occur. We expand further on tradeable pollution permits when we compare them to a pollution tax in the case study below.

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361 Russell R, Frame B, Lennox J (eds). 2011. *Old Problems New Solutions: Integrative Research Supporting Natural Resource and Governance*. Lincoln: Manaaki Whenua Press; Harris S, Butcher G, Smith W. 2006. T*he Opuha Dam: An Ex Post Study of Its Impacts on the Provincial Economy and Community*. Timaru: Aoraki Development Trust. Retrieved from http://opuhawater.co.nz/about-us/the-success-of-the-dam (16 June 2020).

CASE STUDY: MANAGING NITROGEN POLLUTION – ENVIRONMENTAL TAX OR TRADEABLE POLLUTION PERMITS?

As part of the Government's proposed reforms of the national direction on freshwater, more stringent maximum limits will be set for nitrates and other sources of water pollution. This increase in the stringency of limits presents an opportunity to introduce tradeable permits or a corrective tax to efficiently allocate nitrate discharges up to the limit or cap. Both instruments give land users the flexibility to determine the least-cost way to reduce their environmental impact.

As close substitutes, these pricing instruments allow negative externalities to be internalised – which is a necessary condition for efficient allocation. These instruments also aid equitable allocation by ensuring the environment is not damaged for future generations. However there are different circumstances where each instrument will be more suitable.

Tradeable nitrogen permits

Tradeable nitrogen permits offer a certain level of pollution reduction but an uncertain price. This dependability of hitting the pollution target makes tradeable permits more suitable for catchments at or over their environmental limits. If the catchment is over allocated, permits provide the flexibly for governments to buy back and retire permits. Alternatively, a transition period could be used, were the available permits are gradually reduced to the target pollution level. This gives existing land users time to rearrange their assets to accommodate a binding environmental constraint. Permits can also be auctioned on a periodic basis, to ensure they move quickly to their best use, and revenue is generated for environmental restoration.

However, as the Lake Taupō nitrogen scheme shows, tradeable permits work better with large and active markets, and a diversity of land users. A robust market of willing sellers and buyers helps ensure limited pollution rights, and associated land use, transition to the highest value use. Future developments in compliance market monitoring and trading software will assist with wider use of tradeable permits.

Nitrogen tax

A nitrogen tax gives a certain price, but an uncertain level of pollution reduction. Thus a tax is more suited to catchments approaching their environmental limits or which are too small for an active market of tradeable permits. A corrective tax may also be simpler than a trading scheme, and therefore could have lower set up and running costs. Like auctioned permits, taxes provide revenue which could be used to help restore waterways.

The key challenge for a nitrogen tax is setting the correct rate to correct the environmental damage. This can be particularly difficult when there is a lack of data and the tax rate needs to be established through trial and error. However, the periodic adjustments that are needed to set the correct tax rate may not occur if they become crowded out by other local government priorities. Further, multiple adjustments to the tax rate can provide unwelcome uncertainty for businesses. To help overcome these disadvantages, the tax rate could be set low initially and include an automatic upwards adjustment mechanism (similar to inflation) with a review date. In the meantime, the tax revenue could be invested in data and modelling to establish a more accurate tax rate at the review date.

89. Trading is more likely to happen in areas where there is high demand for water and accurate measurement or modelling of water use or pollution. However, effective, high volume trading can be impacted by differences in environmental effects occurring between trading areas. For instance, trading between areas with different run-off profiles (eg, wetlands and hill country) are likely to need council assessment of environmental impacts. This can increase

transaction costs and slow down or reduce trading, especially for smaller or temporary trades. To overcome this constraint, highly specific trading rules could be used to create 'free-trade zones' in areas where transfers have similar environmental effects. But those trading rules are themselves complex to design and may severely limit the gains from trading. In time, smart trading software may facilitate 'dynamic free trade zones' that reflect near or real time changes to environmental factors.

The introduction of market mechanisms, such as trading, also increases the risk of concentrating market power if permits become controlled by a few users.

90. The introduction of market mechanisms, such as trading, also increases the risk of concentrating market power if permits become controlled by a few users. To guard against this, traded consents could still be subject to an expiry date. This means all consents eventually return to local authorities for reallocation. This return of permits diminishes the scarcity value of water that can be extracted from trading. This reduced scarcity value can make markets more acceptable to those who have equity concerns about historic users cashing in on an exclusive resource.

91. Auctioning or tendering to address the initial allocation of permits could be considered as part of a move to more widespread trading. This approach is used successfully to allocate radio spectrum in New Zealand. When multiple businesses vie for a limited number of consents, an auction reveals the value of a resource to a business and the highest value users self-select.

92. Auctions could be held regularly to align with the common expiry dates of permits for specific catchments or locations. Councils could choose the proportion of permits auctioned and who they are auctioned to. For example, all users could receive a limited 'free' allocation subject to the criteria for the merits of resource use discussed above, with auctions targeted at above average users or polluters. Alternatively, councils could take a more straightforward approach and make a set proportion of a resource available for auction (ie, 50 per cent) with the remainder allocated to public uses, existing users and to address Tiriti interests.

While market approaches have many advantages, they can be complex and require robust rules, systems and oversight for all users to have confidence in them.

93. The gains from auctions include a more immediate allocation of permits to their highest use value, a reduction in selection bias by consenting staff and a source of revenue that can be shared amongst the community, including with Māori.

94. Any downsides from auctions could be mitigated through the auction's design features. For example, auctions could be made more accessible to a wider range of users by allowing the purchase price to be paid off over time. Auction rules could also include safeguards that prevent purchases from outside the catchment, including from speculators who can push up prices.

95. While market approaches have many advantages, they can be complex and require robust rules, systems and oversight for all users to have confidence in them. Lessons from Australia's Murray-Darling water markets highlight that strong institutions, independent

governance, scientific knowledge and market structures are crucial for allocating water efficiently and equitability. Although New Zealand's water markets are likely to be much smaller than the Murray-Darling system, as we show in the Opuha Dam case study, more sophisticated water markets can work successfully in New Zealand, including within a coalition of private investors.

Transitional arrangements, initial allocations and getting back to limits

96. The transition to a new allocation regime could also be guided by the principles of sustainability, efficiency and equity. One aspect of this is balancing the desired timeframe within which better allocation of resources is to be achieved, with the need to provide as much certainty as possible, particularly for land users and communities. There are a range of ways this could be achieved.

The transition to a new allocation regime could also be guided by the principles of sustainability, efficiency and equity.

97. At one end of the spectrum of possible options, existing permits could be allowed to continue until they expire. They would then be reset at renewal with provisions in line with the preferred allocation approach. At the other end of the spectrum, all permits could be reset at the same time or over a short period. If this approach were taken, existing users could be assured of some business certainty if initial allocations provided some portion of their existing permits. The remainder could be auctioned, extinguished or allocated based on administrative criteria.

98. Gifting or the free allocation of permits based on historic or existing water use, can make market-based schemes more acceptable to land owners. This is especially so when trading is unfamiliar and auctioning from a zero base may create significant disruption to existing livelihoods. However, free allocations of permits have to be weighed up against any equity concerns that some users do not have to pay to use or pollute the resource, while others do. One way to mitigate this issue is for permits to be gifted free up to the average pollution or water use for each sector (such as dairy or sheep and beef) and businesses which pollute or consume more than the average, need to purchase the balance via auction. This sector average gifting can reward those who have made investments to reduce their environmental footprint.

99. There is also a range of options for dealing with situations in which catchments are over-allocated. Reductions in allocations can be phased in over time through 'claw backs' or small reductions in the regular auction of permits. If time is not critical, this 'sinking lid' option is a pragmatic way to deallocate. Alternatively, central or local government can 'buy back' permits in return for achieving a faster reduction in resource use. Acquiring water for the environment has been used in the Murray Darling basin water markets and in the Lake Taupo nitrogen trading scheme.

Developing a new approach

100. Our view is that the many detailed design questions that need to be addressed to develop a new approach to allocation of freshwater are best addressed through a combination of national direction and regional combined plans. National direction could further develop the

principles of sustainability, equity and efficiency in the context of freshwater. It could also provide a consistent framework and range of allocative tools to be used locally in different circumstances. Regional plans could specify the parameters for consenting and the particular allocation methods to be used. Within the principles, the specific allocation policies in plans could vary by region, but might contain (without providing an exhaustive list):

- current and foreseeable allocation issues
- demand and supply forecasts and risks to forecasts
- environment limits
- priority allocations for public use, such as drinking, sanitation and firefighting
- regulatory allocations including the proportion to go to Māori, existing users and new users
- allocation methods including merit criteria such as good water practices, common expiry dates for consents, transfers, auctions and the establishment of water user groups
- transition measures for over-allocated catchments including the timing and recognition of existing users
- water pricing including cost recovery
- governance including water metering and monitoring.

National direction could further develop the principles of sustainability, equity and efficiency in the context of freshwater. It could also provide a consistent framework and range of allocative tools to be used locally in different circumstances. Regional plans could specify the parameters for consenting and the particular allocation methods to be used.

101. Given freshwater policy is highly context-specific, we do not consider the reformed RMA should specify the particular methods to be used in different circumstances. Rather it should provide an enabling framework in which national direction and regional plans can address these issues.

Allocation issues in the coastal marine area

102. Allocation policy settings in the coastal marine area, including aquaculture, are arguably more advanced than they are for other natural resources. As mentioned above, the NZCPS requires councils to assign appropriate places for aquaculture, however the implementation of this varies between councils. Tendering can also be used to allocate space. Tiriti settlements have provided for the allocation of some coastal space to Māori such as for aquaculture. Although the flood of first-in, first-served aquaculture applications in the earlier years of the RMA were not well managed, a more comprehensive planning approach has evolved, including greater scrutiny of the environmental impacts of activities.

103. However, a number of coastal allocation issues still remain. Chief among them is the identification of suitable new sites, for different forms of aquaculture, that are can provide for the activity within environmental limits. Without sufficient proactive site identification, primary allocation decisions are made mostly through costly individual consent decisions. These ad hoc applications, which involve expensive environmental assessments with no

certainty of approval (including on any appeal decisions), are a barrier to market entry. This can deter potential marine farmers and stifle the ability to use the current tender provisions to allocate resources efficiently.

104. The barriers to market entry are also exacerbated by lengthy consents of between 20 and 35 years and particular consideration given to existing users at consent renewals. Although these conditions provide investment certainty for existing users, opportunities for new users to add greater value and/or share in the increasing scarcity value of a public resource are reduced.

105. To address these issues, some of the allocation options discussed above for water could also be applied in the coastal environment, such as more flexible permits. The starting point, however, is to consider a greater role for marine spatial planning.

Greater use of marine spatial planning

106. Like freshwater, coastal space is a public resource that can be allocated between different uses and users using the principles of sustainability, efficiency and equity. However, the marine environment has some unique characteristics that require a slightly different beginning for allocation decisions. First, the coast as the receiving environmental for rural and urban land-based activities, is particularly exposed to cumulative environmental effects. This damage can compound any negative impacts from poorly sited aquaculture such as nutrient and effluent build up. Secondly, a highly visible marine farm has the potential to impact a high number of coastal users including homes and businesses with sea views. Compared to a land-based farm that draws water, a marine farm is a conspicuous consumer of the commons.

Like freshwater, coastal space is a public resource that can be allocated between different uses and users using the principles of sustainability, efficiency and equity.

107. Given these wider impacts, a significant upfront investigation is required to identify the most suitable locations for marine farming. Marine spatial planning allows this investigation to begin by assigning parts of the coastal space to different uses, both current and future. By harnessing good environmental and industry evidence, and collaborative input from the community, spatial planning can provide greater allocative certainty to where aquaculture and other marine activities can and cannot locate.

108. Although New Zealand does not yet have legislation prescribing the process and outcomes for marine spatial planning, communities have taken the lead. A notable example is the Sea Change Tai Timu Tai Pari Hauraki Gulf Marine Spatial Plan that was developed between 2013 and 2016. Sea Change was a mana whenua, central government and local government joint initiative that also involved industry and other stakeholders in a robust spatial planning process. Although the outcomes were ambitious and there are implementation challenges, the spatial plan identified 13 new sites for aquaculture, and in doing so, validated the community's resolve to support the future growth of the industry.

109. A combination of strategic direction through the NZCPS, and comprehensive spatial planning, could be used to set direction for the use of coastal space, including for different types of marine farming such as finfish, shellfish and seaweed. Such strategic direction would mean fewer allocation decisions would have to be made at the subsequent consenting stage, which provides certainty for a wider range of applicants. As discussed in chapter 4, our proposals for a Strategic Planning Act includes the coastal marine area, and the regional spatial strategies to be prepared under it will provide greater strategic direction for users of the coastal marine area including aquaculture. It is beyond our terms of reference to develop a spatial planning framework that encompasses all relevant marine legislation including the fisheries and marine reserves legislation. Nevertheless, these acts could be integrated through future amendments to the Strategic Planning Act.

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More flexible regulatory permissions

110. As with freshwater, permits for aquaculture could be designed to create more allocative efficiency. Common expiry dates allow the relative merits of competing users to be assessed together, including via tender or auction. For ease of assessment, common expiry dates could be staggered or grouped by location or type of marine farm.

111. Shorter permit durations also allow councils to make more frequent reallocations, if required, to preserve environmental limits, accommodate new uses and reflect the changing preferences of society. However, shorter terms need to be weighed carefully against the need to provide investment certainty and the costs of frequent applications. The current minimum and maximum permit duration of 20 and 35 years might be appropriate in some cases, but when coastal space is particularly scarce, shorter terms should be considered.

112. Flexibility can also be enhanced by granting permits for biomass rather than specific, fixed locations. This follows the Norwegian model where production can be shifted to different approved zones to take advantage of changes in the environment, market conditions and new technologies, such as cage towing. A biomass or production permit would also facilitate trading between different farmers, while also reducing the risk of a farm being locked into an unsuitable location for several decades, caused perhaps by seawater warming or runoff from land-based activities. Further investigation into the merits of this or similar models should be considered, especially if they encourage industry innovation and productivity gains.

Better enabling market mechanisms to operate

113. Although more comprehensive marine spatial planning would improve allocative outcomes, it does not address how best to allocate space (or biomass) to individual operators. The ability to tender for coastal space has been part of the RMA since its introduction in 1991 but has had infrequent use.

114. Despite this slow start, we see a greater role for tendering. The confirmation of aquaculture zones through marine spatial planning could be commercially attractive to a wider range of potential marine farmers. Further, common expiry dates and potentially shorter permits will enable more competing interests to be considered at the same time.

We see a greater role for tendering.

115. A weighted tender can be used that considers a one-off tender price along with other desirable merit criteria, such as community benefit. If need be, the tender can also be used to allocate exclusive rights to apply for a resource consent. Separating the allocation decision from the consenting decision could be useful, if limited spatial planning has been undertaken, and a particular area requires a substantive environmental assessment. For applicants, this dual approach reduces the entry risks, as it buys them time to submit a comprehensive consent application. In turn, this reduced risk may attract more competition from users and increase the chances that the space will be used for higher returning activities.

116. Coastal permits can be transferred under existing provisions. Either the short or long term transfer (or leasing) of marine space or biomass to another marine farm or coastal user allows existing and new entrants to use a limited resource for higher value purposes/species, and providing opportunities for new capital investment. This transfer of resources to more efficient uses can also be aided by the wider adoption of coastal occupation charges, which we discuss further below under resource rents. Such a charge can incentivise users to establish higher returning ventures or sell space to those who can. Greater opportunities for aquaculture development within environmental limits, alongside the other measures discussed above, is also likely to lead to wider use of these transfer provisions.

Allocation of urban development capacity and improving competition in urban land markets

117. Allocation of new capacity for urban development can also be thought of as a form of resource allocation. Enabling new capacity for urban development requires both changes in land use rules and investment in necessary infrastructure networks, in particular the transport, drinking water, wastewater and stormwater infrastructure needed to service urban areas. This makes the allocation issues in relation to urban development unique in an important respect. While in the case of most natural resources, the resource is a public commons, in the case of allocation of new capacity for urban development, the land is privately owned, but (mostly) public investment in infrastructure is required to ready it for urban use.

Allocation of new capacity for urban development can also be thought of as a form of resource allocation.

118. It has been well documented by the Productivity Commission and others that restrictive zoning practices in district plans have constrained urban growth, ostensibly to achieve environmental outcomes. While there are many factors that contribute to the demand and supply of housing, the extent of available capacity for development underpins the effective operation of urban land markets. In cases where there is a shortage of available capacity, those wishing to develop, bid up the price of urban land, and in doing so award windfall gain to existing owners.[362] The combination of strong demand through historically high immigration levels and historically low interest rates, and constraints on the supply of new development capacity for housing, contribute to the extreme increases in housing costs in recent years.[363]

119. District plans can constrain growth both 'up' and 'out'. Constraints on urban intensification come in the form of rules that limit building heights and site coverage, among other things. Constraints on urban expansion often taken the form of a rural-urban boundary on planning maps. Many commentators have criticised how these rules are designed. In particular, they point out that restrictive zoning has encouraged land-banking both inside urban areas and amongst owners of undeveloped land near the urban/rural fringe. These policies can contribute to a number of negative impacts including:

Developing more competitive urban land markets has the potential to increase opportunities for urban development, increase the supply of housing and reduce its cost, and in so doing create more equitable and accessible urban areas that improve the wellbeing of present and future generations.

- higher house prices
- greater congestion
- infrastructure and welfare costs, as workers and residents opt for sub-optimal locations
- greater environmental degradation, that may come about through more dispersed urban form, higher energy requirements and vehicle emissions and greater overall consumption of land
- distributional consequences, as increasing land and house prices benefit existing owners, but not those who rent or are seeking to purchase a house for the first time.

120. Developing more competitive urban land markets has the potential to increase opportunities for urban development, increase the supply of housing and reduce its cost, and in so doing create more equitable and accessible urban areas that improve the wellbeing of present and future generations. In an effort to create more competitive urban land markets, central government has required larger urban councils to plan more proactively for urban growth. The National Policy Statement on Urban Development Capacity requires local authorities to ensure there is always sufficient development capacity available (including infrastructure) for foreseeable urban growth.

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362 This is sometimes described as an economic rent.

363 New Zealand now has some of the highest housing costs in the world. For discussion, see OECD. 2019. *OECD Economic Surveys: New Zealand 2019*. Paris: OECD Publishing. Retrieved from https://doi.org/10.1787/b0b94dbd-en (16 June 2020).

121. In developing infrastructure to support new capacity for urban development, councils face two key issues that are central to achieving more competitive urban land markets:
    - how much capital to allocate towards urban infrastructure
    - where to allocate it.
122. An underlying challenge for local authorities is the reluctance of current ratepayers to accept higher debt and to pay rates for new infrastructure which is seen to benefit future residents and the owners of the land it services. Furthermore, rising levels of council debt often make it imprudent to borrow to fund this infrastructure. Where to allocate the limited infrastructure capital that is available is decided mainly by territorial authority planners and engineers through zoning and land use plans as well as asset management strategies. These decisions are complex and need to take into account demand, community preferences, environmental constraints, existing land use patterns and infrastructure networks.
123. Many of the proposals already discussed in other chapters of our report will assist in improving the allocation of urban development capacity and making urban land markets more competitive. In particular:
    - **purpose and principles**: we propose to include both availability of development capacity for housing and business purposes to meet expected demand, and strategic integration of infrastructure with land use as specified 'outcomes' to be achieved under the Natural and Built Environments Act
    - **regional spatial strategies**: we propose greater emphasis on long-term strategic and integrated planning through the development of regional spatial strategies which will apply across legislation for land and other natural resource use, infrastructure provision and funding, and climate change. These will allow identification of suitable areas for urban growth
    - **combined plans**: we propose the integration of regional and district policies and plans to ensure a more coherent approach is taken to planning for urban growth, among other things. We also propose to improve the quality of regulation through use of an IHP process
    - **consenting**: we propose a range of measures to improve the certainty and reduce the costs of the consenting process, including changes to the approach to notification.
124. Here we discuss further ways to improve the allocation of urban development capacity and the competitiveness of urban land markets:
    - better design of urban land use regulation
    - a secondary role for tradeable development rights
    - targeted rates to capture uplift in land value.
125. To assist this discussion, we first address how a competitive urban land market might be more clearly defined by policy makers.

Defining a competitive urban land market

126. Competitive land markets should not be thought of as a laissez-faire regulatory approach to urban areas. In our view, a competitive urban land market is a well-planned and well-regulated built environment:

- by 'competitive', we mean there is ample supply of alternative opportunities for development with the result that the price of land is not artificially inflated through scarcity
- by 'well-planned' we mean that infrastructure and land use provision is aligned and timely provision of infrastructure avoids unnecessary costs
- by 'well-regulated' we mean that the positive and negative external effects of land and resource use are considered in decision-making, and the costs of regulation are minimised and commensurate with the benefits. Positive effects include economies of agglomeration,[364] and the benefits of proximity and access to urban amenities. Negative effects include pollution and effects from industry, effects of development on heritage and character features, traffic congestion, and infrastructure costs (where they are not covered by development or user charges).

Improving the design of urban land use regulation

127. We see three further ways in which New Zealand's approach to urban land use regulation might be designed to achieve more competitive urban land markets:

- more use of land price data and analysis to inform regulatory decision-making
- ensuring new capacity is targeted to high-demand areas
- ensuring a flexible approach to the design of land use regulation.

128. Data and analysis of land prices can reveal the underlying demand of people and firms to use urban land in particular ways. This is an important source of information that should be used by planners to inform regulatory settings.

Data and analysis of land prices can reveal the underlying demand of people and firms to use urban land in particular ways. This is an important source of information that should be used by planners to inform regulatory settings.

129. Land is more expensive when it is accessible to high-paying employment areas and other valued amenities. This reflects a combination of things such as proximity and lower transportation costs, scarcity and intense competition for use. Provided regulatory settings are sufficiently flexible, the market response to high land prices is for developers to economise on the use of land through more intensive (often vertical) built form. For example, in the case of housing, when land prices are low, standalone homes are cheaper to build per unit than terraced homes or apartments. As land prices rise, developers can economise through vertical development, allowing more residents to share the higher cost of land.

[364] This concept of agglomeration relates to the productivity gains of economies of scale, clustering and network effects.

130. Data and analysis of land prices can be used to measure the extent to which local regulations impact the type of development that is occurring. This is sometimes referred to in urban economics as regulatory stringency. If land use regulations are highly stringent, a local area might have high land values relative to the type of development that is occurring. This suggests that regulatory settings may be preventing land from being used for its full development potential. This might occur in a single housing zone close to the city centre or for land just outside an urban boundary. To assist analysis of regulatory stringency and its costs and benefits, aggregated land value data collected by local authorities could be made publicly available, so that informed and contestable cost-benefit analysis of local regulations can be undertaken.

131. Drawing on this data and analysis, land use plans should prioritise expansion of development capacity in areas where there is high demand. Planners should consider whether development is constrained by unnecessary regulatory controls. Competitive land markets are not necessarily achieved by 'flooding the market' with supply. Floods do not make distinctions about what lies where, while good planning should. Moreover, a 'flood' of new capacity is a poor way of allocating scarce funds for infrastructure investment. Emphasis should be given to increasing supply for the type of capacity and in the locations where demand is high. For example, if the price of land for industrial use in a particular location is relatively low, this suggests there is little to be gained for competitive land markets in making more industrial capacity available in this area. On the other hand, many residents will pay to avoid or reduce the costs of commuting. Intensification policies around existing and new rapid transit infrastructure are therefore particularly important for competitive land markets.

132. Finally, as city amenities, transport infrastructure and technology, and market forces are all dynamic, the flexibility of regulatory settings is important to the development of competitive land markets. Land use flexibility allows development to be more responsive to changes in local land price changes. If one area becomes more attractive for urban development relative to another, local prices rise, incentivising more intensive development and redevelopment. For instance, when commuting times lengthen and residents are prepared to pay more to live in central suburbs, development moves inward. If transport investment shortens travel times, development expands to wherever accessibility has improved.

Plans should not generally be trying to 'micro-manage' urban design issues through detailed land use rules. Rather they should focus on upholding clear environmental limits and addressing significant positive and negative social effects of development.

133. To accommodate this dynamic, regulatory settings need to be flexible. This can be achieved by more broadly stated controls or through detailed provisions that require constant review to ensure they remain appropriate for the circumstances. We conclude that plans should not generally be trying to 'micro-manage' urban design issues through detailed land use rules. Rather they should focus on upholding clear environmental limits and addressing significant positive and negative social effects of development. There may however be particular reasons why detailed controls are needed in some circumstances, for example to protect valued resources.

134. The National Policy Statement on Urban Development addresses these issues to some extent. In our view, this work should be further developed and refined through national direction under our proposed Natural and Built Environments Act.

Using tradeable development rights in urban areas

135. Tradeable development rights (TDRs) are a market mechanism to allocate limited development capacity, including costly infrastructure, to where it is most valued. TDRs provide for the purchase of the right to develop in excess of the current capacity made available in land use plans. In doing so, they can signal to councils where supporting infrastructure investment is needed most, thereby reducing delays or surplus infrastructure which are inefficient.

136. TDRs have been used to transfer unused development rights, such as air space above city churches, to developments that have more capacity to build up or out. Some councils have used TDRs to allocate limits on rural subdivision within a district.[365] TDRs can be designed in many ways. To function as intended, TDRs would need to be targeted to areas where regulatory stringency is high.

137. Of course, the value of TDRs relies on there being scarcity in opportunities for development. Some argue that the better option is simply to open up more capacity for development as of right. Given the infrastructure funding challenges facing growing urban areas, our view is that some scarcity in development opportunities is inevitable; however, we expect TDRs to play a relatively small or secondary role in regulatory plans.

Using targeted rates to capture land value uplift

138. Targeted rates may be used for a variety of purposes. In this section we address the use of targeted rates for the purpose of capturing land value uplift due to infrastructure investment. Local government funding and financing has recently been addressed in some depth by the Productivity Commission.[366] The Productivity Commission recommends using targeted rates to capture the uplift in land values that results from infrastructure investment. Here we highlight this new tool for infrastructure funding which has strong links to land use planning. The government is yet to act on the Productivity Commission's recommendation but in our view, this would be a valuable extension to existing infrastructure funding mechanisms that would support measures in our proposed Natural and Built Environments Act.

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[365] The Western Bay of Plenty District Council, Waipa District and former Franklin and Rodney District Councils have all adopted TDR mechanisms. For discussion, see Hodgson V. 2012. *Transferable rural lot right related incentives: Investigation and options*. Retrieved from https://www.aucklandcouncil.govt.nz/ (16 June 2020).

[366] For a useful discussion see Oliver R. 2016. *Productivity Commission Inquiry Into Better Urban Planning – Revenue Funding Options*. Retrieved from www.productivity.govt.nz (26 June 2020).

139. Investment in public works, such as rapid transit, can result in uplift in land values and windfall gains for land owners. Developing a better way for local authorities to capture some of this value uplift might assist efficient allocation of development capacity by providing a new way to fund infrastructure. It would also provide incentives to use land efficiently, as land owners could find ways to increase the yields on their property to offset any increase in rates. From an equity perspective, capturing value uplift from public investment would link those who benefit from new infrastructure investments to its funding, and allow windfall gains to private land owners to be shared with the community.

Investment in public works, such as rapid transit, can result in uplift in land values and windfall gains for land owners. Developing a better way for local authorities to capture some of this value uplift might assist efficient allocation of development capacity by providing a new way to fund infrastructure.

140. Current laws already give local authorities a number of ways to recover the costs of infrastructure including those listed below.

- **Development contributions:** under the Local Government Act 2002 (LGA), councils can require development contributions on subdivisions and other development to recover a fair, equitable, and proportionate portion of the total cost of capital expenditure necessary to service growth over the long term. This includes costs of connections to drinking water, wastewater, stormwater, roads and other transport infrastructure, and community facilities.
- **Financial contributions:** under the RMA councils may require financial contributions to provide resources to avoid, remedy or mitigate the adverse environmental effects of development. They can take the form of money or land and may be applied to fund capital expenditure on similar assets to development contributions, but cannot be used to fund the same expenditure for the same purpose.
- **General rates:** the Local Government (Rating) Act 2002 provides councils with powers to set, assess and collect rates to fund local government activities. They can be based on land value, capital value, or annual value.
- **Targeted rates:** under the Local Government (Rating) Act 2002 councils can set targeted rates to fund infrastructure and services that benefit identifiable ratepayers.
- **Uniform annual general charges:** these are fixed charges applied under the Local Government (Rating) Act 2002 to every rating unit, irrespective of the value of the property.
- **User charges:** Under the Local Government (Rating) Act 2002, councils can set volumetric charges for drinking water. Councils may also set charges under the Local Government Act 2002 for services they provide such as waste collection and community facilities. These charges can cover both operational and capital costs.
- **Development agreements:** Councils may allow developers to provide infrastructure directly. Once completed, the infrastructure is vested in the council, and it meets ongoing operational, maintenance and depreciation costs. Development agreements may be a full or partial alternative to development contributions.

141. The government also has legislation before Parliament to better enable private capital to be accessed to fund infrastructure without putting pressure on council balance sheets.[367]

142. Despite the broad range of existing tools, enabling local authorities to levy a charge on value uplift from infrastructure investment would fill a gap. When council infrastructure investment can be directly related to a particular new development, for example, connections to drinking water, wastewater or stormwater facilities, development agreements and development/financial contributions are an efficient and equitable way to fund investments. This is because they allow costs to be passed on to developers and land owners that benefit. However, where these links are less direct, such as investment in public transport infrastructure, it is still desirable for councils to fund their investments by capturing some of the value it creates. This value is reflected in increases in land values and could be captured through use of targeted rates.

143. Targeted rates are already a flexible tool and can be calculated according to a range of different factors including land values, specified areas and services provided. In cases where the beneficiaries of an investment can be clearly identified, the current powers are sufficient to allow local authorities to efficiently recover costs as an additional rate might simply be levied on a specified area. In that case the general rate would not necessarily be linked to increases in land value. However, often the benefits of council infrastructure investment will be diffuse, unevenly spread and difficult to attribute accurately. In these cases, the most equitable option is to base a targeted rate on the *increase* in the unimproved value of land in an affected area.

144. The targeted rate could work as follows. A council announces its intention to develop a new rapid transit link, alongside proposals for regulatory changes to enable increased development in the vicinity. A targeted rate could be announced at the same time, since the value of these policy changes can be capitalised into land values almost immediately. The rate might be designed to capture only increases in value above a certain threshold (eg, gains in value 20 per cent above the measure of general property inflation). Allowance might also be made for the contingency that the infrastructure might not proceed.

145. This approach would be efficient, as basing the rate on the unimproved value of land would ensure it is unaffected by a land owner's actions, and therefore would not distort their incentives to make improvements. It would also be fair as it would target only those who have made substantial windfall gains as a result of the actions of the wider community. As is the case for rates generally, rates rebates for land owners with low incomes could be used in cases of hardship. Finally, this would be practical, as all land in New Zealand is already valued independently for rating purposes.

146. The use of this sort of instrument has some precedent. New Zealand local authorities had the legal ability to impose a 50 per cent betterment tax between 1926 and 1953, and are still able to impose betterment conditions when a road is widened or a watercourse is covered in under the Local Government Act 1974.[368] Prior to 1926, other value capture mechanisms had

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[367] For further information on this proposal, see Treasury. 2019. *More Homes, Sooner: A New Infrastructure Funding Tool*. Retrieved from www.treasury.govt.nz (26 June 2020).

[368] Harris C. 2005. Slow train coming: the New Zealand State changes its mind about Auckland Transit, 1949–56. *Urban Policy and Research* 23: 37–55; see section 326 and 447 of the Local Government Act 1974.

also been used, including to fund a railway extension in the Hutt Valley through the state purchase of land, prior to the announcement of the railway, followed by the state sale of the newly valuable land upon completion of the railway. The Urban Development Bill, currently before Parliament, also gives the new urban development authority Kāinga Ora Homes and Communities the ability to use the betterment payment provisions in the Local Government Act 1974 when land is acquired for roads and public transport.

147. The Local Government (Rating) Act 2002 does not currently allow councils to rate on the basis of an increase in land values, so progressing this further would require an extension to rating powers.[369] There are also more detailed issues that will need to be worked through as part of developing this approach:

- whether the targeted rate captures land value appreciation in a 'lump-sum' fashion or on an accrual basis
- interaction effects with the existing rating system
- defining and measuring increases in value.

148. We recognise this approach may be controversial but recommend that further work is undertaken to address these issues and enable local authorities to use targeted rates to capture land value uplift.

Enabling wider use of taxes and charges for environmental management

The case for enabling local environmental taxes and charges

149. Having discussed the range of instruments we consider are needed to improve the allocation of resources, we now consider the use of taxes and charges more generally. As discussed earlier, the RMA provides for local authorities to use financial contributions, administrative charges, bonds and royalties to assist the administration of the resource management system. Developing the Natural and Built Environments Act is an opportunity to ensure this tool kit remains fit for purpose.

150. Recent work by both the Treasury and Productivity Commission has considered whether corrective taxes should be administered locally.[370] Criteria include:

- are the costs and benefits of the regulatory outcomes contained locally?
- is local variability likely to lead to better regulatory outcomes?
- does the local electorate have the most interest and ability to hold the regulator to account for the policies made?
- what is the mobility of the tax base? Could tax payers avoid a regional corrective tax by moving to, or transacting in, another location where the corrective tax does not apply?

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369 See sections 16, 18 and schedule 3 of the Local Government (Rating) Act 2002.

370 New Zealand Productivity Commission. 2013. *Towards Better Local Regulation*. Wellington: New Zealand Productivity Commission; p 119; Treasury. 2019. *Treasury Report T2019/2434: Principles for Local Government Taxation*. Wellington: New Zealand Treasury.

- are there incentives (eg, cost avoidance) for local government to address the underlying harm?
- what is the administrative capacity and capability of local authorities to manage a tax and what are the distributional impacts, especially on low income households?

151. Our view is that in the case of environmental management, most of these conditions are likely to be met. For instance:
    - a correctly designed environmental tax will be targeted at where the most environmental harm occurs. This means environmental taxes will be a highly-localised instrument with local variability in pricing
    - stronger environmental limits and monitoring are expected to apply nationwide which would stabilise the mobility of the tax base
    - the administration of a tax could be outsourced if local authorities have limited administrative capacity
    - with respect to distribution impacts, environmental taxes provide local authorities with the ability to raise revenue, which could be used to offset the impact of the tax on low-income households.

The case for empowering local authorities to use taxes and charges for environmental management remains strong in principle.

152. We therefore consider the case for empowering local authorities to use taxes and charges for environmental management remains strong in principle. As these instruments need to be expressly authorised in primary legislation, the Natural and Built Environments Act should ensure an adequate range of instruments is specified. To prevent potential abuse of taxes by local government, a number of safeguards should also be included. These could be borrowed from the Local Government (Rating) Act 2002 and the proposed legislation for special purpose vehicles to fund and build infrastructure.

Good practice criteria for the use of environmental taxes and charges

No single policy instrument is ideal for dealing with all types of allocation and pollution objectives – all involve trade-offs.

153. No single policy instrument is ideal for dealing with all types of allocation and pollution objectives – all involve trade-offs. A range of criteria is needed to identify the best instruments. To guide the successful use of environmental taxes and charges, we have developed some criteria which could be incorporated into the development of future legislation and guidance. Further criteria should be developed as part of our proposals for institutional support for the introduction of environmental taxes and charges (discussed shortly).
    - **A focus on achieving environmental outcomes**: environmental taxes and charges should be located and priced to change behaviours rather than to raise revenue. A dual objective compromises both outcomes. For instance, a revenue-raising levy needs to be set low and wide so as not to change behaviour. Conversely, a behaviour change levy may need

to be set high to reflect the full marginal cost to the environment and to change behaviour, while targeted to the activity causing the most harm. If revenue is the primary aim, setting up new economic instruments can be costly when more efficient revenue raising instruments exist like rates or GST.

- **A focus on cost-effectiveness**: cost effectiveness should be a key criterion for choosing an instrument to allocate resources and manage externalities. For instance, tradeable pollution permits and pollution taxes focuses the abatement effort on polluters that can abate at least cost. However, this has to be balanced against the costs of implementation, administration and monitoring and compliance. A cost-effective policy response can include a mix of regulation and pricing instruments, as well as provision of information. The case study below shows how a mix of instruments could be cost effective in improving urban air quality.
- **Polluter-pays:** The polluter-pays principle can be used to justify the use of economic instruments to allocate the costs of pollution control. In short, those who pollute should pay the costs of preventing harm to human health or the environment. Since this principle was adopted by the OECD in 1972, it has inspired environmental polices worldwide. The polluter-pays principle is most applicable when individual bargaining is not possible to find a mutually beneficial way to reduce pollution[371]. These situations include where many people suffer from pollution, they are individually poorly resourced to challenge polluters, free-riding behaviour prevents collective action, and there are multiple polluters.
- **Responsive to change:** instruments should be flexible enough to change and adapt as new information arises or policy targets are altered. As shown by New Zealand's tradeable fishing quota scheme, it is a challenge to design the perfect market instrument from the outset.

CASE STUDY: IMPROVING URBAN AIR QUALITY – A MIX OF REGULATION AND ECONOMIC INSTRUMENTS

Regulation and financial incentives can be used together to achieve a policy goal cost effectively. For example, technology standards and financial instruments to improve urban air quality could:

- require the use of catalytic converters with random checks and high fines for non-compliance – input regulation
- impose a petrol tax for emissions – price instrument
- implement road pricing for congestion hotspots – price instrument.

[371] The Coase theorem, shows how private bargaining between individuals can lead to a mutually agreeable, efficient outcome – independent of who has the property rights to pollute or accept no pollution. This means the polluter or victim could pay to reduce the cost of harm. For instance, if the polluter has the right to pollute, a bargain can be reached because the victim's willingness to pay for pollution reduction is higher than the polluter's costs of pollution reduction. Alternatively, if the victim has the right to accept no pollution, their willingness to accept compensation for pollution is lower than what they could charge the polluter for polluting. However, the conditions for private bargaining breakdown when there are multiple parties, property rights are not certain and there is poor information about costs of harm and pollution reduction.

Other low-cost means to influence behaviour include guidelines and releasing information such as pollution and safety data. For example, releasing data on the particulate pollution from different car types and its impacts on young people's lungs could prompt drivers to drive less, car pool, alter their route or change their car.

Some specific instruments to consider

154. In addition to the instruments already discussed above, we have identified a number of further opportunities for different types of environmental taxes and charges. We note however that this is not an exhaustive list and further work should be completed to refine the full range of tools necessary.

Resource royalties

155. For efficiency, a royalty payment is an incentive not to waste resources and to encourage their best use. Similarly, an incentive is created to surrender resources that are not put to good use. For equity, private users who use a free public resource for profit, should share some of those benefits with their community. In addition, the scarcity value accruing to resource entitlements over time is also (partially) captured through a resource rental.

In principle, we consider a fair charge should be placed on the private use of common resources such as coastal space and water – particularly for commercial use.

156. In principle, we consider a fair charge should be placed on the private use of common resources such as coastal space and water – particularly for commercial use. We see little difference between using or occupying a private resource for profit and using a public resource for profit. The former is subject to rent while the latter is generally not.

157. We also understand there are instances where some holders of coastal permits for marine farms can sublease the space and charge a rental for it, even though they have effectively been given the use of public space for free. We agree with EDS that this practice seems unfair.

158. In our view, the current RMA provisions for coastal occupation charging have the right intention and are a useful starting point for further reform. Regional councils are empowered to, but are not required to, set a coastal occupation charge on long-term occupiers of the coastal commons. Revenue from the charge can only be used by regional councils to promote sustainable management of the coastal marine area. Only two councils have elected to implement a coastal charge. Further uptake is constrained by uncertainties about how to fairly set an appropriate charge and how to accommodate Māori rights and interests in some Tiriti settlement assets and also in terms of customary rights under the Marine and Coastal Area (Takutai Moana) Act.

159. A future system should make it mandatory for councils to charge such royalties (as occurs with sand and shingle royalties). It should also provide greater guidance and direction on charging methodologies, use of funds and transitional arrangements. For example, royalties could be applied gradually, starting with a low rate and increasing over time.

160. We recognise that the charging of royalties, especially for water, is controversial and complex, particularly due to the long-standing practice of making public goods available for private use without charge and the capitalisation of this free use in land values. Further, we are aware of the sensitivities about Māori rights and interests in water which we have discussed elsewhere in this report.

Financial contributions

161. The RMA's provisions for financial contributions could be carried over into a future system. Financial contributions are imposed as a condition on a resource consent to mitigate the environmental effects of proposals and incentivise good environmental design. Financial contributions could be made more effective by:

- applying them on an opt-out basis, as most development has a negative environmental footprint to some degree
- making them subject to rebates to reward restorative development
- enabling them to be changed outside plan changes
- renaming them as 'environmental outcome charges' to make it crystal clear that this charge should not be conflated with development contributions, which are generally used to fund capital expenditure for new developments.

Environmental bonds

162. Environmental bonds help ensure externalities, such as abandoned development, are internalised, which is efficient. They could be extended to a wide range of products (eg, bottles and plastics) and be used to incentivise recycling and reuse and to 'price in' the cost of environmental harm. We are aware work is underway to design a national container return scheme and see potential for the Natural and Built Environments Act to support more frequent use of such schemes. We note too that bonds could reduce compliance costs for local authorities, by shifting to the developer the onus of proving the bond conditions are met.

User charges

163. User charges (eg, water, wastewater and congestion charges) encourage efficient use of existing infrastructure, while delaying capital expenditure for new infrastructure. User charges provide an additional funding source to ensure infrastructure can be deployed to areas that will give the greatest benefits to society. Although the Local Government (Rating) Act and the Local Government Act are the main legislation for local authority rates and charges, the Natural and Built Environments Act could reinforce greater use of user charges in accordance with the allocation principles described earlier in this chapter.

Road pricing

164. There is a possible case for the Natural and Built Environments Act to reinforce road pricing which accounts for a wider range of negative externalities from road use. These include congestion, accidents, air pollution, noise, water pollution from oil run-off and loss of biodiversity. Current road user charges (which are revenue focused), the Emissions Trading Scheme and parking charges act as disincentives to road use. But they do not encourage

optimal road use, where all the external social and environmental costs are faced by road users.

165. We are aware that designing and implementing successful road pricing is a complex exercise, especially due to the transport network effects of price changes. There are also equity issues and credible transport substitutes to consider. Given this, a holistic approach to road pricing through the LTMA which has jurisdiction for congestion charges and tolls, could be a better option.

Subsidies

166. Subsidies are an incentive to encourage more positive benefits to society which are generally undersupplied (eg, wetlands or native forests on private property). Subsidies can also be used to pay polluters to reduce negative externalities. However, revenue is forgone by the use of subsidies for this purpose and this may not be seen as equitable. It follows that subsidies need to be carefully designed.

An environmental footprint tax and natural capital fund

167. Finally, an environmental footprint tax was recently highlighted by the Tax Working Group as a desirable longer-term policy option that warrants further exploration. We highlight this idea here, although we acknowledge considerably more work is needed to refine it further. This could be undertaken alongside the development of the Natural and Built Environments Act. Key features include:

- the tax is levied per unit area of land or privately owned coastal area. However, the rate of the tax is set to reflect the ecological impact of activities occurring on that land or coastal zone
- higher tax rates apply to areas of land with low or degraded ecological value
- lower or even negative tax rates apply to areas of land with high ecological value
- the tax aims to recognise that natural capital produces valuable ecosystem services. It provides incentives for the conservation, restoration and regeneration of high-value natural capital, going beyond more narrowly targeted negative externality taxes
- remote sensing technologies, combined with mapping and modelling tools, could potentially be used to assess the amount of change in the ecological value of a specific area of land or coastal zone.

168. To assist with reversing years of environmental degradation, revenue from the tax could be hypothecated into a natural capital fund to invest in restoration activities. Investments could include purchasing or creating new environmental assets, such as wetlands.

Providing institutional support for implementation

169. Some commentators believe that national direction and support for the design and implementation of economic instruments is needed to overcome the knowledge,

capacity and coordination constraints of local government.[372] Central government could support local authorities with guidance to set up and manage economic instruments. Institutional support could include:

- guidance on **when** it is appropriate to use economic instruments, including minimum criteria, least-cost options and interaction effects with other instruments and regulations
- guidance on **how** to design and implement specific instruments such as tradeable permits, environmental taxes, bonds, royalties and subsidies. This guidance would include valuation methods for setting taxes, royalties and charges; market rules; allocation of use rights; transitional measures; and compliance monitoring

Central government could support local authorities with guidance to set up and manage economic instruments.

- **evaluation** of the costs, benefits and risks of preferred instruments. Benefits of a natural resource could be assessed for their 'total economic value' which accounts for a wider range of consumptive and non-consumptive values. This information could form the basis of a more formal impact analysis, similar to the section 32 requirement under the RMA which we discuss in chapter 8. More timely and reliable information on the relative merits of a new instrument can also help local authorities garner support from the community
- **data pooling** and improving data to measure and value the impacts of pollution, costs of pollution abatement and the benefits of nature, including ecosystem services. Investments in data and modelling would also help local authorities set more robust environmental bottom lines as we discuss in chapter 12
- a **centralised marketplace** to lower the price discovery and transaction costs for market participants. This function could include periodic online auctions of permits to stimulate trading during the allocation and trading phase. Additional support could include the administration and collection of environment taxes for local authorities wishing to outsource this task
- an **independent market regulator** to monitor market performance and the use of hypothecated funds as well as to conduct audits and protect the public interest.

It would be appropriate for the PCE to audit the effectiveness of economic instruments as well as the resource management system more generally.

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372 Environmental Defence Society. 2016. *Evaluating the Environmental Outcomes of the RMA: A Report by the Environmental Defence Society*. Auckland: Environmental Defence Society; Brown MA. 2016. *Pathways to Prosperity: Safeguarding Biodiversity in Development*. Auckland: Environmental Defence Society; Waikato Regional Council. 2016. *Waikato regional fresh water discussion: A framework for getting the best use allocation through time*. Hamilton. Waikato Regional Council; Greenhalgh S, Water S, Lee B, Stephens T, Sinclair RJ. 2010. *Environmental Markets for New Zealand: The Barriers and Opportunities*. Lincoln: Manaaki Whenua Press; Guerin K. 2004. *Theory vs reality: Making environmental use rights work in New Zealand*. New Zealand Treasury Working Paper 04/06. Wellington. The Treasury.

170. There are various options as to how and by whom economic instruments should be developed. The Tax Working Group suggested the Parliamentary Commissioner for the Environment (PCE) could design and support economic instruments.[373] But our view is that the Ministry for the Environment should lead development, working with Treasury and other central government institutions and agencies with relevant expertise. It is likely additional resource would be required to expand the Ministry's capacity and capability to undertake this role.

171. Given our view that the PCE should have an expanded audit and oversight role in the resource management system, we consider it would be appropriate for the PCE to audit the effectiveness of economic instruments as well as the resource management system more generally.

Expected outcomes

172. We consider our proposals for reform of allocation and economic instruments address the key issues in our terms of reference and align with the objectives and principles we adopted for our review. They provide a new basis for determining resource allocation matters within the Natural and Built Environments Act. They also ensure the powers and methods are available for central and local government to develop policy on a resource specific basis. Finally, new support and oversight measures will encourage greater use of economic instrument alongside regulation to improve both the efficiency and effectiveness of the environmental management system.

Key recommendations

Key recommendations – Allocation of resources and economic instruments	
1	The Natural and Built Environments Act should retain the current allocative functions for resources in the RMA.
2	Allocation principles of sustainability, efficiency and equity should be included in the new Act to provide greater clarity on the outcomes sought and a consistent framework for the development of more detailed measures.
3	The allocation principles should not be included in the purpose and principles of the Natural and Built Environments Act but should be in a part of the Act focused on allocation.
4	A combination of regulatory and market-based mechanisms is needed to allocate resources. These should be enabled under the Natural and Built Environments Act and developed in the context of specific resources through strategic planning, national direction and combined plans.
5	To enable sustainable, efficient and equitable allocation of resources, the Natural and Built Environments Act should adopt a more balanced approach to the prioritisation of existing users in resource consent processes. This includes:

373 Tax Working Group. 2019. *Future of Tax: Final Report*. Wellington: Tax Working Group. Retrieved from https://taxworkinggroup.govt.nz/sites/default/files/2019-03/twg-final-report-voli-feb19-v1.pdf (16 June 2020).

Key recommendations – Allocation of resources and economic instruments	
	(i) encouraging shorter permit durations, with flexibility to provide longer-term permits for major infrastructure (ii) providing stronger powers to review and change consent conditions (iii) providing for a wider range of matters to be considered in consent renewal processes (iv) providing powers to direct common expiry of permit terms.
6	To promote more competitive urban land markets, national direction should be used to require the use of data on urban land prices, analysis of regulatory stringency, and a clear and flexible approach to urban land use regulation.
7	Further work should be undertaken to consider enabling local authorities to use targeted rates to capture uplift in land values as a result of public works.
8	To encourage greater use of economic instruments: (i) future legislation should ensure there is a broad mandate for the use of tradeable rights and permits, incentives and environmental taxes and charges (ii) central government should provide institutional support for the development and use of economic instruments by local authorities through a combination of national direction, guidance, and support for capability.

Chapter 12 System oversight

1. This chapter discusses our proposed framework for undertaking monitoring and oversight of the resource management system. It covers the following connected and mutually reinforcing elements:
    - monitoring the state of the environment and system performance, including collecting data and information
    - reporting on environmental outcomes and system performance
    - independent oversight to ensure system functions are carried out efficiently and effectively
    - taking action in response to evidence of poor outcomes.

Our proposed framework will ensure the system performs as intended and responds to new information and emerging environmental pressures.

2. Our proposed framework will ensure the system performs as intended and responds to new information and emerging environmental pressures.

Background and current provisions

3. Government, regulators, Māori, businesses and the general public need to be confident that the country's resources are being sustainably managed. System monitoring and oversight provides information on how legislation is being implemented and how effective and efficient it is in practice.
4. However, monitoring by itself serves no purpose unless there is some degree of assessment or interpretation of the information it provides and an ability to respond. The framework for monitoring and oversight should therefore include requirements for assessments, reporting and responses to evidence of poor environmental outcomes or system performance.
5. Monitoring the resource management system includes several distinct but related responsibilities:
    - monitoring and reporting on outcomes across natural and built environments
    - monitoring environmental and system outcomes for Māori
    - monitoring the performance of legislation and regulation
    - monitoring operational compliance at national and local levels.
6. While monitoring is frequently associated with ensuring compliance with plan rules and resource consent conditions, this chapter focuses on monitoring at a system level. It examines how we can monitor the state of the environment and environmental pressures, and the performance of the system overall. Monitoring of operational compliance and enforcement is discussed in chapter 13.

7. The term ‘oversight’ is often used interchangeably with the word ‘monitoring’. However, in this chapter we are using the term to mean ensuring institutions and actors in the system are carrying out their responsibilities according to the law, including their monitoring responsibilities, and are held accountable for the system’s outcomes.

8. Responsibilities for system monitoring and oversight are spread across the resource management system. Section 35 of the RMA places a duty on local authorities to gather the information necessary to carry out their functions. This includes monitoring the state of the environment and the efficiency and effectiveness of policy statements and plans, and taking appropriate action where necessary. Every local authority must at least once every five years compile and make publicly available a review of the results of its efficiency and effectiveness monitoring.

9. Sections 360(1)(hk) and (hl) of the RMA provide for regulations to be made that:

    - set out the indicators or other matters by which local authorities are required to monitor the state of the environment
    - enable the Minister to prescribe the standards, methods and requirements to apply to the monitoring
    - require local authorities to provide information gathered under section 35 to the Minister, and prescribe the content, manner and time in which the information must be provided.

10. The RMA also gives the Minister for the Environment a range of powers to monitor and oversee the system. The Minister can require local authorities to provide information for the purposes of:

    - monitoring the effect and implementation of the RMA, national policy statements, national planning standards and water conservation orders
    - monitoring the relationship between the functions, powers and duties of central and local government
    - investigating the performance of local authorities and responding to any failures in performance.

11. The Ministry for the Environment has regulatory stewardship responsibilities for the RMA under the State Sector Act 1988. To assist in undertaking these responsibilities, the Ministry has a mixture of monitoring arrangements in place. Internal monitoring systems include the National Monitoring System (NMS) for the RMA. The Ministry also draws heavily on councils and stakeholders, public consultation, and data collected by other agencies.

12. Legislative provision for system monitoring and oversight extends beyond the RMA with support and powers provided through the following legislation.

    - **Environment Act 1986**: This established the Ministry for the Environment and the Parliamentary Commissioner for the Environment (PCE). In general terms, the PCE provides oversight of the effectiveness of environmental planning and management in New Zealand.

- **Environmental Reporting Act 2015:** This establishes a framework for the scope and timing of national environmental reporting. The Government Statistician and the Secretary for the Environment are responsible for national environmental reporting.
- **Environmental Protection Authority Act 2011:** This established the Environmental Protection Authority (EPA) with the objective of contributing to the efficient, effective and transparent management of New Zealand's environment and natural and physical resources. The EPA undertakes a range of roles within the system and across several statutes.

13. A number of other statutes, including the LGA and the LTMA, have functions that affect monitoring and oversight of the resource management system to a lesser degree.

14. Other Ministers and agencies that monitor aspects of the system include:
    - the Minister and Department of Conservation, which are responsible for preparing and recommending the New Zealand Coastal Policy Statement (NZCPS) as part of the coastal management regime under the RMA. The Minister of Conservation is also required to review the effectiveness of the NZCPS
    - the Ministry of Housing and Urban Development which, along with the Ministry for the Environment, is responsible for monitoring elements of the housing and urban development system
    - Stats NZ whose Indicators Aotearoa programme provides indicators to measure social, economic and environmental wellbeing outcomes
    - the Climate Change Commission which monitors and reviews progress towards greenhouse gas emissions reduction and climate change adaptation goals.

15. Other agencies, including Heritage New Zealand Pouhere Taonga, Te Puni Kōkiri and the Ministry for Primary Industries, have mandates to monitor and protect specific aspects of New Zealand's environment. Other monitoring and oversight bodies performing roles in the resource management system include the Office of the Auditor-General, professional societies, Māori, advocacy groups, science and research agencies, and academia.

16. The courts also have a role in oversight of the resource management system to the extent they are responsible for determining appeals on plans and consents as well as interpreting the RMA.

17. Table 12.1 shows the roles and functions of different agencies in system monitoring and oversight.

Table 12.1: Overview of current system monitoring and oversight roles and functions[374]

Agency	Monitoring natural and built environments	Monitoring outcomes for Māori	Monitoring regulatory performance	System oversight
Minister and Ministry for the Environment	Responsible, with Stats NZ, for national state of the environment reporting Responsible for monitoring and investigating matters of environmental significance	Responsible, with Stats NZ, for reporting on Te Ao Māori as an impact category in environmental reporting	Responsible for monitoring the effect and performance of RMA functions Responsible for monitoring the powers and duties of central and local government	Responsible for oversight and regulatory stewardship of the RMA
Other government departments	Ministry of Housing and Urban Development – national urban indicators dashboard Stats NZ – Indicators Aotearoa programme Department of Conservation – coastal marine area and conservation estate Climate Change Commission – progress towards emissions reduction and adaptation goals	Te Puni Kōkiri Kaitiaki Survey (Te Puni Kōkiri)	Monitoring the NZCPS (Department of Conservation/Minister of Conservation)	
Councils	Local state of the environment monitoring (section 35 of the RMA)	Iwi management plans and district plans	Regulatory efficiency and effectiveness monitoring (section 35 of the RMA)	
Parliamentary Commissioner for the Environment	Reports on environmental issues in New Zealand		Reports on environmental governance and policy, including environmental reporting	Power to review the system of agencies and processes established to manage New Zealand's resources and investigate their effectiveness

374 This table excludes RMA compliance monitoring as that is covered in chapter 13.

Agency	Monitoring natural and built environments	Monitoring outcomes for Māori	Monitoring regulatory performance	System oversight
Environmental Protection Authority			Monitors consent holders relating to the Exclusive Economic Zone and extended continental shelf	
Mana whenua	Kaitiakitanga obligations	Cultural impact assessments Environmental reporting	Waitangi Tribunal reports on RMA performance and resource management issues for Māori	
Crown agencies and entities	National Institute of Water and Atmospheric Research, Land, Air, Water Aotearoa, Manaaki Whenua Landcare Research – monitor various environmental factors			
Courts				Bringing test cases in the courts Determining appeals on plans and consents and interpreting the legislation
Non-governmental organisations	Independent commentary on environmental outcomes, policy and law			

Issues identified

18. Issues identified with system monitoring and oversight fall under five broad areas:

- an over-emphasis on monitoring processes rather than environmental outcomes and the performance of the resource management system as a whole
- a lack of resources, capability, data and systems to effectively monitor outcomes
- multiple, fragmented and unclear responsibilities for system monitoring and oversight
- a lack of a culturally appropriate measurement system for Māori and limited involvement of Māori in monitoring
- inadequate links between environmental reporting and RMA policy and planning responses.

Monitoring focuses on processes rather than system and environmental outcomes

19. Inadequate monitoring has been undertaken on environmental outcomes and whether the system is delivering on the sustainable management purpose of the RMA. Instead, monitoring has tended to focus on operational matters such as the time and cost of resource management processes. Most of this monitoring is carried out at the local authority level and the results captured through the NMS.

20. One reason put forward for the focus on process over outcomes is that the resource management system has lacked clear goals and measurable outcomes, which has hampered the ability to effectively measure, monitor and evaluate the system. Other than a high-level goal of promoting sustainable management, the RMA does not explicitly set objectives. Until recently, there was insufficient national direction to guide councils on what outcomes they should be seeking through their regional and district planning documents.

Monitoring and reporting across the country remains variable and inconsistent.

21. Another possible reason for the lack of system monitoring is the persistent political and public focus placed on the perceived issue of timeliness and cost of RMA processes. Many amendments to the RMA have focused on addressing these barriers by seeking to streamline and simplify planning and consenting processes, rather than on more substantive matters such as addressing poor environmental and urban outcomes.

22. The move to regular reporting under the Environmental Reporting Act has begun to improve our overall understanding of the state of the environment. However, monitoring and reporting across the country remains variable and inconsistent. Central government has given no clear direction on what state of the environment monitoring and reporting local authorities should be undertaking and how they should do it.

23. Submissions on our issues and options paper generally agreed with this problem definition. Waikato Regional Council for example noted "what oversight has existed has generally focused on the timeliness and cost of decision making with little attention paid to the quality of decision making...". Others noted there had been little recent monitoring or reporting on the state of built heritage.

Lack of resources, capability, data and systems to effectively monitor outcomes

24. Collecting data and monitoring the condition of ecosystems is a complex and difficult activity. There are major knowledge gaps across environmental domains and particularly for our marine environment. The Environment Aotearoa 2019 report noted that gaps in the "coverage, consistency, accuracy, and representation of data" limit our understanding and

reporting on the environment.[375] Similarly, the PCE recently noted significant data and knowledge gaps due to inconsistent data collection and analysis and insufficient long-term investment, making it hard to construct a clear picture of the state of our environment.[376]

25. Environmental data to inform environmental reporting comes from many disparate sources, is gathered for a number of purposes, is not consistently measured and does not cover all the places required. In addition, some important data is not publicly available as it is collected for research projects, covered by privacy restrictions or held by commercial organisations that resell the same data multiple times. Information gathered for specific purposes such as environmental effects assessments is not always used to inform analysis of wider impacts across the system.

There are major knowledge gaps across environmental domains and particularly for our marine environment.

26. Many local authorities also lack capability and capacity to collect data for monitoring outcomes, although some have developed good capability in this area. The Environment Aotearoa 2019 report acknowledges we have limited resources and we need to sharpen our focus "to act where the [environmental] impact is likely to be the greatest".[377]

27. Submitters on our issues and options paper agreed that resourcing posed the main barrier to achieving better data collection. Far North District Council for example noted that:

> Most councils struggle with the collection of data, due to limited resources being assigned to monitoring consents and capturing data. In many instances the teams that generate this data have other priorities, limited resources, and do not understand the implication of not collecting this information.

Multiple and fragmented responsibilities for system monitoring and oversight

28. System oversight roles are fragmented across several institutions within the system and it is unclear who is primarily responsible for holding institutions and decision-makers to account for environmental and other outcomes. The Environmental Defence Society (EDS) has

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375 Ministry for the Environment, Stats NZ. 2019. *New Zealand's Environmental Reporting Series: Environment Aotearoa* 2019. Wellington: Ministry for the Environment and Stats NZ; p 107. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Environmental%20reporting/environment-aotearoa-2019.pdf (12 June 2020).

376 Parliamentary Commissioner for the Environment. 2019. *Focusing Aotearoa New Zealand's Environmental Reporting System*. Wellington: Parliamentary Commissioner for the Environment; p 24.

377 Ministry for the Environment, Stats NZ. 2019. *New Zealand's Environmental Reporting Series: Environment Aotearoa* 2019. Wellington: Ministry for the Environment and Stats NZ; p 107. Retrieved from https://www.mfe.govt.nz/sites/default/files/media/Environmental%20reporting/environment-aotearoa-2019.pdf (12 June 2020).

previously noted the RMA was not designed to specify who is accountable for system outcomes and how they should be measured.[378]

29. While multiple agencies have oversight roles, there is no overall leadership for system oversight and accountability. Infrastructure New Zealand made this point in its response to our issues and options paper. In its view, the devolution of responsibility for planning and the environment to local government has left no one responsible for overseeing the whole system. Other submitters thought the PCE and Environmental Reporting Act provided independent oversight roles, but there are issues with fragmentation and missed data sources.[379]

While multiple agencies have oversight roles, there is no overall leadership for system oversight and accountability.

30. The Ministry for the Environment and the PCE currently hold the strongest oversight roles in the system. However, the Ministry has tended to focus on policy development and processes within the system, rather than performing an active system oversight and monitoring role. This has been criticised by the Productivity Commission, which has said "central government has too little understanding of whether the RMA is achieving good environmental outcomes or how efficient the current system is in achieving these outcomes".[380]

31. The PCE provides an independent check on the system, the processes of environmental management and the performance of public authorities on environmental matters. The PCE produces reports on topic-based environmental issues as well system governance and oversight matters, such as the recent review of New Zealand's environmental reporting system. However, the PCE does not have a formalised role in the system like some comparable bodies overseas.

Lack of a culturally appropriate measurement system for Māori and limited involvement of Māori in monitoring

32. As discussed in chapter 3, there has been insufficient monitoring and oversight of central and local government's Tiriti performance. There has also been limited monitoring or evaluation of the impacts of resource management decisions on Māori and outcomes that are important to Māori.

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378 Environmental Defence Society. 2016. *Evaluating the environmental outcomes of the RMA: A report by the Environmental Defence Society*. Wellington: Environmental Defence Society; p 16.

379 Wellington City Council submission.

380 New Zealand Productivity Commission. 2017. *Better Urban Planning: Final report.* Wellington: New Zealand Productivity Commission; p 260.

33. Māori have had little involvement in the development and implementation of system monitoring frameworks. Some frameworks and indicators have emerged to measure how environmental and urban outcomes affect Māori and their specific relationships with natural resources. However, this developing knowledge needs to be brought together to form a culturally appropriate environmental performance framework. The framework should contain indicators that measure outcomes in a way that involves Māori in the process, reflects Māori cultural perspectives and includes mātauranga Māori.

Māori have had little involvement in the development and implementation of system monitoring frameworks.

34. Submitters on our issues and options paper agreed that Māori needed greater involvement in monitoring and data collection.[381] This includes the development of mātauranga and tikanga Māori-based monitoring mechanisms.[382]

35. Some submitters raised the need to appropriately resource Māori to undertake monitoring and oversight roles, noting that mana whenua have sometimes undertaken these roles without being funded to do so. Te Rūnanga o Ngāti Ruanui Trust noted "iwi and hapu often find themselves taking the key role for response and monitoring in a local context where environmental events and issues arise. Iwi are often put in the position of advocating for the community with their local Councils".

Inadequate links between environmental reporting and policy and planning responses

36. The final issue we have identified is the lack of effective feedback loops between environmental monitoring and reporting and resource management policy and planning responses.

37. As noted above, the RMA requires local authorities to monitor both the state of the environment and the efficiency and effectiveness of policies, rules or other methods in policy statements and plans. Where it is shown to be necessary, local authorities are then required to take appropriate action. This process is designed to connect to and inform the section 32 evaluation required when making changes to policy statements or plans.

38. However, in practice the link is weak. Local authorities have found it very difficult to report on whether their policy statements or plans have improved environmental and other outcomes or complied with environmental limits. As we discuss in chapter 8, the lack of monitoring information and data has in turn weakened the evidence base and robustness of section 32 evaluations and the justification for policy intervention.

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[381] See submissions from Nelson City Council, Greater Wellington Regional Council, Auckland Council, Albert-Eden Local Board and Ngātiwai Trust Board.

[382] See submissions from Te Rūnanga o Ngāti Awa, Te Rūnanga o Ngāti Tahu and Te Whakakitenga o Waikato Incorporated.

39. Central government is not required to respond to evidence of environmental degradation or system failures as revealed through national state of the environment reporting.[383] Central government also faces the same difficulties as local government in having insufficient information to assess the effectiveness of national policy instruments and to evaluate new or amended policy.

40. A number of submitters on our issues and options paper specifically identified the weak link between monitoring and policy responses and the impact this has had on developing robust environmental policy.[384]

Options considered

41. Our issues and options paper made the following broad suggestions to improve system monitoring and oversight:

    - provide stronger oversight and monitoring by central government (for example, by the Ministry for the Environment, EPA or a new agency)
    - develop an outcomes-focused monitoring system that is culturally appropriate and recognises mātauranga Māori
    - strengthen independent oversight and review (for example, by extending the role of the PCE to include an audit function)
    - require a policy response from central and local government to outcomes identified by environmental reporting.

42. Informed by consultation we undertook in preparing this report and submissions on our issues and options paper, we identified two further options:

    - improve systems for data and information gathering, storage and analysis
    - build central and local government capability and capacity for science and data collection, monitoring and evaluation.

Discussion

43. Overall, the submissions on our issues and options paper did not provide a clear preference or agreed vision for system monitoring and oversight in a future system. We were, however, influenced by the outline EDS suggested for a 'self-evaluative' system that:

    - gathers robust information
    - synthesises and reports information in a meaningful, integrated and accessible way
    - evaluates the system's performance in light of that information
    - takes corrective action in response.[385]

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383 See Parliamentary Commissioner for the Environment. 2019. *Focusing Aotearoa New Zealand's Environmental Reporting System*. Wellington: Parliamentary Commissioner for the Environment; p 74.

384 See submissions from the New Zealand Fish & Game Council and Federated Farmers.

385 See Environmental Defence Society. 2019. *Resource Management Law Reform: A Model for the Future: Synthesis Report*. Auckland: Environmental Defence Society; p 278.

44. We consider this provides a sensible and logical approach for how monitoring and oversight should be structured and flow throughout the resource management system. It also broadly addresses the issues we have identified and the options we have described above. We have therefore taken a similar approach below in arranging our discussion of the options and in making recommendations.

National environmental monitoring system

Establishing and operating a national environmental monitoring system

45. The PCE has recommended that central government establish a comprehensive, nationally coordinated environmental monitoring system to ensure systematic, coordinated and consistent monitoring across the country for the purpose of national environmental reporting.[386] The PCE's report, which is currently being considered by the Government, recommends:

    - shifting from passive to active information gathering and towards a nationally coordinated monitoring system that is supported by dedicated investment and funding over the long term
    - changing the way reports are prepared under the Environmental Reporting Act so they are less frequent but have more impact
    - adjusting roles and responsibilities between the Government Statistician and the Secretary for the Environment, and coordinating roles more clearly between central and local government and Crown research institutes.

We agree with the PCE's recommendation that central government establish a comprehensive, nationally coordinated environmental monitoring system.

46. We agree with the PCE's recommendation that central government establish a comprehensive, nationally coordinated environmental monitoring system. This would provide benefits not just for national environmental reporting, but for environmental monitoring in the resource management system more generally. For example, it could help with:

    - identifying and prioritising data collection on environmental issues that pose the greatest risk to sustainability and the outcomes New Zealanders care most about
    - providing a set of core environmental indicators to be used in monitoring
    - providing direction on incorporating mātauranga Māori into environmental monitoring processes
    - providing the evidence base for monitoring outcomes identified in the purpose and principles of the new Natural and Built Environments Act

[386] See Parliamentary Commissioner for the Environment. 2019. *Focusing Aotearoa New Zealand's Environmental Reporting System*. Wellington: Parliamentary Commissioner for the Environment; p 60.

- providing a standardised and consistent approach to collecting, managing and analysing data across national and local levels, including clarifying the timescales over which data should be collected and for what purpose
- developing online information management systems, databases and tools that enable data to be easily captured, accessed and shared in a consistent way across the country
- developing a strategy to identify and progressively fill data and knowledge gaps
- better connecting science and research to national policy development, including the work undertaken by Crown research institutes, National Science Challenges and related government programmes
- providing better and more coordinated access to data held by councils, government and other agencies.

47. Several local authorities which submitted on our issues and options paper were critical of the current NMS. In their view it has become cumbersome, overly time consuming and of little value. One submitter believed it needed to "…move from a complex excel spreadsheet for monitoring to a cloud based system that councils can update easily and in real time, not annually. It would allow real-time simple reporting and be publicly available".

48. We recommend the new national monitoring system incorporate and build on the current NMS with improvements to be more systematic about the data it collects and to make it easier for councils to use.

The Ministry for the Environment should work with other central government agencies to develop stronger monitoring frameworks and strategies for filling data and information gaps.

49. The Ministry for the Environment should lead the establishment of the new system in consultation with other central government agencies, Stats NZ, the EPA, the PCE, Crown research institutes, local government, Māori and others. This includes developing environmental indicators and measures for monitoring that can be set through national direction and implemented at the local level. Particular attention should be paid to better monitoring those areas that have been poorly or infrequently monitored in the past, such as urban outcomes, historic heritage and the marine environment.

50. Monitoring of urban outcomes has been improved through instruments such as the National Policy Statement on Urban Development Capacity and the establishment of the Ministry of Housing and Urban Development. The Ministry for the Environment should work with other central government agencies to develop stronger monitoring frameworks for these areas and strategies for filling data and information gaps.

51. We agree with the PCE that the national monitoring system would need to be explicitly resourced, and funding would likely be more resilient and secure if it were diversified across a variety of organisations, including central and local government.

Incorporating mātauranga Māori into the monitoring and reporting framework

52. Better provision is needed for Māori involvement in monitoring the resource management system. This includes reflecting mātauranga Māori in environmental monitoring frameworks and monitoring and measuring system outcomes for Māori.

53. Submissions on our issues and options paper, and feedback at regional hui, supported greater recognition of mātauranga Māori and involvement of Māori in state of the environment monitoring and reporting. However, it was noted this would require appropriate resourcing, recognition of mana whenua input and leadership, and a holistic approach to mātauranga Māori. We discuss the need to provide funding to support Māori involvement in the resource management system, including monitoring in chapter 3.

The Minister for the Environment should provide national direction on how to incorporate Māori perspectives and mātauranga Māori in the environmental monitoring system.

54. In our view, the Minister for the Environment should provide national direction on how to incorporate Māori perspectives and mātauranga Māori in the environmental monitoring system as part of the mandatory direction we propose on how Te Tiriti is to be implemented under the Natural and Built Environments Act. This should include the development of a nationally appropriate set of environmental performance indicators for Māori and culturally appropriate criteria to measure system performance from a Māori perspective. The national direction should be developed with Māori.

55. Consistent with national direction, local authorities and mana whenua will need to agree how mātauranga and tikanga Māori approaches will be incorporated into regional and local monitoring frameworks and the role that mana whenua will have in monitoring activities. As the Ngātiwai Trust Board said to us, "mātauranga must not be considered in a reductionist form. A full programme determining what is meant by mātauranga and how it should be implemented is required".

56. Our proposed integrated partnership process (discussed in chapter 3) will provide a mechanism for local authorities and mana whenua to agree how mana whenua will be engaged in monitoring under the reformed system. Combined plans (discussed in chapter 8) will also provide a valuable opportunity for regional councils, territorial authorities and mana whenua to develop integrated systems for data collection, monitoring and evaluation.

57. The role of the National Māori Advisory Board in monitoring central and local government Tiriti performance is discussed below and in chapter 3.

Coordination of information collection and monitoring and defining the roles of central and local government in each

58. It is clear that effective system monitoring and oversight relies on collecting high quality and relevant information and data. This needs to be stored and shared in ways that allow transparency and foster collaboration across the system.

59. The PCE has noted the need to prioritise and gather data in a consistent way and that agreement is needed on a set of core environmental indicators:

> Consistent and authoritative time series coupled with improved spatial coverage are essential if we are to detect trends. Only then will we be able to judge confidently whether we are making progress or going backwards – and get a handle on whether costly interventions are having an effect.[387]

60. In general, submitters on our issues and options paper supported more emphasis being placed on the collection of data. A number were in favour of greater centralised coordination and direction for data collection and monitoring. Several councils considered that a national monitoring and information system was needed to improve the quality, usability and integration of information at the local level. Others supported establishing a national set of outcome-focused environmental indicators to improve data collection and monitoring at the local level and allow the sharing of resource and data between organisations.[388]

61. Some submitters, including a number of local authorities, thought the future system should continue to require local environmental monitoring and reporting. They noted that clarifying roles and responsibilities, addressing resourcing constraints, and setting out clear and consistent requirements for data and information collection would help local authorities undertake this function more effectively.

Roles of central and local government

62. We agree with all these views and consider that addressing the problem of fragmented and inconsistent approaches to the collection and management of data and information requires concerted and dedicated central government direction. At the same time, we recognise that data will still need to be collected primarily at the regional and local levels.

63. Environmental monitoring at the regional and territorial level will remain important to understand what is happening in the environment and why, and whether councils are achieving the system's desired outcomes and targets or environmental limits are under threat. High-quality data is essential to inform plan effectiveness reviews and policy changes.

Addressing the problem of fragmented and inconsistent approaches to the collection and management of data and information requires concerted and dedicated central government direction.

64. Monitoring requirements for local government should be made explicit in the Natural and Built Environments Act and supported by national direction. However, we anticipate local authorities will still need to tailor their monitoring approaches to fit with local circumstances and focus on the most significant environmental pressures in their area. Monitoring approaches should therefore be included in combined plans.

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387 See Parliamentary Commissioner for the Environment. 2019. *Focusing Aotearoa New Zealand's Environmental Reporting System*. Wellington: Parliamentary Commissioner for the Environment; p 5.

388 See submissions from Matamata-Piako District Council, Canterbury Mayoral Forum, Waikato District Council, NZPI and Nelson City Council.

Better use of consenting information

65. The need for better use of consenting information was raised in submissions on our issues and options paper. It was noted that systems used by consent holders to obtain and monitor their consents are often not linked to council systems, meaning information is not used and shared as well it could be.[389] Further, council information about, and deriving from, resource consents is often not well used to inform reviews of policy statements and plans.

66. In our view, local authorities should make greater use of online platforms, software and tools that enable information about individual consents, including monitoring information, to be easily accessed and integrated with council monitoring data. We note, for example, that Marlborough District Council uses an online system that spatially maps the location of each resource consent and links this with detailed information on the consent, including monitoring information. The Ministry for the Environment should investigate ways to support the integration of applicant and council monitoring information and how it could be rolled out nationally in a consistent manner. This would greatly enhance the transparency and sharing of data, which would benefit environmental monitoring and reporting at both national and local levels.

67. Linking consent conditions to objectives in combined plans would enable better use of information gathered through the consent process in local state of the environment reporting. This includes information generated as part of the assessment of environmental effects for resource consent applications, environmental monitoring undertaken by resource consent holders, and compliance monitoring undertaken by council officers.

68. This information could be particularly useful in identifying cumulative effects, for example. Data collected for consented activities should generally be made publicly available. However, we recognise in some cases cultural monitoring information may need to be kept confidential.

Supporting capacity and capability for monitoring

69. We are aware the future system will need to prioritise what is monitored. Even with a system that has dedicated funding, trade-offs will continue to be made in terms of the extent of data collection and monitoring that might be desirable, and the reality of data availability and the time and cost associated with collection.

70. However, for the system to be effective it needs enduring investment over time so a consistent data base is able to be built up year on year. This will help decision-makers to determine what drivers and pressures pose the greatest threats to the environment and enable more effective monitoring.

[389] See submissions from Port Otago, Fonterra and Genesis Energy.

71. Effective monitoring of the system will require improvements in the capacity and capability of central and local government to use science and data. Much of the environmental data needed for the resource management system is highly technical and requires scientific expertise to interpret. Similarly, measuring urban outcomes requires understanding of economics and market issues beyond that provided by general planning qualifications. The ability to manage data and use new technology to get the most out of monitoring data sets often requires data and GIS expertise. Again, many planners and policy-makers do not have this expertise. We recommend central government devotes attention to building science and data capability in both central and local government.

We recommend central government devotes attention to building science and data capability in both central and local government.

72. Local authorities' environmental monitoring and reporting responsibilities should also be better reflected in their budgetary decisions. This could be done through mandatory budgeting for resource management monitoring in council's long-term plans and annual plans under the LGA.

Environmental reporting

Strengthening national environmental reporting

73. Reporting on environmental trends and outcomes and system performance is critical to identifying the effectiveness of the resource management system and any changes that may be needed.

74. The Ministry for the Environment will continue to undertake national environmental reporting in the reformed system. We have already noted the improvements in this area brought about by the Environmental Reporting Act, however further improvements are needed.

75. In 2019, the PCE made several recommendations to improve the reporting of environmental outcomes at the national level. Two key recommendations were to:

    - produce environmental synthesis reports every six years that include commentary on five overarching themes
    - replace the current single domain-focused reports with theme-based commentaries covering land, freshwater and the marine environment, biodiversity and ecosystem functioning, pollution and waste, and climate change and variability.

76. We broadly agree with these recommendations. Reducing the frequency of synthesis reports should allow for stronger reporting of trends, better filling of data gaps and more in-depth analysis. Focusing on broad themes should enable the impacts of activities to be covered in a more interconnected way and focus reporting on the most pressing issues. It should also allow aspects of the environment that intersect across multiple domains, such as urban environments, to be covered more comprehensively within environmental reporting.

77. However, care should be taken to avoid an approach to reporting that is too uncertain and undefined. This may require a more definitive timeline and more clearly prescribed content for the reports than envisaged by the PCE. Too much flexibility in reporting could lead to the process being reinvented for every report and result in unstable resourcing and capability. In addition, important issues could be overlooked or given insufficient attention.

The national environmental monitoring system should support the operation of both the Natural and Built Environments Act and the Environmental Reporting Act.

Improving links with the Environmental Reporting Act

78. Currently, no direct link exists between the RMA and Environmental Reporting Act. The national environmental monitoring system should support the operation of both the Natural and Built Environments Act and the Environmental Reporting Act. It should clarify the data to be collected under each Act and how it should be collected, evaluated and used.

79. Given our focus for this review, we have not developed detailed proposals for how the two Acts should be connected. In principle, however, we think the current RMA provisions that enable the Minister for the Environment to direct the collection of data should be retained. We also consider the collection of data should be more systematic and proactive.

Strengthening local authority environmental reporting

80. Currently, there is no legal requirement for local authorities to produce a written report on the state of the environment. Under the Natural and Built Environments Act, local authorities should be required to report on the results of their state of the environment monitoring. We consider the period for reporting should be set at five years to allow enough data to be collected to present a meaningful picture of environmental trends and outcomes. It would also align with our recommended five-yearly reporting period for national direction.

Local authorities should be required to report on the results of their state of the environment monitoring.

81. Local authorities should be able to decide how to present the information and results of their monitoring activities, taking into account available resources and capability. What is important is that the reporting contextualises and makes sense of the data, so members of the public and other agencies can understand environmental trends within the area. If carried out in a consistent and regular manner, local environmental reporting should then support national level environmental reporting carried out under the Environmental Reporting Act.

Oversight of system performance

National system oversight

82. More effective oversight will be needed to ensure local monitoring and reporting is carried out as required by the legislation. The Ministry for the Environment should undertake this role as part of its operational system oversight responsibilities.

83. The Ministry already works with and supports local authorities across a range of resource management activities and this role has been increasing. This should continue in the future system. However, we consider the Ministry should have a greater role in:

    - providing guidance on monitoring and evaluation of plans and policies
    - monitoring the incorporation of national direction into combined plans
    - providing capability support on technical planning issues, especially for smaller councils
    - monitoring draft combined plans and changes to plans.

84. Potential benefits of the Ministry having a stronger operational oversight role include:

    - the ability to identify and remedy environmental deterioration before environmental limits are breached
    - providing a feedback loop to better understand how plans are working in practice
    - developing better central-local government relationships and facilitating the sharing of information, capability and resources between local authorities.

85. Consideration should also be given to whether the existing powers of investigation by the Minister for the Environment for the non-exercise of functions by local authorities should be retained or possibly strengthened further.[390] At a minimum, our view is that they should be retained as they provide a powerful tool of last resort to enable the Minister to appoint one or more people to take over a function if it is not being exercised properly.

86. We have also made recommendations in earlier chapters about how specific parts of the future system should be monitored and evaluated by central government, including that:

    - spatial planning partners should jointly report on progress against their spatial strategy within three years of approval of the strategy
    - spatial strategies should be reviewed in full at least every nine years, with flexibility to review in full or in part within the nine-year period to make adjustments in response to significant change
    - Ministers should monitor and review national direction and report to Parliament at least every five years (including reporting on progress towards targets and compliance with limits)
    - national direction should be reviewed in full every nine years, with flexibility for earlier review.

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[390] Sections 24, 24(A) and 25, RMA.

Regulatory stewardship

87. Regulatory stewardship is the process of central government departments undertaking periodic assessments of the legislation they are responsible for to determine if it is still fit for purpose. Over the history of the RMA, there has been insufficient assessment of its performance. This has contributed to the failure of the RMA to achieve desired outcomes. The lack of adequate stewardship has also contributed to the RMA being subject to frequent and ad hoc reforms based on political priorities and perceived issues, rather than on evidence-based assessments of problems and a clear direction of travel for the system.

88. In recent years, the government has required all the main regulatory departments, including the Ministry for the Environment, to publish annual regulatory assessments to ensure they are fulfilling their regulatory stewardship responsibilities under section 32 of the State Sector Act 1988. The Ministry for the Environment's reports have assessed how well it is developing and maintaining its regulatory regimes, including the state of each piece of legislation, highlighted any plans for amendments, and identified important emerging issues.

89. In our view, a future system should require government agencies to undertake regular and thorough assessments of their regulatory frameworks based on more comprehensive system monitoring data and environmental reporting information. Consistent and regular assessments should enable a more responsive approach to dealing with problems as they arise and ensure future legislative amendments are more evidence based and coherent.

A more regular and systematic approach to reviewing the legislation should help to avoid the piecemeal amendments that have plagued the current RMA.

90. We recommend the Natural and Built Environments Act be comprehensively assessed every six years. While the review should be led by the Ministry for the Environment, other agencies with responsibilities in the resource management system should also be involved. The results should be reported to the Minister for the Environment and other interested Ministers before being made publicly available.

91. Through its oversight and monitoring role with local authorities, and regular engagement with Māori, stakeholders and the general public, the Ministry for the Environment should be able to keep abreast of problems and respond as appropriate. The period between detailed reviews of the legislation should allow time to ascertain how the system is operating in practice.

92. Where the assessment demonstrates changes are needed to correct or improve system performance, the Ministry for the Environment should be required to say how it intends to address those problems and by when.

93. Taking a more regular and systematic approach to reviewing the legislation, and linking it with state of the environment reporting, should help to avoid the piecemeal amendments that have plagued the current RMA. Amendments may still be needed outside the review cycle to respond to urgent issues, but we anticipate these being much less frequent than under the current system.

Monitoring the performance and effectiveness of national direction and combined plans

Monitoring and reporting on national direction

94. In chapter 7 we recommend the Minister for the Environment and Minister of Conservation be required to monitor and report on the effectiveness of national direction for which they are responsible. Specific indicators or measures for monitoring and reporting will be contained in national policy statements and national environmental standards. We consider this is crucial to knowing whether national direction is achieving the outcomes desired and whether changes are required.

Monitoring and reporting on combined plans

95. In a well-functioning system, local authorities would regularly monitor and evaluate those parts of the system they are responsible for. As already noted, councils are already required to monitor the efficiency and effectiveness of their policies, rules and other methods. They must prepare a report at least every five years on the results of their policy statement and plan effectiveness monitoring. This should identify whether their policies, plans and other tools are having the desired impact, and inform the preparation of policy statements and plans and changes to them, including the associated evaluations we propose to replace section 32 of the RMA.

96. We agree with the view that efficiency and effectiveness monitoring has been a weakness of the system and this has limited the robustness and effectiveness of RMA policy interventions. To address this, a stronger connection is needed between the collection of data, monitoring the efficiency and effectiveness of policy statements and plans, and the evaluations we propose to replace section 32 of the RMA.

97. In chapter 8 we recommend the review of combined plans be linked to regional spatial strategies. Ideally a plan review would be completed within three years of the release of a new spatial strategy. This would focus policy effectiveness monitoring on the extent to which combined plans are having an impact that is aligned with current strategic outcomes and directions. We also recommend the regional policy statement component of the combined plan include indicators to be monitored to determine the extent to which the desired outcomes are being achieved.

Policy effectiveness monitoring reports should be produced over the course of a combined plan and be informed by state of the environment monitoring and reporting.

98. The joint committees responsible for developing, approving and reviewing combined plans should commission their constituent local authorities to undertake the necessary policy effectiveness monitoring. This should cover both the implementation of plans and whether anticipated outcomes are being achieved. The joint committee would then review the monitoring reports and make decisions in response.

99. Policy effectiveness monitoring reports should be produced over the course of a combined plan and be informed by state of the environment monitoring and reporting. Connecting

these reviews with environmental monitoring data and information should better enable local authorities to deal with cumulative effects. It will also assist them to change plans where necessary to achieve outcomes and targets and stay within limits.

100. Policy effectiveness monitoring of combined plans should also inform reviews of regional spatial strategies and national direction. For example, it could help illustrate where these higher level instruments are not having the desired effect on the ground or where local authorities are finding them difficult to implement, and inform amendments to those instruments where necessary.

101. As with environmental monitoring, policy effectiveness monitoring will need integrated online planning and consenting platforms that can quickly collect and deliver data to local authorities on the performance of plans. These tools should be developed by central government in conjunction with local government and mana whenua.

Auditing of system performance

Strengthening the audit role of the Parliamentary Commissioner for the Environment

102. We have considered the extent to which there should be independent oversight of the resource management system. As noted earlier, current system oversight responsibilities are fragmented, with no clear leadership for overseeing system performance. We have already described our proposals to give central government a greater oversight role in the operation of the system. However, an independent institution is also needed to ensure the system is meeting its overall purpose, and those operating within it are fulfilling their duties.

103. Submissions on our issues and options paper showed general support for stronger central oversight and review of system outcomes and performance. However, no consensus was reached on which agency should have these oversight functions. Some submitters suggested the PCE should take an oversight role on the basis of its independence. The Ministry for the Environment was also suggested as an appropriate body to exercise this role by some submitters. Others discounted this option on the basis of the Ministry's responsibilities to Ministers.

104. The EPA also received support because of its existing oversight functions. The EPA itself submitted that as an independent central government agency it could undertake a measurement and reporting role for central and local government performance against environmental targets and limits.

105. EDS has proposed that a Futures Commission be established with responsibility for periodically auditing the performance of public authorities against criteria in a new Futures Act. EDS also recommends establishing a standing, cross-departmental grouping of officials to act as a steward for the resource management system as a whole and to provide integrated advice to Ministers and Cabinet.

106. The New Zealand Fish & Game Council supported establishing an independent environmental ombudsman to oversee councils on the basis that "oversight by another political body (such as the MfE or the EPA) is unlikely to reduce political interference in environmental decision making".

107. In our view, the submissions and lack of a clear preference for where oversight should sit in the system illustrate two points. First, it shows that several agencies have existing oversight roles but all have current limitations. Second, it is essential for the new system to be clear about where oversight is located and what that role entails.

108. The main functions of an independent oversight body would be to:

- monitor and report on the overall progress of the system in achieving its desired outcomes and environmental targets and compliance with environmental limits
- monitor and report on the effectiveness of economic instruments
- monitor and report on the effectiveness of the system in achieving outcomes for Māori
- audit and report on the performance of public agencies within the system
- monitor the response of public agencies to evidence of poor outcomes in the system
- recommend where changes are needed to the overall system to improve performance.

109. We consider existing institutions provide a solid basis for overseeing the system without having to establish a new agency. In our view, independence from Ministers and the government of the day is a crucial requirement. As an independent Officer of Parliament the PCE fits this criterion. Furthermore the PCE already has broad powers under the Environment Act 1986 that suit an oversight role. For this reason we recommend the PCE's role be expanded to include a broader auditing and reporting function. This will ensure better transparency and accountability for system outcomes.

An expanded role should require the PCE to provide regular reports to Parliament on the overall performance and direction of the system and audit the performance of public authorities according to criteria in the legislation.

110. An expanded role should require the PCE to provide regular reports to Parliament on the overall performance and direction of the system and audit the performance of public authorities according to criteria in the legislation. The PCE could also advise on where future pressures and challenges are emerging for the system. The PCE should be required to table its reports in Parliament and make them publicly available.

111. We do not anticipate the PCE reviewing or commenting on local plans or taking a policy advocate role for the environment. As previously noted, the Ministry for the Environment would continue to have primary responsibility for operational oversight of the system, including ensuring plans adequately reflect national direction and environmental limits. It would be for the PCE to make sure the Ministry carries out this function and to take action when necessary.

112. The timing of the PCE's reports to Parliament on the progress and performance of the system should be considered in relation to other regular reporting requirements in the system. Ideally the PCE's report should follow those other reports, so they can be considered and incorporated into the PCE's own findings and overall assessment. As needed, the PCE would also be able to draw on central and local government monitoring and reporting.

113. An increased oversight role for the PCE would require a significant expansion of capability and capacity for the PCE's office and increased funding would be essential as we discuss in chapter 14.

Role of the National Māori Advisory Board

114. In chapter 3 we recommend the establishment of a National Māori Advisory Board. The Board would have a system oversight role to monitor how the resource management system gives effect to the principles of Te Tiriti. The PCE would not therefore have an oversight role in relation to Tiriti performance. It should however refer to the National Māori Advisory Board's reports when reporting on the system as a whole.

Responding to evidence of poor outcomes

115. Currently, state of the environment reports in New Zealand intentionally do not comment on the effectiveness of policies. Ensuring separation in assessing the effectiveness of policies and regulation, from state of the environment reporting itself, is considered important to ensure the reports are a trusted source of information and free from political interference.

116. Under the RMA, local authorities are required to take 'appropriate' action where poor environmental or system outcomes are identified through their state of the environment or policy effectiveness monitoring. However, as noted above, this is a relatively weak requirement and planning and policy frameworks have in practice not been sufficiently responsive.

We agree with the PCE's recommendation that the government should be required to respond to state of the environment reports. This would help provide a link back to the desired outcomes for the system and ensure state of the environment reports are more effective at influencing decision-making.

117. To improve the relationship between state of the environment reporting and policy-making, the PCE has recommended the Minister for the Environment be required to provide a formal response on behalf of the government to the findings of a state of the environment report within six months of the report being released.[391] This formal response may include comment on:

- what policies and initiatives currently exist
- what new policies and initiatives are proposed or planned
- what policy analysis the government proposes to undertake to identify any other policies and initiatives that are needed.

118. Several submitters on our issues and options paper supported a requirement for a planning or policy response from central and local government where monitoring, reporting and evaluation showed this to be necessary.

119. We agree with the PCE's recommendation that the government should be required to respond to state of the environment reports. This would help provide a link back to the desired outcomes for the system and ensure state of the environment reports are more effective at influencing decision-making. We recommend the Minister for the Environment

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391 Parliamentary Commissioner for the Environment. 2019. *Focusing Aotearoa New Zealand's Environmental Reporting System*. Wellington: Parliamentary Commissioner for the Environment; Recommendation 1i, p 85.

should be primarily responsible for this response in consultation with other Ministers. Further discussion is needed to determine how this would operate in practice.

120. Central government, led by the Minister for the Environment, would also be required to respond to the regular monitoring and auditing reports from the PCE on the overall performance of the system. To promote efficiency and effectiveness, it would make sense for the government to respond to the national state of the environment and PCE reports at the same time, ideally within six months of their release. This would require the timing of environmental reporting and the PCE's reports to be broadly aligned.

121. We also recommend the Natural and Built Environments Act explicitly require local authorities to state, as part of their state of the environment and policy effectiveness reporting, what actions they have taken or will take in response to evidence that shows:

- adverse environmental outcomes, such as poor progress towards achieving a target or risk of an environmental limit being breached
- the local authority's regulatory framework is not operating in an effective or efficient manner.

122. Central government should monitor whether the corrective actions identified by local authorities are in fact carried out and respond when this does not occur.

Expected outcomes

123. Our proposals for improvements to monitoring and oversight of the resource management system address issues raised in our terms of reference and align with the objectives and principles adopted for our review. A nationally coordinated environmental monitoring system will improve access to information about our environment. Strengthened independent oversight and requirements to respond to state of the environment and regulatory performance reporting will assist in ensuring decision-makers act when necessary.

Key recommendations

Key recommendations – National environmental monitoring system	
1	The Ministry for the Environment should establish in consultation with other agencies a comprehensive, nationally coordinated environmental monitoring system with the following features: (i) it should incorporate and build on the current National Monitoring System, with improvements to be more systematic about the data it collects and to make it easier for councils to use (ii) it should be supported with sufficient resourcing to improve the capacity and capability of central and local government, including science and data capability.
2	The Minister for the Environment should provide national direction on how the system should be implemented, including national direction developed with Māori on how to incorporate Māori perspectives and mātauranga Māori into the system.

Key recommendations – National environmental monitoring system	
3	The Ministry for the Environment should be responsible for implementing the system and monitoring performance of the system at a national level.
4	Local authorities should continue to have primary responsibility for the collection of data and the monitoring of system performance at local government level.
5	Combined plans should provide for monitoring and reporting.
Key recommendations – Environmental reporting	
6	The Ministry for the Environment and the Government Statistician should continue to be responsible for regular reporting to the Minister for the Environment on environmental outcomes at a national level.
7	There should be clear links between the Natural and Built Environments Act and Environmental Reporting Act.
8	Local authorities should be required to report regularly to the Ministry for the Environment on the state of the environment in their regions and districts.
9	Reports on the state of the environment should be made publicly available.
Key recommendations – Oversight of system performance	
10	The Ministry for the Environment should have primary responsibility for oversight of the effectiveness of the resource management system, including the effectiveness of the Natural and Built Environments Act and national direction made under it.
11	The combined planning joint committees should have oversight of the performance and effectiveness of combined plans.
Key recommendations – Auditing of system performance and responding to evidence of poor outcomes	
12	The Parliamentary Commissioner for the Environment's role should be expanded to include a more formalised and independent auditing and oversight role of the performance and effectiveness of the resource management system and on the state of the environment.
13	The Parliamentary Commissioner for the Environment should be required to provide regular reports to Parliament on the performance and effectiveness of the resource management system and on the state of the environment.
14	These reports should be made publicly available and the Minister for the Environment should be required to identify steps to be taken to respond to issues identified.
15	Local authorities should also be required to state how they will respond to issues identified that relate to their regions and districts.

Chapter 13 Compliance, monitoring and enforcement

1. Effective and efficient compliance, monitoring and enforcement (CME) are hallmarks of a well-functioning regulatory system. Central and local government, mana whenua and communities invest a significant amount of resources to establish a plan and rules-based framework for resource management. Without CME, lax compliance and unmonitored activities can throw the whole system off course and threaten progress towards plan outcomes. CME action is essential to ensure the actions of a few do not adversely affect broader society nor breach important environmental limits and targets.

Lax compliance and unmonitored activities can throw the whole system off course and threaten progress towards plan outcomes.

Background

2. In the resource management system, CME encompasses the strategies, tools and institutional arrangements used to encourage or compel resource users to adhere to rules and regulations. In this chapter we adopt the definitions of CME as set out in the *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991*:[392]

    - **compliance**: adherence to the RMA, including the rules established under regional and district plans and meeting resource consent conditions, regulations and national environmental standards (NESs)
    - **monitoring**: activities carried out to assess compliance with the RMA. This can be proactive (for example, resource consent or permitted activity monitoring) or reactive (for example, investigating suspected offences)
    - **enforcement**: actions to respond to non-compliance with the RMA. These can be punitive (for the purpose of deterring or punishing the offender) and/or directive (for example, directing remediation of the damage or compliance with the RMA).

3. This chapter focuses on monitoring in relation to compliance with consent conditions and rules. As discussed in chapters 8 and 9, rules in plans set up the framework for intervention in activities people undertake, triggering a need for consent for activities that pose some risk to the environment. Plan rules and consent conditions provide parameters within which an activity can take place. CME is important to ensure these requirements are being followed, and that they work to contain or minimise the potential damage that could arise from an activity.

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392 Ministry for the Environment. 2018. *Best Practice Guidelines for Compliance, Monitoring and Enforcement under the Resource Management Act 1991*. Wellington: Ministry for the Environment; p 11.

4. Broader monitoring considerations in the resource management system are addressed in other chapters, including:

    - monitoring the effectiveness of plans and progress towards achieving the purpose of the Act (chapter 12)
    - monitoring in relation to Tiriti performance (chapter 3)
    - monitoring the state of the environment in terms of both mātauranga and biophysical measures (chapter 12).

Undertaking CME

5. Most CME activity in the resource management system is undertaken by regional councils and territorial authorities. Local authorities have a high degree of discretion about the scope and nature of CME activities they undertake. The amount of CME activity varies depending on the number of consents, size of the rating base and local priorities. In addition to their regulatory role, local authorities also hold consents and need to comply with their own rules.
6. Regional and unitary councils collaborate on CME matters through the Compliance and Enforcement Special Interest Group (CESIG). CESIG is made up of regional and unitary council regulatory compliance managers and team leaders, and members from the Ministry for the Environment and the Environmental Protection Authority (EPA). Territorial authorities have yet to be involved.
7. CESIG has established valuable systems of peer review and reporting. The review system relies on councils accepting semi-independent assessment of their CME systems and resourcing by regulatory practitioners from other councils. This is an important step toward better, more independent auditing of council CME performance.
8. Private parties have a variety of roles in CME. They hold the majority of resource consents and are responsible for carrying out consent conditions. Members of the public also report incidents or areas of potential non-compliance to local authorities and can take enforcement action in limited cases.
9. Private parties and non-governmental organisations can also seek enforcement orders and declarations from the Environment Court that the law has been breached. This is an important check and balance, particularly on the performance of local authorities.
10. The EPA also has a role in CME through its RMA enforcement unit. The unit can provide supplementary expert investigative resources to support councils when invited to do so.
11. The Resource Management Amendment Bill 2019[393] is proposing the EPA take a broader role in CME. The amendments would enable the EPA to investigate a case no council is dealing with, assist a council with an investigation, or to take control of a case from a council.
12. The Ministry for the Environment oversees CME activities in relation to the RMA and collects data through the National Monitoring System (NMS). The Ministry has also commissioned research and published best practice CME guidelines.

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393 Retrieved from http://www.legislation.govt.nz/bill/government/2019/0180/latest/LMS259082.html (16 June 2020).

Current provisions in the RMA relating to CME

13. The RMA contains numerous provisions relating to CME functions. This section provides a brief description of key provisions not described in previous chapters.

14. Section 22 of the RMA provides for enforcement officers to require the name, address and date of birth of any person whom they have reasonable grounds to believe has contravened the RMA. Enforcement officers also have the power to require them to provide details of anyone acting as their principal, that is the person(s) on behalf of whom they have carried out the offending activity, such as an employer, client or project manager.

15. Under section 36 of the RMA, local authorities may charge consent holders for the reasonable and actual costs of carrying out compliance monitoring activities in relation to the consent. This cost-recovery provision enables councils to fund this work directly rather than through the general rating base or a targeted rate.

16. Sections 126 and 314 of the RMA provide limited circumstances when a resource consent can be revoked. Section 128 enables consent authorities, under certain circumstances, to review conditions of resource consents through the notice of review process set out in section 129.

17. Consent notices are described in section 221 of the RMA. Consent notices are, in effect, consent conditions imposed on consent for the subdivision of land. An application to cancel or alter a consent notice is a discretionary activity under the RMA. Section 221(4)(b) deems every consent notice to be a covenant running with the land which means the obligations transfer to subsequent land owners.

18. Part 12 of the RMA provides for declarations, enforcement functions and ancillary powers.[394] The provisions relating to declarations enable the Environment Court to clarify such matters as the existence or extent of any function, power, right or duty under the Act. A declaration cannot be sought on a notification decision by a consent authority nor on defects of administrative law.

Enforcement methods

19. Enforcement functions under Part 12 include those listed below.

    - **Enforcement orders (sections 314–321):** Issued by the Environment Court, these orders can require a person to do or stop doing something to comply with the law; require a person to pay or reimburse another person; and change or cancel a resource consent if the information provided to obtain the consent contained inaccuracies.
    - **Abatement notices (sections 322–325B):** These may be served on any person by an enforcement officer to require that person to cease doing something or to do something in order to ensure compliance with a rule or resource consent condition.
    - **Excessive noise and water shortage directions (sections 326–329):** These directions are designed to keep noise to a reasonable level and to apportion, restrict or suspend water takes, water use, or discharges to water when there is a water shortage.

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394 Two other ancillary powers not covered in this section are those relating to powers of entry and search, and provisions relating to the return of property.

- **Emergency works powers (sections 330–331):** These powers enable the suspension of the requirements under sections 9 and 12–15 to allow for emergency works and preventative or remedial action. These apply when a service or area is likely to be affected by an adverse environmental effect requiring immediate response, or a sudden event likely to cause loss of life, injury or serious property damage.

Offences and penalties

20. Sections 338–339 define offences under the RMA and available penalties.

- Section 338(1) includes the contravention of sections 9 and 11–15, an enforcement order, an abatement notice or a water shortage. Sections 338(1A) and (1B) include the contravention of sections 15A–15C. For natural persons, offences against section 338(1), (1A) and (1B) have a maximum fine of $300,000 and a maximum term of imprisonment of two years. For any other person, the maximum fine is $600,000. For continuing offences, offenders are also liable for a $10,000 fine per day.
- Section 338(2) includes the contravention of sections 22 and 44, a direction or abatement notice for excessive noise, or an Environment Court order (other than an enforcement order). For all persons, offences against section 338(2) have a maximum fine of $10,000 and for continuing offences there is also a $1000 fine per day.
- Section 338(3) includes the contravention of sections 41 and 283, contravention of any provision in an esplanade strip or easement instrument, entry to a closed strip, and makes it an offence to wilfully obstruct any person executing RMA powers. For all persons, offences against section 338(3) have a maximum fine of $1500.
- Section 338(4) specifies that, despite the Criminal Procedure Act 2011, the limitation period regarding an offence against sections 338(1), (1A) or (1B) ends six months after the contravention is known or should have become known. A court may also sentence an offender to community work and may make an order requiring a consent authority to review a resource consent.
- Under section 339B, where a person has contravened sections 338 1(A) and 1(B), an additional penalty can be ordered for the offender to pay an amount up to three times the value of the commercial gain resulting from the offence.
- Section 341 of the Act provides that offences relating to contraventions of sections 9 and 11–15 are strict liability offences, that is, there is no need to prove intent. A variety of defences are still available, for example, where the actions taken were necessary for protecting life or health. Section 340 specifies that principals are generally liable for the actions of agents.
- For minor breaches of some provisions, infringement notices can be served under sections 343A-343D requiring the offender to pay an infringement fee. Infringement offences are set out in the Resource Management (Infringement Offences) Regulations 1999, and include contraventions of sections 9, 12–15B, 22, 327, and 322(1)(c). Infringement fees range from $300–$1000 depending on the offence.

Compliance, monitoring and enforcement frameworks

21. Effective CME requires capable regulators who act proportionately and flexibly within a fair and consistent framework. There are several models in use in New Zealand and internationally that seek to achieve this balance.

Voluntary–Assisted–Directed–Enforced model

22. The VADE (Voluntary–Assisted–Directed–Enforced) model is built upon the regulatory principles of proportionality and flexibility and is the approach adopted by many modern regulators.[395] This model is shown in figure 13.1.

23. VADE divides parties into behavioural groups and describes the CME strategies appropriate to each group. Being able to adopt successful strategies for each behavioural group depends on regulators having sufficient capability and capacity.

Effective CME requires capable regulators who act proportionately and flexibly within a fair and consistent framework.

24. The group shown in green in figure 13.1 represents parties willing to comply **voluntarily**. Regulators should seek to make it easy for these parties to comply. Rules and regulations need to be accessible and easy to understand. Roles and responsibilities should similarly be clear and easily understood. Regulators may wish to audit or inspect operations occasionally to check compliance and identify compliant best practice.

25. The group in blue represents parties willing to comply but who may need **assistance** to do so. Regulators should help these parties through education or by referrals to experts. Audits or inspections need to be regular to ensure any issues are identified early and can be corrected.

26. The group in orange represents parties for whom compliance is not a priority and they must be **directed** to comply. Parties may be non-compliant due to competing priorities or poor compliance culture. Regulators need vigilant oversight of these parties with frequent audits and inspections. Non-compliance should be treated seriously, with formal warnings, coercive enforcement tools, infringement fines and prosecution.

Inspections and audits need to be targeted and relentless.

27. The group in red represents parties who may act in open defiance of rules and regulations or show a reckless or negligent disregard for them. In such cases, regulators must use their strongest coercive **enforcement** techniques. Inspections and audits need to be targeted and relentless. Non-compliance should be met with prosecution and/or revocation of the parties' right to operate.

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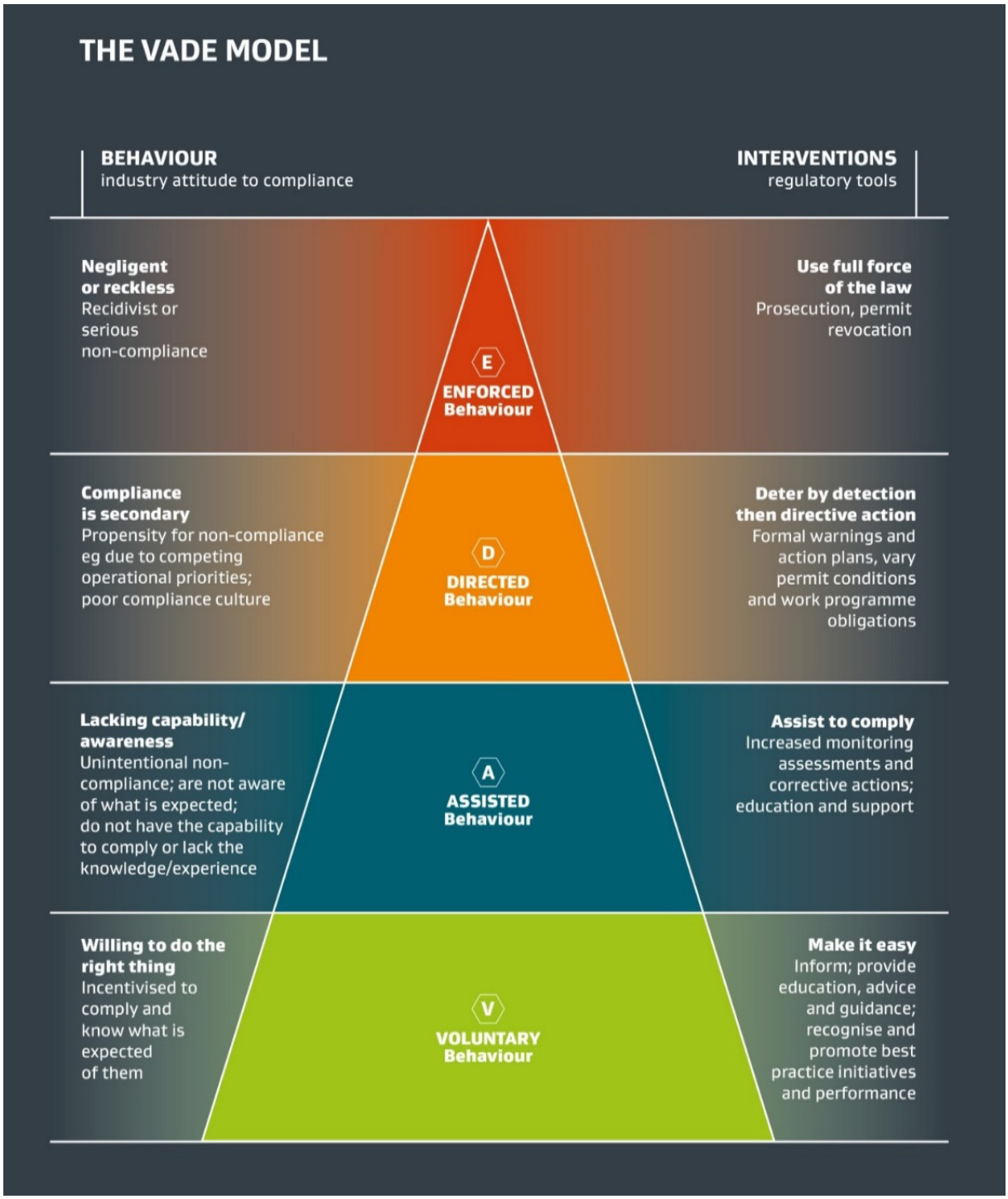
395 The VADE model is widely used internationally. In New Zealand, it has been adopted by numerous regulators including: the Ministry of Business, Innovation and Employment; New Zealand Transport Agency; Ministry for Primary Industries; Maritime New Zealand; Department of Internal Affairs, and others including various local government agencies.

Figure 13.1: VADE behavioural compliance model



Compliance and Enforcement Special Interest Group model

28. In the context of resource management, the Compliance and Enforcement Special Interest Group (CESIG) has also developed a shared strategic risk-based compliance framework[396] to guide councils. This has helped drive continuous improvement in council CME approaches.

29. The CESIG model emphasises the importance of the balanced '4-E' model.

    - **Enable:** provide opportunities for regulated parties to be exposed to industry best practice and regulatory requirements.
    - **Engage:** consult with regulated parties, stakeholders and the community on matters that may affect them. This will engender support and identify opportunities to work together.
    - **Educate**: alert regulated parties to what is required to be compliant. Education should also be used to inform stakeholders and the community about relevant regulations.
    - **Enforce:** where appropriate using the range of formal coercive enforcement tools.

30. These four strategies need to be used together. Pricing signals and other economic tools are also useful supplements. The 4-E model is consistent with VADE, in that it provides for different types of interventions based on the behaviours of regulated parties.

Issues identified

31. The main issues facing CME in the resource management system can be usefully grouped into two categories: institutional arrangements; and legislative deficiencies. We discuss each of these in turn.

Devolution of CME functions to a large number of small local authorities results in a fragmented system.

Institutional arrangements

32. The current institutional arrangements have affected the capacity and capability of the system to deliver CME objectives. The devolution of CME functions to a large number of small local authorities results in a fragmented system with operational and jurisdictional overlaps. The effectiveness of these authorities is affected by:

    - a lack of economy of scale to properly resource CME functions
    - biases and conflicts of interest (both actual and perceived)
    - competing functions, which means CME has lower priority.

33. A long history of weak oversight and guidance from central government, including the Ministry for the Environment, exacerbates the problem. While progress has been made to address this shortcoming in recent years, much work remains to be done.

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396 CESIG. 2019. *Regional Sector Strategic Compliance Framework 2019–2024*. Compliance and Enforcement Special Interest Group.

34. In 2015, Treasury released a report[397] assessing the regulatory systems in New Zealand against a regulatory principles framework. It identified the following indicators of a lack of regulatory capacity relevant to CME: conflicting or unclear objectives, and inadequate resources, enforcement tools, discretion and/or expertise.

Regulatory fragmentation, and monitoring and enforcement gaps

35. In the broader environmental management system, numerous agencies have CME responsibilities under a myriad of statutes. Regulators frequently have operational overlaps. Relationships are unclear between CME functions under the RMA and other related regimes, such as the Hazardous Substances and New Organisms Act 1996, the Building Act 2004 and bylaws made under the Local Government Act 2002 (especially those seeking to address environmental issues).

Fragmentation and overlap results in confusion for regulated parties about which regulator they should be dealing with.

36. This fragmentation and overlap results in confusion for regulated parties about which regulator they should be dealing with. Multiple regulators may address the same sites or issues, creating duplication and inefficiency. There can be confusion about which agency should lead a response and this can delay action being taken to monitor or address an issue.

Biases and conflicts of interests

37. Environmental regulators are primarily local authorities. Many of these councils serve small communities and can easily be dominated by strong local personalities and inescapable conflicts of interest. This can create perceived and actual biases that hinder the broader regulatory objectives and create inconsistency.

38. A 2016 survey into how CME officers perceive their organisation's attitude to CME showed "The majority of interviewees … were of the opinion that formal enforcement action was seen as undesirable by elected officials".[398] Referring to this study in *Last Line of Defence*, Dr Doole (née Brown) concludes:

> …it is possible that political interference in technical enforcement decisions is simply unavoidable in an entity headed by politicians. If so, the real improvement will only be possible with some restructuring of current institutional arrangements.[399]

39. The risk from these biases can be compounded by other conflicting roles of councils, for example, when a council is acting as both the regulator and the regulated party. Case study 1 illustrates the issues that can occur.

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397 Treasury. 2015. *Best Practice Regulation: Principles and Assessments.* Wellington: New Zealand Treasury. Retrieved from https://treasury.govt.nz/sites/default/files/2012-08/bpregpa-feb15.pdf (6 June 2020).

398 Brown MA. 2017. *Last Line of Defence*. Auckland: Environmental Defence Society; p 37.

399 Brown MA. 2017. *Last Line of Defence*. Auckland: Environmental Defence Society; p 48.

CASE STUDY 1: JACKETT ISLAND

In the early 1990s, the Tasman District Council proposed to construct a groyne (a coastal engineering feature designed to dissipate wave action and limit the movement of sediment) near the mouth of the Motueka River, as a means of keeping the channel open to shipping. The application was eventually approved for a limited 15-year period by the Minister of Conservation in 1994. The Council established the groyne in 1996.

Between 1997 and 2009, the sandspit that was supplemented by the groyne expanded significantly southward. This in turn affected tidal flows and sand deposition patterns in the bay, and caused substantial erosion on the seaward side of neighbouring Jackett Island. Although the coastal permit authorising the groyne expired in 2009, the Council took no action to either remove the structure or to authorise its retention through further consent.

The Van Dyke Family Trust, a land owner on Jackett Island, argued with supporting expert evidence that the growth of the spit (and hence the erosion of Jackett Island) was an adverse effect arising from the installation of the groyne. The Trust sought enforcement orders against the Council to undertake further research, remove the groyne, and take remedial actions to arrest the erosion. The Council submitted in response that the growth of the spit was a natural coastal phenomena, within the scope of normal variability, and not an effect of the groyne.

The Court ultimately accepted the evidence of the Van Dyke's expert witness and directed the Council to undertake interim works and reports. The finding of facts noted several substantial failures of the Council in implementing the consent and managing compliance. Specifically, the Council had failed to undertake the monitoring and surveying work required by the conditions of the coastal permit, had not established the groyne in the proper location authorised by the permit, and had failed to remove the groyne when the permit expired. Judge Dwyer noted:

> It seems inconceivable that the Council would tolerate such failures to comply with conditions from any other consent holder … the failure to comply with the conditions of consent forms part of the background of denial of responsibility adopted by the Council.[400]

The Court made a costs award against the Council of $189,000, in addition to works directed by an enforcement order.

This case highlights a failure to properly monitor compliance with the conditions of a consent. It illustrates the types of bias that can arise when regulators are also the regulated party, and must police themselves. It also serves as an example of the value of enabling private enforcement action under the RMA.

Competing functions and priorities, and inadequate economy of scale

40. Local authorities have many competing functions and priorities and have discretion to prioritise funding to areas they consider more important. Some local authorities do not prioritise CME functions or resource them.

41. Even where CME is resourced, those resources can be directed towards areas of questionable impact. As the New Zealand Planning Institute notes in its submission:

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400 *Van Dyke v Tasman District Council* [2011] NZEnvC 405.

> Monitoring and compliance tends to be the Cinderella of planning. Resourcing is an issue but a greater problem is the resourcing which is available tends to be diverted to squeaky wheels and "neighbours at war" issues rather than the issues which have greater environmental impact.

42. Some small local authorities simply lack the economies of scale to resource CME functions adequately or at all. This lack of dedicated resource in some councils inevitably leads to uneven application of the law between different local authorities.

43. Monitoring data is collected on the number of full-time-equivalent employees (FTEs) allocated to resource management CME functions in each local authority. The 2018/19 NMS data combined with the CESIG data[401] for regional/unitary councils shows:

    - of 78 local authorities, 35 have one or fewer FTEs for resource management CME. Of these, 11 have no FTEs for resource management CME, all of which are territorial authorities
    - of 653 CME FTEs nationwide, 366 (56 per cent) are employed by only six councils, five of which are regional or unitary councils
    - only 18 councils have 10 or more FTEs for resource management CME, of which 13 are regional or unitary councils.

44. At the time of writing, the Ministry for the Environment has only one FTE dedicated to resource management CME issues. This is woefully inadequate and reduces the Ministry's ability to be an effective system steward.

Monitoring of permitted activities

45. Permitted activities can be undertaken without the need for a resource consent, subject to any requirements attached to the activity through the RMA, regulations or a plan or proposed plan (section 87A(1) of the RMA). Permitted activity status is often used for activities that frequently occur and only generate minor adverse effects. Performance standards that a permitted activity needs to meet may be set out in the plan.

46. While section 36 of the RMA enables cost recovery for compliance monitoring in relation to consents, there is no equivalent provision for unauthorised activities or permitted activities, even when non-compliance is detected. Cost recovery for compliance monitoring of these activities is possible only in limited circumstances such as when provided for under a national environmental standard.[402]

47. This lack of cost recovery options means compliance monitoring for these activities is either not undertaken because there is no budget for it, or is funded from the general ratepayer base rather than by those causing the issues, which runs counter to the polluter pays principle. This situation can also incentivise councils to require consents for some activities, even where this may not be necessary, so they can recover the cost of monitoring them.

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401 Sourced from Doole MA. 2020. *Independent Analysis of the 2018/2019 Compliance Monitoring and Enforcement Metrics for the Regional Sector*. Palmerston North: The Catalyst Group; p 23. Retrieved from www.lgnz.co.nz/assets/Uploads/bc9da4d6cd/CME-Regional-Sector-Metrics-Report-FINAL.pdf (16 June 2020).

402 For example, the National Environmental Standards for Plantation Forestry provide in clause 106 that a local authority may charge for monitoring permitted activities under these national environmental standards relating to earthworks, river crossings, forestry quarrying and harvesting.

48. If permitted activities are not carried out responsibly, they can have significant localised effects, and widespread non-compliance can add up to serious environmental impacts as shown in case study 2. It is therefore essential that the performance standards attached to permitted activities are monitored.

CASE STUDY 2: FLAT BUSH

The developing suburb of Flat Bush in Auckland encompasses a number of large residential subdivisions. Thousands of houses have been built over the past five years. Most of these houses were constructed as small-scale permitted activity projects under the relevant district plan rules and did not require resource consent beyond the initial subdivision. Monitoring compliance was therefore not cost-recoverable under the RMA.

In 2017 the Howick Local Board became concerned about water quality in the Flat Bush area. Berms, footpaths, gutters and catchpits in the suburb were cluttered with portable toilets, construction materials, plastic and polystyrene packaging, sand, sawdust and other debris. Concrete and grouting slurry, paint-stained wastewater and sediment-laden stormwater were discharging from many of these small sites and carrying their litter and contaminants into the local waterways. The absence of controls on the individual sites, to prevent such discharges, breached the permitted activity performance standards for earthworks under the Auckland Unitary Plan (AUP rule E11.6.2(2)).

The Local Board funded a contractor (a former compliance officer) to carry out proactive compliance monitoring inspections of properties in the area and to provide education and advocacy to builders and contractors. The inspections identified numerous instances of non-compliance, but the education and advocacy approach was ineffective in changing the behaviour of construction contractors and clients in order to comply with the rules.

Consequently, the Council's Regulatory Compliance Unit decided to deploy formal enforcement tools. Over 400 properties were inspected by enforcement officers and approximately 25 per cent were issued with one or more abatement notices for non-compliance with RMA rules.

The Council proactively followed up with properties that were served with abatement notices. About 65 per cent of properties complied without requiring any further enforcement action. Of the remaining 36 properties, 28 complied after receiving one infringement notice, a further 5 complied after receiving 2 infringement notices, and 3 complied after receiving a third infringement notice. By the end of the project, all of the properties inspected were in full compliance.

49. Submitters on our issues and options paper generally supported monitoring of permitted activities but had mixed views about how this should be funded. For example, the New Zealand Fish & Game Council proposed:

> The cost of monitoring should not fall to the rate or tax-payer. Councils are at liberty to set their own funding policy, and this is not always based on the fundamental principle of 'polluter pays.' If you are undertaking a consented or permitted activity you should pay for all compliance costs, including monitoring. Effectively, the environmental cost of an activity must be internalised within that activity.

In contrast, Federated Farmers supported creating a:

> [D]irect link between who is benefiting from a council activity and who is paying. In many cases, there will be no benefit to the resource user of any such monitoring. It is often simply to provide peace of mind to the general public. The justification for requiring land owners to pay for monitoring when complying with permitted activity standards is questionable.

50. Some councils use targeted rates to pay for permitted activity monitoring,[403] although it can be hard to target the particular group which needs monitoring[404] and very hard to target those who are causing the issues.

Inadequate data, intelligence and support systems

51. Undertaking compliance monitoring in all places at all times is not possible. The system relies on public complaints and a risk-based approach to target limited resources to the areas where the greatest gains can be made. Modern regulators rely on data and intelligence services to identify where to apply a risk-based approach. However, data relevant to environmental CME is currently piecemeal, inconsistent, inadequate and not shared effectively between regulators.

52. Existing data has limited value for analysing CME strategy and effectiveness, or planning proactive interventions. While the NMS counts formal CME actions, it provides limited information about those actions, and no insights into the use and effectiveness of informal approaches such as education and advocacy services.[405] Ambiguity of questions, arbitrary metrics and constantly shifting questions also reduce the value of the NMS as a reporting tool.[406]

53. Because each council operates on standalone software and databases, little information is shared between councils. Awareness of cases in other council areas relies almost entirely on personal initiative and connections rather than systematic or strategic means.[407]

54. The piecemeal and idiosyncratic nature of information and data management for CME means councils have highly variable levels of transparency on CME. The *Independent Analysis of the 2017/2018 Compliance Monitoring and Enforcement Metrics for the Regional Sector* found "many councils were unable to provide some relatively basic information".[408]

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403 For example, Waikato Regional Council uses a targeted rate to pay for dairy effluent monitoring.

404 Because of the nature of permitted activities and unauthorised activities; that is, the council does not have a list and it is generally unknown who all the parties are who are undertaking these activities before issues arise.

405 Brown MA. 2017. *Last Line of Defence*. Auckland: Environmental Defence Society Incorporated; p 35.

406 Brown MA. 2017. *Last Line of Defence*. Auckland: Environmental Defence Society Incorporated; p 41.

407 Brown MA. 2017. *Last Line of Defence*. Auckland: Environmental Defence Society Incorporated; p 82.

408 Brown MA. 2018. *Independent Analysis of the 2017/2018 Compliance Monitoring and Enforcement Metrics for the Regional Sector*. Palmerston North: The Catalyst Group; p iv. Retrieved from www.lgnz.co.nz/assets/Uploads/bc9da4d6cd/CME-Regional-Sector-Metrics-Report-FINAL.pdf (16 June 2020).

55. As Local Government New Zealand notes in its submission, "While information management is doubtless an area in which the sector has improved greatly in recent years, further development is required to maintain reasonable levels of transparency".

Compliance, monitoring and enforcement capacity and capability

56. A number of capacity and capability issues impact on the effectiveness of CME. Although a suite of CME-related qualifications and training initiatives is now available, there has been slow uptake of them.[409] Further, it is difficult to recruit and retain appropriately trained and qualified staff. Lower remuneration, especially in contrast to comparable policy planning, resource consent processing or environmental health roles, appears to be a significant factor.

57. A lack of qualifications and training can lead to a poor understanding of the issues, the CME provisions available under the RMA, and the broader links between the RMA and other relevant legislation. For example, the emergency works powers under the RMA have sometimes been used to respond to sudden events, but are rarely used for remedial or preventative purposes. This is primarily because the use of these tools for such purposes is not well understood. More guidance is required in this area (particularly post-COVID-19), including on links between the RMA and other civil defence and emergency legislation.

58. There can also be serious health and safety risks in undertaking CME functions. Most regulatory compliance inspectors and investigators conduct a significant proportion of their fieldwork as lone workers. Lone workers face greater health and safety issues and are at higher risk of confrontation and acute injury. Employers have an obligation to eliminate lone worker risk wherever reasonable to do so, but most local government agencies lack the economies of scale required to avoid lone worker situations.

59. Even where compliance officers are deployed in teams or pairs, the nature of their work means they are often at higher risk of aggressive or confrontational behaviour. While assaults are rare, serious cases have occurred. In June 2013, a Northland Regional Council compliance officer was seriously assaulted while travelling to give evidence in an enforcement case.[410] In July 2014, an officer of the New South Wales Office of Environment and Heritage was murdered while visiting a farm to serve a compliance notice.[411]

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409 The suite of regulatory compliance qualifications include those developed by the Government Regulatory Practice Initiative, the Basic Investigative Skills course developed by Waikato Regional Council, and the various training opportunities shared through the annual Environmental Compliance Conference.

410 Brutal attack on NRC worker. 2013. *Northland Age* 11 June. Retrieved from https://www.nzherald.co.nz/northland-age/news/article.cfm?c_id=1503402&objectid=11101714 (16 June 2020).

411 Chillingworth B. 2016. Farmer Ian Turnbull jailed for murdering environment officer Glen Turner. *Sydney Morning Herald* 23 June. Retrieved from https://www.smh.com.au/national/nsw/farmer-ian-turnbull-jailed-for-murdering-environment-officer-glen-turner-20160623-gppzki.html (16 June 2020).

Legislative deficiencies

Inadequate penalties

60. The threat of legal punishment can act as an effective deterrent on non-compliance. For this threat to be effective, there needs to be a general perception that the laws are enforced and that meaningful punishment will result from non-compliance. The RMA, along with several other regulatory regimes in New Zealand, have deterrence as their primary enforcement objective. In such regimes, penalties need to be set at a level high enough to deter non-compliance with the rules.

Some offenders treat RMA offending as no more than a cost of doing business.

61. Maximum penalties under the RMA are low when compared with other commonwealth countries, as shown in table 13.1.

Table 13.1: Maximum penalties under the RMA compared with other commonwealth countries

Nation	United Kingdom	Canada	Australia	New Zealand
Statute/ Regulation	Environmental Permitting (England and Wales) Regulations 2016	Environmental Enforcement Act 2003	Environment Protection and Biodiversity Conservation Act 1999	Resource Management Act 1991
Individual imprisonment	5 years	3 years	7 years	2 years
Individual fine	700% of offender's weekly income*	CAN$5,000 Min CAN$1,000,000 Max	AU$1,085,000*	NZ$300,000
Corporate fine	£3,000,000*	CAN$100,000 Min CAN$6,000,000 Max	AU$10,850,000*	NZ$600,000
Comment	*Guideline only (no statutory maximum) Sentencing guidelines link fine values to offender income or financial means	Minimum penalties applicable only for indictments	*As at 1 July 2017: penalty unit value revised in line with Consumers Price Index every three years	Maximum penalties set in statute; law change required for uplift

62. The maximum penalties under the RMA are also low compared with those under other regulatory regimes in New Zealand with deterrence as their primary enforcement objective (table 13.2).

Table 13.2: Maximum penalties under the RMA compared with other regulatory regimes in New Zealand

Regulatory regime	Workplace health and safety	Biosecurity	Commerce	Resource management
Statute	Health and Safety at Work Act 2015	Biosecurity Act 1993	Commerce Act 1986	Resource Management Act 1991
Individual imprisonment	5 years	5 years	5 years	2 years
Individual fine	$600,000*	$500,000	$500,000	$300,000
Corporate fine	$3,000,000	The greater of $10,000,000, or either three times the value of any commercial gain, or 10% of the turnover of the body corporate	The greater of $10,000,000, or either three times the value of any commercial gain, or 10% of the turnover of the body corporate	$600,000
Comment	*For an individual who is a person conducting a business or undertaking	Pecuniary penalties	Pecuniary penalties	

63. Many offences against the RMA involve an element of commercial gain to the offender. It is common for this gain to far outweigh the penalties imposed through the courts. This means that the payment of a fine may simply be viewed as a 'reasonable licence fee'. As case study 3 shows, some offenders treat RMA offending as no more than a cost of doing business.

CASE STUDY 3: HORIZON FLOWERS LTD AND THE WINTON STREAM

The Horizon Flowers Ltd (Horizon) case is an illustration of the inadequacy of penalties imposed in relation to RMA offending. If penalties do not exceed the financial advantage an operator obtains from evading compliance, then offences are not adequately deterred. In addition, other water users who comply with the rules are unfairly disadvantaged, and the environment is left vulnerable to illegal exploitation and associated adverse effects.

During 2017, Southland experienced drought conditions. Overall rainfall was 21 per cent below average. The year was the driest on record for the region since 1971. Flow rates and water levels in many of the region's rivers and streams were very low.

Horizon, a horticultural production business whose main income derived from the export of tulip flower bulbs, had sought consent to take and use water from the Winton Stream for irrigation in 2016, but had withdrawn the consent application before a decision was made.

CASE STUDY 3: HORIZON FLOWERS LTD AND THE WINTON STREAM

In October 2017, the Council became aware that Horizon was unlawfully taking water from the Winton Stream and issued an abatement notice. Horizon wrote to the Council providing an assurance that no further water would be taken unless resource consent was granted. In November, the Council became aware that Horizon was continuing to extract water from the stream. As a result, a further abatement notice was issued.

On 1 December 2017, the Council granted a resource consent for the abstraction of water from the stream. Consent conditions required that no abstraction occur when the flow rate dropped below specified levels. Over the following three days, Horizon unlawfully took 3.6 million litres of water from the stream, despite its flow rate sitting well below the levels specified. On 6 December, Horizon was also found to be engaged in a further unlawful water take from a separate stream in a neighbouring catchment. The affected environment was sensitive, being habitat for declining and at-risk species of fish. This sensitivity was exacerbated by the drought conditions and low flow rates of the streams.

The Southland Regional Council successfully prosecuted Horizon. Horizon was convicted on three charges and received a total fine of $53,400. Mr Roy Smak, Horizon's regional manager, was convicted on two charges and received a fine of $7,125. The agreed summary of facts estimated the commercial gain to Horizon as a direct result of the offending was between $320,000 and $985,000. The total fine imposed by the Court therefore represents only between 6–19 per cent of the commercial gain to the offenders.

64. At present, the RMA has only one mechanism to specifically target commercial gain. This is section 339B which provides additional penalties for offences relating to dumping and discharging harmful substances into the marine environment. As noted above, other regulatory regimes have much broader provisions to target offending that involves commercial gain.

65. More generally, section 6 of the Criminal Proceeds (Recovery) Act 2009 provides that offending resulting in the acquisition or delivery of "property, proceeds, or benefits" exceeding $30,000 constitutes significant criminal activity which may result in a civil forfeiture application. This threshold is commonly exceeded in RMA offences.

66. Under this Act, only the Commissioner of Police may make a civil forfeiture application. Various agencies frequently approach the Commissioner to make such an application on their behalf, but to date the Criminal Proceeds Act has only been used in one known RMA case.[412]

Insurance against criminal penalties

67. Insurance against penalties can cause problems where it mitigates the financial risk and so undermines the deterrent effect of penalties. However, as the Legislative Design and Advisory Committee guidelines note, "… on the other hand, insurance companies can motivate their clients to minimise their risk of non-compliant behaviour through the threat

[412] *Commissioner of New Zealand Police v Jiang 2016*, CIV-2016-409-298.

of increased premiums".[413] Judge Harland stated in *Bay of Plenty Regional Council v Whitikau Holdings Ltd [2018]* that she was not persuaded it is lawful for a defendant to be insured against a fine in an RMA prosecution. This area clearly requires clarification.

Poor links to criminal legislation

68. There are weak links between resource management offending and criminal legislation, such as the Criminal Procedure Act 2011 and the Search and Surveillance Act 2012. On the former, Dr Doole (née Brown) notes:

> Councils are excluded from the definition of public prosecution in the Criminal Procedure Act. It means the Solicitor General's oversight applies only weakly, meaning an important check and balance on most public agencies is missing for councils.[414]

And on the Search and Surveillance Act the Law Commission states:

> … the rules in the [Search and Surveillance] Act, which were designed largely with law enforcement powers in mind, do not always fit well with regulatory powers.[415]

69. Local authorities can use the *Solicitor-General's Prosecution Guidelines*[416] to help with enforcement decisions but, unlike other public prosecutors, they are not required to do so. They are also exempt from the associated reporting requirements. Some councils have developed their own prosecution guidelines, and the CESIG councils have a relatively consistent group of compliance and prosecution policies, though even within that group there are outliers.[417]

70. The Solicitor-General's guidelines are designed for prosecution decisions on conventional criminal offending. The application of the Solicitor-General's public interest test in the context of regulatory environmental offending can be difficult. For example, environmental regulators are often faced with the investigation of offences by other regulatory agencies such as a regional council investigating unlawful wastewater treatment discharges from a district council facility. The public interest test in this case has distinct characteristics that are quite different from conventional 'offender–victim' crimes.

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413 Legislative Design and Advisory Committee. 2018. *Legislation Guidelines*. Wellington: Legislative Design and Advisory Committee; p 125. Retrieved from www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/compliance-and-enforcement/chapter-26/part-8/ (16 June 2020).

414 Brown MA. 2017. *Last Line of Defence*. Auckland: Environmental Defence Society; p 35.

415 Law Commission. 2017. *Review of the Search and Surveillance Act 2012* – Questions and Answers. Wellington: Ministry of Justice and Law Commission.

416 Crown Law. 2013. *Solicitor-General's Prosecution Guidelines*. Wellington: Crown Law. Retrieved from https://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/ProsecutionGuidelines2013.pdf (16 June 2020).

417 Brown MA. 2018. *Independent Analysis of the 2017/2018 Compliance Monitoring and Enforcement Metrics for the Regional Sector*. Palmerston North: The Catalyst Group. Retrieved from www.lgnz.co.nz/assets/Uploads/bc9da4d6cd/CME-Regional-Sector-Metrics-Report-FINAL.pdf (16 June 2020).

Options considered

71. This section outlines options we have considered to address the issues identified. These options have been drawn from our issues and options paper, academic sources, advice from officials, suggestions from submitters and options suggested at our discussions with Māori at regional hui.

72. Options to tackle deficiencies with the institutional arrangements should address such matters as regulatory fragmentation, jurisdictional confusion, operational overlaps (and the resulting monitoring and enforcement gaps), biases, competing functions and priorities, and inadequate economies of scale. We have considered the following options.

    - **Option 1 (minimal change):** this would involve local authorities undertaking CME functions with assistance from the Ministry for the Environment and the EPA as proposed under the Resource Management Amendment Bill 2019.
    - **Option 2 (regional councils):** regional councils would take over CME responsibilities, including for territorial authorities, with assistance from central government.
    - **Option 3 (regional CME hub):** a regional hub would be established for all resource management CME functions, with assistance from central government. The hub would undertake CME functions regionally on behalf of all the local authorities in the region.
    - **Option 4 (centralised model):** this would involve a fully centralised model administered either by the EPA or a new standalone agency.

73. Each of these options could also provide for more mana whenua involvement in CME functions. Whatever the institutional arrangements for CME, increased effectiveness and institutional capability, capacity and resourcing issues should also be addressed.

Discussion

Better system links

74. Our vision for CME as part of the broader resource management system goes beyond just the deterrence and enforcement goals associated with the monitoring of compliance with consent conditions and rules. Compliance monitoring should also support both state of the environment monitoring and monitoring progress towards achieving outcomes.

75. A wealth of information is collected, or could be collected, when CME officers are undertaking compliance inspections and this is not being used in a strategic way at present. Investment, standardisation and guidance can all help to leverage compliance monitoring to support the meeting of environmental targets, compliance with limits and the achievement of system outcomes overall.

76. As discussed in previous chapters (see chapters 8 and 12), we recommend the establishment of system links between compliance monitoring, state of the environment monitoring and monitoring progress towards outcomes. To support this integration, we propose:

- when setting standards or conditions, councils should think about how progress towards achieving outcomes is going to be monitored and whether data can be gathered on this at the same time as monitoring for compliance
- information gathered during compliance monitoring needs to support state of the environment and policy effectiveness monitoring conducted as part of a revised section 35 in a reformed RMA. This information will support the proactive assessments made under a revised section 32
- councils should gather and store information using systems and formats that enable an integrated end-to-end database and easy retrieval and sharing of information.

Institutional changes

77. The current institutional arrangements do not provide for the effective and efficient undertaking of CME functions. There is an imbalance of resources between local authorities. Some small councils do not have sufficient scale to adequately fund CME activities. As noted in the section above on issues identified, 35 councils have one or fewer FTEs devoted to resource management CME. This is simply untenable and change is needed.

The current institutional arrangements do not provide for the effective and efficient undertaking of CME functions. There is an imbalance of resources between local authorities. Some small councils do not have sufficient scale to adequately fund CME activities.

78. The status quo (option 1), even with enhancements, is insufficient to meet the challenges. Giving the territorial CME functions to regional councils (option 2) would not adequately address the potential for system bias, nor address issues of competing functions and priorities. Having a centralised agency undertake CME functions (option 4) would risk losing the valuable connections CME officers have with their communities and the policy and planning teams within the local authorities of their region. Therefore we consider the option of the regional CME hub (option 3) will best address the shortcomings of the current system.

79. While there may be differences between regions, depending on local circumstances, the features listed below would apply to all regional CME hubs.

- The combination of personnel and resources from all local authorities of the region supported by the EPA.
- Independence and structural separation from the local authorities in a region. This will mitigate potential bias and conflicts of interest.
- Enforcement discretion and a principled approach to CME consistent with best practice risk-based approaches, for example the VADE model behavioural strategies.

We consider the option of the regional CME hub will best address the shortcomings of the current system.

- Enough funding for the quantity and quality of CME needed to support system outcomes. This funding would come partly from cost recovery with the balance coming from local authorities on a proportional and equitable basis.
- Reporting to the regional joint planning committees (see chapter 8), and providing insights to planning teams at local authorities as to what is, and is not, working on the ground. As discussed above, this should include better system links to the equivalent of section 35 and section 32 processes in the Natural and Built Environments Act.
- Mana whenua involvement in CME activities to ensure cultural expertise and knowledge is applied. Mana whenua would also maintain broad oversight of regional CME hubs through their representatives on joint planning committees.
- Clear lines of authority for accountability, responsibility, and health and safety purposes.
- Coordination between regional CME hubs (and central government) to provide opportunities to learn and develop best practice, building on the excellent coordination work by CESIG.
- An internal peer review and support network to promote best practice and continuous improvement. This should be supplemented by a focus on increasing uptake of training opportunities and qualifications.
- Additional expertise available to call on for specialist cases or to provide extra resource for large investigations.
- Data gathering and reporting of CME statistics and case notes, feeding into a national database administered by the Ministry for the Environment (discussed below).

80. Our proposed approach would regionalise CME functions in standalone organisations with dedicated expertise in resource management CME. We consider this approach will address the issues caused by regulatory fragmentation, jurisdictional confusion, operational overlaps, biases, and competing functions and priorities.

81. Several mechanisms can be used to create regional CME hubs, for example a shared services model or council-controlled organisation. We do not have a preference for the mechanism which should be used to establish the hubs as long as it fulfils the intended purpose and functions.

Our proposed approach would regionalise CME functions in standalone organisations with dedicated expertise in resource management CME.

82. We consider our regional CME hub proposal will have many benefits, including being more integrated while staying at arm's length from undue influence. We also envisage that regional CME hubs will be more efficient and able to provide CME functions at less cost, saving regulators, regulated parties and ratepayers both time and money. Combining resources for CME at a regional level will provide the economies of scale needed to address institutional capability and capacity issues. It will also maintain the advantages of a devolved CME system in that the functions will be undertaken by people who understand local issues.

83. National oversight and coordination of CME would be provided by the Ministry for the Environment. This would include administering a publicly available national database containing a national resource management case register to record enforcement outcomes such as judgments, enforceable undertakings and warning letters. As Forest & Bird notes in its submission, "…results of all CME work should be easily accessible (online) to the public, in a digestible form".

National oversight and coordination of CME would be provided by the Ministry for the Environment.

84. This function will provide transparent information for central and local government and interested parties on plan effectiveness and CME performance. It could also establish a company's CME track record, which would be in the public realm, and could inform central and local government procurement decisions.

85. Our discussions at the regional hui highlighted that Māori overall do not consider councils are performing CME functions well and involving mana whenua in CME would help address the current deficiencies. Participants at the Dunedin hui felt that monitoring (both CME and environmental monitoring) led by Māori would be in service of the wider community and part of their role as kaitiaki.

86. We agree that mana whenua should be involved in CME activities. It is important that cultural expertise and knowledge held by the mana whenua of a region is part of the regional CME hub approach. Mana whenua could be involved in regional CME hubs in many ways. Where mana whenua are providing a cost-recoverable service they should be reimbursed for that contribution rather than involved on a voluntary basis.

It is important that cultural expertise and knowledge held by the mana whenua of a region is part of the regional CME hub approach.

87. In some circumstances, monitoring of particular compliance functions may be best carried out by mana whenua. Where both parties agree, local authorities could use the integrated partnership process (outlined in chapter 3) to transfer powers or make joint management agreements to involve mana whenua groups in monitoring compliance. In these cases, mana whenua groups should work closely with the regional CME hub and the details of this could be specified in the integrated partnership process arrangements.

88. It is worth noting that local authorities (territorial authorities in particular) have an array of enforcement officers who are not solely focused on RMA matters. For example, in many councils an enforcement officer will be doing CME tasks relating to rules for dogs, buildings and food as well as resource management. Our proposal would enable consolidation of these enforcement duties, with the hub expanding over time to include the broader CME functions.

89. A final point is that consent conditions are not always worded in a way that is easy to enforce. Increased guidance and training for planners to draft enforceable conditions would be useful, although we do not think formal national direction for CME is needed at this time.

Legislative changes

Penalties and commercial gain

90. As outlined above, the maximum penalties available under the RMA are low compared with similar statutes in other countries and other regulatory regimes in New Zealand.

91. An increase in penalties was generally supported by local government submitters. For example, Christchurch City Council supports "… increasing the penalties for non-compliance so that they are an effective deterrent compared to the financial advantage of non-compliance".

92. It is worth noting that the maximum penalties in the RMA are for the worst offending and fines to those levels have never been imposed under the Act. The courts set a starting point and then adjust that figure taking into account a series of aggravating and mitigating factors.

The current maximum financial penalties under the RMA should be substantially increased by bringing them in line with similar legislation in other countries and other regulatory regimes in New Zealand.

93. In 2013, the Ministry for the Environment commissioned Karenza de Silva to analyse prosecutions under the RMA.[418] The highest fine identified was $120,000 in *West Coast Regional Council v Potae and Van der Poel Ltd*. There have been cases since then where a higher maximum fine was imposed.[419] The report also showed the average fine between 2009 and 2012 was just $28,792.[420]

94. Fines of this level will never be an adequate deterrent. We consider the current maximum financial penalties under the RMA should be substantially increased by bringing them in line with similar legislation in other countries and other regulatory regimes in New Zealand.

95. Likewise we also consider the provisions against commercial gain should be extended to apply to further offences, and commercial gain should be specified as an aggravating factor.

Judge-only trials

96. Section 338(1) offences have a maximum imprisonment period of two years. As such, they are defined as category 3 offences for the purposes of the Criminal Procedure Act. As category 3 offences, defendants may generally elect whether to be tried before a jury or a judge alone. The Court has the power to order judge-alone trials, if relevant circumstances apply, and this has occurred in some cases where a jury trial has been elected by the defendants.

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418 Ministry for the Environment. 2013. *A Study into the Use of Prosecutions under the RMA*. Wellington: Ministry for the Environment. Retrieved from https://www.mfe.govt.nz/sites/default/files/study-into-the-use-of-prosecutions-under-the-RMA.pdf (16 June 2020).

419 For example, Fonterra was fined $192,000 in 2015. Coster D. 2015. Fonterra sentenced in the Environment Court over the Eltham buttermilk stink. *Stuff* 3 August. Retrieved from https://www.stuff.co.nz/business/farming/dairy/70762256/fonterra-sentenced-in-the-environment-court-over-the-eltham-buttermilk-stink (16 June 2020).

420 This figure is higher than the true average as it excludes prosecutions where the defendants were regarded by the Court as 'poor' and where the Court classified the offences as accidental, because these two factors are the main reasons for reductions of fines.

97. Prosecutions under the RMA often involve the interpretation and application of technical rules and scientific data. The technical nature of rules and evidence involved in RMA offending makes it difficult for laypersons to capably engage with a case if they are called to be part of a jury. As such, we consider jury trials are not generally appropriate for RMA cases.

98. We recommend changes should be introduced to provide that all except the worst RMA prosecutions may be heard as judge-alone trials.[421] The simplest way to achieve this would be to institute an offence or penalty categorisation in a reformed RMA that would enable greater distinction between offences based on their seriousness. Lesser offences should carry maximum terms of imprisonment less than two years, with the maximum term of two years reserved for the most serious offending. This would make less serious offences 'Category 2 offences' for the purpose of the Criminal Procedure Act 2011, and thus ineligible for jury trials.

We recommend changes should be introduced to provide that all except the worst RMA prosecutions may be heard as judge-alone trials.

Prohibition of insurance

99. On balance, we consider a reformed RMA should prohibit insurance against prosecution fines and infringement fees, in the same way as section 29 of the Health and Safety at Work Act 2015. Some commentators support this approach.[422]

100. We think insurance should continue to be available to cover legal defence costs and environmental remediation or restoration costs that might arise from offences. In the latter case, this would minimise the risk of public agencies having to cover the costs of dealing with environmental harm that might arise from serious non-compliance.

Creative sentencing

101. The Natural and Built Environments Act would provide the opportunity for creative sentencing options, such as offenders contributing capital or labour towards cleaning up or restoring environments affected by litter, dumping or other environmental offences.

102. Creative sentencing options can be deployed in conjunction with, or as an alternative to, traditional sentencing and restorative justice options and are used to good effect in other commonwealth jurisdictions. Creative sentencing could be used where a specific enforcement order may not be an option due to the nature of the offending or the effect arising from it, or in situations where the offender may not be in a financial position to pay a

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421 As recommended in De Silva K. 1999. *Prosecutions under the Resource Management Act 1991*. Auckland: University of Auckland.

422 For example, Devine R, de Groot S, Woodward C. 2018. Findings from the Courts: Environmental indemnity insurance. *Planning Quarterly 211*: 32–36.

fine. Some commentaries claim creative sentences for environmental offences have stronger deterrent effects than monetary fines.[423]

Tailored Solicitor-General guidelines

103. As noted in the issues identified section of this chapter, criminal legislation does not always apply easily to environmental cases. More work needs to be done to better align the proposed Natural and Built Environments Act with this legislation. For example, search provisions could be made simpler and less onerous, while still meeting the principles of the Search and Surveillance Act.

104. One action that would provide benefits for a range of regulators, would be for the Ministry for the Environment and other regulators to work with the Solicitor-General and the Crown Law Office to develop new prosecution guidelines for the public interest test in environmental and other specialist regulatory cases.

Better cost-recovery provisions

105. As Ngātiwai Trust Board notes in its submission, "… the compliance, monitoring and enforcement in Northland is under-resourced and often not effective. A different method of resourcing compliance, monitoring and enforcement is essential". We consider the cost-recovery provisions should be amended to enable cost recovery for permitted activity monitoring and for the costs associated with the investigation of unauthorised activities in some circumstances.

106. The new resource management system we envisage will have stronger and clearer plans and we are expecting there will be more permitted activities with attached performance standards. This makes it even more important to ensure that permitted activity performance standards are monitored and adhered to.

107. We consider it to be more efficient, effective and equitable to require payment for permitted and authorised activity monitoring than the alternatives of either no monitoring (and the likely negative effects on compliance and the environment) or charging all the costs to the general ratepayer.

Changes should be made to give regulators the flexibility to choose between cost-recovery options.

108. Cost recovery should be done in a principled manner and needs to be targeted, if possible, to those who are causing the issues in line with the polluter pays principle. Conversely, cost recovery should not be used where the benefits of the monitoring accrue largely to the general public.

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423 Alberta State Government. 2013. *Creative Sentencing in Alberta: 2013 Report*. Calgary: Alberta Environment and Sustainable Resource Development Department and Alberta Crown Prosecution Service; Hughes EL, Reynolds LA. 2009. Creative sentencing and environmental protection. *Journal of Environmental Law and Practice* 19: 105–137; Cliffe JD. 2014. Creative sentencing in environmental prosecutions, the Canadian experience: An overview. Paper prepared for the Canadian Institute of Resources Law Symposium on Environmental Education for Judges and Court Practitioners, Halifax, Nova Scotia, Canada, 21–22 February.

109. We consider changes should be made to give regulators the flexibility to choose between cost-recovery options, depending on the particular circumstances, and the relative weighting of the polluter pays principle and the benefits to the general public. It would be at the discretion of the regulator whether or not to use the cost-recovery options.

110. We propose changes to enable regulators to:

- recover all reasonable costs of permitted activity monitoring from the regulated party where the activity is governed by rules in NESs or in a regional plan, for example for permitted discharges or takes
- recover all reasonable costs associated with the investigation of unauthorised activities from the non-compliant regulated party where it becomes necessary to take enforcement action, such as through an abatement notice.

111. The rules and permitted activity performance standards of a combined plan should outline any intention to charge for monitoring requirements.

112. We consider that most district plan permitted activity rules are not suitable for cost recovery for permitted activity monitoring. This is because district plan rules deal with a very broad spectrum of low-risk permitted activities. It would not be appropriate to allow for cost-recoverable compliance checks on most of these activities.[424]

113. However, we think two district rule types may be appropriate for cost recovery because they deal with broader environmental issues: the rules governing historic heritage and indigenous biodiversity and habitat. Non-compliance with historic heritage rules can compromise protected historic buildings, structures and archaeological features that contribute to our shared history and social and cultural wellbeing. Indigenous biodiversity and habitat is a particularly important aspect of ecosystem health, and non-compliance with biodiversity rules might have wide-reaching implications for the environment. Cost recovery for these rule types should be enabled.

Improve the provision of information power

114. As noted earlier, section 22 of the RMA provides for enforcement officers to require the provision of certain information, and to require persons to divulge the details of any person who is authorising their activity (that is, the principal).

115. We consider this power should be amended so, in addition to information about principals, information about the person carrying out the allegedly contravening activity (that is, the agent) can also be required to be disclosed. This would enable regulators to identify the full range of parties involved in non-compliant events and make better judgements about which parties bear greatest responsibility for offences.

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[424] Many district plans, for example, make it a permitted activity to use a house for residential purposes, but it would be inappropriate to conduct a compliance inspection to verify this use.

Limitation periods

116. The legislative principles behind statutory limitation periods imposed on enforcement action generally involve balancing two public interests: prompt enforcement of legislative sanctions or disposal of civil claims; and ensuring someone who has committed a serious offence does not escape punishment because their actions remained undetected for a long time.[425]

117. The passage of time may make it harder for a person to adequately defend themselves, which may compromise their right to a fair hearing. However, there is a strong public interest in seeing unlawful or otherwise wrongful conduct addressed, regardless of when the conduct occurred. It is worth noting that RMA directive enforcement options (abatement notices and enforcement orders) are not subject to limitation periods.

118. There can also be practical difficulties for regulators needing to comply with the limitation periods, and this is particularly the case under the current RMA settings. As noted earlier, section 338(4) specifies that despite the Criminal Procedure Act, the limitation period regarding an offence against sections 338(1), (1A) or (1B) ends on the date six months after the contravention is known or should have become known. Ordinarily under section 25 of the Criminal Procedure Act, these offences would have a limitation period of five years after the date on which the offence was committed. The Resource Management Amendment Bill 2019 currently before the House proposes to extend the limitation period to 12 months.

119. The process of determining whether to pursue a prosecution or other enforcement action can take a long time. The current statutory limitation period gives local authorities only six months to complete the complex investigations process required. Untangling the interactions, relationships and contractual arrangements between potentially liable parties can be time consuming. For difficult cases, the current limitation period can result in councils not undertaking prosecutions in situations when they otherwise would.

120. There are also practical difficulties with limitation periods for infringement offences. Section 1 of the Summary Proceedings Act 1957 sets out when proceedings can be taken for infringement offences. Proceedings can only be taken 28 days after a reminder notice has been given, which can itself only occur 28 days after the original infringement notice. This has the effect, in practice, of reducing the limitation period for proceedings on infringement offences by at least two months. Factoring in a council's administrative, evidence gathering and enforcement processes, the time taken may extend past the six-month limitation period for the original offence, which can mean the option to prosecute for the original offence is lost.

121. Under a reformed RMA, we propose infringement offences and limitation periods for offences be reconsidered and set to reflect the legislative principles above and ease the practical difficulties faced by regulators.

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425 Legislative Design and Advisory Committee. 2018. *Legislation Guidelines*. Wellington: Legislative Design and Advisory Committee; chapter 27. Retrieved from www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/compliance-and-enforcement/chapter-27/ (16 June 2020).

Contravention of a consent condition

122. While contravention of a consent condition can give rise to the issue of an abatement notice, contravention of a resource consent condition *in itself* is not an offence against the RMA and cannot form the basis of an infringement fine or a prosecution charge.

123. Where activities are consented, but conditions are contravened, this can be construed as an offence but it can be difficult for the regulator to clearly identify the rules breached and confusing for the regulated party. In contrast, demonstrating a contravention of the consent condition may be quite straightforward. This situation could be easily addressed to allow greater clarity for consent holders and regulators. We consider a new offence of 'contravention of a condition of consent' should be created to allow either prosecution or the issue of an infringement notice.

A new offence of 'contravention of a condition of consent' should be created.

Abatement notices for contravening a consent notice or other covenant

124. As noted, consent notices are described in section 221 of the RMA and are, in effect, consent conditions imposed in relation to the subdivision of land. An application to cancel or alter a consent notice is a discretionary activity under the RMA.

125. Under section 221(4)(b) of the RMA, every consent notice is deemed to be a covenant running with the land to which it relates. However, as a deemed covenant, contravention of a consent notice is not an offence against the RMA and only civil law remedies are available. For example, the breach of a consent notice cannot give rise to directive enforcement action such as an abatement notice or application for an enforcement order. It is anomalous that an activity requiring a discretionary consent can be undertaken without authorisation and not be subject to any regulatory sanction.

126. Similarly, covenants governing a range of environmental effects can be imposed as conditions of consent. However, it is often the case that a breach of covenant is not a breach of the RMA so only civil law remedies are available.

127. We consider the provisions for abatement notices could be easily amended so that contravention of a consent notice, or any covenant imposed under section 108 of the RMA or its replacement, may provide grounds for an abatement notice.

New power to apply for a consent revocation order

128. Revocation of a regulated party's licence to operate is widely regarded as the ultimate penalty for a regulator to prevent further offences or harm.[426] However, under the existing regime, provisions are limited and ineffectual in removing an operator's right to undertake an

[426] Sparrow MK. 2000. *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*. Washington DC: The Brookings Institution; pp 37–40.

activity once it is approved through a consent.[427] This is troublesome because the consent process only considers the merits of the proposal and does not take adequate account of an operator's compliance history or attitude.[428]

129. We consider a new power should be established to allow a regulator to apply for a consent revocation order in response to serious or repeated non-compliance. This power should apply to all consents and activities.

A new power should be established to allow a regulator to apply for a consent revocation order in response to serious or repeated non-compliance.

Enforceable undertakings

130. We also consider provisions to allow regulators to accept enforceable undertakings should be added to the Natural and Built Environments Act. Provisions could be added comparable to the existing provisions in other regulatory regimes such as workplace health and safety, fair trading and anti-money laundering.

131. Enforceable undertakings allow an agreement to be made between the regulator and the regulated party for reparation and/or alternative actions following a breach or potential breach. They are similar to the diversion process (settling in the early stages of court) but can be used independently as a cheap and readily enforceable means of ensuring compliance. As the Christchurch City Council notes in its submission, "undertakings of this kind are voluntary and can reduce the time and cost associated with resolving enforcement outcomes…".

132. There would be many benefits from enabling enforceable undertakings as part of a reformed RMA. Some of the benefits would include:

- gaining an alternative approach to legal action where it may not be in the best interests of the public to prosecute
- increasing the flexibility for regulators to address non-compliance
- providing a more cost-effective regulatory response, as well as improving consistency with modern regulatory practice
- enabling outcomes that may not be achievable through court action, for example, promoting industry good practice, carrying out or funding state of the environment assessments, or environmental remediation projects.

We also consider provisions to allow regulators to accept enforceable undertakings should be added to the Natural and Built Environments Act.

133. Enforceable undertakings are generally used as a lower-level alternative to prosecution and are not intended to be used in cases of serious or chronic non-compliance, nor where a prosecution is in the best interests of the public.

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427 Sections 126 and 314 of the RMA provide limited circumstances where a resource consent can be revoked.

428 Brown MA. 2017. *Last Line of Defence*. Auckland: Environmental Defence Society; pp 51, 79.

Expected outcomes

134. We consider our proposals for reform of CME arrangements address the key issues in our terms of reference and align with the objectives and principles we adopted for our review. They provide for functions and processes that are efficient, effective and proportionate and ensure necessary powers are available. Better compliance, monitoring and enforcement of environmental law will ensure outcomes that are fair both for current and future generations.

Key recommendations

Key recommendations – Compliance, monitoring and enforcement	
1	System links should be established between compliance monitoring, state of the environment monitoring and monitoring progress towards outcomes.
2	New regional hubs should be established to undertake resource management compliance, monitoring and enforcement options.
3	The offence and penalties regime should be strengthened, including by: (i) increasing the maximum financial penalties (ii) deterring offending by extending the circumstances in which commercial gain may be taken into account in sentencing (iii) adjusting the maximum imprisonment term so most prosecutions may be heard as judge-alone trials (iv) prohibiting insurance for fines and infringement fees under the Natural and Built Environments Act (v) enabling creative sentencing options (vi) developing new Solicitor-General prosecution guidelines for environmental cases.
4	A number of new compliance, monitoring and enforcement measures should be introduced and existing measures improved, including by: (i) enabling regulators to recover costs associated with permitted activity and unauthorised activity monitoring (ii) amending the power to require disclosure of information about those carrying out the allegedly contravening activity (iii) creating a new offence for contravention of a condition of consent (iv) enabling abatement notices for the contravention of a consent notice, or any covenant imposed by condition of consent (v) establishing a new power to allow a regulator to apply for a consent revocation order in response to serious or repeated non-compliance (vi) providing for enforceable undertakings.

Chapter 14 Institutional roles and responsibilities

1. The administration and implementation of the RMA is primarily undertaken by the Ministry for the Environment, the Department of Conservation, the Environmental Protection Authority, local authorities, and the courts. A broad array of other public and private institutions also participate in the resource management system and influence the outcomes achieved. This chapter provides an overview of the main issues arising from current institutional arrangements and discusses our proposed changes to roles, responsibilities and working arrangements. We also discuss issues of capacity and capability.

Significant investment in building the capability and capacity of institutions will be required for successful implementation of the new system.

2. Overall, we have concluded that a future environmental management system should be based on streamlined and clarified roles and responsibilities and improved partnership and collaboration between central and local government and Māori. We recommend new statutory processes to enable this to happen. We also recommend a new institution be established (a National Māori Advisory Board) to reflect Māori interests in resource management. Capability and capacity are also key barriers to effective implementation of the current resource management system, and significant investment in building the capability and capacity of institutions will be required for successful implementation of the new system.

3. Many submitters made the point to us that institutional issues were at the root of failure to deliver on the promise of the RMA. We consider our proposals are what is needed to ensure a future system is successfully implemented.

Current institutions and their functions

4. Resource management functions can be grouped as follows:
    - strategic planning for environmental outcomes and sustainable development
    - protecting and promoting Māori interests
    - regulatory plan-making and consent processes
    - provision of economic instruments
    - funding of infrastructure and other public goods
    - establishing and allocating rights to use public resources
    - resolving disputes
    - review and appeal of decisions
    - regulatory compliance, monitoring and enforcement
    - overall system oversight.

5. These functions are undertaken by a variety of institutions at different levels. We describe significant national and local institutions below.

National institutions

6. National institutions include central government, pan-Māori groups, infrastructure providers, Crown research entities, specialist interest groups, non-governmental organisations and many more. Central government provides resource management legislation, policy and guidance for implementation by local authorities and other decision-makers. The main actor with the widest scope of policy responsibility is the Minister for the Environment, supported by the Ministry for the Environment.

Minister for the Environment

7. The Minister for the Environment maintains an active overview and monitoring role in the implementation of the RMA. The Minister has a wide range of responsibilities and powers under the Act including:

    - recommending the Governor-General issue national policy statements and national environmental standards and approving national planning standards
    - deciding whether a matter is of national significance
    - determining applications to use the streamlined planning process
    - recommending the approval of a new requiring authority or heritage protection authority
    - recommending the Governor-General issue water conservation orders
    - monitoring the effect and implementation of the RMA, including any regulations in force under it, national policy statements, national planning standards and water conservation orders
    - monitoring the relationship between the functions, powers and duties of central government and local government
    - deciding whether to use any of the ministerial powers of intervention
    - considering the use of economic instruments.

Ministry for the Environment

8. The Ministry for the Environment was established under the Environment Act 1986 along with the Parliamentary Commissioner for the Environment (PCE). It is the central agency responsible for delivering an effective regulatory system for planning and resource management in New Zealand. It administers the RMA and several other statutes, including the Climate Change Response Act 2002 and Environmental Reporting Act 2015.

9. The Ministry advises the Government on legislation, regulation, policies and issues affecting the environment. It also monitors the performance of the Environmental Protection Authority (EPA) and administers the Waste Minimisation Fund, the Community Environment Fund, the Freshwater Improvement Fund and the Environmental Legal Assistance Fund.

Minister of Conservation

10. The Minister of Conservation has responsibilities under the RMA and several other statutes, including the Conservation Act 1987. Under the RMA, the Minister is responsible for preparing the New Zealand Coastal Policy Statement (NZCPS) and recommending the Governor-General issue it. The purpose of the NZCPS is to state objectives and policies that achieve the purpose of the RMA in relation to the coastal environment of New Zealand. The Minister of Conservation is also responsible for approving regional coastal plans and monitoring the effect and implementation of the NZCPS and coastal permits for restricted coastal activities.

Department of Conservation

11. The Department of Conservation was established under the Conservation Act 1987 to manage New Zealand's conservation land and resources. Under that Act it has a role in advocating for the conservation of natural and historic resources, which is separate from its role of providing advice to the Minister of Conservation on conservation issues. The Department manages historic heritage, protects species through predator control programmes, implements restoration projects, carries out research and development, manages threats to places and species, and produces conservation strategies, policies and plans.

12. Under the RMA, the Department of Conservation administers the NZCPS and provides advice to the Minister of Conservation on whether to approve regional coastal plans. It is consulted by local authorities during the development of regional policy statements and plans and in relation to applications for consent that affect conservation issues. The Department also administers and has functions under other statutes, such as the Reserves Act 1977.

Environmental Protection Authority

13. The EPA was established under the Environmental Protection Authority Act 2011. It is a Crown entity with the objective of contributing to the efficient, effective and transparent management of New Zealand's environment and natural and physical resources, and to enable New Zealand to meet its international obligations. The EPA has a diverse range of responsibilities under several statutes and is supported by two statutory committees: the Māori Advisory Committee and Hazardous Substances and New Organisms Committee. The EPA's functions include:

    - administering applications for nationally significant proposals and water conservation orders under the RMA, including providing support for boards of inquiry responsible for making the decision or recommendation to Ministers
    - making decisions under the Hazardous Substances and New Organisms Act 1996
    - regulating certain activities under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
    - administering New Zealand's emissions trading scheme (see chapter 6)
    - enforcement and compliance functions (see chapter 13)
    - providing scientific advice on government environmental policy, legislation and regulation.

Parliamentary Commissioner for the Environment

14. The PCE was established under the Environment Act 1986. The Commissioner's primary role is to give independent advice to Parliament on environmental planning and management with the objective of maintaining and improving the quality of the environment. The Commissioner reports on investigations, makes submissions to select committees on bills, inquiries, petitions and policy proposals and writes commentaries on state of the environment reports under the Environmental Reporting Act 2015. The PCE's role in the system is discussed in more detail in chapter 12.

Other national institutions

15. Many other national institutions play an important role in the resource management system, including:

    - **central government agencies and Crown entities:** such as the Department of Internal Affairs, Ministry of Housing and Urban Development, Ministry of Transport, Ministry for Primary Industries, Ministry of Business, Innovation and Employment (with relevant responsibility to work with others on Building Act reform as it relates to climate change and natural hazards), Te Puni Kōkiri, Stats NZ (which operates in partnership with the Ministry for the Environment to produce national environmental reports), Land Information New Zealand, the Climate Change Commission, the Infrastructure Commission, the Ministry of Health, and the proposed new water services regulator – Taumata Arowai
    - **network utility operators/requiring authorities:** such as Kāinga Ora – Homes and Communities, NZTA, KiwiRail and Transpower, that distribute gas, petroleum, geothermal energy, telecommunications, electricity, water and wastewater, or construct or operate roads, railway lines and airports
    - **Crown research institutes:** such as AgResearch, Landcare Research, Geological and Nuclear Sciences (GNS) and the National Institute of Water and Atmospheric Research (NIWA)
    - **pan-Māori groups:** such as the Federation of Māori Authorities – Me Uru Kahikatea, New Zealand Māori Council and Iwi Leaders Forum
    - **statutory bodies:** with specific responsibilities (such as the Queen Elizabeth II National Trust and the New Zealand Fish and Game Council)
    - **non-governmental organisations:** representing the interests of the environment (such as Environmental Defence Society (EDS) and the Royal New Zealand Forest and Bird Protection Society)
    - **specialist interest groups:** including those representing resource users (such as Federated Farmers and the Property Council)
    - **universities and professional planning, legal and academic bodies:** such as the New Zealand Planning institute (NZPI), the Resource Management Law Association (RMLA) and law societies.

Local institutions

Local government

16. At the local level, local authorities have primary responsibility for implementing resource management policy, including through plan-making and consenting under the RMA.

17. There are 11 regional councils, 61 territorial authorities[429] (comprising 11 city councils and 50 district councils) and 6 unitary authorities.[430] Local authorities vary considerably in size, capability and financial capacity.

18. Council functions under the RMA are discussed in detail in chapter 8. Regional councils are primarily responsible for providing direction to territorial authorities on regionally significant resource management issues and the integration of those issues (through regional policy statements). They are also responsible for regulating air, freshwater and soil and activities within the coastal marine area (through regional plans). Territorial authorities are primarily responsible for the regulation of land use, subdivision and noise. Regional councils and territorial authorities share some functions, such as the responsibility to ensure their plans provide sufficient development capacity and management of natural hazards. Unitary authorities have both regional council and territorial authority functions.

19. Councils have functions under many other statutes that are part of the resource management system or interface with it. As discussed in chapter 4, these functions include planning, funding, delivering and managing infrastructure under the LGA and LTMA.

20. Councils are themselves made up of a myriad of institutions, including committees, joint committees (such as regional land transport committees under the LTMA), local boards, community boards and council-controlled organisations (CCOs).

21. The planning, delivery and management of infrastructure can occur directly through the local authority or through CCOs, such as Auckland Transport, Watercare, CityCare (Christchurch) and Wellington Water. These are established through the LGA or in some cases through separate legislation.[431] Not all councils choose to delegate responsibility to a separate entity. Regardless of local institutional arrangements their asset management functions mean they have shared responsibility for the development of natural and physical resources and have a role to play in strategic planning. Our expectation is that councils and their CCOs will align on strategic planning issues for their region and this could be achieved through their statement of intent.

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429 Not counting the Department of Internal Affairs, which is the territorial authority for offshore islands.

430 Including Chatham Islands Council, which is constituted under the Chatham Islands Council Act 1995 and is similar to a unitary authority.

431 The Local Government (Auckland Council) Act 2009.

Other local institutions

22. As discussed in chapter 3, Māori play a critical role in the resource management system. Relevant institutions include iwi authorities, post-settlement governance entities and mātāwaka groups, among others.

23. Other local institutions in the resource management system include:

    - network utility operators/requiring authorities, such as airports and irrigation companies
    - heritage protection authorities
    - regional public health authorities
    - non-governmental organisations.

The courts and other bodies with power to make recommendations

24. The Environment Court is New Zealand's primary environmental adjudicative body. It is a specialist court for plans, resource consents and environmental issues. Its role in the system is discussed in more detail later in this chapter. In addition to the courts, there are other bodies with powers of recommendation, including independent hearing panels and boards of inquiry.

Issues arising from existing institutional arrangements

25. The current resource management system is characterised by complex interactions between statutes and policies, and institutions with stewardship and implementation roles. The significant issues we have identified are:

    - there are numerous decision-makers and a lack of clarity about their roles and responsibilities
    - incentives are not necessarily aligned with environmental objectives
    - te ao Māori and obligations under Te Tiriti o Waitangi are inconsistently provided for
    - institutions have insufficient capacity and capability to fulfil the roles expected of them.

26. As we have already discussed many of these issues in earlier chapters, we provide a brief summary of the first three issues here, and further discussion of capacity and capability issues.

Numerous decision-makers and lack of clear roles and responsibilities

27. Commentators have described the institutional landscape for resource management in New Zealand as "extremely complex."[432] Areas where this complexity is evident include:

    - **region-wide planning:** planning for urban growth and major infrastructure across territorial authority boundaries has proved challenging. This was one driver for local government reform in Auckland, and has led some stakeholders to call for the creation of regional unitary authorities[433]
    - **compliance and enforcement:** compliance and enforcement functions also suffer from overlapping roles and responsibilities. (See detailed discussion of CME issues in chapter 13.)

28. Many new institutions have also been established in recent years, or are now under development, including the Ministry of Housing and Urban Development, Kāinga Ora Homes and Communities, the Climate Change Commission, the New Zealand Infrastructure Commission, new institutions as a result of Tiriti historical settlement acts, and proposed institutional arrangements for three waters regulation. Special purpose organisations have the advantage of creating visible, focused intentions and resourcing for emergent or chronic problems. The disadvantage is fragmentation of decision-making and loss of system connections. The cumulative effect of current arrangements on environmental outcomes and other institutional arrangements is not clear at present.

Incentives not necessarily well-aligned with environmental objectives

29. As discussed earlier in this report, although the RMA contains many mechanisms and processes to manage environmental issues, both central and local government have failed to act in a sufficiently responsive and effective manner. Opportunities have also not been taken to form effective collaborations between and within different levels of government.

Both central and local government have failed to act in a sufficiently responsive and effective manner.

30. One reason given for the lack of central government direction is a lack of political appetite for, or ideological opposition to, intervention in local matters.[434] Some have also argued that

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432 For example, see EDS. 2018. *Reform of the Resource Management System: The Next Generation: Synthesis Report*. Auckland: Environmental Defence Society; p 160.

433 Infrastructure New Zealand. 2015. *Integrated Planning, Governance and Delivery: A Proposal for Local Government and Planning Law Reform in New Zealand*. Auckland: Infrastructure New Zealand.

434 Connor R, Dovers S. 2004. *Institutional Change for Sustainable Development*. Cheltenham: Edward Elgar; p 109. See also Schofield R. 2007. *Alternative Perspectives: The Future for Planning in New Zealand – A Discussion for the Profession*. Auckland: New Zealand Planning Institute; p 7.

councils do not face the right incentives to deliver a well-functioning regulatory system. For example, "the duelling economic and environmental mandates of councils" have been cited by some as the reason for weak environmental regulation. Others point to more specific conflicts of interest and inappropriate political intervention in enforcement decision-making.[435] The Productivity Commission has argued that shortfalls in provision of capacity for urban development are the product of a 'democratic deficit' in local government.[436] Local democratic processes are dominated by incumbent property owners and insufficient attention is paid to the interests of prospective residents and those with fewer means to have their voices heard. This results in opposition to:

- **urban intensification:** so as to avoid possible or perceived amenity losses and neighbourhood change
- **urban expansion:** so as to limit increases in local rates and debt levels that would be required to fund growth-supporting infrastructure.

Te ao Māori world view and Te Tiriti are inconsistently provided for

31. As discussed in chapter 3, a range of institutional problems have been identified regarding Māori participation in the resource management system including:
    - existing ways to partner with iwi/Māori have not been well used
    - there is a lack of capability and capacity for consulting with iwi, adhering to cultural protocols, and allowing enough time for genuine consultation.

Insufficient capacity, capability and funding

32. The RMA is one of New Zealand's most complex pieces of legislation to administer. The frameworks contained in its more than 750 pages attempt to manage an ever-increasing array of complicated environmental issues, as well as competing needs and interests. Since its enactment in 1991, around 20 substantive amendments[437] have been made to the Act. These have fragmented it and compounded its complexity.
33. Organisations responsible for the implementation of the Act require skilled and experienced staff to carry out their duties and responsibilities effectively and efficiently. The issue of insufficient capacity and capability is evident across the current resource management system.

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435 McNeil J. 2008. The public value of regional government: How New Zealand's regional councils manage the environment. PhD thesis, Massey University; pp 233–234; Environmental Defence Society. 2016. *Evaluating the Environmental Outcomes of the RMA: A Report by the Environmental Defence Society*. Auckland: Environmental Defence Society.

436 New Zealand Productivity Commission. 2015. *Using Land for Housing: Final Report*. Wellington: New Zealand Productivity Commission.

437 Not counting consequential amendments that arose from changes to other legislation.

Central government

34. In its submission to our issues and options paper, Infrastructure New Zealand expressed the view that central government is not equipped to represent all national interests in planning decisions or provide effective monitoring and oversight of the whole system. Similar sentiments were stated or implied by various other submitters and have been presented in various reports on the overall effectiveness of the RMA and its implementation.[438]

The Ministry's resources are still relatively small for the range of RMA work it has.

35. Lack of central government capability and capacity appears to be derived from a mix of a lack of understanding of the RMA's complexity and the issues it manages, and substantial under-resourcing of key agencies such as the Ministry for the Environment and Department of Conservation. The under-resourcing has existed since the RMA began, to the extent those departments have not been able to perform their functions to the level required. For example, in a 2004 study Neil Ericksen and colleagues[439] found:

    - in the early 1990s the cost of advice from the Ministry for the Environment to the government was the lowest of central government agencies in comparative analysis, at around 30 per cent of the cost of advice from the Treasury and Ministry of Commerce
    - between 1990 and 2000, the number of staff in the Ministry's Resource Management Directorate[440] fell from 40 to 25, while the non-staff budget during the crucial years of 1991 to 1996 (the years national direction, guidance and training should have been provided to local authorities) was less than $1.9 million per year
    - the Department of Conservation was downsized in the early years of the RMA, which saw its 1991 budget of $7.5 million for RMA activities halving and staff numbers dropping by 20 per cent.

36. The Ministry's resources are still relatively small for the range of RMA work it has. As at 2020 approximately 65[441] full-time staff are working on RMA-related activities (policy and operational) and the annual budget has increased from $19 million to $25 million over the last

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438 For example: Environmental Defence Society. 2016. *Evaluating the environmental outcomes of the RMA: A report by the Environmental Defence Society*. Wellington: Environmental Defence Society; New Zealand Productivity Commission. 2017. *Better Urban Planning: Final Report*. Wellington: New Zealand Productivity Commission; pp 421–422.

439 Ericksen NJ, Berke PR, Dixon JE. 2017. *Plan-making for Sustainability: The New Zealand Experience*. London: Taylor and Francis; pp 50–56. See also Miller C. 2015. *Culture and Capability within the New Zealand Planning System: A Report for the Productivity Commission*. Wellington: New Zealand Productivity Commission.

440 The Directorate was responsible for Ministry for the Environment's RMA policy and implementation functions during this period.

441 This figure does not include short-term contractors or staff from other parts of the Ministry for the Environment who may work temporarily on aspects of new national direction to complement other environmental programmes.

three years.[442] However, when matched against the resources required to carry out its functions and workload, the level of resourcing is still light. For example, it took about 24[443] staff (more than a third of the Ministry's RMA staffing resources) to work on national direction for freshwater management and the National Policy Statement on Urban Development Capacity alone.

37. The Office of the PCE has always been a small agency, which has limited its work programme and ability to provide oversight. Its staffing levels rose from 13 in 1998 to approximately 20 in 2020. The annual budget rose from $1.45 million to $3.7 million over the same period.

Councils vary considerably in size, capability and financial capacity.

Local authorities

38. Many submitters on our issues and options paper identified that local authorities have both capability and capacity challenges in implementing the RMA.[444] They noted these challenges were most evident in relation to complex planning and consenting issues, and undertaking monitoring and enforcement functions.

39. Councils vary considerably in size, capability and financial capacity. For example, in the 2018/19 financial year the Chatham Islands Council had a total annual revenue of around $8 million and 14 FTEs[445] while Auckland Council had a total annual revenue of around $4.9 billion[446] and nearly 10,000 FTEs. The numbers and ratio of RMA planning, consenting and compliance staff are not evenly spread among local authorities even though the functions and responsibilities of the local authorities for whom they work are often very similar. The sample of local authorities in table 14.1 demonstrates this variability in available resources.

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442 Ministry for the Environment. 2019. *2018/19 Annual Report Pūrongo ā-Tau*. Wellington: Ministry for the Environment. This range includes one-off funding for a number of initiatives not previously funded and a lift in staff numbers and capability over previous years.

443 Plus staff from other departments and consultants called in to assist.

444 For example, Fletcher Building, Federated Farmers, Wellington City Council and Local Government New Zealand.

445 Chatham Islands Council. 2019. *2018/19 Annual Report*. Waitangi: Chatham Islands Council.

446 Auckland Council. 2019. *2018/19 Annual Report Summary*. Auckland: Auckland Council.

Table 14.1: RMA staffing levels at a sample of local authorities

Local authority	RMA planning staff (FTE)	RMA consenting staff (FTE)	RMA monitoring and enforcement staff (FTE)	Total (FTE)
Auckland Council	27.6	230.0	165.0	422.0
Greater Wellington Regional Council	22.5	15.0	12.5	50.0
West Coast Regional Council	3.0	2.7	4.5	10.2
Christchurch City Council	16.3	54.0	14.5	84.8
New Plymouth District Council	6.0	12.0	2.0	20.0
Ashburton District Council	1.9	2.0	0.6	4.5
Opotiki District Council	1.0	1.5	0.5	3.0

Source: NMS Data 2018/19

40. This variability in resourcing is not new. The 2004 research by Ericksen and colleagues[447] found over a quarter of local authorities employed less than one FTE to work on RMA plans, while another quarter employed between one and two FTEs. In some instances individual local authorities have no dedicated RMA staff and must rely on consultants or other local authorities to carry out work on their behalf.

Local authorities frequently struggle to fund, recruit and retain skilled, experienced staff.

41. The variability in the number of RMA staff highlights an important issue. A complex law must be administered by a few local authority staff who may not be fully expert in every topic they encounter.[448] Staff can also easily be swamped by an unexpectedly large volume of consent applications, or a single large and complex application. These problems are exacerbated when local authorities do not have access to experienced staff.

42. Local authorities frequently struggle to fund, recruit and retain skilled, experienced staff. This is especially true of smaller, typically rural-based local authorities, which account for over half of the New Zealand local government sector.[449] Over a number of years some local authorities experienced a net loss of resource management staff. As the OECD noted in 2017:[450]

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447 Ericksen NJ, Berke PR, Dixon JE. 2017. *Plan-making for Sustainability: The New Zealand Experience*. London: Taylor and Francis; pp 50–56.

448 One or more consent applications could cover subject matter as diverse as law, engineering, ecology, surveying, architecture, economics, chemistry, acoustics, health science, traffic management, geography and geology, and climate change science.

449 At 30 June 2019 over half of New Zealand's territorial authorities are rural-based and have a population of less than 40,000, while three regional councils have populations under 50,000: Stats NZ. 2020. *Subnational Population Estimates*. Wellington: Stats NZ. Retrieved from https://www.stats.govt.nz/information-releases/subnational-population-estimates-at-30-june-2019-provisional (16 June 2020)

450 OECD. 2017. *OECD Environmental Performance Reviews: New Zealand 2017*. Paris: OECD Publishing; pp 91–92.

> The issue of resource capacity of local authorities (particularly smaller councils) is a persistent challenge. Environment-related staff numbers have recently been decreasing in all three sub-national authority types: between 2011 and 2013 alone, they dropped by between one-quarter and one-third. In 2012/13, only 20 of 78 local authorities had dedicated environmental inspectors, while 10 councils had dedicated general enforcement officers who prepared sanction decisions. One unitary authority and nine territorial authorities had no compliance monitoring or enforcement staff at all … 80% of all district and city councils believe they lack sufficient human resources to exercise their duties.

43. Local authorities may resort to using consultants or working with other local authorities to fill capacity and capability gaps. However, this approach can be costly,[451] particularly if consultants have to travel from other regions.

44. Providing additional funding for RMA functions is difficult for local authorities. Small local authorities lack the rating base (and therefore the revenue) to pay for many specialised staff. At the same time, larger, fast-growing local authorities can struggle to stay within budgetary debt[452] and prudential[453] limits while paying for the large capital projects needed to service urban growth. We expect financial pressures to cut local authority costs as a way of keeping rates low in the aftermath of the COVID-19 pandemic will create further challenges.

Māori groups and organisations

45. In chapter 3 we described a lack of funding and lack of people with expertise in resource management and council processes as a major issue for local authorities and Māori impacting on Māori participation under the RMA.

46. Resourcing is particularly problematic for smaller Māori groups and organisations, but concerns about insufficient capacity and capability are much broader. Puketāpapa Local Board, Patuharakeke Te Iwi Trust Board Inc, Te Whakakitenga o Waikato Inc and Te Rūnanga o Ngāi Tahu all raised concerns about mana whenua capacity to engage with the RMA in their submissions on our issues and options paper.

47. Although Māori groups want to be actively involved in RMA planning, processes and decision-making, most groups are largely self-funded.[454] This limits their ability to fill the capacity and capability gaps they need to address if they are to play a greater role.

Although Māori groups want to be actively involved in RMA planning, processes and decision-making, most groups are largely self-funded.

451 For example, see the commentary in Whangarei District Council. 2019. *Annual Report 2018–19*. Whangarei: Whangarei District Council; p 82.

452 Budgetary debt is set through debt covenants with the Local Government Funding Agency, which specify debt is not to exceed 250 per cent of annual revenue.

453 Prudential ratios are debt-servicing ratios set through the Local Government (Financial Reporting and Prudence) Regulations 2014.

454 Some local authorities may contribute towards basic costs such as meeting fees and mileage for Māori to attend meetings; such contributions fall well short of covering the full participation costs.

48. The RMA provides no specific funding or revenue streams for Māori groups and organisations. In a number of instances Māori groups are providing their services or input free of charge. Where funding for Māori participation does exist, it tends to come from a mix of resourcing from within the group or organisation itself, koha and invoicing consent applicants for consultation or cultural impact assessments.

49. Some Māori groups and organisations do receive monetary and in-kind contributions from local authorities. Ministry for the Environment statistics for 2019 show some budgetary support is given by 53 per cent of local authorities for iwi and hapū participation in the consenting process and by 41 per cent for Māori participation in planning processes.[455]

What is really at the heart of institutional issues across the resource management system?

50. The Productivity Commission has recently published the report *Local Government Insights* (2020), an aggregation of five of its recent inquiries into local government.[456] This report provides a useful insight into the complexities of local government and its relationships with central government. Its main points are paraphrased here for convenience.

Common symptoms of poor local government performance

- lack of affordable housing (the Commission notes that the resource management system is only partly responsible for the dynamics of housing)
- environmental degradation
- risk to human health (this is focused on drinking water standards)

Causal factors

- problems with the major pieces of legislation guiding local authorities' planning decisions, in particular the RMA
- a lack of direction and guidance from central government
- weak incentives for local authorities to meet and enforce minimum environmental and health standards
- wide variation in practices and outcomes across local authorities

"What's really at the heart of it"

- poor relationship between central and local government
- varied and often low capability

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455 Ministry for the Environment. 2020. *Trends in Resource Management Act Implementation: National Monitoring System 2014/15 to 2018/19*. Wellington: Ministry for the Environment.

456 New Zealand Productivity Commission. 2020. *Local Government Insights*. Wellington: New Zealand Productivity Commission. The previous reports were *Housing Affordability* (2012), *Towards Better Local Regulation* (2013), *Using Land for Housing* (2015), *Better Urban Planning* (2017) and *Local Government Funding and Financing* (2019).

- lack of scale
- local authorities struggle to balance competing interests
- a democratic deficit at the local level

Challenges for local government

- actively promoting Māori interests
- protecting the natural environment
- adapting to climate change
- tackling housing affordability
- lifting the performance of essential infrastructure.

We agree with the Productivity Commission's call for improved working relationships between central and local government and have made this a focus of our proposals for institutional change.

51. The report concludes in relation to better collaboration between central and local government

> Getting all this right will require a systems approach. This means that central and local government need to understand how they can work together better. They need to agree on their respective roles and responsibilities and build a mutual understanding of how to deliver the required changes. All tiers of government will need to work much more effectively together, and with the private and community-based sectors, to achieve the desired outcomes.[457]

52. We agree with the Productivity Commission's call for improved working relationships between central and local government and have made this a focus of our proposals for institutional change.

Discussion

Principles for improving the allocation of roles and responsibilities

53. Large scale reform of institutions is beyond the scope of this review. Rather, our focus has been on ensuring roles in the system are allocated in ways that ensure incentives and capability to deliver the desired outcomes. Our consideration of institutional issues has been informed by the work of the Productivity Commission, submissions on our issues and options paper, and the policy framework we adopted for the review.

54. The important considerations were:

- the outcomes to be achieved (including the purpose and principles discussed in chapter 2 and the need to reduce complexity in the system)

457 New Zealand Productivity Commission. 2020. *Local Government Insights*. Wellington: New Zealand Productivity Commission; p21.

- the institutions needed to deliver these (ensuring roles do not cause conflicting organisational incentives)
- the need to provide an effective role for Māori to participate in the system (see chapter 3)
- what level in the system is appropriate: national, regional or local (considering the scale and complexity of the issue and who is affected)
- the balance between nationally consistent direction and the ability to devise local solutions
- the need to build capacity and capability to deliver
- the need for accountability (direct accountability to the public is generally appropriate when decisions involve determining public values)
- the need for independence (independence from political decision-making is needed to provide checks and balances for some decisions, and to provide technical input and evidence)
- the nature and extent of public participation required (to ensure decision-makers are well informed about impacts and the costs and benefits to the system).

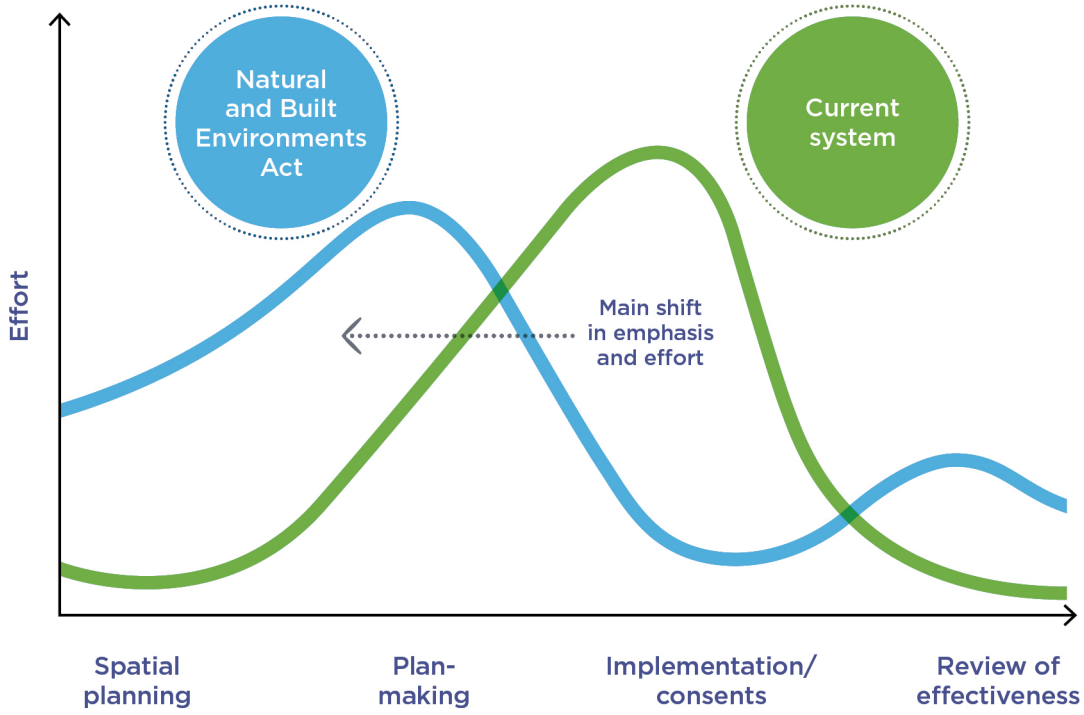
Proposals for improving institutional arrangements

55. Our proposals for changes to institutional arrangements result from consideration of the issues discussed in previous chapters. This section draws these proposals together and considers their implications for capability and capacity. We also discuss the role of the Environment Court in more detail.

Increasing the strategic focus of the system

56. Taken overall, our proposals for reform lead to a number of big shifts in the way the resource management system will operate. When compared with the current system, our proposals:
    - have a greater focus on achieving positive outcomes for the natural and built environments, instead of concentrating on avoiding, remedying or mitigating adverse effects
    - place a greater emphasis on collaborative planning and more strategic, integrated plans to resolve environmental issues and disputes
    - place less reliance on consent processes and conditions to resolve environmental disputes and issues
    - see greater recognition of Te Tiriti and provide a statutory role for Māori in preparing and making policy and plans (at both national and local levels)
    - increase the focus on monitoring and reporting to track progress towards outcomes and improve decision-making accountability and responsiveness.
57. Figure 14.1 illustrates how these shifts will collectively change the focus and effort in the new system we propose.

Figure 14.1: Change in focus and effort under the Natural and Built Environments Act



58. Increasing the focus of the system on planning as opposed to consenting will also transfer costs to the former. This will see taxpayers and ratepayers carry more of the overall system costs and private individuals (that is, consent applicants) carry less. This may have the positive effects of incentivising local authorities to improve the quality of their plans (being less able to rely on resource consents to fix loose drafting) and reducing costs for resource consent applicants at a time when the economy is facing significant financial challenges. If local authorities wish to keep costs down, this system will also require them to work effectively and efficiently together to take advantage of the savings a combined plan development process can offer (see chapter 8).

A focus on partnerships between central and local government and mana whenua

59. Under our proposals, local authorities would continue to be the main decision-makers in the new resource management system. However there would be greater requirements for partnerships between central and local government and mana whenua in the delivery of planning functions. These partnerships are intended to foster strong collaborative relationships, improve coordination and alignment between decision-makers and help address capability and capacity issues.

60. An increased emphasis on partnerships is consistent with submissions on our issues and options paper that sought improved collaboration and coordination between existing institutions.

61. New joint decision-making bodies would require collective decision-making at the regional level. These bodies would include:

    - joint governing bodies for developing and approving regional spatial strategies under a new Strategic Planning Act
    - joint committees for developing and approving combined plans
    - regional hubs for resource management CME functions. These would be funded by, but would be independent from and structurally separated from local authorities.

62. Central government would have a more active role in the system through provision of mandatory national direction and participation in regional spatial planning. The development of regional spatial strategies and, to a lesser extent, the development of national direction will involve many central government agencies. The spatial planning process will provide a mechanism for improving coordination and alignment between agencies and relevant Crown entities, such as NZTA and the Infrastructure Commission.

Local authorities would continue to be the main decision-makers in the new resource management system. However there would be greater requirements for partnerships between central and local government and mana whenua in the delivery of planning functions. These partnerships are intended to foster strong collaborative relationships, improve coordination and alignment between decision-makers and help address capability and capacity issues.

63. As discussed in chapter 3, the Crown–Māori partnership is the only area of the resource management system where we recommend a new institution – a National Māori Advisory Board. The Board would be responsible for monitoring Tiriti performance from a Māori perspective and other functions outlined in the table below. In chapter 3, we also recommend:

    - a more effective strategic role for Māori in the system
    - an integrated partnership process for mana whenua and local authorities.

Implications of proposals for those responsible for implementation

64. This section discusses the implications of our proposals for the capacity and capacity of those with responsibilities for implementation of a future system.

Ministry for the Environment

65. Most of the changes proposed in this report that will have an impact on the capability, capacity and funding requirements for the Ministry for the Environment are extensions to existing roles. Only a few changes are entirely new. The principal changes to the Ministry for the Environment's roles are that it:

- must prepare and review national direction on a range of mandatory matters and support a board of inquiry process
- has a more prescriptive role monitoring and reporting on the effect of national direction
- has a new role participating in the preparation of regional spatial strategies along with other government agencies, local government and Māori groups
- has a new task auditing draft combined plans
- advises the Minister whether a proposal of national significance should be referred to the Environment Court (a function that would be transferred from the EPA)
- has a new role in developing economic instruments
- increases its national environmental monitoring and reporting role, including by establishing a comprehensive, nationally coordinated monitoring system.

The expanded roles will require the Ministry to find additional funding and staff.

66. In addition to the roles outlined above, the Ministry will have a crucial role in supporting local authorities, Māori groups and organisations, and other key participants to transition to the new resource management system under the Natural and Built Environments Act. Support could take the form of guidance, training, financial support and facilitation. (Transitional arrangements are discussed in chapter 16.)
67. The expanded roles will require the Ministry to find additional funding and staff. Additional resourcing will be needed in the areas identified above.

Department of Conservation

68. The principal changes to the role of the Department of Conservation under our proposals for the Natural and Built Environments Act are that it would:
    - incorporate environmental targets and limits into the NZCPS and have greater requirements to monitor the effectiveness of the NZCPS
    - participate in joint committees for combined plans and in regional spatial strategy development.
69. We consider the resourcing requirements for the Department under a reformed resource management system will be similar to or only slightly greater than the current ones. The Department already prepares a relatively directive NZCPS, has a role in preparing and approving regional coastal plans, and is consulted on national direction.
70. The additional work involved in participating in regional spatial strategy development will be offset by a reduction in the total number of plans and resource consents the Department will need to engage with. Further, the resource needed to participate in the development of spatial strategies will be spread because we envisage the preparation of all the spatial strategies will occur in a prioritised sequence rather than concurrently.

Environmental Protection Authority

71. Under the reformed resource management system, the role of the EPA would continue to have most of its current functions and an additional role supporting and advising local authorities in compliance, monitoring and enforcement through our proposed regional hubs.

72. Under our proposals the EPA would no longer have functions associated with proposals of national significance. The Ministry for the Environment would provide the secretariat support for such proposals where the relevant local authority does not have sufficient capacity.

73. Although the level of staffing for the EPA may be similar and the change in staff roles will make the workload more predictable,[458] resources may need to be transferred to support its additional monitoring and enforcement role.

The EPA would no longer have functions associated with proposals of national significance.

Parliamentary Commissioner for the Environment

74. Under the Natural and Built Environments Act the PCE will have an expanded role. As proposed in chapter 12, the PCE's role will expand by:

    - having a more formalised role in system oversight
    - auditing and reporting on the effectiveness of regional spatial strategies against system outcomes
    - auditing and reporting on the effectiveness of national direction and economic instruments.

A significant expansion of the PCE's resourcing will be essential to provide the additional capacity and capability required.

75. This expanded role will extend beyond the current capacity of the PCE to manage within existing staffing levels. A significant expansion of the PCE's resourcing will be essential to provide the additional capacity and capability required.

Local authorities

Resource management functions, powers and responsibilities

76. Local authorities will continue to play a central role under the Natural and Built Environments Act but the focus of their activities will shift toward strategic and collaborative planning processes.

77. Local authorities will need to reallocate or dedicate staff and budget resources to match their changed roles under a reformed resource management system. However, this may not involve additional costs in every circumstance. Some RMA policy statements and plans are

[458] The EPA has told us that the workload for administering the proposals of national significance can be unpredictable.

due for review regardless of any legislative changes. Preparing combined plans should ultimately produce savings that help offset other implementation costs.

78. Table 14.2 summarises the principal changes to local authority capacity, capability and funding arising from the proposals in this report.

Table 14.2: Changes to local authority roles and factors mitigating impacts on funding and capacity

Changes requiring an increase in capacity, capability and funding	Features, mitigations or opportunities that will reduce local authority cost, capability and capacity issues
Preparing spatial strategies, including the use of joint committees Upskilling participants and decision-makers involved in preparing and administering spatial strategies	Plan preparation costs and resources can be shared among councils in a region
Preparing combined plans, including the use of IHPs	The total number of plans in a region will be reduced. Over time, greater efficiency and reduced costs could be expected Unitary authorities are already moving to a combined plan approach and some regional councils have been progressively combining regional plans[459]
Processing consents	Savings from having fewer resource consents to process (assuming the full cost of processing applications is not recovered) Savings from fewer resource consent appeals and use of alternative dispute resolution processes
Supporting the Environment Court with secretariat functions in the hearing and determination of proposals of national significance	Local authorities could use the same cost-recovery mechanisms for this role as the EPA currently uses
Stronger duties to monitor, report on, ensure compliance with and enforce the reformed system, including: • monitoring progress against spatial strategies • engaging with Māori groups and organisations on the incorporation of Māori perspectives and mātauranga Māori into monitoring frameworks	Compliance, monitoring and enforcement resources would be shared as part of new regional CME hubs A new ability to charge for the monitoring of permitted activities and investigation of unauthorised activities Clearer direction on what to monitor and how, provided through improved national direction from central government

459 For example, the Auckland Unitary Plan, the Tairāwhiti Resource Management Plan (Gisborne District Council) and the Proposed Marlborough Environment Plan.

79. Although the costs of the changes to local authority roles will be offset to some degree, we acknowledge there will be capability and capacity issues to manage. Wellington City Council, in its submission on our issues and options paper, noted smaller local authorities may struggle with additional functions such as spatial planning, meaning central government support through guidance, additional training and other methods may be required. However this would be offset in part by clearer national direction and by sharing the cost of regional hubs and combined plans.

80. As occurred in 1991, we anticipate the greatest draw on local authority resourcing will occur during the initial decade after the proposed legislation is enacted. It will be during this period that local authorities will be preparing spatial strategies and combined plans, establishing new monitoring arrangements and starting to implement requirements of the new set of national direction.

As occurred in 1991, we anticipate the greatest draw on local authority resourcing will occur during the initial decade after the proposed legislation is enacted.

Climate change responsibilities

81. In chapter 6 we recommend giving local authorities stronger climate change mitigation and adaptation responsibilities as part of the wider resource management system. These responsibilities include developing climate risk assessments and adaptation plans, and funding adaptation approaches and risk reduction measures (such as managed retreat).

82. Most local authorities do not currently have staff with the specialist knowledge to develop and implement climate change risk assessments, planning and works. Many smaller local authorities may never have such staff because of their limited resources. Central government will need to fill this capacity and capability gap by working with local authorities.

Māori groups and organisations

83. As discussed in chapter 3, we propose an increased role for Māori groups and organisations. Submissions from Māori on our issues and options paper indicated they sought a greater role in the development of policy and plans, as opposed to resource consent processes. Consistent with those views we propose roles for Māori organisations and groups in:

    - participating in the preparation of national direction
    - working with central and local government to prepare regional spatial strategies
    - being part of the preparation and decision-making processes to develop combined plans
    - participating in the development and implementation of integrated partnership processes with local authorities.

84. We consider that our proposals for the Natural and Built Environments Act will impose capacity, capability and funding demands on Māori groups and organisations that, if not attended to, would be unsustainable. This funding gap will need to be addressed by central and local government.

Our proposals for the Natural and Built Environments Act will impose capacity, capability and funding demands on Māori groups and organisations that, if not attended to, would be unsustainable. This funding gap will need to be addressed by central and local government.

85. Some submitters on our issues and options paper favoured giving Māori resources and additional funding to support their participation under the Natural and Built Environments Act. We set out funding options in chapter 3. That chapter also outlines our proposals to establish a National Māori Advisory Board to monitor both central and local government performance in meeting the obligations to give effect to the principles of Te Tiriti. The National Māori Advisory Board would be central government funded but draw its membership from various Māori groups and organisations. Support may need to be provided to ensure board members are properly equipped for their role.

Resource consent applicants

86. Ministry for the Environment data[460] shows that 30,000 to 40,000 resource consent applications are processed by local authorities (and some central government agencies) every year. Many consent applications are for comparatively minor projects and come from people with limited resources. The complexity of the RMA means that consultants, lawyers or other parties often lodge consent applications on behalf of applicants although some private individuals have the skills to do this themselves.

87. Our proposals in chapter 9 should help reduce costs for resource consent applicants. However, making changes to the resource management system is likely to result in a period of uncertainty until applicants and their consultants become familiar with the new legislative concepts and requirements. The Ministry for the Environment, in partnership with local authorities and professional organisations, will need to provide information, guidance and training to applicants and consultants to help them understand new requirements and processes.

[460] Ministry for the Environment National Monitoring System.

The role of the Environment Court and higher courts in a future system

88. Given the central importance of the Environment Court in the resource management system we now discuss its current and proposed roles in more detail and include some recommendations to improve access to justice.

Constitution and complement of the Environment Court

89. The Environment Court is a specialist court of record established under section 247 of the RMA. It is the primary environmental adjudicative body in New Zealand and provides independent decision-making by Environment Judges and commissioners.

The Environment Court is a specialist court of record established under section 247 of the RMA. It is the primary environmental adjudicative body in New Zealand and provides independent decision-making by Environment Judges and commissioners.

90. Although the Environment Court was not established as such until 1996, it continued the role formerly undertaken by the Planning Tribunal under previous legislation and has continued to build a substantial body of knowledge and expertise in environmental issues. There are currently nine permanent Environment Judges (including the Principal Environment Judge), 11 permanent commissioners and 3 deputy commissioners. As well, 6 alternate Environment Judges are drawn from the District Court but are rarely used in the Environment Court due to pressures of work in the District Court. Four alternate Environment Judges are drawn from the Māori Land Court and sit regularly in the Environment Court particularly in complex cases involving Māori cultural issues and tikanga.

The current jurisdiction of the Court

91. The principal functions of the Environment Court at present are:

- appeals from decision by consent authorities on proposed plans, policy statements and resource consent applications
- appeals from decisions of requiring authorities on notices of requirement for designation
- directly referred resource consent applications or notices of requirement
- proposals of national significance directed to the Court
- applications for enforcement orders and appeals on abatement notices (prosecutions under the RMA are heard in the District Court but must be heard by an Environment Judge)
- applications for declarations
- objections to the taking of land and other determinations under the Public Works Act 1981
- Land Valuation Tribunal proceedings
- miscellaneous applications.

Court processes

92. At times, concerns have been expressed about Environment Court processes including issues about cost, delay and formality. If there had been justification for these comments in the past, we are satisfied that the Environment Court is currently operating efficiently and effectively and has been for a number of years. The Court clearance rate is 93 per cent, which means that almost all appeals are disposed of within a calendar year. Factors that have contributed to the high resolution rate are proactive case management, effective mediation, streamlined hearing techniques and the use of modern technology.

93. The RMA contains extensive provisions for case management conferences and alternative dispute resolution. The latter have been particularly effective. The Court estimates that only about 5 per cent of cases lodged with it proceed to a formal hearing. The remainder are resolved by consent through mediation, settlement between the parties or are withdrawn.

The future role of the Environment Court

94. Given the experience, expertise, efficiency and independence of the Environment Court we are firmly of the view that it is a valuable institution and that its role in the resource management system should be continued and indeed expanded. This view was shared by many (but not all) submitters on our issues and options paper. For example, Trustpower submitted that it:

> supports retaining the Environment Court as a specialist expert that can determine environmental disputes. This includes providing for consideration of merit-based appeals. These are important for environment and planning issues as lower-order decision-makers can make errors about substantive matters of fact and technical elements.

95. We have discussed elsewhere in this report the future roles we see for the Environment Court and summarise these briefly here:

    - a sitting or retired Environment Judge should chair boards of inquiry on proposed national direction
    - a sitting Environment Judge should chair independent hearing panels considering combined plans
    - the Environment Court should continue to exercise all its current functions
    - the Environment Court should hear all applications for proposals of national significance
    - the Environment Court should continue to have a role in relation to the taking of land for designations, and as discussed in chapter 6, consideration should be given to a similar role under separate legislation on managed retreat.

Given the experience, expertise, efficiency and independence of the Environment Court we are firmly of the view that it is a valuable institution and that its role in the resource management system should be continued and indeed expanded.

96. Although not strictly within our terms of reference, we would recommend giving consideration to whether the Environment Court should take over jurisdiction in other matters currently considered by the District Court that could take advantage of the specialist jurisdiction of the Environment Court. In particular, it may be that the Environment Court

could be given a role in enforcement proceedings under the Building Act 2004 given the close relationship between matters arising under that legislation and those in the RMA.

97. The expanded role of the Environment Court will result in a greater workload, particularly while new legislation and processes bed in. The new roles we propose for the Environment Court in independent hearing panels for combined plans will require further resource but this should be spread over time as combined plans will be sequenced according to priority. Nevertheless the successful implementation of our reform proposals will depend on the provision of additional judges and commissioners as well as further funding for registry staff.

Access to justice

98. The judges of the Environment Court are conscious of the need to ensure access to justice and to enable participation by affected parties in the processes of the Court. The RMA currently provides in section 269 that the Court may regulate its proceedings in such manner as it thinks fit. The Court is required by current legislation to regulate its proceedings in a way that best promotes timely and cost-effective resolution. Proceedings in the Court may be conducted without procedural formality where this is consistent with fairness and efficiency and the Court is obliged to recognise tikanga Māori where appropriate. Under section 276 of the RMA, the Court may receive anything in evidence that it considers appropriate to receive and is not bound by the rules of evidence normally applying to judicial proceedings in the general courts. In addition, the Court has the power to call for evidence on any matter it considers will assist it in making a decision. The Court's approach is best described as adopting a combination of adversarial and inquisitorial approaches. We consider this is appropriate and should continue.

99. We wish to comment specifically on the right of persons to appear as a party in the Environment Court. Although a person who made a submission before the consent authority has standing to appear, the former provision enabling a person to appear who represented a 'relevant aspect of the public interest' was repealed in 2009. Under the current legislation, only the Attorney-General may appear to represent a relevant aspect of the public interest, although in some cases the Environment Court has allowed a public interest group to appear on the basis it has an interest in the proceedings that is greater than the general public.[461]

We recommend that the former provision enabling a person to appear who represents a relevant aspect of the public interest should be reinstated.

100. The Environment Court has frequently commented on the assistance it receives from public interest groups and it is unfortunate that the specific right of such groups to appear under section 274 of the RMA has been repealed. We recommend that the former provision

[461] Under section 274(1)(d) of the RMA, a person who has "an interest in the proceedings that is greater than the interest that the general public has" may give notice to appear and the Court has allowed intervention by a range of persons, including public interest groups, under this provision.

enabling a person to appear who represents a relevant aspect of the public interest should be reinstated.

101. In 1996 the RMA was amended to give the Environment Court the same powers as the District Court in its civil jurisdiction including the power to order parties to provide security for costs.[462] Although the Court has a discretion as to whether to order security for costs, the existence of this power is a potential impediment to participation in appeals. To encourage participation by public interest and other community groups in proceedings before the Environment Court, we recommend removing the power to order security for costs in Environment Court proceedings. We consider sufficient protection is available under section 279 of the RMA for a judge to strike out proceedings where a person's case is frivolous or vexatious, discloses no reasonable or relevant case or would otherwise be an abuse of process. This provision should remain.

102. For similar reasons, we recommend that a costs award should not be made against a party in Environment Court proceedings unless that party has conducted the proceedings in a frivolous, vexatious or unreasonable manner.

Who should bear the cost of appearing in the Environment Court?

103. It is well known that the costs of engaging legal counsel and expert witnesses represent a major barrier to individuals and groups seeking to participate in Environment Court appeals. The availability of legal aid is very limited. So too is the possibility of obtaining assistance from the Environmental Legal Assistance Fund established by the Ministry for the Environment.[463] In its submission on our issues and options paper, the Tairua Environment Society submitted that funding for community groups "is not always available and covers far less than actual costs. The success of funding applications is never known until well after the community group has had to commit to action or withdraw". The absence of funding support for those seeking to oppose developments is one of the most important impediments to effective participation in Environment Court proceedings and is not conducive to effective decision-making. In some jurisdictions, limited funds are made available through a public defence service.[464]

The absence of funding support for those seeking to oppose developments is one of the most important impediments to effective participation in Environment Court proceedings.

104. Counsel assisting boards of inquiry and process advisors to submitters[465] are sometimes appointed in the Environment Court but are not normally funded to call expert evidence challenging the applicant's expert. Although a public defence service is a viable option, we recommend giving consideration to empowering the Environment Court to order that the

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462 This power was removed in 2003 but reinstated in 2009, and is now found in section 278 of the RMA.

463 The fund has a total annual budget of $600,000 (excluding GST). An additional $200,000 was made available as a one-off injection for the last three funding rounds for the 2019/20 financial year. The fund was almost fully allocated in the 2017/18 financial year and approximately $439,000 was allocated in the 2018/19 financial year.

464 See Kós P. 2016. *Davids and Goliaths: Public participation in the planning process.* Paper prepared for the Tony Hearn QC Memorial Lecture.

465 The cost of such personnel is recoverable by the Court's registrar by statutory enablement in direct referral cases.

applicant for the relevant consent should pay or contribute towards the costs of opposing parties and the costs of retaining expert witnesses.

The higher courts

105. We have discussed appeal processes beyond the Environment Court in other chapters. As a general proposition, we consider it is important that rights of appeal to the High Court and beyond on questions of law in respect of substantive decisions made by the Environment Court should continue. As we have noted in chapter 9, although on occasion this may lead to further delay, cases that proceed to the High Court or to the Court of Appeal or Supreme Court are a miniscule percentage and are only likely to occur in matters of real importance. In those few cases, the delay inherent in further appeals is outweighed by the importance of preserving appropriate access to the higher courts.

106. One final point relates to the role of the High Court in judicial review. As in other areas of the law, the High Court performs the vital constitutional role of maintaining the rule of law through the process of judicial review. It is in the wider public interest to ensure that any proposals to limit or diminish those functions should be carefully scrutinised. As noted earlier in this report, however, we accept that where rights of appeal to the High Court exist, judicial review should not be available until those appeal rights have been exhausted.

Generating institutional buy-in

107. The support of institutions with new or changed roles will be essential for effective and efficient implementation of the new system. Motivating factors include:

- a shared desire to improve environmental outcomes for New Zealand
- the opportunity for more cost-effective investment as a result of improved coordination between tiers of government
- the potential for links between spatial planning and central government funding streams
- the potential for long-term efficiencies through a shift in focus from consents to plans.

Expected outcomes

108. Our recommended changes to institutional roles are expected to support a more cohesive and better-coordinated system. Some complexity is inevitable due to the diversity of resource management issues, impacts and competing interests involved. However, the proposed changes will clarify the roles of central and local government, mana whenua and other actors and set clear expectations for how decision-makers should work together.

Building the relationships and trust required to make the new system work will take time and effort. However, it also presents an opportunity to develop stronger relationships between central and local government and Māori.

109. Instead of ad hoc interventions and misaligned decision-making, there will be a stronger, integrated system of national direction, regional spatial planning and combined plans.

Building the relationships and trust required to make the new system work will take time and effort. However, it also presents an opportunity to develop stronger relationships between central and local government and Māori.

110. Additional resourcing will be required to support a future system. We do not view this as an imposition of additional costs as a result of reform. Rather, the additional resourcing required should be seen as a correction of long-term, persistent, underfunding which is needed to address significant capability and capacity deficits. The current levels of spending and resourcing have not achieved the outcomes anticipated for the RMA.

Key recommendations

111. Most of our recommendations relating to institutional roles are covered in previous chapters. Recommendations covered here focus on capability and capacity and the role of the Environment Court.

Key recommendations – Institutional roles and responsibilities	
1	Additional resourcing should be provided to the Ministry for the Environment to undertake its expanded role, including providing support for local authorities and mana whenua.
2	Additional resources should be provided to the Office of the Parliamentary Commissioner for the Environment to enable the Office to undertake expanded oversight and auditing roles.
3	Participation by mana whenua in resource management processes should be supported by central government and local government funding and capability-building assistance.
4	The Ministry for the Environment should work with professional institutes and organisations to ensure those administering the reformed RMA are appropriately equipped and upskilled to implement it.
5	The Ministry for the Environment should provide easily accessible public guidance on all the essential aspects of a reformed RMA.
6	A climate change adaptation fund should be established, and hazard risk management guidance provided by central government, to enable local authorities to take pre-emptive adaptation action on climate change effects.
Key recommendations – Environment Court	
7	A sitting or retired Environment Judge should chair boards of inquiry on proposed national direction.
8	A sitting Environment Judge should chair independent hearing panels considering combined plans.
9	The Environment Court should continue to have all its present jurisdiction and a new appellate role in the combined plan/independent hearing panel process.
10	The Environment Court should hear all applications for proposals of national significance.

11	Consideration should be given to a potential role for the Environment Court under separate legislation on managed retreat.
Key recommendations – Environment Court	
12	The changes recommended in this chapter to improve access to justice should be adopted.
13	The number of judges, commissioners and registry staff at the Environment Court should be increased as necessary to ensure the Court has sufficient capacity to carry out the increased range of functions we propose.

Chapter 15 Reducing complexity

1. A key issue identified in our terms of reference to be addressed by the review is removing unnecessary complexity from the RMA and the resource management system generally.
2. We approached this task in two ways:
    - ensuring our proposals for reform across the system establish clear principles and processes that are as simple and effective as possible
    - addressing issues arising from the current structure and drafting of the RMA that make it difficult to navigate.

In our view, the RMA has become unworkable through many years of poorly thought through and poorly drafted amendments. There are now considerable benefits to be achieved by replacing the Act.

3. Taken as a whole, our proposals should provide greater clarity about purpose and principles, functions, powers, decision-making criteria and processes across the resource management system. In our view, the RMA has become unworkable through many years of poorly thought through and poorly drafted amendments. There are now considerable benefits to be achieved by replacing the Act. We anticipate plain English drafting of our proposed Natural and Built Environments Act will substantially reduce unnecessary costs of legal interpretation among system users.
4. We recognise however that the resource management system is inherently complex. The goal is to ensure that the new legislation is no more complex than it needs to be.

The goal is to ensure that the new legislation is no more complex that it needs to be.

Issues identified

5. Our issues and options paper made the following observation about the complexity of the current resource management system:

> Processes are complex, litigious, and costly, and frequently disproportionate to the decision being sought or the risk or impact of the proposal. Matters that should be addressed in plans are left to the resource consenting process to resolve, generating unnecessary uncertainty. There have been successive legislative amendments targeting aspects of the RMA, and a proliferation of new arrangements to work around it, such as the proposed Kāinga Ora Homes and Communities planning powers, and Special Housing Areas. While the amendments sought to address deficiencies in the system, these workarounds have resulted in further misalignment between legislation.

6. The paper posed a number of questions on this issue:
    - what changes should be made to the RMA to reduce undue complexity, improve accessibility and increase efficiency and effectiveness?

- how can we remove unnecessary detail from the RMA?
- are any changes required to address issues in the interface of the RMA and other legislation beyond the LGA and LTMA?

7. Submitters were in broad agreement that the complexity of the current system was a significant issue that needed to be tackled. They indicated that complexity is a result of both the current legislation and challenges with its implementation.

8. Many of the issues that generate unnecessary complexity have been discussed in other aspects of the report, however we note them briefly here in light of their relevance to the complexity of the system. The issues are grouped as follows:
   - policy settings generally that lead to unnecessary complexity
   - issues arising from the RMA's legislative drafting.

Policy settings generally that are important drivers of complexity

Lack of central government direction

9. Submitters pointed to lack of central government direction as a significant source of complexity. They called for central government to provide more national direction, increase engagement with councils, and provide more and improved training and guidance. There was some support for greater standardisation through use of the national planning standards:

> A core issue is lots of councils having to reinvent the same wheel when they review their district plans which adds considerable expense for both the councils and for organisations seeking nationally consistent provisions. This can be addressed by greater content across common themes/ zones/ topics in the National Planning Standards or Model Plans. (NZ Planning Institute)

10. We discuss this issue in more detail in chapters 7 and 14 on national direction and institutions.

Provisions relating to the role of mana whenua

11. Submitters identified provisions relating to the role of mana whenua in the resource management system as a significant source of complexity. Some discussed the benefits of improving engagement with Māori in planning and resource consents process.

12. Māori submitters reported that local authorities often fail to meet their obligations, leading to time consuming and costly dispute processes as well as negative effects on the environment and relationship between mana whenua and the environment. A related issue was the capability and capacity of local authorities in this regard.

13. One reason that the current resource management system can be difficult for Māori to navigate is because the provisions relating to Māori are scattered throughout the Act. The recently introduced Mana Whakahono ā Rohe process does not require consideration of all aspects of mana whenua engagement in resource management processes and has had little use as yet.

14. We discuss this issue in more detail in chapter 3 on recognising Te Tiriti and te ao Māori.

Planning and consenting

15. Submitters also drew attention to the costs, time and litigation in preparing plans and processing resource consents. There was support for improved processes:

> Any revised planning system should consider providing a standardised process which can enable plan changes/variations to be prepared quickly and cost-effectively. – Matamata-Piako District Council

> Future Proof would also be very supportive of initiatives which fast track planning approvals (plan changes or consents) for developments which are part of an agreed settlement pattern contained within a growth strategy or spatial plan, such as the Future Proof strategy – Future Proof

16. It is also noteworthy that the complexity of planning and consenting processes was seen as a barrier to public engagement. An industry has grown up around RMA processes because few people can navigate the resource management system without assistance from planning consultants or lawyers.

> We would all support any reform package that reduces complexity and makes it easy for people to access the replacement RMA processes. – Tasman District Council

17. We discuss these issues in more detail in chapters 8 and 9 on plans and consents.

Legislative interfaces

18. Submitters also identified the relationship between the RMA and other legislation in the system as a source of complexity and called for better integration and alignment of legislation. A range of interfaces were identified as in need of review including the Building Act 2004, Conservation Act 1987, Electricity Act 1992, Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, Heritage New Zealand Pouhere Taonga Act 2014, Marine and Coastal Area (Takutai Moana) Act 2011, Property Law Act 2007, Public Works Act 1981, Land Transfer Act 2017, Local Government (Rating) Act 2002, and Wildlife Act 1953.

19. In addition, we recognise the need to ensure alignment between the Natural and Built Environments Act and more than 70 current and pending Tiriti settlement enactments. Their current relationship with the RMA is complex due to overlap in the way some resources are managed, but it may not be possible to reduce that complexity without undermining the function of Tiriti settlements.

Implementation challenges

20. Many submitters were sceptical that changing the words of the RMA alone would 'solve' the problems associated with the complexity of the resource management system. These issues were seen to be as much a product of implementation challenges, and in particular the capacity and funding of local government. We discuss these issues in more detail in chapter 14.

Legislative drafting

21. Submitters called for the use of plain English, removing jargon, and using relevant and consistent definitions across the RMA, planning instruments (plans, regulations, policy statements) and associated legislation (such as the LGA and LTMA).

Discussion

Addressing the important drivers of complexity across the system as a whole

22. Here we highlight how our main proposals for reform will reduce the current complexity of the resource management system.

    - Greater clarity throughout the system as a whole will be achieved through our proposals for reform of the purpose and principles of the RMA. The shift to an outcomes-based framework with specified targets and limits will improve direction for decision-makers, and enable greater accountability for results.
    - Establishing long-term strategic and integrated planning for resource management and infrastructure under a new Strategic Planning Act will reduce conflicts in decision-making by central and local government across the system.
    - Mandatory national direction with improved tools and processes will ensure consistency and good practice, and assist in addressing capability limitations among those implementing the Natural and Built Environments Act.
    - Our proposal for regional combined plans will consolidate more than 100 RMA policy statements and plans into 14 combined plans. This will improve integration across the system and make it more user-friendly.
    - An independent hearing process for developing combined plans will ensure participants have access to justice, but should also reduce the number of appeals, meaning that plans can become operative more quickly.
    - A focus on decision-making about resource use, development and protection in plans rather than consents will provide greater certainty about activities and save time and expense for applicants.
    - Alternative dispute resolution processes for consents and a shared regional portal to coordinate regional and local administration of consents should support faster and less costly consent processes.
    - A National Māori Advisory Board will provide support to local authorities to determine who represents mana whenua groups in their region and will significantly reduce the time and resource local authorities spend in determining with whom to engage.
    - A process for mana whenua and local authorities to develop binding relationship agreements encompassing all aspects of resource management will make it easier for mana whenua to navigate the resource management system.

- Establishing a nationally coordinated environmental monitoring system will provide the foundation for robust analysis of plan preparation and review and genuine focus on evidence-based planning decisions.

Improving legislative drafting

23. There are many examples of poor drafting that make the RMA difficult to navigate and hard to understand for laypersons as well as planners and lawyers alike. To take one example, while Section 95E plays an important role in the system, to the uninitiated it appears to be a nonsense:

> 95E Consent authority decides if person is affected person
>
> (1) For the purpose of giving limited notification of an application for a resource consent for an activity to a person under section 95B(4) and (9) (as applicable), a person is an affected person if the consent authority decides that the activity's adverse effects on the person *are minor or more than minor (but are not less than minor)*. (emphasis added)

24. The present state of the RMA reflects the passage of 30 years. The current legislation has been amended multiple times using a variety of drafting styles and now lacks any internal consistency. The many amendments have contributed to complexity by adding layers of process to an already complex system.

The present state of the RMA reflects the passage of 30 years. The current legislation has been amended multiple times using a variety of drafting styles and now lacks any internal consistency. The many amendments have contributed to complexity by adding layers of process to an already complex system.

25. To address these issues, as well as the problem of drafting, the Panel's view is the current legislation should be repealed and replaced. This will also enable the substantial reforms we have recommended to be introduced in an ordered way. There has been considerable change in the way legislation since the RMA was developed. The replacement of the RMA with new legislation will allow the Parliamentary Counsel Office to use current drafting standards, plain English terms, and ensure internal consistency.

26. We propose the new legislation broadly follows the structure of the current RMA. The principal parts should be:

- Interpretation and definitions
- Purpose and principles
- Duties and restrictions
- Functions powers and duties of central and local government
- Functions of the EPA
- National Māori Advisory Board
- Mana whenua engagement process (integrated partnership process including equivalents of section 33 and section 36B)
- Jurisdiction to conduct hearings by consent authorities and delegates
- National direction

- Proposals of national significance
- Combined planning and an independent hearing process
- Consenting
- Designations
- Subdivision and reclamations
- Heritage (specific mechanisms and processes, including heritage orders)
- Water conservation (specific mechanisms and processes relating to protection of water bodies of national significance, including water conservation orders)
- Allocation and economic instruments
- Aquaculture
- Environment Court (jurisdiction, functions and powers)
- Compliance, monitoring and enforcement
- Miscellaneous (including regulation powers)
- Transition
- Schedules (details of processes for submissions, hearings and appeals for plan-making, plan changes and resource consents).

27. We anticipate our proposals for reform will help resolve the underlying issues that have led to repeated legislative change over the history of the RMA. However, regulatory stewardship will be required to ensure the new system operates as intended. As submitters noted, the current problems with the system do not relate to the legislation alone but also to how it is implemented.

28. A significant increase in funding for organisations carrying out roles under the system will be required to boost their capacity. Chapters 14 and 16 outline the need for increased funding and capacity and some suggestions to guide transitional requirements for the new system.

Our proposals for reform will considerably reduce complexity across the system and improve the clarity of legislation.

Expected outcomes

29. Our proposals for reform will considerably reduce complexity across the system and improve the clarity of legislation. They address a key issue raised in our terms of reference and align with the objectives and principles adopted for our review. We anticipate the future environmental management system will be more efficient for all users and more accessible to the public.

Key recommendation

Key recommendation – Reducing complexity	
1	The RMA should be repealed and replaced by the Natural and Built Environments Act to reduce complexity and improve overall coherence of the legislation.

Chapter 16 Transition to a reformed system

1. The new Natural and Built Environments Act and Strategic Planning Act should provide for a sensible transition from existing legislation to the new system. Development of transitional arrangements is outside our terms of reference, however we offer our thoughts on matters the Ministry for the Environment and others will need to consider in the next phase of reform.
2. This chapter describes the transitional arrangements that accompanied the introduction of the RMA and identifies some key components to consider in the transition to the new resource management system.

Transitional arrangements under the RMA

3. The RMA combined over 60 statutes and regulations,[466] including the Town and Country Planning Act 1977. The RMA set out transitional arrangements, including carrying over specified plans, consents, uses and designations. The transition, which occurred at a similar time to significant local government reform, was undoubtedly complex.
4. Provisions for transition were set out in Part 15 of the RMA:
    - approved regional planning schemes under the Town and Country Planning Act were 'given regard to' until a proposed regional policy statement and operative regional coastal plan were in place
    - operative and proposed district schemes were carried over as deemed district plans and deemed proposed plans
    - existing notices, bylaws and standards relating to water, air and soil under the previous legislation were deemed to be regional rules
    - existing permissions became resource consents and coastal permits, and specific provisions were granted for ports to occupy coastal marine areas and for mining privileges
    - designations, heritage protection orders and water conservation orders were carried over
    - existing uses were generally continued
    - particular provisions dealt with subdivisions and financial contributions.
5. The RMA specified that the Minister of Conservation must prepare a draft New Zealand Coastal Policy Statement (NZCPS) within one year of the commencement of the Act. The NZCPS was notified in 1992 and gazetted in 1994.

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466 Ericksen NJ, Berke PR, Dixon JE. 2017. *Plan-making for Sustainability: The New Zealand Experience*. London: Taylor and Francis.

6. The other timeframe specified in the RMA was the requirement for regional councils to publicly notify regional policy statements and coastal plans within two years of commencement of the Act.

7. The transition was intended to take five to 10 years, with a target of 16 policy statements and around 150 plan documents.[467] By June 1995 all regional councils had publicly notified a regional policy statement for public submissions and some had become operative.[468]

8. However after seven years only 10 per cent of district plans, 16 per cent of regional plans (including coastal) and 35 per cent of regional policy statements were operative.[469]

9. In 1999 the Ministry for the Environment recognised that the transition to the new Act had taken longer than expected. At this point most of the regional policy statements were fully operative, but only a third of territorial authorities had operative plans and a further third had plans that were before the Environment Court.[470] It was also noted the bulk of local authority resources were being diverted into preparing policy statements and plans, with little progress on monitoring.

10. Other assessments of the transition also pointed out "there is no doubt that practitioners and councils would have benefited by more guidance from the centre. This does not mean the production of model plans, rather development and application of methods and new ways of thinking about plan writing and constructing plans".[471] Similarly, "had more resources been made available in 1991 to assist councils in preparing effects-based plans, the transition to a resource management regime may have been much faster and effective in achieving the mandated goal of sustainable management."[472]

Moving from an existing system to a new system requires a balance between providing stability and a smooth transition, while implementing the reforms as soon as practicable.

Discussion

11. Moving from an existing system to a new system requires a balance between providing stability and a smooth transition, while implementing the reforms as soon as practicable. We have considered the following key components of transition to a reformed system:

    - the timing and sequencing of national direction, regional spatial strategies and combined plans

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467 Gow LJA. 1995. New Zealand's experience with its Resource Management Act. Address to the World Resources Institute, Washington DC, 6 June.

468 Mallett C. 1995. *Designing Co-ordinated Regulatory Systems: The New Zealand Resource Management Act*.

469 Minister for the Environment. 1998. *Report of the Minister for the Environment's Reference Group*. Wellington: Ministry for the Environment.

470 Mallett C. 1999. *The New Zealand Resource Management Act*. YLBHI Seminar, Jakarta, November.

471 Burby RJ, Dixon JE, Ericksen NJ, Handmer J, May P, Michaels S, Smith DI. 1996. *Environmental Management and Governance: Intergovernmental Approaches to Hazards and Sustainability*. London: Taylor and Francis.

472 Dixon JE, Ericksen NJ, Crawford JL, Berke P. 1997. Planning under a co-operative mandate: New Plans for New Zealand. *Journal of Environmental Planning and Management* 40(5): 603–614.

- the impact on existing processes, consents and activities under the RMA
- the financial and resourcing implications to develop and implement the reformed system
- supporting the change in culture.

The timing and sequencing of national direction, regional spatial strategies and combined plans

12. The Natural and Built Environments Act would require national direction on identified outcomes and environmental limits specified in the purpose and principles of the Act. The ideal sequence would be to have all mandatory national direction completed before beginning work on regional spatial strategies. In turn, these spatial strategies should ideally be in place before development of combined plans.

The ideal sequence would be to have all mandatory national direction completed before beginning work on regional spatial strategies. In turn, these spatial strategies should ideally be in place before development of combined plans.

13. However it is not practicable with current resources to wait until all mandatory national direction is completed before starting regional spatial planning. At present development times for single instruments are in the order of 18 months to three years for national policy statements, and three to six years for national environmental standards. Following the ideal sequence of issuing all mandatory national direction first would mean the benefits of spatial planning and combined regulatory planning would not be realised for some time.
14. We are also aware that recent plan-making processes have involved significant costs to local authorities. We recommend taking a pragmatic view, which is likely to mean different timescales across the country depending on how well a region's plans align with the new legislation and the urgency required to respond to pressures and opportunities in that region.

Transitional provisions to carry over national direction and spatial plans

15. We recognise that progress has been made in recent years on developing national direction and that many local authorities have undertaken spatial planning processes, sometimes in partnership with central government and mana whenua.
16. We would suggest reviewing these documents to specify within the new legislation which existing national direction and spatial plans are to be carried over or continued.

Prioritised set of national direction

17. As discussed in chapter 7, we recommend mandatory national direction to set targets to achieve outcomes identified in the principles of the Natural and Built Environments Act and to set environmental limits for key biophysical resources, among other matters. It will be important to set these targets and limits as early as possible to achieve the intent of the new Act. We recognise it may not be possible to develop the full set of mandatory national direction all at once, and choices will be needed on priority areas.

18. Data collection and analysis should begin now as part of the proposed national monitoring system to establish a robust evidence base for targets and limits. Priority should be given to addressing significant gaps in the existing national direction programme such as climate change and natural hazards, and biodiversity.

19. Our recommendation that national direction on how Te Tiriti principles are to be implemented under the Natural and Built Environments Act will be an important influence on processes and practice across the system. The process to develop this national direction could begin before the new legislation is enacted.

20. National planning standards will also play an important role in the reformed system by supporting consistent plan format and structure. Work on developing these could also begin before the commencement of the new legislation.

Sequencing of spatial plans and combined plans

21. The transition to a new system will take place over a number of years as regions across the country develop regional spatial strategies and combined plans on a staged basis. As discussed in chapter 4, we recognise it will not be possible to prepare spatial strategies for all regions simultaneously and we have recommended a Ministerial power to prioritise and sequence their development.

22. To facilitate a successful transition to the new system we propose that one region should be selected to develop the first regional spatial strategy, followed by development of the combined plan, to provide a model for other regions. This process should be initiated by the Ministry for the Environment and could be advanced alongside development of the new legislation and updates to guidance in the national planning standards. The Minister would select the region best suited for the first application of the planning process under the Natural and Built Environments Act.

To facilitate a successful transition to the new system we propose that one region should be selected to develop the first regional spatial strategy, followed by development of the combined plan, to provide a model for other regions. This process should be initiated by the Ministry for the Environment and could be advanced alongside development of the new legislation and updates to guidance in the national planning standards.

23. Current work programmes by the Ministry for the Environment and other central government agencies on urban growth, climate change adaptation, the COVID-19 recovery and other relevant topics could inform the identification of priority areas for spatial planning.

24. The Resource Management Amendment Bill proposes a new freshwater planning process. The Bill provides for the establishment of a Chief Freshwater Commissioner who will convene freshwater hearings panels to make recommendations to regional councils and unitary authorities on plan provisions relating to freshwater. The process will apply when regional councils or unitary authorities are developing or changing regional policy statements and regional plans that contain provisions to give effect to the National Policy Statement for Freshwater Management or otherwise relate to freshwater. The Ministry for the Environment

will need to consider how the proposed freshwater planning process should be integrated into the process to develop combined plans under the reformed system.

The impact on existing consents and activities

25. The shift from an existing system to a reformed system will have an impact on existing consents and activities. Providing a suitable transition period can help to mitigate these impacts.

26. The transition strategy will need to provide for the continuation of existing consents and designations, at least initially. However, new national direction may require reconsideration of some existing activities, consents and designations.

There can be no doubt that the far-reaching reforms we propose will require very substantial investment in money and resources. But without such investment, the benefits we anticipate from the reforms will not be realised.

The financial and resourcing implications of the reformed system

27. A key factor in designing transition arrangements will be the cost of implementing the reforms and the availability of sufficient funds and resources to achieve that. There can be no doubt that the far-reaching reforms we propose will require very substantial investment in money and resources. But without such investment, the benefits we anticipate from the reforms will not be realised.

Supporting the change in culture

28. The reformed system will require resource management practitioners and decision-makers to become more outcome-focused and less rule-focused and to ensure decisions are based on evidence. There is a risk that 'rolling over' existing national direction and plans could slow down the change in culture required to successfully implement the reformed system.

29. The Ministry for the Environment will need to play a key leadership role in supporting the change in culture. Some of the ways it can do this are: working with practitioners and decision-makers on the development of national direction; providing implementation guidance and support; coordinating environmental monitoring and investing in science and data; participating in regional spatial planning processes; and auditing draft combined plans.

30. In our view, the culture shift can only occur through central government working with organisations that represent and/or build the capability of practitioners and decision-makers. This could be achieved by collaboration between the Ministry for the Environment and organisations such as the New Zealand Planning Institute, Resource Management Law Association and Local Government New Zealand on training and guidance before, during and after the new Natural and Built Environments Act and Strategic Planning Act come into force.

Responding to the global pandemic

31. At the time of completing this report, the world was responding to the COVID-19 pandemic. As noted in the introduction to this report, proposed COVID-19 recovery legislation to fast track resource consent processes for infrastructure, housing and other projects is warranted to boost economic activity in the short-term but more enduring reforms remain essential. Our current understanding is that this short-term legislation is intended to expire in 2022.

Anticipated time to completion of new legislation

32. Given likely lead times, work should commence as soon as possible on the preparation of the Strategic Planning Act, the Natural and Built Environments Act and the Managed Retreat and Climate Change Adaptation Act we discuss in chapter 6. The Strategic Planning Act could commence first, but certainly no later than the Natural and Built Environments Act. Both should be in place by the time the proposed COVID-19 recovery legislation expires. The Managed Retreat and Climate Change Adaptation Act is discrete legislation which could come later if necessary, but should not be delayed.

Given likely lead times, work should commence as soon as possible on the preparation of the Strategic Planning Act, the Natural and Built Environments Act and the Managed Retreat and Climate Change Adaptation Act.

33. We would expect all mandatory national directions under the Natural and Built Environments Act and the overall transition process to be completed within 10 years of the introduction of the Strategic Planning Act and the Natural and Built Environments Act.

Key recommendations

Key recommendations – Transition to a reformed system	
1	Work on developing transitional arrangements as part of implementing the reforms we propose in this report will need to balance stability and a smooth transition with implementation of the reforms as soon as practicable.
2	The key components of the transition are: (i) the timing and sequencing of national direction, regional spatial strategies and combined plans (ii) the impact on existing processes, consents and activities under the RMA (iii) the financial and resourcing implications to develop and implement the reformed system (iv) supporting the change in culture.
3	Work should commence as soon as possible on the preparation of the Strategic Planning Act, the Natural and Built Environments Act and the Managed Retreat and Climate Change Adaptation Act.

Key recommendations – Transition to a reformed system	
4	The Strategic Planning Act should come into effect before or at the same time as the Natural and Built Environments Act, but the Managed Retreat and Climate Change Adaptation Act could come later.
5	The new legislation for the reforms we propose should be in place by the time the proposed COVID-19 recovery legislation expires.
6	We would expect mandatory national directions to be completed within three years of the introduction of the Natural and Built Environments Act.
7	We would expect the overall transition process to be completed within 10 years of the introduction of the Strategic Planning Act and the Natural and Built Environments Act.
8	Some work should commence immediately, such as data collection and analysis to establish a robust evidence base for setting targets and limits.
9	The Minister should select one region to develop the first regional spatial strategy, followed by development of the combined plan, to provide a model for other regions.

Summary of the report and key recommendations

Aims of the review

The Resource Management Review Panel was appointed by the Minister for the Environment, the Hon David Parker, to undertake a comprehensive review of the resource management system in New Zealand. The main focus was the Resource Management Act (the RMA) but we were also asked to review the relationship between the RMA, the Local Government Act (LGA), the Land Transport Management Act (LTMA) and the Climate Change Response Act (CCRA).

The specific aim of the review under our terms of reference was to improve environmental outcomes and better enable urban and other development within environmental limits.

This summary outlines the principal reasons which led to the review and the main recommendations in our report. The more detailed recommendations follow this summary but the report itself should be read for a full understanding.

The drivers of the review

The key concerns prompting the review include:

- **New Zealand's natural environment is under significant pressure:** the way we use land and water has proved to be unsustainable for the natural environment. The quality of our freshwater, coastal and marine environments is in serious decline, and biodiversity is under significant threat.
- **Urban areas are struggling to keep pace with population growth:** poorly managed urban growth has led to increasing difficulty in providing affordable housing, worsening traffic congestion, greater pollution, and reduced productivity.
- **An urgent need to reduce carbon emissions and adapt to climate change:** the impacts of climate change are already affecting where people live and how we use our environment. Our land and resource use patterns need to change to mitigate and adapt to the effects of climate change and we need a resource management system that supports New Zealand's commitments to reduce greenhouse gas emissions.
- **The need to ensure that Māori have an effective role in the system, consistent with the principles of Te Tiriti o Waitangi:** when it was enacted, the RMA was a significant step forward for Māori, offering opportunities for shared management of the environment. However, it has failed to live up to its promise, leaving Māori out of critical decision-making.
- **The need to improve system efficiency and effectiveness:** significant criticisms of the RMA have been its increasing complexity, cost and delay caused by its processes, uncertainty, and lack of responsiveness to changing circumstances and demands.

The need for new legislation

When the RMA was introduced in 1991 it contained a number of valuable principles which it is important to retain. One of these was the principle of sustainability to ensure the needs of future generations are taken into account. However, in the ensuing period of nearly 30 years, the RMA has been subjected to numerous amendments designed to improve its effectiveness but which have instead resulted in a doubling of its original length and an unduly complex patchwork of provisions.

Rather than attempt to amend the RMA, the Panel has concluded that the Act should be repealed and replaced with new legislation which we propose be named the Natural and Built Environments Act (NBEA). This would have a substantially different approach from the RMA but would also incorporate some of the key principles of the previous legislation which remain appropriate. The aim of the NBEA would be to establish more enduring solutions and bring to an end the series of ad hoc interventions that have been an undesirable feature of legislative change to date.

The Panel has also recommended a new separate piece of legislation which we have called the Strategic Planning Act. The purpose of the Strategic Planning Act would be to set long-term strategic goals and facilitate the integration of legislative functions across the resource management system. These would include functions exercised under the NBEA, the LGA, the LTMA and the CCRA to enable land and resource planning to be better integrated with the provision of infrastructure as well as associated funding and investment. Our consultation found strong support for greater use of spatial planning to identify areas suitable for development as well as areas or features it is important to protect. Spatial strategies developed at regional level, encompassing land and the coastal marine area, would play a critical part in delivering the outcomes intended for the resource management system.

The preparation and approval of spatial strategies under this new legislation would be the responsibility of a joint committee comprising representatives of central and local government as well as mana whenua.

We expect this new approach to result in stronger coordination between these parties in developing long-term strategic planning for both the natural and built environments, with closer links between land and resource planning and associated funding and investment.

Revised purpose and principles for the NBEA

One criticism of the purpose of the RMA has been its focus on managing the adverse effects of activities on the environment rather than promoting more positive outcomes. The Panel proposes a new purpose for the NBEA: enhancing the quality of the environment to support the wellbeing of present and future generations. That purpose will be achieved by promoting positive outcomes for both the natural and built environments, ensuring that use, development and protection of resources only occurs within prescribed environmental limits and that the adverse effects of activities on the environment are avoided, remedied or mitigated.

A further purpose of the NBEA would be to recognise the concept of Te Mana o te Taiao which is an expression of the importance of maintaining the health of air, water, soil and ecosystems and their capacity to sustain life. A similar concept is already incorporated in section 5(2)(b) of the RMA.

The concept of wellbeing has long been embedded in planning legislation and is also a feature of other legislation including the LGA. In the new legislation it would continue to be widely defined to include social, economic, environmental and cultural wellbeing as well as health and safety. The environment would also be broadly defined to include the natural and built environments, whether in rural or urban areas.

In brief, the revised purpose and principles would establish a system designed to deliver specified positive outcomes for both the natural and built environments. The use and development of resources would be enabled so long as this can be achieved sustainably and within prescribed minimum limits to protect natural resources such as water, air, soils and natural habitats. The new legislation would also require the setting of targets to achieve ongoing improvement of the quality of both the natural and built environments.

Protecting and enhancing the natural environment

The revised purpose and principles under the NBEA now recognise an expanded range of outcomes that are to be provided for in respect of both the natural and built environments. Those relating to the natural environment include many of the features recognised under the RMA such as the protection of the coastal environment, wetlands, lakes and rivers, outstanding natural landscapes, improving the health of ecosystems and avoiding further loss of biological diversity. To improve certainty, the new Act requires the Minister to identify through national direction natural features that are of national significance. Regional councils would identify features that are of regional significance.

In addition, we have proposed the setting of mandatory environmental limits (sometimes referred to as bottom lines) for biophysical aspects of the environment including freshwater, coastal water, air, soil and habitats for indigenous species.

We expect the changes we propose in the NBEA will provide a greater level of protection for features of the natural environment which we know are highly valued by New Zealanders and, over time, for the restoration of resources such as our waterways which have become degraded.

Managing urban growth

Another criticism of the RMA has been the lack of provision for managing urban growth. This has become particularly urgent in larger urban areas experiencing substantial increases in population but insufficient capacity to accommodate growth. The Panel proposes this be addressed in several ways. The revised purpose and principles of the NBEA will provide for specific outcomes for the built environment, including the availability of development capacity for housing and business purposes to meet expected demands, and the strategic integration of infrastructure with land use.

These outcomes would be supported by the use of national policy statements such as those currently in use, the greater use of economic instruments and, importantly, by the Strategic

Planning Act we propose. We expect that spatial strategies prepared on a regional basis under the Strategic Planning Act would identify areas suitable for urban growth (as well as areas not suitable for development) and would also facilitate the provision of infrastructure necessary to support growth. Effective ways to achieve this integration have been a missing element of the resource management system to date.

The new purpose and principles under the NBEA would further improve certainty in the resource management system by requiring the resolution of any potential conflicts between the identified outcomes through national direction by the Minister for the Environment or in the combined plans we propose at local government level.

The effects of climate change

The need to address the effects of climate change has been a particular focus of the Panel's work. The Panel has concluded that the resource management system should complement the CCRA and the emissions trading scheme to help New Zealand achieve the agreed targets for reduction of greenhouse gas emissions. As well, the resource management system needs to enable adaptation to the impacts of climate change and reduction of risk from natural hazards.

The Panel has recommended these issues be addressed in a number of ways, including by providing outcomes in the purpose and principles of the NBEA designed to reduce risks from natural hazards, improve resilience, reduce greenhouse gas emissions, promote activities that mitigate emissions or sequestrate carbon and to increase the use of renewable energy. This would be supported by mandatory national direction and through combined plans at local government level. We also expect the regional spatial strategies developed under the proposed Strategic Planning Act will be an important means of identifying areas at risk of inundation as well as climate change mitigation measures consistent with the CCRA.

Finally, we propose a new discrete piece of legislation which we have called the Managed Retreat and Climate Change Adaptation Act. This would establish an adaptation fund to enable central and local government to support necessary steps to address the effects of climate change and would also deal with the many complex legal and technical issues involved in the process of managed retreat.

We expect these recommendations to result in a much improved and better coordinated response to these challenges.

Improving engagement with Māori

Our consultation processes have highlighted the need for a significantly greater role for Māori in the resource management system.

In the revised purpose and principles for the NBEA we have recommended that those involved in the administration of the legislation should give effect to the principles of Te Tiriti o Waitangi rather than taking them into account as currently provided in the RMA. To provide clarity about what this means in the context of the NBEA, the Panel has recommended that the Minister for the Environment be required to give national direction on how the principles of Te Tiriti will be given effect through functions and powers exercised under the NBEA.

The Panel is also recommending that mana whenua should participate in decision-making for the proposed regional spatial strategies and in the making of combined plans at local government level. These are important changes that will give Māori an effective role in decision-making on resource management issues at a strategic level.

The Panel has also recommended the creation of a National Māori Advisory Board to advise central and local government on resource management from the perspective of mana whenua and an integrated partnership process between mana whenua and local government to address resource management issues at local government level.

We expect the combination of these provisions to provide a significant and effective role for Māori in the resource management system.

System efficiency and effectiveness

In our report we have highlighted deficiencies in the resource management system, including undue complexity and inefficient processes leading to unnecessary expense and delay. We have also commented on the provisions of the RMA tending to favour the status quo and which hinder the ability of the system to respond to change.

To address these issues, we have proposed:

- greater use of mandatory national direction by the Minister for the Environment to guide planning at local government level
- the use of combined plans which would bring together the plans prepared by regional councils and territorial authorities in each region
- a more streamlined process for the preparation and change of plans
- a much greater focus on the quality of plans which is expected to provide clearer guidance and a reduction in the time and effort spent on individual resource consent processes
- providing greater clarity about notification of resource consent applications
- an alternative process to deal with resource consents raising localised issues such as boundary issues between neighbours
- an improved ability to have more serious disputes over consents referred directly to the Environment Court
- improvements in the designation process including extending the default lapse period to better protect opportunities for the provision of public infrastructure
- a wider range of mechanisms guided by specified principles to allocate resources such as freshwater and the use of coastal space
- more focus on the use of economic instruments to complement regulatory land use controls
- enhancing the ability of regional councils to modify or extinguish resource consents for natural resources such as discharges into freshwater where environmental limits are threatened

- giving territorial authorities the ability to change land use consents in narrowly defined circumstances, such as where necessary to implement a managed retreat process as part of adapting to climate change
- improving enforcement under the resource management system, including the use of regional hubs to coordinate enforcement effort in each region and introducing stronger penalties for offences
- improving monitoring and oversight of the resource management system, including through a new national environmental monitoring system and an enhanced audit and reporting function for the Parliamentary Commissioner for the Environment.

Perhaps the greatest single process change is our proposal for mandatory combined plans in each region. At present there are well in excess of 100 policy statements and plans in existence throughout the country. Under our proposal for combined plans, the number of plans would reduce to just 14. Preparation of these combined plans would be undertaken by a joint committee comprising representatives of the regional council, the constituent territorial authorities in the region along with representatives of mana whenua. The Ministry for the Environment would have an auditing role to ensure quality and consistency.

An independent panel, chaired by a sitting Environment Judge, would hear submissions, review the combined plan and make recommendations on its provisions. Decisions would then be made by the joint committee, and a streamlined appeal process would follow based on the model recently used for the Auckland Unitary Plan.

Our proposals for plan making are expected to have significant beneficial results:

- a simplified and more efficient process
- better quality plans
- the resolution of uncertainty arising from overlapping functions of regional councils and territorial authorities
- greater clarity in plans including by minimising potential conflicts between the outcomes specified in the purpose and principles of the NBEA
- fewer resource consent applications as a result of clearer guidance in plans.

Next steps

Cabinet is responsible for making all decisions about how to progress our report and recommendations. Cabinet has indicated that a broad, open process of public consultation will follow its consideration of our proposals. Wide engagement with New Zealanders and stakeholders is anticipated for the introduction of any new legislation.

Hon Tony Randerson QC, Chair
Rachel Brooking
Dean Kimpton
Amelia Linzey
Raewyn Peart MNZM
Kevin Prime ONZM

Summary of key recommendations

Note that further detailed recommendations are made within the discussion section of each chapter.

Chapter 1 Integrating land use planning and environmental protection

Key recommendation – Integrating land use planning and environmental protection	
1	An integrated approach for land use planning and environmental protection, encompassing both the built and the natural environments, should be retained in reformed legislation.

Chapter 2 Purpose and principles

Key recommendations – Purpose and principles	
1	The RMA should be repealed and replaced with new legislation to be called the Natural and Built Environments Act.
2	The purpose of the Natural and Built Environments Act should be to enhance the quality of the natural and built environments to support the wellbeing of present and future generations and to recognise the concept of Te Mana o te Taiao.
3	The purpose of the Act should be achieved by ensuring: positive outcomes for the environment are promoted; the use, development and protection of natural and built environments is within environmental limits; and the adverse effects of activities on the environment are avoided, remedied or mitigated.
4	The environment should be defined broadly to include: (i) ecosystems and their constituent parts (ii) people and communities (iii) natural and built environments whether in urban or rural areas.
5	There should be a requirement to give effect to the principles of Te Tiriti o Waitangi.
6	Current matters of national importance should be replaced by positive outcomes specified for the natural and built environments, rural areas, tikanga Māori, historic heritage, and natural hazards and the response to climate change.
7	Mandatory environmental limits should be specified for certain biophysical aspects of the environment including freshwater, coastal water, air, soil and habitats for indigenous species.
8	Ministers and local authorities should be required to set targets to achieve continuing progress towards achieving the outcomes.
9	There should be greater use of mandatory national direction, including the identification of features and characteristics that contribute to the quality of both natural and built environments, and to respond to climate change.

Key recommendations – Purpose and principles	
10	Principles to guide implementation should be identified.
11	Any conflicts in achieving the outcomes should be resolved through national direction or, in the absence of such direction, in combined plans.
12	Indicative drafting of the new purpose and principles identified in this chapter along with associated definitions are provided in appendix 1 of this report.

Chapter 3 Te Tiriti o Waitangi me te ao Māori

Key recommendations – Te Tiriti o Waitangi me te ao Māori	
1	The concept of 'Te Mana o te Taiao', should be introduced into the purpose of the Natural and Built Environments Act to recognise our shared environmental ethic.
2	Specific outcomes should be provided for 'tikanga Māori', including for the relationships of mana whenua with cultural landscapes.
3	The current Treaty clause should be changed so that decision-makers under the Act are required to 'give effect to' the principles of Te Tiriti o Waitangi.
4	A national policy statement should be required on how the principles of Te Tiriti will be given effect through functions and powers exercised under the Act.
5	A more effective strategic role for Māori in the system should be provided for, including representation of mana whenua on regional spatial planning and joint planning committees.
6	A National Māori Advisory Board should be established to monitor the performance of central and local government in giving effect to Te Tiriti and other functions identified in the report.
7	The current Mana Whakahono ā Rohe provisions should be enhanced to provide for an integrated partnership process between mana whenua and local government to address resource management issues.
8	The current legislative barriers to using the transfer of power provisions and joint management agreements should be removed and there should be a positive obligation on local authorities to investigate opportunities for their use.
9	The current definitions of the terms 'iwi authority' and 'tangata whenua' should be replaced with a new definition for 'mana whenua'.
10	Provision should be made for payment of reasonable costs where Māori are undertaking resource management duties and functions in the public interest.
11	The funding and support options recommended in this chapter should be implemented.

Chapter 4 Strategic integration and spatial planning

Key recommendations – Strategic integration and spatial planning	
1	There should be a new Strategic Planning Act to promote the social, economic, environmental and cultural wellbeing of present and future generations through the long-term strategic integration of functions exercised under the Natural and Built Environments Act, LGA, LTMA and CCRA.
2	The Strategic Planning Act should provide a framework for mandatory regional spatial planning for both land and the coastal marine area.
3	Regional spatial strategies should set long-term objectives for urban growth and land use change, responding to climate change, and identifying areas inappropriate to develop for reasons such as their natural values or their importance to Māori.
4	There should be flexibility for: (i) the responsible Minister to determine sequencing, timing and priorities for preparation of these strategies (ii) spatial strategies to cover two or more regions or to focus on sub-regions in response to particular issues.
5	Regional spatial strategies should set a strategic direction for at least the next 30 years, informed by longer-term data and evidence as appropriate, such as 100 year plus projections for climate change.
6	Regional spatial strategies should be strategic and high level with project and site-level detail provided through separate implementation agreements and subsequent combined planning and funding processes.
7	Regional spatial strategies should be prepared and approved by a joint committee comprising representatives of central government, the regional council, all constituent territorial authorities in the region, mana whenua and an independent chair.
8	There should be significant stakeholder and community involvement in the preparation of these strategies, including through public submissions and a process similar to the special consultative procedure under the Local Government Act.
9	Joint committees should seek consensus, but dispute resolution procedures should be provided including a facilitated mediation process and power for the Minister to resolve any remaining disputes.
10	Regional spatial strategies should be consistent with national direction under the Natural and Built Environments Act.
11	Combined plans and regional and local funding plans should be consistent with spatial strategies.
12	Regional spatial strategies should be fully reviewed at least every nine years with flexibility for review within that period when required.

Chapter 5 A more responsive system: addressing status quo bias

Key recommendations – A more responsive system	
1	The principles that should guide the design of a more responsive resource management system are: (i) sustainability (ii) fairness and equity (iii) early notice and adequate time for transition (iv) balancing responsiveness with certainty for investment. These principles are reflected in the recommendations in chapter 6 Climate change and natural hazards, chapter 7 National direction, chapter 8 Policy and planning framework, chapter 9 Consents and approvals and chapter 11 Allocation of resources and economic instruments.
2	The protections generally afforded to existing uses and consented activities should be retained except that: (i) the powers of regional councils to modify or extinguish regional consents should be strengthened to achieve agreed outcomes and be more responsive to change (ii) the powers of territorial authorities should be extended to enable them to modify or extinguish existing land uses and land use consents in specific circumstances. These should be confined to: (a) where necessary to adapt to the effects of climate change or to reduce risks from natural hazards or (b) where there is high risk of significant harm or damage to health, property or the natural environment, for example by the breach of an environmental limit.

Chapter 6 Climate change and natural hazards

Key recommendations – Climate change and natural hazards	
1	Outcomes should be introduced for the following matters in the purpose and principles of the proposed Natural and Built Environments Act: (i) reduction of risks from natural hazards (ii) improved resilience to the effects of climate change, including through adaptation (iii) reduction of greenhouse gas emissions (iv) promotion of activities that mitigate emissions or sequestrate carbon (v) increased use of renewable energy.

Key recommendations – Climate change and natural hazards	
2	Mandatory national direction should be required for: (i) climate change mitigation consistent with the emissions reduction plan under the CCRA and in a way that aligns with and supports emissions pricing (ii) climate change adaptation and reduction of risks from natural hazards consistent with the national climate change risk assessment and national adaptation plan under the CCRA.
3	Regional spatial strategies developed under the proposed Strategic Planning Act should be used to address at a strategic level: (i) climate change mitigation, informed by the emissions reduction plan under the CCRA (ii) climate change adaptation and natural hazard risk reduction, informed by the national adaptation plan under the CCRA.
4	Reducing greenhouse gas emissions, climate change adaptation and reducing risks from natural hazards should be included in the functions and powers of both regional councils and territorial authorities under the proposed Natural and Built Environments Act.
5	Combined plans should be used to regulate land and resource use to give effect to the national direction and implement spatial strategies. This would include provisions under the proposed Natural and Built Environments Act to allow for adaptive planning measures.
6	Powers under the Natural and Built Environments Act to modify established land uses should be used to address climate change adaptation and reduction of risks from natural hazards.
7	A Managed Retreat and Climate Change Adaptation Act should be introduced to: (i) provide for managed retreat, powers to change established land uses and to address liability and options for potential compensation (ii) establish an adaptation fund to enable central and local government to support necessary steps to address climate change adaptation and reduction of risks from natural hazards.

Chapter 7 National direction

Key recommendations – National direction	
1	The current forms of national direction should be retained: national policy statements, national environmental standards, national planning standards and regulations.
2	The present functions of the Minister for the Environment and the Minister of Conservation should be continued, including the mandatory requirement for a New Zealand Coastal Policy Statement.
3	The purpose for national direction should be setting objectives, policies, limits, targets, standards and methods in respect of matters of national significance to give effect to the purpose and principles in the Natural and Built Environments Act and to resolve any conflicts between these matters.
4	Mandatory national direction should be required on the topics specified in section 9(3) of the purpose and principles of the Natural and Built Environments Act.
5	The power for the Minister for the Environment to issue discretionary national directions should be retained with some modification of the matters to be taken into account before deciding whether to do so.
6	There should be a single board of inquiry process for the preparation and review of both national policy statements and national environmental standards, except for minor changes for which an alternative process can be adopted.
7	All existing and new national direction should be brought together into a coherent combined set and any conflicts between them resolved.
8	National directions should be reviewed every nine years but intermediate changes should also be allowed for as necessary.
9	The respective roles of national policy statements and national environmental standards should be clarified and provision should be made for them to be issued separately or in a single instrument.
10	The making of regulations should generally be confined to their traditional role of dealing with administrative matters but regulations to address substantive issues should be allowed in limited circumstances and subject to appropriate safeguards.
11	National planning standards should have a more confined role and should be established by a process overseen by an expert advisory group which would make recommendations to the Minister for the Environment.
12	To improve responsiveness to national direction: (i) the ability to review existing regional permits and consents should be strengthened (ii) land use consents granted by territorial authorities and existing land use rights should be able to be reviewed but only in exceptional circumstances. These should be confined to: (a) where necessary to adapt to the effects of climate change or to reduce risks from natural hazards, or (b) where there is high risk of significant harm or damage to health, property or the natural environment, for example by the breach of an environmental limit.

Chapter 8 Policy and planning framework

Key recommendations – Policy and planning framework	
1	There should be a mandatory plan for each region combining regional policy statements and regional and district plans.
2	The functions of regional councils and territorial authorities should be clarified in the way described in this chapter.
3	The combined plans should be prepared by a joint committee comprising a representative of the Minister of Conservation and representatives of: (i) the regional council (ii) each constituent territorial authority in the region (iii) mana whenua.
4	The role of combined plans in the new system should be to demonstrate how the outcomes set out in the purpose of the Natural and Built Environments Act will be delivered in a region, including resolution of any conflicts or tensions between outcomes (if not resolved through national direction).
5	The joint committee should have authority to prepare and notify the combined plan and to make all decisions relating to the plan and subsequent processes without the need for ratification by the constituent local authorities.
6	The joint committee and the secretariat supporting it should be funded by the constituent local authorities.
7	The evaluation process currently undertaken under section 32 of the RMA should be retained under the Natural and Built Environments Act but should be modified in the way described in this chapter.
8	Prior to notification the Ministry for the Environment should undertake an audit of the plan.
9	After notification and receipt of submissions by interested parties, including the constituent local authorities and mana whenua, a hearing should be conducted by an independent hearing panel chaired by an Environment Judge.
10	The independent hearing panel should make recommendations to the joint committee which should have authority to decide which recommendations to accept or reject.
11	In respect of any recommendation rejected by the joint committee there should be a right of appeal to the Environment Court on the merits by any submitter. Where recommendations are accepted by the joint committee the right of appeal should be to the High Court and limited to questions of law.
12	This process should also apply to plan changes with some variation to account for the nature, scale and complexity of the change.
13	The preparation of combined plans should usually be undertaken after the preparation of a spatial strategy for the relevant region and reviewed at least every nine years with flexibility to review more often.
14	Private plan changes should still be possible but with greater constraints on when and in what circumstances that may occur.

Key recommendations – Policy and planning framework	
15	These new provisions should replace all plan-making processes available under current legislation including the current Schedule 1 process, and streamlined processes and collaborative planning.

Chapter 9 Consents and approvals

Key recommendations – Consents and approvals	
1	Current resource consent types should remain: land use and subdivision consents, and water, discharge and coastal permits.
2	The current list of activities should remain, except for the non-complying category which should be removed.
3	The current rules on notification of consent applications should be substantially changed by removing the 'no more than minor' effects threshold and replacing existing provisions with a combination of presumptions and plan provisions specifying when notification is to occur and in what form.
4	Information requirements should be proportionate to the nature, scale and complexity of the issue.
5	The matters to be considered on an application for resource consent should be amended in various respects including shifting the focus to identified outcomes and removing the 'subject to Part 2' reference and the permitted baseline test.
6	The direct referral process should be modified. Where the relevant consent authority declines to consent to the referral the Environment Court should be permitted to approve direct referrals on stated criteria.
7	An alternative dispute resolution process should be established for controlled or restricted discretionary activities in prescribed circumstances. Parties to the process should still be able to exercise rights of appeal but only by leave of the Environment Court.
8	An 'open portal' for consent applications should be established to coordinate agency responses and encourage the bundling of applications.
9	Proposals of national significance should remain but with a simplified process involving Ministerial referral to the Environment Court in accordance with prescribed criteria.

Chapter 10 Designations, heritage and water conservation orders

Key recommendations – Designations	
1	Eligibility to exercise designation powers should be centred on public-good purposes.
2	Those eligible should include: (i) a list of approved requiring authorities in the legislation: Ministers of the Crown, local authorities, and network utility operators that meet specified criteria (ii) other requiring authorities approved by the Minister for the Environment based on specified criteria.
3	A new default lapse period of 10 years should be available for all designations, with extensions of up to another 10 years subject to specified criteria.
4	There should be two stages in the designation process: (i) a notice of requirement defining the designation footprint (ii) a construction and implementation plan confined to addressing construction and operational effects.
5	Flexibility to combine these two stages should be provided.
6	The relevant considerations for a designation requirement should be modified to also include: (i) consistency with the regional spatial strategy (ii) its contribution to the outcomes identified in the Act, any national direction and the combined plan (iii) the opportunity for co-location of infrastructure within the designation.
7	Requiring authorities should prepare a construction and implementation plan. This should consider the environmental effects of the construction and implementation of the work and the appropriate controls to manage those effects.
8	Notices of requirement should continue to be publicly notified with appeal rights retained.
9	The construction and implementation plan should be available for public and territorial authority comment prior to construction works commencing.
10	Consideration should be given to extending designations into the coastal marine area.
Key recommendations – Heritage orders	
11	The Ministry of Culture and Heritage should continue its Strengthening Heritage Protection project as part of resource management reform. This work should include: (i) investigating potential provisions for national direction on heritage (ii) reviewing heritage order provisions (iii) exploring options for dealing with ‘demolition by neglect’ issues.

Key recommendations – Heritage orders	
12	This work should also investigate the interface between the Natural and Built Environments Act and the Heritage New Zealand Pouhere Taonga Act 2014 to provide greater clarity about which agency has primary responsibility for which aspects of heritage protection.
13	Subject to the outcomes of the review above one option for heritage orders could be to provide interim protection for a heritage site while more enduring solutions are explored.
Key recommendations – Water conservation orders	
14	The water conservation order process should be included in the Natural and Built Environments Act, retaining the current purpose, but with the following changes: (i) applications should be heard by the Environment Court in a one-stage process, with a draft order and recommendations made by the Court and referred to the Minister for the Environment for final decision-making (ii) applications should include a statement of proposed changes to the relevant planning documents which would be required to give effect to the order (iii) the Court's recommendations should include changes to relevant planning documents to give effect to the order (iv) ministerial approval of the order would include changes to planning documents which would give direct effect to the order without further process (v) hearings should be held at the closest practical location to the water body in question (vi) the application and hearing process should include mana whenua (vii) any relevant planning documents should 'give effect' to any order (viii) once an order is made it should be a matter for consideration in any consent applications that may impact on the water body.
15	Further work should be undertaken by the Ministry for the Environment and the Department of Conservation to investigate and develop policy on the effectiveness of water conservation orders as discussed in this chapter.

Chapter 11 Allocation of resources and economic instruments

Key recommendations – Allocation of resources and economic instruments	
1	The Natural and Built Environments Act should retain the current allocative functions for resources in the RMA.
2	Allocation principles of sustainability, efficiency and equity should be included in the new Act to provide greater clarity on the outcomes sought and a consistent framework for the development of more detailed measures.
3	The allocation principles should not be included in the purpose and principles of the Natural and Built Environments Act but should be in a part of the Act focused on allocation.
4	A combination of regulatory and market-based mechanisms is needed to allocate resources. These should be enabled under the Natural and Built Environments Act and developed in the context of specific resources through strategic planning, national direction and combined plans.
5	To enable sustainable, efficient and equitable allocation of resources, the Natural and Built Environments Act should adopt a more balanced approach to the prioritisation of existing users in resource consent processes. This includes: (i) encouraging shorter permit durations, with flexibility to provide longer-term permits for major infrastructure (ii) providing stronger powers to review and change consent conditions (iii) providing for a wider range of matters to be considered in consent renewal processes (iv) providing powers to direct common expiry of permit terms.
6	To promote more competitive urban land markets, national direction should be used to require the use of data on urban land prices, analysis of regulatory stringency, and a clear and flexible approach to urban land use regulation.
7	Further work should be undertaken to explore the use of targeted rates to capture uplift in land values as a result of public works.
8	To encourage greater use of economic instruments: (i) future legislation should ensure there is a broad mandate for the use of tradeable rights and permits, incentives and environmental taxes and charges (ii) central government should provide institutional support for the development and use of economic instruments by local authorities through a combination of national direction, guidance, and support for capability.

Chapter 12 System oversight

Key recommendations – National environmental monitoring system	
1	The Ministry for the Environment should establish in consultation with other agencies a comprehensive, nationally coordinated environmental monitoring system with the following features: (i) it should incorporate and build on the current National Monitoring System, with improvements to be more systematic about the data it collects and to make it easier for councils to use (ii) it should be supported with sufficient resourcing to improve the capacity and capability of central and local government, including science and data capability.
2	The Minister for the Environment should provide national direction on how the system should be implemented, including national direction developed with Māori on how to incorporate Māori perspectives and mātauranga Māori into the system.
3	The Ministry for the Environment should be responsible for implementing the system and monitoring performance of the system at a national level.
4	Local authorities should continue to have primary responsibility for the collection of data and the monitoring of system performance at local government level.
5	Combined plans should provide for monitoring and reporting.
Key recommendations – Environmental reporting	
6	The Ministry for the Environment and the Government Statistician should continue to be responsible for regular reporting to the Minister for the Environment on environmental outcomes at a national level.
7	There should be clear links between the Natural and Built Environments Act and Environmental Reporting Act.
8	Local authorities should be required to report regularly to the Ministry for the Environment on the state of the environment in their regions and districts.
9	Reports on the state of the environment should be made publicly available.
Key recommendations – Oversight of system performance	
10	The Ministry for the Environment should have primary responsibility for oversight of the effectiveness of the resource management system, including the effectiveness of the Natural and Built Environments Act and national direction made under it.
11	The combined planning joint committees should have oversight of the performance and effectiveness of combined plans.
Key recommendations – Auditing of system performance and responding to evidence of poor outcomes	
12	The Parliamentary Commissioner for the Environment's role should be expanded to include a more formalised and independent auditing and oversight role of the performance and effectiveness of the resource management system and on the state of the environment.

Key recommendations – Auditing of system performance and responding to evidence of poor outcomes	
13	The Parliamentary Commissioner for the Environment should be required to provide regular reports to Parliament on the performance and effectiveness of the resource management system and on the state of the environment.
14	These reports should be made publicly available and the Minister for the Environment should be required to identify steps to be taken to respond to issues identified.
15	Local authorities should also be required to state how they will respond to issues identified that relate to their regions and districts.

Chapter 13 Compliance, monitoring and enforcement

Key recommendations – Compliance, monitoring and enforcement	
1	System links should be established between compliance monitoring, state of the environment monitoring and monitoring progress towards outcomes.
2	New regional hubs should be established to undertake resource management compliance, monitoring and enforcement options.
3	The offence and penalties regime should be strengthened, including by: (i) increasing the maximum financial penalties (ii) deterring offending by extending the circumstances in which commercial gain may be taken into account in sentencing (iii) adjusting the maximum imprisonment term so most prosecutions may be heard as judge-alone trials (iv) prohibiting insurance for fines and infringement fees under the Natural and Built Environments Act (v) enabling creative sentencing options (vi) developing new Solicitor-General prosecution guidelines for environmental cases.
4	A number of new compliance, monitoring and enforcement measures should be introduced and existing measures improved, including by: (i) enabling regulators to recover costs associated with permitted activity and unauthorised activity monitoring (ii) amending the power to require disclosure of information about those carrying out the allegedly contravening activity (iii) creating a new offence for contravention of a condition of consent (iv) enabling abatement notices for the contravention of a consent notice, or any covenant imposed by condition of consent (v) establishing a new power to allow a regulator to apply for a consent revocation order in response to serious or repeated non-compliance (vi) providing for enforceable undertakings.

Chapter 14 Institutional roles and responsibilities

Key recommendations – Institutional roles and responsibilities	
1	Additional resourcing should be provided to the Ministry for the Environment to undertake its expanded role, including providing support for local authorities and mana whenua.
2	Additional resources should be provided to the Office of the Parliamentary Commissioner for the Environment to enable the Office to undertake expanded oversight and auditing roles.
3	Participation by mana whenua in resource management processes should be supported by central government and local government funding and capability-building assistance.
4	The Ministry for the Environment should work with professional institutes and organisations to ensure those administering the reformed RMA are appropriately equipped and upskilled to implement it.
5	The Ministry for the Environment should provide easily accessible public guidance on all the essential aspects of a reformed RMA.
6	A climate change adaptation fund should be established, and hazard risk management guidance provided by central government, to enable local authorities to take pre-emptive adaptation action on climate change effects.
Key recommendations – Environment Court	
7	A sitting or retired Environment Judge should chair boards of inquiry on proposed national direction.
8	A sitting Environment Judge should chair independent hearing panels considering combined plans.
9	The Environment Court should continue to have all its present jurisdiction and a new appellate role in the combined plan/independent hearing panel process.
10	The Environment Court should hear all applications for proposals of national significance.
11	Consideration should be given to a potential role for the Environment Court under separate legislation on managed retreat.
12	The changes recommended in this chapter to improve access to justice should be adopted.
13	The number of judges, commissioners and registry staff at the Environment Court should be increased as necessary to ensure the Court has sufficient capacity to carry out the increased range of functions we propose.

Chapter 15 Reducing complexity

Key recommendation – Reducing complexity	
1	The RMA should be repealed and replaced by the Natural and Built Environments Act to reduce complexity and improve overall coherence of the legislation.

Chapter 16 Transition to a reformed system

Key recommendations – Transition to a reformed system	
1	Work on developing transitional arrangements as part of implementing the reforms we propose in this report will need to balance stability and a smooth transition with implementation of the reforms as soon as practicable.
2	The key components of the transition are: (i) the timing and sequencing of national direction, regional spatial strategies and combined plans (ii) the impact on existing processes, consents and activities under the RMA (iii) the financial and resourcing implications to develop and implement the reformed system (iv) supporting the change in culture.
3	Work should commence as soon as possible on the preparation of the Strategic Planning Act, the Natural and Built Environments Act and the Managed Retreat and Climate Change Adaptation Act.
4	The Strategic Planning Act should come into effect before or at the same time as the Natural and Built Environments Act, but the Managed Retreat and Climate Change Adaptation Act could come later.
5	The new legislation for the reforms we propose should be in place by the time the proposed COVID-19 recovery legislation expires.
6	We would expect mandatory national directions to be completed within three years of the introduction of the Natural and Built Environments Act.
7	We would expect the overall transition process to be completed within 10 years of the introduction of the Strategic Planning Act and the Natural and Built Environments Act.
8	Some work should commence immediately, such as data collection and analysis to establish a robust evidence base for setting targets and limits.
9	The Minister should select one region to develop the first regional spatial strategy, followed by development of the combined plan, to provide a model for other regions to follow.

Appendix 1 Indicative drafting of purpose and principles and definitions for the Natural and Built Environments Act

Section 5 Purpose

(1) The purpose of this Act is to enhance the quality of the environment to support the wellbeing of present and future generations and to recognise the concept of Te Mana o te Taiao.

(2) The purpose of this Act is to be achieved by ensuring that:

(a) positive outcomes for the environment are identified and promoted;

(b) the use, development and protection of natural and built environments is within environmental limits and is sustainable; and

(c) the adverse effects of activities on the environment are avoided, remedied or mitigated.

(3) In this Act **environment** includes–

(a) ecosystems and their constituent parts;

(b) people and communities; and

(c) natural and built environments whether in urban or rural areas.

(4) In this Act **wellbeing** includes the social, economic, environmental and cultural wellbeing of people and communities and their health and safety.

Section 6 Te Tiriti o Waitangi

In achieving the purpose of this Act, those exercising functions and powers under it must give effect to the principles of Te Tiriti o Waitangi.

Section 7 Outcomes

To assist in achieving the purpose of this Act, those exercising functions and powers under it must provide for the following outcomes:

Natural environment

(a) enhancement of features and characteristics that contribute to the quality of the natural environment;

(b) protection and enhancement of:

(i) nationally or regionally significant features of the natural character of the coastal environment (including the coastal marine area), wetlands, lakes, rivers and their margins:

Section 7 Outcomes

(ii) outstanding natural features and outstanding natural landscapes:

(iii) areas of significant indigenous vegetation and significant habitats of indigenous fauna:

(c) enhancement and restoration of ecosystems to a healthy functioning state;

(d) maintenance of indigenous biological diversity and restoration of viable populations of indigenous species;

(e) maintenance and enhancement of public access to and along the coastal marine area, wetlands, lakes, rivers and their margins;

Built environment

(f) enhancement of features and characteristics that contribute to the quality of the built environment;

(g) sustainable use and development of the natural and built environment in urban areas including the capacity to respond to growth and change;

(h) availability of development capacity for housing and business purposes to meet expected demand;

(i) strategic integration of infrastructure with land use;

Tikanga Māori

(j) protection and restoration of the relationship of iwi, hapū and whanau and their tīkanga and traditions with their ancestral lands, cultural landscapes, water and sites;

(k) protection of wāhi tapu and protection and restoration of other taonga;

(l) recognition of protected customary rights;

Rural

(m) sustainable use and development of the natural and built environment in rural areas;

(n) protection of highly productive soils;

(o) capacity to accommodate land use change in response to social, economic and environmental conditions;

Historic heritage

(p) protection of significant historic heritage;

Natural hazards and climate change

(q) reduction of risks from natural hazards;

(r) improved resilience to the effects of climate change including through adaptation;

(s) reduction of greenhouse gas emissions;

(t) promotion of activities that mitigate emissions or sequestrate carbon; and

(u) increased use of renewable energy.

Section 8 Environmental limits

(1) Environmental limits are the minimum standards prescribed through national directions by the responsible Minister to achieve the purpose of this Act

(2) Environmental limits –

  (a) must provide a margin of safety above the conditions in which significant and irreversible damage may occur to the natural environment;

  (b) must be prescribed for, but are not limited to:

    (i) the quality, level and flow of fresh water:

    (ii) the quality of coastal water:

    (iii) the quality of air:

    (iv) the quality of soil:

    (v) the quality and extent of terrestrial and aquatic habitats for indigenous species:

  (c) may be quantitative or qualitative.

(3) Local authorities are not precluded from setting standards that are more stringent than those prescribed by the Minister.

Section 9 Implementation

(1) This section states the approach to be adopted in implementing this Part but does not limit or affect the exercise of functions under this Act in any other respect.

Principles

(2) Those performing functions under this Act must do so in a way that gives effect to this Part and:

  (a) promotes the integrated management of natural and built environments;

  (b) ensures public participation in processes under this Act to an extent that recognises the importance of public participation in good governance and is proportionate to the significance of the matters at issue;

  (c) promotes appropriate mechanisms for effective participation by iwi, hapū and whanau in processes under this Act;

  (d) provides for kaitiakitanga and tikanga Māori and the use of mātauranga Māori;

  (e) complements other relevant legislation and international obligations;

  (f) has particular regard to any cumulative effects of the use and development of natural and built environments; and

  (g) takes a precautionary approach where effects on the environment are uncertain, unknown or little understood but have potentially significant and irreversible adverse consequences.

Section 9 Implementation

Ministerial duties: outcomes and environmental limits

(3) The responsible Minister must through national direction identify and prescribe:

(a) features and characteristics that contribute to enhancing the quality of natural and built environments;

(b) targets to achieve continuing progress towards achieving the outcomes specified in section 7;

(c) the environmental limits specified in section 8(2)(b);

(d) nationally significant features of the matters set out in section 7(b)(i);

(e) outstanding natural features and outstanding natural landscapes under section 7(b)(ii) that are of national significance;

(f) areas of significant indigenous vegetation and significant habitats of indigenous fauna under section 7(b)(iii) that are of national significance;

(g) methods and requirements to give effect to the enhancement and restoration of ecosystems for the purposes of section 7(c);

(h) methods and requirements to give effect to the maintenance of indigenous biodiversity and restoration of viable populations of indigenous species for the purposes of section 7(d);

(i) how the principles of Te Tiriti o Waitangi will be given effect through functions and powers exercised under this Act; and

(j) methods and requirements to respond to natural hazards and climate change for the purposes of section 7(q) to 7(u).

(4) The responsible Minister is the Minister for the Environment except in relation to the coastal marine area for which the Minister of Conservation is the responsible Minister in consultation with the Minister for the Environment.

Hierarchy: resolution of conflicts

(5) The use and development of natural and built environments must be within prescribed environmental limits and comply with binding targets, national directions and regulations.

(6) Subject to (5), any conflict in or doubt about the application of matters in section 7 must be reconciled and clarified as necessary in a way that gives effect to the purpose of this Act:

(a) by the Minister through national direction or by regulation; or

(b) in the absence of any such direction or regulation, by the provisions of policy statements and plans.

Definitions

biological diversity means the variability among living organisms including diversity within species, between species, and of ecosystems of which they are a part.

built environment includes human-made buildings, structures, places, facilities, infrastructure and their interactions which collectively form part of urban and rural areas in which people live and work.

climate change means a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods (*retained RMA definition*).

coastal marine area means the foreshore, seabed, and coastal water, and the air space above the water—

(a) of which the seaward boundary is the outer limits of the territorial sea:

(b) of which the landward boundary is the line of mean high water springs, except that where that line crosses a river, the landward boundary at that point shall be whichever is the lesser of—

  (i) 1 kilometre upstream from the mouth of the river; or

  (ii) the point upstream that is calculated by multiplying the width of the river mouth by 5 (*retained RMA definition*).

coastal water means seawater within the outer limits of the territorial sea and includes—

(a) seawater with a substantial fresh water component; and

(b) seawater in estuaries, fiords, inlets, harbours, or embayments (*retained RMA definition*).

cultural landscape means a defined area or place with strong significance for mana whenua arising from cultural or historic associations and includes connected natural, physical or metaphysical markers or features.

cumulative effect means any effect that–

accumulates over time or space or in combination with other effects; and

may be individually minor but collectively significant.

ecosystem means the dynamic complex of organisms, their associated physical environment, their intrinsic value and the natural systems, cycles and processes through which they interact as a functional unit.

effect includes—

(a) any positive or adverse effect; and

(b) any temporary or permanent effect; and

(c) any past, present, or future effect; and

(d) any cumulative effect –

regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) any potential effect of high probability; and

(f) any potential effect of low probability which has a high potential impact.

Definitions

fresh water means all water except coastal water and geothermal water *(retained RMA definition).*

historic heritage –

(a) means those natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:

  (i) archaeological:

  (ii) architectural:

  (iii) cultural:

  (iv) historic:

  (v) scientific:

  (vi) technological; and

(b) includes—

  (i) historic sites, structures, places, and areas; and

  (ii) archaeological sites; and

  (iii) sites of significance to Māori, including wāhi tapu; and

  (iv) surroundings associated with the natural and physical resources *(retained RMA definition).*

identify for the purpose of sections 9(3)(d), (e) and (f) means–

(a) establishing criteria for assessing their significance;

(b) describing them;

(c) defining the values to be protected and enhanced; and

(d) mapping their location where practicable.

infrastructure means the structures, facilities and networks required nationally or in a region or district to support the functioning of communities and the health and safety of people and includes the network and community infrastructure and community facilities defined in section 197 of the Local Government Act 2002.

kaitiakitanga means the exercise of guardianship by iwi, hapū and whanau of an area in accordance with tīkanga Māori in relation to the natural and built environment.

natural environment includes land, water, air, soil, minerals and energy, all forms of plants, animals and other living organisms (whether native to New Zealand or introduced) and their habitats, and includes ecosystems.

natural hazard means any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment (*retained RMA definition*).

precautionary approach means undertaking a careful evaluation of the risks and favouring caution and the protection of the environment.

Definitions

protected customary rights means protected rights in the Takutai Moana (Marine and Coastal Area), established by sections 51 to 57 of the Marine and Coastal Area (Takutai Moana) Act 2011 (*retained RMA definition*).

renewable energy means energy produced from solar, wind, hydro, geothermal, biomass, tidal, wave, and ocean current sources (*retained RMA definition*).

risks means the likelihood and consequences of a natural hazard *(to align with the definition in section 4 of the Civil Defence Emergency Management Act 2002)*.

sustainable means that the needs of the present generation are met without compromising the ability of future generations to meet their own reasonably foreseeable needs.

targets mean binding or non-binding goals or objectives to achieve continuing improvement in the outcomes specified in section 7.

Te Mana o te Taiao refers to the importance of maintaining the health of air, water, soil and ecosystems and the essential relationship between the health of those resources and their capacity to sustain all life.

Te Tiriti o Waitangi has the same meaning as the word Treaty as defined in section 2 of the Treaty of Waitangi Act 1975.

tikanga Māori means Māori customary values and practices (*retained RMA definition*).

wetland includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions (*retained RMA definition*).

Appendix 2 Design of the spatial planning legislation

Design parameters	Preferred model
Purpose	**Purpose** The purpose of this Act is to promote the social, economic, environmental and cultural wellbeing of present and future generations through the long-term strategic integration of functions exercised under specified legislation in relation to: (a) the use, development, protection and enhancement of the natural and built environments; (b) the provision of infrastructure and services and associated funding and investment; (c) the relationship of iwi, hapū and whānau and their culture and traditions with natural and built environments; and (d) responses to climate change including the reduction of greenhouse gas emissions, reduction of risks from natural hazards and the use of adaptation measures. **Specified legislation** means enactments specified in Schedule 1. **Schedule 1** **Enactments subject to this Act** Natural and Built Environments Act Local Government Act 2002 Land Transport Management Act 2003 Climate Change Response Act 2002
Scope	Broad: Spatial strategies encompass planning (both for land use and in the coastal marine area), protection and enhancement of the natural environment, the provision of infrastructure, and associated funding and investment. They also encompass the spatial aspects of social and economic development Spatial strategies have effect across the Natural and Built Environments Act, LGA, LTMA and wider infrastructure provision by central government
Timescale	Long-term: at least 30 years, informed by longer-term data and evidence as appropriate, including 100 plus year projections for climate change
Geographical scale	The default geographical scale is current regional boundaries. However, there is flexibility for inter-regional processes and particular focus on parts of a region
Regional application	Mandatory for all regions, but the responsible Minister can prioritise and sequence.
Application of regional spatial strategies to the coastal marine area (CMA)	Regional boundaries include the CMA. Spatial plans include the CMA and must be 'consistent with' the NZCPS

Design parameters	Preferred model
Provision for a national priorities statement	To enable coordination across central government and transparency with regard to engagement with local government, a national priorities statement would set out: • any intended sequence in which central government intends to engage in the development of regional spatial strategies • any particular areas central government intends to promote or address through regional spatial strategies (for example, climate change adaptation and urban development). Focus areas might be tailored to the characteristics of particular regions • expectations about inter-regional processes to address cross-boundary issues
Legislative design	A new Strategic Planning Act
Links to legislative purposes and national instruments	Regional spatial strategies to be 'consistent with': • the purposes of the Natural and Built Environments Act, LGA and LTMA • national policy statements and national environmental standards under the Natural and Built Environments Act • the national adaptation plan under the CCRA • government policy statements, including on land transport and housing and urban development Regional spatial strategies are to 'take into account' other relevant national strategies, including the Emissions Reduction Plan under the CCRA and the Infrastructure Commission's 30-year national infrastructure strategy
Influence over regulatory and funding plans	Strong: Natural and Built Environments Act combined plans, LGA infrastructure strategies, long-term plans and annual plans, and LTMA regional land transport plans required to be 'consistent with' the spatial strategy
Specified content	Regional spatial strategies should: • set long-term objectives and strategies to improve the quality of the natural and built environments, provide sufficient development capacity, promote Māori interests and values, promote the sustainable use of rural land, protect historic heritage, address natural hazards and climate change mitigation and adaptation • illustrate the need to protect certain areas from development due to their economic, environmental or cultural value • ensure that development is avoided or carefully considered in areas subject to constraints, such as natural hazards and coastal inundation (consistent with national direction under the Natural and Built Environments Act and the national adaptation plan under the CCRA) • identify areas where significant land use change is required for climate change mitigation and adaptation • identify areas where significant land use change is required to reduce impacts of activities, land use and development on lakes, rivers, wetlands and the marine environment • identify additional development capacity required to accommodate growth and areas suitable for future development and intensification (consistent with national direction and government policy statements) • establish the need for new infrastructure corridors, major social infrastructure and other strategic investments (consistent with government policy statements and informed by the Infrastructure Commission's national infrastructure strategy)

Design parameters	Preferred model
	• identify opportunities to make better use of existing infrastructure networks • establish the need for new regionally significant recreational or community facilities • illustrate options or scenarios (with indicative costs and timing) that reconcile these different opportunities and challenges
Focus and level of detail	Strategic and high level: • describes graphically at a high level how limits and targets set through national direction and combined planning processes might be implemented through the regional spatial strategy, for example, blue green networks • includes future infrastructure corridors (ie, a major new public transport corridor like the City Rail Link, or a major new road like Transmission Gully) and indicative locations for future social infrastructure, such as hospitals and schools • includes consideration of measures to maximise the existing capacity of infrastructure networks • does not include detailed information about infrastructure project design, costs or timing. However, this would be progressed in an implementation agreement developed alongside or following the spatial strategy
Separate implementation agreement	A separate implementation agreement would provide an easily updated means of prioritising certain projects arising from a spatial strategy. For example: • agreement to progress a more detailed options analysis or a business case for certain major infrastructure projects, or measures to make better use of existing networks • agreement to progress a more detailed options analysis or a business case for certain other projects (ie, large scale environmental remediation projects) • agreement to a funding share between central and local government for certain initiatives The implementation agreement would be progressed through central and local government budget processes
Accountability and governance	Governing bodies (eg, joint committees) with members from central government, councils of the region and mana whenua to be responsible for the development, approval and implementation of spatial strategies
Chair	Independent expert (ie, not a central or local government or mana whenua representative)
Decision-making	Consensus, with facilitated mediation and power for the responsible Minister or Ministers to resolve disputes
Stakeholder and public participation	Significant stakeholder involvement, including representation on working groups Public consultation designed to reach a diverse range of people in the community. Includes use of special consultative procedure in the LGA, modified as necessary
Independent review	Independent review of draft regional spatial strategies by a suitably qualified expert appointed by the governing body, with the reviewer to make recommendations to the governing body

Design parameters	Preferred model
Review frequency	A requirement for a full review 'at least every nine years', with flexibility to review in full or in part within the nine-year period to make adjustments in response to significant change
Monitoring and oversight requirements	Central and local government to be primarily responsible for implementation and monitoring. PCE to audit and report on the effectiveness of spatial strategies across New Zealand in achieving system outcomes

Appendix 3 Indicative drafting of national direction

Indicative drafting for the purpose of national direction

Purpose of national direction

(1) In this Part, **national direction** means a national policy statement or a national environmental standard prepared under this Act.

(2) The purpose of national direction is to set objectives, policies, limits, targets, standards and methods in respect of matters of national significance in order to achieve the purpose of this Act and to give effect to the purpose and principles of this Act (the Natural and Built Environments Act).

Indicative drafting on matters to which Ministers must have regard

Matters to which the Minister must have regard to before issuing national direction

(1) The Minister must prepare and maintain, at all times, national directions necessary to give effect to the obligations in section 9(3).[473]

(2) There shall, at all times, be at least one New Zealand Coastal Policy Statement prepared and recommended by the Minister of Conservation in consultation with the Minister for the Environment.

(3) In deciding whether to proceed with any other national direction, the Minister must have regard to —

- (a) the nature, scale and significance of the matter at issue;
- (b) the potential to contribute to achieving nationally significant outcomes for the natural or built environments and the social, economic, environmental and cultural wellbeing of peoples and communities;
- (c) whether there is evidence of widespread public concern or interest regarding actual or potential effects of the matter on the natural or built environments;
- (d) whether there is the potential for significant or irreversible effects on the natural or built environments;
- (e) whether the matter affects the natural and built environments in more than one region;
- (f) whether the matter relates to a network utility operation affecting more than one district or region;
- (g) whether the matter relates to effects on a structure, feature, place or area of national significance including in the coastal marine area;
- (h) whether the matter involves technology, processes or methods that are new to New Zealand and may affect the natural or built environments;
- (i) whether the national direction would assist in fulfilling New Zealand's international obligations in relation to the global environment;
- (j) whether by reason of complexity or otherwise the matter is more appropriately dealt with under this Part rather than by other processes under this Act;
- (k) any other relevant matter.

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[473] References to section numbers are to those in the indicative drafting of the new purpose and principles in appendix 1.

Indicative drafting for the content of national policy statements and national environmental standards

Content of national policy statements

(1) National policy statements under this Act must—

- (a) state the matters that contribute to the quality of the natural and built environments;
- (b) set binding or non-binding targets to achieve continuing improvement in the outcomes specified in section 7;
- (c) state the objectives and policies to achieve the targets;
- (d) state how the principles of Te Tiriti will be given effect through functions exercised under this Act;
- (e) state which provisions are to be incorporated into plans without further formality or process, and which provisions are to be incorporated by way of a plan change process;
- (f) state how the national policy statement will be monitored, including the measures or indicators to be used and the frequency of monitoring and reporting.

(2) A national policy statement may—

- (a) state the matters that local authorities must consider and take into account in preparing policy statements and plans;
- (b) state matters or provisions to be included in policy statements or plans;
- (c) state constraints or limits on the content of policy statements or plans;
- (d) state methods or requirements to be included in plans, and any specifications about how local authorities must apply those methods or requirements;
- (e) include any other matter relating to the purpose or implementation of the national policy statement;
- (f) prescribe the information to supplied by local authorities required to support monitoring and reporting on the effectiveness of the national policy statement;
- (g) include directions to local authorities.

(3) A national policy statement may apply—

- (a) generally across New Zealand; or
- (b) to any specified region or district; or
- (c) to any specified part or parts of New Zealand.

(4) A national policy statement may express its provisions—

- (a) as a narrative for the purposes of providing guidance; or
- (b) as directions to be complied with; or
- (c) as a combination of narrative and directive provisions.

Indicative drafting for the content of national policy statements and national environmental standards

Content of national environmental standards

(1) National environmental standards under this Act must—

(a) state the limits to be set in order to fulfil the Minister's obligations under section 9(3);

(b) state the standards to be complied with to ensure environmental limits are not breached;

(c) state how the national environmental standard will be monitored, including the measures or indicators to be used and the frequency of monitoring and reporting.

(2) A national environmental standard may—

(a) state binding targets to be complied with in order to fulfil the obligations of the Minister under section 9(3);

(b) state the matters that local authorities must consider and take into account in preparing policy statements and plans;

(c) state matters or provisions to be included in policy statements or plans;

(d) state constraints or limits on the content of policy statements or plans;

(e) describe methods to be used to achieve compliance with a standard (including rules);

(f) prescribe the information to be supplied by local authorities required to support monitoring and reporting on the effectiveness of the environmental standard;

(g) include any other matter relating to the purpose or implementation of the national environmental standard.

(3) A national environmental standard may apply—

(a) generally across New Zealand; or

(b) to any specified region or district; or

(c) to any specified part or parts of New Zealand.

Combined national policy statement and national environmental standard

(1) The Governor-General may, by Order in Council, make regulations combining a national policy statement and a national environmental standard in a single instrument.

(2) A national policy statement and a national environmental standard in any such regulations must have the same purpose, function and content as if they had been issued separately.

(3) The making of a regulation under this section must follow the same public participation and board of inquiry processes as a national policy statement, with all necessary modifications, as though it were a national policy statement.

(4) A regulation made under this section is a legislative instrument.

Appendix 4 Indicative drafting for resource consent applications and proposals of national significance

Indicative drafting for consideration of resource consent applications

Consideration of applications

(1) When considering an application for a resource consent the consent authority must have regard to—

- (a) whether, and to what extent, the activity would contribute to the outcomes, targets and policies identified in any relevant operative or proposed policy statement or plan;
- (b) any effects on the natural and built environments of allowing the activity;
- (c) any relevant provisions of—
  - (i) a national environmental limit or standard:
  - (ii) other regulations:
  - (iii) a national policy statement:
  - (iv) a New Zealand coastal policy statement:
  - (v) a regional policy statement or proposed regional policy statement: and
  - (vi) a plan or proposed plan;
- (d) the nature and extent of any inconsistency with any policies and rules in any relevant operative or proposed plan; and
- (e) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) When considering an application for a resource consent, the consent authority must not have regard to—

- (a) trade competition or the effects of trade competition; or
- (b) any effect on a person who has given written approval to the application.

(3) The consent authority must not grant a resource consent—

- (a) that is contrary to—
  - (i) an environmental limit;
  - (ii) a binding target;
  - (iii) a national environmental standard;
  - (iv) any regulations;
  - (v) a water conservation order;
  - (vi) the restrictions on the grant of a discharge permit and a coastal permit;
  - (vii) wāhi tapu conditions included in a customary marine title order or agreement; and
  - (viii) section 55(2) of the Marine and Coastal Area (Takutai Moana) Act 2011;
- (b) if the application should have been notified and was not.

Indicative drafting for consideration of resource consent applications

(4) The consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, or a discretionary activity, regardless of what type of activity the application was expressed to be for.

(5) The consent authority may decline an application for a resource consent on the grounds that it has inadequate information to determine the application.

Indicative drafting for making a direction on a proposal of national significance

Matters to which the Minister must have regard before making a direction on a proposal of national significance

In deciding if a matter [defined at present under section 141] is or is part of a proposal of national significance and whether to invoke the process under this Part the Minister must have regard to—

(a) the nature, scale and significance of the proposal:

(b) its potential to contribute to achieving nationally significant outcomes for the natural or built environments and the social, economic, environmental and cultural wellbeing of people and communities:

(c) whether there is evidence of widespread public concern or interest regarding its actual or potential effects on the natural or built environment:

(d) whether it has the potential for significant or irreversible effects on the natural or built environment:

(e) whether it affects the natural and built environments in more than one region:

(f) whether it relates to a network utility operation affecting more than one district or region:

(g) whether it affects or is likely to affect a structure, feature, place or area of national significance including in the coastal marine area:

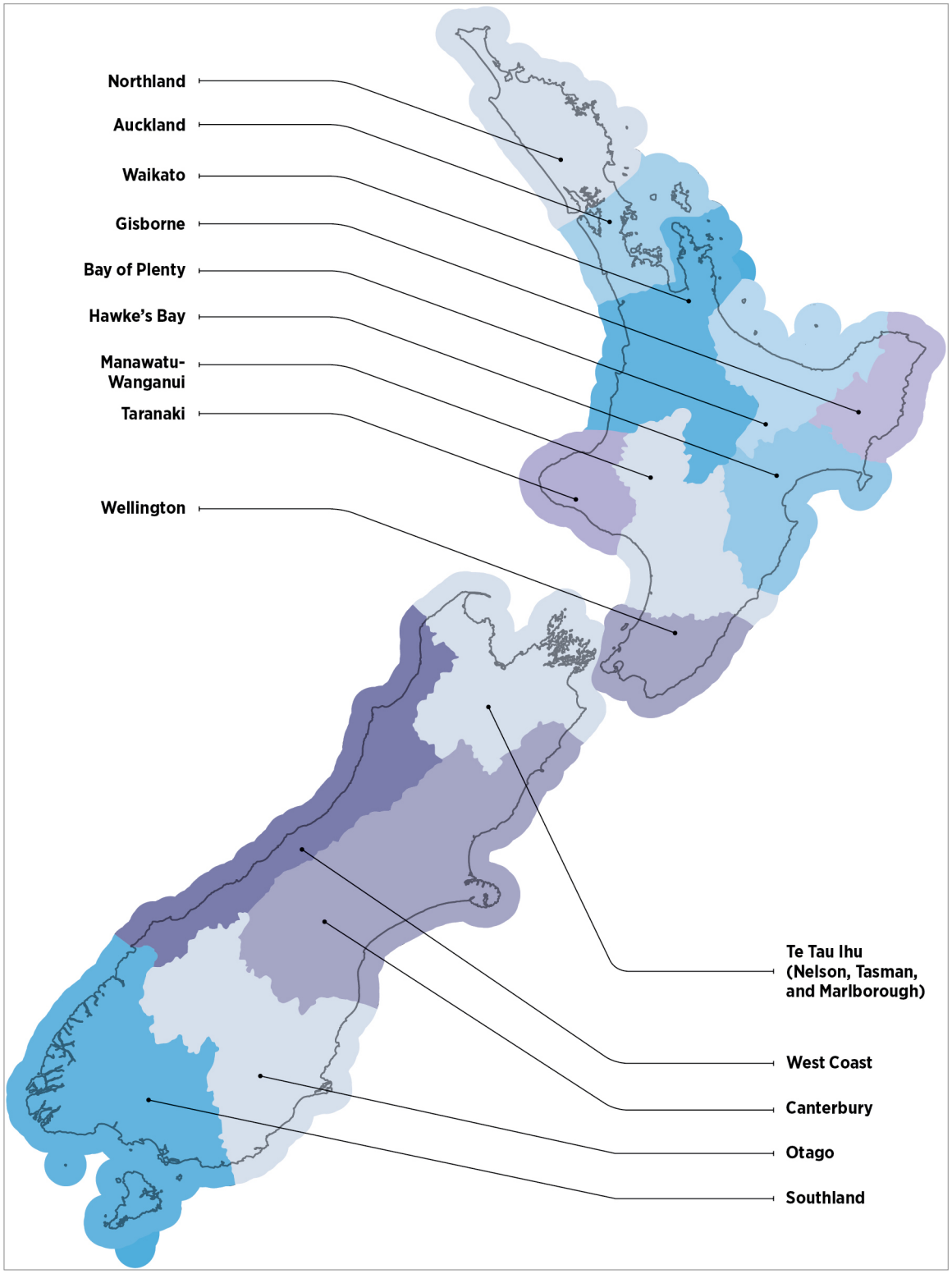
(h) whether it involves technology, processes or methods that are new to New Zealand and may affect the natural or built environment:

(i) whether it would assist in fulfilling New Zealand's international obligations in relation to the global environment:

(j) whether by reason of complexity or otherwise it is more appropriately dealt with under this Part rather than by the normal processes under this Act:

(k) any other relevant matter.

Appendix 5 Map of regions for combined planning



It is proposed that Nelson, Tasman and Marlborough unitary authorities jointly produce a combined plan for their regions.

Appendix 6 Terms of Reference

Terms of Reference

Resource Management Review Panel

Approved by Cabinet on 11 November 2019

Establishment of the Resource Management Review Panel

1. These terms of reference establish the Resource Management Review Panel (the Panel).

2. The Panel is established for the purpose of undertaking a comprehensive review of the resource management system (the review). This review represents the second stage of the Government's two-stage approach to resource management reform.

3. The role of the Panel will be reviewed following Cabinet's consideration of the Panel's final report.

4. Further context is set out in the associated Cabinet Paper *Comprehensive review of the resource management system: scope and process*.

Aim of the review

5. The aim of the review is to improve environmental outcomes and better enable urban and other development within environmental limits.

Approach to the review

6. The Resource Management Act 1991 (RMA) was a major step forward for resource management in New Zealand, and was a product of rising environmental awareness. While much of the RMA remains sound, it is underperforming in the management of key environmental issues such as freshwater, and in delivering affordable housing, social and network infrastructure, and well-designed urban communities.

7. The review is expected to resolve debate on key issues (listed at Appendix 1), including possibly separating statutory provision for land use planning from environmental protection of air, water, soil and biodiversity. Resolving questions of this magnitude will require the review to consider a wide range of options, including options that depart from the status quo.

8. One such option, in the context of further clarifying Part 2 (purpose and principles) of the RMA, is determining whether Part 2 (or its replacement) sits in the RMA or in a separate piece of legislation.

9. The review must design a system for land use regulation and environmental protection that is fit for addressing current and future challenges. Recommendations should consider, and where appropriate reflect, developments in New Zealand and international best practice. The review should support the development of a system that delivers cultural and environmental outcomes for all New Zealanders, including Māori, and improves their wellbeing.

Scope of the review

Primary focus is the RMA

10. This review will focus primarily on the RMA itself.[1] The review will include the interface of the RMA with the Local Government Act 2002 (LGA), the Land Transport Management Act 2003 (LTMA) and the Climate Change Response Act 2002, as visualised in Figure 1 below.

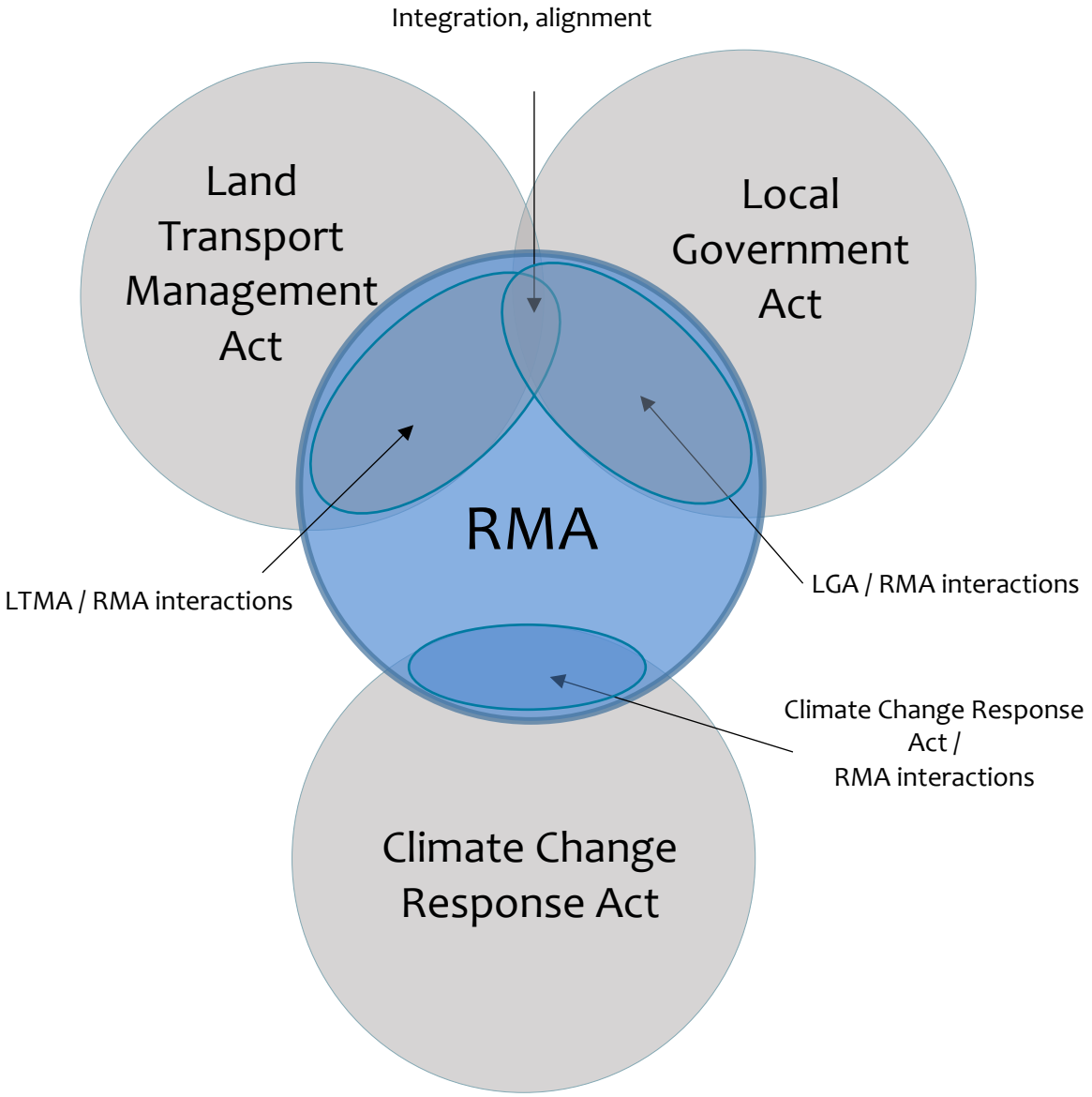


Figure 1: Scope of the review scope. Blue areas are in scope - green areas are beyond scope.

11. The review should prioritise setting the high level framework for an improved resource management system, rather than resolving all specific issues with the current legislation. More detailed policy, process and transitional issues will be progressed by officials following the review.

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[1] Cabinet has previously agreed to consider the particular issues of urban tree protection and climate change resilience (both mitigation and adaptation) as part of this review.

12. The review can recommend where further work is needed to strengthen New Zealand's overall resource management system that falls outside either the scope or timeframe of the review.

13. The review will focus on addressing the key issues listed at Appendix 1.

Spatial planning between the RMA, the LGA and the LTMA

14. The review will consider a new role for spatial planning. Doing so requires consideration of plans and processes across the RMA, LGA and LTMA. This will include how to improve planning responses to the pressures of urban growth, and better manage environmental effects.

15. Proposals for strengthening spatial planning across all three Acts are currently being developed under the Urban Growth Agenda in conjunction with the Ministers of Housing, Urban Development, Local Government, and Transport.

16. The review must consider any proposals arising from this work and how they should be integrated into the Panel's recommended changes.

Other reviews and legislation within the resource management system

17. The review should consider the potential impact of and alignment with other relevant legislation (including the Building Act 2004 and Fisheries Act 1996), government programmes and regulatory reviews currently underway within the resource management system. These include but are not limited to the initiatives listed at Appendix 2.

18. The Secretariat can facilitate connections between the Panel and related policies and programmes as required. Where necessary, the Panel can communicate its view as to how such policies and programmes intersect with and impact on its review.

Role of institutions

19. Institutional reform is not a driver of the review, and it is expected that both regional councils and territorial authorities will endure. However, in making recommendations, the review should consider which entities are best placed to perform resource management functions. In considering any allocation of functions the review should:
    - consider the roles of existing entities, including post-settlement governance entities and iwi authorities, and any new entities under development
    - consider whether all entities delegated with resource management functions have the capacity, funding, incentives and capability to deliver those functions effectively
    - only consider the possibility of creating a new entity after evaluating the potential for existing and proposed entities to deliver functions
- take into account the Productivity Commission's framework to guide the allocation of regulatory roles, especially the principles for allocating roles.[2]

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[2] New Zealand Production Commission. 2013. *Towards Better Local Regulation.* Section 6.4. Pages 117–135. URL: https://www.productivity.govt.nz/sites/default/files/towards-better-local-regulation.pdf

Out of scope

20. The following matters are outside the scope of the review, unless approved by the Minister for the Environment (the Minister):

    - the marine environment that is beyond the 12 nautical mile territorial sea outer limit
    - existing Treaty of Waitangi settlements and orders made under the Marine and Coastal Area (Takutai Moana) Act 2011, except insofar as how a new resource management system will provide for them
    - issues with other Acts, such as the LGA and LTMA, beyond spatial planning or the interfaces of these Acts with the RMA (as visualised in Figure 1)
    - issues with other pieces of legislation within the resource management system, beyond their interface with the RMA, including for the marine environment
    - issues relating to Māori rights and interests in freshwater allocation, including current work looking at how Māori can fairly access freshwater resources[3]
    - wider issues within the resource management system not included in these terms of reference.

Changes to scope

21. The scope of the review may only be modified by written agreement from the Minister.

Review Deliverables

Final report

22. The primary review deliverable is a final report for the Minister recommending how to improve the resource management system and strengthen spatial planning. The report will provide detailed policy proposals for significant parts of a new Act or Acts, and indicative legislative drafting of key provisions. Policy recommendations must address the review's aim, and issues identified in Appendix 1.

23. Recommendations in the final report should be reached by consensus between Panel members.

24. The final report is due with the Minister at the end of May 2020. A complete rewrite of the RMA is not a review deliverable, but indicative solutions should be provided that can be used for completion of that task. Cabinet will be responsible for making all decisions about how to progress review findings.

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[3] These issues are being progressed under the Essential Freshwater – Healthy Water, Fairly Allocated work programme. The Cabinet paper: *A New Approach to the Crown/Māori Relationship for Freshwater* sets out decisions made by the Cabinet Environment, Energy and Climate Committee and endorsed by Cabinet (CAB-18-MIN-0318) – accessible at https://www.mfe.govt.nz/sites/default/files/media/Fresh%20water/shared-interests.pdf

Issues and options paper

25. The review will produce an 'issues and options' paper to solicit feedback for the Panel to consider in writing their final report.

26. This issues and options paper is due with the Minister by 31 October 2019.

27. Additional reporting may be required at the Minister's request.

Making use of previous reviews of the resource management system

28. A large number of recent reviews have looked at aspects of the resource management system.

29. These reports contain useful frameworks for evaluating the performance of the RMA, identifying problems with the system, and proposing options for reform. The Panel should look to build on previous review findings in developing its own recommendations.

30. A list of previous relevant reviews is at Appendix 3. Summaries of documents can be provided by the Secretariat (see paras 42-46 below for detail on the Secretariat).

Roles and Responsibilities

Resource Management Review Panel

31. The Panel's role is to undertake a comprehensive review of the resource management system in line with the scope and process outlined by these terms of reference.

32. The Panel will collectively have, or be able to draw on, skills in planning, local government, infrastructure environmental management, ecology, te ao Māori, resource management law, development, primary industries, economics and climate change response.

33. The Panel reports to the Minister, through the Chair. The Minister can direct the Panel on any aspect relating to the review as required.

34. The Panel's engagement with Māori should support the government's efforts to strengthen Māori–Crown relationships and be consistent with relevant relationship agreements established through Treaty settlements.

35. The Panel's proposals should be consistent with the principles of Te Tiriti o Waitangi/the Treaty of Waitangi

36. All Panel members will be responsible for:

    - maintaining a broad knowledge of the issues and interests that relate to the review
    - attendance at Panel meetings and other events directly related to the review
    - preparing for Panel meetings and actively participating in discussion
    - complying with the terms and conditions set out in their appointment letter

- progressing any relevant actions delegated by the Panel Chair
- responding to direction from the Minister in a timely manner
- working constructively with other Panel members and striving for consensus
- producing outputs within agreed time, cost and quality parameters
- assisting with the drafting of parts of the Panel reports
- seeking financial approval from the Chair and Secretariat prior to incurring expenditure.

37. All appointments are made on an individual basis and Panel members cannot delegate their role to another person.

Resource Management Review Panel Chair

38. The Panel Chair is an experienced senior decision-maker.

39. The Chair plays a critical role in convening the Panel, reporting to the Minister on behalf of the Panel, and maintaining relationships with the Secretariat and officials.

40. In addition to the general responsibilities that apply to all Panel members, the Chair is also responsible for:
    - confirming the forward work programme with the Secretariat and the Minister
    - setting the operating protocols for the Panel, in conjunction with the Secretariat
    - chairing Panel meetings and working towards consensus amongst Panel members
    - setting meeting agendas in consultation with the Secretariat
    - overseeing the work of the Panel and advising the Minister on behalf of the Panel
    - requesting information, project support and advice from the Secretariat
    - ensuring the production of interim and final deliverables to agreed time, cost and quality parameters.

41. The Chair may establish subgroups of Panel members, officials and/or external advisors to progress specific deliverables or consider specific topics.

Secretariat

42. The Secretariat will be provided by the Ministry for the Environment. The Secretariat's role is to help the Panel operate efficiently and support the production of the key deliverables.

43. The Secretariat will be accountable to the Minister, and responsible for completing all reasonable requests made by the Chair on behalf of the Panel. The Secretariat will also be responsible for all financial expenditure associated with the review.

44. The Secretariat will be supported by a Policy Taskforce, which will provide the Panel with technical analysis, research capability and policy advice needed to progress the review. This includes support for both writing and indicative legislative drafting.

45. The Secretariat will separately lead work and provide advice on complementary measures to support the transition to a new system and to address planning system culture, capacity and capability.

46. Officials from other agencies and subject matter experts from outside of Government will be invited to join the Secretariat and Policy Taskforce as required.

Conditions of appointment

47. The Chair and Panel members will be appointed subject to the terms and conditions specified in their letter of appointment and these terms of reference. These letters will be signed by the Minister, following Cabinet approval.

48. Each Panel member will be required to complete a conflict of interest declaration prior to their appointment.

49. The Chair and members may resign at any time by notifying the Minister in writing.

50. The Minister may terminate an appointment at any time for any reason.

Appendix 1: Key issues the review should address

Aspect of RMA	Key issues
Objectives and alignment	• Removing unnecessary complexity from the RMA and the resource management system generally. • Improving environmental outcomes, including through strengthening environmental bottom lines, and further clarifying Part 2. • Recognising objectives for growth, development and change (including capacity for housing and urban development and infrastructure networks and projects in cities, towns and regions). • Considering how to effectively identify and address cumulative effects. • Ensuring the system has sufficient resilience to manage risks posed by climate change and other natural hazards and is responsive to future challenges and pressures. • Considering an explicit ability to restore or enhance the natural environment. • Considering principles, systems, roles, and processes for resource allocation. • Aligning land use planning and regulation with infrastructure planning and funding, including through spatial planning. • Considering whether or not to separate statutory provision for land use planning and environmental protection. • Considering whether there should be overarching principles for the resource management system and where these should be located. • Considering how the RMA can support emissions reductions (mitigation) and climate resilience (adaptation). • Ensuring that the RMA aligns with the purpose and processes outlined in the Climate Change Response (Zero Carbon) Amendment Act (once passed). • Ensuring that Māori have an effective role in the resource management system that is consistent with the principles of the Treaty of Waitangi. • Considering how to allocate marine space for aquaculture and offshore wind.
Functions and processes	• Examining all RMA functions and processes. • Improving the coherence, effectiveness and timely implementation of national direction. • Enabling faster and more responsive land use planning and adequate response to environmental harm. • Improving the system of plans and their quality. • Reducing the complexity and improving the quality of decision-making for approvals, including consenting and designations. • Considering how decision-making processes, including consultation, can better reflect the needs and interests of the wider community, including the national interest and future generations. • Improving the range and use of funding tools and economic instruments. • Ensuring appropriate mechanisms for Māori participation in the system, including giving effect to Treaty settlement agreements. • Clarifying the meaning of iwi authority and hapū. • Ensuring compliance, enforcement and monitoring functions are effective.

Aspect of RMA	Key issues
Institutions	• Allocating roles in the system to central and local government, the Environment Court, and other institutions. • Considering the interaction of the Climate Change Commission and other institutions in responding to climate change. • Ensuring institutions have the right incentives (including clearly defined roles, responsibilities, and accountability mechanisms).Introducing a package of complementary measures to support the transition to a new system and to address planning system culture, capacity and capability. [See also para 45 above.]

Appendix 2: Related Government programmes and projects

The Government has a number of programmes and projects (such as those below) to address environmental issues and improve the efficiency and effectiveness of existing systems. Many of these will intersect with the comprehensive review of the resource management system. The Panel should consider how these workstreams intersect and impact the review. The Secretariat can advise on these matters.

- Kāinga Ora–Homes and Communities Act 2019, including the Government Policy Statement on Housing and Urban Development, which will provide the overall direction and government priorities for the housing and urban development system
- Resource Management Amendment Bill 2019
- Resource management and Crown relationship obligations in existing Treaty of Waitangi Settlement Acts
- Climate Change Response (Zero Carbon) Amendment Act (once passed), and directions to transition to a low emissions and climate-resilient New Zealand
- National Climate Change Risk Assessment, and implications for a future National Adaptation Plan
- Alignment of regulatory frameworks for natural hazards and climate change under the Community Resilience Group (cross-government programme)
- Urban Growth Agenda
- Review of Three Waters regulation: drinking water, wastewater and stormwater management
- Building System Legislative Reform Programme
- Strengthening Heritage Protection work programme
- Open ocean aquaculture project
- Productivity Commission Inquiry into Local Government Funding and Financing
- Existing RMA national direction and its implementation
- RMA national direction under development, including for:
  - freshwater management
  - urban development
  - highly productive land
  - indigenous biodiversity
  - historic heritage
  - aquaculture.

Appendix 3: Previous reviews of the resource management system of relevance to this review

There are a number of existing reviews of the resource management system that will be relevant for this review. The Secretariat will provide summaries and sections from these reviews.

Relevant reviews include:

a. Environmental Defence Society 2019: *Reform of the Resource Management System*[4]

b. Tax Working Group 2019: *Future of Tax*[5]

c. OECD 2017: *Environmental Performance Review*[6]

d. Environmental Defence Society 2017: *Last Line of Defence*[7]

e. Productivity Commission 2018: *Low-emissions economy*[8]

f. Productivity Commission 2017: *Better urban planning*[9]

g. Productivity Commission 2016: *Using land for housing*[10]

h. Environmental Defence Society 2016: *Evaluating the environmental outcomes of the RMA*[11]

i. Local Government New Zealand 2016: *Planning our future - 8 point programme for a future-focused resource management system*[12]

j. Local Government New Zealand 2015: *A 'blue skies' discussion about New Zealand's resource management system*[13]

k. Infrastructure New Zealand 2015: *Integrated Governance, Planning and Delivery: A proposal for local government and planning law reform in New Zealand*[14]

l. Productivity Commission 2014: *Regulatory institutions and practices*[15]

m. Productivity Commission 2013: *Towards better local regulation*[16]

n. Waitangi Tribunal commentary related to the RMA system from Tribunal reports 27, 55, 167, 153, 262, 304, 785, 796, 863, 894, 1130, 1200, 2358.

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4 http://www.eds.org.nz/our-work/rm-reform-project/

5 https://taxworkinggroup.govt.nz/resources/future-tax-final-report

6 http://www.oecd.org/newzealand/oecd-environmental-performance-reviews-new-zealand-2017-9789264268203-en.htm

7 http://www.eds.org.nz/our-work/publications/books/last-line-of-defence/

8 https://www.productivity.govt.nz/inquiry-content/3254?stage=4

9 https://www.productivity.govt.nz/inquiry-report/better-urban-planning-final-report

10 https://www.productivity.govt.nz/inquiry-content/2060?stage=4

11 http://www.eds.org.nz/our-work/publications/reports/evaluating-the-RMA/

12 http://www.lgnz.co.nz/our-work/publications/planning-our-future-eight-point-programme/

13 http://www.lgnz.co.nz/our-work/publications/a-blue-skies-discussion/

14 https://www.infrastructure.org.nz/resources/Documents/Reports/NZCID%20Local%20Government%20and%20Planning%20Law%20Reform%20Booklet%20NEW%20single%20pages%20(2).pdf

15 https://www.productivity.govt.nz/inquiry-content/1788?stage=4

16 https://www.productivity.govt.nz/inquiry-content/1510?stage=4

Appendix 4: Ministerial letters identifying issues to be considered as part of the review process

Hon Kelvin Davis, Minister for Māori Crown Relations–Te Arawhiti, 27 August 2019

Hon Kelvin Davis, Minister of Corrections, 24 October 2019

Hon Phil Twyford, Minister of Transport, 26 August 2019

Hon Dr Megan Woods, Minister of Energy and Resources, 30 August 2019

Hon Dr Megan Woods, Hon Phil Twyford, Hon Nanaia Mahuta, and Hon Kris Faafoi as the collective Housing and Urban Development Ministers, 10 September 2019

Hon Chris Hipkins, Minister of Education, 10 September 2019

Hon Nanaia Mahuta, Minister for Māori Development, 30 July 2018

Hon Nanaia Mahuta, Minister of Local Government, 9 September 2019

Hon Stuart Nash, Minister of Fisheries, 2 October 2019

Hon Damien O'Connor, Minister of Agriculture, 1 September 2019

Hon Ron Mark, Minister of Defence, 2 September 2019

Hon James Shaw, Minister for Climate Change, 30 August 2019

Hon Julie Anne Genter, Associate Minister for Health, 2 September 2019

Hon Eugenie Sage, Minister for Conservation, 30 August 2019

Appendix 7 List of submitters

Aggregate and Quarry Association
Albert-Eden Local Board
Aotea / Great Barrier Local Board
Auckland Council
Barker & Associates
Bay of Plenty Regional Council
Beca
Bunnings Limited, Kiwi Property Group Limited, Woolworths New Zealand Limited and Scentre (New Zealand) Limited
BusinessNZ
Canterbury / Aoraki Conservation Board
Canterbury Mayoral Forum
Central Hawke's Bay District Council
Central Otago District Council
Christchurch City Council
Climate Action Network
Climate Justice Taranaki Inc.
Coastal Ratepayers United, Inc
DairyNZ
Dunedin City Council
Employers & Manufacturers Association
Engineering New Zealand
Environment Canterbury
Environmental Defence Society
Environmental Noise Analysis and Advice Service
Environmental Protection Authority
Far North District Council
Federated Farmers of New Zealand
Federated Farmers of New Zealand (Auckland Province) Incorporated
Fletcher Building Limited
Fonterra
Foodstuffs (NZ) Ltd
Future Proof Implementation Committee
Generation Zero
Genesis Energy Limited
Greater Wellington Regional Council
Hamilton City Council
Hastings District Council
Heritage New Zealand Pouhere Taonga
Historic Places Aotearoa
Historic Places Canterbury
Historic Places Mid Canterbury
Historic Places Wellington

Horizons Regional Council
Horowhenua District Council
Horticulture New Zealand
ICOMOS New Zealand
Independent Māori Statutory Board
Infrastructure New Zealand
Isovist Ltd
Iwi working group – Ngāti Toa Rangatira
Kāpiti Coast District Council
Lawyers for Climate Action New Zealand Inc
Local Government New Zealand
Low Carbon Kāpiti
Lyttelton Port Company Limited
Mana Whenua Kaitiaki Forum
Market Economics Limited
Masterton District Council
Matamata-Piako District Council
Mercury NZ Limited
Meridian Energy Limited
MidCentral Public Health Service
Ministry of Health
Nelson City Council
Nelson Marlborough District Health Board
NERA Economic Consulting
New Zealand Airports Association
New Zealand Animal Law Association
New Zealand Archaeological Association
New Zealand Association for Impact Assessment
New Zealand Centre for Sustainable Cities
New Zealand Fish & Game Council
New Zealand Infrastructure Commission
New Zealand King Salmon Co Limited
New Zealand Law Society
New Zealand Planning Institute
New Zealand Planning Institute - Auckland Emerging Planners
New Zealand Sport Fishing Council and LegaSea
Ngā Rangahautira Māori Law Students Association of Victoria University of Wellington
Ngāti Whātua Ōrākei
Ngātiwai Trust Board
Ngati Tahu-Ngati Whaoa Runanga Trust
Oji Fibre Solution (NZ) Limited
Orion New Zealand Limited
Otago Regional Council
Patuharakeke Te Iwi Trust Board Inc
Petroleum Exploration and Production Association of New Zealand
Physicians & Scientists of Global Responsibility

Planz Consultants Limited
Port Nelson Ltd
Port Otago Limited
Ports of Auckland
Precinct Properties NZ Limited
Property Council New Zealand
Puketāpapa Local Board
Queenstown Lakes District Council
Refining NZ
Regional Public Health
Registered Master Builders Association
Resource Management Group Limited
Resource Management Law Association of New Zealand Inc
Retirement Villages Association of New Zealand Incorporated
Royal Forest and Bird Protection Society of New Zealand Inc
SmartGrowth Leadership Group
Southern Cross Hospitals Limited
Southern District Health Board
Straterra
Stride Property Limited
Summerset Group Holdings Limited
Tairua Environment Society
Tasman District Council
Tauranga City Council
Te Arawa Lakes Trust
Te Kaahui o Rauru
Te Korowai o Ngāruahine Trust
Te Ohu Kaimoana and Te Wai Māori
Te Rūnanga o Ngāti Awa
Te Rūnanga o Ngāi Te Rangi Iwi
Te Rūnanga o Ngāti Ruanui Trust
Te Rūnanga o Ngāi Tahu
Te Whakakitenga o Waikato Incorporated
Telcommunication Companies – Vodafone New Zealand, Spark New Zealand, Chorus
The New Zealand Port Companies' CEO Group
The Preservation Coalition Trust
Tilt Renewables
Todd Corporation Limited
Transpower
Trustpower Limited
Urban Design Forum
Waiheke Local Board
Waikato District Council
Waikato Regional Council
Waipā District Council
Waitematā District Health Board

Waitematā Local Board
Water New Zealand
Watercare Services Limited
Weber Bros Circus trading as Great Moscow Circus
WEL Networks Limited
Wellington City Council
West Coast Regional Council
Z Energy Limited and BP Oil New Zealand Limited
39 individual submitters

Appendix 8 Record of engagement

Individuals and organisations

The Resource Management Review Panel met with the following individuals and organisations.

- Auckland Council
- ADLS Inc
- Cross-government spatial planning officials (including the New Zealand Transport Authority, Ministry of Housing and Urban Development, Ministry for the Environment, Department of Internal Affairs and Ministry of Transport)
- Dairy NZ
- Dame Anne Salmond
- Environment and Conservation Organisation
- Environmental Defence Society
- Environment Judges
- Environmental Protection Authority Māori Advisory Committee – Ngā Kaihautū Tikanga Taiao
- Federated Farmers
- New Zealand Fish & Game Council
- Forest & Bird
- Hamilton City Council
- Hawkes Bay Regional Council
- Horticulture New Zealand
- Independent Māori Statutory Body (Auckland)
- Justice Joe Williams
- Kahui Wai Māori
- Local Government New Zealand
- Mana Whenua Kaitiaki Forum
- New Zealand Law Society
- New Zealand Beef and Lamb
- New Zealand Infrastructure Commission
- New Zealand Planning Institute
- Papa Pounamu
- Parliamentary Commissioner for the Environment
- Productivity Commission
- Property Council
- Queenstown Lakes District Council
- Resource Management Law Association
- Resource Reform New Zealand
- Sustainable Seas National Science Challenge
- Utilities Chief Executives
- Urban Growth Agenda Ministers

Groups

Resource Management Review-established working groups

- Climate Change
- Economic Instruments
- Integration and Spatial Planning
- Reducing Complexity across the RMA
- Treaty and te āo Māori
- Urban Systems and Planning
- Design of Environmental Limits (and other tools)

Minister for the Environment-established Reference Groups

- Built and Urban Reference Group
- Natural and Rural Environment Reference Group
- Te Ao Māori Reference Group

Regional hui

At regional hui across the country in February 2020, Panel members met with individuals from the following iwi and hapū, among others.

Auckland

- Ngāti Kahungunu, Rongowhakaata, Mataawaka
- Ngāti Whātua Ōrākei
- Te Āti Haunui-ā-Pāpārangi
- Ngāti Rehua Ngāti Wai ki Aotea
- Ngā Puhi, Ngāti Raukawa, Te Arawa
- Ngāti Horowhenua, Ngāti Paoa
- Ngāti Awa / Ngāti Kahungunu / Te Whānau Apanui
- Te Āti Haunui-ā-Paparangi, Waikato-Tainui

Christchurch

- Ngāi Tahu

Dunedin

- Aukaha
- Kāti Taoka, Kāi Tahu
- Te Rūnanga ō Ngāi Tahu
- Whakatōhea raua ko Te Rarawa

Gisborne

- Rongowhakaata
- Ngāti Porou
- Te Whānau ā Ruataupare, Te Ao Tawarirangi, Ngāti Horowai, Ngāti Rangi, Ngāi Tai
- Te Āitanga ā Mahaki, Te Whānau a Apanui
- Ngāi Tamahuhiri
- Ngāti Kahungunu
- Ngāti Porou
- Rakaipaaka
- Ngāi Tawhiri, Ngāti Ruapani,
- Tainui

Hamilton

- Ngāti Maniapoto
- Ngāti Mahuta ki te Hauaauru
- Ngāti Tamainupo, Waikato, Ngāti Parekaawa, Tūwharetoa
- Ngāi Haua ki Taumarunui
- Ngāti Mahuta
- Waikato-Tainui
- Te Ākitai Waiohua

Napier

- Ngāti Kere
- Ngāti Hori
- Ngāti Kahungunu
- Te Wairoa, Tatau ō te Wairoa
- Ngāti Pahauwera
- Heretaunga Tamatea
- Ngāti Kahungunu ki Rakaipaaka
- Ngāti Rakai Rangi
- Ngāti Mihiroa
- Uri ā Maui

Nelson

- Pukatapu
- Ngāti Tama
- Te Āti Awa
- Ngāti Kuia
- Te Āti Awa Mana Whenua ki Te Tau Ihu

New Plymouth

- Te Kotahitanga ō Te Āti Awa
- Ngā Ruahine
- Ngā Mahanga
- Ngāti Tairi
- Ngāti Maru

Tauranga

- Ngāti Taka
- Ngāti Rangitihi
- Ngāti Hangarau, Te Pirirakau, Ngāti Ranginui
- Ngāi Te Ahi, Ngāti Ranginui
- Ngā Pōtiki
- Ngāti Pikiao
- Te Rūnanga ō Ngāti Awa
- Ngāi Tukairangi
- Ngāi Tamarawaho

Wellington

- Tūwharetoa, Ngāti Tamakopiri,
- Ngāi Tahu
- Ngāti Hauiti
- Ngāti Maru, Taranaki Whānau
- Patuharakeke, Ngāti Wai, Ngāti Whātua, Ngā Puhi
- Te Āti Awa
- Taranaki Whānui ki te Upoko ō te Ika
- Ngāi Tūhoe
- Waikato Tainui
- Whanganui, Tuhourangi, Ngāti Manawa, Kāti Mahaki
- Ngāti Kahungunu, Ngāti Tūwharetoa
- Ngāti Toa, Ngāti Rakiwa
- Ngāti Awa, Tukerangi, Ngāti Porou, Waikato
- Te Āti Haunui ā Pāpārangi

Whanganui

- Ngāti Kahungunu
- Ngāti Raukawa
- Te Rūnanga ō Ngāti Hauiti
- Ngāti Rangi
- Te Āti Haunui ā Pāpārangi, Ngāti Patutokotoko, Ngāti Tupoho, Tumango
- Nga Poutama, Ngāti Hineoneone
- Nga Wairiki, Ngāti Apa

Whangarei

- Ngāi Tahu, Ngāti Porou, Te Whānau ā Apanui
- Ngāti Whātua
- Patuharakeke
- Te Waiariki
- Ngāti Aukiwa, Ngāti Kahu ki Whangaroa
- Ngā Kaitikai ō Wai Māori, Ngāti Kahu ō Torongare
- Ngāti Hine
- Whaingaroa
- Te Orewai
- Whangaroa
- Ngāti Toki
- Ngāti Wai
- Ngāti Horahia, Ngāti Hau, Ngā Puhi
- Taiamai ki te Takutai Moana, Te Uri Taniwha
- Ngā Puhi ki Whangaroa
- Ngā Puhi, Tainui, Ngāti Whātua, Ngāi Te Wake,
- Ngāti Hau, Ngāti Hine, Te Parawhau, Ngā Puhi te Iwi
- Tōhunga Matengaro, Rongoa practitioner
- Te Uriroroi
- Te Uri Taniwha
- Whangaroa
- Patuharakeke
- Te Arawa
- Ngāti Kahu
- Whangarei
- Te Uri ō Tiopira, Te Roroa
- Ngāti Hine

Appendix 9 Membership of reference groups

Built and Urban Reference Group

Member name	Member name
Brendon Harre	Leonie Freeman
Christina van Bohemen	Megan Tyler
Denis O'Rourke	Prof Peter Skelton
Katherine Wilson	Stuart Shepherd

Natural and Rural Reference Group

Member name	Member name
Alison Dewes	Marjan van den Belt
Hilke Giles	Mark Paine
James Palmer	Prof Peter Skelton
Judy Lawrence	Sally Gepp
Karyn Sinclair	Wendy Saunders
Marie Doole	

Te ao Māori Reference Group

Member name	Member name
Dame Anne Salmond	Rebecca Kiddle
Craig Pauling	Tame Te Rangi
Jade Wikaira	Watene Campbell

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