



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Resource Management Amendment Bill

12/11/2019

Submission on the Resource Management Amendment Bill 2019

1 Introduction

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Resource Management Amendment Bill (the Bill). The Bill principally amends the Resource Management Act 1991 (the principal Act) and the Resource Legislation Amendment Act 2017.
- 1.2 This submission identifies:
 - a. issues in the practical application of the Bill; and
 - b. provisions which would benefit from further consideration or clarification to ensure the Bill remains clear and workable in practice.
- 1.3 The Law Society does not seek to be heard.

2 Part 1: Amendments to Resource Management Act 1991

Proposed section 80A: Freshwater planning process

- 2.1 Proposed section 80A requires all freshwater planning instruments to undergo the freshwater planning process.
- 2.2 Subsection 2 defines what a freshwater planning instrument is. However, it is unclear whether regional plans and regional policy statements giving effect to the proposed National Policy Statement for Freshwater Management 2020 (NPS-FM) (even those obliquely touching on freshwater issues) are to be referred to the freshwater planning process. A qualification on this (such as the referral being dependent on freshwater issues being the principal purpose) may be required.
- 2.3 Further, the test of whether a policy statement or plan '*relates to freshwater*' in subsection 2(b) is overly broad, and could capture a wide range of documents, including those where any effect on freshwater is a comparatively minor element of the plan (for example an Earthworks Plan dealing with situations where runoff to freshwater is possible). The Law Society suggests further clarification might be provided by referring to specific regional functions to which the activity relates.
- 2.4 Subsection 6 identifies which of the sections in Part 1 of Schedule 1 of the Bill apply. As currently drafted, clause 8A (which allows for service of further submissions) is included. However, clause 8 (which expressly allows for making further submissions) is not included. This does not appear to be consistent and further clarification is necessary.
- 2.5 Finally, proposed section 80A(8) excludes provision for extensions and waivers under section 37(1)(a), which may result in breaches of natural justice, increased litigation and insufficient information to make fair and effective decisions. One example would be where lodging a submission is delayed as a result of circumstances beyond the organisation or individual's control (such as a power cut or car accident). Section 37(1) of the Act currently provides an ability to waive that non-compliance. The Law Society invites the Committee to give further consideration to whether it is desirable to provide no avenue for the submission to be considered in such circumstances.

Amendments to fast track applications

- 2.6 Clause 15 amends section 87AAC and the meaning of a fast track application. Further clarity is appropriate to determine whether applications for more than one controlled activity may be bundled together or must be dealt with separately.

Amendments to right to appeal

- 2.7 Clause 26 amends section 120 and the right to appeal. It is not clear in subsection 1B whether applications on appeal must be based on an issue squarely raised in a submission (but not necessarily that of the appellant's) or whether it need not be raised in any submission and accordingly might not have been raised during the course of the hearing by any person. If the latter is intended, this would be a significant extension of the current appeal provisions. It would also encourage gaming of the hearing process, contrary to the legislative policy underlying section 290A of the principal Act.

Amendments to circumstances when consent conditions can be reviewed

- 2.8 Clause 27 amends the circumstances in which consent conditions can be reviewed, including proposed new subsection 2A. The Bill does not clearly reflect the degree of connection between activities and effects to enable a collective review of applications. Further provisions to clarify the manner of this review, sharing of costs, the submission process, and conditions could be included in the Bill to address this. The Bill would benefit from guidance around how the responsibility for effects are to be managed when activities are collectively reviewed. For example, if in the course of the review only one consent holder is found to be primarily responsible for effects of concern, it is unclear whether all consent holders are to restrain their activities to address the effect.

3 Proposed New Part 12A: Enforcement functions of Environmental Protection Authority

General Comments

- 3.1. The Bill imposes additional responsibilities (with accompanying powers) on the Environmental Protection Authority (EPA), enabling the EPA to take over an investigation (for example to determine whether there is or has been a contravention of the principal Act) and enforcement measures, in place of local authorities. While proposed Part 12A provides enforcement powers for the EPA, further clarification is needed in the Bill to ensure those powers can be properly defined and implemented.
- 3.2. Proposed section 343G sets out how the EPA may intervene. The circumstances in which the EPA can act are broad. To provide guidance to the EPA, a threshold, perhaps similar in structure to the powers provided to the Minister under section 142 of the principal Act, could be included. This would identify in what circumstances the EPA may exercise its powers to intervene and take over an investigation or enforcement process.
- 3.3. The Bill does not require that the EPA and local authority consult with each other prior to the EPA exercising its powers to intervene. An obligation to consult could assist the EPA to determine whether it should exercise its powers, and to plan the sharing of information and involvement (if any) of the local authority in the investigation and enforcement when the investigation is transferred to the EPA.
- 3.4. The Bill does not address what formal involvement local authorities may have once the EPA has exercised its powers. Scenarios can be envisaged, for example, where a local authority

wishes to be a party in the enforcement proceeding, because the proceeding engages a difficult question of the interpretation of the local authority's district plan. Whether this should be permitted is a question the Committee may wish to consider.

- 3.5. The Bill also does not specify whether once the EPA is involved, it is required to provide ongoing support to the local authority for monitoring of any remedial steps following an intervention. The Law Society assumes that it is intended that the EPA may seek, as terms and conditions on an enforcement order, for example, that monitoring steps are taken by the local authority. However, this has not been specifically provided for. If this is not intended, it may be helpful for the Committee to consider whether, if the EPA intervenes, it should be required to monitor compliance with the relevant regulatory outcome. Equally, if the opposite is intended, it may be helpful to specify what support (including provision of resources) the local authority is required to provide.

Comments on specific sections in new Part 12A

- 3.6. Proposed section 343E(1)(a): the meaning of '*other activity*', in the context of an '*enforcement action*' is not clear. Difficulties could arise as to the threshold where local authorities are deemed to have collective knowledge. For example, where a science officer has routinely collected water samples in relation to an '*other activity*', but which may later relate to the action which is the basis of the alleged offence.
- 3.7. Proposed section 343G(2): the term '*executed*' is used in this section but is not defined in the principal Act or the Bill. The term *executed* can mean a broad range of actions with different conclusions. A clearer definition could be considered, for example *completed* may be a more appropriate term.
- 3.8. Proposed section 343J(1): the information requirements on what is required by a local authority for this section are broad and non-specific. It would be helpful if section 343J(1) stated that the information to be provided by a local authority must already be in the possession of, or readily obtainable by, that local authority.
- 3.9. Proposed section 343J(3): the Committee may wish to consider whether it is appropriate for local authorities, after consultation with the EPA, to extend the timeframe for providing information to the EPA, or providing for the EPA to resource the provision of the information under the management of the local authority. This may help to ensure that all relevant information is provided in a timely fashion, to guarantee a fair investigation and enforcement process is undertaken.

4. Proposed new Part 4 of Schedule 1: Freshwater Hearings Panel and new clauses

- 4.1. Clause 46 of the proposed new Part 4 of Schedule 1 provides for freshwater hearings panels to appoint specialist advisors. The Bill does not clearly define the qualifications and experience of the '*special advisor*', their role in these proceedings, the payment of their costs and the responsibility for their instruction. The Law Society invites the Committee to consider whether this proposed subpart should stipulate that additional information.
- 4.2. Clause 49 sets out the matters which a freshwater hearings panel must have regard to in making a recommendation. The requirement imposed by the phrase '*must have regard to*' appears to be a lower threshold in respect of some matters than that placed upon a commissioner or a hearing panel hearing a resource consent application under the principal Act. It is not clear whether the intention is to provide the freshwater hearings panel with

greatly flexibility. If that is not the intention, then the proposed section needs to be amended accordingly.

- 4.2. Clause 50 requires a freshwater hearings panel to provide its report under clause 48 to the relevant regional council within the specified timeframe. It is not clear whether there is an ability to extend the timeframe (particularly in the case of circumstances outside the control of the hearings panel) or alternatively, in the absence of a power of extension, identification as to the consequence of a failure to meet the timeframes provided.
- 4.3. Clauses 57 – 59 stipulate how a freshwater hearings panel is to be comprised and how appointments to the panel will be made. These clauses do not appear to cover circumstances where a panel decision-maker becomes unavailable at a later date (for example retirement). Provision within these clauses to address these practical difficulties should they arise, may be required.
- 4.4. Clause 61(1) states the relevant regional council is responsible for all costs incurred by the freshwater hearings panel, including activities related to the performance or exercise of the panel's functions and powers under the relevant Part. The Law Society notes this imposes additional costs and requirements on local authorities which may affect their ability to participate and fulfil their responsibilities under this Part, particularly in circumstances where those local authorities have undertaken recent plan processes to respond to previous versions of the proposed NPS-FM.

5 Proposed Part 2, subpart 1: amendments to the Resource Legislation Amendment Act 2017

- 5.1 Clause 76 repeals Part 1, Subpart 3 of the Resource Legislation Amendment Act 2017. This subpart comprises an extensive set of amendments to provisions relating to the drafting and content of local authority policy statements and plans. A complete repeal of this subpart would mean all provisions of the principal Act would return to the pre-existing wording. The Law Society questions whether this was intended or whether a more targeted and limited repeal was envisaged.



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12 November 2019