

13 March 2020

Ministry for the Environment
Wellington

By email: indigenousbiodiversity@mfe.govt.nz

Re: A proposed National Policy Statement for Indigenous Biodiversity

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on *He kura koiora i hokia: a discussion document on a proposed National Policy Statement for Indigenous Biodiversity (draft NPSIB)*.
2. The draft NPSIB is proceeding in parallel with the more wide-ranging review of the Resource Management Act 1991 (**RMA**). The Law Society considers the draft NPSIB needs to be considered in conjunction with this review and other current reforms, including the recent suite of National Policy Statements, and relevant case law.
3. In addition, the Law Society has identified concerns with some definitions used in the draft NPSIB and drafting issues. The guidance provided by the Supreme Court in *EDS v New Zealand King Salmon* [2014] NZSC 38 is that directive provisions in a National Policy Statement will be given effect according to their terms, and it is therefore important that national guidance is expressed clearly, to avoid unintended and undesired effects.

DRAFT NPSIB SHOULD BE CONSIDERED ALONGSIDE OTHER REVIEWS AND REFORMS

4. The draft NPSIB is highly detailed and comprehensive, and requires local authorities to implement or give effect to the objectives and policies contained therein. An issue identified by the Resource Management Review Panel (**Panel**)¹ is the complexity of the RMA plan-making process, the length of time it takes, and the litigiousness of the process. Given the Panel's first report is due in mid-2020, it may be appropriate to delay finalising the draft NPSIB so that any relevant outcomes and/or recommendations of that report can be considered.
5. The way in which the draft NPSIB will operate in conjunction with other relevant National Policy Statements (current and proposed) should also be considered. Some examples of areas where there may be tensions or a need for further clarification are outlined later in this submission.

DEFINITIONS

Definition of indigenous biodiversity (Part 1.7(2))

6. The definition provided of indigenous biodiversity is:

¹ See the Panel's paper "*Transforming the resource management system – Opportunities for Change – Issues and Options Paper*" (November 2019) at paragraph 103.

“...biodiversity that is naturally occurring anywhere in New Zealand. It includes all New Zealand’s ecosystems, indigenous vegetation, indigenous fauna and the habitats of indigenous vegetation and fauna.”

7. The terms "*naturally occurring*" and "*all New Zealand's ecosystems*" should be considered further as set out below.

Naturally occurring

8. The term "*naturally occurring*" would benefit from further consideration. Concerns with this term are:
 - 8.1 Biodiversity that is "*naturally occurring*" excludes biodiversity that has been created or enhanced with human assistance, for example the inland predator-proof sanctuaries located in various parts of the country and/or reserves and other natural areas that are subject to active planting programmes.
 - 8.2 However, if the definition was expanded to include human-assisted biodiversity, consideration would need to be given to its extent. This is to avoid discouraging landowners from planting their properties with indigenous vegetation and to avoid capturing indigenous vegetation planted for other purposes (e.g. riparian or hillside planting). This concern could be addressed by introducing a purpose test so that human-assisted indigenous biodiversity is only included where the primary stated purpose of the planting is to restore or enhance indigenous biodiversity.
 - 8.3 The definition as currently drafted would also include stray birds blown in from Australia, or pest vegetation incursions (a defined adverse effect) since this is occurring by way of natural processes. If the intention is not to include this, the definition should be reviewed to provide clarity between indigenous as opposed to 'wild' or 'natural'. Alternatives could be:
 - 8.3.1 To use a similar definition to that of indigenous vegetation which refers to plants that are "*native*" to the relevant ecological district which, by contrast, would include areas that are created or enhanced with human assistance, and exclude isolated stray arrivals; or
 - 8.3.2 Refer to indigenous biodiversity as that 'originating in New Zealand', as opposed to occurring 'naturally'.

All New Zealand’s ecosystems

9. Defining indigenous biodiversity to include "*all New Zealand’s ecosystems*" includes ecosystems with potentially significant exotic elements. We suggest reversing the order, to say that indigenous biodiversity includes "*indigenous vegetation, indigenous fauna, the habitats of indigenous vegetation and fauna, and the ecosystems wholly or principally incorporating indigenous vegetation and fauna*".

Definition of “maintenance of indigenous biodiversity” (Part 1.7(3))

10. The definition of "*maintenance of indigenous biodiversity*" incorporates reference to "*habitats*". Habitat in the draft NPSIB is defined to mean:

“...the area or environment where an organism or ecological community lives or occurs naturally for some or all of its life cycle, or as part of its seasonal feeding or breeding pattern.”

11. The definition of “*habitat*” would benefit from further consideration. Concerns with this definition are:
 - 11.1 The reference to organisms and ecological communities is without qualification (i.e., it is not restricted to indigenous organisms or indigenous ecological communities). As a result, the definition may include the habitats of exotic organisms.
 - 11.2 The built environment now forms part of the environment within which indigenous organisms and ecological communities live and occur naturally. For example, in the suburbs of western Wellington a diverse range of native birds can be seen perched on overhead electricity lines. If the intention is to not include the built environment, it is suggested the definition should refer to “natural areas or natural environments”.
 - 11.3 An indication of scale may assist with the practical workability of this definition. At present, the definition of habitat would include a single tree with a single organism living on or in it. Read literally, maintenance of the full range and extent of that habitat (in terms of Part 1.7(3)(d)) would appear to preclude even pruning the tree. If this is not the intention, some minimum scale needs to be incorporated in the definition of habitat.
12. The definition of “*maintenance of indigenous biodiversity*” also includes a requirement that there be “*at least no reduction as from the commencement date*” in various matters including the “*full range and extent of ecosystems and habitats*” and the size of the populations of indigenous species. In relation to habitats, this requirement could be read as requiring that existing habitats must not be reduced, irrespective of whether additional replacement habitats are offered as compensation or offsets. Some qualification – such as “at least no reduction overall” or “at least no reduction within the ecological district” – should be considered. Requiring “no reduction” whatsoever does not appear to be intended, given the draft NPSIB provides for an effects management hierarchy that provides for avoidance, remediation, and mitigation, through to offsetting and compensation.
13. Similarly, the prohibition on reducing the size of populations of indigenous species requires further definition by reference to scale. Populations of animals can be described on both large and small scale, often by reference to geographical location. As a result, the population of flora or fauna at one location may be reduced while the population within the wider ecosystem achieves gains or remains static.

Other definitions or terms used in the draft NPSIB

14. The Law Society has identified concerns with other definitions or terms used in the draft NPSIB, as listed below.

Definition	Law Society Comment
<p>The concept of “<i>adverse effects on indigenous biodiversity</i>” includes reference to “<i>the degradation of mauri</i>”.</p> <p>(see Part 1.7(4))</p>	<p>“<i>Mauri</i>” is not defined in the draft NPSIB or in the RMA. It is suggested a definition or explanation of the term is included.</p>
<p>The definition of “<i>effects management hierarchy</i>” focuses initially on avoidance of adverse effects “<i>where possible</i>”.</p> <p>(see Part 1.8)</p>	<p>The discussion document advises that this term was deliberately chosen over “<i>where practicable</i>” in order to “<i>ensure resource consent applicants adequately consider each step of the hierarchy, and assess what may be technically or financially feasible</i>”.</p> <p>It is not clear the term “<i>where possible</i>” will have the desired result to be a more onerous test than “<i>where practicable</i>”. The natural and ordinary meaning of “<i>possible</i>” is “<i>capable of existing or happening; that may be managed, achieved</i>”.² That does not expressly allow scope for consideration of financial feasibility and the term should be qualified to make that clear.</p> <p>In addition, a literal interpretation to avoid adverse effects where possible would produce the conclusion that avoidance is always possible (in the context of an application for a resource consent), by not undertaking the activity. This issue could be addressed by reframing the test as “<i>where reasonably possible</i>” in each case.</p>
<p>The definition of “<i>highly mobile fauna</i>” poses as one test whether “<i>individuals move between different environments</i>”.</p> <p>(see Part 1.8)</p>	<p>It is unclear what the word “<i>environment</i>” is intended to mean in this context given the very wide scope of the definition of “<i>environment</i>” in the RMA. The RMA suggests that New Zealand constitutes one environment which includes many elements. On the other hand, virtually all bird species that are able to fly would move between different locations. Is the intention that each location is a different environment? It would be helpful to have this clarified.</p>
<p>The definition of “<i>Māori land</i>” is exhaustively defined as meaning Māori customary land and Māori freehold land.</p>	<p>This definition excludes general land held by Māori which is a land type also governed by Te Ture Whenua Māori Act 1993 and which is a land type applying to some returned Treaty settlement land. It is not clear whether the intention is to exclude such land (and if so, why).</p>

² The Concise Oxford Dictionary

Definition	Law Society Comment
<p>The definition of “<i>nationally significant infrastructure</i>” is defined to mean, among other things, “<i>national renewable electricity generation facilities that connect with the national grid</i>”.</p>	<p>It is suggested that the first “<i>national</i>” is superfluous in this definition. If the intention is to identify some subset of renewable electricity generation facilities that connect with the national grid, then it is suggested that greater clarity is required as to how that subset is identified.</p> <p>The inconsistency with the National Policy Statement for Renewable Electricity Generation 2011 (NPSREG) also needs to be addressed. (The NPSREG states that <i>all</i> renewable electricity generation activities are of national significance whether or not they connect to the national grid, whereas the draft NPSIB appears to only include renewable generation facilities that connect to the national grid as being ‘nationally significant’.)</p>

Specific drafting issues

15. The Law Society has identified the drafting issues referred to below.

Drafting of objectives and policies do not clearly differentiate between desired outcomes (objectives) and courses of actions (policies)

16. The operative parts of the draft NPSIB comprise objectives, policies and implementation requirements. Relevant cases define objectives as desired outcomes³ and policies as courses of action designed to achieve the objective(s).⁴
17. The way the objectives and policies are expressed in the draft NPSIB does not reflect that juxtaposition. For example, the introduction to the policies section speaks in terms of achieving policies, whereas policies should be the actions undertaken or implemented, and objectives are to be achieved. It is suggested that the objectives are reframed to more clearly specify desired outcomes. For example, objective 1 could be revised to read “*maintenance of indigenous biodiversity*”.

Status of implementation requirements in draft NPSIB

18. There is a lack of clarity as to the legal status of Part 3 of the draft NPSIB. In terms of the matters a National Policy Statement may contain under section 45A of the RMA, it is not clear what category these “*implementation requirements*” fall under (or whether they fall under any of the listed categories). Local authorities are required to amend their plans to give effect to objectives and policies stated in a National Policy Statement (section 55, RMA), however this does not apply to implementation requirements. Since these are framed as courses of action that must be followed by local authorities, they would more easily fit within the rubric of policies. It is suggested that consideration be given to amalgamating existing Part 2.2 and Part 3 on this basis.

Policy 13 as to managing highly mobile fauna should be clarified

³ See *Ngati Kahungunu Iwi Inc v Hawkes Bay Regional Council* [2015] NZ EnvC 50 at [42]

⁴ See *Auckland Regional Council v North Shore City Council* CA29/95 at page 10

19. **Policy 13** provides for highly mobile fauna to be managed. The requires clarification as to whether it is the fauna that are managed, or potential adverse effects on the fauna that are to be managed.
20. If highly mobile fauna are to be managed, local authorities might need assistance in identifying how that is to occur. Further, the mobility of fauna creates cross-boundary management challenges, and specific management strategies would be required to deal with such fauna in a similar manner to how such strategies are required for highly migratory species in a fisheries context.

Implementation of coordinated management across boundaries should be further considered

21. **Part 3.4(b)** of the draft NPSIB requires provision “*for the coordinated management and control of subdivision, use and development, hazard effects, indigenous biodiversity across administrative boundaries*”.
22. This requirement may be practically difficult to implement. For example, how would local authorities manage bird species that migrate the length of the country (e.g. the ‘At-Risk’ South Island Pied Oystercatcher is recorded as migrating from inland Canterbury to the Firth of Thames), or internationally, in an integrated manner? It is suggested that greater clarity is required as to the nature and extent of the obligation this provision requires.

The reference to 'kaitiaki' to be clarified

23. **Part 3.7(e)** refers to local authorities recognising “*the importance of respecting and fostering the contribution of landowners as stewards and kaitiaki*”. As currently worded, this implies that all landowners can be both stewards and kaitiaki. However, the draft NPSIB recognises that the role of tangata whenua as kaitiaki. The relationship of tangata whenua with the land does not depend on land ownership. Consideration should be given to revising this wording, for example “*the importance of respecting and fostering the contribution of landowners as stewards and tangata whenua as kaitiaki*”, to make the distinction clear.

Expectations of engagement with regional councils should be clarified

24. **Part 3.8** imposes a requirement on territorial authorities to identify significant natural areas (SNA) in accordance with certain principles and approaches. While there is a requirement to take a partnership and transparent approach with landowners, there is no similar requirement to engage with regional councils which may hold information of relevance, and nor is there a requirement to engage with neighbouring territorial authorities on SNAs which may cross territorial boundaries. While that engagement may occur in any event, it may be useful for the draft NPSIB to clarify the expectations and requirements around such engagement.

Use of 'margins' not capturing meaning

25. In **Part 3.8(2)(f)** the word “*margins*” does not appear to capture the meaning intended. Perhaps consider substituting “*delineations*”.

Extra requirements for resource consent applications and need to identify SNAs

26. **Part 3.9** governs management of adverse effects on SNAs. Part 3.9(1)(a) requires local authorities to ensure that none of the specified adverse effects occur in relation to any new subdivision, use or development that takes place in or affects an SNA. For local authorities to ensure these outcomes, this will require that every resource consent application, irrespective of size or scale, will need to be accompanied by a comprehensive ecological assessment. This makes the identification of SNAs particularly important in order to know the extent of the obligations imposed.
27. The criteria for identifying SNAs (through identification of significant indigenous vegetation and significant habitat of indigenous fauna) are contained in Appendix 1.
28. The "*direction on approach*", at Point 2 refers to the attributes of four specified criteria. The criteria are well recognised in case law⁵ but in this case, it appears the attributes being referred to are those specified in the balance of Appendix 1. It is suggested that the link between recognised criteria in case law and Appendix 1 should be made clearer.
29. The first criterion of representativeness has assessment principles which provide helpful clarification as to what is included but provide little or no direction as to what is excluded. It is suggested that this criterion provides direction on exclusions, to assist with practical application.
30. Testing using representativeness relates to the present-day environment. The present-day environment might have relatively high quality indigenous vegetation and habitat values, or it might have very poor vegetation and habitat values. If vegetation and habitat values lean to the latter extreme (for example in a highly developed urban environment), is the intention that everything representative of that poor quality indigenous biodiversity environment be treated as significant? Testing by reference to rarity and distinctiveness may be more useful than representativeness.
31. The representativeness attributes in A4(b) appear to suggest that a SNA could be as small as a single tree provided that tree supports a typical suite of indigenous fauna for that particular species of tree. If this is not the intention, a minimum habitat size would provide clarity.
32. Similar issues arise with the rarity and distinctiveness criteria attributes. Specifically, because the attributes test whether any one of the specified considerations will apply, in ecological districts, regions or land environments that have less than 30% of the former extent of indigenous vegetation (which is likely to include most lowland ecological districts and land environments), all indigenous vegetation will be included in multiple significant natural areas, down to a single tree. Again, this would suggest the desirability of having a minimum area, perhaps in conjunction with an exclusion for existing or proposed urban areas (the latter to avoid conflict with the draft National Policy Statement on Urban Development).
33. Also, in relation to Attribute C6(g), the text refers to "*the type locality of an indigenous species*". It is unclear what this means in the context of a test for identifying SNAs. Further clarification is needed.

⁵ See for example *Royal Forest and Bird Protection Society Inc v Central Otago District Council* A154/2004 [2004] NZEnvC 419 (10 December 2004) at [31].

Consider whether the principles which apply to improved pasture could be extended to other modified natural environments

27. **Part 3.12** of the Draft NPSIB is the policy underlying particular provision for improved pasture. It is suggested that such provision or principles could equally apply to any modified natural environment (e.g. industrial sites, urban residential properties and the like), rather than limiting it to improved pasture.

Clarification needed on management of areas outside an SNA

28. **Part 3.13(2)** requires a local authority to manage an area outside an SNA as if it were an SNA where that area has been assessed as significant indigenous vegetation and significant habitat of indigenous fauna in accordance with Appendix 1. Given the requirement for local authorities to identify SNAs in their plans, it may be that any such area would be included as an SNA in the next plan review process. If that is the case, then it may be useful to include clarification on that point in this Part.

Clarify whether councils are required to survey entire region, or just natural areas

29. **Part 3.15(1)** imposes an obligation on regional councils to survey and record areas outside SNAs “*where highly mobile fauna have been, or are likely to be, sometimes present*”. This could be an onerous obligation. It is suggested that consideration be given to clarifying the extent of this obligation and consider what precision is required (i.e. natural areas only or the council's entire region).

Requirement to restore "former wetlands" may conflict with other objectives (i.e. flood protection)

30. **Part 3.16** requires local authorities to promote, among other things, restoration and enhancement of former wetlands. The extent this could cover would be significant as the area occupied by wetlands has vastly reduced from the position pre-European settlement. In addition, there are large areas of “*former wetlands*” that have been intentionally drained either to create productive pasture or for the purposes of flood protection.
31. For example, large parts of the lower Waikato region have been drained for flood protection purposes. This flood protection scheme is administered in the latter case by Waikato Regional Council and so the ability to restore former wetlands is readily within Council’s control. It is not clear whether it is intended that flood protection objectives will be compromised in order to improve and restore former wetland habitat, and if so, to what extent.

Clarify whether the target of increasing indigenous vegetation cover applies regionally or to a specified smaller area

31. **Part 3.17** is aimed at increasing indigenous vegetation cover in both urban and rural areas with a target of at least 10 percent indigenous vegetation cover in such areas. It is not clear whether this target applies overall – i.e. to the entirety of the urban or rural areas within a region (e.g. Auckland Region), or whether it is intended to apply separately to different urban or rural areas within a region (e.g. Warkworth, Whangaripo etc). It is also not clear whether the requirement would apply to all land types – such as on land classed as highly productive land which is sought to be protected under the proposed National Policy Statement on Highly Productive Land. Further clarification would be useful.

Additional requirements in the draft NPSIB may require consequential amendments to Schedule 4 of the RMA

32. **Part 3.19** imposes requirements in relation to assessment of environmental effects. These are additional to the information requirements for a resource consent as set out in clause 7 of Schedule 4 to the RMA. For clarity, Schedule 4 of the RMA should reflect these additional requirements and be amended to require an assessment of environmental effects to include the matters set out in any relevant National Policy Statement or National Environmental Standard.

We hope you find these comments from the Law Society's Environmental Law Committee helpful. If further discussion or information would assist, please do not hesitate to contact the Committee convenor Bronwyn Carruthers, through the Law Society's Law Reform Adviser Emily Sutton (emily.sutton@lawsociety.org.nz).

Yours faithfully

A handwritten signature in black ink, appearing to read 'Herman Visagie', written in a cursive style.

Herman Visagie
Vice President