

# Submission on New Zealand Productivity Commission's *Better urban planning, Issues Paper, December 2015*

Submitted by: Sir Geoffrey Palmer QC and Dr Roger Blakeley

## Executive Summary

We agree with the Productivity Commission in its *Using land for housing* report, that there are “systemic weaknesses in the planning framework”. We do not agree that the weaknesses require the design of a whole new planning system. That would cause upheaval in institutional arrangements and jurisprudence, with costs and uncertainty for a long time. Also, we do not agree with the constant fiddling with the Resource Management Act 1991 (RMA), which debilitates both the Act and its administration.

There is much about the RMA that needs to be fixed. The fixes do not require ‘throwing out’ the Act, nor should they involve changes to the purpose and principles of the Act as set out in sections 5, 6 and 7. Our recent experience with stakeholders is that there is support for the original intention of the RMA, as articulated by the responsible Ministers at the time, Rt Hon Geoffrey Palmer and Hon Simon Upton. The core idea was that development must take place within the capacity of the environment and the eco-systems that support it.

We recommend that major changes be made to the way the Act is being implemented, that would better *enable* economic and social development. They are set out in sections D.1 to D.9 of this submission:

- Regional spatial planning at the strategic level
- Integration across the RMA, LGA and LTMA
- Better provision for urban planning within the RMA
- Mitigation and adaptation to climate change
- More central guidance through NPS and NES
- Better district planning and rule-making
- Institutional design and decision-making
- Rigorous monitoring/evaluation of effectiveness of the Act

The above changes would not be disruptive to established jurisprudence, but they would require radical changes in behaviours and action by parties that have responsibilities for implementation under the Act. We believe there would be support across the wide range of stakeholders, and it would be enduring and effective.

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**Sir Geoffrey Palmer** is a former Prime Minister of New Zealand. He was Minister for the Environment from 1987 to 1990, and led the development of the Resource Management Bill, 1989.

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## Overview of Submission

The structure of this submission is:

Part A: Background: Three Simultaneous Reviews

Part B: Origins and Purpose of the RMA

Part C: What has happened in the last 25 years since passing of the RMA?

Part D: Policy issues: Review of New Zealand's Resource Management and Urban Planning System

Part E: Conclusion

We are making submissions on both the Productivity Commission's *Better urban planning* issues paper, and Local Government New Zealand's *A 'blue skies' discussion about New Zealand's resource management system*. While the submissions are similar, because the scope of both reviews is similar, this submission is focused in particular on the Productivity Commission's review.

### **Part A: Background: Three simultaneous reviews: Confusion, duplication and policy competition**

There are currently three major policy reviews occurring in the same policy space: the Resource Legislation Amendment Bill public submissions, the Productivity Commission's *Better Urban Planning* review, and the LGNZ's *A 'blue skies' discussion about New Zealand's resource management system*. It is important to look at the context of all three reviews.

#### **A.1. The Resource Legislation Amendment Bill**

On 3 December 2015 the Resource Legislation Amendment Bill received its first reading and was referred to the Local Government and Environment Select Committee for public submissions. The Bill is 170 pages: long, technical and very difficult to follow. The Minister, Hon Dr Nick Smith, said the Bill makes 40 changes to six different Acts. Submissions close on 14 March 2016. The Bill implicitly accepts that the amendments proposed in 2013 to alter the environmental bottom lines in Part 2 will not proceed. But, the changes are extensive and quite a number may not survive Select Committee scrutiny. The most important are:

- Joint development of National Environmental Standards and National Policy statements;
- New regulation-making powers to permit specified land uses to avoid unreasonable restrictions on land, and to prohibit and remove council planning provisions;
- New provisions in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012;

- Lengthy new provisions to enable the development of a national planning template, which gives the Minister for the Environment the power to direct the required structure and format of policy statements and plans, and to specify matters (objectives, policies, methods, and rules) that either must be included in policy statements or plans, or may be included at the discretion of councils;
- Amendments to ensure councils provide sufficient land for residential and business developments to meet long-term demand;
- Lengthy provisions allowing for collaborative planning processes to substitute for normal processes. This is designed particularly for the Land and Water Forum work;
- Substantial powers designed to centralise control, introduce many detailed procedural changes, and provide a new fast track.

The Bill was not supported by Hon Peter Dunne, who voted against it. So did Act MP David Seymour (who thought the amendments were too weak), and the Green Party. New Zealand First abstained. Labour voted for it.

The Maori Party cast their votes for the first reading only, having successfully secured concessions that involved removing two objectionable provisions before the Bill was introduced, and winning enhanced iwi and Maori consultation provisions in return. The Maori Party prevented the introduction of privatised consenting. Alternative Consent Authorities, where public powers would be exercised by organisations approved by the government, but not by people who are publicly accountable officials, had been planned. The Maori Party also stopped changes in the Bill that would have imposed new limitations on restrictions on the use of land. They may secure further changes at the Select Committee stage.

Given the complicated political situation evidenced by the voting upon the Bill's introduction, it is not easy to predict how the Bill will fare at the hands of the Select Committee. The parliamentary debates warrant close study by the Productivity Commission, to recognise which changes in the Bill are likely to be accepted.<sup>1</sup>

## **A.2. Productivity Commission's 'Better urban planning' Review**

The Hon Bill English, as Minister of Finance, launched a new inquiry by the Productivity Commission. On 1 November 2015, he announced the terms of reference asking the Commission "to review urban planning rules and processes, and identify the most appropriate system for land use allocation."<sup>2</sup> This followed the concerns expressed by the Commission in its earlier report *Using land for housing*,

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<sup>1</sup> Resource Legislation Amendment Bill-First reading 710 NZPD 1 (3 December 2015).

<sup>2</sup> Beehive.govt.nz. See terms of reference at [www.productivity.govt.nz](http://www.productivity.govt.nz)

October 2015, including the need to integrate across the Resource Management Act, the Local Government Act, and the Land Transport Management Act.

There is serious scope for confusion and policy collision here. The Minister for the Environment's Bill contains major changes to the planning sections of the Resource Management Act, by enabling the Minister for the Environment to make regulations that override the existing powers of local authorities to make residential land use rules, and other changes that will create new decision-making powers at central government level. This conflicts with the devolved decision-making and community-enabling principles in the RMA. The Productivity Commission is not due to report until November 2016, so its findings will not be able to influence the debate on the Bill.

Hard on the heels of receiving its terms of reference, the Productivity Commission produced in December 2015 *Better Urban Planning*, a 95-page issues paper. Submissions close on 9 March, 2016.

### **A.3. LGNZ's A 'blue skies' discussion about New Zealand's resource management system**

Local Government New Zealand has chimed in with a 'blue skies' discussion paper about New Zealand's resource management system, and accepted submissions until 19 February 2016<sup>3</sup>.

At the very least, those stakeholders with an interest in planning will suffer from submission fatigue. Three sets of submissions on related, but not identical, topics are due at almost the same time. This is a recipe for confusion and policy train wreck. Serious resources need to be brought to a topic like this, and to balkanise the policy resources of a small country in three separate efforts seems both unwise and profligate. Efforts to change this Act without success have been going on for nearly five years now. A more robust, determined and high-quality effort within the executive government and local government would produce a better outcome, and more quickly in our view.

## **Part B: Origins and Purpose of the Resource Management Act 1991**

### **B.1. Origins of the Resource Management Act**

We note that the Productivity Commission in Chapter 4 of *Better urban planning, October 2015* has traced some of the history of the Resource Management Act, and the thinking behind its purpose and principles. From our own direct involvement, we

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<sup>3</sup> Local Government New Zealand, *A 'blue skies' discussion about New Zealand's resource management system, A discussion document prepared for LGNZ by MartinJenkins, December 2015*

would like to elaborate on the forces that led to the Resource Management Act in the first place, and on what the legislators had in mind at the time.

The answer lies in the political history of the 1980s and the early 1990s. The Resource Management Act Law Reform Project was the largest law reform effort that New Zealand had ever undertaken up until that time. The purpose was to provide a single system to promote “sustainable management of all natural and physical resources”.<sup>4</sup>

The international inspiration for this project was the report of the World Commission on Environment and Development, which set out principles for environmental protection and sustainable development. The Commission's report, issued in 1987, is known as the Brundtland Report after its Chair, Norwegian Prime Minister Gro Harlem Brundtland. The Brundtland Report defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"<sup>5</sup>. It contained two key concepts: the concept of needs, and the idea of limitations. Rather than viewing ‘development’ and ‘environment’ as competing values, one to be sacrificed to the other, the Brundtland Report approaches the two as inseparable – needs could only be met within the limitations in the environment. That report put sustainable development into the international mainstream.

The Brundtland Report formed the foundation for the Earth Summit held in Rio de Janeiro in 1992. Principle 4 of the Rio Declaration declared that:<sup>6</sup>

In order to achieve sustainable development, environmental protections now constitute an integral part of the development process and cannot be considered in isolation from it.

The core idea was that development must take place within the capacity of the

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<sup>4</sup> Resource Management Act 1991, section 5. See Geoffrey Palmer *The Making of the Resource Management Act*, in *Environment –the International Challenge* (Victoria University Press, Wellington, 1995) at 145-174. Geoffrey Palmer *The Resource Management Act-How we got it and what changes are being made to it* in Trevor Daya-Winterbottom (ed) *Resource Management Act-Theory and Practice*, 2014 (Resource Management Law Association, Auckland 2014) at 22. There are a number of legal texts upon the Act that are useful to practitioners, which do not discuss the policy but rather describe the law, see Derek Nolan (ed), *Environmental and Resource Management Law* (5<sup>th</sup> ed., LexisNexis, Wellington, 2015). For more on the policy see Klaus Bosselman, David Grinlinton and Prue Taylor (eds), *Environmental Law for a Sustainable Society*, (2<sup>nd</sup> ed., New Zealand Centre for Environmental Law, University of Auckland, 2011).

<sup>5</sup> *Report of the World Commission on Environment and Development: Our Common Future*, A/42/427 (1987) at ch 2, [1].

<sup>6</sup> *Rio Declaration on Environment and Development*, A/CONF151/26, vol. 1, (1992), 31 ILM 874 adopted by the United Nations Conference on Environment and Development at Rio de Janeiro, 13 June 1992.

environment and the eco-systems that support it. That is why the Resource Management Act is driven by Part 2, the purpose and principles. The purpose of the Act is to promote "the sustainable management of natural and physical resources".

The immediate domestic reason why a large law reform effort of this type was undertaken flowed from the "Think Big" policy of the National Development Act 1979. That Act promoted a fast track for big development projects. It was a statute of considerable constitutional dubiety and led to a wave of political opposition based essentially on *environmental* and *constitutional* factors.

The concerns were *environmental* because the fast track for large developments could easily result in adverse environmental effects, and *constitutional* because the statute removed the checks and balances contained in many other acts and allowed ministerial decisions to predominate. Had it not been for the National Development Act, it is very unlikely that the Resource Management Act would have occurred. Such was the nature of the contrapuntal harmonies of New Zealand politics under the first-past-the-post electoral system.

## **B.2. Purpose of the Resource Management Act**

The Labour government elected in 1984 had pledged to repeal the National Development Act, and it did so. But that exposed a gap. The morass of laws built up over the years that dealt with the development of resources in New Zealand remained. If the National Development Act was not the answer, what was? The government received a report on the Town and Country Planning Act 1977 from a leading lawyer in Christchurch, Anthony Hearn QC, but decided that a new framework was preferable.

The real work did not begin until after the 1987 election, when a number of factors made it possible to engage in the massive law reform project. The project was led by a Cabinet committee, dedicated to Resource Management Law Reform and Local Government Reform, and supported by a core group of officials. It included publication of many background policy documents, and major public consultation.

The aims of the project are stated in the explanatory note for the Resource Management Bill as it was introduced into the House in 1989, before going to a select committee. The explanatory note isolated the list of concerns that the statute was designed to remedy. They were as follows:

- There is no consistent set of resource management objectives.
- There are arbitrary differences in management of land, air and water.
- There are too many agencies involved in resource management, with overlapping responsibilities and insufficient accountability.

- Consent procedures are unnecessarily complicated and costly, and there are undue delays.
- Pollution laws are ad hoc and do not recognise the physical connections between land, air and water.
- In some aspects of resource management there is insufficient flexibility and too much prescription, with a focus on activities rather than end results.
- Maori interests established in Te Tiriti o Waitangi are frequently overlooked.
- Monitoring of the law is uneven.
- Enforcement is difficult.

When the bill was introduced there was a lengthy select committee process and the bill was not passed before the 1990 election. The in-coming National Government re-examined the measure, produced a report, amended the bill in some detailed respects and passed it in 1991.

Hon Simon Upton, Minister for the Environment, set out the policy intent of the legislators in his speech on the Third Reading of the Bill and a subsequent paper<sup>7</sup>, as follows:

- It broke from the Town and Country Planning approach which: “encouraged limitless interventions for a host of environmental and social reasons”.
- 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”. The focus of the outcomes sought was therefore “significantly narrower than the general welfare ambition of the old Town and Country Planning Act.”
- The objectives embodied in paragraphs 5(2)(a) to (c) were intended to provide “a framework to establish objectives with a biophysical bottom line that must not be compromised”.
- The three objectives were to be treated as “high-level constraints”, which had to be met while enabling people and communities to promote their own welfare. The principles in 5(2)(a) to (c) could not be traded off as a means of enabling the community to pursue its wellbeing.
- The outcomes required by paragraphs 5(2)(a) to (c) 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.
- Sections 6 and 7 provided guidance on what those bottom lines comprised, and hence had a biophysical focus.

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<sup>7</sup> Hon Simon Upton, *Resource Management Bill: Third Reading*, New Zealand Parliamentary Debate, 4 July 1991; Simon Upton, Helen Atkins and Gerard Willis, *Section 5 re-visited: a critique of Skelton and Memon’s analysis*, *Resource Management Journal*, Issue 3, Volume X, November 2002.

A frequent criticism of the Resource Management Act is that it does not promote economic and social growth. As explained above, it was designed to ensure sustainable management of natural and physical resources, and protect environmental bottom lines, and thereby enable a healthy economy and society. It is not a social planning statute. Rather it enables people and communities to promote their own welfare.

## **Part C: What has happened in the last 25 years since the passing of the RMA?**

### **C.1. Concerns about how the RMA is working**

It was clearly recognised when the legislation was being designed, that the entire exercise was always at the outer limits of the attainable in a law reform project. This was simply because the project was so comprehensive and ambitious. To get it enacted at all was something of a miracle. And to get bi-partisan support for it was very important in the early years. But to make the legislation work properly after it was passed was an even greater challenge.

Examining the list of concerns identified in the Resource Management Bill in 1989 (listed in section B.2 above) today, after 25 years of experience, it is clear that many of those problems still remain. People say that consent procedures are still unnecessarily complicated, costly and that there are undue delays. Many would also say that monitoring of the law is uneven and enforcement is difficult. However, the vast majority of consents are granted quickly and without too much difficulty: the Ministry for the Environment reported in 2011 that only 0.56% of resource consents in the previous year were declined. In 2012/13, 97% of resource consents were granted within the statutory time frames. Nevertheless, procedural aspects of the legislation are cumbersome and unnecessarily prolix, and figures understate the problems that face large developments.

### **C.2. Legislative amendments**

Much of the difficulty stems from the prolific number of amending Acts that have been passed since 1991. Over its 25-year lifetime, the RMA has been subject to 21 substantive amendments. The original Act occupied 382 pages of the statute book when it was passed in 1991. The April 2014 reprint had 827 pages. The September 2015 reprint had 682 pages. So at present the Act is exactly 300 pages longer than it was when it began. New Zealand exhibits a habit of passing big statutes, finding we do not like the results, and then engaging in a constant series of amendments, with the result that the statutes lose both their principles and their coherence. There are many reasons for this tendency - a unicameral legislature, a three-year parliamentary term, a desire not to open up too many issues in the Parliament, and others. The result is

legislation of lower quality than is optimal. The New Zealand habit of continual legislative meddling needs to be broken.

### C.3. Jurisprudence

A notable feature of the original Resource Management Act was that the environmental safeguards in it were defined and limited in Part 2 of the Act. This applies to all decision-makers and decisions made under the authority of the Act. It has taken a very long time to reach a judicial understanding of how these provisions should be interpreted. But now, many years after 1991, one consequence of starting again would be to lose the granulated and now clear jurisprudence that applies here. That would be a retrograde step.

Leading cases have been slow to reach the senior courts in New Zealand to provide definitive guidance on how the Resource Management Act is to be interpreted. The old planning philosophy was overturned by the new Act. Disputes were dealt with in the beginning by Planning Tribunal Judges, who were not sympathetic to the new legislation, and quite critical of it. By the beginning of 1995, there had not really been any leading cases about it. There was, however, a good deal of academic commentary on the uncertainties presented by the Act, an issue that occurs with all new legislation, and one of the reasons why big, quick changes in direction are to be avoided. But after the Planning Tribunal was abolished and recreated as the Environment Court, new approaches began to emerge. It seems almost as if the stuff of which leading cases are made in the law, was consciously avoided by both sides of the environmental divide, so their interests were not weakened by the decisions taken.

It emerged in the Environment Court, and indeed in some decisions in the High Court, particularly in a judgment by Justice Grieg in *New Zealand Rail Limited v Marlborough District Council*<sup>8</sup>, that the correct approach was an ‘overall judgment’ approach. In that case Justice Grieg considered that the preservation of natural character was subordinate to section 5’s primary purpose, which was to promote sustainable management. He described the protection of natural character as “not an end or an objective on its own” but an “accessory to the principal purpose” of sustainable management. This led to the application of an ‘overall judgment’ test, which seemed to take priority over the intention of the Act: to provide environmental bottom lines. That was clearly illustrated in parliamentary speeches by the Minister for the Environment at the time the Act was passed, the Hon Simon Upton, and earlier by Rt Hon Geoffrey Palmer.<sup>9</sup>

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<sup>8</sup> *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70(HC).

<sup>9</sup> Hon Simon Upton (4 July 1991) 515 NZPD 3019; Rt Hon Geoffrey Palmer (28 August 1990) 510 NZPD 3950.

Fortunately, the Supreme Court of New Zealand has now provided clarity in the case of *Environmental Defence Society v New Zealand King Salmon*<sup>10</sup>. In a careful and elegant judgment of the Court given by Justice Terrence Arnold, matters were made as clear as it is possible to be. It is to be hoped that decision-makers do not return to their old habits of ad hoc balancing.

Without going into detail, it is important to note that the Supreme Court, in the most important judicial decision since the inception of the Act, made a number of significant pronouncements of great precedential value:

- It repeatedly emphasised that environmental protection is an essential part of the RMA's purpose of sustainable management.
- It stressed that sections 6 and 7 are an elaboration of the statement of principle contained in section 5.
- It drew a distinction between the matters addressed in section 6 and those addressed in section 7, noting that the matters in section 6 "fall naturally within the concept of sustainable management in a New Zealand context", and section 6 therefore contains a stronger direction to decision-makers than section 7.
- It explained that the elements of "protection and preservation" in section 6 "are intended to make it clear to those implementing the RMA that they must take steps to implement that protective element of sustainable management."
- It rejected the 'overall judgment' approach adopted by the Board of Inquiry.

The Government's 2013 proposed changes to sections 6 and 7 take on a new significance in light of this interpretation. Collapsing sections 6 and 7 into a single list, after the Court has clearly identified the relationship between the two provisions and explained the basis for it, would make a significant difference. Further, an overall broad judgment approach is not appropriate, the Court tells us.

Sections 6 and 7 contain a list of values that can be updated over time. They all flow from sustainable management.

The decision makes it very difficult to argue that the Government's proposals for reform, made in 2013 but never introduced, were a simple 'rebalancing exercise'. Following the Supreme Court decision, the decision that the government has made to abandon its plans to radically alter Part 2 is a wise decision. What the decision makes plain, is that ad hoc balancing tests are out, and environmental bottom line tests are in. For this reason the provisions of the National Policy Statement on the coastline could not be balanced away, as the Board of Inquiry had done.

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<sup>10</sup> *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014]NZSC 38(SC).

The unfortunate feature of the struggle on Part 2 has been to cause years of delay in making the processes of the Act less cumbersome, less bureaucratic and more user-friendly. What the Supreme Court decision demonstrates, in a remorselessly analytical manner, is that the environmental protections in the Act are real, and any reduction of them would be a retrograde step. People who want to change the approach have to recognise that the sustainability paradigm constitutes the key anchoring principle for the key policy in the whole Act.

#### **C.4. Research and Post-legislative Scrutiny of How the Act is Working**

Over the years we have seen little empirical research that convinces about how the Resource Management Act is working. No doubt empirical research is expensive, but before changes are made it is really necessary to find out what is actually happening. Only that way can meaningful improvements be made. Far too many of the changes to the RMA have been driven by anecdote, prejudice, and interest, rather than evidence.

New Zealand has a bad habit of passing large legislative schemes, and never analysing whether they were effective and efficient in achieving their goals. There are many reasons for the phenomenon, but none of them convinces. Some exciting new developments on this issue have been tried in some European countries, notably Belgium, the Netherlands, and the EC Commission.<sup>11</sup>

Acts of Parliament are designed to produce a set of policy results for the future. Whether these will be achieved cannot be known fully at the time the law is made. Thus, efforts to compare the results that were actually achieved with those expected and desired would seem essential in any rational policy-making community. Laws are passed to make improvement and produce better outcomes. Legislation is used as an instrument to change behaviours and shape society in various ways, whether it be the economy, the environment, health, housing, education or the crime rate. The New Zealand approach, however, seems to be to continue legislating in quantity with little attempt to see what actually happened, until something goes sufficiently wrong to require hurried legislative attention. Too often, known and reliable research is not followed or not examined, and seat-of-the-pants reactions and popular sentiments are used to change the law rather than careful analysis. Today, with a variety of social science research methodologies available for examining how legislation has performed in practice, this seems unfortunate. It is only by carrying out such work that it will be possible to make definitive judgments about the quality of both the policy and the law.

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<sup>11</sup> Koen van Acken (2011), *From Vision to Reality: Ex Post Evaluation of Legislation*, (2011)5 *Legisprudence* 41

The reasons for inadequate subsequent examination of laws passed, are as follows:

- it costs money to conduct research, and such expenditures are outranked by other priorities;
- such investigations can be complex: that is a disincentive to undertake them;
- public concern often does not emerge strongly enough to secure attention, due to the lack of influence of those who are adversely affected;
- enforcement is frequently expensive and policy-makers would rather not know whether the law is being followed;
- the increased complexity of many of the problems modern legislation deals with make it easy to get it wrong;
- those who fashion legislation, particularly ministers, would rather not know that it has not turned out as they would have wished or as they said it would;
- political ideology drives much legislation, rather than rigorous empirical analysis, so the incentives to find out how it worked are reduced;
- the law may be too complicated, unclear, or inaccessible to those whose behaviour it desired to alter;
- laws become out-of-date and do not reflect current mores, but the politics of altering them is so difficult it is not attempted. The Adoption Act 1955 is a classic example of badly out-of-date law that has not been addressed but should be.

New mechanisms should be developed to look rigorously at the effect of legislation that has been passed, and to ensure that it achieved the objectives upon which it was based, and that there were no unforeseen consequences of a deleterious kind. It seems sound to do this examination before rushing in with amendments, as occurs so often in New Zealand. Such analysis is also necessary before embarking on new proposals to replace existing law. Further, evaluations can pave the way for the development of a new legislative approach where the existing law contains serious defects upon examination. Such evaluations can show where existing law is out-of-date, or otherwise unsuitable for the purpose. The reports should spark public involvement and debate.

A recommended approach to Post-legislative Scrutiny and evaluation is set out in section D.9 below.

## **Part D: Policy issues: Review of New Zealand's Resource Management and Urban Planning System**

### **D.1. Proposals for Reform of the Planning Framework**

We note in Finding F11.1 of the Productivity Commission's *Using land for housing*, October 2015 report, that: there are systemic weaknesses in the planning

framework, including -

- poor integration between the planning processes of the three main Acts;
- inadequate attention to the national and public interest
- insufficient recognition of the needs of cities and housing
- lack of responsiveness; and
- scope creep

We agree that there are systemic weaknesses in the planning framework. In this submission, we will address all of the Commission's concerns listed above.

### ***International practice***

The Terms of Reference for the Productivity Commission's *Better urban planning* review says that "International best practice has moved on, and a fundamental review of the urban planning system is due". This assertion appears to presume an outcome before the analysis is done. The Commission's *Better urban planning* issues paper describes the urban planning system in several cities/countries including Vancouver, Switzerland, the Netherlands, Germany, many parts of USA (not Houston), Denmark and England, that are similar to New Zealand, with:

- national guidelines set by central government;
- efforts to reduce the number of statutory plans;
- spatial (strategic) planning at national/ regional level, eg integrated land use and infrastructure strategies for growth and housing targets;
- devolved power to the local level to prepare municipal plans/district plans including land use controls such as zoning, and urban design assessment.

Our observation of international practice is that in Europe, including UK, national/regional guidance is perhaps more fulsome (albeit this is being diluted in the UK) with targets in terms of housing supply more defined than here. Apart from that, decision-making is heavily devolved. Local planning in Europe is almost everywhere less prescriptive and rule-based and relies more heavily on the discretion of the local body, supported with specific planning guidance as required. In the UK, the local development framework (district plan equivalent) can be as little as 100 pages long and deal with strategic objectives, policy and broad zoning (residential, employment and open space). Detail relating to specific sites/places is dealt with in supplementary planning documents that are bolted on, following specific public consultation and hearing, if required. (The localism agenda has placed responsibility for initiating these in the hands of communities, alongside local planning authorities).

There are two particular points of difference in New Zealand: the RMA's focus on environmental effects; and its stronger focus on natural resources than on urban planning. We have already discussed in this submission the origins and importance of the focus on environmental effects and environmental bottom lines. The RMA could be strengthened with guidance on how planning can promote good urban systems and outcomes. This is more than just land supply – it includes the economic, social, environmental and cultural aspects that are an important part of any successful city.

The Productivity Commission's *Better urban planning*, 2015, issues paper is replete with emphasis on property rights, reference to Coasian economics, and even the lack of planning laws in Houston. American ideas of planning are not helpful in New Zealand - our planning legislation had no American antecedents. The idea that the market and bargaining can produce the required answers will not withstand any test of realism. Analysis of what is done overseas does not address the deep-rooted values on these matters in the New Zealand political culture. That does not mean, however, that the zoning regulation needs to be as prescriptive as it is now in many plans in New Zealand. Plenty of room for well-designed change exists. Indeed, it is needed.

### ***Recommended changes to the way the RMA is being implemented***

There is much about the RMA that needs to be fixed. The fixes do not require 'throwing out' the Act, nor should they involve changes to the purpose and principles of the Act as set out in sections 5, 6 and 7. Our recent experience with stakeholders is that there is support for the original intention of the RMA, as articulated by the responsible Ministers at the time, Rt Hon Geoffrey Palmer and Hon Simon Upton. The core idea was that development must take place within the capacity of the environment and the eco-systems that support it. That is why the Resource Management Act is driven by Part 2, the purpose and principles. These should not change. We detect little appetite to turn the Act into a social planning act.

*We recommend major changes to the way the Act is being implemented, that would better enable economic and social development. They are:*

- *Regional spatial planning at the strategic level*
- *Integration across the RMA, LGA and LTMA*
- *Better provision for urban planning and development within the RMA*
- *Mitigation and adaptation to climate change*
- *More central guidance through National Policy Statements and National Environmental Standards*
- *Better district planning and rule-making*
- *Better institutional design and decision-making*
- *Rigorous monitoring and evaluation of effectiveness of the legislation.*

The above changes would not be disruptive to established jurisprudence, but they would require radical changes in behaviours and action by parties that have responsibilities for implementation under the Act. We believe there would be support across the wide range of stakeholders, and it would be enduring and effective.

The following sections describe our recommended changes under each heading.

## **D.2. Regional Spatial Planning at the Strategic Level**

We agree with Finding F11.5 in the Productivity Commission's *Using land for housing*, October 2015, report that "spatial plans have a place in a future planning system, and the planning framework should be designed to ensure such plans have stronger legislative weight in other planning processes (ie, land use regulation, transport and infrastructure)" amongst other things.

A number of regions in New Zealand have now developed regional spatial plans. The most recent plan, which applies to the largest region, is the Auckland Plan<sup>12</sup>. It may be helpful to set out the background to this plan. One of the recommendations of the Royal Commission on Auckland was the preparation of a regional spatial plan<sup>13</sup>. Statutory provision was made for this under section 79 of the Local Government (Auckland Council) Act 2009, which required that: "The Auckland Council must prepare and adopt a spatial plan for Auckland. The purpose...is to contribute to Auckland's social, economic, environmental and cultural well-being, through a comprehensive and effective long-term (20- to 30-year) strategy for Auckland's growth and development".

The important distinction in the legislation is the requirement for a "spatial plan for Auckland", not just Auckland Council. For the first time, Auckland has a single, integrated plan for the region, covering land use, transport, infrastructure and housing to guide investment by council, government, the private sector, iwi and communities. It sets out the location, sequence, timing and funding requirements for infrastructure relating to transport, housing, water supply, wastewater and stormwater, services managed by network utility operators, and services relating to social, community and cultural infrastructure. Council officials worked closely with government officials in preparing the Auckland Plan. There were high levels of public engagement and support.

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<sup>12</sup>Auckland Council (2012), *The Auckland Plan*, Auckland Council.

<sup>13</sup> Royal Commission on Auckland Governance (2009), *Report of the Royal Commission on Auckland Governance*, vol. 1, Royal Commission on Auckland Governance.

The council decided that the Auckland Plan would be shaped by the European Regional / Spatial Planning Charter, also known as the Torremolinos Charter, widely regarded as world-best practice in regional spatial planning<sup>14</sup>. The Torremolinos Charter has four fundamental objectives: balanced socio-economic development of the regions; improvement of quality of life; responsible management of natural resources and protection of the environment; and rational use of land. The Auckland Plan is the strategic plan, providing direction for all other plans, including the Unitary Plan, which is the statutory plan under the RMA.

We recommend that spatial planning has a formal place in the planning system at the strategic level, with stronger legislative weight in other planning processes (ie land use regulation, transport and infrastructure), and that it be evidence-based, identifying clear priorities and trade-offs, including expected housing demand and associated land use and infrastructure requirements, developed by regional councils and territorial local authorities, working with government agencies, business, iwi and communities– see also section D.3 below.

We note that the Productivity Commission under “*Scope creep*” in Chapter 11 of the *Using land for housing* , October 2015, report says:

Other significant planning documents, such as the Auckland Plan, have a range of objectives that sit well outside the traditional frame of managing land-use externalities and coordinating infrastructure and arguably outside the control of local government, such as raising vaccination rates, reducing life expectancy disparities, lifting participation in “culturally appropriate early childhood learning services” and increasing foreign language fluency.

This comment appears to show that the Commission has a misunderstanding about spatial planning and the Auckland Plan. As stated above, the mandate for the Auckland Plan was prescribed in the legislation that established the Auckland Council. It included a broad brief for the spatial plan: “to contribute to Auckland’s social, economic, environmental, and cultural wellbeing”. Also, the legislation says it is “a spatial plan for Auckland”, not Auckland Council. So it inevitably covers matters that are broader than Auckland Council’s responsibility, but must be part of a comprehensive 20- to 30-year long-term strategy for Auckland. That is why the Council went to great length to consult widely on the plan, including with government, business, iwi, communities and the public. Also as noted above, the

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<sup>14</sup> Council of Europe (1983), *European Regional/Spatial Planning Charter – Torremolinos Charter*, adopted by the European Conference of Ministers Responsible for Regional Planning, 20 May 1983 at Torremolinos.

Auckland Plan follows the same broad and integrated approach as the Torremolinos Charter, widely regarded as world-best practice in regional spatial planning.

### **D.3. Integration across the RMA, LGA and LTMA**

The Productivity Commission has pointed out that the RMA consolidated the legislative landscape by repealing 59 statutes. Palmer<sup>15</sup> said that: “The RMA brought multiple processes under one law with a common purpose, reduced the number of decision-makers, and removed arbitrary differences in management of land, air and water”.

Nevertheless, complexity is still associated with the three main planning Acts RMA, Local Government Act, 2002 (LGA), and Land Transport Management Act, 2003 (LTMA), as documented by the Productivity Commission<sup>16</sup>, New Zealand Council for Infrastructure Development<sup>17</sup>, and the LGNZ ‘blue skies’ document<sup>18</sup>.

The Ministry for the Environment<sup>19</sup> identified the following set of problems:

- New Zealand’s planning system (namely the RMA, LGA and LTMA) is disintegrated.
- There is little alignment between strategies, funding, regulation and decision-making to integrate land use and infrastructure development, set spending priorities, and manage growth.
- There is both duplication and fragmentation of powers and processes, and a lack of alignment between the RMA and other legislation.
- The three planning statutes are not working together as a complete planning system, although there are some connections.
- Each statute, and its plans and decision-making, are subject to different legal processes and criteria, and operate over different time frames.

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<sup>15</sup> Palmer, G. (2013), *The Resource Management Act: How we got it and what changes are being made to it*, Address to Resource Management Law Association, Devon Hotel, New Plymouth, 27 September 2013.

<sup>16</sup> New Zealand Productivity Commission (2015), *Better Urban Planning*, Issues Paper, New Zealand Productivity Commission, December 2015.

<sup>17</sup> New Zealand Council for Infrastructure Development (2015), *Integrated Governance Planning and Delivery*, A Proposal for Local Government and Planning Law Reform in New Zealand, August 2015.

<sup>18</sup> Local Government New Zealand (2015), *A ‘blue skies’ discussion about New Zealand’s resource management system*, A discussion document prepared for LGNZ by MartinJenkins, December 2015.

<sup>19</sup> Ministry for the Environment (2010), *Building competitive cities: reforms of the urban and infrastructure planning system*, Technical working paper.

- There is insufficient alignment, connection and flexibility within and across planning functions, statutes, and layers of governance and decision-making.
- This results in duplication, fragmentation and lack of clarity, and demands considerable time and resourcing from all parties involved.

The LGNZ ‘blue skies’ document has three suggested approaches to these integration problems:

1. Under section 6.1 Step 2, LGNZ proposes that RMA, LTMA, and LGA be “over-written” with a statute that would “improve [the three acts’] clarity, reduce their complexity and enhance their connectivity”.
2. Under section 6.1 Step 3 LGNZ identifies an option of “Blending the land use, infrastructure planning and funding components of the LGA, RMA and LTMA into a single Planning Act and creating a separate Environment Act. LGNZ does not support this option and says “... the radical changes to governance arrangements implied by such an approach could be expected to cause extreme upheaval that will take a long time, possibly decades, to settle.”
3. Under section 6.1 Step 3 LGNZ proposes: “retaining the RMA, LGA and LTMA but installing spatial planning legislation that sets the regional strategic direction and the high-level parameters within which the ‘implementation’ acts of the LGA, RMA and LMTA are to operate”.

Our analysis of the above three options is as follows:

1. If the integration of the three statutes is to be achieved, even with an ‘over-write’ statute, the legislative design problems are formidable. It also runs the high risk of undoing the recent progress with jurisprudence, whereby in the last 2 years the Supreme Court in the King Salmon case has given a clear legal direction on the purpose of the RMA.
2. We agree with LGNZ that the second option above could be expected to cause “extreme upheaval”. We also think it would be a seriously retrograde step to create a separate Planning Act and Environment Act. That is contrary to the objective of better integration, and would put us back 25 years.
3. As we have noted in Section D.2 above, we agree with the third option above, with the benefit that regional spatial planning provides for much-needed regional strategic integration. It would be wrong to say (see LGNZ’s comment under 3 above) that the RMA, LGA and LTMA are then only ‘implementation’ acts – they are more than that.

We would like to elaborate on how we think the ‘regional spatial planning’ option could be made to work. We will draw on our experience from Auckland<sup>20</sup>, where:

- The regional spatial plan gives strategic direction on 30-year housing supply capacity and integrated land use, transport and infrastructure planning, and funding requirements.
- The Future Urban Land Supply Strategy (that sits under the spatial plan) provides joint agreement between Council, Auckland Transport, Watercare Services Ltd and NZTA on the sequence and timing of greenfields future urban land for development readiness over the next 30 years.
- The regional spatial plan provides the framework for agencies to work together to get alignment on funding provisions within their respective budget processes (eg Council/Auckland Transport/Watercare/Panuku Development Auckland) through the council’s Long-term Plan process, and central government agencies, such as NZTA, through the Government Policy Statement on Land Transport and government’s budget process.
- The regional spatial plan also provides the framework for alignment between council’s 30-year Infrastructure Strategy and central government’s 30-year New Zealand Infrastructure Plan.
- The regional spatial plan (with its related processes) provides the framework for council and government agencies to agree on integrated land use and infrastructure provision and regulatory processes, eg release of land for housing development through the Unitary Plan, provision of infrastructure through LGA and LTMA processes for local and central government funding respectively, and integrated regulatory processes through the RMA.

While these processes have been developed for Auckland to achieve integrated land use and infrastructure development, and to set spending priorities and manage growth, by council and government agencies working together, there is no reason why they could not also work in other regions.

The Productivity Commission identified some frustrations with translating the strategic objectives from spatial plans (eg the Auckland Plan, SmartGrowth in the Bay of Plenty, and the Greater Christchurch Urban Development Strategy) into RMA regulatory documents (eg Regional Policy Statements, Unitary Plans and District Plans). Nevertheless, we consider that a lot has been learned over the last few years about how these processes can be made to work.

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<sup>20</sup> Blakeley, R. (2015), *The Planning Framework for Auckland ‘Super City’: an insider’s view*, Policy Quarterly, The Institute for Governance and Policy Studies, School of Government at Victoria University of Wellington, vol. 11, Issue 4, November 2015.

We recommend (to help achieve integration across RMA, LGA and LTMA) the following approach:

1. Regional spatial planning, that will set the vision and strategy for the region, including targets for supply and funding of integrated housing, land-use capacity and infrastructure requirements - see recommendation under section D.2 above; and
2. Use of mechanisms that have been developed to allow regional councils, territorial local authorities and government agencies to work together, to achieve integrated land use and infrastructure provision and set funding priorities (under LGA and LTMA), and manage growth and integrated regulatory processes (under RMA).

#### **D.4. Better provision for Urban Planning within the RMA**

##### ***Strengthen Urban Planning Guidance in the RMA***

The Productivity Commission's issues paper: *Better urban planning*, December 2015, quotes Lindsay Gow, who was Deputy Secretary for the Environment during the development of the RMA:

The RMA was designed more for natural resource management rather than urban planning where highly modified landscapes predominate. There should have been and still should be distinguishing and probably somewhat different sets of principles for urban planning and design<sup>21</sup>.

We agree that the RMA has a stronger focus on natural resources than urban planning. There is nothing in sections 6 and 7 of the RMA that necessarily compromises urban development. There is no need (nor is it desirable) to change sections 6 and 7. The problem is the way these high-level principles are interpreted and applied in an urban setting.

It will not prove practicable in the end to split off urban planning from other planning, particularly if the integration across the transport, local government and resource management legislation is to be achieved - as recommended in section D.3 above. Transport does not stop at the borders of the city, neither do roads and rivers

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<sup>21</sup> Gow, L. (2014), *The Resource Management Act: Origins, context and intentions*, Speech to the Resource Management Law Association Conference, Dunedin, September 2014.

nor sewerage schemes. And the urban environment has issues that are environmental: air pollution, noise, storm water and sewerage all have environmental implications. The RMA at base is about environmental protection. The recent Supreme Court judgment makes that clear. The urban environment is not an environment-free zone.

The RMA could be strengthened with guidance on how planning can promote good urban systems and outcomes. This is more than just land supply: it includes economic, social, environmental and cultural aspects that are an important part of any successful city.

We also note that amongst the 40 proposals included in the 2015 Resource Legislation Amendment Bill, there is the following about housing and development capacity:

1.5 Strengthen the requirements on councils to improve housing and provide for development capacity.

According to the MfE regulatory impact statement for that proposal, the following is the problem that needs to be addressed through the proposed legislative fix:

In some of New Zealand's major population centres demand for housing exceeds supply, contributing to inflated house prices and reduced affordability. While housing affordability is a complex problem with many causes, urban regulation (development controls and zoning decisions) and the impact this has on land supply (or development capacity) has been identified as a contributory factor to the problem<sup>22</sup>

One of the options could be a National Policy Statement under the RMA.

### ***Proposal for a National Policy Statement on Urban Planning***

We think an NPS on urban planning is desirable. It should be broader than just land supply, and include economic, social, environmental and cultural aspects that are part of a successful city. The scope should be confined to directing how urban development planning and implementation should be identified, evaluated and implemented. Critically, it also needs to identify what environmental issues and constraints, along with natural hazards and resilience requirements, need to be part of urban development decision-making.

We think that central government guidance through an NPS could include:

- Mechanisms to set targets for land supply/development capacity for housing through a regional spatial plan, with agreement between local and central government, recognising national interests (such as macroeconomic stability).

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<sup>22</sup> Ministry for the Environment (2015), *Regulatory Impact Statement: Resource Legislation Amendment Bill, 2015*, Ministry for the Environment.

- Provisions relating to supply of residential land (in particular where growth pressures are intense, such as Auckland and Queenstown) for high density, medium density, mixed use, and greenfields, while differentiating between categories of land preparedness. These are:
  - (a) “Ready to go” which means zoning is in place, bulk services infrastructure is supplied for its development, and environmental and resource constraints are identified and being managed effectively;
  - (b) “Zoned” which means the land is suitable for and capable of development and has been zoned for residential development (i.e there are no planning impediments and environmental and resource constraints have been clearly identified along with means for their protection and management); bulk services infrastructure (transport, water supply, stormwater and wastewater) has not yet been fully supplied, but together with necessary public infrastructure (schools, shops, public open space and other public facilities) has been identified, planned for, costed, is or will be built into long-term plans (that are reviewed every three years), and can therefore be supplied and meet development timing schedules;
  - (c) “Identified in a growth plan” which means the area is zoned as ‘future urban’, where the environmental constraints have been identified and means for their protection and management outlined and agreed, and infrastructure required for land use has been outlined and included in plans.
- Planning for land release is fully integrated with planning and timing of investment in network and community infrastructure.
- Provision relating to the national importance of good urban design outcomes, and requirements that sensitive and/or important environmental systems and features are identified, and that measures to protect and manage them are included in all development plans, with detail to be determined at the local level.
- Provisions that recognise the different contexts of different regions and territorial authorities, ie not ‘one size fits all’ approach.
- Provisions that recognize that natural hazards and resilience must be part of any urban development planning.
- Provisions for monitoring of delivery against pre-development assumptions. These include land supply and development capacity targets, and delivery of good urban form and design outcomes, and reporting perhaps every 3 years, with plans adjusted as required.

The issues listed above inevitably cross over between the two legislative mechanisms: the RMA relating to land use, and the LGA relating to infrastructure and asset management. They also extend to other legislation and agencies such as the Land Transport Management Act and NZTA.

We think that a contextual rather than ‘one size fits all’ approach is needed, because an NPS would not be needed in or relevant to much of the country. Therefore, its provisions ought to be applicable to high growth city-regions, rather than generic.

### ***Auckland Experience on the Proposed Auckland Unitary Plan***

Urban design plays a critical role in times of change: for example, the growth pressure to intensify in existing urban areas in Auckland. Blakeley explained the process that led to decisions on the notified Proposed Auckland Unitary Plan in September 2013:

In the community meetings and media commentary on the draft Unitary Plan, groups such as Auckland 2040 argued strongly against intensification in the low-density suburbs. Their voice was influential in the council's decision to tighten up proposed changes to density provisions in the notified plan. That decision benefited current homeowners, but reduced affordable choices for current or future first-home buyers, or people from lower socio-economic groups wanting to locate closer to the city centre. It acted as a transfer of wealth from future generations to the current generation<sup>23</sup>.

In December last year, residential zoning changes were proposed by the Council's Unitary Plan Committee, to increase density and lift housing development capacity towards the targets set in the Auckland Plan. This was strongly opposed by the Auckland 2040 group on the grounds that 30, 000 households would be affected by “out of scope” changes, which residents did not ask for, and to which there was no formal right of reply. At the end of a seven-hour council meeting on 23 February 2016, council voted to withdraw the evidence on proposed changes before the Independent Hearing Panel on the Unitary Plan. The Independent Hearing Panel is expected to hear all other submissions and deliver recommendations to the Council in July 2016. If Council accepts their recommendations, they will be adopted in the Unitary Plan. If council does not accept any recommendations, those matters may be appealed to the Environment Court.

Deputy Prime Minister Bill English made clear in media comment on Auckland Council's decisions that government expects that council will deliver adequate land for housing development, whatever they choose regarding the combination of ‘going up, and going out’.

Blakeley suggested there is an antidote to NIMBYism (not in my backyard):

Auckland could follow the Vancouver example and adopt the alternative acronym QIMBY (quality in my backyard). That is, there is no reason to fear intensification in the suburbs, provided it is based on quality urban design and amenities. Indeed, that is the principle in the Auckland Plan and Proposed

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<sup>23</sup> Blakeley, R. (2015), *The Planning Framework for Auckland Super City: an insider's view*, Policy Quarterly, The Institute for Governance and Policy Studies, School of Government at Victoria University of Wellington, vol. 11, Issue 4, November 2015.

Auckland Unitary Plan. This would require a shift in thinking, from NIMBY to QIMBY.

### ***Urban Planning***

There is a range of views about urban planning. Some people take a strong regulatory view, which assumes that regulation can deal with many urban development issues. We take a wider view, that planning covers a wide range of actions designed to achieve future and clearly defined environmental, social and economic results, and actions to achieve these results encompass the whole repertoire of incentives and regulations that public authorities have at their disposal.

The usual urban planning tools include a publicly accountable land use plan, supported by development controls. These are seen as a public good that may outweigh a private property owner's wish to develop land in a manner that s/he chooses. Planning also provides a policy framework to coordinate and resolve potential rival objectives: for example, the need to provide new housing and infrastructure, and the need to protect the environment.

### ***Urban Design***

The Unitary Plan will include statutory rules on urban design. It is complemented by a non-statutory document, the Auckland Design Manual, a web-based tool to guide best practice in urban design of buildings, streets, public places and neighbourhoods.

We note that the Commission in its report *Using land for housing, October 2015*, cited the New Zealand Urban Design Protocol as a key example of where "central government should improve the quality of its current planning guidance, which sets poor precedent for the sorts of analysis that is now expected of local authorities". We think the Commission has got it wrong on this. The protocol was designed to help urban planners and designers and, importantly, developers, to help prepare a set of useful principles and ideas drawn from practice. Urban design can be a useful and practical means of developing workable, efficient and pleasant environments that resonate with the people who will live there. While there are basic rules within the Proposed Auckland Unitary Plan, the 'art' of urban design should never be regulated: it is a set of evolving ideas and cumulative experiences best applied by voluntary sharing and application. That is what the Urban Design Protocol set out to do.

### ***Provision of adequate development capacity for housing***

We refer to concerns raised by the Productivity Commission in *Using land for housing, October 2015*, namely:

- *Inadequate attention to the national interest*
- *Insufficient recognition of housing and cities*
- *A lack of responsiveness*

All three of these issues are strongly related to adequate provision of land supply for housing. The mechanisms that we have recommended in section D.2 above provide for councils and government to agree on the 30-year housing development capacity targets in regional spatial plans. Provision for adequate land supply capacity then needs to be provided by councils through their unitary plan or district plan. The mechanisms we have described in D.3 above provide for councils working together with government agencies, such as NZTA and the National Infrastructure Unit, to ensure provision is made for funding, sequencing and timing of integrated land use and infrastructure provision, to meet the housing development capacity targets. That is, all three of the above concerns will be addressed by our recommendations.

The seriousness of the housing development capacity issue is most prominent in Auckland. While the council still has a long way to go on the zoning issues in the Unitary Plan, as discussed above, it is important that the Commission sees the full picture of actions taken by Auckland Council to address the issue of adequate supply of housing:

\* The Auckland Plan and the Proposed Auckland Unitary Plan have

- removed the constraint of the Metropolitan Urban Limit and replaced it with the Rural Urban Boundary, with the capacity for 30 years' greenfield growth;
- set the target that there will always be at least 7 years' forward supply of land zoned for future development with bulk infrastructure services in place;

\* Recommended to government an Independent Hearings Panel (IHP) hear submissions on the notified Proposed Auckland Unitary Plan, which has reduced scope for vested interests to thwart rezoning in the wider public interest

\* Agreed to the Auckland Housing Accord with government, which has established 106 Special Housing Areas, and exceeded its 2-year target of 22,000 consented dwellings or sites

\* Agreed to provide guarantees on bonds to philanthropic investors to enable community housing providers to access finance at cheaper rates (about 5%)

\* Established Auckland Council as joint shareholder with government in the Tamaki Redevelopment Company, which aims to create 6,000 homes over 30 years

\* Established Panuku Development Auckland as an urban development agency to redevelop brownfield areas at scale, in partnership with the private sector, iwi and government

\* Established a \$400M fund for 10 years' infrastructure for residential development

\* Agreed to the Future Land Supply Strategy, which makes 11,000 ha of greenfield available for housing development.

Also, the council is refreshing the Auckland Plan, including council working with government to achieve a home-buyer's price-to-income ratio of 5:1 by 2030 (currently 10:1)

We recommend that guidance on urban planning is given through an NPS, or guidance within the RMA: it should link to mechanisms to set agreed targets for land supply and development capacity for housing through regional spatial plans. It should be broader than just land supply, and include economic, social, environmental and cultural aspects that are an important part of any successful city. The scope should be confined to directing how urban planning requirements should be identified, evaluated and implemented and, critically, what environmental issues and constraints, along with natural hazards and resilience requirements, need to be part of urban development decision-making.

#### **D.5. Climate Change**

The most serious environmental problem facing both New Zealand and the world is climate change. The Paris Agreement of December 2015 needs to be studied intensively by the Commission, in our view. Proper planning provisions will be vital to address the most serious problem New Zealand faces - inundation from the sea. Urban areas in New Zealand are vitally affected by this issue. Good planning law will be essential if these challenges are to be met.

The Parliamentary Commissioner for the Environment has made that abundantly clear in the eight recommendations contained in her 2015 report. All of them concern actions by central government, and they should be heeded.

They were:<sup>24</sup>

(1) Recommendation to the Minister for the Environment and the Minister of Conservation:

(a) Take direction on planning for sea level rise out of the New Zealand Coastal Policy Statement and put it into another National Policy Statement, such as that envisaged for dealing with natural hazards.

(b) Direct officials to address the matters raised in this investigation in the revision of the 2008 MfE Guidance Manual.

(2) Recommendation to the Minister for the Environment:

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<sup>24</sup> Report of Parliamentary Commissioner for the Environment, Preparing New Zealand for rising seas: Certainty and Uncertainty (Wellington, November 2015)  
<http://www.pce.parliament.nz/media/1390/preparing-nz-for-rising-seas-web-small.pdf>.

\* In revising central government direction and guidance on sea level rise, include protocols for the procurement of elevation data, and work with Land Information New Zealand and other relevant agencies to create a national repository for LiDAR [this is a methodology used to measure the data] elevation data.

(3) Recommendation to the Minister for the Environment:

\* In revising central government direction and guidance on sea level rise, set standards for the use of IPCC projections of sea level rise to ensure they are used clearly and consistently across the country.

(4) Recommendation to the Minister for the Environment:

\* In revising central government direction and guidance on sea level rise, specify planning horizons that are appropriate for different types of development.

(5) Recommendation to the Minister for the Environment:

\* In revising central government direction and guidance on sea level rise, specify that 'best estimates' with uncertainty ranges for all parameters be used in technical assessments of coastal hazards.

(6) Recommendation to the Minister for the Environment:

\* In revising central government direction and guidance on sea level rise, include a standard process for council engagement with coastal communities.

(7) Recommendation to the Minister for the Environment:

\* In revising central government direction and guidance on sea level rise, specify that councils develop whole coast plans for dealing with sea level rise, and expand coastal monitoring systems to enable adaptive management.

(8) Recommendation to the Minister of Finance:

\* Establish a working group to assess and prepare for the economic and fiscal implications of sea level rise.

A further policy should be to amend the Resource Management Act 1991 to allow local government to properly deal with climate change factors when making environmental decisions. Cities and urban areas are estimated to account for 80% of New Zealand's greenhouse gases. At present, the Act is largely prevented from considering the issue when assessing and granting consents. The 2004 Amendments to the Act introduced provisions prohibiting consent authorities from considering the effects of greenhouse gas emissions on climate change, when making rules to control discharges in air, and when considering an application for discharge permits. Further, a National Policy Statement or National Environmental Standard on Climate Change needs to be designed and agreed to. These are major policy tasks. If the Commission does not engage with climate change in its report, that report will lack credibility. This is going to be the biggest policy game in town.

We recommend the Productivity Commission supports an amendment to the RMA to allow local government to properly deal with climate change factors when making environmental, planning and infrastructure decisions.

#### **D.6. More Central Guidance Through National Policy Statements and National Environmental Standards**

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.

When developing the statute, it was clear that there were issues where central government had to decide upon the precise policy. Two instruments in the Act, designed to allow gaps to be filled in as time went on, were the provisions relating to national policy statements and those relating to national environmental standards. These have direct legal force.

It is hard to understand why so few of these instruments have been developed. It is true the procedures are somewhat elaborate, particularly for national policy statements, but following the King Salmon decision, the force of these statements from the government's point of view should be clear, and as long as they are made within the four corners of Part 2 they will be binding.

There have only been four national policy statements developed, one of which, the Coastal Policy Statement, was required by law. Five national environmental standards have been established since 1991. Considerable trouble and expense for many people could have been avoided had more extensive use been made of these instruments. Central government failed to provide the guidance required to make the statute work well. Years of central government being asleep at the wheel made the implementation of the Act by local government much more difficult than it needed to be.

We note from the Ministry for the Environment's website that the Ministry has a work plan for ten new or revised environmental standards and policies, and we welcome and support this work.

#### **D.7. Better District Planning and Rule Making**

### *Making Planning documents*

The hierarchy of plans provided for by the Resource Management Act means that many different plans are produced in different parts of New Zealand. There are regional plans and there are territorial district plans.

Making plans under the RMA was a challenge for many local authorities in the early years. Many local authorities re-invented the wheel at considerable expense, and with little attention to shared ways to deal with common problems.

Deputy Secretary for the Environment at the time the Act was developed, Lindsay Gow said:

In my view, one of contributing problems here was the decision to allow existing district planning schemes under the Town and Country Planning Act to be rolled unchanged into the new regime. Reviews would come later - much later, as often happened. This resulted in far too many rules that were not reassessed and/or removed, simply being added to under the RMA provisions<sup>25</sup>.

A simpler, more zero-based approach to plans would have been better.

Rules are not necessarily the first or best means of achieving outcomes. They are attractive to local politicians because they appear to be costless. Economic instruments such as road pricing, incentives, or charges for resource use could better allocate the actual costs of resource use, so that people who make decisions to use resources can respond to price signals.

Nevertheless, the effects-based approach helped achieve more targeted rules, based on outcomes, policies, and methods.

The government has announced its intention to try and cure these problems by the provision of a national planning template through the Resource Legislation Amendment Bill 2015. That is a change that we support, provided it does not undermine the devolved decision-making and community-enabling principles of the RMA (note our concerns in section A.1 above, about the Minister's regulation-making powers to override councils' decisions on residential land use rules).

There are simply too many plans across a region. They are too diverse and they are too complicated. This has involved local authorities in considerable duplication of effort and there has been a proliferation of planning documents. The result has been ineffective and inefficient planning and poor resource management outcomes. While plans for local government amalgamation seem to have withered or been abandoned

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<sup>25</sup> Gow, L. (2014), *The Resource Management Act: Origins, context and intentions*. Speech to the Resource Management Law Association Conference, Dunedin, 25 September 2014.

in many parts of New Zealand, the requirements to produce plans can be streamlined. Ideally, there should be one District Plan for each region. It would be desirable that it be developed after a regional spatial plan has been adopted.

### ***Rules versus Discretion***

At our meeting with the Productivity Commission on 28 January 2016, we were asked what the arguments were concerning the issue of rules versus discretion. This no doubt stemmed from the fact that plans made under the Resource Management Act have the force for law: they are indeed a form of subordinate legislation.

Section 76 of the Act, as it currently stands, demonstrates in microcosm how convoluted the Act has become through amendments, but it demonstrates the capacity that the local authorities have in territorial plans to make rules:

#### **76 District rules**

(1) A territorial authority may, for the purpose of—

(a) carrying out its functions under this Act; and

(b) achieving the objectives and policies of the plan,—include rules in a district plan.

(2) Every such rule shall have the force and effect of a regulation in force under this Act but, to the extent that any such rule is inconsistent with any such regulation, the regulation shall prevail.

(2A) Rules may be made under this section, for the protection of other property (as defined in section 7 of the Building Act 2004) from the effects of surface water, which require persons undertaking building work to achieve performance criteria additional to, or more restrictive than, those specified in the building code as defined in section 7 of the Building Act 2004.

(3) In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect.

(3A) [Repealed]

(3B) [Repealed]

(4) A rule may—

(a) apply throughout a district or a part of a district:

(b) make different provision for—

(i) different parts of the district; or

(ii) different classes of effects arising from an activity:

(c) apply all the time or for stated periods or seasons:

(d) be specific or general in its application:

(e) require a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan.

(4A) A rule may prohibit or restrict the felling, trimming, damaging, or removal of a tree or trees on a single urban environment allotment only if, in a schedule to the plan,—

(a) the tree or trees are described; and

(b) the allotment is specifically identified by street address or legal description of the land, or both.

(4B) A rule may prohibit or restrict the felling, trimming, damaging, or removal of trees on 2 or more urban environment allotments only if—

(a) the allotments are adjacent to each other; and

(b) the trees on the allotments together form a group of trees; and

(c) in a schedule to the plan,—

(i) the group of trees is described; and

(ii) the allotments are specifically identified by street address or legal description of the land, or both.

(4C) In subsections (4A) and (4B),—

group of trees means a cluster, grove, or line of trees

urban environment allotment or allotment means an allotment within the meaning of section 218—

(a) that is no greater than 4,000 m<sup>2</sup>; and

(b) that is connected to a reticulated water supply system and a reticulated sewerage system; and

(c) on which there is a building used for industrial or commercial purposes or as a dwellinghouse; and

(d) that is not reserve (within the meaning of section 2(1) of the Reserves Act 1977) or subject to a conservation management plan or conservation management strategy prepared in accordance with the Conservation Act 1987

or the Reserves Act 1977.

(4D) To avoid doubt, subsections (4A) and (4B) apply—

(a) regardless of whether the tree, trees, or group of trees is, or the allotment or allotments are, also identified on a map in the plan; and

(b) regardless of whether the allotment or allotments are also clad with bush or other vegetation.

(5) A rule may exempt from its coverage an area or class of contaminated land if the rule—

(a) provides how the significant adverse effects on the environment that the hazardous substance has are to be remedied or mitigated; or

(b) provides how the significant adverse effects on the environment that the hazardous substance is reasonably likely to have are to be avoided; or

(c) treats the land as not contaminated for purposes stated in the rule.

The difficulties surrounding this issue are legion, and the resolution of them has important implications for the rule of law. It is desirable that certainty be attainable as far as possible, but legal experience demonstrates it is not possible. This is because the drafter of the law or rule cannot foresee every future contingency, and it then becomes an issue of interpretation as to whether the law covers the particular facts.

On the other hand, discretion means that outcomes are uncertain and unpredictable and at worst may be arbitrary. The best legal writing on the topic is from the American administrative lawyer K C Davis at the University of Chicago under which one of the submitters studied<sup>26</sup>. He states the issue this way:

If all decisions involving justice to individual parties were lined up on a scale, with those governed by precise rules at the extreme left, and those involving unfettered discretion at the extreme right, and those based on various mixtures of rules, principles, standards, and discretion in the middle, where on the scale might be the most serious and most frequent injustice?

His analysis makes it clear that the most serious and fertile source of injustice is at the discretionary end of the scale. Analysing the problems of discretionary justice is very difficult, and there is less research on it than at the rules end. His conclusion at the end of the book, and with which most lawyers would probably agree, is as follows:

The vast quantities of unnecessary discretionary power that have grown up in

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<sup>26</sup> Davis, K.C. (1971), *Discretionary Justice-A Preliminary Inquiry*, University of Illinois Press, 1971

our system should be cut back, and the discretionary power that is found to be necessary should be cut back, structured and checked.

Discretion cannot be eliminated but it needs to be confined and cut back. The answer lies in ensuring better ways of making the rules in the first place. And since much of the rule-making is done at a local authority level, that is not easy to achieve. There is no easy answer to this issue.

We recommend a carefully framed legal study of how to improve the composition, framing, drafting of plans and the consultation process, which would be of direct benefit to all involved in drafting plans and rules, and those who are subject to them.

#### **D.8. Institutional Design and Decision-Making**

What is needed are simple principles and processes that will work in the real world. But the fixes lie in better plans and better processes, not in altering the environmental bottom lines or in an absence of rules. The legislative history of the Act since 1991 demonstrates a picture of confusion and inadequate law-making processes that have failed to address important problems. The machinery of government seems not to have been up to the task. Failure to make policy statements and environmental standards handicapped the legislation, and left local authorities wandering in the wilderness. It is important to rectify these weaknesses.

Those in the business community who resent the RMA and praise markets, fail to acknowledge the defects of markets when it comes to dealing with environmental issues. Price signals are often distorted for environmental issues, and externalities produced by pollution are not reflected in prices. The polluters do not pay, and those harmed by the pollution are not compensated. As Yale economist Professor William Nordhaus puts it “markets can distort incentives and produce inefficient and potentially dangerous ‘free market’ outcomes.”<sup>27</sup> This is the reason that the environmental bottom line in the RMA is so important, and tinkering with it so unwise.

Humankind's destruction and defilement of the natural environment is seriously endangering the continuation of life on this planet. The failure is one of rational ecological governance. When it comes to environmental issues, the market fails to capture many of the values and contributing factors at play. The externalisation of environmental and social costs seems to be inevitable in an atmosphere where governments seek endless economic growth. Elementary economics suggests that the

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<sup>27</sup> William Nordhaus “The Pope and the Market” *New York Review of Books* October 8-21, 2015, 26 at 27.

polluter should pay, so that costs imposed by development are not externalised to the public. But how often does that happen?

It is hardly surprising in light of the market failures, that the issue of environmental protection has been constitutionalised. South Africa, France, the Netherlands and many South American countries give constitutional guarantees to the right to a safe and clean environment.

That does not mean, however, that the zoning regulation needs to be as prescriptive as it is now in many plans around New Zealand. Plenty of room for well-designed change exists. Indeed, it is needed.

Our own take on the policy problems suggests that, to succeed, reform of the structures of local government will also be necessary to achieve the outcomes that the government wants. Government policies so far in that area have lacked bite and determination. Local government needs more constitutional autonomy in New Zealand, and the levers that can be exerted by central government should be better designed, clearly defined and not often altered, as they are now. Constant meddling is counterproductive.

Our hope is that the task of integration is done once, done right and not hurried. Much time has already been wasted. The dawning realisation that New Zealand has become a complex place has been some time in arriving. The pressures that greater population exerts on the environment, coupled with the development of much larger cities, bring new challenges. The ingrained New Zealand pattern of quick legislative cut and fill needs to be abandoned, and some enduring legislative designs created. This will involve sorting out the confused pattern of local government. Auckland changed everything.

There is no post-RMA world. The New Zealand statute book has to be viewed as a whole. And that is the place to start. Concentrating reform efforts on one subject, such as land for housing, is bound to have unexpected consequences elsewhere.

**We recommend provision of more constitutional autonomy for local government, as part of a holistic, comprehensive review of the New Zealand statute book and a constitution for the nation.**

#### **D.9. Rigorous Monitoring and Evaluation of Effectiveness of the Legislation**

In 2006, the English Law Commission published a discussion paper on post-legislative scrutiny. The case for carrying out some post-legislative scrutiny is put at paragraph 6.2 of the paper:<sup>28</sup>

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<sup>28</sup> Law Commission *Post-Legislative Scrutiny: A Consultation Paper* (No. 178, London, 2006) at 30

The primary reason which has been recurrently suggested to us is that legislation should be reviewed after it has been brought into force to see whether it is working out in practice as intended, and if not to discover why and to address how any problems can be remedied quickly and cost effectively. This driver for post-legislative scrutiny is based on a concern that every year a huge and increasing amount of legislation is poured onto the statute book, most of which is not thoroughly digested. Much of this generates further regulation either in the form of secondary legislation or in the form of codes and guidance. There may also have been a number of amendments introduced with little time for scrutiny during the passage of the Bill. In 2003, Parliament passed 45 Acts which ran to a total of over 4,000 pages. There were also 3,354 Statutory Instruments, running to 11,977 pages. There is a perceived need to take stock of this by providing a mechanism that will enable Parliament to look back and review the effects of legislation once it has been implemented. We do not suggest that review of this kind would have any impact at all in stemming the flow or volume of legislation, rather that the fact of the flow necessitates looking back to see what lessons may be learnt. Post-legislative scrutiny should translate into better regulation. If there is to be public commitment to better regulation, an obvious part of that is the examination of legislation once it has been brought into force; it may be that wider lessons can then be learnt on the method of regulation and the necessity for legislation.

The difficulty with post-legislative scrutiny is to provide an effective set of intellectual tests as to what it comprises and how it can be delivered. Data and information must be generated if the analysis is to be meaningful. The first issue is whether Parliament itself should engage in this activity. In New Zealand, select committees can conduct inquiries on a wide range of matters. But Parliament is busy and there are resource restraints. Further, there are many different types of legislation.

Obvious questions for exercises in post-legislative scrutiny are:

- What interpretative difficulties have been encountered in the legislation?
- Has the legislation had unintended legal consequences?
- Have the policy objectives been achieved?
- What have been the economic costs imposed by the legislation, and what does it cost to administer?
- Has it been cumbersome and bureaucratic?

Indeed, proper assembly of data at the pre-legislative scrutiny stage, and making plans to monitor legislation after it goes into effect, should be carried out much more than is the case at present. There is a direct and dynamic relationship between pre-legislative and post-legislative scrutiny. Consideration needs to be given in New Zealand to imposing some requirements in both phases to avoid the common

syndrome: 'we have a problem, let's pass a law'.

While post-legislative scrutiny may be difficult and expensive, it is impossible to see why it should not be carried out. How much do we really know about the effects of all the laws that have been passed? Modern social science research methods, which could answer the question, often seem to be ignored. A multitude of methods exists: survey research, focus groups, time series analysis, regression analysis, cost-benefit analysis, cost-effectiveness analysis, analysis of implementation processes and costs, measuring administrative burdens, legal textual analysis, historical analysis, in-depth interviewing, and participant observation. In our view, New Zealand should know whether its legislation is effective, efficient, enforced, coherent, clear and relevant to the problems that exist. In a rational society committed to the rule of law, we should know more. Passing more legislation, without knowing the effects of what we have, is like whistling in the dark.

Post-legislative scrutiny needs proper funding and expert staff to conduct the work on a continuous basis. Such reviews should no longer be left to departments and ministries. They have too many other priorities.

As far as we can see, no comprehensive empirical research has been undertaken to analyse the performance of the Resource Management Act, so that remedies can be introduced to deal with proved and demonstrated problems. A lot of data has been collected, but there has been no systematic process of evaluation of how effective the Act has been in delivering on its objectives. As so often has been the case in the life of our public policy, we proceed on the basis of assertion, pressure group activity and anecdote, before throwing all our toys out of the cot in order to produce a new regime that it is asserted will perform better. So certain are governments in New Zealand that they know the right answer, that they legislate with a high degree of prescription to produce their outcomes, but the design of such legislation is often too hurried, too lacking in coherence and so replete with internal contradictions that it soon has to be amended. The Ministry for the Environment does not seem to be funded for empirical research to any significant degree, which has granted vested interest groups a great deal of latitude to influence policy outcomes. Reform needs to be evidenced-based in the twenty-first century.

**We recommend an examination by Parliament of the need for rigorous, post-legislative scrutiny and evaluation. This should be applied to ongoing review of the effectiveness of the RMA. This would inform future reform.**

## **Part E: Conclusion**

There is much about the RMA that needs to be fixed. But the fixes lie in better plans and better processes, not in altering the environmental bottom lines or in an absence

of rules. The legislative history of the Act since 1991 demonstrates a picture of confusion and inadequate law-making processes that have failed to address important problems. The machinery of government seems not to have been up to the task. Failure to make policy statements and environmental standards handicapped the legislation and left local authorities wandering in the wilderness. It is important to rectify these weaknesses. Many of the political reactions that led to amending acts for the RMA over the years have made the legislation worse, not better. Constant fiddling debilitates both the Act and its administration. The pattern is continuing.

We have recommended in this submission that major change to the RMA is not needed, and that the environmental bottom lines in the RMA must not be altered. Instead, we have recommended that major changes be made to the way the Act and related legislation are being implemented at central and local government levels. These changes in implementation would better *enable* economic and social development. They are:

- Regional spatial planning at the strategic level
- Integration across the RMA, LGA and LTMA
- Better provision for urban planning and development within the RMA
- Mitigation and adaptation to Climate Change
- More central guidance through National Policy Statements and National Environmental Standards
- Better district planning and rule-making
- Better institutional design and decision-making
- Rigorous monitoring and evaluation of effectiveness of the legislation

The above changes would not be disruptive to established jurisprudence, but they would require radical changes in behaviours and action by parties that have responsibilities for implementation under the Act. We believe there would be support across the wide range of stakeholders, and it would be enduring and effective to ensure New Zealand has the 21<sup>st</sup>-century resource management system that it needs.

### **Acknowledgement**

We gratefully acknowledge the contribution to ideas in this submission from Lindsay Gow, who was Deputy Secretary for the Environment during the time of the development of the Resource Management Act, 1991.