

Productivity Commission 'Better Urban Planning' Draft Report

TO: Productivity Commission

Submission on behalf of the

Resource Management Law Association of New Zealand Inc

INTRODUCTION

1. This Submission is made by the Resource Management Law Association of New Zealand Inc (**RMLA**).
2. The RMLA is concerned to promote within New Zealand:
 - (a) An understanding of Resource Management Law and its interpretation in a multi-disciplinary framework
 - (b) Excellence in resource management policy and practice
 - (c) Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes
3. The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives and others. Currently the Association has some 1,100 plus members. Within such an organisation there are inevitably a divergent range of interests in views of members.
4. While the membership has been consulted in preparing this submission, it is not possible for the RMLA to form a single universally accepted view on the

Productivity Commission Draft Report. It should also be noted that a number of members may be providing their own individual feedback and those may represent quite different approaches to the views expressed here.

5. For these reasons, this submission does not seek to advance any particular policy position in relation to the draft Report, but instead seeks to ensure that any potential outcomes of the Productivity Commission Report are:
 - (a) Practicable and workable;
 - (b) Likely to result in the least amount of legislative disruption proportionate to the scale of changes required;
 - (c) Will assist in sound management of all resources and provide a framework for best practice decision making.

SUBMISSION SUMMARY

6. Structure of Submission
 - (a) This submission addresses aspects of the Productivity Commission draft 'Better Urban Planning' Report ("**Report**") under the following topic headings:
 - (i) The current plan making process and roles of local authorities;
 - (ii) The relationship between built and natural environment planning;
 - (iii) Urban Planning and Infrastructure; and
 - (iv) Reflections on bespoke planning processes, the IHP, and the role of the Environment Court.
7. The topics set out above are intended to provide an overview of the RMLA position in respect of core aspects of the Report. The associated sections address views to ensure that any policy outcomes as a result of the Report are provided in a manner which provides efficient, effective and sustainable outcomes for New Zealand, and in a way which avoids unforeseen adverse consequences.
8. The RMLA in particular is concerned that a number of the recommendations proposed in the Report are not reasonably necessary having regard to the scale and significance of the issues which the report proposes to address, and taking into account other alternative options for reform and improvement available. The RMLA considers that the recommendation in the Report to provide a permanent IHP process for planning preparation and change, and a more defined split of the built and natural environments are unnecessary responses

to potential areas for reform and which may have adverse unforeseen consequences.

9. The RMLA considers that the current definition of the 'environment' under the RMA is necessarily broad so as to encompass the complex interrelationships between natural and physical resources, and recognise different ways that reflect our social, cultural, and economic values and aspirations. Any proposal to fundamentally split the planning regime based upon built and natural environments risks arbitrary distinction of those two environments and a risk of resultant planning which does not holistically provide for integrated and efficient management of all resources.

SUBMISSION

(I) The current plan making process and roles of local authorities

Specific Matter

10. The Report considers, at chapter 3, 'the rationale for planning'. It addresses a number of historical and core aspects of urban planning, including that it is the processes of government regulation over land use, and that varied definitions of planning are varied according to what are best practice approaches.
11. The Report also states that urban planning is justified if it yields benefits that exceed costs relative to other options, and that it addresses problems such as to regulate external effects on the natural environment; to make fair and efficient collective decisions about the provision of local public goods, and to loan and implement infrastructure investments.

Submission

12. The RMLA submits that the premise upon which the rationale for planning in the Report is based is founded upon predominantly an assessment of urban planning in an urban context. The RMLA considers that urban planning cannot and should not be so distinctly separated from the general theory and practice of planning which has evolved under the RMA to date.
13. The definition of the environment in the RMA is necessarily broad so as to encompass the complex interrelationships between natural and physical resources, and recognise different ways that reflect our social, cultural, and economic values and aspirations.
14. The practice of planning necessarily involves a consideration of a holistic view of the 'environment' in the sense of the meaning under the RMA. The isolation of two separate planning regimes for built and natural environments, or the consideration that the effects of the former must be managed on the latter is

overly simplistic and will not provide for sound integrated management of all resources.

15. The RMA mandates a three-tier hierarchy of planning documents relating to the sustainable use, development and protection of natural and physical resources nationally, regionally and locally. Each regional council and each district council must prepare regional policy statements / plans / district plans, respectively. Each planning instrument must give effect to those further up the hierarchy.
16. The hierarchical system was a deliberate intention in the creation of the RMA, so as to devolve a significant amount of planning power to district councils and to provide integrated and democratic planning for their respective communities. The Report states that this system has resulted in councils not finding their planning process 'neat and orderly' in part due to the interrelationship between other pieces of legislation, including the Transport Management Act, the Building Act, the Reserves Act, and the Conservation Act.
17. In the RMLA's experience, the interrelationship between various legislation which covers land related matters, including those listed above, has been a matter which has improved since the inception of the RMA. However it is acknowledged that there is still in some instance a disconnection between the RMA and other legislation which could be better streamlined. The Environment Court, as a specialist Court, is the most suitable judicial body to preside over all such land and resource related legislation, should there be further rationalisation and streamlining in the future. The expansion of the role of the Environment Court to determine broader planning land-use related matters would not require fundamental systemic or legislative change, and would provide an opportunity for future efficiency gains.
18. The draft Report also considers that a plan change process should be simplified and streamlined for developers as far as possible, so as to facilitate a master planned / spatial plan approach to use of resources. The RMLA considers that the existing regulatory framework already enables such an approach, and that with further guidance, district and regional plans can provide adequate regulation based upon a spatial plan / master plan approach.
19. The relative interests and responsibilities of central and local governments and how they interact through the urban planning system are important. Central governments may reserve powers to plan or place limitations on lower levels of planning when national interests are at stake. However generally, the RMA design of devolved plan making powers to local and regional councils provides a suitable regime to take into account local preferences and circumstances.
20. The Report considers at Chapter 5, that recent trends in the RMA framework have included a move towards greater centralisation of government's role in planning, for example by increased Ministerial call-in and direction powers. The RMLA has noticed this more recent change in approach, however notes that these reforms do not deviate substantially from the overall approach to local plan making powers. There already exist significant central government powers

under the current legislation which have not been accessed, such as greater use of national policy statements and environmental standards.

Relief sought

21. The RMLA submits that prior to recommendation of any legislative change, the Productivity Commission consider the complex interrelationship of planning as a holistic method which encompasses both built and natural environment planning;
22. That prior to recommending any legislative change, the Productivity Commission undertake a further review of the instruments and capability of the current legislative system to be used in ways to address some of the concerns raised in the Report;
23. That the Productivity Commission takes into account other contemporaneous changes to planning legislation currently proposed when finalising the Report, including the Resource Legislation Amendment Bill 2015 and the proposed National Policy Statement - Urban Development Capacity 2016;
24. That the Productivity Commission further consider its recommendation that "A future planning system should focus urban notification requirements (and any associated appeal rights) on those directly affected, or highly likely to be directly affected, by a proposed development", given that a planning proposal is inherently likely to have an effect on significant parts of a community (currently and in the future), beyond the "directly affected or highly likely to be directly affected" parties.

(II) The relationship between built and natural environment planning;

Introduction

25. The Report states that the natural and built environments require different regulatory approaches.¹ The suggested components of future planning frameworks are set out in Chapters 7 and 8 of the Report. The Report states that "current statutes and practice blurs the two environments, and provides inadequate security about environmental protection and insufficient certainty about the ability to develop within urban areas."²
26. It is suggested that the management of the natural environment requires "a clear focus on setting standards that must be met", whereas the built environment "requires assessments that recognise the benefit of urban development and allow change".

¹ Section 13.5, page 332 Report

² Section 13.5, page 332 Report

27. The Report states that the definition of 'environment' in the RMA "gives prominence to biophysical features".³ The broad definition of the environment in the RMA is cited as a reason that there is little prioritisation of effort and resources into 'areas of high value to the *natural* environment'.⁴
28. The Report also contends that 'regulatory scope creep' has arisen in part due to broad definitions of 'sustainable management' and the 'environment' in the RMA.⁵ The Report goes on to state that this is confounded by the absence of national policy statements on urban issues resulting in a lack of guidance to Councils on related priorities and any associated limits.⁶

Submission

29. The RMLA submits that there is generally a common understanding among resource management professionals that the environment is, in its broadest sense, formed of complex interrelationships between natural and physical resources, which manifest in diverse ways across the various parts of New Zealand, be they urban or rural. People and societies attribute value to the environment in different ways that reflect our social, cultural, and economic values and aspirations. Some people also recognise intrinsic environmental value irrespective of the environment's benefit to people.
30. The RMLA disagrees that the definition of 'environment' in the RMA gives prominence to biophysical features. The RMLA is concerned that this perspective may have partially informed the suggestion to manage the built environment separately from the natural environment.
31. There does not appear to be any rationale for this perspective set out in the Report. The definition of 'environment' in the RMA specifically makes reference to people and communities, amenity values, and the social, economic, aesthetic and cultural conditions which affect the pre-listed 'components' of the environment. The RMLA submits that the definition therefore reflects both biophysical aspects and anthropocentric relationships within those aspects.
32. The RMLA acknowledges that clear guidance on prioritisation of environmental matters upon which to focus effort and resources is important, but disagrees that the definition of 'environment' in the RMA is precluding such prioritisation occurring, as asserted in the Report. As reflected elsewhere in the Report, state of the environment reporting and robust evidence bases should be the basis for informing any such priorities, which could then be reflected in existing mechanisms under the RMA such as NPSs and NESs.
33. The RMLA notes that a lecture given to its association members in 2014 by the Parliamentary Commissioner for the Environment (PCE) addressed the theme of prioritisation of environmental issues. The PCE suggested a series of criteria

³ Section 6.1, page 125 Report

⁴ Section 8.3, page 203 Report

⁵ Section 7.4, page 177 Report

⁶ Section 7.4, page 178 Report

that could be used to help prioritise environmental issues. This lecture is included as a reference that has informed the Draft Report. The RMLA submits that this type of approach to prioritising environmental issues is more constructive than potentially limiting the definition of such a broad concept as the environment in order to assist prioritising the environmental issues that should be focussed on by a future planning system.

34. As set out above, the definition of the environment in the RMA forms a fundamental concept under which practitioners implementing the RMA operate. There is concern that distilling that concept into simply the 'built' and 'natural' environment and applying separate planning approaches to them may result in additional complexities in legislation and practice. As acknowledged in the Report, the RMLA supports the view that these two aspects clearly overlap in the urban environment. Environmental outcomes may suffer as a result of employing separate planning approaches in an urban context, particularly given that natural (and physical) systems operate across rural and urban areas.
35. Further, if a separate regulatory approach were to be adopted for the built and natural environments within the urban context, the RMLA submits that careful consideration should be given to the management approach (and associated legislation) that would manage natural resources. While the focus of the inquiry is on urban planning, the statutes referred to as having been part of this inquiry also manage the planning activities for natural resources and the non-urban environment.

Relief sought

36. That the Productivity Commission reconsider the extent to which the broad definition of the 'environment' in the RMA gives prominence to biophysical features, results in little prioritisation of effort and resources into areas of high value to the natural environment, and contributes to regulatory scope creep.
37. That the Productivity Commission gives further consideration to the extent to which existing tools provided for under the RMA such as NPSs and NESs may address the concerns in relation to prioritisation and managing 'scope creep'.
38. That if the Productivity Commission recommends legislative changes to enable distinct planning regimes for the built and natural environments in an urban context, careful consideration also be given to the resultant legislative and planning approach that will apply to rural areas, particularly as many natural systems do not necessarily align to rural and urban delineations.

(III) Urban planning and infrastructure

Specific Matter

39. What is Infrastructure and why is it important for urban growth?
40. Section 9.2 of the Report sets out the scope of "urban infrastructure" and considers its importance for urban growth. The Report states that urban

infrastructure includes facilities, services and social structures for cities and communities that underpin the quality of life.

Submission

41. Education and health facilities should also be included within the scope of urban infrastructure. These types of facilities are “structural infrastructure” that should form part of the skeletal framework for urban development. They underpin the adaptability and viability of urban areas. These types of facilities also share most, if not all, of the seven typical characteristics of infrastructure assets set out in the report.
42. Past failures by central government providers of health and education facilities to adequately engage in urban planning has, in some cases, left a gap in social infrastructure provision and increased the cost of urban land development.
43. Sites for schools are frequently purchased after land has been fully (and sometimes unnecessarily) serviced for residential use. Difficulties then arise over development funding shortfalls where central government is not subject to the payment of development contributions.
44. With an ageing population and reducing mobility, ease of access to local health services will become an increasingly important issue for the community over the next 2-3 decades.
45. Properly planned in advance, education and health facilities can be provided at lower cost, and located to contribute fully to the liveability of urban areas.

Relief sought

46. The RMLA seeks that education and health facilities be recognised as urban infrastructure and included as a key consideration in urban spatial planning.

Specific Matter

47. Spatial planning would help to provide greater security of supply.
48. The identification of spatial planning as a means of achieving an integrated, system-wide approach to urban planning is supported by the RMLA. The Commission sets out what it considers to be the matters where spatial planning would yield the most benefit⁷.

Submission

49. Spatial plans also offer potential benefits in addressing broad scale effects of urban development on significant natural and cultural values through appropriate decisions on the location and form of land uses and infrastructure. The report

⁷ Page 233, Report

does refer to “reserves and conservation areas”, which are also appropriate considerations, but are too narrow a focus.

50. An understanding of broad-scale natural and cultural values of land intended for urbanisation is essential to the achievement of sustainable outcomes that are accepted by the community. Sound and well supported evidence-based decisions on the location of urban development and infrastructure can be made, based on this understanding.
51. Early stakeholder participation can reduce the risk of conflict at later, more detailed, stages of urban development planning. This in turn increases land supply certainty. Taking this approach will also support making spatial plans a formal part of the planning hierarchy. This is an issue we address in further detail below.
52. There are other related benefits of spatial planning that are not sufficiently recognised in the report. These include:
 - (a) Providing a platform for collaboration between all participants who operate in the urban development sphere, not limited to local authorities;
 - (b) Addressing cross-boundary issues or interagency issues where administrative boundaries do not promote integrated outcomes;
 - (c) Establishing a shared and agreed analytical framework and evidence for decision-making by all agencies with roles in accommodating urban growth.

Relief sought:

53. The RMLA seeks that the benefits of spatial planning be recognised as including the effective management of broad scale effects of urban development on significant natural and cultural values, and opportunities for development of working relationships and collaboration between key participants.

Specific Matter

54. Ensuring adequate supply in the future depends on good planning now.
55. The report recognises that it is highly desirable that urban land is planned well in advance of development, allowing councils to accomplish the important tasks of securing and reserving land for essential infrastructure corridors and spaces. Other benefits are also recognised, including the platform of certainty provided to private and public planning of other components of city development.

Submission

56. Investment in long-term strategic urban planning pays dividends in the long-run through the quality of outcomes achieved, reduced conflict in later, more detailed, stages of implementation. There are many examples of urban plans that fail to

- give clear direction on the outcomes sought, choosing to leave this to risk averse discretionary consent processes that are fraught with uncertainty and conflict.
57. Spatial planning can bring about a greater emphasis in the urban planning system on outcomes as opposed to process, giving greater confidence that private decisions on development can be allowed to be made within a robust overall urban framework.
 58. A significant constraint on urban development on the edges of cities that has not been recognised, is the impact on the fragmentation of land resulting from inappropriate interim development, often for small-lot rural residential or business uses seeking to locate on the peri-urban fringe.
 59. Fragmentation greatly increases complexity and costs of urban development and can result in less-than-optimal outcomes. Councils are faced with increased risks in the provision and funding of infrastructure due to the multiplicity of owners, timing uncertainties, and often a greater need to deliver development contribution-funded services which have a high risk due to this uncertainty. Land-use conflict can also arise where the future urban development may involve activities (e.g. industrial activities) that are incompatible with more sensitive uses.
 60. Spatial planning should identify areas for long-term urban development and provide clear signals to the market on appropriate interim development that does not constrain long-term land supply and infrastructure. Tools should also be provided to alleviate development constraints resulting from past short-term decisions, including wider powers to designate and acquire land for infrastructure and to facilitate efficient development sequencing, and the opportunity to apply infrastructure funding measures such as targeted rates where appropriate.

Relief sought

61. The RMLA seeks that management of interim land-use to optimise efficient urban development be a clear mandate for spatial planning and that suitable implementation tools be made available.

(IV) Reflections on bespoke planning processes, the IHP, and the role of the Environment Court;

Specific Matter

62. This section of RMLA's submission relates specifically to recommendation 7.7, that a permanent Independent Hearings Panel ("IHP") be established to consider and review plans and changes to plans, where:
 - (a) Councils retain the right to accept or reject recommendations from the IHP; and;
 - (b) Where a council accepts the recommendations, appeal rights are limited to points of law (presumably to the High Court, as with the Proposed Auckland

Unitary Plan (“PAUP”) process, although the Report does not make this specifically clear).

Submission

63. Generally, an IHP process may offer some advantages in terms of reducing the overall time-frame for promulgating plans, by restricting rights of appeal to the Environment Court.
64. Having said that, there are (as per Auckland Council’s summary of appeals) 65 merit appeals to the Environment Court regarding the PAUP, 41 appeals to the High Court on points of law and 8 applications for judicial review against the Auckland Council’s decisions on the PAUP. The High Court matters include related appeal and judicial review proceedings which affect significant areas of residentially-zoned land. The result is that many parts of the PAUP currently cannot be made operative as a result of Environment Court and High Court proceedings and it is not clear as to when those proceedings will be resolved.
65. Resource management practitioners hold significant concerns with respect to the time-frames within which the PAUP and the Christchurch Replacement District Plan (“CDRP”) were required to be prepared, heard and decisions issued. In that regard:
 - (a) Tight time-frames for the drafting the PAUP appear to have resulted in a proposed plan that was based on insufficient information and in some instances, poorly drafted. This is evidenced by the conclusions the IHP reached on many hearings topics (such as urban growth, sites of value to Mana Whenua and the pre-1944 overlay), as to the lack of robust assessment and analysis that had been undertaken in preparing the notified version of the PAUP and the extent to which the PAUP was rewritten by the IHP. Together, these factors meant the IHP had to devote significant time to hearing issues that may not have been required if there was more time available to Auckland Council at the plan preparation / consultation stage.
 - (b) The limited time-frames for issuing the IHP’s decisions may have limited the quality of decisions and RMLA submits that the Productivity Commission should explore whether that is the case with the IHP decision-makers, by undertaking a full review of the Christchurch and Auckland planning processes.
 - (c) The time-frames required for hearings created unreasonable and unsustainable workloads for the resource management profession. Many practitioners suffered stress-related health issues and RMLA submits that the Productivity Commission should explore this issue with IHP decision-makers and the wider profession.
66. The PAUP IHP process highlighted a number of workability issues for that specific process, including:

- (a) The IHP was unable to issue separate decisions on the regional policy statement (“RPS”) chapters of the PAUP due to the time-frames for issuing its decision on the whole plan and the potential for appeals against RPS decision to impact on those time frames. This made for a complex legal situation to navigate in terms of the requirements of lower order planning instruments having to give effect to higher order planning instruments under the Act.
 - (b) The RMLA submits that it would be far more preferable for decisions on an RPS to be issued before hearing submissions on the regional and district plans so that parties know whether the RPS supports their case, or whether their submission needs to be altered, in order to give effect to the RPS.
 - (c) The process for the Environment Court and High Court appeals (and applications for judicial review) is not clear and is subject to interpretation. For example, more clarity is required with respect to:
 - (i) How the High Court appeals (and judicial review proceedings) will be progressed, including the correct procedure for joining such matters;
 - (ii) Whether successful High Court appeals will be referred back to the IHP or Council for determination, and if so, what the rights of original submitters are in this process;
 - (iii) The correct procedure for addressing issues as to scope; and
 - (iv) How the Environment Court and High Court can (and should) proceed where there are appeals to both Courts on related provisions from the PAUP.
67. One of the key successes of the PAUP IHP was the quality and experience of the IHP members. If a permanent IHP process is adopted, the make up of the IHP is fundamental to its success in issuing quality decisions. In the RMLA’s submission, an IHP should be chaired by an Environment Judge, retired Environment Judge, or senior legal counsel, supported by senior resource management practitioners to ensure good decision-making which properly interprets and applies the law.
68. The Report also notes that the role of the Environment Court would be significantly reduced as a result of more narrow appeal rights due to both restricted notification provisions and the introduction of a permanent IHP process. However, declaratory proceedings in the Environment Court are likely to increase as any new legislation takes effect and the public requires assistance from the Environment Court in interpreting and applying it.
69. Further, if a permanent IHP process is implemented, the High Court may play a far greater role in the interpretation and application of resource management legislation than it does presently, because the Environment Court will be

bypassed on questions of law arising from the IHP process. This will put additional pressure on the High Court, while reducing the Environment Court's workload. It also risks significantly under-utilising the significant experience and capabilities of the Environment Court Judges and Commissioners, who are arguably more qualified and capable of adjudicating on complex resource management and planning matters than other, less specialised Judges or Commissioners may be.

70. The Environment Court, being the specialist Court in resource management planning, is best placed to hear points of law appeals on planning instruments in the first instance. The Environment Court is well used to considering legal questions, and has the benefit of greater familiarity with interpreting and applying planning instruments than the High Court.
71. The Environment Court also plays a significant and important role in society generally; acting as a 'check and balance' on public decision making in the context of land and resource use and planning. This important role should continue to be recognised, along with the potential to further expand and make the best, most efficient use of the Court.

Relief sought

72. In light of the above, the RMLA respectfully requests that the Productivity Commission not issue any final recommendations on a permanent IHP process until:
 - (a) Both the Christchurch and Auckland planning processes are complete; and
 - (b) The Productivity Commission has undertaken a comprehensive consultation with the Christchurch and Auckland IHPs and participants in those processes in order to obtain a full understanding as to the aspects of the processes that worked and those that did not.
73. If and when the Productivity Commission does issue a recommendation in that regard, the RMLA respectfully requests that:
 - (a) The workability issues, which have arisen in the context of the PAUP IHP, be addressed and solutions offered as to how those can be addressed; and
 - (b) The Productivity Commission recommends that the IHP be chaired by an Environment Judge, retired Environment Judge or senior legal counsel supported by senior resource management practitioners to ensure good quality decision-making; and
 - (c) The Report realise the importance and specialist nature of the Environment Court and recommend that it be the most appropriate appellate Court for any subsequent points of law appeals.

74. RMLA further submits that the final report should acknowledge that the introduction of an entirely new planning regime will likely result in:
- (a) The need for greater assistance from the Environment Court in ensuring the correct interpretation and application of the new legislation; and
 - (b) If the IHP process is also introduced, more pressure on the High Court which may take on a greater role in interpreting and applying the new legislation because the Environment Court will be bypassed on questions of law arising from the IHP process.

REQUEST TO BE HEARD

75. If there is any further opportunity to do so, the RMLA wishes to be heard in support of this submission.



Signature of Maree Baker-Galloway on behalf of the Resource Management Law Association

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