# 5 New Zealand's current urban planning system

**Key points**

- The New Zealand urban planning system is underpinned by three main statutes – the Resource Management Act 1991 (RMA), the Local Government Act 2002 (LGA), and the Land Transport Management Act 2003 (LTMA). The RMA is primarily a regulatory statute, while the LGA and LTMA govern budgeting, service and infrastructure provision and planning.
- The founders of the RMA envisaged it as an enabling statute that would produce "tightly targeted controls that have minimum side effects" (Upton, 1991). The RMA has failed to deliver on this goal. The carrying over of old traditions and institutions from the former Town and Country Planning Act 1977, capability gaps and insufficient checks on regulatory quality contributed to this failure.
- The debate about the meaning of core concepts within the RMA and LGA has been considerable. This debate has led to rising frustration with the performance of the RMA (particularly in handling growth pressures in urban areas) and successive legislative amendments. Repeated amendments to the planning statutes have increased their complexity and reduced their coherence.
- Appeal rights in New Zealand are broader than in other comparable jurisdictions. The ability to appeal provisions of Plans is particularly unusual.
- Councils have faced difficulties recovering the full costs of infrastructure from those creating the demand. This has led many councils to ration the supply of new infrastructure, contributing to scarcity and higher land and housing prices.
- Councils face a number of statutory obligations to engage with the public. Statutory consultation requirements differ, sometimes creating duplication, and can be slow. Consultation processes are open to capture and can discourage participation by some groups.
- Apart from land transport, central government has played a relatively weak role in leading and managing the planning system. However, recent years have seen trends towards:
  - tighter central control over local government and reduced local discretion; and
  - legislative exceptions (specific to regions) from the main planning system.
- Multiple amendments to planning statutes have increased complexity and reduced legislative coherence, making it harder for the public to understand the laws and for councils to implement them. This mounting complexity and deteriorating coherence in the face of rising urban growth pressures sets the scene for the Commission's current inquiry.

Chapter 3 outlined the key purposes of planning:

- management of negative externalities;
- fair and efficient collective decisions about the provision of local public goods; and
- planning, implementation and coordination of infrastructure investments.

That chapter argued that land use regulations should conform to the principles and practices of good-practice regulation, in the interests of efficiency, innovation and fairness.

Chapter 5 describes and assesses key features of New Zealand's current planning system and discusses some debates about the purpose and scope of planning and local government.

In this chapter, the Commission analyses the statutes, processes, institutions and practices of the planning system against the good practice principles and frameworks laid out in its *Regulatory institutions and practices* report (2014). Although the planning system is not exclusively about regulation, it does have a significant regulatory component and the principles underpinning the *Regulatory institutions* framework are more widely applicable. Applying these frameworks also allows for comparisons between the existing system and good practice.

## 5.1 Clarity of purpose and scope

Clear roles and purposes matter for the effective and accountable operation of regulatory regimes. (NZPC, 2014b). The current planning system distributes roles and processes across three main statutes (see (Box 5.1):

- land use regulation through the Resource Management Act (RMA) 1991;
- budgeting, service and infrastructure provision and planning through the Local Government Act (LGA) 2002; and
- transport planning, provision and management through the Land Transport Management Act (LTMA) 2003.

Box 5.1 **Current purposes of the three main planning Acts:**

**Resource Management Act 1991 (section 5)**

(1) The purpose of this Act is to promote the sustainable management of natural and physical resources.

(2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

**Local Government Act 2002 (section 3)**

The purpose of this Act is to provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act—

(a) states the purpose of local government; and

(b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and

(c) promotes the accountability of local authorities to their communities; and

(d) provides for local authorities to play a broad role in meeting the current and future needs of their communities for good-quality local infrastructure, local public services, and performance of regulatory functions.

**Land Transport Management Act 2003 (section 3)**

The purpose of this Act is to contribute to an effective, efficient, and safe land transport system in the public interest.

The purposes of two of the main planning Acts – the RMA and LGA – have proved controversial, while the differing purposes of the three Acts create unhelpful tensions, costs and complexity within the planning system.

Three key points of debate for the RMA are the meaning and implications of "sustainable management" (section 5 of the RMA), the scope of sustainable management, and whether the RMA adequately reflects cities. Chapter 9 discusses the concept of "sustainability" in more detail.

## Interpretation of section 5 of the RMA

The main question about the interpretation of section 5 and its "sustainable management" objective was whether the RMA set "environmental bottom lines" that could not be breached, or instead required decision-makers to form an "overall broad judgement" over an activity or development. Under the former approach, subsections 5 (2) (a), (b) and (c) are "safeguards or qualifications" that "must all be met before the purpose [of the RMA] is fulfilled" (*Shell Oil New Zealand Ltd v Auckland City Council*, W8/94 PT, at 10). Under the "overall broad judgement" approach, subsections 5(2) (a), (b) and (c) do not necessarily trump other considerations. As the Environment Court noted in *North Shore City Council v Auckland Regional Council*,

> The method of applying s 5 then involves an overall broad judgement of whether a proposal would promote the sustainable management of natural and physical resources. That recognises that the Act has a single purpose. Such a judgement allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome. (para 347)

The judiciary's interpretation of section 5 changed over time. The founders of the RMA, Geoffrey Palmer and Simon Upton, were both clear in their Parliamentary speeches on the Resource Management Bill that the fundamental aim of the law was to provide an environmental "bottom line that must not be compromised" (Upton, 1991, p. 3019). Early court decisions appeared to favour this interpretation. The courts then gradually adopted the "overall broad judgement" method, partly on the grounds that the inclusion of "remedying, or mitigating" in section 5(2)(c) envisaged allowing for adverse effects from a development. A recent Supreme Court decision has modified and refined the "overall broad judgement" approach.[28]

As a result of this initial lack of clarity, councils in the earlier years of the RMA "had trouble understanding what was required of them under section 5" and

> either ducked the task of articulating sustainable management by choosing to write district plans that were based largely on their earlier activities-based plans, or regurgitated key phrases from the Act to avoid 'getting it wrong'. To avoid confrontation, many councils negotiated a resolution to disputes over plan content rather than defend their policies in the Environment Court…Only when a proposal for using or developing resources required a specific consent was the inadequacy of the plan revealed in its lack of a rigorous framework for assessing environmental effects. (Ericksen et al., 2003, p. 285)

**F5.1** There has been considerable debate about the purpose of the Resource Management Act 1991, and the practical implications of "sustainable management" for council plans and rules. Confusion about the purpose of the RMA in its early years made it harder for councils to develop and implement land use plans.

[28] The implications of the Supreme Court's *Environmental Defence Society Inc. v New Zealand King Salmon Ltd* are discussed in K Palmer (2016)

## Scope of sustainable management

The current planning system lacks clear limits. This reflects the wide scope of the purposes and definitions of both the RMA and LGA, and unforthcoming central government guidance. The lack of limits provides opportunities for councils and some interest groups to pursue land use regulations that have weak links to genuine externalities, are unlikely to provide net community benefits, or which only provide benefits for particular segments of the community. The lack of limits can also lead to local regulatory plans that have conflicting objectives.

Part of the reason for regulatory scope creep is the broad definition of "sustainable management" and "environment" in the RMA.

As noted in Box 5.1, section 5 of the RMA defines "sustainable management" as:

> managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety.

Section 2 of the RMA defines "environment" as including:

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

This wide scope lends itself to a number of intrusive rules and policies. For example, floor-to-ceiling height rules in plans were often effectively justified on the grounds that buildings were a "physical resource" and that "sustainable management" of that resource required regulation of internal building structures to ensure reuse and adaptability.

The broad definition of "environment" and "sustainable management", the range of other issues that must be considered or given effect to in Part 2 of the RMA, and the previous absence of national policy statements on urban issues, also provide little guidance to councils on priorities, and few limits. This lack of limits and priorities, and the legacy of the "four well beings" from the old LGA 2002 purpose statement, leaves the system open to behaviour that seeks to respond to an ever-growing variety of social ills, without considering whether planning is the most effective and efficient mechanism. Councils face rising pressures and community expectations to act on social matters (NZPC, 2013). This is noticeable in the wide range of objectives sought through the Auckland Plan, many of which are not within the control of local government. These include:

- eliminating life expectancy gaps "between European, Maori, Pacific and Asian ethnicities by 2040";
- decreasing "the number of child hospitalisations due to injury by 20% by 2025";
- increasing "the number of residents who are conversant in more than one language from 25% in 2006 to 50% in 2040";
- increasing "annual average real GDP growth from 3% p.a. in the last decade to 5% for the next 30 years"; and
- increasing "the value added to the Auckland economy by rural sectors (including rural production, complementary rural enterprises, tourism and visitor experiences" by 50% by 2040" (Auckland Council, 2012).

On the issue of lack of clarity in the meaning of "the environment", Simon Upton and others have pointed to the RMA's definition of "environment" – and in particular paragraph (d)[29] – as a key source of difficulty:

> The reality is that the definition of environment as it currently stands does allow the full gamut of economic and social consequences to be considered….As presently cast, the definition of environment is so wide that adverse effects could plausibly encompass any loss of employment, any loss of profits or even any loss of possible rates or taxes. While the direct effects of trade competition are prohibited from being taken into account under section 104 (8) of the Act, the indirect consequences of changes in the market place would still seem to be relevant considerations under section 5 (2) (c). (Upton, Atkins & Willis., 2002)

In Māori thinking (te ao Māori) the physical, the cultural, and the social form a holistic, interconnected whole, as described in the submission of the Greater Christchurch Urban Development Strategy (sub. 83, pp. 13-14)

> Mana whenua values, not just kaitakitanga, demonstrate the holistic, interconnected relationships between people and place and the importance placed on intergenerational obligations. Such values align well with sustainability and wellbeing principles more commonly expressed in legislation and oversees and reinforces the submission that an urban planning framework must have these values at its core.

Yet this need not and should not lead to plans and planning that attempt to tackle an overly broad range of social and cultural issues. Rather it calls for the meaningful involvement of mana whenua and mātāwaka in planning processes to recognise and provide for Māori values, rights and interests in the course of setting clear priorities (Ngā Aho and Papa Pounamu, 2016b)

**F5.2** The planning system lacks clear statutory limits. This has led the system to respond to a growing variety of social and other issues, without considering whether land-use planning is the most effective and efficient mechanism for their resolution.

## The RMA and cities

Compared with former planning Acts, the RMA is virtually silent on urban areas. The definition of the environment – set out in the previous section – refers to urban issues only indirectly:

"Natural and physical resources" is defined in the Act as including "land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures" (section 2). "Structures" is defined as meaning "any building, equipment, device, or other facility made by people and which is fixed to land; and includes any raft" (section 2).

Although some people argue that cities and urban environments are captured within the RMA (see, for example, Munro and Beattie, 2014), others have highlighted the absence of any focus on urban issues in the law as leading to difficulties. Key features of the RMA cited as restricting its usefulness in urban areas include its largely reactive character, its limited scope to deal with cumulative effects, and its focus on managing negative impacts rather than planning for positive effects (Parliamentary Commissioner for the Environment, (PCE) 2001; Rae, 2009; Miller, 2011; Urban Technical Advisory Group, 2010; NZCID[30], 2015a). Miller (2011) said that the Act's drafting "left planners with no clear indication of how urban issues should be addressed under the new legislation" (p. 85). The Ministry for the Environment (MfE, 2010) has noted "growing concerns and evidence" that the RMA was not delivering such outcomes as "[h]igh quality urban services and amenities, including open space" (p. 8).

**F5.3** The Resource Management Act provides no clear indication of how the development of urban areas should be handled, and tends to focus on negative impacts only rather than on weighing up the potential benefits of development against those impacts.

[29] "(d) the social, economic, aesthetic and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters."

[30] New Zealand Council for Infrastructure Development (NZCID) is now called Infrastructure New Zealand.

## The Local Government Act's purpose and scope

Debates about the LGA have concentrated on the wide scope given to local authorities in the 2002 Act's original purpose statement. Under the 2002 Act, councils' roles were

- to enable democratic local decision-making and action by, and on behalf of, communities; and
- to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future. (sections 10(a) and (b), Local Government Act 2002 [since amended])

Supporters of the original purpose statement argued that it better reflected the needs of modern local government, while critics said that it reduced council focus and encouraged scope creep. Since a change in government in 2008, the LGA has been amended several times to tighten the Act's purpose and provide greater clarity about the role of local authorities.

The 2002 LGA gave local government the power of "general competence", which allowed local authorities to "do anything that is not expressly forbidden by law or given exclusively to another organisation" (Palmer & Palmer, 2004, p. 250). It was a response to concerns that the previous 1974 Act had been overly prescriptive, limiting the activities of councils to specified tasks or roles. This could reach minute levels of detail:

> The approach in the old Act was: before local authorities did anything they needed to check to see that they were empowered to do it. For example, section 663 reassured that they were empowered to install clocks. Section 659 confirmed they could sell firewood. (Palmer & Palmer, 2004, p. 230)

"Well-being" was referenced throughout the 2002 Act, especially in relation to decision making. In making decisions about promoting wellbeing and fulfilling their purpose, councils were expected to either contribute to enhancing all four wellbeing dimensions, or make explicit trade-offs between them. The then government's discussion document on the need for a new approach to local government argued that

> the challenges facing New Zealand in areas such as sustainable development cannot be met by central government making decisions and acting on its own. They require a partnership approach within which central government, local government and the voluntary and business sectors can work together (DIA, 2001, p. 13)

The broad scope of the LGA and the introduction of general competence were controversial. Local government welcomed the new Act, and the law was "regarded internationally as highly innovative and cutting edge, particularly in its emphasis on sustainability and community outcomes" (Reid, 2010, p. 4). Others, however, argued that the lack of constraints led councils to lose focus on "core services", move outside their areas of comparative advantage, and reduced accountability and transparency to their communities (Kerr, 2003, 2005; Local Government Forum, 2007).

Rising council rate levels and burgeoning infrastructure costs were a particular source of concern. In a 2009 paper seeking Cabinet approval to amend the LGA, the Minister for Local Government commented that:

> In recent years:
>
> - residential rates have grown by 63.1 per cent while the consumers price index has grown by 23.7 per cent; and
> - residential rates have grown by 53 per cent while household incomes have grown by 37.8 per cent
>
> Infrastructure costs have risen at a rate more than consumer price inflation and have been a major source of rate increases. Councils have also needed to upgrade the quality of infrastructure, especially for water and wastewater treatment plants, and to invest in more infrastructure to meet growth demands. Councils' 2009 LTCCPs forecast local authority rates to grow to 3.7 per cent of Gross Domestic Product (GDP) and local authority debt to grow to almost seven per cent of GDP. These are levels never previously seen. (Office of the Minister for Local Government, 2009, pp. 2–3)

A series of amendments to the LGA between 2010 and 2014 revised the purpose of local government and introduced new reporting and review requirements on councils.

- Amendments to the LGA in 2010 introduced a list of "core services" that local authorities had to have "particular regard to" in performing their role. These include network infrastructure, public transport services, solid waste collection and disposal, the avoidance or mitigation of natural hazards, libraries, museums, reserves, recreational facilities, and other community infrastructure. The 2010 amendments also introduced a requirement on councils to periodically assess the expected returns "from investing in, or undertaking, a commercial activity" and satisfy themselves that the expected returns were "likely to outweigh the risks inherent in the investment or activity". The amendment also empowered the Secretary for Local Government to set non-financial performance measures that councils would have to report against.[31]

- In 2012, the LGA's purpose statement was amended to remove the references to the "four wellbeings". The Act's primary purpose remained "to provide for democratic and effective local government that recognises the diversity of New Zealand communities;" but the amended section 3 provided for local authorities to play a broad role "in meeting the current and future needs of their communities for good-quality local infrastructure, local public services, and performance of regulatory functions" instead of "in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach".

- The amendments also changed the purpose of local government from promoting community wellbeing to meeting "the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses" (section 10)

## Overall coherence and consistency of the planning system

A fourth area of debate and controversy about the purposes and roles of the planning system is its internal coherence and consistency. The New Zealand Council for Infrastructure Development, for example, notes that

> the balance of the RMA is primarily concerned with the adverse impacts of development. Apart from proposed amendments which are hotly contested, almost no recognition is given to the positive outcomes derived from good urban planning and development or investment in infrastructure… The LGA and LTMA, conversely, remain oriented towards future action. Consequently, consenting and other regulatory issues may only arise through the implementation phase of activity planning, rather than through the development of plans. This increases uncertainty, adds significant cost and slows the delivery of essential services. (NZCID, 2015a, p. 34)

Local Government New Zealand similarly argues that

> plans and decision-making under the RMA, LTMA and LGA affect each other, all have different purposes, processes and criteria, and operate over different timeframes. This results in duplication and lack of clarity, demands considerable time and resourcing from all parties involved, and potentially frustrates efforts to promote innovative projects. (LGNZ, 2015a, p. 28)

The Commission has previously noted that the requirements of the three Acts create a:

> complex web of plans, with interactions at a number of points. This complexity can make it difficult to effectively and efficiently coordinate decisions around land use, transport services and infrastructure provision. (NZPC, 2015a, p. 269)

Ngā Aho & Papapounamu (2016b p. 36) note that this complexity can and does "often compromise the capacity of Māori communities to engage effectively in urban planning. The complexity of engaging in multiple planning processes is amplified when tribal takiwā straddle multiple districts or regions."

The range of social, economic, cultural and environmental objectives that some councils seek to achieve through the planning system can lead to "objective overload" and conflicting goals at a District Plan level.

[31] The performance measures would cover water supply, sewerage and the treatment and disposal of sewage, stormwater drainage, flood protection and control works, and the provision of roads and footpaths.

The Commission noted two examples of this in its *Using Land for Housing* report, where the expressed housing affordability objectives of the Proposed Auckland Unitary Plan and notified Christchurch Replacement District Plan were undermined by rules introduced to achieve other goals (eg, heritage and "special character" protection, environmental protection) (NZPC, 2015a, p. 119).

**F5.4** The differing purposes of the three planning Acts create internal tensions, duplication, complexity and costs.

## 5.2 Governance and decision rights

Governance arrangements vary, and decision rights are allocated in different ways, between the three main planning Acts. The key points of difference between the three statutory processes are the role and influence of central government, and the relative roles of the different layers of local government.

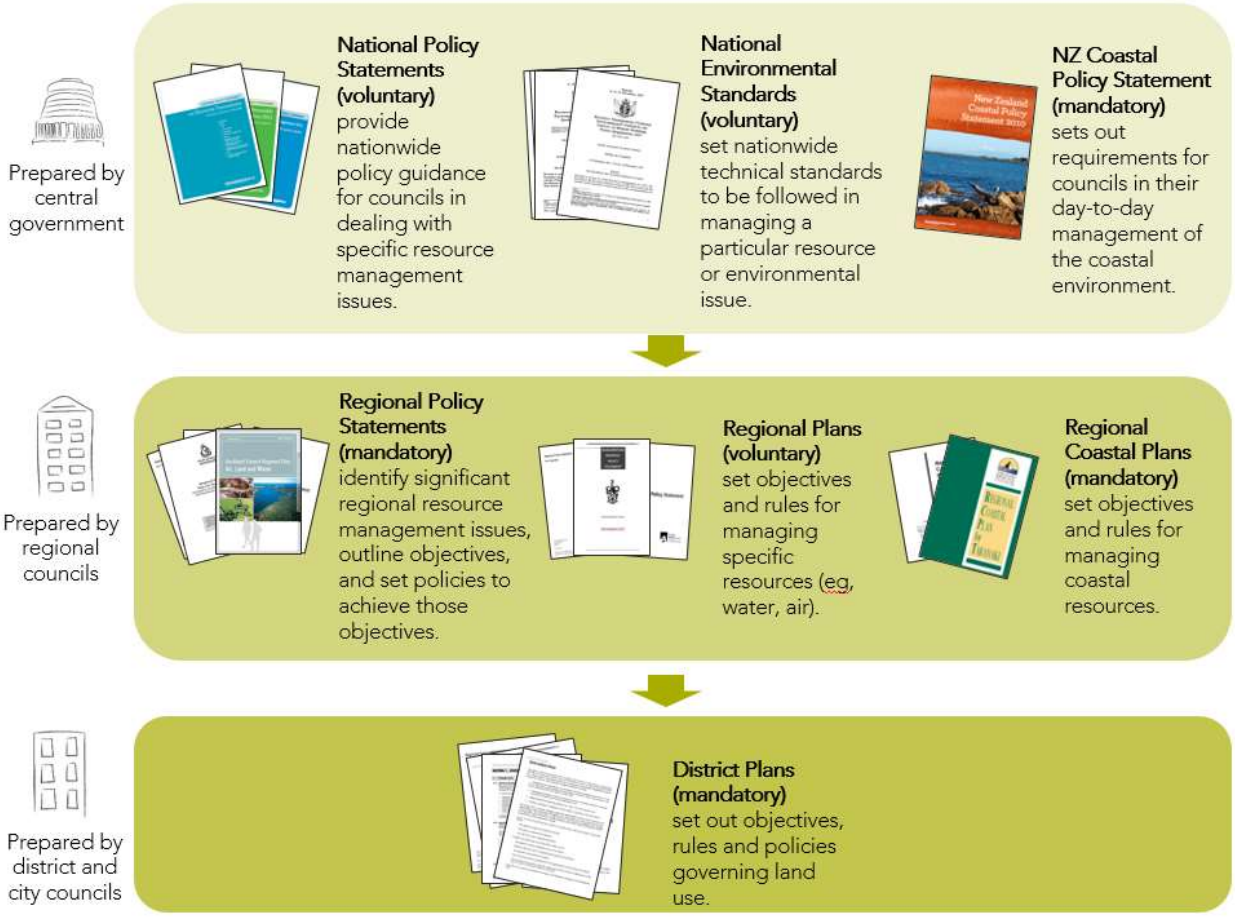
- Central government has the most direct and regular influence through the LTMA because of its major funding role, and the least through the LGA. Central government has significant powers under the RMA, but has not used them to their fullest extent.
- Under the RMA and LTMA, regional councils have a leading role, relative to territorial authorities.

### Resource Management Act

#### Decisions over the development of plans

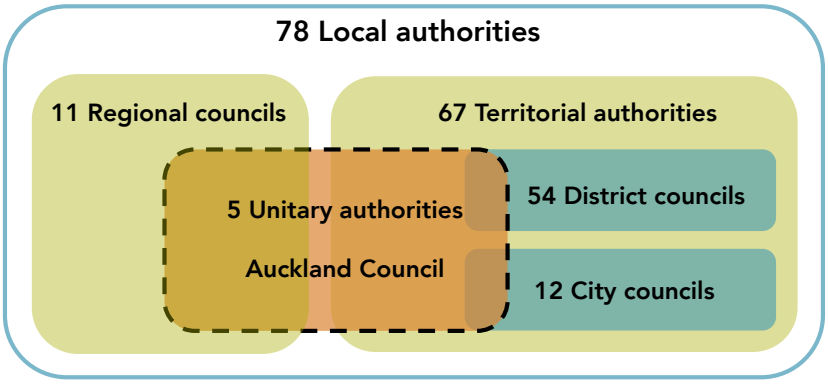
The RMA defines the responsibilities of central government, regional councils and territorial authorities, and requires or enables them to develop plans that show how they will manage the natural and physical environment. It also establishes a three-tier hierarchy of regulatory planning documents (Figure 5.1).

**Figure 5.1 Hierarchy of RMA Plans**



Each Plan must give effect to those higher up the hierarchy. In some circumstances, a single council can prepare Plans at more than one level in the hierarchy. For example, the Auckland Council, Gisborne District Council, Chatham Islands Council, Nelson City Council, Tasman District Council and Marlborough District Council are *unitary authorities* that carry out the functions of territorial authorities and regional councils (Figure 5.2). Unitary authorities can prepare both district plans and Regional Policy Statements (RPSs) (and regional plans, if they wish), and some councils – such as Auckland and Nelson – have developed Unitary Plans, which combine their District Plan, RPS and any other Regional Plans into one document.

**Figure 5.2 Types of local authorities**




*Note:*

1. Auckland Council is a unitary authority and a territorial authority but not a city or district council.

National Policy Statements (NPSs) set policies or objectives for matters of national significance. The Minister for the Environment issues NPSs, subject to a number of statutory content and procedural requirements. The New Zealand Coastal Policy Statement (NZCPS) is a mandatory NPS designed "to promote the sustainable management of natural and physical resources…in relation to New Zealand's coastal environment" (NZCPS 2010 Implementation Steering Group, 2011, p. 1). National Environmental Standards (NESs) are regulations that prescribe technical standards, methods or requirements for particular activities. The Governor-General issues them on the advice of the Minister for the Environment. Every regional council and territorial authority must enforce the same standard, although in some circumstances a council may set higher standards.

Other than the NZCPS, the government has discretion over whether and on what topics an NES or NPS is developed. Excluding the NZCPS, no national instrument was issued until 2004, and governments up to the present day have issued four NPSs and five NESs (Table 5.1). Others are currently being developed.

**Table 5.1 RMA national tools currently in force**

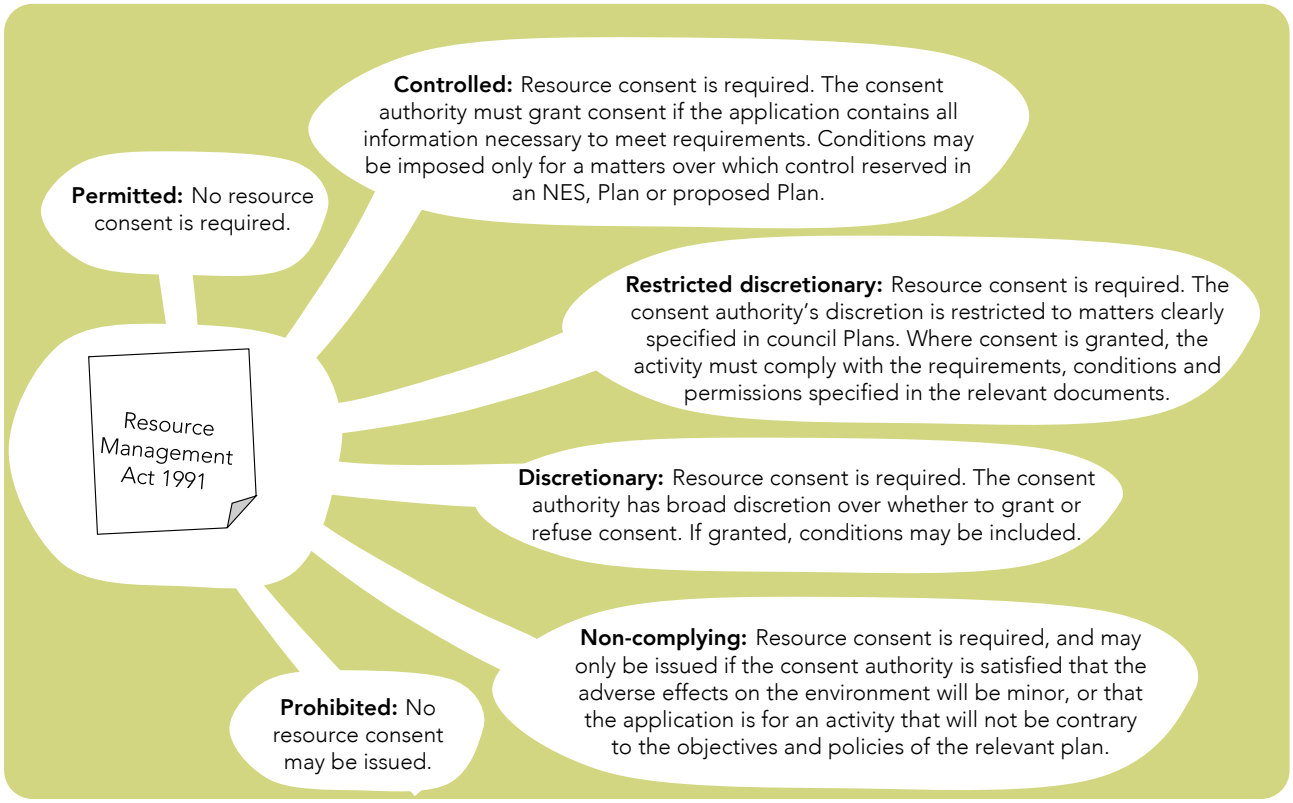
| National tool | Year brought into force |
|---|---|
| New Zealand Coastal Policy Statement | 1994 (new CPS issued in 2010) |
| National Environmental Standards for Air Quality | 2004 (amended 2004, 2005, 2008, 2011) |
| National Environmental Standard for Sources of Drinking Water | 2008 |
| National Environmental Standards for Telecommunications Facilities | 2008 |
| National Policy Statement on Electricity Transmission | 2008 |
| National Environmental Standard for Electricity Transmission Activities | 2010 |
| National Policy Statement for Freshwater Management | 2011 (revised in 2014) |
| National Policy Statement for Renewable Electricity Generation | 2011 |
| National Environmental Standards for Assessing and Managing Contaminants in Soil to Protect Human Health | 2012 |
| National Policy Statement on Urban Development Capacity | 2016 |

Each regional council prepares its RPS, which set directions for the management of resources within the region. Each regional council also prepares Regional Coastal Plans, which the Conservation Minister must approve.

District plans are the main tool used to regulate land use, although other Plans may affect certain types of development. District plans lay out whether or not a particular development activity is allowed, and the sorts of regulatory tests to meet before consent is issued. Zoning is a common way of defining the sorts of activities permitted in particular areas. In New Zealand, each territorial authority sets its own rules and zones.

Councils classify development activities in their district plans. Whether a resource consent is required depends on the classification applied (Figure 5.3). In 2014/15, 39% of processed resource consent applications were discretionary activities, followed by restricted discretionary (33%), controlled (15%) and non-complying activities (11%) (MfE, 2016a).[32]

**Figure 5.3 Activity classifications under the RMA**

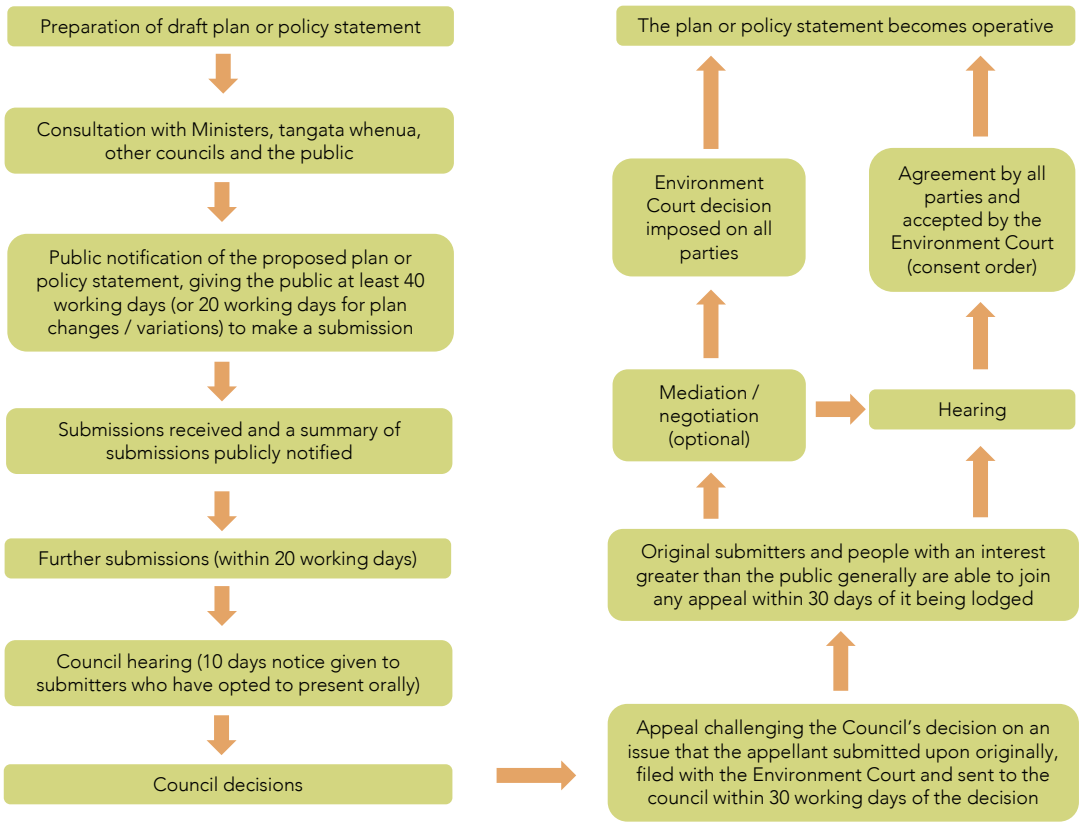



Territorial authorities can make changes to their district plans, while regional councils can change their Regional Plans and their RPSs. Councils are expected to review their Plans every 10 years, either in whole or on a rolling basis. The RMA lays down procedural requirements for making Plan changes and for preparing new Plans or reviewing existing Plans (Figure 5.4).

Generally, elected officials make decisions on whether to approve a new Plan or change an existing Plan, although the task of hearing submissions and making recommendations to councils may be delegated to commissioners. Commissioners may be "internal" (appointed from within a council) or "independent" (from outside the council). They may be appointed to act alone, with other commissioners, or as part of a panel with elected members.

[32] No data on the activity classification was available for the remaining 2% of processed applications.

**Figure 5.4 RMA Plan preparation process**




Bespoke arrangements were established for the Proposed Auckland Unitary Plan (PAUP) and the Christchurch Replacement District Plan. Independent Hearings Panels (IHPs) were set up to hear submissions and review the content of the Plans. Ministers appointed the IHPs,[33] which had prescribed terms of reference and had to complete their tasks within set timeframes (Box 5.2). The Auckland IHP delivered its recommendations to the Auckland Council on changes to the PAUP in August 2016. The Council had the right to accept or reject these recommendations. It accepted most of them knowing that if it rejected a panel recommendation it faced a higher risk of having the Plan appealed. The Christchurch IHP completed its work in December 2016. Unlike in Auckland, the Council cannot reject its decisions.

Box 5.2 **The Auckland and Christchurch Independent Hearings Panels**

**Auckland**

The Local Government (Auckland Transitional Provisions) Act 2010 established an Independent Hearings Panel (IHP) for the Proposed Auckland Unitary Plan (PAUP). The Panel was able to hear submissions on the PAUP, convene conferences of experts to resolve or clarify issues, and refer specific issues and parties to mediation. It made recommendations to Auckland Council on the Plan. Auckland Council then accepted most of Panel's recommendations but rejected several. Submitters were able to object to the IHP if it declined to consider their submission or struck out their submission in whole or in part. Except for a submitter making an objection (see below), no one can appeal the Panel's decision on an objection.

If the IHP declines to consider a submitter's objection, then that submitter can only appeal to the courts in the following circumstances.

- A submitter can appeal to the Environment Court on a matter they submitted on where the Auckland Council rejected a recommendation of the IHP.

[33] The Minister for the Environment and Minister of Conservation appoint the Auckland IHP members. The Minister for the Environment and Minister for Canterbury Earthquake Recovery appointed the Canterbury IHP members.

- An "unduly prejudiced" person can appeal to the Environment Court where Auckland Council accepted a recommendation by the IHP that was beyond the scope of submissions.
- Submitters can appeal to the High Court on a question of law where Auckland Council accepts a recommendation of the IHP (MfE, 2013, p. 4).

Environment Court Judge David Kirkpatrick chaired the Auckland Unitary Plan IHP, which included seven other members who are experts in urban planning, law, tikanga Māori, and economics. Several appeals to the Environment Court and the High Court are in progress.

**Christchurch**

The Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 modified the RMA to enable an accelerated process for reviewing the Christchurch City and Banks Peninsula District Plans. As in Auckland, Ministers established an IHP to hear submissions and review the content of the replacement Christchurch District Plan. Unlike in Auckland, however, the City Council was not able to reject the IHP's decisions which became operative in the Plan. Objection rights are similar to those for the Auckland IHP. Only Ministers, the City Council or submitters (in relation to matters raised in their submission) can appeal to the High Court. The High Court will only hear appeals on questions of law.

Retired High Court Judge Sir John Hansen chaired the Christchurch IHP, which included members who have significant legal, planning and development experience. The Panel concluded its deliberations in December 2016.

Ministers have the power to direct councils to change or review an existing RMA Plan, or to prepare a new Plan, where this would address an issue that relates to the council's function. Selected Ministers also have the right to be consulted on the preparation of new Plans, and have the right of audience before every planning and consent hearing. In recent years, however, these rights have not been exercised frequently. The Urban Technical Advisory Group observed in 2010 that

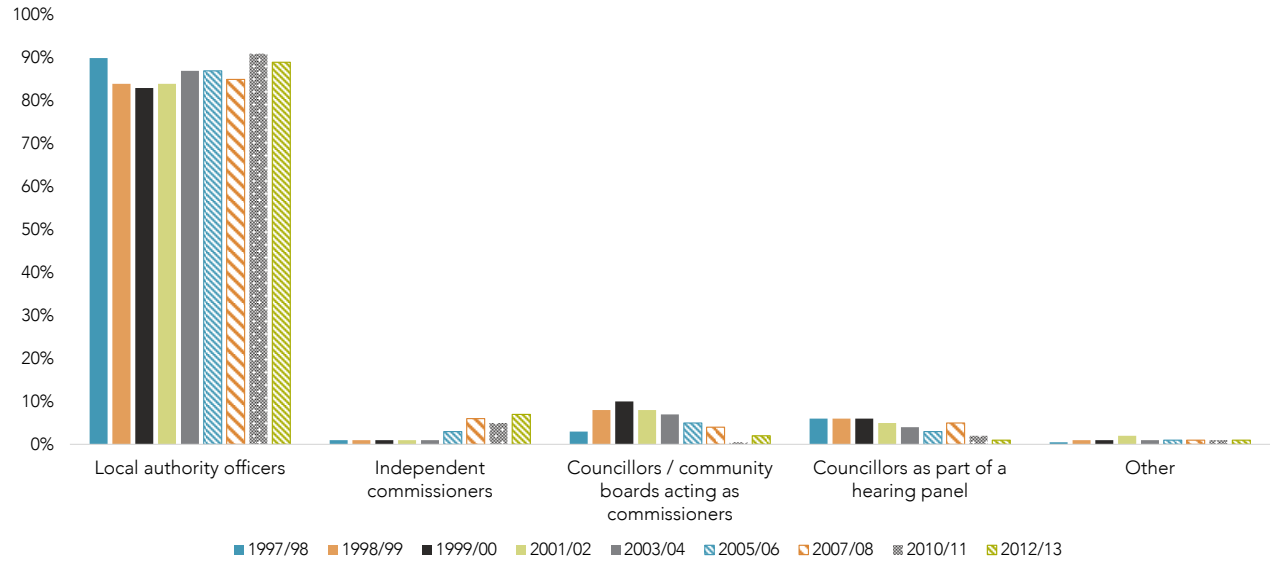
> every local authority is required by clause 3 of the First Schedule of the RMA to consult with the Minister during the preparation of a proposed plan or plan change. This affords the Minister an early opportunity to have an influential voice in the preparation of every planning document throughout the country. Our understanding however is that the Ministry no longer engages in this role to anything more than the most limited or cursory extent. Indeed, it may not be going too far to say that the Ministry has virtually withdrawn from this role altogether. (pp. 15–16)

Individuals and organisations can apply to make changes to district plans (known as "private Plan changes"). No one can seek Private Plan changes for Regional Plans, RPSs, National Policy Statements or National Environmental Standards.

## Decisions over whether land can be developed

Who takes decisions on types of land use depends upon the nature of the proposed development and the policies of the specific council. Many councils delegate responsibilities for assessing low-risk and uncomplicated development proposals to their staff. For more complicated proposals, the council, independent commissioners, or panels of elected representatives and independent commissioners may decide on consent. Council staff make most resource consent decisions (Figure 5.5).

**Figure 5.5 Percentage of resource consent decisions made, by decision maker, 1997/98–2012/13**




*Source:* MfE, 2014a.

*Note:*

1. The MfE surveys were not run over consistent time periods.

Where the effects of a proposed development on the environment are considered "more than minor", the resource consent application will be publicised, or 'notified'. The two forms of consent notification are *limited notification* and *public notification*. For limited notification, only affected persons are advised and can make submissions. For public notification the council advertises the application and seeks submissions from the general public.

Under the RMA, an applicant for a notified resource consent or a submitter on a notified resource consent may request that a council appoint at least one independent commissioner to hear and decide on the application. Where a request is made, the council must delegate its functions, powers and duties to hear and decide the application to one or more independent commissioners. The council can decide on the number of commissioners appointed.

Since 2009, people or organisations seeking a resource consent or changes to existing resource consent conditions have been able to seek a "direct referral", under which the Environment Court rather than the relevant council decides on the application. The relevant council must agree to the request for a direct referral, and the avenue is only available for notified applications and requirements (ie, those consent applications that must be publicly announced).

Nationally significant proposals (Box 5.3) can include resource consent applications, applications to cancel or change consent conditions, private Plan change applications, and notices of requirement for designations or heritage protection orders. The people who can refer nationally significant proposals to a board of inquiry or the Environment Court are:

- the Minister for the Environment, acting on their own initiative (once the matter is lodged with a council);
- the relevant council or applicant, who can request the Minister to make a direction on a matter after it is lodged with the council; or
- the applicant, who can lodge the application directly with the Environmental Protection Authority (EPA) instead of the council.

Established in 2011, the EPA is New Zealand's single national-level environmental regulator and has consenting and regulatory functions under a range of statutes.[34] The EPA recommends to the Minister whether the issue should be referred to a board of inquiry or the Environment Court.

If the Minister decides not to refer a matter to a board of inquiry or the Environment Court, then the relevant council deals with the matter in the normal manner.

Box 5.3 **Nationally significant proposals and Boards of inquiry**

When the Minister decides a proposal is nationally significant, they may refer the proposal to an independent board of inquiry for a decision. The Minister for the Environment selects a board for a land-based proposal; the Minister of Conservation selects a board for a coastal proposal.[35] The Minister may refer a proposal that:

- has stimulated widespread public concern or interest regarding its effect on the environment;
- is likely to involve significant use of natural and physical resources;
- may affect a place of national significance, more than one region or district; or international obligations;
- may involve new technologies;
- could result in changes to the environment; or
- could be significant in terms of the Treaty of Waitangi.

A board must have between three and five members, selected by a Minister. The board members are selected based on factors such as local knowledge, understanding of the RMA, expertise in areas relevant to the proposal, and knowledge of tikanga Māori.

The board considers all submissions, holds a hearing process, and makes a final decision on the matter. It also uses the same decision-making criteria that a council would have to follow if it were dealing with the matter. The inquiry boards run their own processes and make a decision that is independent from the Environmental Protection Authority and the Minister. Decisions made under this process are subject to appeal only on points of law.

*Source*: MfE, 2009a; Environmental Protection Authority, 2013.

## Gaps between the intentions and practice of RMA land use controls

The RMA was intended to introduce a very different form of environmental planning and management from the previous Town and Country Planning Act. It attempted to establish an effects-based system, where any land use or activity is permitted so long as it does not adversely impact the biophysical environment (Perkins & Thorns, 2001). However, in practice the RMA has not met those expectations. Concerns emerged shortly after the RMA was introduced. Those concerns were about excessive costs, complexity and poor regulatory analysis. Meanwhile, councils struggled to put "effects-based" plans into practice.

The goals behind the RMA were most famously expressed by then Minister for the Environment, Simon Upton, in his Third Reading speech on the Resource Management Bill:

> [T]he Government has moved to underscore the shift in focus from planning for activities to regulating their effects... We run a much more liberal market economy these days. Economic and social outcomes are in the hands of citizens to a much greater extent than they previously have been. The Government's focus is now on externalities – the effects of those activities on the receiving environments...

[34] Hazardous Substances and New Organisms Act 1996; Resource Management Act 1991; Ozone Layer Protection Act 1996; Import and Exports (Restrictions) Act 1988 and Imports and Exports (Restrictions) Prohibition Order (No.2) 2004; and Climate Change Response Act 2002.

[35] When a proposal contains both land and coastal matters, the Ministers will work together to select a board.

> The presumption about rights to use land should further underscore that point. Current law presumes that one can use land only in accordance with the provisions of the law. Clause 7 intentionally reverses that presumption. That was a very important reversal that the authors of the Bill made right at the outset – that is, people can use their land for any purpose they like. The law should restrain the intentions of private land-users only for clear reasons and through the use of tightly targeted controls that have minimum side effects. (1991, pp. 3019–3020)

Former Environment Ministry deputy secretary Lindsay Gow (2014) later commented that

> the idea was that rules should target the adverse effects of resource development rather than be constructed to encompass all sorts of restrictions that did not target the problem effects, and worse, created adverse side effects and new problems. (p. 8)

The introduction of the RMA initially led councils to look harder at the justifications for their rules and regulations. Citing interviews with local body politicians, Perkins and Thorns (2001) commented that the

> shift from zoning to effects-based management has been hard for some councillors to come to terms with as it had reshaped their ability to control activities. In the previous system they could more easily proscribe an activity; under the new system they must now show that the activity is harmful with respect to the 'environmental bottom lines' that they have established within their district plan. (p. 648)

Gleeson and Grundy (1997) note that while many early plans retained traditional approaches such as zoning, some councils felt "compelled for the first time…to defend, through explicit rationale, their continued use of zoning as a planning tool" and some local authorities reduced the number of zones and broadened their scope. (p. 304)

However, it soon became clear that planning practice on the ground was not providing "tightly targeted controls that have minimum side effects". Dormer (1994) pointed to the higher than expected costs of securing approvals, excessive information requirements from councils, the absence of the anticipated economic instruments, and poor regulatory analysis and land use rules. McShane (1996) concluded that the RMA "as it has been, and is being, implemented, has imposed massive extra costs on the residential housing market in the Auckland Region, in terms of both time and money" (p. 4). He attributed these cost increases to the absence of direction from central government, vague and broad regulatory definitions, the need for "a multitude of experts" to gain a resource consent, and the "ingenuity" of councils "in using the new Act to make the allocation of resources a necessary means of controlling effects" (1996, pp. 4, 49). Even the Environment Minister voiced his frustrations. In a 1997 speech, Simon Upton argued that

> there are still far too many rules being proposed that have absolutely no plausible foundation in the RMA and have nothing to do with environmental effects. I can illustrate the point very simply by referring to the Ashburton Plan in which we find a mind-numbingly detailed prescription for protecting retailers in the central business district.
>
> Isn't it comforting to know that the good people of Ashburton must proceed in orderly fashion to the fringes of the CBD to find awnings, blinds and curtains, equestrian supplies, sewing machines and spa pools? ….
>
> We have embraced, in my view, a huge amount of regulation aimed at development proposals that have only the very remotest chance of ever eventuating. The risk presented by these development proposals even if they did eventuate is often minimal. Yet the mere possibility provokes a response in the form of plans the size of several telephone directories. I am amazed that tiny settlements in provincial New Zealand continue to be constrained because of the threat that they may explode across the so called 'high quality' soils. The risk of this happening in places where the rate of population growth this century can be measured in single figures (and sometimes negative figures at that) must surely be infinitesimal. The risk to the availability of 'high quality' soils presented by the most likely scenario of a handful of new houses over the life of the plan is equally minimal. Yet many planners persist with such risk averse approaches.
>
> The practice of 'zoning in' the status quo and, by implication, 'zoning out' anything innovative or novel for fear of the unknown continues to undermine a truly effects based approach to the Act.

Local authorities encountered numerous problems implementing the RMA. Many found "effects-based" Plans extremely challenging to make work, especially as they tended to be highly complex and generate

public opposition. Miller (2011) cites the Far North District Plan and Christchurch City District Plan as examples:

> In many cases a person seeking to establish an activity had to assess their proposal against three different types of controls. If they undertook this assessment and determined that they could comply and then were unable to comply they became an enforcement problem, resulting in extra expense for all the parties involved. In the case of the Far North District Council the response was far more extreme…it attracted some 60,000 submissions, a petition to Parliament and a public march in opposition…Effects-based plans also provided a field day for lawyers, given the potential for litigation in the New Zealand planning system, which was again a 'turn off' for politicians trying to constrain local body budgets. (p. 184)

As a result, many councils stuck with or reverted to activity-based district plans, with "the greatest use of effects-based approaches…in regional plans in which the approach is a better fit" (Miller, 2011, p. 184).

**F5.5**

The founders of the Resource Management Act (RMA) envisaged it as an enabling statute that would restrain the activities of landowners "only for clear reasons and through tightly targeted controls that have minimum side effects." The RMA has failed to deliver on this goal. Critics charge the RMA with creating excess costs, complexity and poor regulation, while many councils have struggled to make "effects-based" plans work.

## Local Government Act

Under the LGA, all local authorities are required to produce core planning and accountability documents, namely Long-Term Plans, Annual Plans and Annual Reports. The LGA also gives councils scope to set plans and strategies on a wide range of issues, some of which may affect the development of urban areas.

### Long-Term Plans

The Act requires all local authorities to prepare a Long-Term Plan (LTP) every three years, covering at least 10 financial years. LTPs set out the local authority's planned activities and expected performance, the community outcomes it is pursuing, and forecast revenue and expenditure. These tasks are specifically required for specified classes of infrastructure. Such infrastructure is water supply, sewerage and the treatment and disposal of sewage, stormwater drainage, flood protection and control works, and the provision of roads and footpaths.

LTPs must include a funding impact statement that sets out revenue and funding across different classes of infrastructure. The funding impact statement includes details of what operational and capital funding will be raised from different sources (eg, rates, fees and charges, subsidies or grants) and how the local authority will apply this funding. LTPs must also include a revenue and funding policy that explains how and why the local authority has chosen the funding tools set out in their forecast financial statement.

Since 2014, local authorities have needed to prepare an infrastructure strategy and incorporate it into their LTP. That strategy should:

- identify infrastructure issues over a 30 year timeframe;
- identify the authority's plans for maintaining and improving its infrastructure assets;
- identify the estimated expenses, and key decisions about capital expenditure;
- explicitly state the authority's assumptions about the lifecycle of infrastructure assets, and changes in demand and service levels.

### Annual Plans and Reports

Councils must prepare Annual Plans that detail their activities, revenue and expenditure for the next financial year. The purpose of an Annual Plan, as set out in the LGA, is to:

- contain the proposed budget and funding impact statement for the year to which the Annual Plan relates;
- identify any variation from the financial statements and funding impact statements included in the local authority's LTP for the year;
- provide integrated decision making and coordination of the resources of the local authority; and
- contribute to the accountability of the local authority to the community.

Every council must prepare an Annual Report for each financial year, to compare activities performed with those set out in the previous Annual Plan. A particular emphasis is on comparisons with the council's forecast financial and non-financial performance.

### Other LGA plans and processes that may affect development

The LGA, as enacted in 2002, was an enabling statute that let local councils set strategies or plans on any topic they considered advanced the needs of their communities. One side effect of this wide scope was a proliferation of plans, as Miller (2011) observes:

> For urban areas this seems to have provided the opportunity to take a more strategic approach to issues, particularly urban growth, although there has been no guidance on how local bodies can and should reconcile its sustainable management focus of the RMA with the broader sustainable development remit of the Local Government Act. The enormity of reconciling the two with a lack of central government guidance seems to have had the perverse effect of generating a parallel planning system of strategic planning exercises, which are undertaken outside RMA processes. This has produced what can only be described as a plethora of plans – Whangarei City, with an estimated population of 79,000, has, in addition to its district plan and LTCCP [Long-Term Council Community Plan],[36] a strategic plan (for the council), a subregional growth strategy, an urban growth strategy, a coastal management strategy, a rural strategy, an open space strategy and a walking and cycling strategy. (p. 94)

This proliferation also reflects the expansion in the role and scope of planning (section 5.2). A number of councils have used the LGA to establish spatial or growth management plans, which act as linchpins to guide RMA, LGA and LTMA decisions. Councils use the LGA plans to set the strategic goals for their cities, and then use the RMA to set regulatory controls aimed at achieving these goals. These plans were discussed in *Using land for housing* (NZPC, 2015a) and in Chapter 4.

Individual development proposals may also have to comply with council bylaws – a type of subordinate legislation. Under the LGA, territorial authorities can set bylaws for one or more of the following purposes:

(a) protecting the public from nuisance;

(b) protecting, promoting, and maintaining public health and safety;

(c) minimising the potential for offensive behaviour in public places. (section 145)

The LGA prescribes the process that local authorities must follow to make a bylaw. In preparing bylaws, local authorities must determine whether "a bylaw is the most appropriate way of addressing the perceived problem" and consider whether a proposed bylaw gives rise to any New Zealand Bill of Rights Act 1990 implications (section 155(2)).

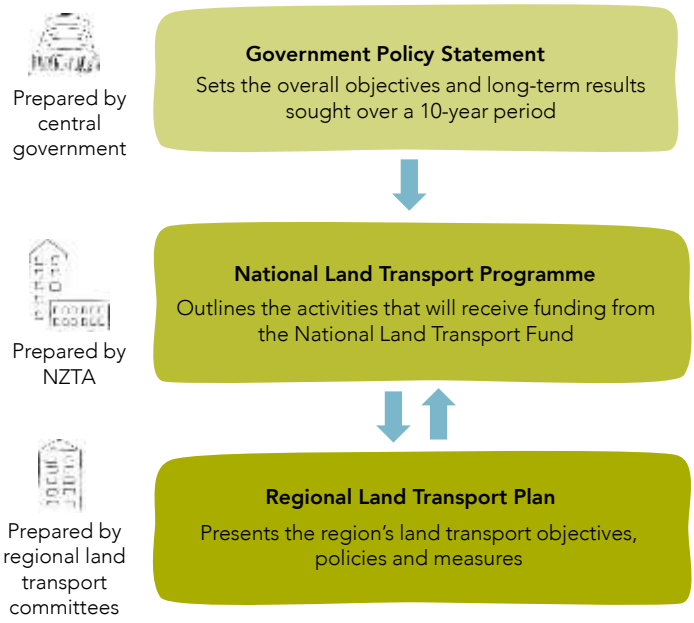
## Land Transport Management Act

Central government has its largest role in the planning system through the LTMA. Every three years, central government issues a Government Policy Statement (GPS) on Land Transport, which sets the overall objectives and long-term results sought for land transport over a 10-year period, as well as the expenditure ranges for each class of transport activity. In doing this, central government sets out how it will allocate funding between activities such as road safety policing, state highways, local roads and public transport. The New Zealand Transport Agency (NZTA) then develops a three-year National Land Transport Programme

[36] Long-Term Council Community Plans were renamed 'Long-Term Plans' in the 2010 amendments to the LGA.

(NLTP), which gives effect to the GPS and outlines the activities that will receive funding from the National Land Transport Fund (Figure 5.6).

**Figure 5.6 The LTMA planning hierarchy**




At the regional level, activities proposed for funding through the NLTP must form part of the Regional Land Transport Plan (RLTP). RLTPs are prepared by regional land transport committees, which include representatives of NZTA and the relevant regional council and territorial authorities.[37] RLTPs present the region's land transport objectives, policies and measures over a 10-year period. The Plan must include:

- transport priorities;
- a financial forecast of anticipated revenue and expenditure;
- all regionally significant land transport expenditure to be funded from sources other than the National Land Transport Fund; and
- an identification of activities that have inter-regional significance (section 16).

Once the RLTP is confirmed, territorial authorities can seek funding for activities carried out in their area.

Because of the close interaction between land-use regulation and the performance of the transport system, NZTA participates actively in the development of RMA and LGA plans, through submissions, court actions and participation in council collaborative processes (such as the SmartGrowth partnership in the Western Bay of Plenty, Future Proof in greater Hamilton, and the Greater Christchurch Urban Development Strategy).

## Other statutes affecting land use decisions

In some circumstances, other statutes may affect individual development proposals. The Terms of Reference specifically ask the Commission to consider "the elements of Building Act, Reserves Act and Conservation Act relating to land use".

The Building Act 2004 regulates building work to promote its safety, health and sustainability. That Act has some areas of overlap with the RMA about land use issues. For example, the safety of land subject to material damage from natural hazards must be assessed under both Acts. Some councils have also used the RMA to impose controls on the internal design or construction of buildings that exceed the standards set by the Building Act. This may be unlawful (NZPC, 2015a).

[37] Auckland Transport prepares the RLTP for Auckland.

Where land has been designated as a public reserve under the Reserves Act, it must be held and administered for the purposes to which it is dedicated. The Act sets out seven different types of reserves: recreation reserves; historic reserves; scenic reserves; nature reserves; scientific reserves; Government purposes reserves; and local purpose reserves. An administering body can change the purpose or designation of a public reserve, but only after notifying interested parties, and considering any objections from the Minister of Conservation. The Minister may not agree to a change of purpose for scenic, nature, scientific or historic reserves unless physical changes have made the reserve unsuitable for its designated purpose. The Minister can authorise the exchange of reserve land for other land to be held for the same purpose.

Where the revocation or change of purpose for a reserve also requires a change to the local District Plan, the local authority must notify the wider public under the RMA. The two processes are interdependent, but occur sequentially rather than concurrently. This increases holding costs and uncertainty for some urban development projects, and is unnecessarily duplicative. A regulatory impact statement prepared for the Resource Legislation Amendment Bill noted that

> reserve exchanges or revocation processes can take three to six months, depending on the scale of the project. Resource consents and plan changes can take longer, which means that it can take up to one year or more to get approval under both regimes. (MfE, 2015a, p. 68)

Similar issues of duplication and costs can arise under the Conservation Act, where some applicants for concessions (ie, permission to carry out activities on conservation land) also have to apply for resource consents.[38] Each process has distinct notification criteria, scopes and timeframes, and different submission time periods.

Amendments to the RMA currently before Parliament include proposals to:

- align the notified concessions processes and timeframes under the Conservation Act with those for notified resource consents under the RMA; and
- create an "optional joint process of public notification, hearings, and decisions for proposals that involve publicly notified plan changes or resource consents under the RMA and recreation reserve exchanges under the Reserves Act" (explanatory note, Resource Legislation Amendment Bill, p. 4).

Māori land is also regulated under the Te Ture Whenua Maori Act 1993. The Act sets out processes and rules to govern the "effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori" (section 17 (1)(b)). Parliament is currently considering a new Te Ture Whenua Māori Bill (Chapter 7).

## 5.3 Decision review

Opportunities to review decisions are most extensive under the RMA, reflecting that Act's regulatory focus. Apart from the RMA, the options to review decisions are mostly limited to judicial review. Decision review and appeal rights under the RMA are broad by international standards, although they have narrowed since the Act's introduction.

A range of council planning decisions can be appealed to the Environment Court, which has three main functions: appeals; hearing and deciding applications; and enforcement matters. Most of the Court's work involves hearing appeals relating to issues that arise under the RMA, with most of its workload generated by appeals brought against decisions of local authorities. The Court's jurisdiction includes hearing:

- appeals against decisions on submissions regarding Policy Statements and Plans prepared by local authorities;
- appeals against decisions on resource consent applications;

[38] A regulatory impact statement prepared for the Resource Legislation Amendment Bill estimated that about 5% of concession applicants also required a resource consent (MfE, 2015a).

- applications for declarations, applications for enforcement orders; and
- appeals against abatement notices (Daya-Winterbottom, 2005).

Appeals before the Court are *de novo*, meaning the Court considers all relevant issues afresh. Hearings must consist of at least one judge and one environmental commissioner. The RMA allows for automatic rights of appeal on a question of law to the High Court from a decision of the Environment Court. Further rights of appeal (if leave is granted) exist to the Court of Appeal and the Supreme Court.

Appeal rights in New Zealand have expanded over successive iterations of the planning system (NZPC, 2015a) and are now broad compared with similar appeal rights in other comparable jurisdictions. The ability in New Zealand to appeal decisions on Plans in the courts, including by third parties, is particularly unusual. Chapter 8 gives more details and sets out the Commission's view on the reform of appeal rights.

Amendments to the RMA in recent years have restricted appeal rights.

First, a new form of public notification ("limited notification") was introduced in 2009 for some resource consents. That notification meant that only "affected persons" (rather than the general public) would be informed of applications. As only notified consents (and not limited notified ones) can be appealed, this reduced the number of parties with recourse to the courts.

Second, the ability of trade competitors "or other potentially frivolous or vexatious parties" to participate in appeal processes was limited in 2009. Persons who could gain an advantage in trade competition can now only make submissions on Plans and Policy Statements if directly affected by an aspect of a Plan that adversely affects the environment, and does not relate to trade competition or its effects. Appeals may not be sought for the purposes of protecting from trade competition or deterring others from engaging in competition. Also, decision-makers must not consider competition when preparing or changing Plans and Policy Statements or considering resource consent applications. The Environment Court is also empowered to declare that a party to an appeal has contravened the Act's trade competition provisions and order that party to pay costs. A person who obtains a declaration from the Court may also bring damages proceedings in the High Court against the person in breach (MfE, 2009b).

The 2009 amendments removed the ability of any member of the public to participate in proceedings before the Environment Court where they "represented a relevant aspect of the public interest". This role is now the prerogative of the Attorney-General. However, people and organisations who have an "interest in the proceedings that is greater than the interest that the general public has" may still join as parties to an appeal (section 274 (1)(d)). Finally, as noted earlier, appeals against decisions by boards of inquiry and the Auckland and Christchurch IHPs are limited to points of law[39].

The role of the courts in the planning system is controversial. This is examined in Chapter 8.

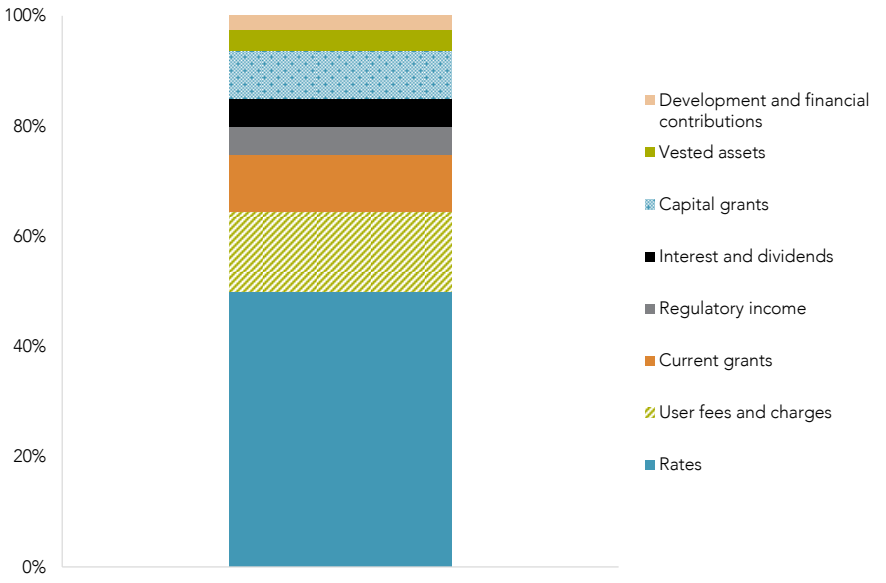
## 5.4 Funding

Local authorities in New Zealand fund their own regulatory activities and infrastructure needs, with the partial exception of transport assets and services. Local government funding and financing practices can be a barrier to the growth of cities.

Under the Local Government (Rating) Act 2002, local authorities have flexible powers to determine rates, which make the largest contribution to council income. Other sources of funding include user fees and charges; current grants; regulatory income; interest and dividends; capital grants; vested assets and development and financial contributions (Figure 5.7). Financial and development contributions are charges associated with land-use development. Financial contributions can be imposed to avoid or mitigate adverse environmental effects, while development contributions can be imposed to fund the portion of new infrastructure related to development.

[39] Except in the case of Auckland's IHP, if Auckland Council does not accept an IHP recommendation on a matter, then a submitter on that matter can appeal the decision.

**Figure 5.7 Summary of local government revenue sources, 2013–2014**




*Source:* Statistics New Zealand, 2015a.

*Note:*

1. "Capital grants" and "current grants" are transfers from central government, mainly for land transport activities. Excludes income from valuation changes and other non-operating income.

Local councils often rely on increased debt to fund capital expenditure (which includes infrastructure such as road and water assets). The extent of reliance on debt varies between councils (Figure 5.8).

**Figure 5.8 Sources of council capital funding, 2016**

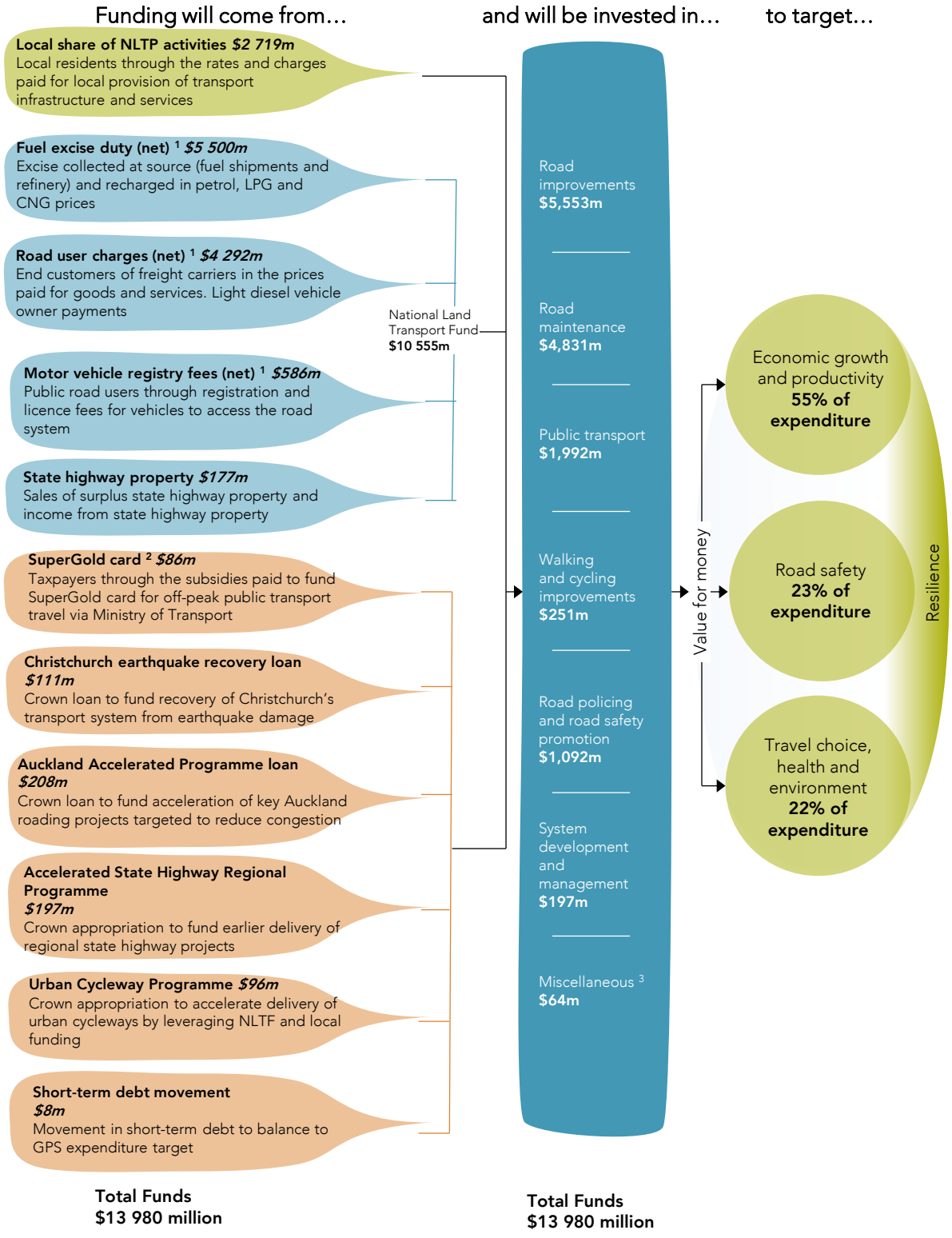

*Source:* Long-Term Plan data from Department of Internal Affairs.

Councils share the costs of transport assets and services (eg, public transport, local road improvements and extensions) with central government. Central government's contribution is funded through a Crown contribution, vehicle licence and registration fees and fuel levies (Figure 5.9). Under current settings, the National Land Transport Fund meets an average of 53% of local transport costs across the country. Local authorities meet the remaining costs from sources such as rates, development contributions and passenger fares.

In its *Using Land for Housing* report, the Commission found that councils in high-growth areas were tightly rationing the supply of infrastructure. This in turn constrained the supply of development capacity and contributed to rising land prices. Reasons for the rationing of infrastructure included:

- risks to councils associated with installing infrastructure ahead of demand;
- an inability or unwillingness by councils to appropriately price new infrastructure;
- unclear statutory governance frameworks for the supply of water infrastructure;
- reluctance by councils to take on debt to fund new investment; and
- resistance from ratepayers to higher rate bills (NZPC, 2015a).

**Figure 5.9 2015–2018 National Land Transport Fund revenue and investment flows**




*Source:* adapted from NZTA.

*Notes:*

1. Net of refunds and administration costs.
2. SuperGold card amount is an estimate only.
3. Covers costs for bad debts, search and rescue, recreational boating safety awareness and revenue system management.

## 5.5 Culture and capability

The "culture" of an organisation or profession describes the norms, values and beliefs shared by staff working in the organisation or within the profession. These norms of behaviour influence how planning related tasks are undertaken. When introduced in 1991, the RMA looked to replace the existing prescriptive approach to planning with an enabling "effects-based" approach. This new approach ran contrary to conventional planning norms and challenged the existing culture of the planning profession. These tensions remain to this day.

Planning requires councils and central government agencies to draw on a wide range of disciplines including engineering, economics, natural sciences, sociology and Māori studies. There are capability gaps within the planning system – particularly in the areas of economics and environmental science. In addition, there is a scarcity of critical assessment skills within New Zealand planning profession.

Chapter 14 explores in more detail how planning culture and capability have contributed to the Resource Management Act failing to achieve its potential. It also examines the culture and capability needs of a future planning system.

## 5.6 Communication and engagement

Effective communication helps ensure the legitimacy of regulatory and policy actions. Local councils face a number of statutory obligations to consult and engage with their communities when making decisions on plans and, in some cases, on individual development proposals. Statutory consultation requirements differ somewhat between the main planning Acts. These differences create costs, duplication and delay for councils. Council engagement processes often do not gain representative input from the community.

### Requirements for engaging with the community

Expectations of community participation in local affairs have been increasing since the 1970s (NZPC, 2015a), and both the RMA and LGA place a heavy weight on public consultation. The RMA was designed on the basis of "[o]pen public participation with no restrictions on standing" (Gow, 2014). Schedule 1 of the Act (see Figure 5.4) requires councils to:

- notify proposed new Plans or changes to existing Plans to the general public;
- receive and summarise submissions from the public;
- invite further submissions;
- hold public hearings; and
- consult with Ministers and iwi in the development of RMA Plans.

As noted earlier, if a local authority considers that a development proposal could have more than minor effects on the environment, then the resource consent application will be notified.

The LGA imposes general obligations on councils to take the views of their communities into account, reflecting the RMA's goal of promoting "the accountability of local authorities to their communities" (section 3(c)). Consultation on decisions must follow statutory principles (Box 5.4), and must provide opportunities for Māori to contribute to decision-making processes. The Act also lays down particular requirements for the content of public consultation documents on Annual Plans and Long-Term Plans.

Box 5.4 **The Local Government Act consultation principles**

- that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons,
- that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority,
- that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented,
- that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons,
- that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration,
- that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory material relating to the decisions, which may include, for example, reports relating to the matter that were considered before the decisions were made.

*Source*: LGA 2002, section 82(1).

## Effectiveness of engagement

The legislative goals are to encourage broad public participation in planning. Even so, engagement and decision-making processes are open to capture and can discourage some groups from getting involved.

In its *Using Land for Housing* report, the Commission found that homeowners were more likely to participate in political and planning processes, and that their influence promotes decisions that reduce the supply of development capacity for housing. Existing homeowners also have a disproportionate influence in the policy and political processes, and tend to be the dominant voters in local body elections (NZPC, 2015a). Nunns' (2016) comparison of the age, gender and ethnicity of submitters on Auckland's 2015–2025 Long-term Plan with the demographics of all Auckland residents confirms that younger age groups were significantly underrepresented. The age profile of submitters was almost the inverse of the age profile of the overall population of Auckland (Table 5.2).

Others have raised concerns about the accessibility and openness of local authority decision-making processes:

> The complexity of the RMA and the cost of engaging experts to buttress one's position makes it more difficult for individuals to compete with corporate entities, and is a barrier to community participation – individual community members regularly represent themselves at hearings or build a case off the information and evidence provided by councils. On the other hand, vested interests – including individual community members with NIMBY and BANANA attitudes[40] – have disproportionate power and too much scope to limit competition or thwart rezoning and development that would be in the wider public interest. (LGNZ, 2015a, p. 28)

NZCID (2015a), in reviewing the three main planning statutes, concluded that

[40] NIMBY stands for "Not in my back yard"; BANANA stands for "Build Absolutely Nothing Anywhere Near Anyone".

typically engagement models are based on the rigid statutorily defined special consultative procedure, which, instead of encouraging proactive solutions to contentious issues, engenders antagonism and division. (p. 36)

**Table 5.2 Demographics of submitters on the Auckland 2015–2025 Long-term Plan**

| Demographic Category | Proportion of submitters | Proportion of Auckland residents | Degree of over-or-under representation | |
|---|---|---|---|---|
| Gender | | | | |
| Male | 61.9% | 48.6% | Overrepresented by: | 27% |
| Female | 38.1% | 51.4% | Underrepresented by: | -26% |
| Ethnicity | | | | |
| Kiwi (or New Zealander) | 3.9% | 1.0% | Overrepresented by: | 287% |
| European | 80.2% | 53.5% | Overrepresented by: | 50% |
| Māori | 3.7% | 9.7% | Underrepresented by: | -62% |
| Pacific | 2.6% | 13.2% | Underrepresented by: | -81% |
| Asian | 5.7% | 20.8% | Underrepresented by: | -73% |
| African/Middle Eastern/ Latin America | 0.7% | 1.7% | Underrepresented by: | -58% |
| Other | 3.2% | 0.1% | Overrepresented by: | 6324% |
| Age | | | | |
| <15 | 0.2% | 20.9% | Underrepresented by: | -99% |
| 15-24 | 4.2% | 14.9% | Underrepresented by: | -72% |
| 25-34 | 12.5% | 14.0% | Underrepresented by: | -11% |
| 35-44 | 17.8% | 14.3% | Overrepresented by: | 25% |
| 45-54 | 19.1% | 14.0% | Overrepresented by: | 37% |
| 55-64 | 18.4% | 10.4% | Overrepresented by: | 77% |
| 65-74 | 19.0% | 6.7% | Overrepresented: by: | 182% |
| 75+ | 8.8% | 4.8% | Overrepresented by: | 84% |

*Source*: Nunns (2016).

Different consultation processes and requirements within the planning system – and in particular between the RMA and the other two statutes – create the potential for duplication of effort. Local authority submitters to the *Using Land for Housing* inquiry emphasised this:

> As the law stands, even though a spatial plan goes through considerable consultation with the community, the RMA requires a separate consultation process to embed it into a statutory plan developed under the RMA, and includes possible appeal to the Environment Court. (Greater Wellington, Using Land for Housing sub. 38, p. 3)

> Even though a spatial plan goes through considerable consultation with the community, the RMA requires a separate consultation process to embed it into a statutory plan. (Selwyn District Council, Using Land for Housing sub. 45, p. 14)

> An important aspect of planning for future housing supply needs in Hamilton has occurred through the Future Proof strategy and the Hamilton Urban Growth Strategy. The development of these strategies occurred under the Local Government Act 2002 special consultative procedures. However, in order to embed these into RMA documents to give the strategies sufficient statutory weight, further processes such as a Regional Policy statement Review, district plan changes/variations and reviews, have been undertaken. These have taken around 5 years in total to date and some of the processes are still not complete. (Hamilton City Council, Using Land for Housing sub. 70, p. 14)

Chapter 8 explores how to improve consultation in a future planning system.

## 5.7 Ensuring the principles of the Treaty of Waitangi are taken into account

The Treaty of Waitangi is an integral part of New Zealand's constitutional fabric, and the rights and obligations that it creates need to be reflected accordingly in regulatory and policy systems. This is particularly the case with the planning system, where decisions over land and other natural resources can touch on Article 2 rights and obligations. All three planning statutes refer to the Treaty, and require councils to take steps to enable Māori to participate in making decisions. However, councils have performed these obligations to varying extents. Chapter 7 explores in more detail the performance of the current planning system in reflecting Treaty obligations.

## 5.8 Effective approaches to keeping regulation and policy up to date

It is important to review regulation and policy regularly, to ensure that they are still needed and fit for purpose. The LGA and RMA include requirements on councils to assess whether their proposed policies or regulations would be efficient and effective, and the RMA obliges councils to monitor the effectiveness of their plans. However, these checks and balances have had disappointing effects.

### Statutory obligations on councils

Planning statutes impose a number of obligations on councils to ensure that their policies and regulations are necessary, efficient and effective. The LGA requires local authorities, in making decisions, to:

> (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
>
> (b) assess the options in terms of their advantages and disadvantages; and
>
> (c) if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga. (section 77, LGA)

In meeting these obligations, councils have discretion over the depth of analysis and quantification. The depth should be "largely in proportion to the significance of the matters affected by the decision", and in line with the council's significance and engagement policy (section 79, LGA).

Section 32 of the RMA requires councils to prepare and publish an evaluation report for any "proposal", which is defined as "a proposed standard, statement, regulation, plan, or change". An evaluation report should "contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal". Aside from this, it must:

> (a) examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of this Act; and
>
> (b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—
>
> (i) identifying other reasonably practicable options for achieving the objectives; and
>
> (ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and
>
> (iii) summarising the reasons for deciding on the provisions. (section 32(1))

The RMA also obliges local authorities to monitor:

- a number of outcomes and activities, including the state of the environment;
- the exercise of any delegated or transferred powers, functions and duties;

- the exercise of resource consents granted, and "the efficiency and effectiveness of policies, rules, or other methods in its policy statement or its plan" (section 35(2)(b)).

## Effectiveness of evaluation, monitoring and review

In its previous inquiries, the Commission has identified a number of weaknesses in the implementation of these checks (such as provided by evaluation reports) on local government regulatory and policy action. Other parties have also raised questions about the rigour and impact of council monitoring processes.

In its local government regulatory inquiry, the Commission noted that "considerable room for improvement" existed in areas of local government decision making (2013, p. 77). Particular areas of weakness were:

- insufficient tailoring of regulatory objectives to local conditions;
- consideration of few options;
- a tendency to assess alternative options with the same broad characteristics;
- insufficient analysis of options against stated objectives; and
- poor implementation analysis.

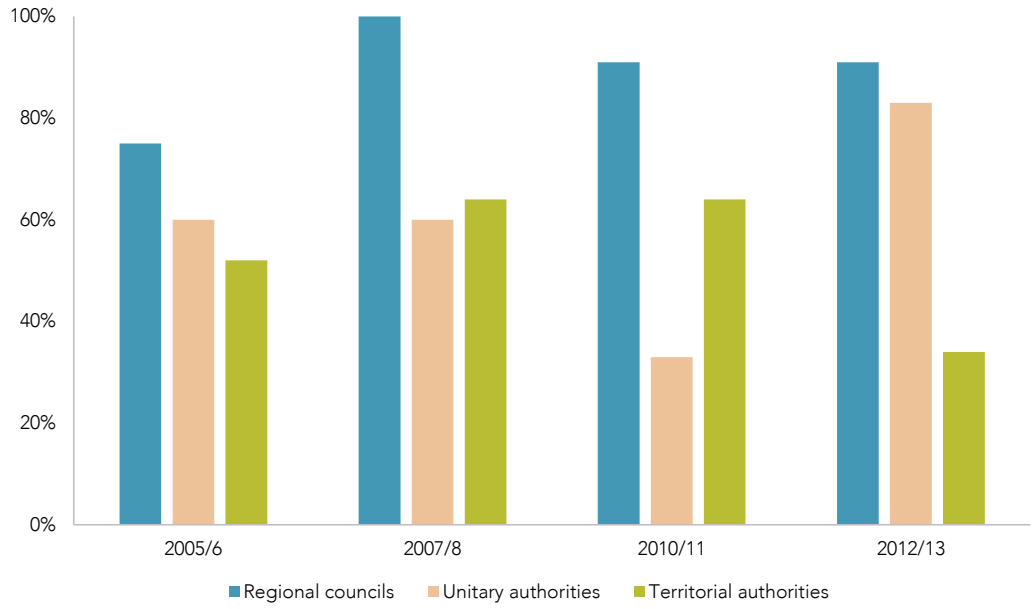
The Commission also observed:

- a "low level of prioritisation of monitoring and enforcement resources based on risks" (p. 79);
- inappropriate involvement by elected officers in decisions about investigations and prosecutions;
- inadequate feedback loops;
- a lack of balance in what is measured; and
- insufficient assessment of performance information.

Similarly, in its *Using land for housing* inquiry, the Commission identified a number of land-use regulations in district plans whose costs likely exceeded their benefits. It identified other land-use regulations that could provide net benefits, but which were not well-designed. The key sources of unnecessary regulatory costs were multiple or conflicting objectives in district plans, inadequate analysis before rules are introduced, and poor overlaps with other regulatory frameworks (especially the Building Act) (NZPC, 2015a).

Other reports have echoed these findings. Dormer (1994) highlighted problems with section 32 analyses only a few years after the RMA was introduced. The Urban Technical Advisory Group (2010) concluded that "s.32 has not proven to be an effective check on interventions that intentionally or otherwise result in a rise in the price of housing" (p. 30). Crawford (2007) noted that "many councils are reluctant to fund research and monitoring" of plans, and that few councils have provided resources for non-regulatory planning methods (p. 217). Ericksen et al.'s review (2003) of the introduction of the RMA highlighted the generally poor quality of data underpinning district plans and regional policy statements, and the resulting "lacklustre scores" for plan monitoring efforts (p. 290). MfE surveys of local authorities show variable levels of monitoring (Figure 5.10).

**Figure 5.10 Percentage of councils monitoring effectiveness and efficiency of plans and policy statements**




*Source:* MfE (2009c, 2011, 2014a).

*Note:*

1. The 2005/06, 2007/08, and 2010/11 results are councils reporting that they had monitored their plans/policy statements. The 2012/13 results are for councils that had monitored and reported on their plans, policy statements, or both.

**F5.6** Although local authorities are required to ensure that their plans, policies and regulations are necessary, efficient and effective, their use of these checks and balances has been disappointing.

## 5.9 Monitoring, leadership and management from the centre

Successful regulatory systems and institutions require strong monitoring and oversight arrangements and effective leadership from the centre of government (NZPC, 2014b). Until recently, central government's management of the planning system has been weak. Its current ability to monitor the performance of the system varies, depending on the statute. Since about the end of the last decade, central government has taken a more active and directive role, including through legislative amendments that have strengthened central intervention powers and limited council discretion.

In *Towards better local regulation* (2013), the Commission concluded that central government's relationship with local authorities over regulatory regimes has often been poor. Key problems identified were:

- limited analysis of local government's capability or capacity to implement regulations before allocating additional regulatory functions;
- inadequate knowledge by central government agencies about the local government sector; and
- poor engagement with local government during the design of new regulations.

Similar issues are apparent in the management and operation of the planning system. Until recently, central government has played a relatively weak role in planning compared with other countries. The Urban Technical Advisory Group (2010) concluded that:

> central government is much less involved in planning for our cities (or indeed planning for anywhere) than is common overseas… Another way of putting the same proposition is that New Zealand has an extremely devolved planning/land and resource use regulation system: more so than any of the

> countries with which we commonly compare ourselves. This devolved system, combined with the multitude of local authorities in New Zealand, means there are many inefficiencies that arise. (pp. 10–11)

A lack of central government leadership in the early years of the RMA's implementation is a particular point of criticism. Palmer (2015a) argued that the absence of guidance through NPSs or NESs contributed to unnecessary pain:

> Much trouble and expense for many people could have been avoided had more extensive use been made of these instruments. Central government failed to do the work and 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. (p. 16)

Miller (2011), who was a planning professional during the Act's implementation, observed that the Ministry for the Environment

> was slow to provide any practical assistance to regional and city/district councils on how to interpret the new sustainable management mandate and most importantly how to translate it into the new effects-based plans that the minister in particular emphasised were the true practical embodiment of the act. Essentially, the lower levels of the planning mandate were left to 'learn by doing', which inevitably ensured that everyone learned at least a slightly different lesson. (p. 167)

Ericksen et al. (2003) point to the small size of the Ministry for the Environment in the early 1990s, the tight fiscal constraints under which it operated, and the limited funding available for the Act's implementation. The Planning Tribunal (later renamed the Environment Court) saw its caseload quadruple between 1992 and 2001, contributing to significant delays in the development and roll-out of district and regional plans (OECD, 2007). Simon Upton, Environment Minister during the passage and implementation of the RMA, later said that the Government had been "slow in its provision of guidelines to assist councils, staff, applicants, consultants et al in determining the type of information required, how much is needed and how it should be evaluated" (1999).

Because of central government's limited involvement, many councils in the early years of the RMA faced significant challenges in meeting their obligations.

> Some four years after the RMA became law, serious conflicts were emerging in some local councils, such as over seeking to recognize and protect significant indigenous flora and fauna and outstanding landscapes in new plans. In part this was due to four interrelated problems. First, there was an inadequate appreciation of what and how much to protect, and why, as there were no national policy statements to guide councils in their thinking about these matters, just phrases in the Act. Second, the methods by which natural areas should be identified for protection were flawed. No specific methods were provided by central government to guide local councils. Instead, councils searched the literature or employed consultants to devise their own, or pleaded with the under-resourced DoC for help. Sometimes others told them that they had it wrong when their proposed plans were reviewed. Third, there were limited options for protecting these important areas. A regulatory approach combined with the lack of funds for adequate research and consultation too often resulted in a backlash from property-owners to the notified plans because they would be carrying the costs…Fourth, there was no case law for guiding actions. (Ericksen et al., 2003, p. 70)

The absence of central government also left space for local interests to gain a disproportionate influence over local plans. Gow (2014) commented that in some cases, "devolution has resulted in local interests having an unacceptable dominance, leading to poor decisions; in other cases political differences and inertia have led to insufficient change" (p. 7).

Ngā Aho and Papa Pounamu (2016b) note that recognition of Māori kaupapa in planning, and of Māori values, rights and interests has been uneven across local authorities. Greater central government leadership on the Treaty obligations of local authorities would likely have "levelled up" practice in areas that were falling short. (Chapter 7) They also note the complexities and costs for Māori communities to engage in planning processes that vary across the country (pp. 37-38).

Central government's current ability to monitor the performance of the planning system varies, depending on the statute. At least until the NPS-UDC came into effect in late 2016, the urban outcomes desired from the RMA lacked specificity.

For the LGA, the increased focus on 'core services' in recent years has led to the development of a suite of non-financial performance benchmarks, providing comparable data on delivery of key services by local authorities (Table 5.3). Councils will report against the benchmarks for the first time in their 2015/2016 annual reports. It is unclear how the Government will use this data to inform its involvement in the planning system.

**Table 5.3 Local authority non-financial performance measures**

| Water supply | Sewerage and the treatment & disposal of sewage | Stormwater drainage | Flood protection & control works | The provision of roads & footpaths |
|---|---|---|---|---|
| • Safety of drinking water<br>• Maintenance of the reticulation network<br>• Fault response times<br>• Customer satisfaction<br>• Demand management | • System and adequacy<br>• Discharge compliance<br>• Fault response times<br>• Customer satisfaction | • System and adequacy<br>• Discharge compliance<br>• Response times<br>• Customer satisfaction | • System adequacy and maintenance | • Road safety<br>• Road condition<br>• Road maintenance<br>• Footpaths<br>• Response to service requests |

*Source:* Department of Internal Affairs (DIA), 2013.

As noted earlier, councils must also report against financial prudence measures. According to the Department of Internal Affairs (DIA), information from these measures will

> assist the Minister of Local Government to determine whether, in the case of any particular local authority, financial management problems are such that the Minister should initiate any of the assistance and intervention options in the Local Government Act 2002. (DIA, 2013)

Monitoring and evaluation is most sophisticated through the LTMA, where the Government regularly expresses clear objectives for the land transport system through its GPS. NZTA and the Ministry of Transport collect data on a number of indicators and use these to inform investment decisions and the development of future GPSs.

For the RMA, the MfE has recently introduced a National Monitoring System, which collects detailed information on the inputs and timeframes involved in producing plans, assessing resource consent applications, and monitoring and enforcement. The Ministry has also recently published a statement of its long-term environmental goals. While many of the goals and targets expressed for the natural environment are clear and measurable, the goals for the urban environment are much less specific:

> Urban: our vision is that New Zealand is a leader of environmentally sustainable cities, leveraging the benefits that cities offer while reducing the costs and impacts that they impose
>
> Long-term outcomes: the use of the environment, including natural resources, is optimised for the betterment of society and the economy, now and over time
>
> Long-term targets: urban environments maximise social, cultural and economic exchange
>
> Intermediate outcomes: urban form supports liveable, connected and productive urban environments that are adaptable to changing needs
>
> Intermediate targets:
>
> - 2020: Frameworks are in place to support development of resilient, multi-functional and adaptive urban environments including infrastructure
> - 2030: Urban environments are developed through coordinated urban and infrastructure planning (MfE, 2015b)

**F5.7** Apart from land transport, central government has, until very recently, played a relatively weak role in leading and managing the planning system.

## Processes to align local and national interests

Planning decisions in most countries occur at a local level, reflecting the fact that this is where most of the information needed to make decisions lies and where most of the costs and benefits of these decisions are borne. However, as noted in Chapter 6, decisions taken locally can have effects felt much further afield, creating costs and residual risks that have to be borne by central government (eg, health and accommodation expenses). Planning systems need to ensure that local and national interests are aligned.

In other comparable systems; higher-level governments (states, territories or provinces in Australia, Canada and some parts of the United States; central government in England and Wales) play a more active and regular role in the oversight and operation of planning systems.

Central government in New Zealand currently lacks:

- a significant planning capability of its own;
- the systems needed to support well-informed and timely intervention in plan-making processes, or effective engagement with local authorities over the wider impacts and suitability of their proposed land-use rules and policies[41]; or
- a clear leader or contact point on planning issues, meaning that local authorities can face difficulties obtaining a coherent central government view.

These deficiencies indicate that central government needs to improve its performance as a regulatory steward of the planning system (Chapter 13).

**F5.8** Central government lacks the capability and systems needed to support timely and well-informed intervention on issues and wider impacts of local land-use regulation, or effective engagement with local authorities on planning issues.

## Tighter central control over local government, and reduced local discretion

Decision rights and responsibilities in New Zealand's planning systems have been progressively devolved to local authorities. (NZPC, 2015a) In recent years, however, the policy pendulum has swung away from this trend towards greater devolution, with central government increasingly setting standards and controls over local government planning processes. This is noticeable in a number of amendments to the LGA and RMA. In addition to the amendments to the purposes of the LGA 2002 discussed earlier, these amendments have increased Ministerial powers, council reporting requirements and individual rights to object:

- Ministerial powers to intervene in councils (eg, through appointing Crown review teams, Crown observers, Crown managers or Commissions or calling elections) were strengthened through 2012 changes to the LGA.

[41] NZTA (and its predecessor agencies) has been active in local planning processes for some time, but has focused primarily on transport issues rather than wider regulatory matters about land use. Other Crown delivery agents (eg, Housing New Zealand Corporation) also regularly submit on District Plans. At a policy level, MfE has submitted on the specific issue of genetically modified organisms in the case of the Hastings, Far North and Whangarei District Plans (MfE, pers. comm.). The Department of Conservation also submits on issues related to conservation, many of which are dealt with at a regional level (rather than by territorial authorities).

- Amendments in 2014 required local authorities to prepare 30-year infrastructure strategies (discussed in section 5.2 above), and required councils to report in their Annual Plans, Annual Reports and Long-Term Plans on their planned and actual performance against a set of financial prudence benchmarks.[42]
- Finally, amendments in 2014 enabled developers and other interested parties to object to the "assessed amount of development contribution" that their council required. Independent development contributions commissioners would hear the objections.

Similar trends towards greater central control and less local discretion can be observed for the RMA, where successive amendments have increased Ministerial control, removed some decisions from councils, and introduced greater standardisation:

- Amendments in 2005 created a new power for the Minister for the Environment to direct plan changes. This power was expanded in 2009 to allow the Minister to direct councils to review their plans.
- Amendments in 2009 mandated "changes to the protection for trees in all district plans nationwide – preventing councils from making general rules to protect trees or groups of trees in an urban environment" (G. Palmer, 2013a, p. 24).
- Amendments in 2009 also obliged councils to offer discounts for late consent decisions, where the local authority was at fault.
- As discussed earlier, changes to the RMA in 2009 created the power for the Minister to refer nationally significant proposals for decision to a board of inquiry or the Environment Court, and "significantly extended" the list of matters that a Minister could "call in" (G. Palmer, 2013a, p. 26).
- Changes to the law in 2013 altered the factors that councils must consider when conducting section 32 analyses to include the "opportunities for (i) economic growth that are anticipated to be provided or reduced; and (ii) employment that are anticipated to be provided or reduced"[43].
- The Housing Accords and Special Housing Areas Act 2013 created the power for the Governor-General to designate regions or districts experiencing significant housing supply or affordability issues. Once designated, the Minister can negotiate with the relevant territorial authority to establish a Housing Accord, which is an agreement for central and local government to work together to make housing more affordable by increasing land or housing supply. Where a district or region has been designated, a Special Housing Area may be established, enabling faster and more permissive resource consenting processes and more limited notification of development.[44]

**F5.9**

After decades of greater devolution of planning powers to local government, recent developments have seen a trend towards central control.

- Amendments to the Local Government Act have narrowed the purpose of local government, introduced more planning requirements, imposed standardised reporting obligations on councils, and given central government more powers to intervene.
- Amendments to the Resource Management Act have increased Ministerial powers to direct changes to plans, removed some decisions from councils, and increased the expectations for regulatory analysis.

[42] The financial prudence benchmarks cover rates affordability, debt affordability, balanced budgets, essential services, debt servicing, debt control, and operations control.

[43] Section 32(2((a)(i) and (ii).

[44] Where a Housing Accord is in place, the relevant council must approve the establishment of any Special Housing Area.

## Legislative exceptions to the planning system that are specific to a region

Another notable recent trend has been legislative exceptions to the main planning system to meet the governance needs or challenges of particular areas.

The first area to see exceptions from the planning system was Auckland. The scale and complexity of Auckland, its rapid growth, and the large number of local authorities in the region raised questions during the 1990s and 2000s about the need for more effective coordination. As the Royal Commission on Auckland Governance commented:

> Auckland remained bedevilled by the problem of complex governance that failed to deliver progressive and necessary solutions to infrastructure issues, particularly transport. As the population continued its runaway growth, the region faced increasing challenges in ensuring areas such as public transport, affordable housing, and urban growth kept up with demand. (2009a, p. 130)

In response to the calls for greater coordination, the LGA and RMA were amended in 2004 to "promote increased integration of decision making in respect of Auckland land transport" (explanatory note, Local Government (Auckland) Amendment Bill). A new council controlled organisation – the Auckland Regional Transport Authority – was established to carry out the planning, funding and development of land transport. The 2004 amendments also gave legislative weight to the Auckland Regional Growth Strategy (ARGS), a growth management plan prepared under the 1974 LGA, requiring all councils within the Auckland region to change their RMA Plans to give effect to the Growth Strategy. The ARGS sought to prevent Auckland's expansion and better integrate transport and land use decisions. The 2004 amendments prevented the Environment Court or councils from making changes to RMA Plans that would extend the city's metropolitan urban limit without the approval of the Auckland Regional Council.

Ongoing concerns about the performance of New Zealand's largest city led to the establishment of a Royal Commission on Auckland Governance. The Commission recommended, among other things, establishing a single unitary authority to replace the Auckland Regional Council and the seven territorial authorities. A new government took up many of the Royal Commission's recommendations, successively amending the LGA and other planning statutes between 2009 and 2013 to:

- establish the new Auckland Council;
- arrange for the transition from the legacy councils to the new authority; and
- make provision for new planning tools and processes.

The planning institutions and arrangements for Auckland differed in a number of ways from those in place elsewhere in New Zealand.

- The new council would be required to prepare a spatial plan (later named the Auckland Plan) to:
    - set a strategic direction for Auckland and its communities that integrates social, economic, environmental, and cultural objectives; and
    - outline a high-level development strategy that will achieve that direction and those objectives; and
    - enable coherent and co-ordinated decision making by the Auckland Council (as the spatial planning agency) and other parties to determine the future location and timing of critical infrastructure, services, and investment within Auckland in accordance with the strategy; and
    - provide a basis for aligning the implementation plans, regulatory plans, and funding programmes of the Auckland Council. (section 79(3), Local Government (Auckland Council) Act 2009)
- Auckland Council was required to maintain council controlled organisations to provide water and transport services, as opposed to having the options to provide these in-house.[45]
- The new Council was required, at least in its initial year, to adopt a capital value rating system.

[45] Statute prevented the Council from disestablishing Watercare Services as a council controlled organisation until 30 June 2015.

- A council-controlled organisation (Auckland Transport) rather than a committee would carry out the regional land transport planning role.
- An Independent Māori Statutory Board was established to assist the Auckland Council by promoting issues of significance to Māori and ensuring that the Council meets its Treaty of Waitangi obligations (see Chapter 7 for more details).
- The new council was required to prepare a new Unitary Plan, to replace the District Plans, Regional Plans and RPS of its predecessor councils. The new Unitary Plan would be prepared under a streamlined process, and an IHP (appointed by the Minister for the Environment and Minister of Conservation) would review the Plan (see Box 5.2). The IHP would, within timeframes set by statute, make recommendations to the Council on changes to the Unitary Plan. The Council would be required to respond to those recommendations within 20 working days.[46]

In Canterbury, concerns about governance at the regional council led the Government to seek special legislation under urgency in 2010 to replace elected councillors with commissioners, cancel the 2010 election, give the commissioners additional powers,[47] and limit appeals on the commissioners' decisions on plans to points of law. The intervention followed a damning independent review of the council's management of the region's freshwater, and concerns about the council's performance in processing resource consents. Special legislation was sought because of concerns that the LGA and RMA lacked sufficient powers "to enable an effective and timely response" (DIA, 2010a, p. 8).

The third area where statutory variations from the main planning system have been created is the Treaty of Waitangi settlements. Perhaps the most far-reaching of these to date has been the Waikato and Waipa river settlements, which saw the establishment of a Waikato River Authority (see Chapter 7 for more details).

The Auckland, Canterbury and Waikato innovations raise questions about the flexibility and fitness of the planning system and suggest rising doubt on the part of central government about the ability of local communities to resolve problems or identify solutions themselves. The Institute of Policy Studies argues that they also signify a growing willingness by central government to promote "what it considers national policy goals over local goals" at "the expense of local community voice" (2011, p. 225).

**F5.10** A notable recent trend has been legislative exceptions to the main planning system to meet the governance needs or challenges of particular areas (Auckland, Waikato and Canterbury), as central government has promoted national goals over local interests.

## 5.10 Increasing legislative complexity, declining coherence and accessibility

One result of rising frustration with the RMA and the performance of local government has been repeated legislative amendment, leading to increased complexity. This has implications for the ability of councils to manage the system and the quality of its outcomes.

The RMA in particular has been amended extensively. As Palmer (2015a) notes, the RMA "occupied 382 pages of statute book when it was passed in 1991. The April 2014 reprint had 827 pages. The September 2015 reprint has 682 pages. So at present the Act is exactly 300 pages longer than when it began" (p. 6). Chief Justice Sian Elias observed of the RMA in 2013:

> If revisiting the suggestion that the Resource Management Act was "overambitious", today it would not perhaps be necessary to go beyond pointing to volume 41 of the Bound Reprinted Statutes. The Act takes up almost the entire volume and the section numbers have been obliged by amendment to adopt the sort of alphabet soup consistency of the technical and turgid Income Tax Act 2007. So, for example, s 165ZFG is obliged to cross-refer to s 165ZFF. As if 433 sections is not long enough, important

[46] Provision was made for the Council to seek an extension of a further 20 working days.

[47] These additional powers include the ability to impose a moratorium on the issue of further water take and discharge consents.

> procedural provisions and references to other legislative provisions are contained in a further 12 schedules. (pp. 1–2)

The length and complexity has implications for the public to understand the law. Justice Elias continues:

> The complexity in the Income Tax Act is understandable. It is a technical Act dealing with a wholly artificial universe constructed by law. But the Resource Management Act is an Act that affects people and their aspirations in the real world. It is a framework of values for practical living and for the management of disagreements about the physical environment. It is meant to engage communities, not alienate them. So impenetrability and complexity in this statute is not a good thing. (2013, p. 2)

Many believe that this continual change has led to legislative frameworks that are neither coherent nor easy to implement (Box 5.5).

Box 5.5 **Views on the impact of continued reform to planning statutes**

> Over the past few decades, the resource management system has evolved through new legislation, institutions, and multiple amendments to address new and emerging issues. However, when the system is viewed as a 'whole', this evolution has resulted in inconsistencies and misalignment between core legislative frameworks… Fundamentally, the problem with reforms to date is that they have avoided the difficult, publicly contentious structural issues at the heart of domestic governance and resource management. With the exception of the reform of Auckland governance, none of these, nor any other, responses address underlying structural anomalies in the overall domestic governance and planning system. (NZCID, 2015a, p. 44)
>
> …there have been too many piece meal changes responding to one off issues, and this has led to a weighty and somewhat cumbersome legislative package. (Gow, 2014, p. 12)
>
> 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 whereby the statutes lose both their principles and their coherence...What results is legislation of lower quality than is optimal. (Palmer, 2015a, p. 6)
>
> Reform itself has become the norm. This creates major difficulties for councils' planning and delivery of long-run infrastructural services as the willingness of successive Parliaments to amend their governing legislation can only result in an unstable and uncertain environment. (Reid, 2010, p. 68)
>
> The constant amending of the [Resource Management] act has left it as a disjointed patchwork that needs to be replaced. (Associate Professor Caroline Miller, sub. 50, p. 9)
>
> …substantial reforms have been advanced without the benefit of robust and reliable information on system performance. It is arguable that this has led to a series of changes that address symptoms rather than root causes or part of the problem, but not the whole. Similarly, changes have potentially addressed one issue, but created another or shifted a problem from one part of the system to another. (LGNZ, 2015a, p. 23)

**F5.11** Continual reform of the planning statutes has increased their complexity, reduced the coherence of the legislative frameworks, and made it harder for councils to implement the planning system and for the general public to participate in it.

## 5.11 Conclusion

When assessed against principles of good regulatory practice, a number of weaknesses are noticeable in New Zealand's current planning system. These weaknesses include:

- unclear purposes;
- funding difficulties (especially for infrastructure);
- variable public engagement processes;
- poor mechanisms for keeping regulation and policy up to date; and
- weak leadership from central government in several areas of the planning system.

As a result of these weaknesses, recent years have seen:

- rising frustration with the RMA;
- increasing central control;
- a reduction in local discretion; and
- the emergence of regionally-specific exemptions from the planning system.

Multiple amendments to the underlying planning statutes have increased complexity and reduced legislative coherence, making it harder for the public to understand the laws and for councils to implement them. The repeated use of legislative amendments and overrides also signal that the main planning system has struggled to deal with pressure. This growing complexity, deteriorating coherence and rising pressure sets the scene for the Commission's current inquiry.