ISSUES AND OPTIONS PAPER

TRANSFORMING THE RESOURCE MANAGEMENT SYSTEM - OPPORTUNITIES FOR CHANGE

TO: The Resource Management Review Panel (by email: rmreview@mfe.govt.nz)

Submission on behalf of the

Resource Management Law Association of New Zealand Inc

Introduction

1. This Submission is made by the Resource Management Law Association of New Zealand Inc (RMLA).

2. The RMLA is concerned to promote within New Zealand:
   b. Excellence in resource management policy and practice
   c. Resource management processes which are legally sound, effective and efficient and which produce high quality environmental outcomes.

3. The RMLA has a mixed membership. Members include lawyers, planners, judges, environmental consultants, environmental engineers, local authority officers and councillors, central government policy analysts, industry representatives and others.
Currently the Association has some 1,100 plus members. Within such an organisation there are inevitably a divergent range of interests in views of members.

4. While the membership has been consulted in preparing this submission, it is not possible for the RMLA to form a single universally accepted view on the Review Panel’s Issues and Options Paper (IOP). It should also be noted that a number of members may be providing their own individual feedback and those may represent quite different approaches to the views expressed here.

5. For these reasons, this submission does not seek to advance any particular policy position in respect of the issues raised in the IOP. Rather, the submission provides high level comments (grouped by topic) on key matters raised by the IOP. These comments are largely based on feedback received from the RMLA’s regional committees, following their discussions with members regarding the IOP.

6. It is hoped that the Panel finds these comments both constructive and of assistance. The RMLA is grateful for the opportunities it has had to engage with the Panel regarding the reform process to date. Members of the Executive would also be available to discuss the matters raised in this submission with the Panel further, if that is useful and the Panel’s timeframes permit.

**SUBMISSION**

7. The RMLA supports the need for a comprehensive review of the resource management system in accordance with the Panel’s Terms of Reference (ToR). As outlined in its submission on the draft ToR, the RMLA also supports the stated aim of this review, being to improve environmental outcomes and enable better and timely urban development within environmental limits.

8. Further to that general position and having regard to the feedback received from its members, the RMLA wishes to comment on the following key topics raised by the IOP in more detail:

   a. The need for separate environmental and planning statutes (Issue 1: Legislative Architecture).

   b. Better recognition of built environment and economic issues under the RMA (Issue 2: Purpose and principles of the RMA).

   c. The role of spatial planning in a future resource management system (Issue 4: Strategic integration across the resource management system).

   d. Addressing climate change mitigation and adaptation under the RMA (Issue 5: Addressing climate change and natural hazards)
e. Improving plan making (Issue 7: Policy and planning framework).

f. Improving the consenting process (Issue 8: Consents/Approvals).

9. Given the nature of the feedback received from members, the submission is arranged in accordance with those topics, rather than addressing the specific questions contained in the IOP. However, for each topic, we have also identified (as per the material in brackets for each item in paragraph 8 above) the most relevant “Issue” from the list of issues contained in the IOP.

10. RMLA has chosen to focus on topics raising issues which, as an organisation of resource management practitioners, it has practical experience with. The provision of a selective response should not be taken to suggest that the other issues raised in the IOP are not considered relevant by RMLA members.

The need for separate environmental and planning statutes (Issue 1: Legislative Architecture)

11. The RMLA agrees that given the RMA’s identified failure to achieve its intended environmental outcomes, it is both appropriate and necessary for the Panel to consider whether the legislative architecture of the resource management system should be changed. This includes whether the system should now comprise separate environmental management and land use planning statutes.

12. That said, as outlined in the RMLA’s submission on the ToR, previous inquiries (including by the Productivity Commission, Environmental Defence Society and Local Government New Zealand) have all identified that the RMA’s failings are not primarily due to the structure of or integrated approach taken in the RMA. Rather, they have largely been caused by implementation issues, arising at least in part as a result of:

   a. The culture and capability of the local authorities and other institutions charged with implementing the RMA; and

   b. The inadequate (both in terms of quantity and quality) provision of national direction that has been issued by central government under the RMA.

13. Such issues will not be addressed by legislative amendments alone. To the contrary, providing a radically different (and separated) regulatory regime for the resource management system will likely only further exacerbate such problems, especially those around institutional culture and capability. In particular, it will unavoidably introduce significant complexity and confusion as to how the new framework should be interpreted and applied in practice, which would affect all those involved with the resource management system.
14. On balance, the RMLA considers that there were compelling reasons why an integrated approach was adopted under the RMA. Those reasons remain equally valid and relevant today. In particular, this approach recognises that land use and natural resource planning issues are often inextricably linked and so are best addressed in a holistic manner. Further, based on the extensive body of work undertaken to date (as well as the experience of RMLA members), none of the Act’s identified failings present a justifiable case for, or will be answered by, reverting to the former situation of having multiple segregated statutes.

15. There are also a range of issues with how a fragmented regulatory regime would work in practice, including the following:

   a. Would consent be required under multiple pieces of legislation? If so, would you need to obtain consent under one statute before seeking subsequent consents, or could all consents be sought contemporaneously?

   b. What are the respective roles of regional councils and territorial authorities under this new regime?

   c. What is the relative priority/hierarchy between the separate statutes in various circumstances, and how would this be determined? For example, environmental issues will always be relevant to urban planning – so how would they be required to be taken into account under the planning statute?

16. For the above reasons, the RMLA’s preference is for the status quo approach to be retained, with a “refreshed RMA” continuing to address both environmental management and land use planning. This should be coupled with the introduction of enhanced principles (likely under Part 2 of the Act) for land use and environmental management, as well as better integration with related legislation such as the Local Government Acts and Land Transport Management Act 2003.

17. Alternatively (although not preferred), if there were to be separate environmental and planning statutes, these should be combined with an overarching statute which addresses the prioritisation and logistical/practical issues identified above.

18. Finally, it is also important that whatever its architecture, the new regulatory framework should not be heavily orientated towards (or solely designed to address) achieving one particular objective – for example, combating housing supply and affordability. There are two key reasons for this, as follows:

   a. First, there is no credible evidence base that the RMA is the sole (or even a predominant) cause of such issues. Thus it follows that they will not necessarily be addressed by amending the RMA. At the very least, they will clearly not be resolved by amending the RMA in isolation.
b. Second, regardless of its relationship to or influence on any one single issue, the discipline of sound resource management requires a statutory framework that is broad and comprehensive. This is already reflected in the RMA’s sustainable management purpose, which requires equal consideration of economic, social, cultural and environmental wellbeings.

**Better recognition of built environment and economic issues under the RMA (Issue 2: Purpose and principles of the RMA)**

19. As noted in paragraph 16 above, the RMLA considers that if a single integrated statute is to be retained, this should be coupled with both strengthening and clarifying the statute’s principles as currently reflected in sections 6 and 7 of the RMA. In general, the RMLA considers that this is likely to be the most effective way of ensuring that any revised resource management system can achieve its intended objectives, both with respect to environmental and built environment outcomes.

20. In particular, the RMLA’s preference would be to reframe sections 6 and 7, so that they include the following:

   a. The maintenance and enhancement of the environment;

   b. Outcome (or pro-active, rather than effects based) planning for the built environment;

   c. The provision of urban development capacity and infrastructure;

   d. Direction for more comprehensive consideration of economic issues; and

   e. Providing separate statements of principles for environmental and built environment/urban issues.

21. With respect to the consideration of economic issues (paragraph 20(d) above), it is noted that there is currently often pressure to limit the scope of any “economic” assessment to mean only business and government activity, and exclude social, cultural and environmental matters. The principles of any revised statute should make clear that economic assessments should encompass social, cultural and environmental matters. This broader/comprehensive scope would be consistent with the current requirements of section 32 of the RMA. It would also be essential to complement any enhanced requirements for spatial planning, as discussed further below.

22. Further, it is also important that any amendments to the statutory framework regarding the consideration of economic issues does not risk imposing (or giving preference to) any specific economic philosophy in the resource management context. To avoid this risk, the content and methodology for preparing economic assessments should be nationally consistent and informed by a national direction on this matter. It
would also be appropriate to ensure that economic considerations are generic and comprehensive, and take account of the full range of benefits and costs to the community and biophysical environment. This is distinct from just monetary costs and returns through exchange in commercial markets, for example.

23. In terms of providing separate principles for environmental and built environment issues (paragraph 20(e) above), the RMLA has been provided with and reviewed the redrafting of section 6 of the RMA suggested by Associate Professor Ken Palmer. It is not appropriate (or possible) for the RMLA to provide detailed comment on that redrafting in this submission. However, the RMLA would be able to provide such comment to the Panel by mid-February 2020, if that would be of assistance.

The role of spatial planning in a future resource management system (Issue 4: Strategic Integration across the resource management system)

24. The RMLA generally supports greater (and more formal) use of spatial planning. It is noted that such planning has already been undertaken for many of the country’s main centres, without any formal requirement for this – for example the Auckland Plan in Auckland, FutureProof in Hamilton and SmartGrowth in the Bay of Plenty. However, there are a range of issues that would need to be addressed in this regard, including the following:

a. What is meant by spatial planning? The RMLA notes that there are differences in how this term is used and understood throughout the country. For example, in some regions, spatial planning is preceded by structure planning, whereas in other areas it is the opposite. The introduction of spatial planning should therefore be accompanied by clear definitions of the term and its overall place in the planning hierarchy, as well as clear criteria and processes by which spatial planning disciplines are to be applied, and spatial plans are to be developed.

b. Is spatial planning to be undertaken on a national, regional or local scale? In general, the RMLA considers that it is most appropriate to undertake spatial planning at a regional scale, consistent with the approach adopted in Australia (where spatial planning is generally done at a state rather than federal level). However, there are some issues (for example, the provision of nationally significant infrastructure) which may need to be addressed at a national level.

C. How are cross-boundary issues to be resolved? There may well be instances where it is necessary to provide for infrastructure (or undertake spatial planning) across regional boundaries. For example, infrastructure to address the continued population growth in/development of Auckland and Waikato. Regional council boundaries are also not necessarily aligned with those of the territorial authorities. There should be clear direction as to the process that should be followed in such circumstances.
d. How does the spatial plan fit within the planning hierarchy? It may well be appropriate, or most efficient, for the spatial plan to either be combined with (or even replace) regional policy statements. Such issues will need to be addressed when considering the appropriate hierarchy of planning instruments in the new statutory framework. However, the RMLA does not consider spatial planning should simply be inserted as a further layer within this hierarchy – RMLA supports simplification rather than expansion of the current layers, which add to planning complexity and are often repetitive.

e. Spatial planning should apply to the provision and funding of infrastructure.

f. The need for the spatial plan to be flexible and adaptable over time. For example, the RMLA suggests that the spatial plan should have a long term (30 to 50 year) vision, but be set (and unable to be reviewed) for an initial 3 or 5 year period from when it is finalised. It should then be subject to regular review and updating following that – again with a set period following each review after which it cannot be changed. It is considered such a framework provides an appropriate balance between certainty and flexibility that such a spatial plan requires.

g. Spatial planning should be seen as a tool to achieve environmental enhancement as well as provision for development. For example, it could be used to comprehensively identify areas that are protected, and which are the focus of restoration efforts. It is seldom used in rural domains at present, despite having the potential to provide significant benefits to the integrated management of land and freshwater. Spatial planning can also be highly effective in the coastal marine area.

h. How will different legislative functions be integrated. For example important matters such as nationally significant infrastructure, significant natural areas, water catchments, and iwi management boundaries are not aligned with boundaries of territorial and regional authorities.

Addressing climate change adaptation and mitigation under the RMA (Issue 5: Addressing climate change and natural hazards)

25. In general, the RMLA considers that climate change mitigation is best dealt with at the central government level, by building on the statutory and policy responses (including the Emissions Trading Scheme and Climate Change Response Act 2002) that have already been introduced in this regard. This should also be coupled with the introduction of strong national direction, for example regarding the transition to renewable energy.

26. The scale of the issue and the desire to ensure that there are as many opportunities to mitigate climate change effects as possible is understood and accepted. It is also
acknowledged that some may consider that the Government’s current response to climate change is too weak and/or too slow. RMLA did not reach agreement on whether consent authorities should be given the mandate to consider and require mitigation of climate change effects in the context of every single consent application. On one view, there could be unintended (and disproportionate) consequences from this approach and there are also already a number of other avenues (for example, the issuing of national direction) that can be used to ensure climate change mitigation is consistently implemented at a regional and / or local level.

27. On another view, climate change mitigation at the national level can only be achieved by all individual activities mitigating their emissions. In particular, there is a general concern that presently, consent authorities are unable to take into account the effect of greenhouse gas emissions from (for example) a new coal plant, when that is being consented. On balance, the RMLA considers that as a minimum, the new regulatory framework should allow councils to consider such effects when making plan rules and assessing resource consents. The current restrictions in this regard should be repealed. As with any resource management decision, climate impacts should not be the sole or determinative factor and all environmental considerations should be taken into account.

28. The RMLA considers that climate change adaptation should also be addressed in the new resource management legislative framework. In particular, there is the opportunity to use the spatial planning process for this purpose, for example by identifying future adaptation responses and funding for this. Adaptation should be applied broadly – it is not just people but also ecosystems that must be supported and enabled to adapt. This is an issue that is particularly suited to being addressed by a national spatial plan. Some RMLA members considered that any restriction on existing use rights for the purposes of climate change adaptation should also be accompanied by corresponding rights to compensation (most appropriately from a national fund, which is implemented at a local level).

Improving plan making (Issue 7: Policy and planning framework)

29. The RMLA generally supports a single stage plan making process with restricted appeal rights, such as that used for preparation of the Auckland Unitary Plan and Christchurch Replacement District Plan. That is, Independent Hearings Panels (IHP) being established to facilitate plan making, with merits appeals to the Environment Court only where the Council rejects the IHP’s recommendation. This should replace the current Schedule 1 process (i.e. there should only be the one plan making process, rather than three as there are currently), while retaining the ability to apply for private plan changes.

30. In terms of the specifics of the IHP process, the RMLA generally supports the following as being appropriate to ensure process efficiency, public participation and quality decision making:
a. Cross-examination is provided for;

b. The IHP does not reach a final decision, but makes recommendations to the initiating Council;

c. The members of the IHP are appointed jointly by central and local government, with iwi participation and include an Environment Court judge or members with analogous skills and experience as well as members with specific subject matter skills and experience; and

d. There are only restricted appeal rights to the higher courts from any High Court decision. For example, there is only a right of appeal from the High Court directly to the Supreme Court (bypassing the Court of Appeal), with leave of the High Court or Supreme Court.

31. However, the issue of timeframes also needs careful consideration in the context of this single stage process. There is a common view that the timeframes under which both the Auckland and Christchurch IHPs were conducted were unsustainable and unworkable. If the timeframes are too tight, many affected parties are unable to participate. This is primarily because they are unable to engage the necessary experts (through lack of money and/or available experts) and have insufficient time or expertise to represent themselves. This raises concerns regarding natural justice/access to justice and will (significantly) reduce community acceptance of the resulting plan.

32. Further, mediation and expert witness conferencing are valuable tools and needs to be encouraged in the context of plan making. Sufficient time therefore needs to be incorporated into the plan making process (whether utilising the IHP model or otherwise) to allow for these.

33. The RMLA also considers there is a need for greater vertical and horizontal integration across planning documents. In terms of vertical integration, there are inconsistencies (or competing objectives and policies) across national instruments that need to be rectified. In other words, national direction should actually be directive and indicate how issues are to be prioritised (for example, between providing for urban development and protecting highly productive land), when necessary.

34. Better horizontal integration can be achieved for example through the use of consistent structures and definitions. The first tranche of National Planning Standards was useful in this regard, although was perhaps overly detailed in some respects (for example, prescribing exactly which colours and fonts to use on planning maps). That said, the RMLA would generally support more national direction being provided in this regard, particularly regarding rule structure and the classification/status that should be given to particular activities.
Improving the consenting process (Issue 8: Consents/Approvals)

35. The consenting process can be improved by reducing the number of consent applications that are actually required to be made. As the IOP notes, Ministry for the Environment data shows that for 2017/18, 96% of consents were processed non-notified and 99.7% of consents were granted. It is possible that this latter figure is slightly inflated, as it does not account for applications which were lodged but then withdrawn, because the applicant became aware that the application was not going to be granted. In any event, the RMLA considers that this data indicates that planning instruments are requiring resource consent applications to be made for many proposals which should in reality be permitted and therefore not require such authorisation. This issue would at least in part be addressed by improving the quality of the plan making process (and therefore the resulting plans), as discussed above.

36. Notification is also commonly seen as a key issue within the current consenting process. While as noted, only 4% of applications (on average) are notified each year, applicants are often required to spend significant time and cost in achieving that outcome. Conversely, some decisions not to notify consent applications which appear to have major environmental effects are difficult to justify even under the current notification framework. As such, the RMLA agrees with the statement at page 39 of the IOP that “notification decisions have also become increasingly complex, time consuming and contentious”. That said, the RMLA also agrees that in the resource management context, the consenting process must provide for effective (but efficient) public participation.

37. In this regard, the RMLA considers that with respect to notification, the new regulatory framework should:

a. Require plans to specify when applications must and must not be notified. Notification decisions would then only need to be made in respect of activities that fall outside of those specific provisions.

b. Set a cap on the fees that Councils can charge for making their notification decision.

c. Simplify the criteria for making notification decisions (i.e., providing a concise set of criteria based on the proposal’s activity status and the existence of any affected parties or environmental effects, as opposed to the current two-stage, eight-step process) and provide additional statutory guidance on thresholds for notification rather than the current “more than minor” test which is highly uncertain

d. Specify the consequences if a notification decision is not made within the statutory timeframe.
e. Enable challenges to notification decisions to be heard by the Environment Court.

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

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