



# LEGISLATION DESIGN AND ADVISORY COMMITTEE

4 August 2021

Eugenie Sage  
Chairperson  
Environment Committee  
Parliament Buildings  
**WELLINGTON**

Tēnā koe Chairperson

## **Inquiry on the Natural and Built Environments Bill**

### **Introduction**

1. The Legislation Design and Advisory Committee (LDAC) has been given a mandate by Cabinet to review legislative proposals and introduced Bills against the Legislation Guidelines (2018 edition) (Guidelines). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles.
2. LDAC's focus is not on policy, but rather on legislative design and the consistency of a legislative proposal or Bill with the principles contained in the Guidelines.

### **Background**

3. The purpose of the inquiry is to provide feedback to the government on the extent to which the provisions in the exposure draft of the Natural and Built Environments Bill (the Bill) will support the resource management reform objectives. These objectives include better enabling development and improving system efficiency and effectiveness, while retaining appropriate democratic input.<sup>1</sup>
4. The Environment Committee is also asked to collate a list of ideas for making the new system more efficient, proportionate to the scale and/or risks associated with given activities, affordable for the end user, and less complex, compared to the current system.
5. We note that the exposure draft only contains key elements of the Bill to test with the public. We anticipate further work being undertaken to ensure the legislation is fit for purpose. Our submission is intended to guide that further development.

---

<sup>1</sup> Inquiry on the Natural and Built Environments Bill: Parliamentary Paper (updated), page 9.

6. We appreciate the opportunity to make this submission and support the use of the select committee process to provide additional democratic input at an early stage in the development of this important legislation. LDAC will continue to work with officials as the Bill is developed to address the issues raised by this submission and any other issues that may arise.

### **Our submission (Summary)**

7. Our submission is directed at the following legislative design issues in the exposure draft of the Bill and recommends that:
  - further consideration is given to whether the purpose clause of the Bill should expressly address more of the reform objectives and how these objectives are to be balanced, and to reviewing the key concepts to minimise complexity and uncertainty
  - consideration is given to including operative provisions in the Bill in addition to clause 6 to support greater clarity about what is required to appropriately give effect to Te Tiriti o Waitangi principles
  - the scope of the proposed regulation-making powers in clauses 11 and 12 and checks and balances are reviewed.

### **Clause 5 (Purpose of the Act)**

#### *Effect of the proposed provision*

8. Clause 5 provides that the purpose of the Bill is to enable:
  - Te Oranga o te Taiao to be upheld including by protecting and enhancing the natural environment
  - people and communities to use the environment in a way that supports the well-being of present generations without compromising the well-being of future generations.
9. Subclause (2) of clause 5 lists additional matters to guide the interpretation of the purpose clause including that outcomes for the benefit of the environment must be promoted and any adverse effects on the environment of its use must be avoided, remedied, or mitigated.

#### *Comment about the proposed provision*

10. A clearly defined and discernible policy objective set out in a purpose clause provides a strong foundation for an Act.<sup>2</sup> It allows Parliament's underlying objective to be clearly articulated to guide decision-makers within the scheme that is being sought to be established.
11. However, purposes clauses can be difficult to design and can present risks. In order to address any potential risks officials may wish to consider the supplementary material on designing purpose provisions and statements of principle published by LDAC in developing the operative provisions that will be needed to support the purpose clause.<sup>3</sup>

---

<sup>2</sup> Legislation Guidelines, chapter 2.1.

<sup>3</sup> Legislation Design and Advisory Committee supplementary material on 'Designing purpose provisions and statements of principle' [www.ldac.org.nz/guidelines/supplementary-materials](http://www.ldac.org.nz/guidelines/supplementary-materials).

12. LDAC also has some specific comments on the purpose clause which could be addressed as the Bill is further developed.
13. LDAC considers that the draft purpose clause could more clearly reflect some of the reform objectives. For example, the objectives to “better enable development within environmental biophysical limits” and “improve system efficiency and effectiveness, and reduce complexity”<sup>4</sup> are reflected in the environmental outcomes, but not fully captured in the purpose clause at present.
14. The clause also does not clearly identify how the Bill intends to balance the wellbeing of current vs future generations. LDAC notes that the list of environmental outcomes provided for in clause 8 is intended to “assist in achieving the purpose of the Act” and is intended to reflect the development and environmental aspects of the reform objectives.
15. However, the requirement that the national planning framework and the natural and built environments plans must promote these environmental outcomes may not provide the necessary clarity as to how communities at various scales (e.g. national, regional and local) balance these outcomes. Uncertainty may impact considerably on the Bill’s ability to achieve the reform objectives of increasing efficiency and reducing complexity in decision-making.
16. LDAC acknowledges that the national planning framework regulations are intended to be a mechanism for providing the balance between the reform objectives. This may achieve certainty on the appropriate balance. However, LDAC notes that this is a significant delegation of power. Safeguards may be appropriate to guide decision-making and ensure there is public participation in the making of those regulations. Further comment on proposed safeguards is outlined from paragraph 29 of the submission.
17. LDAC acknowledges that uncertainty and a certain amount of risk is inevitable as a price of reform. In developing the Bill, LDAC recommends that officials consider other ways to minimise this uncertainty and reduce possible complexity, for example:
  - ensuring, as the Bill develops, the substantive provisions of the Bill and the key concepts contained in them, are able to be reconciled with the purpose clause.
  - whether it is possible to clarify what it means in practical legal terms for Te Oranga o te Taiao to be upheld. LDAC notes that this concept is only inclusively defined, leaving the scope of Te Oranga o te Taiao ultimately to be determined by the courts. The concept of not “compromising” the well-being of future generations may be less precise than, for example, the more familiar concept of meeting “the reasonably foreseeable needs of future generations” found in section 5 of the Resource Management Act 1991.

*Clause 18*

18. Clause 18 is a placeholder for “implementation principles”. These principles appear to place requirements on relevant persons when they make decisions under the Act. LDAC recognises that this section is at an indicative stage, and notes that as the Bill develops officials should consider how these principles are properly integrated into the Bill by the operative provisions.

---

<sup>4</sup> Ibid.

19. The risks identified above with the purpose clause can apply equally to this clause. LDAC advises that care needs to be taken to align the purpose and principles clauses to minimise these risks.
20. In addition to clause 18, the Bill through the purpose clause (clause 5) and the environmental outcomes provision (clause 8) introduces a number of concepts that will need to be integrated into the operative clauses. LDAC notes that when a large number of principles or concepts are incorporated into an Act, this can often lead to increased complexity and associated risks with any decisions expected to be made under that Act.

### **Clause 6 (Te Tiriti o Waitangi)**

#### *Effect of proposed provision*

21. Clause 6 states that all persons exercising powers and performing functions and duties under this Bill must give effect to the principles of Te Tiriti o Waitangi. This appears consistent with the objectives of the reform to give effect to the principles of Te Tiriti o Waitangi and provide greater recognition of te ao Māori, including mātauranga Māori.

#### *Comment about the proposed provision*

22. LDAC considers that including operative provisions in the Bill in addition to clause 6 would support greater clarity about what is required in practical terms to appropriately give effect to Te Tiriti o Waitangi principles.
23. This could involve:
  - considering what is required in the particular context to enable the legislation and the framework it establishes to be consistent with the principles
  - then building principle-consistent requirements or mechanisms into the operative provisions of the legislation. In some cases, this may require a decision-maker to take account of the principles. In other cases, the operative provisions will achieve consistency with the principles themselves through their protections.
24. Taking this approach ensures that the Government has actively worked through what is required in order to give effect to the principles of Te Tiriti o Waitangi in the particular context.<sup>5</sup> It is also likely to be more effective in achieving the reform objective.

### **Clause 11 (National planning framework to be made as regulations)**

#### *Effect of proposed provisions*

25. Clause 11 enables the national planning framework to be made in the form of regulations. The empowering provision refers broadly to setting directions, policies, goals, rules or methods, and providing criteria, targets and definitions. The regulations may apply to any specified region or district of local authority, or to any specified part of New Zealand.

---

<sup>5</sup> Legislation Guidelines, chapter 1 – Legislation should be fit for purpose.

### *Comment about the proposed provision*

26. LDAC notes that this is a broad empowering provision. As a general principle, matters of significant policy and principle should be in primary legislation.<sup>6</sup> In addition, an empowering provision should clearly and precisely define the permitted subject matter of secondary legislation and the purposes for which it may be made.
27. LDAC recommends that officials, as the Bill develops, consider whether matters of significant policy relating to the national planning framework would be more appropriately included in the Bill instead of being left to the regulations.<sup>7</sup>
28. In particular, clause 13 requires the national planning framework to include provisions to “help resolve conflicts relating to the environment”, including “conflicts between or among any of the environment outcomes described in section 8”. Other similar provisions relating to resolving conflicts through secondary legislation can also be found in clauses 22 and 24 of the Bill.
29. If it not possible to address the matters concerning conflicts in the Bill, an alternative option to consider could be to build in bespoke mechanisms that enable public participation in the regulation-making process. This would provide for a more democratic process and support public buy-in in balancing those matters.
30. As the Bill develops, LDAC also recommends that officials consider whether additional safeguards are appropriate for the making of regulations concerning matters of significant policy.<sup>8</sup> These safeguards could include, for example, requiring the Minister to take into account certain criteria or to be satisfied that certain matters are met before making a recommendation to the Governor-General.

### *Clause 12*

31. The power in this clause to enable environmental limits to be prescribed is a significant sub-delegation of law-making power. As with the national planning framework regulations, LDAC recommends that further consideration should be given to whether additional safeguards should be provided to support how the limits will be set in the plans.
32. Similar to the safeguards referred to above, the Act, for example, could require plan decision-makers to take into account certain criteria when setting these limits. Other matters like consultation requirements or inclusion of criteria to be satisfied before the plans include these limits should also be considered. LDAC assumes that requirements of this kind are intended to be included once these provisions are more fully developed.

### *Clause 19*

33. Clause 19 requires a natural and built environments plan for each region at all times, with clause 22 providing for the matters that must be included in those plans.

---

<sup>6</sup> Legislation Guidelines, chapter 14.1.

<sup>7</sup> Legislation Guidelines, chapter 3.2.

<sup>8</sup> Legislation Guidelines, chapter 14.4.

34. At this stage, the consequences for non-compliance appear to be unclear. The scope or the parameters of the plan appear very similar to the regulation-making powers relating to the national planning framework (that is, the powers are not clearly and precisely defined). Plans may set “objectives” and “rules” for example. Clause 22(1)(c) also appears to imply that the national planning framework can override the environmental outcomes set out in clause 8. LDAC wonders whether this was deliberate and suggest clarity be provided as to its intent.

### **Recommendations**

35. For the above reasons, we recommend:

- further consideration is given to whether the purpose clause of the Bill should expressly address more of the reform objectives and how these objectives are to be balanced, and to reviewing the key concepts to minimise complexity and uncertainty
- consideration is given to including operative provisions in the Bill in addition to clause 6 to support greater clarity about what is required to appropriately give effect to Te Tiriti o Waitangi principles
- the scope of the proposed regulation-making powers in clauses 11 and 12 and checks and balances are reviewed.

36. Thank you for considering our submission. We wish to be heard briefly.

Yours sincerely



Karl Simpson  
Chair  
**Legislation Design and Advisory Committee**