// SUBMISSION

DISCLOSURE OF NATURAL HAZARDS INFORMATION ON LIMS

// LGNZ's submission on the Local Government Official Information and Meetings Amendment Bill

// FEBRUARY 2023

Ko Tātou LGNZ.

Local Government New Zealand (LGNZ) provides the vision and voice for local democracy in Aotearoa, in pursuit of the most active and inclusive local democracy in the world. We support and advocate for our member councils across New Zealand, ensuring the needs and priorities of their communities are heard at the highest levels of central government. We also promote the good governance of councils and communities, as well as providing business support, advice, and training to our members.

Introduction

Thank you for the opportunity to submit on the Local Government Official Information and Meetings Amendment Bill (**Bill**). LGNZ supports the Bill's intention to create a statutory framework that makes better natural hazard information, including information about the impacts of climate change, available through Land Information Memorandums (**LIMs**).

LGNZ has been seeking change to LIMs for some time

We support several amendments proposed in the Bill because they reflect work we have already done on this topic. In October 2020, LGNZ convened a workshop with a cross-section of local government representatives and central government agencies to discuss potential amendments to LIMs. Our report *"Review of Land Information Memorandums: Achieving best practice"* (**Report**) summarises these discussions.

The workshop focused on LIMs as a tool for disclosing natural hazard information. Our Report identified issues with the current LIM system and proposed both short and long-term solutions. The amendments proposed in the Bill support changes we have long been advocating for.

We support the Bill but think it could be improved

We support many of the amendments proposed by the Bill, in particular the limitation on liability for councils when providing natural hazard information. However, we suggest improvements in several areas, which are each discussed in detail below.

We would like to see these changes to the Bill:

1. Improvements to the regulation-making provisions, so that they become either mandatory or prescribed by the legislation, and there is a requirement that the Minister consult with councils prior to issuing any regulations;

2. Ensuring that councils can recover costs associated with satisfying the new information requirements, in a way that does not act as a disincentive to property owners/prospective purchasers obtaining LIMs;

3. Extending the 'good faith' liability protection in proposed section 44D (or section 41 of the Local Government Official Information and Meetings Act 1987 (**LGOIMA**)) to all information provided in a LIM;

4. Including a specific requirement that LIMs must be obtained by vendors for properties in high risk hazard areas. The vendor must then provide a copy of the LIM to all prospective purchasers, to ensure that important natural hazard information is available to those that may need it. As an

alternative, vendors could be required to notify prospective purchasers if their property is in a high risk hazard area;

5. Ensuring alignment with the Building Act 2004 (**BA04**), in relation to Property Information Memorandums (**PIMs**); and

6. As the Natural and Built Environments Bill (NBE Bill) progresses, ensuring that the definition of natural hazard is consistent.

LGNZ does not have any comments on the proposed changes around alignment with the withholding and certification processes in the Official Information Act 1982.

Detailed discussion of potential changes

1. Require that regulations must be made and that the Minister consult with councils when making regulations

Proposed new sections 44B(3), 44C(2) and 55(1A) of the Bill provide for the Minister to make regulations, which will address how "*information must be summarised and presented*" in a LIM.

While LGNZ supports this shift, these provisions do not make it mandatory to issue regulations. As a result, there is no certainty for councils that such regulations will be made. If such regulations aren't made, there won't be clear, consistent requirements that councils seek and can then adhere to.

This is an important issue for LGNZ and goes to the heart of the matters summarised in the Report, which sought national consistency and alignment across local government. The desire at that time was to develop a uniform approach to the presentation of natural hazard information in LIMs, and also (potentially) standardised wording. The Report highlighted an example of best practice guidance on flood hazard terminology, which was developed for roll out across the Greater Wellington region. The Report noted that "*this consistent terminology could be used as a starting point for developing a template of standard wording for natural hazard terms used within LIMs nationally*".[1] It strikes LGNZ as a missed opportunity to not make it mandatory that regulations are made, or that the LGOIMA itself prescribe the form of LIMs (at the least).

[1] Another option suggested in the Report that LGNZ would also like to see achieved is a centralised information hub with natural hazard information available nationally, administered by central government.

In light of the objective of the Bill, which is to provide the public with understandable information about natural hazards and any impacts of climate change that exacerbate natural hazards, there is an opportunity now to provide clear guidance or requirements. Without any requirement to develop nationally consistent formats for LIMs, then it is more likely that the status quo will continue and there will be district-by-district variation.

In relation to consultation, and although there is a requirement in new section 55(1A) for the Minister to consult before any regulations are made, LGNZ has not identified any reason why this requirement could not be made more directive, and require that the Minister consult with local authorities separately.

An equivalent model exists under the RMA, where regional councils are required to consult with affected local authorities before proposing amendments to regional policy statements. The simple reason for this is that amendments to those policy statements could realistically impact on district plans, and so prior consultation is not only fair, but could be of practical benefit. In our view, the same could be said for requiring prior consultation with local government on any regulations, as they are the effective owners of LIMs and required by LGOIMA to resource their production.

2. Information to be provided and costs for councils

LGNZ supports the use of the phrase "to the extent that it is known", as set out below:

> The new section 44B requires that a LIM include "to the extent that it is known to the territorial authority" information:
>
> - about each hazard or impact that affects the land concerned;
> - about each **potential** hazard or impact, to the extent that the authority is satisfied that there is a **reasonable possibility** that the hazard or impact may affect the land concerned (whether now or in the future);
> - about the cumulative or combined effects of those hazards or impacts on the land concerned.

LGNZ is pleased that sections 44B (applicable to territorial authorities) and 44C (applicable to regional councils) both include this new phrase in relation to natural hazard information.

What this phrase means in practice is that a council will only be expected/required to include information where it has some prior knowledge of the existence of that information. This wording makes it clear there is no expectation that councils will proactively seek information, before issuing a LIM, which would be a significant departure from the current intent of LIMs.

Increased costs for councils may require increased LIM fees. Solutions are needed to ensure increased fees do not act as a disincentive to obtaining a LIM.

However, the new requirement in sections 44B and 44C to provide information "about" the hazard or impact is a departure from the existing requirement to provide information "identifying" special features

or characteristics. The effect of this wording is that councils will be required to provide some explanation, or summary, of the natural hazards or impact of climate change, rather than simply "identifying" them (spatially, or in other ways).

This amended requirement could import a new obligation on councils to particularise or explain the nature of the relevant hazard or impact. While clarification about this requirement may be achieved through regulations (if any are introduced, and we note the above points on that matter), irrespective of that, this broader requirement will inevitably result in additional time and costs for councils, which will need to be passed on to customers through increased LIM fees.[2]

While the disclosure statement suggests that implementation costs should be low to medium, LGNZ expects that the processing costs associated with these new requirements will be much higher than they are today. The explicit requirement to address the cumulative/combined effects of actual and potential hazards in section 44B(2)(a)(iii) will probably require expert involvement to help determine whether:

- a "reasonable possibility" threshold has been reached; and
- any two hazards could combine for specific land, creating a cumulative effect/risk.

For most territorial authorities, this will require consultant input and associated costs.

Councils will want to recoup these costs and are likely to pass them on to LIM purchasers, instead of increasing general rates. This could create a corresponding risk of discouraging requests for LIMs, if it is perceived that the costs become too much of a burden relative to the benefit. If that situation arises, then the result would be contrary to the central objective of the Bill.

LGNZ considers that there are three options for reducing this risk:

1. Initial central government funding to assist territorial authorities to obtain an appropriate level of base information to inform LIMs.
2. The issuing of regulations or other statutory direction that confirms what form and content is required on any LIM, which will allow councils to evaluate whether the costs of LIMs will need to be increased based on the new requirements.
3. In order to reduce the impact on territorial authorities, include a new cost recovery mechanism for regional councils in the Bill. The provision of the wider regional information could be regarded as a 'public good' matter, and within the existing functions of regional councils, in which case the costs of this information could be recovered across the broader rating base of a region. However, as a new requirement in this Bill, it could also be something to be funded by way of a small levy charged in each LIM requested and then paid to the regional council.

[2] As noted in section 6.3 of the 2021 report: "*The development of a LIM system ... is highly technical and pulls a range of information from across various council departments into the document meeting the requirements of section 44A and the council's duty of care in terms of representing voluminous information on a LIM that is accurate and must not mislead the recipient*." This statement will be just as true in relation to the increased natuiral hazard information, despite the reduced legal liability for Councils in relation to that information.

LGNZ recommends that the Bill include a mechanism to enable charging by regional councils, which would provide a backstop in the event there is an increase in the scale and volume of information regional councils need to provide. Regional council charges should not be mandatory but left to their discretion. Our view is that it is easier to provide a mechanism in the Bill at this stage, instead of retrofitting a solution later.

3. Extend the 'good faith' liability protection to all LIM information

Currently, failing to include mandatory information on a LIM, or making an error in presenting the mandatory information, can lead to legal liability for a council (under section 44A). Consequently, a conservative approach has generally been adopted by councils when providing information on LIMs or choosing to provide discretionary information.

Protection against liability in certain cases is proposed to be addressed by new section 44D of the Bill. LGNZ agrees with the proposed inclusion of this new provision but recommends that the protection is extended.

LGNZ recommends that this statutory protection is extended to include information provided under section 44A(2)(ab) (other special features and the likely presence of hazardous contaminants), and for other information that is mandatory in a LIM. In addition, section 44D does not change or clarify the extent to which liability could arise if a council decides to include discretionary information in a LIM under section 44A(3).

The explanatory note to the Bill records that new section 44D "*will provide local authorities with a similar level of protection to that they currently have when sharing other official information under the principal Act. Affected parties may still bring complaints to the Ombudsman and apply for judicial review*."

LGNZ doesn't see any good reason why the existing complaints and judicial review mechanisms shouldn't also apply to the other information that a territorial authority provides "in good faith" in a LIM. It is also considered to be something of an anomaly (and potentially confusing) that certain information has an elevated status, in terms of protection against liability under section 41 of the LGOIMA, if it was sought and provided through separate information requests, compared to all of the same information being provided in one report.

LGNZ recommends that new section 44D be amended to apply to any information provided in a LIM. Alternatively, section 41 of the LGOIMA could be amended to include information provided in a LIM under Part 6A.

4. Ensuring important natural hazard information is provided

The explanatory note to the Bill states that LIMs "*are the main source of property information for the public and are a key tool for communicating natural hazard information to buyers so they can make informed decisions*".

Importantly, there is no legal requirement on either a vendor or purchaser to provide or obtain a LIM, nor is there any requirement for a real estate agent to obtain a LIM as part of the marketing of a property (we note that the standard Agreement for Sale and Purchase of a property includes a clause relating to LIMs but also provides that it is optional for a purchaser to obtain a LIM).

There is the potential for this situation to be improved, by requiring that LIMs are obtained by vendors for any properties located in high risk hazard areas. Once obtained, the LIMs must be provided to any prospective purchasers so that they aware of the presence of risk. LGNZ accepts that it shouldn't be mandatory in all cases to obtain a LIM ahead of the sale of property (as that may be unnecessarily costly), but considers that a framework can be put in place that is proportionate to the level of identified risk.

The framework LGNZ proposes would only require that LIMs are obtained in relation to land or properties that are located in identified high risk or high hazard areas, or subject to an assessed high level of risk from particular features/characteristics affecting specific land. This framework would rely on the relevant council mapping high risk areas, and identifying specific features/characteristics that are high risk matters, so that a requirement for a LIM is readily identifiable for a vendor at the time of marketing their property.

If this amendment were to be accepted, LGNZ considers that it would require the inclusion of a statutory requirement for councils to map natural hazards areas, and then determine a threshold which would require a LIM to be compulsory. It would also be appropriate for a new mechanism to be included in the Bill (or an amendment to other legislation) that creates an offence if a LIM is not obtained by a vendor in relevant circumstances.

If the requirement for vendors to obtain a LIM is considered too onerous, then at the least there should be a requirement for vendors to put prospective purchasers on notice of the presence of features or characteristics that have an assessed high level of risk, so that purchasers are made aware of those matters ahead of completing their due diligence.

LGNZ recognises requiring councils to identify relevant high hazard risk areas will have resourcing implications for some councils. This proposal will needed to be worked through further with local government, but if initiated, funding support from central government may be required. LGNZ would be happy to work with officials on this matter further.

5. Changes required to the Building Act 2004 in relation to Property Information Memorandums (PIMs)

LGNZ has identified a need for amendments to the BA04, given the similar requirements that guide the preparation of a PIM.

A PIM can be requested by an owner of land when they are considering carrying out building work for which a building consent is required (section 32, BA04). Section 35 of the BA04 requires that a PIM 'must include' information likely to be relevant to the proposed building work that identifies "*each special feature of the land concerned (if any)*".

Section 35(2) defines "*special feature of the land concerned*" as:

> *includes, without limitation, potential natural hazards, or the likely presence of hazardous contaminants, that*
>
> *(a) is likely to be relevant to the design and construction or alteration of the building or proposed building; and*
>
> *(b) is known to the territorial authority; and*
>
> (c) *is not apparent from the district plan under the Resource Management Act 1991*.

As it is territorial authorities that are responsible for preparing and issuing both LIMs and PIMs, any misalignment between the two may give rise to confusion and potentially additional cost, for both members of the public and councils alike. Councils could, in fact, potentially require two different systems for recording natural hazard information – one for PIMs and one for LIMs – which would be entirely inefficient.

Given the purpose of LIMs and PIMs, and the overall intention of the Bill to provide better quality and more consistent information, it would be efficient to align the information, and liability protection, requirements across LGOIMA and the BA04. Without that alignment, there is room for confusion, and if a council were to provide the same information required by LGOIMA in response to a PIM request, there is no liability protection provision in the BA04 that would protect the council. This is inconsistent.

6. Definition of natural hazard and the Natural and Built Environment Bill

LGNZ supports the proposed new definitions of climate change and natural hazard in the Bill. In particular, LGNZ supports the intended alignment with the RMA.

However, the definition of natural hazard in the NBE Bill (one of the Bills intended to replace the RMA), is different to that in the RMA. The proposed definition in the NBE Bill includes reference to:

soil that contains concentrations of naturally occurring contaminants that pose an ongoing risk to human health.

This proposed definition aligns in part with the current section 44A(2)(a), which refers to the "likely presence of hazardous contaminants" as an example of a special feature or characteristic of the land concerned.

Given the difference between the RMA and NBE Bills' definitions of natural hazard, and assuming that the proposed definition in the NBE Bill is enacted and will apply to LIMs, LGNZ is concerned that there could be scope for confusion. The reason for this is that:

- section 44A(2)(ab) of the Bill covers the "*other special features or characteristics of the land concerned, including information about the likely presence of hazardous contaminants*", while new section 44A(2)(a), refers to "*the information about natural hazards that is required by section 44B*";
- Both natural and non-natural hazardous contaminants could be reported on under new section 44A(2)(ab), with the test being whether they have a "*likely presence*" on the land;
- Section 44B captures a wider range of reporting on naturally occurring hazardous contaminants. Although the test under section 44B would appear to also cover the "likely presence" of those contaminants, it is undesirable to have a different standard for both natural and non-natural hazardous contaminants;
- If the new definition in the NBE Bill is to eventually replace the RMA definition, then it is not clear whether *naturally occurring contaminants* would need to be reported on twice in a LIM (under both section 44A(2)(a) and (ab)).

As noted, while this confusion may only arise if the NBE Bill definition of natural hazard will be used in the LGOIMA, LGNZ recommends that this issue be clarified, either ahead of or as part of the NBE Bill process, so that there is certainty around the reporting required in a LIM for naturally occurring contaminants, and those that are not naturally occurring. (LGNZ will also be recommending this issue be addressed in its NBE Bill submission).

An alternative may be for the LGOIMA Bill to include its own definition of natural hazard, and not rely on either the RMA or the NBE Bill definition.

LGNZ also recommends that the definition of natural hazard in section 71 of the BA04 be amended to align with the definition in the RMA and/or the new definition in the NBE Bill.

Recommendations

1. That sections 44B(3), 44C(2) and 55(1A) of the Bill are amended to make it mandatory for the Minister to provide regulations that address how information must be summarised and presented in a LIM.

2. That section 55(1A) of the Bill is amended to specifically require the Minister to consult with local authorities before making regulations that address how information must be summarised and presented in a LIM.

3. That the words "to the extent that it is known to the territorial authority" are retained in section 44B of the Bill.

4. That central government provide initial funding to assist territorial authorities to obtain an appropriate base level of information to inform LIMs.

5. That the Bill is clearer on whether or not regional councils can charge territorial authorities for the information that they provide to them.

6. That the protection from liability in new section 44D is amended to apply to any information provided in a LIM. Alternatively, section 41 of the LGOIMA could be amended to include information provided in a LIM under Part 6A.

7. That the Government further investigates, in partnership with local government, the possible introduction of a requirement for LIMs to be obtained by vendors in relation to land or properties located in identified high risk or high hazard areas, or subject to an assessed high level of risk from particular features/characteristics affecting specific land.

8. That the BA04 be amended so that the information requirements for PIMs align with the requirements for LIMs.

9. That there is alignment between the definition of natural hazard in the Bill, the proposed NBE Bill and the BA04.