SUBMISSION

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Resource Management Amendment Bill

Local Government New Zealand's submission on the Resource Management Amendment Bill

7 November 2019

We are. LGNZ.

LGNZ is the national organisation of local authorities in New Zealand and all 78 councils are members. We represent the interests of councils and lead best practice in the local government sector. LGNZ provides advocacy and policy services, business support, advice and training to our members to assist them to build successful communities throughout New Zealand. Our purpose is to deliver our sector's Vision: "Local democracy powering community and national success."

This final submission was endorsed under delegated authority by Dave Cull, President, Local Government New Zealand (LGNZ). We would like to be heard in support of this submission.

Introduction

Thank you for the opportunity to submit on the Resource Management Amendment Bill (RMAB). LGNZ made an extensive submission to the Resource Legislation Amendment Bill in 2016 and we opposed many of the proposals that the Government is now proposing to rescind. Other proposals are matters the sector has requested for some time. Overall we strongly support the current Bill.

Key provisions

Repealing changes made by the RLAA

Regulation-making powers

LGNZ strongly opposed the regulation-making powers introduced under RLAA. We made the case that the regulation making powers were far-reaching and we have concerns at several levels including:

(i) The extensive use of regulations and other secondary instruments to define and prescribe policy. This contravenes best practice and established guidelines and amounts to legislation by the executive of the day, not Parliament;

(ii) The use of regulations imposed by central government to override rules made by local authorities under the authority of statutes;

(iii) The uncertainty as to what the regulations may contain; and

(iv) The uncertain status of Ministerial Policy Statements. While they are presented to the House, the ability of the House to address them is unclear.

Therefore we strongly support the proposal to now remove these provisions from the RMA, noting the powers have never been utilised so it begs the question as to why they were introduced at all.

Public notification for residential resource consents

In our submission to RLAA we opposed this proposal, one of the reasons/benefits of public notification of an application for resource consent, is to bring to the table input from others – technocrats will not always get it right and identify all the potential adverse effects. The importance of a robust notification decision is recognised by local authorities.

However we note the submissions of councils – Auckland Council for instance notes their practice has changed to accommodate this provision and that their submission argues it is working well. The special circumstances provision in the RMA is always a fallback for notification and the review of the RM system provides the opportunity to look at public participation in the round.

Removing restrictions on appeals on residential and subdivision applications and on the scope of appeals

LGNZ supports removing these restrictions. In terms of the scope of appeals, applications often change through the addition of new evidence as a hearing progresses. It is therefore unfair that appeals are limited in scope to the matters raised in submissions.

We agree with the submission of Auckland Council that this proposal should be supported, contingent on the proposed removal of preclusion on public notification not progressing, as these two proposals are clearly linked. LGNZ does not support removing the restrictions on appeals if the existing preclusions on public notification are not retained. This is because of the very significant cumulative resource, cost and risk burdens that would be incurred if both the amendments to public notification and appeals were made.

Fast-track activities

We support the proposals regarding fast track activities. We were concerned the proposals would be unworkable and that perverse consequences would likely be a rewinding of plans being "front loaded" with a greater use of controlled activity status.

Subdivision presumption

LGNZ is agnostic on this provision, noting that the presumption against subdivision activity is largely historic, but has some logic given that permitted activity status is not really viable for this activity. We noted that plans would need to be redrafted to account for the change. The Select Committee is encouraged to consider the submissions of councils and how much redrafting has been undertaken to date that might need to be redone.

Financial contributions

RLAA repealed the provisions for financial contributions. We did not support that, noting that:

- The proposal to remove financial contributions from the RMA is underpinned by the assumption there is duplication with development contributions (under the LGA02). On the contrary, financial contributions and development contributions serve different purposes. The proposal to remove financial contributions is misguided.
- Development contributions can only be used for capital expenditure and the removal of financial contributions will impact low/no growth areas particularly. Regional councils cannot take development contributions and the Crown cannot be required to pay development contributions. The trigger for a requirement for Development Contributions (DCs) some kind of authorisation (resource consent, building consent or service connection authorisation). Financial contributions (FCs) can be required for permitted activities which do not require resource consent as a trigger.

Accordingly, we support the Bill's proposals to reinstate financial contributions and we support SOLGM's submission in this regard.

However LGNZ holds the view that the Crown should not be exempt – they should contribute their fair share of financial contributions for any relevant development works.

Resource management processes and enforcement provisions

Suspension of non-notified resource consent applications

LGNZ supports the proposal to enable applicants to suspend their non-notified applications. This occurs informally and councils have requested this provision for some time.

Suspension of processing until charges paid

LGNZ supports this proposal.

Emergency works and retrospective consents

LGNZ supports this proposal.

Review of conditions of multiple consents

The Bill proposes provisions for review of consent provisions.

LGNZ supports this proposal strongly and notes the sector has requested this enabling provision previously.

Increasing infringement fines

LGNZ strongly supports the proposal to increase infringement fines. The sector has asked for an increase in fines for some time.

LGNZ notes that although the Act provides for increasing the fines available in the infringement regime it does not actually change what can be done practically unless there are corresponding changes to the RMA infringement regulations. The current schedule of fines in the infringement regulations needs to be repealed with a fresh schedule compiled to reflect the new penalties. Two schedules are required: one for the individual and one for corporate. The infringement regulations need to change at the same time as, or hard on the heels of, the changes to the Act.

Extending statutory limitation period to file charges for prosecutions

LGNZ supports this proposal and notes this is another matter that has been requested for some time.

Enabling EPA to take enforcement action

LGNZ has previously advised the Government that LGNZ supports the proposed new role for the EPA with the caveat that EPA action should only be available in circumstances where a particular council specifically requests, or agrees to, EPA assistance on an enforcement matter.

The Bill, however, assumes the EPA will only 'take over' enforcement action – it does not envisage a situation where the EPA would support enforcement action, with the council retaining lead enforcement responsibility.

LGNZ does not support law changes empowering the EPA to initiate enforcement activity without the support of the council concerned nor does it support the provisions that enable intervention. LGNZ seeks amendments that reflect these changes.

Appendix A contains the suggested redrafting of these provisions.

Improving freshwater management

New specialised planning process for freshwater

The Government's proposals for freshwater reform include a tight timeframe to firstly notify and secondly to make plans operative.

LGNZ, and its Regional Sector have made the case for some time for "plan agility" ie removing the ability to appeal council decisions on plans to the Environment Court.

In principle, we are supportive of this new planning process. However, we note that the proposed process helps with the process from notification, and will dramatically speed that part of the process but it does not help councils notify by 2023. Faster notification will require some form of trade-off: quality/durability, community engagement, data collection, or evaluation. We have addressed this matter in our submission to the Government's freshwater proposals.

We note there are likely to be practical challenges – it is unlikely that there is capacity in New Zealand across RMA, science, and planning professionals to service and take part in multiple parallel processes between 2023 and 2025.

It is likely to be difficult and inappropriate to contain the scope of plan changes to 'just' the NPS-FM (or even just freshwater), since relevant provisions are likely to extend across multiple parts of a plan and need to give effect to multiple documents including other national policy statements and planning standards, Treaty Settlement legislation and associated river documents, and second generation Regional Policy Statements, and RMA requirements to review regional plans every ten years. A national hearings process that considers only the freshwater aspects of a plan while councils are attempting to run co-ordinated hearings processes of their own (for example, to implement National Planning Standards) would be fraught. A strict separation of concurrent hearings processes would compromise overall integration and decision-making; this may even force councils to reject the panel's recommendations.

The approach could compound the disconnect between competing elements of national direction, eg NPS-UDC versus NPSFM. The High Court could then be asked to make a declaration of the relative weighting of these instruments. There may be merit in making the new hearing process available to regional councils for any plan change that includes NPSFM implementation, or more broadly when they are implementing national direction, whether that is freshwater, air, urban development or some other resource management issue.

There is a desire by iwi (and a shift in councils) for a greater role in decision-making. This is reinforced by recent changes to the RMA (s43A) that enhance iwi influence over commissioner appointments. A fast process to get to proposed plan stage will disadvantage iwi due to capability and capacity.

Given the significance of water to iwi, representation of the interests of multiple iwi on hearings panels (as a trade-off speeding up the plan development stage) may have to be considered. In some regions, the sheer number of iwi groups may make this unworkable. Iwi often rely on consultants of their own for input. The national bottleneck for technical expertise will extend to tikanga and Mātauranga Maori expertise.

Taking into account parliamentary processes, we assume Royal Assent will not be received before mid-2020. This leaves little time ahead of the 2023 notification date to put the proposed arrangements in place. A significant amount of co-ordination and preparatory work will be required of central government to avoid a 2023 bottleneck and process slippage beyond 2025.

At a local level, there are also financial timing implications that require planning. The next set of LTPs will be adopted in mid-2021. If the RMA changes get assent mid-2020 then the next time funding decisions can be made to re-allocate funds will be year one of the LTP starting 1 July 2021.

The timelines for alerting the Chief Freshwater Commissioner and organising the panel should be brought forward, given the time and resource constraints noted. Planning for the hearings could reasonably commence from when the pre-consultation draft of any plan change is released (not six months after public notification).

Discretion of the Independent Hearings Panel (IHP)

It is important to ensure that the IHP has the latitude to make pragmatic decisions across the freshwater regulatory spectrum.

The panel may be able to agree with councils the scope and sequencing of plan changes across the country. To bring significant numbers of hearings forward and avoid a 2023 bottleneck, the panel would need to be able to agree with each council what action is required to set its plans on a pathway towards implementation by 2025, and demonstrate an ongoing commitment to incremental and adaptive improvement beyond that date. It might mean agreeing what process will be followed to incorporate plans developed through post-Treaty settlement arrangements.

Enabling the panel to take a pragmatic view may require changes to the NPS-FM and/or RMA. In their absence, plan-change decisions may well be challenged on legal grounds that a prescribed process wasn't followed, or that a plan change doesn't fully address all relevant provisions. This may lead to appeals on points of law and/or judicial reviews; another possibility is increased use of WCO processes where parties are dissatisfied with RMA/NPS-FM processes.

Scope of IHP's recommendations

S48(2)(b) states that a freshwater hearings panel:

- May make recommendations on any other matters relating to the freshwater planning instrument identified by the panel or any other person during the hearing.

The plan making process under the RMA does not provide for a hearings panel or the council as decision-maker, to make recommendations on matters other than those raised in submissions. There is concern about the latitude of this provision and that there is no means to test a recommendation of the Hearings Panel once the hearing is over.

LGNZ is concerned that the ability to make 'beyond scope of submission' recommendations is unfettered. There is no apparent ability for the council (or any submitter) to challenge these 'beyond scope' recommendations. Clause 51(3) says the council may accept the 'beyond scope' recommendations – it should further clarify by saying 'may accept or reject recommendations…. that are beyond the scope of submissions.'

There could be considerable cost and resourcing implications arising from such recommendations, which the council must clearly be able to control.

Part 12A Enforcement functions of EPA

343E Terms used in this Part

(1) In this Part,— **enforcement action** means—

(a) an inspection, investigation, or other activity carried out in accordance with this Act for the purpose of determining whether there is or has been—

(i) a contravention of a provision of this Act, any regulations, a rule in a plan, a national environmental standard, or a resource consent; or

(ii) a failure to comply with a requirement of an enforcement order or abatement notice; or

(b) an application for an enforcement order under section 316; or

(c) an application for an interim enforcement order under section 320; or

(d) the service of an abatement notice under section 322; or

(e) the laying of a charge relating to an offence described in section 338; or

(f) the issuing of an infringement notice under section 343C; or

(g) an inspection, investigation, or other activity carried out in accordance with this Act for the purpose of an enforcement action described in **paragraphs (b) to (f)**

enforcement function means a function of the EPA described in **section 343F**

incident means an occurrence that may, directly or indirectly, be linked to—

(a) a contravention or possible contravention of a provision of this Act, any regulations, a rule in a plan, a national environmental standard, or a resource consent; or

(b) a failure or possible failure to comply with a requirement of an enforcement order or an abatement notice

subsequent action—

(a) means a prosecution, proceeding, application, or other activity that the EPA or a local authority may carry out under this Act in relation to an enforcement action that has been executed; and

(b) includes an inspection, investigation, or other activity carried out in accordance with this Act for the purpose of an activity described in **paragraph (a)**.

(2) In **paragraph (a)** of the definition of enforcement action in **subsection (1)**, **other activity** includes, without limitation, an application for a declaration under section 311.

(3) In this Part, an enforcement action is **executed** when, as the case may be, the application for the enforcement order or interim order is made, the abatement notice is served, the charge is laid, or the infringement notice is issued.

343F Enforcement functions of EPA

The EPA may perform any of the following enforcement functions if satisfied that the performance of the function is necessary or desirable to promote the purpose of this Act:

(a) the EPA may, with the agreement of the local authority, take an enforcement action and any subsequent action in relation to an incident if the local authority has not commenced taking any enforcement action in relation to the same incident:

(b) the EPA may, with the agreement of a local authority, assist the local authority with an enforcement action in relation to an incident and any subsequent action:

(c) ~~the EPA may intervene in an enforcement action of a local authority in relation to an incident by taking over the enforcement action and taking any subsequent action~~.

~~343G Intervention by EPA~~

~~(1) If the EPA intervenes in an enforcement action of a local authority in relation to an incident,~~

~~(a) the EPA must notify the chief executive of the local authority in writing of the incident to which the intervention relates and the date on which the intervention takes effect; and~~

~~(b) the local authority must,~~

~~(i) on receipt of the notice, cease any enforcement action in relation to the incident, except for an enforcement action described in **paragraph (a) or (g)** of the definition of enforcement action in **section 343E(1)**; and~~

~~(ii) from the date specified in the notice, cease all enforcement action in relation to the incident; and~~

~~(c) the EPA takes over all enforcement action in relation to the incident from the date specified in the notice; and~~

~~(d) only the EPA may take any enforcement action or subsequent action in relation to the incident unless **subsection (3)** applies.~~

~~(2) When intervening in an enforcement action of a local authority, the EPA must not intervene in relation to an enforcement action that the local authority has already executed in respect of a person.~~

~~(3) If the EPA decides to cease its intervention,~~

~~(a) it must notify the chief executive of the local authority in writing of its decision and the date on which it takes effect; and~~

~~(b) it must specify in the notice the date on which the intervention will cease; and~~

~~(c) the local authority may take an enforcement action or subsequent action in relation to the incident from the date referred to in **paragraph (b)**.~~

~~(4) To avoid doubt, **subsection (2)** does not prevent the EPA from taking an enforcement action in relation to another incident in respect of the same person.~~

343H EPA may change enforcement functions

(1) The EPA may change its enforcement function in relation to an incident to another function described in **section 343F** if the EPA considers that the circumstances require it.

~~(2) If the EPA decides to change to an intervention function described in **section 343F(c)**, it must include its reasons for the change in the notice required under **section 343G(1)**.~~

343I EPA enforcement officers

(1) The EPA may authorise a person described in **subsection (2)** to be an enforcement officer for the purpose of carrying out its enforcement functions under this Act.

(2) A person may be authorised as an enforcement officer if the person—

(a) has appropriate experience, technical competence, and qualifications relevant to the area of responsibilities proposed to be allocated to the person; or

(b) is an employee of the EPA who is suitably qualified and trained.

(3) The EPA must supply each enforcement officer with a warrant that—
(a) states the full name of the person; and
(b) includes a summary of the powers conferred on the person under this Act.
(4) An enforcement officer may exercise the powers under this Act, in accordance with his or her warrant, only for the purposes for which he or she was appointed.
(5) An enforcement officer exercising a power under this Act must have with him or her, and must produce if required to do so, his or her warrant and evidence of his or her identity.
(6) An enforcement officer who holds a warrant issued under this section must, on the termination of the officer's appointment, surrender the warrant to the EPA.

343J EPA may require information from local authority

(1) The EPA may require a local authority to provide information that the EPA requires for taking an enforcement action in relation to an incident.
(2) The EPA must notify the chief executive of the local authority in writing and specify the incident for which information is required.
(3) A local authority must provide the required information to the EPA as soon as is reasonably practicable, but no later than 10 working days after the chief executive is notified.

343K Additional reporting requirements

(1) The annual report of the EPA under section 150 of the Crown Entities Act 2004 must include information about the performance of the EPA's enforcement functions, including the number and type of enforcement actions executed by the EPA.
(2) The EPA is not required to provide information under **subsection (1)** that would prejudice the maintenance of law, including the prevention, investigation, or detection of offences, or the right to a fair trial.

343L Order for payment of EPA's costs in bringing a prosecution

(1) On the application of the EPA, the court may order a person convicted of an offence under this Act to pay to the EPA a sum that the court thinks just and reasonable towards the costs of the prosecution (including the costs of investigating the offence and any associated costs).
(2) If the court makes an order under **subsection (1)**, it must not make an order under section 4 of the Costs in Criminal Cases Act 1967.
(3) If the court makes an order under **subsection (1)** in respect of a Crown organisation, any costs and fees awarded must be paid from the funds of that organisation.

Compare: 2015 No 70 s 152