



## Resource Management Amendment Bill draft Cabinet Legislative Committee paper and decision required on the alternate Environment Judge matters

Date Submitted:	28 February 2019	Tracking #: 2019-B-05321	
Security Level	In-Confidence	MfE Priority:	High

	<b>Action sought:</b>	<b>Response by:</b>
To Hon David Parker, Minister for the Environment	Decision	4 March 2019

Actions for Minister's Office Staff	<b>Return</b> the signed report to MfE.
Number of appendices and attachments #2	Titles of appendices and attachments (ie separate attached documents): 1. Draft LEG paper 2. Chief Justice's response
Note any feedback on the quality of the report	

### Ministry for the Environment contacts

Position	Name	Cell phone	1 <sup>st</sup> contact
Principal Author	Chyi Sim		
Responsible Manager	Robert McClean	027 067 6655	
Responsible Director	Jo Gascoigne	021 531 7202	✓

# Resource Management Amendment Bill draft Cabinet Legislative Committee paper and decision required on the alternate Environment Judge matters

## Key Messages

1. The purpose of this briefing is to:
  - a. provide a draft Cabinet Legislation Committee (LEG) paper for the proposed resource management amendment bill, for your review (Appendix 1),
  - b. seek your agreement to policy clarifications and a new technical amendment that are included in the bill, and
  - c. seek your direction on further proposals to facilitate the appointment of an alternate Environment Judge where they are needed for the operation of the Environment Court so drafting instructions can be issued, and this can be included in the bill.

### *Draft LEG paper for your review*

2. The draft LEG paper gives effect to the Cabinet policy decisions already made [CAB-MIN-0485.01 refers]. It also reflects Ministerial decisions to provide legal immunity for special advisors to the Environment Court (2018-B-05006); enable the Environmental Protection Authority (EPA) to undertake enforcement actions under the RMA (2018-B-05174); and to not progress the proposal to enable the Environment Court to review notification decisions by way of declarations (2018-B-05006).
3. The draft LEG paper also reflects your views on the regulation of high-risk land use activities, and a narrowly scoped regulation making power to remove unduly restrictive rules in district plans.
4. During the preparation of the draft LEG paper, we have identified areas where we recommend clarifications of existing policy decisions. We are recommending that you no longer proceed with the proposal to clarify the legal status of deemed permitted activities as it is not needed, further amend the proposal to enable the consent authority to suspend notified consents (limited or public) until the additional administrative charge is paid when the consent is notified, and retain the preclusion on appeals on any part of a submission that was struck out by a consent authority.
5. We are also recommending a new technical amendment to fix a drafting oversight relating to the board of inquiry process for an NES.
6. We consider the above changes fall within the scope of the Cabinet policy approval, and you are authorised to make consequential changes during drafting by Cabinet.

### *Facilitating the appointment of alternate Environment Judge*

7. Cabinet has agreed to clarify that acting District Court or Māori Land Court Judges can be appointed as alternate Environment Judges under the Resource Management Act 1991 (RMA) [CAB-18-MIN-0485.01, paragraph 51]. An alternate Environment Judge will need to also be a District Court Judge or acting District Court Judge, Māori Land Court Judge or acting Māori Land Court Judge.
8. The Chief District Court Judge or the Chief Māori Land Court Judge is currently required under the District Court Act 2016 (DCA) or Te Ture Whenua Māori Act 1993 (TTWMA) to certify that the appointment of an acting Judge is needed for the proper operation of the District Court or the Māori Land Court. In the situation where an acting Judge's services

are required only for the operation of the Environment Court, this certification requirement cannot be met.

9. You consulted with the Chief Justice on a potential amendment to DCA and TTWMA to remove potential barriers to the appointment of an alternate Environment Judge. She responded and suggested an alternative option to only amend the RMA.
10. We support this alternative option to amend the RMA (Option B) as it appears to be the most direct means of addressing the issue. This option does not involve amendments to the DCA and TTWMA, which may have had wider implications and were not supported by the Chief Justice.
11. We received a further alternative suggestion from Principal Environment Judge Newhook to include a new category of acting Environment Judge under the RMA. However, this is a new suggestion and we consider goes beyond the scope of the narrow bill.

## Recommendations

---

12. We recommend that you:

*Draft LEG paper for your review*

- a. **Note** that the attached draft LEG paper reflects all the policy decisions taken to date by Cabinet [CAB-MIN-0485.01; 2018] and authorised Ministers [2018-B-05006 and 2018-B-05174]
- b. **Agree** to not include the proposal that was previously agreed by Cabinet to clarify the legal status of deemed permitted activities as it is considered unnecessary  
Yes/No
- c. **Note** that Cabinet agreed that the Minister for the Environment has the ability to further clarify and develop policy matters in the paper under ENV-18-MIN-0037 in a manner not inconsistent with the policy recommendations contained in the paper
- d. **Note** that Cabinet agreed to amend the RMA to enable consent authorities to suspend the processing of a resource consent application if a fixed charge is required to be paid at notification, until that fixed charge is paid [CAB-MIN-0485.01-paragraph 21.1 refers]
- e. **Agree** to amend the RMA to enable a consent authority to suspend a resource consent application in cases when a further fixed charge is required from the applicant if and when the application is notified (public or limited)  
Yes/No
- f. **Note** that Cabinet agreed to repeal section 120(1B) of the RMA that restricts the scope of an appeal on a resource consent to matters raised in a person's submission [CAB-18-MIN-0485.01, paragraph 14 refers]
- g. **Agree** to retain the preclusions on appeals regarding any part of a submission that was struck out by a consent authority under section 41D of the RMA  
Yes/No
- h. **Note** that, due to a drafting oversight, the RMA is currently unclear what steps are to be followed by the Minister when a board of inquiry recommends a national environment standard be created;

- i. **Agree** to fix a cross-referencing error, to enable the Minister for the Environment to respond to board of inquiry recommendations for national environment standards in the same manner as national policy statements;

Yes/No

- j. **Note** that Cabinet authorised the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office to make consequential amendments to the RMA and other affected statutes to ensure workability of the agreed amendments
- k. **Note** that drafting instructions have been issued for the matters above and included in the draft LEG paper and bill.

*Facilitating the appointment of an Alternate Environment Judge*

- l. **Note** that we have received the Chief Justice's feedback on the potential amendment to facilitate the appointment of alternate Environment Judges and the Chief Justice has suggested an amendment to the Resource Management Act 1991 only, and not the District Court Act 2016 and Te Ture Whenua Māori Act 1993
- m. **Note** the two options set out in this briefing aim to remove possible barriers to the appointment of alternate Environment Judges, where they are not acting Judges under the District Court Act 2016 and Te Ture Whenua Māori Act 1993
- n. **Note** the alternative suggestion from Principal Environment Judge Newhook includes the creation of a new category of acting Environment Judge under the RMA, which we consider goes beyond the scope of the narrow bill.
- o. **Agree** to include in the bill amendments to the Resource Management Act 1991 to enable the appointment of a retired Environment Judge, that is not an acting District Court Judge or acting Māori Land Court Judge, as an alternate Environment Judge, when the appointment is needed for the operation of the Environment Court (Option B)

Yes/No

- p. **Agree** that a validation clause is no longer required for any acting Judges that are appointed as alternate Environment Judges prior to commencement.

Yes/No

- q. **Note** that the draft LEG paper will be finalised, following agency consultation and your feedback, and the proposed lodgement date for the LEG paper, bill and RIS is 4 April, in order to be considered by the LEG committee on 9 April.

**Signature**

---

  
Jo Gascoigne  
Director, Natural & Built System

28/2/2019

Hon David Parker  
**Minister for the Environment**

**Date**

Proactively released

# Resource Management Amendment Bill draft Cabinet Legislative Committee paper and decision required on the alternate Environment Judge matters

## Supporting material

### Purpose

---

1. The purpose of this briefing is to:
  - a. provide a draft Cabinet Legislation Committee (LEG) paper for the proposed resource management amendment bill, for your review (Appendix 1),
  - b. seek your agreement to policy clarifications and a new technical amendment that are included in the bill, and
  - c. seek your direction on further proposals to facilitate the appointment of an alternate Environment Judge where they are needed for the operation of the Environment Court so drafting instructions can be issued, and this can be included in the bill.

### Context

---

#### ***Draft LEG paper for your review***

2. We have received the Cabinet policy decisions [CAB-MIN-0485.01 refers] and Ministerial decisions to provide legal immunity for special advisors to the Environment Court (2018-B-05006); enable the Environmental Protection Authority (EPA) to undertake enforcement actions under the RMA (2018-B-05174); and to not progress the proposal to enable the Environment Court to review notification decisions by way of declarations (2018-B-05006). Drafting instructions have been sent on your behalf to Parliamentary Counsel Office (PCO), and a draft LEG paper prepared, reflecting these decisions.
3. You have the ability to further clarify and develop policy matters relating to the proposals in the paper under ENV-18-MIN-0037 in a manner not inconsistent with the policy recommendations contained in the paper [CAB-MIN-0485.01, paragraph 59 refers]. We have identified three clarifications that are required which are outlined in paragraph 20.
4. We previously advised you that an amendment is required to fix a drafting oversight (cross-referencing error) relating to the board of inquiry process for national environment standards (NES) under the RMA (2018-B-04731). This is to provide for the process that the Minister has to follow when a board of inquiry recommends a national policy statement, to also apply when a board of inquiry recommends a NES.
5. You are authorised by Cabinet to issue drafting instructions to the Parliamentary Counsel Office to make consequential amendments to the RMA and other affected statutes to ensure workability of the agreed amendments [CAB-MIN-0485.01, paragraph 62 refers].

#### ***Facilitating the appointment of alternate Environment Judges***

6. There is also a separate issue relating to the appointment of alternate Environment Judge in the bill.
7. Currently all Environment Judges and alternate Environment Judges are warranted District Court Judges or Māori Land Court Judges. They can, for example, undertake Resource Management Act 1991 (RMA) related prosecution work in the District Court. Through this arrangement, the Environment Judges are subject to the statutory provisions governing

the appointment, tenure, remuneration and powers of District Court Judges and Māori Land Court Judges in the District Court Act 2016 (DCA) and/or Te Ture Whenua Māori Act 1993 (TTWMA).

8. To be appointed as an alternate Environment Judge, the candidate must be either a District Court or acting District Court Judge, Māori Land Court Judge or acting Māori Land Court Judge. Once a Judge reaches the age of 70 they become eligible for appointment as an acting District Court or Māori Land Court Judge (until they reach 75 years old).
9. However, the Chief District Court Judge or the Chief Māori Land Court Judge is required under the DCA or TTWMA to certify that the appointment of an acting Judge is needed for the proper operation of the District Court or the Māori Land Court. In the situation where an acting Judge's services are required only for the operation of the Environment Court, this certification requirement cannot be met.
10. This means a retired Environment Judge (having reached the age of 70) is not able to be appointed as an acting Judge solely for the purpose of serving the Environment Court and is therefore is not eligible for appointment as an alternate Environment Judge.
11. The certification criteria was introduced in 2016 to avoid excessive reliance on acting Judges rather than permanent judges. Unlike permanent judges, there are no limits on the number of acting Judges that can be appointed. Acting Judges are appointed for fixed terms.
12. The Ministry of Justice (MOJ) advises that it was an oversight at the time the certification requirements were included in the legislation in 2016 that consideration was not able to be given to the operational needs of the Environment Court, alongside the District Court and Māori Land Court.
13. We have raised this issue with you in our earlier advice (2018-B-05006 refers). It is noted that this matter is an extension of the policy proposal to clarify that acting Judges can be appointed as alternate Environment Judges, which had already been approved by Cabinet in October 2018 [CAB-18-MIN-0485.01, paragraph 51 refers].
14. We consulted with MOJ and, at that time, it was recommended that the issue could be rectified by amending DCA and TTWMA to enable the relevant Chief Judges to certify that the appointment of an acting Judge is necessary for the operation of the Environment Court (Option A below). To determine the extent of the issue, and if there is a policy imperative to amend the two Acts, you agreed to consult with the Chief Justice in January 2019.<sup>1</sup> The Chief Justice's feedback was received on 15 February (Appendix 1).

*The Chief Justice suggested an amendment to the RMA*

15. The Chief Justice has responded to your letter and agreed that there are potential barriers to the appointment of an alternate Environment Judge. The Chief Justice provided an alternative possible solution whereby only an amendment to the RMA is required. This would amend the eligibility criteria for appointment as an alternate Environment Judge to include retired District Court or Māori Land Court Judges. This would permit retired Environment Judges to be appointed because all retired Environment Court Judges are retired District Court Judges or retired Māori Land Court Judges.
16. Under this suggestion, the Principal Environment Judge would be directly responsible for making recommendations for the resourcing of the Environment Court, rather than this being done through the DCA or the TTWMA, as is currently the case.

---

<sup>1</sup> This letter was also forwarded to the Chief High Court Judge, the Chief District Court Judge, the Chief Māori Land Court Judge and the Principal Environment Judge.

17. We received a drafting suggestion from Principal Environment Judge Newhook on 27 February 2019. Judge Newhook also forwarded his suggestion to the Attorney-General's Office. We consider his suggestion broadly corresponds with the Chief Justice's response, although he takes a different approach.

## Advice

---

### *Draft LEG paper for your review*

18. The draft LEG paper gives effect to the Cabinet policy decisions already made [CAB-MIN-0485.01 refers]. It also reflects Ministerial decisions to provide legal immunity for special advisors to the Environment Court (2018-B-05006 refers); enable the Environment Protection Authority (EPA) to undertake enforcement actions under the RMA (2018-B-05174 refers); and to not progress the proposal to enable the Environment Court to review notification decisions by way of declarations (2018-B-05006 refers).
19. Other matters which relate to the regulation of high risk land use activities, and a narrowly scoped regulation making power to remove unduly restrictive rules in district plans are detailed in paragraphs 20-24 of the draft LEG paper.
20. We have identified new matters that we are seeking your agreement on to clarify policy decisions made by Cabinet.

- a. The proposed legislative amendment to clarify the legal status of deemed permitted activities that was agreed by Cabinet [CAB-MIN-0485.01, paragraphs 24 and 25 refers], is now not required. s9(2)(h)

[REDACTED]

We agree with this advice, and recommend that you seek LEG approval to rescind the previous decision of Cabinet, so that this is not included in the bill. This is discussed in paragraphs 18 and 19 of the draft LEG paper.

- b. Cabinet agreed to the policy to suspend a non-notified resource consent application at the time of lodgement until a fee is paid [CAB-MIN-0485.01, paragraphs 19 and 20 refers]. A further amendment is required to clarify the policy to suspend non-notified resource consent applications by a consent authority, to cover situations where a consent authority requires an additional administrative charge when a resource consent application is notified (public or limited). We consider this is necessary to ensure the workability of the proposal. This is discussed in paragraphs 27 to 29 of the draft LEG paper.
- c. Cabinet previously agreed to repeal section 120(1B) of the RMA that restricts the scope of an appeal on a resource consent to matters raised in a person's submission [CAB-MIN-0485.01, paragraph 14 refers]. Section 120(1B) of the RMA also precludes appeals on parts of submissions struck out by a consent authority. We recommend retaining the part of this section that precludes appeals on any part of a submission that was struck out by a consent authority. Additional details on this matter can be found in paragraphs 30-32 of the draft LEG paper.

21. The drafting oversight (cross-referencing error) relating to the board of inquiry process for NES is a minor fix and does not represent any change in Government policy, so was not included in the policy Cabinet paper. The draft LEG paper seeks agreement to include this amendment in the bill.

### ***Facilitating the appointment of alternate Environment Judge***

22. We have identified two options to remove the potential barriers in the appointment of an alternate Environment Judge, if he or she is not required for the operation of the District Court or the Māori Land Court, and only for the Environment Court, which are set out below. We have discussed these with MOJ and considered Option B corresponds with the Chief Justice's suggestion.

**Option A:** Amend the DCA and the TTWMA to enable the Chief District Court Judge and Chief Māori Land Court Judge to certify that acting Judges are necessary for the operation of Environment Court, as well as their own courts.<sup>2</sup>

**Option B:** Amend the RMA to include retired Environment Judges<sup>3</sup> to be eligible to be appointed as alternate Environment Judge, and require the Principal Environment Judge to be satisfied that an alternate Environment Judge is needed for the efficient operation of the Environment Court.<sup>4</sup> A retired Environment Judge, who is appointed as alternate Environment Judge will have all the jurisdiction, power, protections and privileges of an Environment Judge.

23. Option A simply widens the current certification requirements and retains the existing mechanism under the DCA and the TTWMA in the RMA. The option is not supported by the Chief Justice and would require amendments to two other pieces of legislation being included in the bill.

24. Option B amends the RMA to widen the criteria to enable retired Environment Judges (who are retired District Court or Māori Land Court Judges) to be eligible for the appointment as alternate Environment Judges. This means that retired Environment Judges who are currently unable to get certified as acting District Court or Māori Land Court Judges by the relevant Chief Judges for their operation of their courts could still be appointed as alternate Environment Judges and sit in the Environment Court. A certification from the Chief District Court Judge or the Chief Māori Land Court Judge would not be required.

25. Instead, we recommend a new statutory requirement that the Principal Environment Judge must be satisfied that an alternate Environment Judge is needed for the operation of the Environment Court before making a recommendation to the Attorney-General.

26. Retired Environment Judges, who do not hold a permanent or acting Judge warrant under the DCA and the TTWMA (and are appointed as alternate Environment Judges), will need to have the same jurisdiction, power, protections and privileges as an Environment Judge in order to operate as an alternate Environment Judge. We also recommend that the change in the RMA to specify that any appointment of retired Environment Judges as alternate Environment Judges does not extend beyond the date on which the Judge reaches the age of 75 years so this aligns with the DCA and the TTWMA.

27. Both options meet the policy objective and fall within the scope of the Cabinet approval. However, having considered the suggestion of the Chief Justice, we now recommend Option B to amend the RMA as the preferred approach. This is because it provides a better alignment for the appointment process of alternate Environment Judges with their counterparts under the DCA and TTWMA. This also avoids the need to amend the DCA and TTWMA.

---

<sup>2</sup> This was also the option that was consulted with the Chief Justice on 14 January 2019.

<sup>3</sup> This will be in addition to permanent/acting District Court Judges and permanent/acting Māori land Court Judges.

<sup>4</sup> This is similar to the certification requirement provided in the DCA and TTWMA.

*Response to Judge Newhook's suggestion*

28. Judge Newhook suggested that the RMA be amended to provide for a new category of acting Environment Judge, who will be appointed for a term no more than two years and extending not beyond the age of 75 years. An acting Environment Judge will have the same jurisdiction and powers as Environment Judge. A retired or former Environment Judge, District Court Judge, acting District Court Judge or Māori Land Court Judge or acting Māori Land Court Judge would be eligible to be appointed as acting Environment Judge, and the certification under the DCA will not apply.
29. We consider Judge Newhook's drafting suggestion to generally align with our proposed recommended option (Option B), and will achieve a similar outcome to his suggestion. However, we consider the suggestion to create a new category of acting Environment Judge goes beyond the scope of the narrow bill.
30. We consider the recommended option (Option B) will rectify the problem identified about the current certification requirements and enable a retired Environment Judge, who is not an acting District Court or Māori Land Court Judge, to be appointed as an alternate Environment Judge.

*Validation Clause*

31. You have previously agreed to validate any acting Judges that were appointed as alternate Environment Judges prior to commencement of this provision (2018-B-05125 refers). We no longer consider a validation clause is necessary s9(2)(h)

**Next Steps**

---

32. We seek your approval to the proposed clarification amendments, the technical amendment, and seek your agreement to the preferred option for the appointment of the alternate Environment Judges. We will provide PCO with any additional drafting instructions following your feedback. We will also update the draft LEG paper following your feedback on the draft LEG paper and this briefing note.
33. The table below outlines the process to introduce the proposed bill.

<b>Milestone</b>	<b>Date</b>
<b>Agency consultation</b>	Underway
<b>Final LEG paper and bill to Minister's Office</b>	By 15 March 2019
<b>Ministerial and political consultation</b>	Weeks of 18 March and 25 March 2019
<b>Cabinet paper lodged for consideration by LEG Committee</b>	4 April 2019
<b>LEG Cabinet Committee</b>	9 April 2019
<b>Cabinet</b>	15 April 2019

<b>Introduction</b>	Any working day following Cabinet <sup>5</sup>
<b>First reading</b>	2 May 2019

Proactively released

---

<sup>5</sup> Note, the House will be in recess during the weeks 15 April and 18 April, but there will be working days available to introduce the Bill during this period under Standing Order 276.

Proactively released

**Appendix 2 - The Chief Justice's response, dated 15 February 2019**

Proactively released



COPY

Chief Justice of New Zealand

15 February 2019

The Hon David Parker,  
Minister for the Environment  
Parliament Buildings,  
Private Bag 18041,  
WELLINGTON.

Dear Minister,

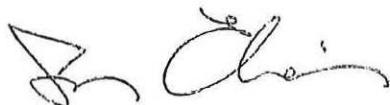
Thank you for your letter of 14 January 2019 in which you sought comments on proposed amendments to remove possible barriers to the appointment of alternate Environment Judges.

I understand that the Principal Environment Judge has some proposals he is working through and wishes to discuss with you. It may well be that they answer the case. Because I understand the matter is under active consideration I thought it might be helpful to give you my immediate reaction, which may be unnecessary if some other arrangement is reached following discussions.

It seems to me that the difficulties faced by requiring the Chief District Court Judge to certify that appointment of an Acting District Court Judge is necessary for the proper conduct of the District Court, should be met directly. That could be by the legislation being amended to permit the Governor-General on the advice of the Attorney-General to appoint an Acting Judge of the Environment Court, with those eligible for appointment being retired judges of the District Court or Maori Land Court. Such formula would also permit an Acting Judge to be appointed who is a retired Environment Court judge, since all retired Environment Court judges are retired District Court judges.

The ability to appoint an Acting Environment Court Judge directly in this way would obviate the need for any certification by the Chief Judge of the District Court or the Chief Maori Land Court Judge.

Yours sincerely,



Sian Elias  
CHIEF JUSTICE

Cc Kos P  
Venning J  
Chief District Court Judge, Judge Jan-Marie Doogue  
Chief Maori Land Court Judge, Judge Isaac  
Principal Environment Court Judge, Judge Newhook

Proactively released