In Confidence

Office of the Minister for the Environment

Chair, Cabinet Environment, Energy and Climate Committee

Proposed Resource Management Amendment Bill: Stage 1 of a resource management system review

1. This paper seeks your agreement to progress a bill making a set of changes necessary to improve the operation of the Resource Management Act 1991 (RMA). It sets out how this proposed bill relates to a more comprehensive review of the resource management system that I propose to begin in 2019.

Executive summary

2. The current resource management and planning system is underperforming in its management of key environmental issues such as freshwater quality, climate change adaptation, and meeting people's needs for affordable housing and thriving urban communities.

3. I propose a two-stage approach for improving the resource management system:

- Stage 1, beginning in 2018, will be a narrowly-focused set of amendments to the RMA, to address problems that I consider relatively straightforward to correct. This will largely reverse widely criticised changes made to the RMA by the Resource Legislation Amendment Act 2017 (RLAA 2017)
- Stage 2, beginning in 2019, will be a more comprehensive review of the resource management system, building on current work across urban development, climate change, and freshwater, as well as inputs from the Productivity Commission, Local Government New Zealand, and the Environmental Defence Society, New Zealand Law Foundation, Property Council New Zealand, Infrastructure New Zealand, the Employers and Manufacturers Association, and Watercare.[1]

4. In any reform of the resource management system, I consider that some key principles must be adhered to. These include upholding the principles in Part 2 of the RMA,[2] providing for local decision-making and meaningful public participation, and achieving good environmental outcomes.

1 For example, *Better Urban Planning,* New Zealand Productivity Commission, 2017; *A 'blue skies' discussion about New Zealand's resource management system*, Local Government New Zealand, 2015; *Reform of the Resource Management System: The next generation*, report by Environmental Defence Society, New Zealand Law Foundation, Property Council New Zealand, Infrastructure New Zealand, Employers and Manufacturers Association and Watercare, 2018.

2 Part 2 of the RMA includes its sustainable management purpose, and various principles that apply in decision-making (such as the management of natural hazards, protecting indigenous biodiversity and upholding the principles of the Treaty of Waitangi).

5. I am seeking Cabinet's agreement to progress Stage 1 through a narrowly-focused bill to amend the RMA, as a first step towards a more comprehensive review.

6. The proposed amendments for the Stage 1 bill are to:

- **reduce complexity and increase certainty** by removing certain ministerial regulation-making powers; removing preclusions on public notification and appeals for certain types of resource consent applications; reinstating the presumption that subdivision is restricted unless expressly permitted by a plan rule, national environmental standard or resource consent; and reinstating the option for councils to require financial contributions to support development
- **introduce a number of relatively simple changes to, in particular, improve consenting, freshwater management, enforcement and Environment Court operations**, by clarifying particular resource consent processes; clarifying when and how conditions of resource consents can be reviewed; clarifying the status of deemed permitted activities; enabling regulation of high-risk land use activities; strengthening tools for compliance, monitoring and enforcement; enabling the Environmental Protection Authority (EPA) to take enforcement action; enabling the Environment Court to make declarations in respect of resource consent notification decisions; clarifying who can be appointed as alternate Environment Judges; and protecting Environment Court special advisors.

7. This Government recognises that an effective and efficient resource management system is important to achieve urban development and affordable housing objectives, and economic growth within environmental limits.

8. In certain circumstances there is a need to expedite processes and provide enabling tools to achieve this – such as through the proposed Urban Development Authority (UDA) and by extending the Housing Accords and Special Housing Areas Act 2013. However, some of the changes made to the RMA in 2017 created perverse incentives and uncertainty for applicants and affected members of the community alike, including development interests. This bill intends to address these by restoring participation by applicants and objectors when appropriate.

9. I intend the bill to be ready for introduction to the House in December 2018, subject to drafting timeframes.

Background

10. The RMA forms one part of our resource management and planning system. It is the principal statute for managing the use of natural and physical resources in New Zealand. It sits alongside the Local Government Act 2002 (LGA), the Land Transport Management Act 2003 (LTMA), and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).

11. Since its enactment, the RMA, and plans developed under it, have become longer, more complex and less accessible for all users.[3] Any approach to remedying this situation must adhere to some key principles. These include upholding the principles in Part 2 of the RMA so as to achieve good environmental outcomes,

3 The RMA is sometimes blamed wrongly for problems with other legislation. For example, the Building Act 2004, the Local Government Act 2002, or the Hazardous Substances and New Organisms Act 1996.

providing for local decision-making and public participation,[4] and achieving more timely and efficient outcomes for applicants, objectors, and councils.

12. Cabinet has confirmed the Cabinet Environment, Energy and Climate Committee's work programme. This includes a commitment to improving the effectiveness of the resource management system [CAB-18-0246 refers].

13. I have taken a number of steps to improve the performance of the resource management system. These have included notifying and consulting on the first set of National Planning Standards, preparing a Forward Agenda for National Direction for 2018/19, and establishing a RMA Enforcement Oversight Unit.

14. This Government also has a range of other priority work programmes to improve urban planning,[5] climate change,[6] and freshwater[7] outcomes. These programmes will make significant improvements and will also help to identify systemic issues in our wider resource management framework, thereby contributing to a more comprehensive review of the resource management system in 2019. Inputs from stakeholders and local government[8] will also inform what further system changes are needed.

A staged approach to improving the resource management system

15. Issues with the current system range from procedural complexity, to more substantial and systemic problems that require careful scrutiny. I therefore propose a two-stage reform approach for improving the resource management system:

- **Stage 1,** beginning in 2018, will be a narrowly-focused set of amendments to the RMA, to address problems that I consider relatively straightforward to correct. This will largely reverse widely-criticised changes made by the RLAA 2017
- **Stage 2,** beginning in 2019, will be a more comprehensive review of the resource management system, building on current work across urban development, climate change and freshwater, as well as inputs from the Productivity Commission, Local Government New Zealand, and the Environmental Defence Society, New Zealand Law Foundation, Property Council New Zealand, Infrastructure New Zealand, the Employers and Manufacturers Association, and Watercare.

16. Stage 2 will provide an opportunity to make more fundamental changes to system settings, in order to support a more productive, sustainable and inclusive economy. I anticipate that Stage 2 will focus on five broad areas:

- improving alignment across different pieces of resource management legislation

4 There should also be allowance, where appropriate, for call-ins or direct referrals to higher level decision-makers.

5 For example the Urban Growth Agenda and the proposed urban development legislation.

6 The Zero Carbon Bill and adaptation initiatives.

7 The Essential Freshwater programme and the Three Waters review.

8 Such as the Productivity Commission's Inquiry into local government funding (due to report in mid-2019) and the work led by the Environmental Defence Society, which is taking a first principles look at how New Zealand's resource management system operates and how it could be improved.

- ensuring plans can be created, amended and implemented within a more reasonable timeframe while providing meaningful opportunities for public participation
- improving the quality of decision-making
- issuing clear national direction
- removing unnecessary complexity, in part by rationalising the multiple decision-making pathways which have proliferated since the RMA was originally passed in 1991.

17. Two specific issues that will be considered under Stage 2 are climate change and urban tree protection. These issues are discussed later in this paper.

18. Stage 2 will be informed by legislative changes identified by work I have been assisting Hon Phil Twyford (Minister of Housing and Urban Development) with as part of the Urban Growth Agenda. This is addressing the planning system settings and fundamentals of land supply, development capacity, and infrastructure provision.

Objectives of a narrowly-focused Stage 1 bill

19. I propose a narrowly-focused Stage 1 bill to amend the RMA.

20. My specific objectives for the bill are to reduce complexity and increase certainty, and to restore appropriate opportunities for meaningful public participation in resource consent processes. The content has been informed by the feedback and suggestions that I have received from stakeholders, and policy work by officials.

21. Some proposals will repeal some amendments made in 2017, which were widely criticised by councils, businesses and other affected members of the community. Those amendments created complexity and perverse incentives in the system. These have hindered applicants as well as affected parties, including owners of important infrastructure assets which we need to protect.

22. These issues will be addressed in Stage 1 by reinstating the pre-2017 position of participation for particular resource consenting processes. This will allow for broader consideration about the role of meaningful public participation in Stage 2, and what changes may be needed to ensure participation is useful and effective for quality decision-making.

23. For the Stage 1 bill, I will only include proposals where:

- the scope and scale of the issue is known and well defined
- the problem is created by legislation and is best addressed by statutory amendment
- a relatively simple amendment with minimal consequential changes will fix the problem
- the amendment will be easy for councils to implement and will not require major changes to their existing systems and processes.

24. The Stage 1 proposals are described below. A fuller description of most, including technical detail, is in Appendix 1.

Reducing complexity and increasing certainty by repealing changes made through the Resource Legislation Amendment Act 2017

Reducing the powers of the Minister for the Environment to prohibit or overturn local plan rules

25. This regulation-making power enables the Minister for the Environment to prohibit or remove district or regional plan rules that duplicate or overlap with subject matter in other legislation (section 360D of the RMA). When this provision was introduced, concerns were raised that its broad scope was not consistent with Legislative Advisory Committee[9] guidelines for good regulatory practice.

26. The provision gives the Minister too much power and undermines local decision-making. For example, it enables a Minister to declare other legislation to be a code, thereby ousting RMA rules. The better view is that if other legislation is intended to be a code, primary legislation should provide this status, not regulations under the RMA.

27. I propose to repeal this provision. I have also instructed officials to investigate opportunities for a narrower regulation-making power, and report back to me in early 2019 and prior to the final stages of the bill's consideration in the House. This will be informed by the work being progressed concurrently as part of the Urban Growth Agenda, which is addressing unduly restrictive rules in district plans.

Removing preclusions on public notification and appeals for subdivision and residential activity resource consents, and restrictions on the scope of appeals

28. Preclusions on public notification and appeals were introduced by the RLAA 2017 on residential and subdivision resource consents, which aimed to reduce delays in decision-making on housing-related resource consents.

29. The Government supports timely and efficient decision-making. However, these preclusions on submissions and appeals have created several perverse outcomes, including preventing key information from being made available to decision makers. Access to justice for applicants and for other parties is also reduced.

30. I sat on the select committee considering the then Resource Legislation Amendment Bill. We heard from some high profile residential developers who were strongly opposed to the removal of appeal rights. Todd Property Group Limited, for example, submitted that the new preclusion on appeals *"could significantly impact on an applicant's ability to negotiate conditions [with councils] on a level playing field, or to have any significant disagreements considered by the Environment Court."* This preclusion of appeal rights removed an incentive for councils to ensure any conditions are reasonable and workable for consent holders.

31. I have since been advised by Ellis Gould, a law firm which acts for Housing New Zealand, that the change has incentivised applicants *"to apply unnecessarily for non-complying activity consents, by constructing the application to make a minor breach so as to increase the activity status to non-complying, to avoid a*

9 Now the Legislation Design and Advisory Committee.

subsequent restriction on appeal rights."[10] This is a perverse outcome that I would like to remedy.

32. We also heard from submitters who represented existing large infrastructure operators. The New Zealand Airports Association, Transpower, and Fulton Hogan, for example, were very concerned that the preclusions on public notification and appeals would prevent them from being able to submit on, or appeal, applications for residential intensification near their facilities. Inappropriate residential development in sensitive areas can have significant 'reverse sensitivity' effects on existing operations and their future development plans. In practice, industrial operators are often overlooked as affected parties and rely on public notification to ensure that reverse sensitivity impacts such as noise, hazardous substances, radiofrequency, dust or odour issues are appropriately considered.

33. Ideally, reverse sensitivity impacts should be accounted for in district plan provisions. However, enabling these organisations to have an opportunity to submit on, and if necessary appeal, consent decisions, provides an important safety net for existing operators if these types of impacts are not adequately addressed in plans.

34. In the interests of fairness, it is important that appeal rights are afforded both to consent applicants and submitters (noting that submitters can include existing large infrastructure operators, as well as individuals, community groups, or iwi). The benefits of reinstating public participation outweigh any costs of development delays that may be caused.

35. In light of these valid concerns, I propose the repeal of the preclusions on public notification, objections, and appeals on resource consent applications for residential activities and subdivision of land.

36. The 2017 amendments also included a regulation-making power (section 360H of the RMA) to identify additional activities that would be precluded from public or limited notification, or prescribe who may be considered 'affected' for the purpose of limited notification. No regulations have been made under this provision to date. If such regulations were made, this would undermine the effect of repealing the preclusions from the RMA itself, carrying similar perverse outcomes and adding complexity to the resource consent application process. I therefore propose to repeal the section 360H regulation-making powers.

37. I also propose repealing the restriction on the ability of submitters to appeal on matters that were not raised in their original submission to the resource consent application, as valid concerns can quite naturally arise later than this (for example, from evidence during a council hearing or from other submitters).

38. I note that the Government is introducing more enabling development powers and processes for urban development projects delivered through the new UDA and subject to the new urban development legislation. The Government is also considering extending the Housing Accords and Special Housing Areas Act 2013, which provides the opportunity for streamlined land use and subdivision consenting within special housing areas (SHA). These processes are suitable for the purposes of enabling housing and urban development projects within specific areas, and carry their own appropriate checks and balances.

10 Letter from Ellis Gould Lawyers in February 2018, entitled *Potential regulatory roadblocks to increased housing capacity and associated infrastructure.*

39. Repealing the preclusions on public notification and appeals for resource consents generally under the RMA does not conflict with these special UDA and SHA processes, as they have their own provisions for public participation.

Repealing the regulation-making power for additional fast-track activities

40. The 2017 amendments introduced a fast-track resource consent process for controlled district land use activities. Fast-track consents must be processed within 10 working days, rather than 20. This fast-track process was said to be justified for controlled district land use activities, as these consents are relatively straightforward. Councils have updated their systems to implement this procedure.

41. The 2017 amendments also introduced a regulation-making power to identify other types of resource consents subject to the fast-track process, and information requirements for fast-track consent applications (section 360G). Regulations have not been made under this provision to date. I consider that issuing regulations for these purposes would create even more complexity and confusion in the resource consent process, for minimal benefit.

42. I propose to repeal the regulation-making power to prescribe additional activities subject to fast-track resource consent processes and information requirements for fast-track applications (section 360G of the RMA). This amendment will reduce complexity within the RMA and provide certainty that local decision-making will not be overridden in these circumstances.

Reversing the change to the subdivision presumption

43. Prior to the RLAA 2017, all subdivision proposals required a resource consent unless specifically permitted by provisions in a district plan or national environmental standard. All plans currently reflect this presumption. However, the RLAA 2017 made all subdivision permitted unless restricted by a rule (or a national environmental standard).[11]

44. Concerns have been raised that this new presumption sends a signal that subdivision is appropriate in all places at all times and should be allowed, irrespective of location (for example, in areas of high natural hazard risk or areas with versatile soils). I do not consider this is appropriate.

45. I propose reinstating the original subdivision presumption that subdivisions are restricted activities, to ensure that all subdivision activities require resource consent unless expressly permitted by a provision in a district plan or other instrument. Reverting to the former presumption will also mean that councils do not have to revise their plans to reflect the 2017 amendment, and will allow limited resources to be appropriately applied to more pressing matters (for example, responding to housing and business requirements of the National Policy Statement for Urban Development Capacity).

Reinstating the use of financial contributions

46. Councils are able to charge financial contributions on resource consents to meet specific purposes set out in the relevant district or regional plan. These could be used to finance the extension or development of services or other infrastructure costs, provide reserves to meet needs generated by the project, or manage

11 See section 11(1A) of the RMA.

adverse effects on the environment that cannot be directly avoided, remedied, or mitigated.

47. Due to provisions in the RLAA 2017 that have not yet commenced, from 18 April 2022 councils will no longer have the ability to impose a condition on a resource consent requiring a financial contribution. It was asserted at the time of the 2017 amendments that there was an overlap with the development contribution regime under the LGA. This was wrong. Section 200(1)(a) of the LGA prevents a council from charging development contributions if it has already charged financial contributions on that development for the same purpose.

48. The majority of submitters on the 2017 changes opposed the removal of financial contributions, including a large number of councils. Some submitters noted that removing financial contributions would leave a financing gap for large scale development projects, as financial contributions can be used for wider purposes than development contributions. Some district councils are unable to transition their existing plans to finance upcoming projects into a development contributions regime without exposing themselves to significant financial risk.

49. For example, a major future development in the Western Bay of Plenty is being jeopardised by the removal of financial contributions. The Department of Internal Affairs advised that the use of development contributions only would in that instance pose a financial risk to the council and the community, and create opportunity costs, and that the financial contributions approach is needed.

50. I propose to reinstate the option for councils to use financial contributions and ensure they are not removed from the RMA in 2022. This will allow councils to choose which regime works best in particular circumstances. It will also assist councils that are having difficulty moving to a development contributions scheme with their current works. This is also important for regional councils, which cannot levy development contributions.

Proposed new RMA amendments to, in particular, improve consenting, freshwater management, enforcement, and Environment Court operations

51. I also propose to make a number of new amendments to the RMA to, in particular, improve consenting, freshwater management, enforcement, and Environment Court operations.

Enabling applicants to have the processing of non-notified resource consent applications suspended

52. Currently, under section 91A of the RMA, applicants can suspend the processing of their notified resource consent applications, but not their non-notified applications. For the latter, this has led to the inappropriate use of other sections of the RMA to circumvent the issue.

53. I propose to enable applicants for non-notified resource consents to suspend the processing of their application for up to 20 working days (cumulatively). This will alleviate confusion as to when application suspension is available, and improve resource consenting process efficiency.

Enabling councils to suspend the processing of resource consent applications until fixed administrative charges are paid

54. Consent authorities are required to process resource consent applications within certain timeframes specified in the RMA.[12] The consent authority is allowed to suspend processing and 'stop the clock' in a number of situations. If an administrative charge is payable to the authority, the RMA allows the consent authority to stop working on a resource consent application until the charge is paid in full, but does not allow them to 'stop the clock' on statutory timeframes.

55. This legislative misalignment can lead to consent authorities having to choose between attempting to recover administrative costs on the one hand, or meeting specified resource consent processing timeframes on the other.

56. I propose to enable consent authorities to suspend the processing of resource consent applications, i.e. stop the clock, where administrative charges are payable in accordance with an authority's published list of fixed charges, until the charge is paid.[13]

Enabling longer time periods to lodge retrospective resource consents for emergency works

57. In recent large civil defence emergencies, applicants have found it difficult to lodge retrospective resource consent applications for emergency works within the required 20 working days. In relation to the Canterbury earthquake situation, special emergency legislation was needed to allow these resource consent applications to be lodged within 60 working days.

58. I propose to extend the RMA timeframe for applying for a resource consent for emergency works from 20 to 60 working days. The current seven day timeframe to advise the consent authority of emergency works will remain.

Enabling review of conditions of multiple resource consents

59. Regional councils can review and change conditions of existing water and discharge permits for activities that contravene rules in a regional plan. However, it is not clear whether they can consider the effects of multiple consents at the same time. Further, any such review can only be undertaken once the entire regional plan becomes operative. Regional councils also cannot review regional land use consents for activities that breach regional rules about water quality or flows.

60. I propose to make explicit that conditions of multiple existing resource consents (including regional land use consents) can be reviewed concurrently, for example on a catchment by catchment basis, and that this can occur as soon as the relevant rule is operative (even if other parts of the plan are under appeal).

Clarifying the legal status of deemed permitted activities

61. Deemed permitted marginal or temporary activities, and deemed permitted boundary activities are new types of permissions that were added to the RMA

12 10 working days for fast-track activities, 20 working days for non-notified, 100 working days for limited notified, and 130 for publicly notified.

13 These fixed charges are set in advance by councils under section 36 of the RMA, and cannot be objected to by resource consent applicants.

through the 2017 amendments. These are not resource consents. They provide an applicant permission to undertake their activity through a 'written notice' even though they infringe a rule in a plan.

62. Currently, Part 3 of the RMA sets out duties and restrictions on different types of activities. However Part 3 does not refer to deemed permitted marginal or temporary activities, or deemed permitted boundary activities. I propose to clarify that 'deemed permitted boundary' and 'deemed permitted marginal or temporary' activities are lawfully established despite contravening a rule in a plan or national environment standard, to rectify this drafting oversight and clarify that the activities are not in contravention of the Act.

Enabling the regulation of high-risk land use activities

63. I have instructed officials to undertake policy work on whether to amend the RMA to enable the regulation of high-risk land use activities to achieve improved water quality outcomes. I will seek policy approval at a relevant Cabinet committee to include the matter in this bill if I consider that changes to the RMA are necessary.

Strengthening enforcement tools for improving environmental compliance

64. The current maximum infringement fee that may be set in regulations under the RMA is $2000 for stock exclusion offences, and $1000 for all other offences. There is currently no distinction in infringement fees for offences committed by a natural person (individual) and other persons (companies/trusts). I consider that these maximum infringement fees are too low to be a real deterrent, especially for companies where non-compliance is cheaper than the fines.

65. I propose to enable the maximum infringement fees payable for infringement offences (including stock exclusion), which may be specified in regulations, to be up to $2000 for a natural person, and up to $4000 for other persons.

66. I also propose to extend the statutory limitation period for filing charges for prosecutions from the current period of six months to 12 months from when an alleged offence was known or should have been known about. This will provide councils with more adequate time to collect and prepare evidence before filing charges, and it mirrors the 12 month limitation period for offences under the EEZ Act.

Enabling the Environmental Protection Authority (EPA) to take enforcement action under the RMA

67. The current RMA enables staff from councils, Department of Conservation, and Maritime New Zealand to be authorised to carry out enforcement actions. These include functions to enter private properties to collect evidence, and functions to issue abatement or infringement notices.

68. Enforcement actions are variable across councils in New Zealand. In May this year, Cabinet agreed to fund an enforcement oversight unit to improve the consistency, transparency and effectiveness of council enforcement of RMA rules and decisions [CAB-18-MIN-0158.10 refers]. I am establishing this unit at the EPA, and I anticipate this will, in some cases,[14] take enforcement action directly.

14 For example, where a council has failed to take effective enforcement action.

69. The EPA does not currently have specific enforcement functions under the RMA (but does for some other legislation). I propose to enable the EPA to carry out enforcement functions, for example through authorising the EPA to warrant enforcement officers to obtain evidence in the same manner as councils under the RMA.

70. Officials are working through the detail of changes necessary to enable the EPA to take enforcement action.

71. I seek Cabinet authorisation for a group of Ministers, following advice from officials, to consider and agree detailed policy on the specific RMA enforcement functions appropriate for the EPA. I propose the group comprise the Minister for the Environment, the Associate Minister for the Environment (with portfolio responsibility for the EPA), the Minister of Finance, and the Minister of Justice.

72. If this group agrees, I seek authorisation from Cabinet to issue drafting instructions to Parliamentary Counsel Office (PCO). This proposed amendment can then be considered by the Cabinet Legislation Committee prior to introduction of the bill.

Enabling the Environment Court to review councils' resource consent notification decisions

73. I propose to enable any person dissatisfied with a council's notification decision on a resource consent to challenge that decision by seeking a declaration from the Environment Court. The Court would be able to make a declaration on whether a council's notification decision was unauthorised or invalid and refer it back to the council for reconsideration with or without direction.

74. Further, I propose that the Environment Court be able to make interim orders preserving the position of any party to the declaration. To make the declaration meaningful, the Court should be able to make an order setting aside the whole or part of the resource consent notification decision. If the Environment Court directs a council to reconsider its notification decision, the Environment Court should give reasons that the council must have regard to when making its new notification decision. I also propose to enable the Environment Court to make orders to prevent the exercise of a resource consent until the council has made its new notification decision.

75. I propose that challenges to notification decisions cannot be made on the basis of trade competition, to reduce the risks of any misuse of the declaration powers and ensure consistency with other provisions of the RMA.

76. I seek Cabinet authorisation for the Minister for the Environment and the Minister of Justice, following advice from officials, to consider and agree how the proposed policy will work in relation to the existing legal avenue to challenge notification decisions.

77. Once this is agreed, I seek authorisation from Cabinet to issue drafting instructions to PCO. This detail of the proposed amendment can then be considered by the Cabinet Legislation Committee prior to introduction of the bill.

Clarifying who can be appointed as alternate Environment Judges

78. It is currently unclear in the RMA whether an acting Judge can be appointed or hold office as an alternate Environment Judge. I propose to clarify in the RMA that

acting District Court Judges and acting Māori Land Court Judges can be appointed as alternate Environment Judges.

Protecting special advisors to the Environment Court

79. Environment Court members have protection from legal proceedings under section 261 of the RMA. Under section 259, special advisors are appointed to sit with and assist the Environment Court, but are not members of the Environment Court. This means that special advisors do not have the same protections from legal proceedings that Environment Court members have.

80. Ministry for the Environment officials are working with the Ministry of Justice to determine the extent of the issue.

81. I seek Cabinet authorisation for the Minister for the Environment and Minister of Justice, following advice from officials, to consider and agree whether or not the RMA needs to be amended in order for special advisors to the Environment Court to have adequate protection from legal proceedings.

82. If we agree, I seek authorisation from Cabinet to issue drafting instructions to PCO. This proposed amendment can then be considered by the Cabinet Legislation Committee prior to introduction of the bill.

Issues identified to progress in a more comprehensive review of the resource management system (Stage 2)

Climate change

83. As the principal statute for managing the use of natural and physical resources in New Zealand, the RMA does not directly manage the effects of the emission of greenhouse gases on climate change. However, many activities that affect New Zealand's emissions arise as a result of planning decisions made under the RMA.

84. Climate change is referred to in a number of ways in the RMA, both explicitly and implicitly. However, these references are mainly to adaptation rather than mitigation activity. Most particularly:

- persons exercising functions and powers under the RMA are required, under section 7, to have particular regard to "the effects of climate change"
- "the management of significant risks from natural hazards" is a matter of national importance under section 6 of the RMA
- regional councils are unable to consider the effects of climate change when making rules on the discharge of greenhouse gases, except with regard to the development of renewable energy generation (section 70A)
- a further exception exists where a national environmental standard (NES) is made to control the effects on climate change of the discharge into air of greenhouse gases (section 70B), but there is currently no such NES
- coastal hazard management is included in the New Zealand Coastal Policy Statement, providing a strong directive to those acting under the RMA
- the National Policy Statement on Renewable Energy Generation 2011 states that the following are matters of national significance: "the need to develop, operate, maintain and upgrade renewable electricity generation

activities throughout New Zealand; and the benefits of renewable electricity generation."

85. So while the RMA provides some ability to consider the positive effects from an activity on New Zealand's transition to lower emissions, there is currently within the Act itself no strong and specific directive to do so. This has implications for the decision-making exercise undertaken when considering resource consent applications, and considering plan provisions.

86. Addressing climate change is a high priority for this Government. There could be significant benefits in elevating the importance of climate change within the RMA framework, so that decision-makers are able to fully consider both the effects of climate change on development (adaptation), and the effects of development on climate change (mitigation).

87. I am therefore proposing to reconsider the role of the RMA in relation to climate change in Stage 2 of the review of the RMA. This will provide the best opportunity for any changes to be carefully worked through.

Urban tree protection

88. I have considered the urban tree protection changes to the RMA that were introduced by the previous government, by way of amendments to section 76 of the Act though new subsections (4A) to (4D). The stated rationale for these changes was that resource consenting requirements for pruning and felling trees, particularly in Auckland, had become too onerous.

89. A 2009 RMA amendment restricted the ability of councils to require resource consents for pruning and tree felling. This amendment was considered by the Environment Court in 2011.[15] The Court decided that District Plans would still be able to protect trees by class. A 2013 amendment responded to this decision by further constraining the ability of territorial authorities to protect trees.

90. The current law only allows trees on "urban environment allotments" to be protected in a District Plan if the trees are described and the allotment or allotments the trees are on are specifically identified.

91. In Auckland, the changed RMA provisions have been implemented through the Auckland Unitary Plan, and Auckland Council has a detailed programme of work relating to urban trees. The Tree Council has asserted that Auckland has lost one-third of its mature tree cover since 2013 as a result of these changes. Recent preliminary monitoring data from Auckland Council indicates that there has been significant loss of mature trees since 2013, but an increase in new planting with no net loss of canopy cover in the six suburbs surveyed.[16]

92. The Auckland Plan is a unitary plan, and the Auckland Council has been able to establish activity standards that restrict vegetation removal based on their regional council functions. This may be a satisfactory solution for Auckland. However, it is

15 Auckland Council [2011] NZEnvC 129

16 Preliminary analysis indicates a 1% net increase in tree cover across a representative sample of suburbs in the southern half of Auckland region between 2013 and 2016. *Auckland Council, Memorandum to the Environment and Community Committee: Update on several workstreams related to trees in Auckland's urban areas, 3 August 2018) - Attachment 2, paragraph 24*
http://infocouncil.aucklandcouncil.govt.nz/Open/2018/08/ENV_20180814_AGN_6842_AT_WEB.htm

not clear what the effect of the section 76 changes has been on tree cover outside of Auckland.

93. Territorial authorities need to be able to protect mature trees and other ecologically significant trees, especially indigenous vegetation, to better meet their functions under section 31 of the RMA. It is also important that these protections do not create unnecessary compliance costs for routine pruning or removal of smaller trees. I am therefore proposing to review the current provisions in section 76(4A) to (4D) as part of the Stage 2 review.

Procedural considerations

Commencement timeframes

94. I seek Cabinet's agreement to delegate to the Minister for the Environment the authority to develop commencement, transitional and any savings provisions with PCO, through the drafting process.

95. The drafted commencement and transitional provisions will be subject to approval by Cabinet when it considers the bill for introduction.

Potential timeframes for progressing a bill in 2018

96. My intention is to take the bill to the Cabinet Legislation Committee (LEG) for approval to introduce it to the House in December 2018, with a view to it being passed mid-2019. However, this is subject to PCO drafting timeframes.

Consultation

97. I have received suggestions from a variety of individuals and organisations, which have been considered in developing these proposals. Submissions made during the select committee process for the RLAA 2017 have also informed the proposals.

98. My officials have consulted practising planning professionals from six councils (district, regional, and unitary), who are generally unopposed to the changes.

99. The public will have an opportunity to participate and contribute to the refinement of these proposals through the select committee process.

100. The following agencies have been consulted on this paper: the Department of the Prime Minister and Cabinet (Policy Advisory Group and Ministry of Civil Defence & Emergency Management); Treasury; Ministry of Business, Innovation and Employment; Department of Conservation; Department of Internal Affairs; Te Puni Kōkiri; Ministry of Transport; Ministry of Justice; Ministry of Culture and Heritage; Ministry for Primary Industries; Land Information New Zealand; New Zealand Defence Force (NZDF); Ministry of Education (MoE); Ministry of Health; and the Department of Corrections.

101. MoE, which uses designations in district plans, considers that the section 360D regulation-making power may be a useful check on councils' plan-making practice. MoE and NZDF are also concerned about reintroducing the ability for submitters to appeal on matters outside the scope of their original submission. I consider that other tools in the RMA, such as national direction, provide an appropriate check on plan making, and that the Environment Court is well placed to address any concerns associated with the change to the scope of appeals.

102. I have consulted with the Chief District Court Judge, Chief Māori Land Court Judge and Principal Environment Judge on the proposal to clarify that acting Judges are eligible to be appointed as alternate Environment Judges. All three Judges support the proposed amendment.

Financial implications

103. The costs of developing the Stage 1 bill will be absorbed within existing baselines. In May 2018, Cabinet agreed to allocate $3.1 million to set up the Resource Management Act Enforcement Oversight Unit [CAB-18-MIN-0158.10 refers].

Human rights

104. There are no human rights implications associated with this paper.

Legislative implications

105. The policy decisions from this paper will require legislative change to be progressed through a bill to amend the RMA.

106. The amendments will be binding on the Crown, consistent with the primary legislation.

107. As the bill is not included in the 2018 Legislation Programme for 2018, I propose to add the bill to the Programme with category 5 priority (to be referred to a select committee in the year).

Regulatory Impact Analysis

108. The Regulatory Impact Analysis (RIA) requirements apply to the proposals in this paper. A Regulatory Impact Statement (RIS) has been prepared by the Ministry for the Environment and is attached.

109. The Regulatory Impact Analysis Team in the Treasury advised that its analysis role could be completed by the Regulatory Impact Analysis Panel of the Ministry for the Environment (the Panel).

110. The Panel has reviewed the RIS and considers that it partially meets the quality assessment criteria.

111. The RIS is written clearly and concisely and does enough to make the case for the recommended options with the elements of the proposals being clear and the potential impacts having been identified.

112. The Panel acknowledges that the future costs are difficult to estimate in terms of reliable and meaningful figures for costs that will be incurred by local government, and also for the users of the resource management system. This in turn affects the ability to assess any potential impact on individual sectors, although the impact on sectors could be further elicited through any consultation and engagement by the Select Committee when it considers the draft bill. Any subsequent implementation of the proposals will help improve their effectiveness, including working closely with local government. The uncertainties around impacts could also be addressed through further monitoring and evaluation after the changes are in place.

113. Four of the matters in this Cabinet paper are not included in the RIS, as policy development for these matters is ongoing. Officials will prepare an additional RIS for three of these matters, if they are proposed to be included in the bill, when the Cabinet Legislation Committee considers the bill for introduction. These are the matters of enabling the Environmental Protection Authority to take enforcement action, detail about how Environment Court declarations on notification decisions will work in relation to judicial review, and the Environment Court special advisors issue. For the fourth matter, enabling the regulation of high-risk land use activities, policy approval will be sought at a relevant Cabinet committee for inclusion in this bill if considered necessary. Officials would prepare an additional RIS for this matter.

Gender implications

114. There are no gender implications associated with this paper.

Disability perspective

115. There are no disability implications associated with this paper.

Publicity

116. I made a media statement on 3 May 2018 in which I announced that short term changes would be made to the RMA over the next year, including to reverse or correct amendments made in 2017. I also announced that a more comprehensive longer term review would be considered next year.

117. In the interests of transparency, I am seeking Cabinet's agreement to make the Cabinet paper and RIS publicly available when the bill is announced.

Recommendations

The Minister for the Environment recommends that the Environment, Energy and Climate Committee:

Improving the resource management system

1. **note** that Cabinet has confirmed the Cabinet Environment, Energy and Climate Committee's work programme, which includes a commitment to improving the effectiveness of the resource management system [CAB-18-0246 refers];
2. **note** that there are a small set of problems that are relatively straightforward to correct through a narrowly-focused set of amendments to the Resource Management Act 1991 (RMA);
3. **note** that the Minister for the Environment considers meaningful public participation and access to justice as fundamental principles in resource management decision-making;
4. **note** that this Government's current priority work areas across urban development, climate change and freshwater may identify desirable long-term changes to the resource management system;
5. **note** that the Minister for the Environment intends to undertake a more comprehensive review of the resource management system in 2019, which will

include consideration of the role of public participation, and be undertaken in conjunction with legislative changes arising as part of the Urban Growth Agenda;

Objectives of a narrowly-focused bill to amend the RMA

6. **note** that the Minister for the Environment proposes a narrowly-focused bill to amend the RMA with its objectives being to reduce complexity, increase certainty, restore previous public participation opportunities, and improve RMA processes;

Reducing the powers of the Minister for the Environment to prohibit or overturn local plan rules

7. **note** that the existing section 360D of the RMA provides unduly broad powers to issue regulations that prohibit or remove district or regional plan rules that duplicate, overlap, or deal with the same subject matter as other legislation;
8. **agree** to repeal section 360D of the RMA (and consequentially section 360E) with the effect that the Minister for the Environment is no longer able to make regulations that either prohibit or remove rules in council plans that duplicate or overlap with subject matter that is included in other legislation;
9. **note** that the Minister for the Environment has directed officials to explore the merits of a more narrowly-scoped regulation-making power, that will be informed by work being progressed concurrently as part of the Urban Growth Agenda, which is addressing unduly restrictive rules in district plans, and report back to me in early 2019 with advice;

Removing preclusions on public notification and appeals for subdivision and residential activity resource consents, and restrictions on the scope of appeals

10. **agree** to repeal the public notification preclusions relating to resource consent applications for residential activities and subdivision of land as set out in section 95A(5)(b)(ii) of the RMA;
11. **agree** to amend section 120 of the RMA to repeal the current preclusions on the ability to appeal against the whole or part of a decision of a consent authority relating to the subdivision of land and residential activities;
12. **agree** to reinstate the ability to appeal to the Environment Court a decision on an objection relating to the subdivision of land and residential activities;
13. **agree** 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;
14. **agree** to repeal section 360H of the RMA with the effect that the Minister for the Environment is no longer able to recommend the making of regulations that would preclude public or limited notification for certain activities, or prescribe who may be considered an affected person in relation to limited notification;

Repealing the regulation-making power for additional fast-track activities

15. **agree** to repeal section 360G of the RMA with the effect that the Minister for the Environment is no longer able to recommend the making of regulations that would prescribe certain activities as fast-track and prescribe the information that an application for fast-track resource consent must include;

Reversing the change to the subdivision presumption

16. **agree** to change the subdivision presumption from permitted to restricted;

Reinstating the use of financial contributions

17. **agree** to repeal all provisions in the Resource Legislation Amendment Act 2017 that are intended to remove the ability to impose financial contributions as from 18 April 2022;

Enabling applicants to have the processing of non-notified resource consent applications suspended

18. **note** that section 91A of the RMA currently enables an applicant to suspend the processing of a notified resource consent application in certain circumstances;

19. **agree** to amend the RMA in respect of a non-notified resource consent application to:

    19.1. enable an applicant to request the suspension of the processing of a resource consent for a period of up to 20 working days, with the request being able to be made at any time between lodging the application for resource consent up to when a hearing is completed or a decision is made;

    19.2. specify that a request to suspend processing cannot be made if the circumstances in either section 91A(3)(a) or (b) exist, or if the application has been suspended for a total of 20 or more working days;

    19.3. specify that the suspension of processing will cease in the same manner as specified for notified resource consent applications;

    19.4. enable the consent authority to return the resource consent application, or to continue to process the resource consent if the application has been suspended for a total of 20 or more working days;

    19.5. require the consent authority to provide a written explanation to the applicant in the event that the suspended resource consent application is returned and provide the applicant an objection right;

    19.6. clarify that if a decision is made to notify a previously suspended non-notified resource consent application that the days it was suspended are added to the period of time set out in section 91C(1)(a);

Enabling councils to suspend the processing of resource consent applications until fixed administrative charges are paid

20. **agree** to amend the RMA to:

    20.1. enable consent authorities to suspend the processing of a resource consent application if a fixed fee is required to be paid at lodgement, until the fixed fee is paid;

    20.2. ensure that the working days for which a resource consent application is suspended are excluded from the statutory working days within which to process the resource consent;

Enabling longer time periods to lodge retrospective resource consents for emergency works

21. **agree** to extend the timeframe for applying for a resource consent for emergency works under section 330B of the RMA from 20 working days to 60 working days;

Enabling review of conditions of multiple resource consents

22. **agree** to amend the consent condition review provisions in the RMA to better enable consent authorities to effectively review conditions of resource consents under s128(1)(b) (certain regional rules) by:

    22.1. clarifying that a consent authority can review water and discharge permits when a relevant rule, part of a plan or plan has become operative;

    22.2. adding the ability for a consent authority to review a regional land use resource consent when a plan sets rules relating to minimum or maximum standards for water quality or quantity, and that rule, part of a plan or plan has become operative;

    22.3. adding a requirement that notification of resource consent reviews must include reference to the intent of a consent authority to manage the effects of the consented activity alongside all of the same or similar consents in a catchment, or catchments, that are affected by a regional plan;

Clarifying the legal status of deemed permitted activities

23. **agree** to clarify that activities "deemed" to be permitted activities under section 87BA or 87BB of the RMA do not contravene any requirements, conditions, permissions specified in the Act, regulations (including any national environmental standard), plan, or proposed plan;

24. **agree** to validate any "deemed" permitted activities already authorised by the application of section 87BA or 87BB of the RMA to the extent that they were lawfully established prior to the proposed amendment in recommendation 23 being enacted;

Enabling the regulation of high-risk land use activities

25. **note** that the Minister for the Environment has instructed officials to undertake policy work on the regulation of high-risk land use activities to achieve improved water quality outcomes;

26. **note** that the Minister for the Environment will seek policy approval at a relevant Cabinet committee to include the matter in this bill if it is considered that changes to the RMA are necessary;

Strengthening enforcement tools for improving environmental compliance

27. **note** that the RMA currently contains empowering provisions that enable regulations to be made that can impose an infringement fee of up to $2,000 for stock exclusion infringement offences, and up to $1,000 for other infringement offences;

28. **agree** to amend the RMA to enable regulations that can differentiate the quantum of infringement fees between natural persons and persons other than natural persons;

29. **agree** to amend the RMA to enable regulations that can prescribe infringement offence fees of up to a maximum of $2,000 for natural persons and up to $4,000 for persons other than natural persons;

30. **agree** to extend the statutory limitation period for filing charges for prosecutions of Category 3 offences under section 338(4), from six months from when a contravention giving rise to the charge first became known or should have become known, to 12 months from when that contravention giving rise to the charge first became known or should have become known;

Enabling the Environmental Protection Authority to take enforcement action under the RMA

31. **note** that the Minister for the Environment is establishing an enforcement unit at the Environmental Protection Authority (EPA) to improve the transparency, consistency and effectiveness of council enforcement actions;

32. **note** that the EPA does not have specific enforcement functions under the RMA;

33. **agree** that the EPA be given enforcement functions under the RMA, for example through authorising the EPA to warrant enforcement officers to obtain evidence in the same manner as councils under the RMA;

34. **authorise** a group of Ministers, following advice from officials, to consider and agree detailed policy on the specific RMA enforcement functions appropriate for the EPA;

35. **agree** that the group of Ministers for the purpose of recommendation 34 comprise the Minister for the Environment, Associate Minister for the Environment (with portfolio responsibility for the EPA), Minister of Finance, and Minister of Justice;

36. **authorise** the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office if detailed policy, referred to in recommendation 34, is agreed to by the group of Ministers;

37. **note** that officials will prepare an additional Regulatory Impact Statement for this proposal, if agreed, when the Cabinet Legislation Committee considers the bill for introduction;

Enabling the Environment Court to review councils' resource consent notification decisions

38. **agree** that any person who is dissatisfied with a council's notification decision on a resource consent may challenge that decision by seeking a declaration from the Environment Court;

39. **agree** that the Environment Court be empowered to make a declaration that a notification decision by a consent authority on a resource consent application was unauthorised or otherwise invalid;

40. **agree** that the Environment Court be empowered to issue interim orders with the effect of preserving the position of any party to the declaration;

41. **agree** that the Environment Court may make an order setting aside a whole or a part of the consent authority's notification decision and refer a whole or a part of the notification decision back to the consent authority with or without any direction as to the reconsideration of the notification decision;

42. **agree** that if the Environment Court makes a direction as to the reconsideration of the consent authority's notification decision, it must give reasons for those directions, and the consent authority must have regard to the reasons of the Court when making its new notification decision;

43. **agree** that the Environment Court be empowered to make orders setting aside the whole or a part of the resource consent granted on the basis of a notification decision made by a consent authority;

44. **agree** that, despite not being empowered to make an enforcement order in the event that a person is acting in accordance with a resource consent, the Environment Court may make an order preventing the exercise of a resource consent until the consent authority has made its notification decision in accordance with the order of the Environment Court;

45. **agree** that trade competitors are not excluded from initiating an application for a declaration in the Environment Court related to a notification decision of a consent authority, but that the application cannot relate to trade competition or the effects of trade competition;

46. **agree** that the prohibition on using a surrogate as set out in Part 11A of the RMA also applies to such an application;

47. **authorise** the Minister for the Environment and the Minister of Justice, following advice from officials, to consider and agree detailed policy about how declarations on notification decisions will work in relation to judicial review;

48. **authorise** the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office if detailed policy, referred to in recommendation 47, is agreed to by the Minister for the Environment and the Minister of Justice;

49. **note** that officials will prepare an additional Regulatory Impact Statement for the detail of this proposal as to how declarations on notification decisions will work in relation to judicial review, if required, when the Cabinet Legislation Committee considers the bill for introduction;

Clarifying who can be appointed as alternate Environment Judges

50. **agree** to clarify that acting District Court Judges and acting Māori Land Court Judges can be appointed or hold office as alternate Environment Judges;

Protecting special advisors to the Environment Court

51. **note** that the RMA provides Environment Court members, but not special advisors to the Environment Court, with protections from legal proceedings;

52. **note** that officials are considering the matter, and will report back to me on whether this needs to be addressed through an additional RMA amendment;

53. **authorise** the Minister for the Environment and the Minister of Justice, following advice from officials, to consider and agree whether to provide special advisors

to the Environment Court with protections from legal proceedings under the RMA;

54. **authorise** the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office if agreement, referred to in recommendation 53, is reached by the Minister for the Environment and the Minister of Justice;

55. **note** that officials will prepare an additional Regulatory Impact Statement for this proposal, if agreed, when the Cabinet Legislation Committee considers the bill for introduction;

Issues identified to progress in a more comprehensive review of the resource management system

56. **note** that the Minister for the Environment intends to consider RMA changes relating to urban tree protection and climate change (both mitigation and adaptation) as part of a subsequent more comprehensive review of the resource management system;

Procedural considerations

57. **note** the Ministry for the Environment's Regulatory Impact Analysis Panel has reviewed the Regulatory Impact Summary (RIS) produced by the Ministry for the Environment, and considers that the RIS partially meets the quality assessment criteria;

58. **agree** that the Minister for the Environment has the ability to further clarify and develop policy matters relating to the proposals in this Cabinet paper in a manner not inconsistent with the policy recommendations contained in the paper;

59. **approve** the inclusion of the bill in the 2018 Legislation Programme, with a priority of category 5 (to be referred to a select committee in the year);

60. **invite** the Minister for the Environment to issue drafting instructions to the Parliamentary Counsel Office to implement the decisions set out above through a bill to amend the RMA, in consultation with relevant portfolio Ministers where appropriate;

61. **authorise** 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;

62. **authorise** the Minister for the Environment to develop commencement, transitional and any savings provisions with the Parliamentary Counsel Office, through the drafting process;

63. **note** that the drafted commencement and transitional provisions will be subject to approval by Cabinet when it considers the bill for introduction;

64. **note** the potential timeframes for progressing this bill are tighter than usual timeframes for legislative drafting;

65. **note** the costs for progressing this reform package will be absorbed within existing budgets; and

66. **agree** that the Minister for the Environment may make this Cabinet Paper and accompanying RIS publicly available when decisions have been made.

Authorised for lodgement

Hon David Parker

Minister for the Environment