29 September 2016

Better Urban Planning Inquiry
New Zealand Productivity Commission
The Terrace
Wellington

Submission on Better Urban Planning Report

This is a brief commentary on behalf of the Environmental Defence Society (EDS) and is intended to supplement the earlier engagement we had with the Commission.

Overall we consider *Better Urban Planning* to be a useful contribution to the wider community conversation about the future of the resource management system. EDS accepts that it is timely to consider whether we should be moving to engage in fundamental reform and that a primary driver for change comes from growing urban pressures. Recent amendments to the Resource Management Act have been focused on urban issues but also apply more generally to the rest of New Zealand. Sometimes urban-focused amendments are not helpful in that wider context.

We make the obvious point that the terms of reference for your report are narrow and are restricted to urban planning matters. We consider that it would be dangerous to proceed from a narrowly focused report on cities to wholesale reform of the resource management system covering all of New Zealand: the system embraces resources other than urban ones. Mistakes could be made.

Any overarching reform should be based on a comprehensive examination that takes account of urban, rural and marine areas. It should examine all the environmental domains, be evidence based, free of ideological positioning and as far as possible represent a consensus on the way forward.

What is needed is an inquiry that is open to all New Zealanders. The legal and administrative framework by which we manage our environment including our cities has implications for all. Some have proposed a Royal Commission as a suitable method for such an inquiry. That may have merit. Our view is that instead of rushing to conclusions about what reform should be implemented, proper consideration needs to be given to the *process* by which issues are identified and the options considered. It would be helpful for you to give some consideration of this question in your final report. Your report would be a useful input to such a process.

We are not wedded *per se* to the current system and have been doing our own research as a further contribution to the conversation. EDS has made three substantive contributions to the overall discussion.

First, we published *Vanishing Nature,* which outlined how (and why) New Zealand's natural environment is still largely in a state of decline. We tabled copies of this book with you. That publication posited a number of reforms some of which (such as more use of market mechanisms) are included in your report.

PO Box 91736, Victoria Street West, Auckland 1142, New Zealand
Phone 09 480 2565 • Email manager@eds.org.nz • www.eds.org.nz

It concluded that unsatisfactory outcomes are often due to an imbalance of resources between private interests in property development and the public interest in the wider environment, with the former dominating decision-making processes. This conclusion is at variance with the assumptions underpinning many of your recommendations, which would tip the imbalance even further in favour of private rights. The analysis in *Vanishing Nature* indicates that such changes would lead to further environmental degradation.

For that reason we do not support your suggestions regarding further limitations on standing, and further constraining appeal rights and the role of the Environment Court.

Secondly, we published just this week *Evaluating the Environmental Outcomes of the RMA (*commissioned from NZCID, EMA and the Property Council). It is available here: http://www.eds.org.nz/our-work/publications/reports/ That report examined the environmental outcomes of the RMA and concluded that they have not met the expectations set down in the statute. The reasons for the poor outcomes are largely to do with implementation but also because the full range of tools potentially available for environmental management have not been deployed. The report highlights a range of key areas that undermine the system's potential to deliver good outcomes for the environment. These include agency capture (most particularly of local government), limited national direction and the influence of present institutional arrangements.

Thirdly, we are currently engaged on a review of *compliance monitoring and enforcement of environmental law*. It examines all our nature-based legislation and the current state of enforcement. It considers what improvements could be made to strengthen regulatory outcomes. This will be completed early in the New Year, and will be pertinent in answering your question about whether regulation should be handed to a regionalized EPA or left with regional councils.

At our earlier meeting EDS traversed with you the implications of the Supreme Court decision *EDS v King Salmon Ltd*. We note that you make only passing reference to the decision (including a footnote) and continue to assert that the "overall balanced judgement" approach dominates RMA jurisprudence.

That is wrong. The *King Salmon* case, as we explained to you at some length, recalibrates the law back to the original intention of Parliament and confirms the paramountcy of environmental bottom lines (above which market forces are intended to play out). Your final report should correct this omission.

On the miscellany of specific recommendations, we respond to selected ones in bold face as follows:

Chapter 7 – Regulating the built environment

Q7.1	Would it be worth moving to common consultation and decision-making processes and principles for decisions on land use rules, transport and infrastructure provision? How could such processes and principles be designed to reflect both: • the interest of the general public in participating in decisions about local authority expenditure and revenue; and • the particular interest of property owners and other parties affected by changes to land use controls? Do the consultation and decision-making processes and principles in the Local

Government Act adequately reflect these interests?

Such a change would likely cause overload on submitters and decision-makers. We contend that better use of Strategic Spatial Planning could provide some improved integration between stautory processes.

Q7.2

Should all Plan changes have to go before the permanent Independent Hearings Panel for review, or should councils have the ability to choose?

EDS does not support the idea of an Independent Hearings Panel at this stage. There is not sufficient evidence to justify effectively replacing the Environment Court with Independent Hearings Panel and a planning process with restrictions on appeal rights. This kind of reform would affect all resource management decision-making and is premature. It risks erosion of the rule of law and the importance of the separation of powers in decision-making.

Q7.3

Would the features proposed for the built environment in a future planning system (eg, clearer legislative purposes, narrower appeal rights, greater oversight of land use regulation) be sufficient to discourage poor use of regulatory discretion?

EDS does not support narrower appeal rights. We consider this would tip the balance further in favour of private interests over the public interest in good environmental outcomes. This entire issue needs much more analysis and thought. The question implies that any restriction on development is a 'poor use of regulatory discretion'. This is incorrect. Regulatory tools are required to set bio-physical bottom lines to ensure that development occurs within the capacity of the environment to sustain itself.

Q7.4

Would allowing or requiring the Environment Court to award a higher proportion of costs for successful appeals against unreasonable resource consent conditions be sufficient to encourage better behaviour by councils? What would be the disadvantages of this approach?

You would have to allow or require the Court to award a higher proportion of costs against unsuccesful appellants to maintain equity and balance. This is too blunt a tool. It assumes that the majority of appeals are driven by an intention to restrict or control development. This is incorrect. A large number of appeals are by proponents of development. Not all development or intensification proposals are appropriate.

Q7.5

Would it be worthwhile requiring councils to pay for some, or all, costs associated with their visual amenity objectives for private property owners? Should councils only rely on financial tools for visual amenity objectives, or should they be combined with regulatory powers?

This is misconceived. Amenity is a key aspiration of communities and relates directly to the quality of life and liveability. Along with unpolluted air and water it is a public good which the legislation needs to protect..

Chapter 8 – Urban planning and the natural environment

Q8.1

What should be the process for developing a Government Policy Statement (GPS) on Environmental Sustainability? What challenges would developing a GPS present? How

could these challenges be overcome?

EDS does not support this concept. It is thinly justified and inadequately outlined. To do away with NPSs and NESs like this would be to invite jurisprudential chaos. Any such concept should be considered in the context of a wider analysis of the resource management system.

Q8.2	Would a greater emphasis on adaptive management assist in managing cumulative environmental effects in urban areas? What are the obstacles to using adaptive management? How could adaptive management work in practice? **Yes adaptive management is a very useful tool and more could be made of it. But again, it needs to be considered in the wider context. It has utility in the rural environment including for freshwater management. It needs through analysis and consideration. We agree that cumulative effects are generally poorly considered under the RMA presently.**

Chapter 9 – Urban planning and infrastructure

Q9.1	Which components of the current planning system could spatial plans replace? Where would the greatest benefits lie in formalising spatial plans? **The Auckland experience is apposite and could be followed. A spatial plan could be a key integrator of the resource management regime' statutes. The Hauraki Gulf Marine Spatial Plan is also instructive. It has been prepared on a non-statutory basis.**

Chapter 10 – Infrastructure: funding & procurement

Q10.1	Is there other evidence that either supports or challenges the view that "growth does not pay for growth"?
Q10.2	Would there be benefit in introducing a legislative expectation that councils should recover the capital and operating costs of new infrastructure from beneficiaries, except where this is impracticable? **This is a complex issue that needs more analysis and an evidenced basis for change.**
Q10.3	Would alternative funding systems for local authorities (such as local taxes) improve the ability to provide infrastructure to accommodate growth? Which funding systems are worth considering? Why? **Congestion charging is worth considering and has been analysed by a Collaborative Group set up by Auckland Council. It provides both additional revenue for essential transport infrastructure as well as the ability to manage demand.**
Q10.4	Would there be benefit in allowing councils to auction and sell a certain quantity of development rights above the standard controls set in a District Plan? How should such a system be designed? **Possibly – worth further consideration.**

Q10.5	Should a requirement to consider public-private partnerships apply to all significant local government infrastructure projects, not just those seeking Crown funding? **Possibly but however the infrastructure project is funded it's users who pay in the end.**

Chapter 11 – Urban planning and the Treaty of Waitangi

Q11.1	What policies and provisions in district plans are required to facilitate development of papakāinga?
Q11.2	How can processes involving both the Te Ture Whenua Act 1993 and the Resource Management Act 1991 be better streamlined?
Q11.3	Do councils commonly use cultural impact assessments to identify the potential impact of developments on sites and resources of significance to Māori? How do councils set the thresholds for requiring a cultural impact assessment? Who sets the fees for a cultural impact assessment and on what basis? What are the barriers to cultural impact assessments being completed in good time and how can those barriers best be addressed?
Q11.4	What sort of guidance, if any, should central government provide to councils on implementing legislative requirements to recognise and protect Māori interests in planning? How should such guidance be provided?
Q11.5	In what way, if any, and through what sort of instrument, should legislative provisions for Māori participation in land-use planning decisions be strengthened?

Chapter 13 – A future planning framework

Q13.1	What are the strengths and weaknesses of these two approaches to land use legislation? Specifically: • What are the strengths and weaknesses in keeping a single resource management law, with clearly-separated built and natural environment sections? **An integrated one-stop shop approach to resource management** • What are the strengths and weaknesses in establishing two laws, which regulate the built and natural environment separately? **It's far too early to say. The idea is nothing more than that: it's an approach that would need far more analysis and consideration than evident here. A change in legislative approach will not lead to better outcomes if the problem is one of implementation as opposed to statutory construction.**

Q13.2

Which of these two options would better ensure effective monitoring and enforcement of environmental regulation?

- Move environmental regulatory responsibilities to a national organisation (such as the Environmental Protection Authority).
- Increase external audit and oversight of regional council performance.

See EDS's publication on this issue to be released in early 2017 for a considered response. But in general terms we are concerned at the performance of councils which are often conflicted; at their propensity for provider capture; and at the lack of scientific grunt in the smaller entities. There may be merit in an external regulator to depoliticise environmental enforcement.

Finally, we reiterate that we do not consider it is appropriate to move towards wholesale RMA (and related statutes) reform on the basis of your impressive but scope-limited Report. We also do not consider it appropriate to engage in a further round of piecemeal amendments to the existing resource management acts.

A more balanced approach to these issues would be to set up a methodology to broaden the scope of your inquiry into a thorough review of the entire resource management system. This should seek cross-party support and be undertaken via a process that engenders high levels of public trust and confidence.

Yours sincerely

Gary Taylor
Chief Executive
Environmental Defence Society