AUCKLAND DISTRICT LAW SOCIETY INC
INDEPENDENT VOICE OF LAW

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Better Urban Planning Inquiry
New Zealand Productivity Commission
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FEEDBACK TO THE DRAFT REPORT: BETTER URBAN PLANNING

The Auckland District Law Society Incorporated Environment and Resource Management Committee (the 'Committee') welcomes the opportunity to provide feedback on the Productivity Commission's draft Report *Better Urban Planning* ('Report').

The Committee will focus its feedback on the two key issues posed by the Commission on pages 339 and 340 of the draft Report.

Question 13.1 - Legislative separation of planning and environmental protection?

The Commission has asked*: What are the strengths and weaknesses in keeping a single resource management law, with clearly separated built and natural environment sections? What are the strengths and weaknesses in establishing two laws, which regulate the built and natural environment separately?*

In answering these questions, it is the view of the Committee that the *Resource Management Act 1991* ('RMA') actually sought to, and largely has, rectified the considerable problems of there being multiple individual pieces of legislation dealing separately with the environment. There is, however, scope for further integration/clarification of roles.

Prior to the RMA, the main statute governing land use was the *Town and Country Planning Act 1977*; for water management it was the *Water and Soil Conservation Act 1967*; and for air, it was the *Clean Air Act 1972*. There were a number of other laws controlling what are now resource management matters as well, such as the *Soil Conservation and Rivers Control Act 1941* and the *Harbours Act 1950*. These laws were all administered by different bodies and different government departments with different, unrelated statutory purposes. Authorities established different procedural rules and applied different criteria to decision-making, and developers had to apply for the requisite licences or permits from the relevant authorities, which created an incredibly complex, time-consuming and expensive permitting system.[1]

[1] See C Warnock and M Baker-Galloway, *Focus on Resource Management Law* (2015), page 16.

The key purpose of the RMA was to address these problems because:[2]

- there was no consistent set of resource management objectives;
- there were arbitrary differences in management of land, air, and water;
- pollution laws were ad-hoc and did not recognise the physical connections between land, air and water;
- Maori interests and the Treaty of Waitangi were frequently overlooked;
- monitoring of existing law was uneven; and
- enforcement was difficult.

The explanatory note to the Resource Management Bill said this about its purpose:

> "*The objective of this Bill is to integrate the laws relating to resource management, and to set up a resource management system that promotes sustainable management of natural and physical resources. This Bill integrates existing laws by bringing together the management of land, including land subdivision, water and soil, minerals and energy resources, the coast, air, and pollution control including noise control. It sets out the rights and responsibilities of individuals, and territorial, regional and central government. The central concept of sustainable management in this Bill encompasses the themes of use, development and protection. The Bill sets up a system of policy and plan preparation and administration which allows the balancing of a wide range of interests and values ...*".

Recognition that environmental matters had to be managed in a more integrated way can be seen in the Long Title to the *Environment Act 1986*, enacted to:

> (c) ensure that, in the management of natural and physical resources, full and balanced account is taken of:
> (i) the intrinsic values of ecosystems; and
> (ii) all values which are placed by individuals and groups on the quality of the environment; and
> (iii) the principles of the Treaty of Waitangi; and
> (iv) the sustainability of natural and physical resources; and
> (v) the needs of future generations

It seems the proposal of the Commission to either clearly separate built and natural environment sections in the RMA or establish two laws, which regulate the built and natural environment separately, risks simply reintroducing (at least in part) the complex, time-consuming and expensive system we had before the RMA. With respect, that would be a backwards step.

Further, the Committee considers that separating urban planning from environmental protection law within an urban planning context will simply exacerbate existing legislative misalignments and potentially lead to a further deterioration of the environment and more ineffective planning practices. The Committee has significant concerns about how either of the urban planning legislative frameworks that the Commission proposes could be implemented in practice, especially in Auckland where there are complex and subtle interfaces between built and natural environments, especially in the coastal environment.

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[2] Ministry for the Environment, *Resource Management Law Reform 1987-1991*. See http://www.mfe.govt.nz/publications/environmental-reporting/state-new-zealand%E2%80%99s-environment-1997-chapter-four-environment-5

While the Committee does not consider that a clear line can be drawn between the built and natural environment, it does see some benefit in appropriately recognising the benefits that can arise from the built environment and the factors or processes that can inhibit these benefits from being realised where there is no actual adverse effects compromising the natural environment or peoples' well-being. That said, the Committee notes that ensuring the RMA is suitably responsive is important, albeit not at all costs. There are also a number of existing tools within the RMA that could assist with responsive planning if appropriately framed (e.g. NPSs/NESs).

The Committee is also concerned that the Commission is approaching land use from a silo perspective that is fundamentally inconsistent with our members' experience of urban planning in practice and which is also inconsistent with Te Ao Māori. Indeed, some of the Commission's recommendations have significant unexamined impacts for Māori as a Treaty partner, and may limit the interests of Māori.

Finally, the Committee also has broader general concerns about the amount of central government reform underway and the lack of clarity surrounding integrated implementation of the planning framework the reform programme may produce. To the extent that the proposals of the Commission are investigated further and implemented through legislative change, the Committee urges the Government to ensure that any fundamental shifts in the application of the RMA be subject to working group discussions with key stakeholder and users of the legislation (including Councils, practitioners, industry bodies, environmental groups and end users) and that meaningful public consultation and debate occurs. The RMA is a significant piece of legislation that affects a number of people in a number of ways. Changes to the legislation can have significant consequences, both intended and unintended, and meaningful input will require time - potentially a year or more to ensure than any change in the legislative focus is robust and appropriate.

Question 2 - Centralisation of environmental enforcement, or greater oversight of regional councils?

The Commission has posed: *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) or increase external audit and oversight of regional council performance?*

Again, prior to the RMA there was considerable criticism of the enforcement provisions existing at the time across multiple statutes. "*People have complained that monitoring and enforcement is inadequate, and that when offenders are prosecuted, penalties are too low … it was difficult to prosecute offenders for a number of different reasons including cost, insufficient evidence, time limits, delays, technicalities and burden of proof.*"[3]

The Committee notes that the *Resource Management Act Survey of Local Authorities 2012/2013* concludes with regard to monitoring and enforcement that: *"The cost and time associated with enforcement was reported as a significant challenge, including the financial cost to ratepayers of taking court action (with no guarantee that costs will be recovered)."*

With regard to the role of agencies, the analysis prior to the RMA was that while there was a need for a national performance monitoring role in government to ensure local agencies performed well in the area of environmental enforcement, actual monitoring and enforcement should be undertaken by regional or territorial authorities. It was these regional or local bodies that granted the resource consents. They should also have responsibility for monitoring and

[3] Resource Management Law Reform, *Enforcement and Compliance Issues in Resource Management*, Working Paper No. 30, 1988, page 75

compliance. These bodies were also charged with the management of resources more generally and could use a variety of monitoring, compliance and enforcement mechanisms (such as education, economic mechanisms and regulatory mechanisms).[4]

Again, it is the Committee's view that this approach has largely worked well and the Committee does not support shifting regulatory responsibilities for environmental monitoring and compliance away from regional and territorial councils to an independent national authority, such as the Environmental Protection Agency.

The Committee considers there may be some benefit in increasing the external audit and oversight of environmental monitoring by councils (with some type of trigger enabling central government intervention). However, the Committee suggests that further analysis is also needed (and as a priority) to find ways to reduce the financial cost to ratepayers of taking court action and better recover the costs of monitoring and enforcement.

Yours faithfully,

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[4] Resource Management Law Reform, *Enforcement and Compliance Issues in Resource Management*, Working Paper No. 30, 1988, pages 2-3.