

Our advice

Prepared for Benno Blaschke, Local Government New Zealand

Prepared by Sarah Scott, with input from James Winchester, Matt Conway, Jonathan Salter, and Padraig McNamara

Date 19 November 2020

PRIVILEGED AND CONFIDENTIAL

Implications of the recommendations in the Randerson Report on the future role and functions of local government

Background The Resource Management Review Panel (**Panel**), through the Randerson Report (**report**) proposes a significant change in direction for the resource management legislative framework in New Zealand. The report recommends a substantial overhaul of the existing legal framework by replacing the Resource Management Act 1991 (**RMA**) with three new pieces of legislation:

- Strategic Planning Act (**SPA**);
- Natural and Built Environments Act (**NBEA**); and
- Managed Retreat and Climate Change Adaptation Act (**CCAA**).

The changes if implemented in their recommended form will have major implications for the role and responsibilities of local government as it is currently configured. Local Government New Zealand (**LGNZ**) seeks greater understanding of the key aspects and impacts of the report's recommendations. A brief, high level overview of the report is sought, together with advice on the implications of the recommendations on the future role and functions of local government, particularly in regard to spatial planning and combined plans.

High-level summary of report in relation to spatial planning and combined plans

1. The report is comprehensive, analysing and providing recommendations on some 16 areas over 531 pages.
 2. The specific aim of the review was to improve environmental outcomes and better enable urban and other development within environmental limits. This reflects two key drivers:
 - 2.1 that New Zealand's natural environment is under significant pressure and the way we currently use land and water has proved to be unsustainable for the natural environment; while
 - 2.2 urban areas are struggling to keep pace with population growth.
 3. The area with the most obvious implications for local government relates to the significant recommendations on spatial planning and combined plans. This advice focuses on summarising that part of the report, and then addresses key implications for local government arising from both spatial planning and combined plans as well as some other recommendations made in the report.
-

Spatial planning under the SPA

4. The SPA would set long term strategic goals, providing a framework for mandatory regional spatial planning for both land and the coastal marine area, and would facilitate the integration of legislative functions across the resource management system. These would include functions exercised under the NBEA (essentially the RMA's replacement), the Local Government Act (**LGA**), the Land Transport Management Act (**LTMA**), and the Climate Change Response Act (**CCRA**).
5. The recommendations seek to resolve fragmented governance (both between central and local government, and between regional and territorial authorities (**TAs**)), and embed a long-term, strategic and integrated approach to planning, the provision of infrastructure and associated funding and investment.
6. The preparation and approval of mandatory long-term (30-year plus) regional spatial strategies under the SPA would be the responsibility of a form of governing body such as a joint committee (**committee**), comprising an independent chair, and representatives of central, regional and local government, as well as mana whenua. Members of the committee would be required to consult with the bodies that they represent, and would then be responsible for representing the views of that body. This is important as it is the committee that would have the final mandate to approve the spatial strategy. The report suggests that before final approval, the committee "should make best endeavours" to satisfy itself that local authorities in the region support the draft spatial strategy as it relates to or affects their region or district. But there will be no ability nor requirement for either the relevant regional council and all constituent TAs to approve or indeed adopt the final strategy – it would become a relevant RMA document as provided for in the SPA and NBEA.
7. The report suggests the use of a modified special consultative procedure currently provided for under section 83 of the LGA. A consensus approach to decision-making is recommended, with a Ministerial decision-making power resolving any disputes between the parties through the preparation and approval process.
8. The report recommends that spatial strategies should concentrate on the major strategic issues and opportunities for a region, including significant anticipated changes in land use, environmental management and major infrastructure and future transport corridors needed to accommodate projected growth. It is expected that spatial strategies will set long-term measurable objectives and milestones. Spatial strategies could also describe graphically how limits and targets set through combined plans might be implemented through the spatial strategy.
9. Accountability for delivery of a spatial strategy would sit with all councils in the region, with the SPA possibly providing that a responsible Minister (or Ministers) is also accountable for delivery. Mana whenua will not be accountable for implementation.
10. As part of the wider recommendations on the new SPA, the report recommends amending the purpose of the LTMA to refer to social, economic, environmental and cultural wellbeing, which would establish the four well-beings as a common thread across the SPA, NBEA, LGA and LTMA.

-
- 11.** The following relationships between the regional spatial strategy and other documents would apply:
- 11.1** Spatial strategies would need to be ‘consistent with’ the purposes of the NBEA, LGA and LTMA, and also national instruments including:
- National policy statements and national environmental standards including environmental limits;
 - The national adaptation plan (which is to be informed by the National Risk Assessment under the CCRA);
 - The Government Policy Statement on Land Transport under the LTMA; and
 - The Government Policy Statement on Housing and Urban Development under the Kāinga Ora-Homes and Communities Act 2019;
- 11.2** Spatial strategies would be required to ‘take into account’ other national strategies and plans, including the Emissions Reduction Plan under the CCRA and the national 30-year infrastructure strategy to be developed by the recently established New Zealand Infrastructure Commission – Te Waihanga; and
- 11.3** Spatial strategies could also ‘be informed by’ other regulatory instruments, as relevant.
- 12.** The SPA is not recommended to specifically override other legislation, but regional spatial strategies prepared under it would have strong influence on policies and plans developed under the NBEA, LGA and LTMA. Of note, the following documents would need to be ‘consistent with’ spatial strategies:
- 12.1** Combined plans;
- 12.2** LGA infrastructure strategies;
- 12.3** long-term plans and annual plans; and
- 12.4** LTMA regional land transport plans.

-
- Combined plans under the NBEA**
- 13.** In our experience, plan making under Schedule 1 of the RMA (the current process) is becoming more complex and contentious. One of the reasons (in our view) is the impact of the *King Salmon* Supreme Court decision,¹ which (relevantly) confirmed that plans can provide ‘bottom lines’ which cannot be balanced against positive effects that form part of the same proposal. This has made the detail and interpretation of words in a plan even more important, particularly for applicants who want to ensure a consenting pathway remains for their particular interests. This has, and continues to, result in long and expensive council, and then Environment Court, plan making processes, throughout New Zealand.
- 14.** The report suggests that the RMA is to blame (at least in part) for the failure to use land and water in a sustainable way and for urban areas to keep pace

¹ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited & Ors* [2014] NZSC 38.

with population growth (outcomes which on their face, can fundamentally conflict with each other).

15. In response, the Panel recommends that regional policy statements, and all regional and district plans, should be combined and replaced with a single plan for each region. In effect, there would be a single plan (similar to the Auckland Unitary Plan (AUP)) for every region which would reduce the number of planning documents from more than 100, to just 14. A combined plan would need to be consistent with a spatial strategy.
16. The Panel also proposes streamlining the plan preparation and change process. The combined plans made under the NBEA would be created by a joint committee comprising representatives of central government, the regional council, all constituent TAs in the region, mana whenua and a representative of the Minister of Conservation (**joint committee**) – which is a different body to the committee for spatial strategies.
17. Each joint committee would need a secretariat for administration, plan drafting, policy analysis, coordination of public engagement and commissioning expert advice (for example).
18. No ‘draft plan’ would go out for consultation prior to notification, rather there would be consultation on a discussion document that would be prepared by the joint committee (or supporting secretariat). The discussion document would draw on national direction, the purpose and principles of the SPA, outcomes to be established by the regional spatial strategy (and what it will contain, the issues and outcomes it will address), existing policy effectiveness and state of the environment data, and mana whenua planning documents and scene setting hui. The discussion document will also highlight where tensions need to be resolved. Widespread engagement with the public and stakeholders would then occur (again, facilitated by the joint committee, not by the constituent local authorities).
19. The results of engagement on the discussion document would then provide the secretariat with the information needed to draft a plan that is responsive to local communities. Prior to formal notification, the Ministry for the Environment (**MfE**) would commission an expert reviewer to review the draft plan, which would address the following:
 - 19.1 alignment with national direction, targets and environmental limits;
 - 19.2 consistency with the outcomes provided by the regional spatial strategy; and
 - 19.3 the robustness of the policy logic of the draft plan.
20. Questions have been raised by some sectors, following release of the Randerson report, as to the capacity of MfE to undertake this exercise in a timely fashion.
21. There would be a similar internal structure within the combined plan as is the case under the RMA at present:
 - 21.1 the regional policy statement (**RPS**) would need to give effect to national policy statements, national environmental standards and the national planning standards (which may not be fit for purpose) and the relevant spatial strategy. The RPS would be developed first (although still forming part of the overall combined plan) and consulted on and

notified at the same time as the rest of the document. The RPS would identify strategic outcomes for the region;

- 21.2** regional and district plans would need to give effect to the RPS, and there would be a move from an effects-based system to an outcomes-focused planning framework; and
 - 21.3** combined plans would include a district plan with consistent objectives, policies and methods for the TAs, when the issues and outcome are common. Some local variation is anticipated where land use patterns, resource pressures or ecological values are unique to the area.
- 22.** Following notification and a call for submissions, an independent panel, chaired by a sitting Environment Court Judge, would hear submissions, review the draft combined plan and make recommendations on its provisions, using a hearings process similar to that adopted for the AUP.
 - 23.** This means that recommendations on submissions would be made by the independent panel, and decisions would then be made by the joint committee (not by individual councils). A streamlined appeal process also similar to the AUP model would be available, such as the following:
 - 23.1** where the joint committee accepts a recommendation of the hearings panel, appeals are limited to the High Court on points of law; and
 - 23.2** where the committee rejects a recommendation, then an appeal on the merits to the Environment Court is available to anyone who has standing to appeal.
 - 24.** In both cases, there would be further rights of appeal to the Court of Appeal and Supreme Court, but only with the leave of those courts.

Key implications for local government

Support for amalgamation

- 25.** While outside the scope of its review, the Panel noted that better outcomes and processes could be achieved by rationalising local authorities along regional lines. We agree that this seems to be a logical consequence of some of the Panel's recommended changes. In particular it is apparent that the consolidation of spatial planning and resource management planning functions through joint committees will inevitably increase the pressure, and provide a stronger rationale, for local authority amalgamation.
- 26.** The amalgamation of TAs on its own, would reduce the number of members of a joint committee. The creation of larger unitary councils (combining regional and TAs) would more substantially reduce the number of members of a joint committee. If some form of amalgamation was to take place prior to the development of the spatial strategies and combined plans referred to in this advice, it is possible that without some form of bespoke or proportional representation formula being applied, council representation on the joint committees could be proportionally less compared to other parties, which would make the seats (and voting rights) to be held by central government and mana whenua even more significant. This could further diminish the influence of democratically accountable bodies, and could potentially result in counterproductive outcomes for individual communities.

-
- 27. In the Auckland amalgamation, one of the answers to the elimination of smaller TAs, was the role of local boards. The reality is that their role is local and essentially related to place making and local services, with no control over key regional decisions like the Long Term Plan.
 - 28. We expand on the relevance of key implications below, that will also contribute to pressure for local authority amalgamation.

Mandatory regional spatial planning under the SPA and integration of other legislative functions

- 29. Regional spatial planning resulting in spatial strategies is recommended to be the mechanism that would integrate planning with the provision of infrastructure and associated investment / funding.
- 30. The report recommends selecting one region to develop the first regional spatial strategy, followed by development of the combined plan, to provide a model for other regions.
- 31. Individual councils would have no individual decision making role, either in the creation or final approval of the spatial strategy. The spatial strategy committee would instead have authority to act on behalf of its constituent agencies with no need for further approval or ratification of the final strategy's contents.
- 32. Central Government would be a member of the committee, making them 'equal' to local authorities in creating long term strategies across New Zealand. This is intended to help address a lack of engagement and coordination by Central Government in strategic land use planning, including a renewed focus on the Government's infrastructure spending across, among other things, health, education and transport.
- 33. Mana whenua would also have membership of the committee (the implications of this for local government are considered in a separate section below).
- 34. The suggested facilitation of better integration of funding and investment in infrastructure through the new SPA is well-intentioned, but more information is required to see what the implications for LGA and LTMA decision making would be.
- 35. The report makes recommendations on the relationship between documents prepared under the SPA, and the LGA and LTMA. Of note, infrastructure strategies, long term plans, annual plans and LTMA regional land transport plans would need to be consistent with spatial strategies. The report suggests that the direction of weighting between the statutes should flow from the RMA, to the LGA and then to the LTMA, "because resource management decisions have a more robust process (are subject to appeals)", but at the same time the report notes that "resource management decisions should not be binding on funding decisions under the LGA and LTMA because investment is a political budgeting decision".
- 36. In reality, if documents prepared under the LGA and LTMA (even after following a special consultative procedures) are to be consistent with a spatial strategy, then this would significantly reduce a TA capacity to make independent funding decisions. While a spatial strategy is a long-term planning document (30 years or more), 'consistency' is a relatively strong direction and this may have significant implications on the constitutional and taxing powers of councils. If spatial planning processes ultimately beyond the

‘control’ of local authorities are to determine location and scale of capital expenditure which are substantially funded by local taxes (rates), we would suggest this is likely to create a constitutional issue. The answer to this may be found in continued expansion of Crown funding of local infrastructure, but that remains to be seen.

37. At a more refined level, there is no indication as to how TAs will grapple with issues such as how to fund infrastructure required within their own district to service urban growth happening, or planned for, in a neighbouring district. The spatial planning approach is intended to assist in resolving priorities around timing of such development, but the funding issues remain. The core funding revenue for these projects, local rates, would continue to be paid at a district level, even when the infrastructure required to service the urban growth may be in a neighbouring district. This issue already arises (for example) in Tauranga / Western Bay of Plenty, Canterbury, and the Greater Wellington region. It previously existed in Auckland prior to amalgamation.
38. An analogy is the Future Development Strategies (FDS) that are currently required under the National Policy Statement on Urban Development 2020. A FDS can be prepared at a regional or district level. TAs have had to grapple with funding implications of 30-year growth. However, in the case of a FDS, each TA makes the final decision to adopt the particular FDS, which gives each constituent council a certain amount of ‘power’ in adopting the final product, increased independence when it comes to funding decisions, and also some transparency with decisions that affect a local community.
39. That would not be the case under the Panel’s recommendations as the final decision making on a spatial strategy would sit with the joint committee. By way of example, this may result in a regional council, or one particular TA, obtaining a particular outcome that may be detrimental to a neighboring council’s infrastructure development and funding plans. A key driver for Auckland amalgamation was disputes (including Environment Court appeals) between the regional council and TAs as to where growth would occur – in the parlance of the time, the issue being the location of the metropolitan urban limits.
40. The consensus approach may also result in a mediated outcome that does not necessarily reflect any parties’ desired outcome. In turn, this may lead to separate LGA and LTMA decisions being made by individual councils that do not align well with the final spatial plan (despite ‘consistency’ being the legal test).
41. We also observe that a move to unitary authorities would not solve all boundary issues. For example, between the Auckland and Waikato region, Watercare (a CCO) will still require consent from the Waikato Regional Council when taking water from the Waikato Region. However, we would anticipate these issues to occur less than under current structures.

Increased national direction, including mandatory environmental

42. While mandatory environmental limits will likely improve environmental outcomes, increased national direction under the NBEA calls into question the extent to which local authorities could continue to set their own desired environmental outcomes through resource management (combined) plans. Local authorities would lose further autonomy and decision making around what is appropriate at a regional or district level.

-
- limits under the NBEA**
- 43. The Government can effectively do this already, if it chooses to be prescriptive, for example the NPS on Freshwater. The key change though is that these environmental limits will be mandatory.
 - 44. The creation of new, and potentially evaluation / alignment of existing, national direction (in our view there is some uncertainty and inconsistencies in existing documents), is likely to be a contentious process, requiring significant engagement and resource input from local authorities through that process.
 - 45. On the other hand, increased national direction should make plan making less contentious, if decisions have already been made at a national level as to what outcomes are expected (and also what competing values are prioritised over others).
 - 46. We expect some national direction to be welcomed by local authorities (ie. in relation to coastal hazards), but it is apparent other national directions don't necessarily work so well across all parts of New Zealand (ie. the draft NPS for Indigenous Biodiversity received this feedback in relation to the West Coast).
 - 47. There is clearly a trade-off between the loss of local autonomy and a potential benefit of cutting through issues that have proved to be intractable at a local level, to achieve positive environmental and social outcomes benefits.

-
- Combined plan preparation and change process**
- 48. Individual councils will have no decision making role, either in the creation of, or final decision on, a combined plan. A fully autonomous joint committee would instead have authority to act on behalf of its constituent agencies with no need for further approval or ratification of plan contents.
 - 49. The role of joint committees would inevitably mean that local authorities lose some of their autonomy for setting and deciding on the resource management direction for their region or district.
 - 50. Under this recommended model, the members chosen to represent a particular council would be critical, to ensure they can obtain the best outcome possible for their particular district or region. Councils would also need to be active in fully representing their particular interests, whether that be wearing their regulatory or asset owner hat, or their Council Controlled Organisations (CCOs) interests where relevant (we return to this below).
 - 51. We would anticipate new delegations would be required to give the representative the necessary authority, although we note all local authorities would need to revisit their RMA delegations when the new legislation is gazetted.
 - 52. Loss of plan making functions would significantly reduce policy-making responsibility for local authorities. It is unclear whether council policy planners could be appointed or 'seconded' to assist the joint committee in the preparation of the draft plans (it is understood via a secretariat) – but this seems like a logical structure.
 - 53. The report suggests funding of the joint committees would need to be agreed between the constituent councils (not central government or mana whenua). The upfront costs associated with the development of the spatial and

combined plans would be significant and need to be shared amongst parties, requiring certain cost sharing arrangements.

54. One of the intentions of the Panel is that tensions between important resource management issues are resolved, rather than being left to a resource consent application. Depending on whether these tensions are resolved at the national document level, this is likely to result in continued contentious processes and involvement of parties from all spectrums of New Zealand interest, industry, and environmental protection groups.
55. Councils may need to submit on the combined plans to obtain desired local outcomes, with the potential to use the limited appeal rights available. This is likely to be particularly important for local authorities as infrastructure providers, including their CCOs who would need to submit and provide information or evidence. The report anticipates local authorities specifying at the outset how their regulatory and infrastructure provider roles would be represented. It is only the former that would be represented through the joint committee. This could conceivably result in councils taking on a (largely) unfamiliar advocacy role including initiating legal challenges against outcomes they do not support.
56. Experience tells us it is critical that there be full alignment between these two perspectives – for example, that regulatory decisions about where greenfield development or intensification should occur are informed by advice from the network operators (transport and three waters) about the feasibility and cost of servicing the area. Equally, once decisions are made by the Council in its regulatory capacity, the infrastructure providers need to deliver. The other thing this raises is the need for integration with regional water entities, assuming this occurs in this term of office. If there are 5 such entities, they will traverse regional boundaries.
57. While Auckland Council has successfully prepared a joint plan of this nature (the AUP), Auckland Council was amalgamated prior to the AUP process being initiated.
58. Changes would however assist in resolving uncertainty arising from overlapping functions of regional councils and TAs.

Te Mana o te Taiao

59. One of the purposes of the new NBEA would be to recognise the concept of Te Mana o te Taiao. This would allow much greater scope for Te Ao Māori to influence planning processes and the outcome of planning decisions, reflecting the constitutional significance of the Treaty of Waitangi/Te Tiriti o Waitangi.
60. The NBEA would require decision-makers to give effect to the principles of Te Tiriti, and mandatory national direction would specify how to do this.
61. Mana whenua involvement in the plan making process would change. Mana whenua would have a representative on the joint committees that would be responsible for the spatial strategies and combined plans. This would essentially provide equal status to local authorities and also central government.
62. In some regions, having a representative from every iwi or hapū with mana whenua in the region may mean joint committees are unwieldy or unbalanced. The reports suggest that delegates on the joint committee

would have to represent the interests and perspective of more than one iwi or hapū (which could prove to be very contentious in certain parts of New Zealand).

- 63. The report anticipates central government and/or local authorities providing the funding for the involvement of mana whenua in the spatial planning and combined plan processes, depending on the function in question.
- 64. Overall this would impact on established local government understanding of the role of mana whenua in district and regional planning, and in the provision of community well-being.

CCAA would establish an adaptation fund

- 65. The new CCAA would establish an adaptation fund to enable local government to support necessary steps to address the effects of climate change. The report does not suggest where the funding would come from.
- 66. An adaptation fund would provide local government with much needed support and certainty, while also addressing the costs and effects of climate change.
- 67. This would also complement the new focus in the NBEA on climate change avoidance.

Overseeing and auditing the resource management system

- 68. The Panel proposes that the Parliamentary Commissioner for the Environment should have a greater role in overseeing and auditing the resource management system, and that local authorities should be required to report regularly to the Ministry for the Environment on environmental outcomes in their districts and regions.
- 69. This suggests an increasing oversight of current local government responsibilities by central government.



Sarah Scott
Partner | **Simpson Grierson**