

Sir Geoffrey Palmer QC

The Resource Legislation Amendment Bill, the Productivity Commission Report and the Future of Planning for the Environment in New Zealand

Let us begin with the proposition that there is much in the Resource Management Act 1991 (RMA) that needs to be fixed.¹ How that cure is to be effected is not widely agreed. Indeed, the policy surrounding the Resource Management Act at present seems confused. We need to stop and ask, what are we trying to do in this space? I shall in this address try to unravel the issues. Being a planner in this febrile policy context must have its challenges.

In my judgement the overall conclusion to be reached is that New Zealand does regulatory statutes rather badly. They are insufficiently researched. They are not rigorously tested before being enacted. Nor are sufficient efforts made to find out how they worked in the real world. And large statutes are amended far too readily, leading to incoherence and uncertainty in the market. No doubt these are not positive conclusions. But I have been around a very long time and seen these issues come back again and again.

My overall conclusion is not restricted to the resource management legislation. New Zealand's methods of law making are deficient both within the executive government, which conducts its affairs in secret on legislation, and in Parliament, which concentrates on politics rather than scrutiny of the legislation itself. Sooner or later we may wake up to the fact that these ingredients are impeding better governance in this country. How the law is designed, how

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it is consulted about, how it is drafted and how parliamentary scrutiny proceeds are all vital issues in securing quality legislative outcomes.

The failures of the RMA can be laid at the doors of central government and local government. Failure to make policy statements and set environmental standards that the act provides for handicapped the legislation. It left local authorities wandering in the wilderness. Too often local government did not appreciate the nature of its duties under the act and there was too much political interference.

It is important to rectify those weaknesses, and there are signs that that is occurring. But the brutal truth

different acts. The bill implicitly accepts that the amendments proposed in 2013 to alter the environmental bottom lines of the statute in part 2 will not proceed. But the changes are extensive and quite a number may not survive select committee scrutiny. The most important changes are:

- joint development of national environmental standards in national policy statements;
- new regulation making powers designed to permit specified land uses to avoid unreasonable restrictions on land, and to prohibit and remove council planning provisions;
- new provisions in the Exclusive Economic Zone and Continental

need to be considered. The bill was not supported by Peter Dunne, who voted against it; so did ACT MP David Seymour (who thought the amendments were too weak), and the Green Party also voted against it. New Zealand First abstained and Labour voted for it.

The Māori Party cast their votes for the first reading only, having successfully secured concessions that involved removing two objectionable provisions before the bill was introduced, and winning enhanced iwi and Māori consultation provisions in return. The Māori Party prevented the introduction of privatised consenting; alternative consent authorities, where public powers would be exercised by organisations approved by the government but not by people who are publicly accountable officials, had been drafted but dropped before the bill's introduction. The Māori Party also stopped changes in the bill that would have imposed new limitations on restrictions on the use of land. They may secure further changes at the select committee stage.

But I sound a word of caution. Given the complicated political situation evidenced by the voting upon the bill's introduction, it is not easy to predict how the bill will fare at the hands of the select committee. The parliamentary debates warrant close study. Predicting the outcome would be speculative.

Issues with the bill

Let me now turn to the weaknesses that I think this bill exhibits. There are at least three significant and dangerous trends running through the bill. These are:

- greater ministerial control and centralised decision making that overrides local planning decisions;
- reduced opportunities for public participation in decisions that will affect local communities;
- emphasis on speed, rather than quality, of decision making.

It is my view that the process for collaborative planning particularly for freshwater management will prove to be unworkable and is likely to deliver outcomes that will be detrimental to the quality of New Zealand's rivers, lakes and streams. The whole collaborative

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needs to be faced. Political reactions that have led to numerous amending acts for the RMA over the years have made the legislation worse, not better. Constant fiddling debilitates both the act and administration. And the pattern is continuing.

There are currently two major policy reviews occurring in the same policy space: the Resource Legislation Amendment Bill and the Productivity Commission's Better Urban Planning review.² In addition, Local Government New Zealand published a blue sky discussion about New Zealand's resource management system earlier this year. At the very least stakeholders will have suffered from submission fatigue.

The Resource Legislation Amendment Bill

On 3 December 2015 the Resource Legislation Amendment Bill received its first reading and it was referred to the Local Government and Environment Committee for public submissions. The bill is 170 pages in length. It is technical and difficult to follow. The minister, Nick Smith, said the bill makes 40 changes to six

Shelf (Environmental Effects) Act 2012;

- lengthy new provisions to enable the development of a national planning template which gives the minister for the environment power to direct the required structure and format of policy statements and plans and to specify matters (objectives, policies, methods and rules) that either must be included in any policy statements or plans or may be included at the discretion of councils;
- amendments to ensure councils provide sufficient land for residential and business developments to meet long-term demand;
- lengthy provisions allowing for collaborative planning processes to substitute for normal processes (that was designed particularly for the Land and Water Forum work);
- substantial powers designed to centralise control, introduce many detailed procedural changes and provide a new fast track.

The politics in the House of Representatives surrounding this bill

enterprise was based upon the principle that it would be accepted as a whole system. It would not be served up to the government in bits and cherry-picked by the government on the basis that it would advance the pieces that it liked.

There is a more serious objection here. Collaborative planning is likely to pave the way for non-transparent dirty deals at the expense of freshwater quality. This is not the sort of situation that is likely to elevate the standards of our public decision making. Power imbalances will threaten the integrity of environmental outcomes. The way it appears in the bill, collaborative planning seems to be designed to favour development interests over the environment. It is wrong to assume that it is possible to find an accommodation of all the relevant interests through mutual compromise. Environmental bottom lines will not survive a process like that.

I think the adoption of a national planning template is a positive development, but there are very grave weaknesses in the manner in which this policy has been translated into law. A national planning template can set out 'requirements or other provisions relating to any aspect of the structure, format, or content of regional policy statements and plans' (emphasis added). Furthermore, the extent of the proposed content may be prescribed through the national planning template under new section 58C. I read this proposal as allowing the minister to use the national planning template to give directions to district and regional councils on substantive matters of policy. It could be used also to tell councils what they substantively can and cannot do. It goes very far beyond the national planning template described in the public consultation documents circulated by the government before the bill was introduced.

There have been many efforts to streamline the processes of the RMA over the years. They never seem to work very well. This bill contains another streamlined planning process and it is far from clear that there is any evidence to support the need for such a process as the one that is proposed. The real risk is that it will politicise the planning process and

lead to quick and suspect decisions based on political expediency. This is supposed to be an effects-based statute.

There are also significant changes to the regulation-making power in the legislation. The effect of these amendments will be to significantly increase the scope of the regulation-making power, thereby increasing the power of the minister to direct the outcome of planning and consent decisions under the act.

The legislative solutions on offer do not seem to me likely to achieve much. They will make the act more complex, cumbersome and bureaucratic. There will be so many alternative routes to getting to yes, resulting in increased transaction costs and legal costs. The people who

Environment and Development, which set out principles for environmental protection and sustainable development. The commission's report, issued in 1987, is known as the Brundtland Report after its chairperson, the Norwegian prime minister. The Brundtland Report defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁴ It contained two concepts: the concept of needs and the idea of limitations.

Rather than viewing 'development' and 'environment' as competing values, one to be sacrificed to the other, the Brundtland Report approaches the two as inseparable: needs can only

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design the processes do not have to make them work.

The Productivity Commission's Better Urban Planning issues paper

Bill English as minister of finance launched a new inquiry by the Productivity Commission on 1 November 2015, asking the commission 'to review urban planning rules and processes and identify the most appropriate system for land use allocation'.³ This followed the concerns expressed by the commission in its earlier report, *Using Land for Housing*, released in October 2015, which made the case for integrating across the Resource Management Act, Local Government Act 2002 and Land Transport Management Act 2003.

What current analysts seem to forget about the Resource Management Act is that the inspiration for it came from the report of the World Commission on

be met within the limitations of the environment. The Brundtland Report puts sustainable development in the international mainstream. It is a concept that appears not to be as popular in New Zealand governmental circles as it was when it was new, but that report formed the foundation of the Earth Summit held in Rio de Janeiro in 1992 and received expression in principle 4 of the Rio Declaration: 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'

It is for this reason that the RMA is driven by part 2, the purpose and principles. The purpose of the act is to promote 'the sustainable management of natural and physical resources' (s5).⁵ All this grew out of the National government's policies in the late 1970s of Think Big. The National Development

Act 1979, now happily repealed, provided a fast track for big development projects. It was a statute of considerable constitutional dubiety and led to a wave of political opposition based essentially on environmental and constitutional factors. The RMA replaced as many as 50 different statutes that dealt with these matters and created a one-stop shop.

The established jurisprudence

A notable feature of the original RMA was that the environmental safeguards in it were defined and limited in part 2 of the act. This applies to all decision makers and decisions made under the authority of the act. It has taken a very long time to reach judicial understanding of how these

made was consciously avoided by both sides on the environmental divide, so their interests were not weakened by the decisions taken. To cut a long story short, the Supreme Court of New Zealand has now provided clarity in the case of the *Environmental Defence Society v New Zealand King Salmon*.⁶ In a careful and elegant judgment of the court given by Justice Terence Arnold, matters were made as clear as possible. It is to be hoped that decision makers do not return to their old habits of ad hoc balancing.

Without going into detail, it is important to note that the Supreme Court in the most important judicial decision since the inception of the act made a number of significant pronouncements

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provisions should be interpreted. But now, many years after 1991, one consequence of starting again would be to lose the granulated and now clear jurisprudence that applies. That would be a retrograde step.

Leading cases have been slow to reach the senior courts in New Zealand to provide definitive guidance on how the RMA is to be interpreted. The old planning philosophy was overturned by the new act. Disputes were dealt with at the beginning by Planning Tribunal judges, who were not sympathetic to the new legislation and quite critical of it. By the beginning of 1995 there had not really been any leading cases on it. There was, however, a good deal of academic commentary on the uncertainties presented by the act, an issue that occurs with all new legislation and one reason why big, quick changes of direction are to be avoided. But after the Planning Tribunal was abolished and recreated as the Environment Court, new approaches began to emerge. It seems almost as if the stuff of which leading cases are

of great precedential value:

- It repeatedly emphasised that environmental protection is an essential part of the RMA's purpose of sustainable management.
- It stressed that sections 6 and 7 are an elaboration of the statement of principle contained in section 5.
- It drew a distinction between matters addressed in section 6 and those addressed in section 7, noting that the matters in section 6 'fall naturally within the concept of sustainable management in a New Zealand context', and section 6 therefore contains a stronger direction to decision makers than section 7.
- It explained that the elements of protection and preservation in section 6 'are intended to make it clear to those implementing the RMA that they must take steps to implement that protective element of sustainable management'.
- It rejected the 'overall judgment' approach adopted by the board of inquiry.

The government's 2013 proposed changes to sections 6 and 7 take on a new significance in light of this interpretation. Collapsing sections 6 and 7 into a single list, after the court has clearly identified the relationship between the two provisions and explained the basis for it, would make a significant difference. Further, an overall broad judgment approach is not appropriate, the court tells us.

The unfortunate feature of the struggle over part 2 is that it has caused years of delay in making the processes of the act less cumbersome, less bureaucratic and more user-friendly. What the Supreme Court decision demonstrates, in a remorseless analytical manner, is that the environmental protections in the act are real, and any reduction of them would be a retrograde step. People who want to change the approach have to recognise that the sustainability paradigm constitutes the key anchoring principle and the key policy for the whole act.

Where is the evidenced-based policy?

It needs to be observed that over the years we have seen very little empirical research that convinces about how the RMA is working. No doubt empirical research is expensive, but before changes are made it really is necessary to find out what is actually happening. Only in that way can meaningful improvements be made. Far too many of the changes to the RMA have been driven by anecdote, prejudice and interest, rather than evidence. Such a position certainly allows political pressure to be exerted for change. Whether the direction in which that change should proceed is based on evidence is entirely another matter.

New Zealand has a bad habit of passing large legislative schemes and never analysing whether they were effective or efficient in achieving their goals. There are many reasons for this phenomenon, but none of them convinces. Some exciting new developments on this issue have been tried in some European countries. New mechanisms should be developed to look rigorously at the effects of legislation that is being passed, and to ensure that it has achieved the objectives upon which it was based and that there are no unforeseen consequences of a deleterious

kind. It seems sound to do this before rushing in with amendments, as occurs so often in New Zealand. Such analysis is also necessary before embarking on new proposals to replace existing law.

Changes to the RMA

The cures to the problems ailing the RMA do not require throwing out the act; nor should they involve changes to the purpose and principles of the act as set out in sections 5, 6 and 7. Our recent experience with stakeholders is that there is support for the original intention of the RMA as articulated by the responsible ministers at the time, myself and Simon Upton. The core idea was that a development must take place within the capacity of the environment and ecosystems that support it. That is why the RMA is driven by part 2, the purpose and principles. But some major change is needed. In particular:

- regional spatial planning at the strategic level;
- integration across the RMA, Local Government Act and Land Transport Management Act;
- better provision for urban planning and development within the RMA;
- mitigation of and adaptation to climate change;
- more central guidance through national policy statements and national environmental standards;
- better district planning and rule making;
- better institutional design and decision making;
- rigorous monitoring and evaluation of effective legislation.

These changes would not be disruptive to the established jurisprudence, but they would require radical changes in behaviour and actions by parties that have responsibilities for implementation under the act. And I would add one thing. One of the greatest problems that the RMA faces lies in the prescriptive nature of the processes and procedures it prescribes. There are so many different processes now and so many different avenues that applicants can go down that the matter has become far too complicated, bureaucratic and difficult. The processes need to be totally

reconsidered, made simpler, clearer and much less convoluted.

Integration across the RMA, Local Government Act and Land Transport Management Act

The New Zealand statute book has to be viewed as a whole, and that is the place to start. Concentrating reform efforts on one subject, such as land for housing, is bound to have unexpected consequences elsewhere.

The issue of climate change does not seem to figure in these debates and it should. Planning for climate change in the future is going to be an enormous issue, and central government so far

inefficient and potentially dangerous “free-market” outcomes.⁷ This is the reason the environmental bottom lines in the RMA are so important and tinkering with them is so unwise. Humankind’s destruction and defilement of the natural environment is seriously endangering the continuation of life on this planet. The failure is one of rational ecological governance.

When it comes to environmental issues, the market fails to capture many of the values and contributing factors at play. The externalisation of environmental and social costs seems to be inevitable in an atmosphere where governments seek endless economic

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in New Zealand has not taken that on board. One has only to read the report of the Parliamentary Commissioner for the Environment of November 2015 – *Preparing New Zealand for Rising Seas: certainty and uncertainty* – to understand that this can be ignored no longer. Post the Paris Agreement there is going to have to be a sea change in New Zealand’s climate change policies.

What is needed are simple principles and processes that will work in the real world. The fixes lie in better plans and better processes, not in altering environmental bottom lines or in the absence of rules. Those in the business community who resent the RMA and praise markets fail to acknowledge the defects of markets when it comes to dealing with environmental issues. Price signals are often distorted for environmental issues and externalities produced by pollution are not reflected in prices. The polluters do not pay and those harmed by pollution are not compensated. As the Yale economist William Nordhaus puts it, ‘markets can distort incentives and produce

growth. Elementary economics suggest that the polluters should pay so that the costs of development are not externalised to the public, but how often does that happen?

Local government

Let me conclude with a word about local government. The policy problems I have outlined all depend upon the reform of the structures of local government. This is going to be necessary to achieve the outcomes that the government wants. Government policies so far in this area have lacked bite and determination.

Local government needs more constitutional autonomy in New Zealand than it enjoys. Too often it is regarded as the agent of central government, to be kicked around and told what to do and not properly consulted. There is little doubt that the local government legislation in New Zealand is defective. Whenever a new government comes in it changes the legislation and often in ways that are incomplete and unclear. Significant constitutional change is required in New Zealand if local

government is to flourish. Let me suggest the following – a set of constitutional principles along these lines:

1. The state shall have a strong, transparent and accountable system of local government based on the principle of subsidiarity. That is to say, decisions should be made as close as possible to the people whom they affect.
2. The provision of services and the solution of problems should take place as close to the citizens as practicable and ‘in accordance with allocative efficiency’ as the nature of the relevant process allows.
3. The right of units of local government to manage their own affairs independently in accordance with laws and regulations under the supervision of the state shall be laid down in acts of Parliament.
4. All local government builds on the concept of community.
5. Central and local government policies must be coherent, but within a broad general framework local authorities must have self-government, with freedom to

decide and control local policies.

Administrative supervision of local government will be limited to ensuring compliance with the law and the execution of delegated responsibilities.

6. Local government representatives shall be democratically elected by secret ballot under an act of Parliament.
7. Local government shall be open and transparent in its decision making and accountable to its citizens.
8. The financing of local government by the imposition of rates on land and property provided for by act of Parliament needs to be accompanied by a revenue-sharing programme with central government negotiated between central and local government.
9. When new responsibilities are placed on local government by central government, they must be preceded by adequate consultation and estimate of what the new responsibilities will cost to administer.

Constant meddling with the local government legislation is as counterproductive as the constant meddling with the resource management legislation. When you put both together it is a rather lethal combination.

- 1 This article is an edited version of Sir Geoffrey Palmer’s keynote address to the annual conference of the New Zealand Planning Institute, Dunedin, 2016.
- 2 The Local Government and Environment Committee expects to report back to Parliament late in November. It is understood that there were 750 submissions. The Productivity Commission is scheduled to deliver its final report to the government on 30 November.
- 3 [Beehive.govt.nz](http://www.beehive.govt.nz); see terms of reference at <http://www.productivity.govt.nz/inquiry-content/2682?stage=3>.
- 4 World Commission on Environment and Development, *Our Common Future*, Oxford: Oxford University Press, 1987, ch.2, p.1.
- 5 See Geoffrey Palmer, ‘The making of the Resource Management Act’, in *Environment: the international challenge*, Wellington: Victoria University Press, 1995; Palmer, ‘The Resource Management Act: how we got it and what changes are being made to it’, in Trevor Daya-Winterbottom (ed.), *Resource Management Act: theory and practice*, Auckland: Resource Management Law Association, 2014, p.22. There are a number of legal texts on the act that are useful to practitioners, which do not discuss the policy but rather describe the law: see Derek Nolan (ed.), *Environmental and Resource Management Law* (5th edn), Wellington: LexisNexis, 2015. For more on the policy see Klaus Bosselman, David Grinlinton and Prue Taylor (eds), *Environmental Law for a Sustainable Society* (2nd edn), Auckland: New Zealand Centre for Environmental Law, University of Auckland, 2011.
- 6 *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38(SC).
- 7 ‘The Pope & the market’, *New York Review of Books*, 8 December 2015.

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