SUBMISSION

Inquiry on the Natural and Built Environments Bill: Exposure Draft

August 2021

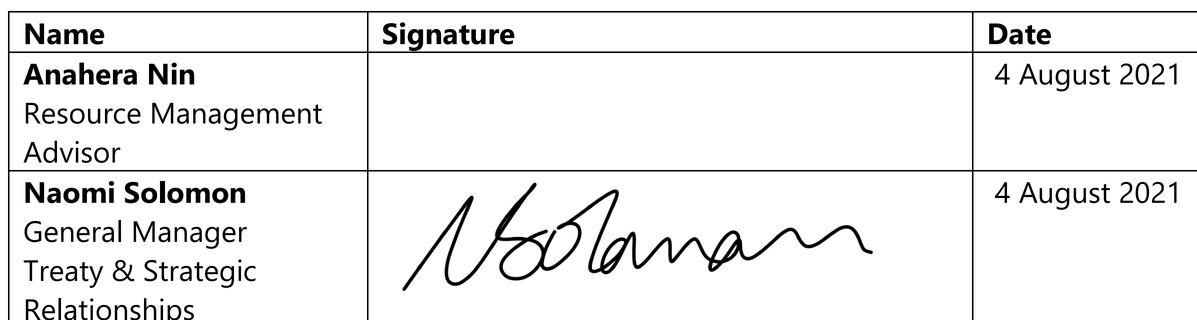
TE RŪNANGA O TOA RANGATIRA

KIA TU AI A NGĀTI TOA RANGATIRA: HEI IWI TOA, HEI IWI RANGATIRA

Ngāti Toa is a strong, vibrant and influential iwi, firmly grounded in our cultural identity and leading change to enable whānau wellbeing and prosperity

TOITŪ TE MARAE O TĀNE, TOITŪ TO MARAE O TANGAROA, TOITŪ TE IWI

If the domain of Tāne survives to give sustenance,
And the domain of Tangaroa likewise remains, so too will the people



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Te Rūnanga o Toa Rangatira as the mandated iwi authority for Ngāti Toa Rangatira (Ngāti Toa) has responsibility for protecting and enhancing the mana of Ngāti Toa across the various political, economic, social and environmental spheres.

In relation to Te Ao Tūroa, Ngāti Toa's objective is to nurture a resilient environment to sustain future generations through reclaimed connection and mātauranga to natural resources, empowering kaitiaki who are leaders and co-managers of our natural environment, our commitment to environmental sustainability and our ability to adapt to the impacts of climate change.

Subject to the written consent of Te Rūnanga o Toa Rangatira, the information contained within this document must not be used for any other purpose than that intended.

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INTRODUCTION

1. This submission outlines the position of Te Rūnanga o Toa Rangatira on the exposure draft of the Natural and Built Environments Bill (NBA).
2. The Government has referred to the reform as "a once-in-a-generation opportunity to make sure our resource management system safeguards the wellbeing of current and future generations." The proposed Natural and Built Environments Bill is intended to be the primary piece of legislation to replace the Resource Management Act. However, our overall impression of the exposure draft to date is that it does not make any significant changes to the structure of the resource management system.
3. Importantly, the parts of the RMA designed to achieve sustainable management of natural and physical resources and protect bottom lines have not been retained. These include sections 6 and 7, and recognition of the Supreme Court of New Zealand's decision in the case of *Environmental Defence Society v New Zealand King Salmon Co Ltd* [2014] NZSC 38(SC), which provides the jurisprudence to clarify the principles in the RMA that protect environmental bottom lines and rejects earlier Environment Court and High Court decisions[1] that the correct approach was an 'overall judgement' approach.
4. The Bill must not allow decision-makers to go back to old habits of ad hoc balancing. Also, the exposure draft does not address some of the fundamental problems with the RMA (such as establishing a framework for allocating scarce natural resources in the most efficient way over time). Ngāti Toa consider that it is not clear that the exposure draft will enhance environmental protection and could in fact result in further environmental degradation.
5. The exposure draft also establishes high expectations for iwi involvement. However, there is already a high demand of engagement from local and central government who drive priorities important to them, but not necessarily of importance to iwi. Active participation in the new system requires resourcing or it will exacerbate issues already present in the system where Māori are unable to discharge their obligations as kaitiaki or participate as active Treaty partners.
6. To realise mana whenua aspirations this opportunity requires the complete re-imagination of the governance, leadership and implementation of systems and structures. Careful

[1] The judgement in *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70(HC).

consideration is required on how the RMA Reform, the Future for Local Government Review and Three Waters Reform will work together, as well as understanding the compounded implications for mana whenua.

7. Questions also remain as to how the Strategic Planning Act and regional spatial plans will interact with the NBA. Ngāti Toa is concerned that pushing ahead with this exposure draft without properly considering these matters risks unintended consequences for the environment as legal issues play out and are worked through. We suggest that, to ensure that the three proposed new Acts are aligned, they are considered at select committee as a package. The Minister may wish to consider a bespoke select committee with extended timeframes and hearings throughout New Zealand.
8. We wish to appear before the select committee to present on our submission.

SUBMISSION ON MATTERS INCLUDED IN BILL

Part 1 – Preliminary provisions

9. The definition of cultural heritage needs to distinguish Māori cultural heritage from other heritage. This definition preferences colonial heritage alongside the indigenous heritage of Aotearoa.
10. The definition of cultural heritage includes something that has a cultural quality, However, cultural itself is not defined. This creates confusion.
11. We support in part the interpretation of "environment" and "natural environment" but requests additional interpretation for the term "built environment". If "natural and built environment" has a definition that is not simply what the terms mean separately, then we also submit that a definition be provided for "natural and built environments".
12. Further consultation will be required in order to develop details around how the Act will bind the Crown, and what this means for local government and the relationships they have with mana whenua.

Part 2 – Purpose and related provisions

Clause 5

13. We support the purpose of the Bill and its intent to promote the wellbeing of the natural environment. We also support placing "Te Oranga o te Taiao" within the purpose of the Act because it inserts an indigenous lens to environmental management. We are

particularly supportive of the recognition of the intrinsic relationship between iwi and hapū and te taiao. This relationship, derived from a whakapapa connection, is fundamental to our identity as Māori.

14. We note that the purpose statement at clause 5 could provide clearer direction about how the competing sub-clauses (i.e. protecting and enhancing the natural environment vs. use of the environment) are intended to be prioritised in circumstances where trade-offs must be made.

Clause 6

15. We are supportive of a separate Te Tiriti o Waitangi Clause noting that additional subclauses could be added that reference "Te Oranga o te Taiao" as a mechanism to help meet Māori aspirations for te taiao. This clause should also extend to any devolution of power to entities that fall under the mana of the Crown (i.e. local government).
16. It is acknowledged that the exposure draft notes Treaty Settlement commitments will be upheld. That clause should be added here. As well as upholding current commitments, it is equally critical that other arrangements under the RMA are also upheld, including (but not limited to):

    - Joint Management Arrangements that do not arise from Treaty settlements, Mana Whakahono ā Rohe and section 33 transfer of powers; and
    - potential future arrangements under the Marine and Coastal Area (Takutai Moana) Act 2011.

17. The development of this kaitiakitanga-based system aims to avoid the situation where co-management or other enhanced iwi participation opportunities only arise from Treaty Settlement provisions. The Tribunal states that 'using the settlement process to determine resource management issues is, in short, a recipe for unfairness and inconsistency – not only in the balancing of kaitiaki and other interests, but also in environmental outcomes' (Waitangi Tribunal. 2019. The Stage 2 Report on the National Freshwater and Geothermal Resources Claims. National Freshwater and Geothermal Resources Claim, 2019, p 80).

Clause 7

18. We are supportive of the inclusion of environmental limits (clause 7). However, there is no explicit connection between Te Oranga o te Taiao and the environmental limits and clause

7 does not provide scope to measure environmental limits using kaupapa Māori concepts or methodologies. We recommend outlining an explicit connection between Te Oranga o te Taiao and environmental limits to provide for kaupapa Māori methodologies. It is also important to note here that capacity and capability in the development of kaupapa Māori methodologies may be required, given that western science has been the favoured knowledge system for measuring environmental limits under the current system.

19. Clause 7 also creates a different meaning to 'limits' than has been developed (iteratively, over a decade) under the NPS-FM. It conflates two concepts (as the NPS-FM did originally) which creates significant confusion. The two concepts should be differentiated in clause 7 to clarify that there are two types: "Environmental limits / bottom lines" and "Resource use limits / maximum resource use". Environmental limits relate to the state of an aspect of the environment, whereas resource use limits provide direction on how much resources can be extracted. Ngāti Toa recommends the definition (and/or relevant clauses) must align with the definition of limits in the NPS-FM 2020.
20. We also consider that there are two additional matters that should be considered for compulsory limits:
    a. greenhouse gas emissions
    b. light pollution

Clause 8

21. All environmental outcomes outlined in clause 8 should have the status of matters of national importance and be provided for in the national planning framework and other plan and consenting processes.

Part 3 – National planning framework

22. Currently Part 2 of the RMA, including the matters of national importance (section 6), other matters (section 7) and Te Tiriti (section 8), is the 'engine room to the RMA' and provides overall direction on 'everything' in the planning hierarchy (national direction, plans, consenting, etc). This means that section 6(e) which recognises and provides for "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" as a matter of national importance must be given effect to in national direction, plans, consenting and enforcement.

23. The proposed Bill, however, situates the national planning framework as the main source of 'national direction'. The national planning framework and all plans must promote environmental outcomes (clause 8) to assist in achieving the purpose of the Act.
24. However, in the list of environmental outcomes that the national planning framework "must include", outcomes relating to Māori interests (8(f), 8(g) 8(h) and 8(i)) are excluded and are effectively optional provisions in the proposed new system (see Appendix 4).
25. Consequently, while the plans still need to promote the clause 8 environmental outcomes, matters such as clause 8(f) may not have any explicit directions if this clause is not included in the national planning framework.
26. The national planning framework should require all plans to provide for the relationship of Māori with te taiao and then provide direction about how this can be done.
27. In the current draft, there is no mention of Te Oranga o te Taiao in the national planning framework. There must be explicit provision in the national planning framework for Te Oranga o te Taiao to further solidify the concept's strength within the resource management system.
28. Clause 10 refers to matters of national significance, but 'matters of national significance' do not exist within the Bill per section 6 of the RMA. All matters that stem from the environmental outcomes outlined in Clause 8 should be compulsory in the national planning framework and be "recognised and provided for".
29. The implementation principles (Clause 18) are a useful list but clarification is required about what these principles relate to. There are concerns that while these implementation principles are aspirational, they will not be abided by in practice and those relevant persons who will need to apply these will not do so in practice given .
30. We recommend that the national planning framework must be co-developed with mana whenua (Schedule 1). Ngāti Toa stresses the importance of co-designing the strategic direction of the national planning framework with mana whenua (Clause 14).

Part 4 – Natural and build environments plans

31. We the concept and inclusion of Natural and built environments plans (Part 4) in the Bill. However, we objects to Clause 22(1)(f) which includes the retention of the status quo (Section 30 and 31 of the RMA) relating to management and control of the environment

by local authorities. New and innovative ways are required to manage our taiao in order to make the step changes required.

32. The status of enhanced iwi environmental plans must also be provided for in this section of the Bill. We recommend that through enabling iwi environmental management plans, discussions with mana whenua around the potentiality of transfer of powers becomes more of a realistic proposition.
33. Direction for creating these IEMPs can be taken from *Ko Aotearoa Tēnei*. The Waitangi Tribunal recommended the establishment of a Treaty-compliant kaitiakitanga resource management system that derives from whanaungatanga at its source.[2] To achieve this, the Tribunal recommended the transfer of exclusive or shared decision-making power as envisaged under the model of kaitiaki control, kaitiaki partnership and kaitiaki influence[3]and the central role of Iwi Resource Management Plans to achieve this. This should be further explored as part of the next stages of the overall process, and could potentially form part of the Te Pae Tawhiti work programme with Te Puni Kōkri.
34. In addition to the enhanced IEMPs, active iwi management must be supported by sufficient funding to build Māori capability and capacity.

Schedule 3 – Planning committees

35. Specific effort will need to be put into how mana whenua are appointed to planning committees that ensures they are able to maintain their rangatiratanga. This is of particular concern in areas where there are more mana whenua interests (iwi, hapū) than there are local government authorities as it could result in inequitable representation of a Te Ao Māori viewpoint.
36. Equally the way mana whenua representation is suggested, may place a burden on iwi who have a large rohe that spans multiple local government authorities.
37. Overall, this is a matter that iwi will need to agree to between each other.

[2] *Ko Aotearoa Tenei, p269*
[3] Ibid, 267 - 281

SUBMISSIONS ON MATTERS NOT INCLUDED IN THE BILL

38. There are a number of matters that will ultimately be included in the National and Built Environments Act, but are not in the Bill. The submissions below address key matters for Ngāti Toa.

Recognition of iwi/hapū freshwater rights and interests in freshwater

39. The recognition of freshwater rights and interests of iwi and hapū must not be negatively affected through the ultimate design of the Act. Currently, the Bill does not provide for the recognition of iwi/hapū rights and interests. The select committee must ensure that the next steps for the Bill do not preclude future recognition of rights and interests.
40. Addressing rights and interests in freshwater covers the areas of governance, management, and allocation. In that regard, Te Mana o te Wai and Ngā Mātāpono ki te Wai can guide the consideration of these matters. These frameworks ensure that the mana of freshwater is upheld while also recognising and providing for the full expression of iwi/hapū rights and interests in freshwater.
41. The freshwater rights and interests of iwi and hapū are substantive, not merely procedural, or participatory. They include decision making on upholding the quality of the wai and an equitable, fair and permanent share of access to water take and discharge entitlements for iwi/hapū (separate from, and in addition to, any policy initiatives for developing Māori land).
42. Any policy objectives relating to freshwater governance, management and allocation must therefore reasonably include (alongside other policy parameters):
    a. giving effect to the principles of Te Tiriti;
    b. better reflecting a Te Ao Māori view (including by upholding both Te Mana o te Wai and Te Oranga o te Taiao); and
    c. addressing iwi/hapū rights and interests.
43. Iwi and hapū rights in freshwater must be addressed as a matter of priority and the Bill must not restrict options for recognition.

Consenting

44. Ngāti Toa understand that the reform intends to create a more permissive planning framework and a reduction in the number and type of activities regulated by resource consents.
45. Caution needs to be applied to any assumption that the proposed plans will be able to fix all issues currently being experienced under the RMA (as the RMA plans have not done that). Reducing consenting requirements will also remove opportunities for iwi to prepare cultural impact assessments.
46. Ngāti Toa recommends that provisions in the new legislation to enable better allocation through the review of consents, and discontinuation of activities contrary to or not permitted by provisions in the National Planning Framework or Natural and Built Environment Plans, should be strengthened.
47. For this Bill to have any teeth, the enforcement of this Bill needs to be carried out effectively and punishment should be severe enough to deter relevant persons from breaking any of the law set out in the NBA. Ngāti Toa recommends an effective enforcement and punishment process be put in place through the IEMPs.
48. This includes taking away the fine cap for breaches and setting higher fines for breaches. The current cap means that there are times where maximising benefit often results in the polluters continuing their actions and paying the fine set out by the current RMA. Taking away that cap will incentivise polluters to stop their pollutive actions and positively impact "Te Oranga o te Taiao".

The Strategic Planning Act

49. Improving how we plan for future growth and development within agreed environmental limits is a fundamental plank of the reforms. While the details of the Strategic Planning Act are still to be developed and agreed by Ministers, the purpose is to set long-term (i.e. 30-year) outcomes and objectives for a spatial area (i.e. a region) and to integrate resource management planning, infrastructure provision and investment decisions.
50. Ngāti Toa understands that Regional Spatial Strategies are likely to precede any process to develop National and Built Environment Plans and would likely 'set the scene' for how natural resources (i.e. water, land etc) are utilised. Ngāti Toa are aware that there are

overlaps with the way in natural resources are protected (or restored) and allocated within environmental limits.

51. Iwi and hapū must be engaged at an early stage in any spatial planning process that is employed to develop Regional Spatial Strategies. The special status of Māori land should be recognised in the planning framework. There may also be opportunities to signal the development of Māori land through Regional Spatial Strategies which could be the subject of further submissions.
52. Ngāti Toa intends to make a submission on the Strategic Planning Bill when it is introduced.

The Climate Change Adaptation Act

53. There is currently very little visibility over the Climate Adaption Act. It is important that the various reform programmes are connected and progressing in tandem. Ngāti Toa intends to make a submission on the Climate Adaption Bill when it is introduced.

Other related reform processes

54. There are currently a range of interconnected reform processes underway (including the Three Waters Review and those other Bills that will be introduced as a part of this reform package).
55. These strands of reform are connected and there needs to be cohesion. In our view, the development of the various strands of reform is currently siloed. The Government must show leadership and ensure that the dots are joining up across the various parts of the reform.

Transitional arrangements

56. Transition arrangements are currently unclear. This should be highlighted. It will be important to ensure that the work undertaken by iwi to date on Te Mana o Te Wai within the National Policy Statement for Freshwater Management must not be derogated from through any new system (if those arrangements have been developed with iwi).