DEMOCRACY ACTION

5 February 2023

Hon Eugenie Sage MP
Chairperson
Environment Committee
Parliament Buildings
Wellington 6160

Email: ec@parliament.govt.nz

Attention: Hon Eugenie Sage

RE: Natural and Built Environment Bill and Spatial Plan Bill

Thank you for the opportunity to provide comment on this legislation.

This submission is lodged on behalf of Democracy Action Inc. The contents do not necessarily reflect all the views of any or all members and supporters of Democracy Action, but it does reflect the group's overall view.

We wish to present to the committee to further clarify points made in our submission.

Susan Short
Secretary

Democracy Action is a group of citizens committed to the principles of democracy, equality of citizenship and the rule of law.

We can be found at democracyaction.org.nz

Submission

In keeping with our organisation's commitment to promoting democracy, equality of citizenship, and the rule of law, we have confined our comments to provisions that impact on these values.

Firstly, we support the intention of the legislation, that is, to enable the use, development, and protection of the environment in a way that supports the well-being of present generations without compromising the well-being of future generations; and to promote the health and well-being of the natural environment.

We also support the objective to improve system efficiency and effectiveness and reduce complexity while ensuring local input and involvement.

However, we have grave concerns that this legislation fails to uphold this objective. Instead, the two Bills will introduce even more complexity into the resource management system than is currently the case. They add an additional layer of governance - which will slow down the planning process, and introduce a great deal of legal uncertainty - which will result in less efficiency and more costs.

Our primary objections can be summarised as:

- Respect for democratic principles and the rule of law are missing.

- The loss of local control and decision-making.
- The lack of provision for citizens to hold decision-makers to account.
- The lack of opportunity for the general public to participate.
- Several provisions facilitate powerful roles for groups of citizens who are unaccountable to the wider community.
- The institutionalizing of racial discrimination by creating a system of unequal and separate rights and powers for different racial groups.
- Key elements of the legislation are incompatible with the rule of law.
- The legal uncertainty caused the increased obligations of the undefined principles of Te Tiriti o Waitangi, and by the introduction of vague and undefined Māori concepts and customs into law.

Therefore, we urge the Select Committee to recommend that these two Bills be withdrawn and that the Government goes back to the drawing board to draft legislation that honours our democracy, equal rights, and the rule of law.

The primary reasons for our objections to the legislation are explained below.

THE LOSS OF LOCAL CONTROL AND DECISION-MAKING, AND THE LOSS OF DEMOCRATIC ACCOUNTABILITY

The Regional Planning and the Spatial Planning Committees will be making significant decisions that will impact the lives and well-being of all citizens. These committees will decide how their region will grow and change over the next thirty-plus years. They will make decisions over land and other resource use, and make rulings such as what gets built, where it gets built, how it gets built, and if it gets built.

The people on these planning committees will have significant powers, and yet democratic and accountability elements are lacking in the legislation. The reasons for this assertion are summarized below.

- Although the Regional Planning and the Spatial Planning Committees will represent all councils in their region, there is no stipulation that every council must have representation on the committees. The composition arrangements are to be agreed to by councils and an iwi and hapū committee of the region (Natural and Built Environment Bill, schedule 8 cl 3).
- It is unclear whether council-appointed members must be elected councillors. This concern is exacerbated by the requirement that each regional committee must include at least two Māori appointed members who will have no accountability at all to the wider community.
- To top off this lack of democratic control is the provision that these committees will have full autonomy in decision-making. They will not be directly accountable to the constituent local authorities, nor to the public.

The consequence of these provisions is that there will be very little in the way of electoral accountability, and none in the case of the Māori members of the committees.

There will be a significant loss of local voice, as well as a lack of adequate representation on the Regional and Spatial Planning Committees. Individual councils and their communities will have

negligible – if any – say. There are no solid and clear mechanisms to ensure local perspectives are heard and considered by these committees, the notable exception being members of iwi, hāpu or other Māori groups with interests in an area.

Recommendations:

1. ***The legislation needs to make it clear that all decision-makers who are able to make significant impacts on other people's lives, their livelihoods, and their well-being, must be accountable to affected communities. The safest recourse for democratic accountability would be through the ballot box.***

2. ***Legislation should vest decision-making in local communities and focus on improving the speed and lowering the cost of local decision-making processes.***

Another example of a potential loss of democratic accountability is the provision for Local Authorities and Regional Planning Committees to be able to transfer one or more of their functions, powers or duties to an iwi authority or a group representing 1 or more hapū – without needing to provide evidence they represent the appropriate community of interest, can provide greater efficiency, and have technical or special capability or expertise. (Natural and Built Environment Bill, s 650).

Public authorities are mandated to carry out their functions, powers, or duties in the interests of the communities they serve. Iwi authorities and hapū are not public authorities. Instead, they are private groups with a mandate to carry out their duties for the benefit of their iwi or hapū and the iwi or hapū membership.

The legislation does not recognise that many iwi authorities have commercial interests that receive, manage, and/or administer assets held in common ownership by iwi members. Their commercial enterprises have a duty to realise a return on investment. Under this provision, the iwi authority could be in a position to benefit financially from decision-making over public resources. This raises conflicts of interest issues too great to ignore.

Recommendation:

3. ***Remove the provision for Local Authorities and Regional Planning Committees to be able to transfer one or more of their functions, powers or duties to an iwi authority or a group representing 1 or more hapū.***

THE LEGISLATION EMBEDS A SYSTEM OF DISCRIMINATORY RIGHTS BASED ON RACE.

Democratic societies emphasize the principle that all people have equal rights. Indeed, this a fundamental pillar of New Zealand's constitutional arrangements. It is also an obligation under international human rights instruments of which New Zealand is a signatory. However, the proposed legislation is at odds with this principle as it delivers to iwi, hapū, and Māori extensive rights not provided to other citizens. In stark contrast, the Bills largely ignore the rest of the population. The public will have limited options to participate, have their voices heard, and hold decision-makers to account.

Instead of treating all New Zealanders as equals regardless of race, this legislation creates new race-based rights and privileges, thereby undermining the concepts of democracy and universal human rights in which *"All human beings are born free and equal in dignity and rights".* (Article 1, Universal Declaration of Human Rights).

With opportunities not available to other citizens - and indeed there is very little provision for input by the general public - iwi, hapū, and Māori will be able to participate at all levels of the resource management system, including a direct role in decision-making. These provisions include practices such as:

- Local authorities are to partner with Māori to prepare and agree on a Natural and Built Environment Plan (NBE plan) for their region, and with the central government, to agree on a regional spatial strategy (RSS) for the region.
- Local authorities are required to reach an agreement with iwi and hapū on the composition of the Regional Planning Committees.
- Regional Planning Committees must include at least two Māori appointments, to be decided by iwi/hapū committees.
- In addition, Regional Planning Committees must consult with iwi and hapū groups affected by their plans during the preparation of strategic plans.
- Regional Planning Committees are required to initiate engagement agreements with one or more Māori groups with interests in the region in order to agree and record how the groups are to participate in preparing the Regional Spatial and Natural & Built Environment plans; and to agree how the groups' participation is to be funded by the regional planning committee. (SP cl.37-41).
- The definition of 'te Oranga o te Taiao' presupposes that the only people with intrinsic relationships with the natural environment are Māori citizens who are affiliated to iwi and hapū. (NBE cl.7).
- An iwi or hapū may, at any time, provide a statement on te Oranga o te Taiao to the relevant regional planning committee. N.B. A statement by an iwi or hapu on te Oranga o te Taiao may relate to allocation matters. (NBE cl.106). This facility is not available to other citizens.
- The establishment of a statutory Māori Entity to monitor decisions taken under both the Natural and Built Environments and the Spatial Planning Acts. This will operate independently of the government. It will monitor whether the regional authorities and central government are meeting their Treaty obligations, including giving effect to the principles of Te Tiriti. This entity will also provide input for the national planning framework. (NBE clauses 659 to 674).
- Clause 650 (NBE Bill) provides for the removal of the public interest test if local authorities and regional planning committees transfer one or more of their functions, powers, or duties to "an iwi authority" and "a group representing 1 or more hapū".
- The Chief Environment Court Judge must consult the National Māori Entity regarding the required collective skills, knowledge, and experience for members of Independent Hearing Panels. NBE Part 3 subpart 1 clause 93(4)
- The National Planning Framework must enable Māori to be involved in monitoring of environmental limits and targets; including the opportunity for Māori to work and agree monitoring methods and approaches to environmental reporting with councils. NBE Cl.53(c)
- Local authorities are required to provide iwi authorities and groups representing hapū within the region with opportunities, in relation to the state of environmental monitoring and the state

of plan effectiveness monitoring, to be involved in the development of monitoring methods, policy, and the actual monitoring work. NBE Cl.783(5)

- A Freshwater Working Group will be established, which will develop a process for engagement between the Crown and iwi and hāpu, at the regional or local level, on freshwater allocation (Natural and Built Environment Bill, clauses 689-693). The outcome of this engagement may be reflected in an allocation statement on the issues relevant to the allocation of freshwater if agreed between the Minister and iwi and hapū.

These provisions and others of a similar nature discriminate against citizens not of Māori descent, and in many cases Māori who do not affiliate to an iwi or hapū. This clearly breaches section 19(1) of the New Zealand Bill of Rights Act 1990 that ensures freedom from discrimination based on race.

One of the five objectives of the proposed new system is *"To improve system efficiency and effectiveness and reduce complexity while ensuring local input and involvement."* (Underlining added). However, with extraordinarily little provision for public involvement, the bill fails to uphold this objective – unless you are a member of an iwi, hāpu or other Māori group with interests in an area.

Recommendation

4. ***Remove all discriminatory race-based policies from legislation.***

THE INTEGRATION OF UNDEFINED MĀORI CONCEPTS INTO LAW CREATES LEGAL UNCERTAINTY

(Sections 4, 5, 6 and others)

The legal uncertainty which results from the introduction of undefined Māori concepts and terms into legislation offends against the principles of good law-making. Law needs to use unambiguous language, be clear in intent, provide certainty, be universal in application, and knowable to all. That is, people must understand and be able to respond to the law.

Concepts such as tikanga, kaitiakitanga and mātauranga Māori are core elements of the two Bills. This legislation will elevate them to sources of law, without proper understanding as to what they mean and how they will work in practice. There is no attempt to define these untested legal concepts, no attempt to restrain interpretation.

To add to the uncertainty, the meaning of such terms is far from uniform, reflecting the varied histories and customs of different hapū/iwi. As Supreme Court judge Justice Joe Williams said, it is not for the courts to declare tikanga or to change it, but for tribal experts to define it.

As one of many examples see section 4 of the Natural and Built Environment Bill which requires *"All persons exercising powers and performing functions and duties under this Act must give effect to the principles of te Tiriti o Waitangi".* These principles are not defined anywhere in the Bill.

There is no certainty in law if all powers and duties provided for in the Act are to be subject to a set of undefined principles that could morph in meaning and scope over time.

Recommendation

5. ***The directive to "give effect to" the Tiriti o Waitangi be removed from legislation until such time as those principles are defined and agreed upon by the citizens of New Zealand.***

Another example of legal uncertainty is found in NBE clause 6 (3)

"All persons exercising powers and performing functions and duties under this Act must recognise and provide for the responsibility and mana of each iwi and hapū to protect and sustain the health and well-being of te taiao in accordance with the kawa, tikanga (including kaitiakitanga), and mātauranga in their area of interest".

This provision, requiring all persons exercising powers and performing functions and duties to provide for Māori to manage the environment in accordance with kawa, tikanga, kaitiakitanga and mātauranga is unclear in scope, with the opportunity to be extremely broad in effect. Such wording is highly directive, with the potential to override other provisions. In effect it directs all decision-makers to prioritise the wishes of iwi and hapū in "their area of interest".

In addition, 'area of interest' is explained in the bill as "the area that iwi authorities or groups representing hapū identify as their traditional rohe". Therefore, this provision includes public, private, and Māori land, which will have an impact on private property rights as well as publicly held land.

Many of the Māori terms and concepts are very subjective. As an example, look at NBE clause 5 which requires that the national planning framework and all plans must provide for the protection or, if degraded, restoration, of the ecological integrity, mana, and mauri of air, water, and soils; and the coastal environment, wetlands, estuaries, and lakes and rivers and their margins; and indigenous biodiversity.

This provision begs the question how is 'mana' and 'mauri' are to be measured? When do we know these requirements has been achieved? As there is no commonly accepted definition of these terms, they will mean whatever those who are monitoring these requirements determine. That is, the control resides with the 'knower' not scientifically proven knowledge.

Recommendation

6. ***Remove all undefined Māori concepts and terms from legislation until there is a clear understanding of the implications of such concepts and terms, and the Government has gained a mandate from the people of New Zealand to include such provisions in our laws.***

CONSULTATION REQUIREMENT ADDS ANOTHER LAYER OF COMPLEXITY

The new structure provides for 'Māori groups with interests in the region' to participate at various stages of the system. For example, the Regional Planning Committees will be required to consult with iwi authorities of the region during the preparation of the strategies and plans. They will be required to initiate engagement agreements by inviting the following Māori groups to enter into one or more agreements:

- iwi authorities, and groups that represent hapū, whose area of interest includes any part of the region:
- customary marine title groups whose customary marine title area under the Marine and Coastal Area (Takutai Moana) Act 2011 includes any part of the region:
- other Māori groups with interests in the region, if the committee considers that entering into engagement agreements with those groups is desirable to ensure that the views of all Māori groups with interests in the region are properly considered in preparing the region's plan.

Rather than promoting efficiency - one of the stated objectives of the legislation - this provision adds complexity to the system. This complication is greatly exacerbated by the deliberate intention not to

determine in the legislation 'Māori groups with interests in the region'. The MfE briefing paper to the select committee - 'Describing Māori representative organisations and record keeping requirements' - explains that the term 'Māori groups with interests' is to provide for the interests of other Māori groups in addition to iwi and hapū, with an explicit intention not to define or limit the number of such groups. The paper explains - *"It is not for the Crown nor local authorities to determine who among iwi, hapū and Māori have a mandate over resources in a particular area, water source, space and resource 'at place'."*

Efficiency will be seriously challenged if an unknowable number of individual groups are included in the decision-making process during the preparation of strategies and plans, and for resource consent applications.

It must also be recognised that although the legislation includes provisions disallowing trade competitors to appeal a resource consent, there is no recognition of or provision for the possibility that any of the Māori groups participating in the decision-making process or resource consenting could be trade competitors of an applicant. As many iwi organisations have commercial interests in land and primary industries, the possibility of conflicts of interest to arise during the process is too great to ignore, and must be addressed in the legislation.

Recommendation

7. ***Either remove from legislation race-based consultation requirements or include in legislation equivalent consultation requirements for other sectors of the community.***
8. ***Officially recognise that at times instances of conflicts of interest may arise and make provision in legislation for a process identifying and managing such situations in a manner that upholds the integrity of a fair and just system.***

FINAL COMMENTS

We understand that it is the job of the select committee to recommend the Government address issues that could arise from the proposed legislation. We submit that this must include the important constitutional issues that this legislation creates.

The Government's proposed resource management reforms appear to be more about instituting a race-based structure than creating a more efficient resource management system. This breaks a fundamental pillar of our constitutional arrangements, that all New Zealanders should be equal before the law. Instead of upholding the principle of equality, considerable weight has been given to providing for Māori governance and input, without the same consideration given to other citizens. This directly attacks the principle of equality for all citizens.

Another constitutional matter we urge you to consider as Members of Parliament is the duty you have to the people of New Zealand to pass laws that are robust and clear. This legislation fails miserably in this obligation. Instead of reinforcing respect for rule of law principles, the Bill promotes an intention to require subservience to vague and ill-defined Māori concepts and terms.

It is evident that the two Bills are creating a legal framework to act as a vehicle for the implementation of rangatiratanga. There are many gaps in the regulation that will no doubt be addressed at a later stage by iwi/hapu or the judiciary. This will condemn the nation to endless argument as courts slowly create definitions from the negligent use of untested and vague concepts.

We have grave concerns that if the proposed legislation proceeds, it will do far more harm than good.

Principal recommendation

We urge the select committee to recommend that both the Natural and Built Environment and the Spatial Plan Bills be withdrawn, and that replacement legislation be drafted that honours democratic principles, upholds equal rights for all citizens, and the rule of law.

Thank you.

Susan Short
Democracy Action Inc.

REFERENCES

- Natural and Built Environment Bill
- Spatial Planning Bill
- MfE: Describing Māori representative organisations and record-keeping requirements.