Submission on the Natural and Built Environment & Spatial Planning Bills

Introduction

Thank you for the opportunity to respond to the Government's proposed reforms on the Natural and Built Environment & Spatial Planning bills. This submission was prepared by representative members of OraTaiao: New Zealand Climate and Health Council, including Co-Convenors Summer Wright and Dr Dermot Coffey. We are New Zealand's only climate change NGO focused on health and health-equity. As health practitioners, our approach is evidence-based and grounded in Te Tiriti o Waitangi.

Our submission is focused on optimising the benefits to human and planetary wellbeing by protecting and restoring the natural environment, by effecting Te Tiriti o Waitangi and grounding reforms in goals for intergenerational and equitable health outcomes. OraTaiao is invested in climate change mitigation and adaptation to achieve health equity in Aotearoa, which are crucial outcomes that are dependent on how the natural environment is treated. This submission draws from submission templates by the Federation of Māori Authorities and the Environmental Defense Society, adding a climate-health perspective.

Bulleted summary:

The bills fail to effect Te Tiriti o Waitangi.

- Focuses on principles rather than the text of Te Tiriti
- The National Māori entity lacks power
- Unclear how Māori will lead national direction
- All Māori rights holders are not recognised
- Māori water rights are not protected

The bills are not congruent with a genuine Te Oranga o te Taiao approach.

- The proposed definition of "natural environment" and description of environmental limits are not based in te Ao Māori.
- Environmental limits are poorly described, lack targets, and do not facilitate protection or restoration of nature
- The bills will not prevent human illness resulting from degradation of nature

& The bills are unclear about how they link in with climate action and the CCRA.

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We wish to make the following comments:

1. Importance of planetary and climate health for human wellbeing and for national direction

It is well established that human wellbeing is dependent on the integrity of the natural environment. People cannot thrive in good health if their surrounding environments are unhealthy. Conversely, protecting and restoring natural environments and biodiversity is a significant lever for public health.

Setting and protecting environmental limits through the new system is critical for mitigation of climate change. Climate change has been described by the World Health Organisation as the single biggest threat against human health[1]. Therefore, environmental reforms in Aotearoa represent a major opportunity to protect human wellbeing in current and future generations.

National direction is expected to be set out by the reformed system and will form the basis of environmental stewardship in Aotearoa. Yet, it is not clear how Māori will contribute to or lead national direction. Nor is it clear how climate mitigation fits into national direction under the NBA. Mitigation of, and adaptation to climate

[1] World Health Organisation. 2021. Climate Change and Health.

change are of major national importance, requiring land use change that political and industrial interests may oppose, national direction under the NBA will be a crucial tool in achieving climate objectives. Land use change demanded by the Climate Change Response Act should be driven through firm national direction under the NBA. The separate Adaptation Act should provide tools that will support such decisions, rather than drive them. There is no reference to the intention of national direction having to "align with" and "support" emissions pricing rather than undermining or overlapping with it[2]. A new provision may be needed if overlap with the ETS is a concern.

2. Te Tiriti clause needs to be stronger

OraTaiao is vested in climate justice as a means of achieving health equity. Māori stand to be among the most adversely affected by climate change[3]; global warming will lead to further alienation from ancestral lands, disruption of taonga species and natural habitats which impedes mahinga kai and rongoā practices, and will compound existing socioeconomic and political inequities already experienced by Māori. All aspects of Government, especially management of the natural environment, must reflect te Tiriti to the maximum extent possible to ensure climate justice and equity for Māori. At present, the Bills assume that the Crown has more power than it has under te Tiriti. Their frameworks for water, riverbeds,

[2] Environmental Defence Society. 2021 National direction in a future resource management system.
[3] Jones, R., Bennet, H., & Blaiklock, A. 2014. Climate Change and the Right to Health for Māori in Aotearoa/New Zealand.

lake-beds, and the removal of natural materials which extends far beyond the kāwanatanga it is given under te Tiriti.

Clause 4 of the NBE Bill and clause 5 of the SP Bill propose a stand-alone te Tiriti clause that has been drafted in the following identical terms:

> *All persons exercising powers and performing functions and duties under this Act must give effect to the principles of te Tiriti o Waitangi.*

This clause is too narrow in its focus on "the principles of te Tiriti", rather than te Tiriti text. The principles of te Tiriti water down te Tiriti (the Māori text) and reaffirm the essence of the English text. More recently, there has been a move towards greater focus on the text of te Tiriti: Cabinet issued a 'circular' in 2019 encouraging policy-makers to use the text, not the principles of te Tiriti; the Supreme Court in its recent Ellis decision acknowledged the criticism of referring to only the principles of te Tiriti; and there are precedents referring to te Tiriti text in s 9(1) of the Education and Training Act 2020, s 6 of the Children and Young People's Commission Act 2022 and s 6 of Oversight of Oranga Tamariki System Act 2022. Te Tiriti clause should be part of the purpose clause of the NBE Bill (clause 3), not separate to it, to avoid diluting te Tiriti clause. The Government has previously adopted such an approach in the Education and Training Act 2020 (ss 4 and 9).

The National Māori Entity is proposed in the NBE bill as an independent monitor of decisions that are made in the new resource

management system, and is effectively a monitoring and reporting body only[4]. Where the Entity is critical of a monitored body and recommends changes, the body must respond within 6 months. Yet, there is a risk that because the body in question has the ability to take up to 6 months to respond to a report by the National Māori Entity, a 6 month delay will become the 'default' for the Crown's response in every case. That might mean that the Crown does not effectively address harm to te Taiao that the National Māori Entity has identified until it is too late. These proposed powers are insufficient.

The RMA experience is that wherever there is no certainty about priorities in decision-making, decisions tend to favour those who can afford to participate and push their interpretation of what's important. This is of significant concern for Māori who struggle to afford to participate in decision-making currently and will continue to under this new regime, unless it is properly grounded in te Tiriti.

3. Te Oranga o te Taiao needs to better reflect a Māori worldview.

OraTaiao supports embedding an integrated Māori view of the environment (including a te ao Māori concept) as a key policy intent of the NBE Bill, not just in order to uphold te Tiriti obligations, but because a te Ao Māori concept can inform an effective approach to environmental decision-making that reflects the core value that the health of ecosystems is integral to the health and wellbeing of

[4] Federation of Māori Authorities. 2023. A Primer on the National Māori Entity.

people and communities, and gives effect to the fundamental truth that life itself depends on ecosystem health.

Te Oranga o te Taiao is not fit for purpose as it has been defined in the NBE Bill. Clause 5 defines te Oranga o te Taiao with a focus on the "health of the natural environment". It takes the Māori concept of 'Taiao', which is understood by Māori to encompass all aspects of the environment, including social, cultural, and economic, and redefines it to mean something much more limited, to what might be thought about as just ecosystems. Abstracted use of single terms like 'mana' and 'mauri' through the bills reflects poor understanding and integration of te Ao Māori and is not consistent with a genuine Te Oranga o te Taiao approach.

A western mindset appears to dominate the Bill; the health of 'nature' and ecosystems thought about separately from humans and the rest of the environment is not consistent with a Māori worldview, which recognises that economic, social, and cultural values are interdependent with ecosystem health, and that te Taiao is an integrated system. It fails to give the clear direction that ecosystem health must be prioritised to the extent that it can support economic, social, and cultural well-being. Instead, there are many examples in the Bill that provide for ecosystem health to be traded off for particular economic values. Moreover, this fails to recognise the extent to which ecosystems promote and protect human health. Protection of te Taiao and people within and dependent on it is significant for public health.

Secondly, the definition proposes recognising and upholding the "intrinsic relationship between iwi and hapū and te Taiao", meaning the "natural environment". This is a step backwards from the more inclusive approach of the RMA which recognised and required provision for the relationships of all Māori to te Taiao, not just iwi and hapū. Additionally, those protections are not provided for relationships to the economic, social, and cultural parts of te Taiao. Yet mātauranga Māori sees the Taiao, the world we live in, as an integrated system, and does not make the distinction that the western scientific tradition makes that there are 'natural' and 'non-natural' elements of the world. A mātauranga Māori view then, would not look at a relationship between people in general and the Taiao as a separate entity, but rather be concerned with how people function as a part of the Taiao. From this it follows that to include the proposed definition of "natural environment" within te Oranga o te Taiao concept wrongly alienates Māori from utilising their own practices, tools, and values in order to implement te Oranga o te Taiao. Overall, the proposed definition of "natural environment" continues a perspective which sees nature as separate from humans and land, water, air, and biodiversity as "resources" to be exploited.

We are also concerned that the NBE Bill provides for 'market-based allocation methods', which would mean that resources like water, air, soil, coastal waters could be allocated to the sectors and groups that are seen to generate the higher economic, particularly financial, benefits, rather than first ensuring that the state required to maintain ecological integrity is provided for, and then the human health needs are allocated for. The problems that this will pose to te Taiao are exacerbated by the fact that there is not a clear

overarching national direction of what to prioritise in the purpose of the NBE Bill, and that various layers of the Bill are contradictory in terms of how decisions are made. This worsens a key issue of the RM system where a lack of central government direction is a source of significant complexity, and there is regional variation in how the legislation is interpreted and applied.

We are concerned with the use of the 'environmental limits' as proposed by the NBE Bill. Environmental limits as proposed in the Bill will not protect ecosystems, because the Bill only requires setting environmental limits that prevent ecosystems degrading from their current state. This is despite the situation across many different domains of the environment, where maintaining ecosystems at their current state is not sustainable. Under the RMA, environmental degradation was allowed to continue, despite risks to planetary and human wellbeing. For example, limits for nitrogen contamination of drinking water are currently set at limits 11 times higher than the generally agreed threshold for human wellbeing[5]. Limits that are not set according to a scientific evidence base and Māori Cultural Health indices will fail to protect, let alone restore, ecosystems. "Environmental limits" are a closely defined legal and ultimately regulatory concept that specifies the lower boundaries of a safe operating space for humanity and describes the minimum measure of an ecosystem's health. Where environmental bottom lines are the basis of setting environmental limits, they are so far framed as a minimum acceptable state of an aspect of the

[5] High nitrate levels in water levels in mainly rural areas of New Zealand is breaching people's human rights. 1News. 2022.

environment, or a maximum amount of harm that can be caused to that state. But, this does not facilitate an outcomes-based approach to achieve aspirational goals for the wellbeing of te Taiao, instead only aiming for avoiding crossing environmental tipping points. The NBE Bill also provides for limits to be set at worse than current state if the current state will cause continuing degradation. This takes an approach that where the environment is really degraded, we should not pursue recovering it, or even maintaining it. This approach is in conflict with the Tiriti obligation to protect taonga including the environment.

The Bill requires that 'targets' are set for each of those limits, but there is no direction to set these at a state that is sustainable, and there is no certainty about when these targets will have effect. Under the NBE Bill, targets could never be set at a standard that is sustainable, and in the meantime, ecosystems could reach tipping points. The current RMA regime at least requires sustainable management and environmental standards to reflect the safeguarding of life-supporting capacity of ecosystems.

4. All Māori rights holders must be recognised

The SP and NBE Bills are both drafted on the basis that it is in most cases only "iwi and hapū" who have rights and responsibilities relevant to te Taiao , and in some cases it is only iwi/post-settlement governance entities ("PSGEs") who matter. PSGEs have no general mandate to represent hapū, whānau, ahi kā,

landowners and marae and should not be assumed to do so unless free and prior informed consent to do that is demonstrated. That is wrong as a matter of tikanga, te Tiriti and State law, as it ignores and makes invisible rights that are held by ahi kā/ landowners/individuals, whānau, and urban Māori. This fails to recognise how colonialism and ongoing Crown practices have led to complexities about Māori rights and ownership of resources. As the Supreme Court recognised in its recent Pouakani lands resumption decision, this 'complexity', and the resulting layers of overlapping Māori rights, is a reality that needs to be recognised and accommodated, not ignored in a way that diminishes the rangatiratanga of some Māori rights holders.

6. Māori water rights must be better protected

Clause 814 of the NBE Bill preserves Māori rights in freshwater. But it is too weak as it is drafted. It is undermined by clause 814(3), which says that nothing in clause 814 affects the lawfulness or validity of any action under the legislation. This appears to mean that the assurance of no further prejudice in clause 814(1) cannot have any practical effect on how the new RM laws are interpreted and applied. Overall, clause 814 provides no protection. The NBE Bill goes on in clauses 689-693 to propose a Freshwater Working Group, made up of Crown and "iwi and hapū" representatives who the Crown must approve (and, potentially, may choose). We are concerned about the narrow focus in these clauses on iwi and hapū alone, as the Māori rights holders, is an example of the Crown prioritising some Māori rights holders over others. This is

unacceptable. As the NBE Bill is written, this could also lead to iwi/PSGEs deciding who get water rights at a sub-catchment level and choosing to allocate water rights to PSGEs rather than to the ahi kā / landowners/ individuals, whānau who live by the affected rivers and lakes and have been working so hard as kaitiaki for so many generations to save them.

We wish to make the following recommendations:

1. Importance of planetary and climate health for human wellbeing and for national direction

The framework of a national direction for these reforms must:

1. Make clear the relationship between national direction and the Climate Change Response Act. In particular, it should be made clear that national direction must be consistent with emissions reduction plans and a national adaptation plan.

2. Make clear how Māori are to be involved in the development phase of national direction. The Natural and Built Environment Bill sets up a National Māori Entity but it has a very narrow role[6]. More funding should be given for capacity-building so that the National Māori Entity can have a broader mandate for real power to shape resource management decisions.

[6] Harris , M., & Sykes, A. Te Tiriti o Waitangi and the new Resource Management Laws (Natural & Built Environment Bill and Spatial Planning Bill).

2. Te Tiriti clause needs to be stronger

OraTaiao ask that clause 4 of the NBE Bill is deleted, and that te Tiriti clause is re-homed in the purpose provision, clause 3, amended to read as follows:

(1) The purposes of this Act are to–

(a) give effect to te Tiriti o Waitangi; and

(b) recognise and uphold Te Oranga o te Taiao, including—

(i)The interconnectedness of te Taiao

(ii)The fundamental role of ecosystem health/ecological integrity to sustain the well-being of the wider environment.

(iii)The relationships between Māori and te Taiao in accordance with tikanga.

(c) enable the use, development, and protection of the environment in a way that—

(i) supports the well-being of present generations without compromising the well-being of future generations; and

(ii) promotes outcomes for the benefit of the environment; and

(iii) complies with environmental limits and their associated targets; and

(iv) manages adverse effects.

(2) Any person who exercises any power or discretion, or performs any function or duty under this Act, must exercise that power or discretion, or perform that function or duty, in a manner that is consistent with the purposes of this Act.

This drafting will ensure that te Tiriti clause operates as the korowai (cloak) that it needs to, informing the understanding as well as the application of all aspects of the new system.

The National Māori Entity must be stronger:

- The NBE bill must guarantee that National Māori Entity will be funded to effectively perform its roles. Further, the roles of the Entity must be clearly defined.
- It should have the right and responsibility to work closely with the Minister for the Environment on the National Planning Framework. The NBE Bill should require the Minister to collaborate and attempt to agree with the National Māori Entity on what limits the NPF should set on uses of water bodies to protect and preserve the mauri of water bodies, and to ensure that Māori communities will get equitable allocations of use rights in the new system.
- The National Māori Entity should have tools that will help to stop breaches of Te Tiriti where they are happening, for instance by stopping illegal actions that harm te Taiao before damage occurs. Another enforcement tool that the National Māori Entity should have is a fund that it manages, and which Māori communities can apply to for grants to support them bringing litigation to protect or preserve tikanga or Te Tiriti

rights. That fund could be modelled on the Environment Legal Assistance Fund, which the Ministry for the Environment currently manages, but instead be managed by the National Māori Entity and directed to Māori who need financial support to protect their taonga.

- The National Māori Entity also needs to have the power to educate people and communities about risks that they and te Taiao face, and how those risks can be avoided. These actions will contribute to ensuring that the reformed system is te Tiriti-compliant.

3. Te Oranga o te Taiao needs to better reflect a Māori worldview

As outlined in the previous section, we recommend that any reference to the 'natural environment' in connection to Te Oranga o te Taiao, or te Taiao generally is removed, as is consistent with the drafting that Te Oranga o te Taiao refers to the interconnectedness of te Taiao. This should also be supported by a requirement for limits to be set at a state of health that is sustainable and ensures the protection of ecosystems, rather than merely the current state.

Environmental limits must be defined in a way that ensures ecosystems are not further degraded and do not reach tipping points, and timelines for when those targets must be met. The law must be clear that these limits are developed in partnership with Māori as an expression of te Tiriti, as opposed to being balanced with te Tiriti obligations. Consenting decisions must comply with environmental limits once they are established. A stronger framework is needed for monitoring, enforcement and evaluation is needed if limits are to be defended. Consents and other

authorisations that are already granted will need to be reviewed if they threaten environmental limits. Consideration should also be given to including ways of imposing environmental limits that are consistent with tikanga.

While limits are crucial to achieving the long-term public interest in a healthy environment and all forms of wellbeing. New Zealanders cannot be healthy and thrive in an environment that is unhealthy. However, unspecific environmental limits can allow for unambitious targets that may even further degrade ecosystems. These limits may be permanent or temporary, universal or with exceptions, and might be expressed in different ways, and there is a lack of understanding of what limits means in the bill. These limits should not merely prevent ecological tipping points but ensure that te Taiao sustains human and non-human health and life in perpetuity, not just prevent illnesses. If an environmental limit has already been exceeded, it should require a binding target to be set within national direction. A clearer legal distinction should be made between binding targets that reflect limits and binding targets that are set to achieve positive outcomes.

In accordance with a genuine Te Oranga o te Taiao approach, bottom lines must reflect the inherent interconnectedness between environmental and human wellbeing and not objectify particular resources or domains. The intrinsic value of taonga (species, environments, places, ecosystems) must be reflected in the new legislation and recognise geographically specific bottom lines to ensure taonga are protected in a tailored manner. Bottom lines should be phrased narratively, in te reo Māori and English, and in accordance with a te Ao Māori perspective.

Setting environmental limits and defining bottom lines must be underpinned by the protection and restoration of nature, including values for human wellbeing. The protection of human wellbeing is inseparable from the health of te Taiao, e.g., protecting air quality protects human respiratory health and protecting soils prevents contamination of land, water, and food. Currently, the long-term human health implications of environmental degradation and ecosystem decline are under-emphasised and need to be stressed in a new system. For many people, this will add urgency, legitimacy and durability to environmental bottom lines.

At the same time, too narrow a focus on the immediate needs of humans will almost inevitably fail to address the underlying causes of environmental degradation and resulting crises like climate change[7]. In order to uphold the rights of nature, fundamental relational tensions must be addressed. In Aotearoa, this relates to transformational shifts needed to ensure that Māori rights are upheld and Māori people and epistemologies are centred in decision making.

4. All Māori rights holders must be recognised

We ask that the primary reference term that is used in the SP and NBE Bills for Māori rights and responsibilities holders is "mana whakahaere", based on the definition in the NPSFM (or, as a second best alternative, that the approach taken in s 6(e) of the RMA is retained). We prefer "mana whakahaere" as it is a more expansive

[7] Jones, R., Reid, P., & MacMillan, A. 2022. Navigating fundamental tensions towards a decolonial relational vision of planetary health.

term in depicting a wider relationship with natural features / resources / environments than "iwi and hapū" does. That in turn better reflects the full range of overlapping rights, interests and responsibilities held by iwi, hapū, whānau, Māori landowner and urban Māori. It also helps to achieve a te Tiriti compliant regulatory framework by ensuring that all kaitiaki can fulfil their kaitiakitanga obligations to te Taiao. The Crown's approach of "picking winners" in terms of iwi, hapū and PSGEs is unnecessary, it is unhelpful, and it is contrary to tikanga and te Tiriti. National, and indeed in some cases regional bodies, that are designed to reflect pan-iwi and hapū interests are often dominated by the larger tribal groupings while the views and interests of smaller iwi may be subsumed[8]. This needs to be protected against. The proposed Māori National Entity must enhance, not subsume or undermine in any way, mana whenua decision making in their own rohe or their special relationship with te Taiao.

5. Māori Water rights must be better protected

We ask that clause 814 is amended by deleting clause 814(3) and by amending clause 814(2)(a) by adding at the end of it "that would or may prejudice Māori rights or interests in freshwater or geothermal resources". Provision of a set quantity or percentage of water rights in every region should be allocated to Māori rights holders, on a first priority basis. Māori communities who get those rights are to be determined by all of the Māori rights holders within the region, and in accordance with tikanga based processes.

[8] Papa Pounamu Feedback on the Discussion Document Transforming Aotearoa New Zealand's resource management system: Our future resource management system. Page 24.