

Environmental Law Initiative
Submission:

Spatial Planning Bill



ELI

Environmental Law Initiative
Tiakina te mauri o te taiao

ABOUT ELI

The Environmental Law Initiative (ELI) thanks the Environment Committee for the opportunity to submit on the Spatial Planning Bill (SPB).

ELI is a registered charitable trust, whose objective is to support the effective protection of Aotearoa New Zealand's natural environment. We are advised by a small team of experts in environmental law, policy, science, ecology and management.

Though operating independently, we partner with a range of other groups and individuals—including iwi, hapū, government agencies, charities, and organisations—to achieve positive outcomes for the environment.

In ELI's view, the law is our best tool for effectively protecting the environment. Our research and advocacy are centred around improving legislation and policy to better protect and restore marine, freshwater, and terrestrial environments, and the biodiversity of Aotearoa.

For more information, see www.eli.org.nz

Summary

1. The Spatial Planning Bill (SPB) is a key part of a significant reform program which will affect the lives of every person living in Aotearoa New Zealand and every facet of the environment on which we depend, from clean water and air to housing and infrastructure.
2. As a small NGO, ELI has focussed on the following areas:
 - (a) Purpose
 - (b) Information certainty and caution
 - (c) Scope and content of regional spatial strategies
 - (d) Considerations when preparing regional spatial strategies
 - (e) Process for preparing regional spatial strategies
 - (f) Renewal and review of regional spatial strategies
 - (g) Engagement Agreements
 - (h) General considerations
3. We have made a number of recommendations to aid the development and improvement of the legislation. These are set out in the submissions below.

Purpose

4. Clause 3 sets out the purpose of the SPB. The statement of the legislative purpose is fundamental as it will be used to interpret the Act.
5. Clause 3 provides that the purpose of the Bill is to provide for regional spatial strategies (RSS) that assist in achieving the purposes of, and outcomes set out in, the Natural and Built Environment Bill (NBEB). In our submission on the NBEB, we have recommended amendments to those purpose provisions. We will not duplicate these here, but refer the Committee to our submission. To summarise very briefly, we are concerned that the dual use and protection purpose creates a tension, and we support the Parliamentary Commissioner for the Environment's (PCE) submission on the NBEB exposure draft¹ that the purpose expressly prioritise protection.
6. We support the approach of referring to the purposes of the NBEB, including recognising and upholding te Oranga o te Taiao. However, the purpose in cl 3 lacks a focus on long-term planning. We acknowledge that that cl 3 incorporates 3(a)(i) of the NBEB by providing that the purpose is to assist in achieving the use, development and protection of the environment in a way which supports the wellbeing of present generations without compromising the wellbeing of future generations. However, this is largely focussed on use, development and protection in the present. The long-term approach should be more central to the purpose.
7. **We recommend addressing this by including a specific focus on the needs and wellbeing of future generations in cl 3.** We also suggest that this be drafted slightly differently from cl 3(a)(i) of the NBEB (or, that the purpose of the NBEB be amended to align with our suggested amendment here).
8. Our reasoning for this change goes back to the genesis of the concept of sustainable development, and its focus on future generations, from the United Nations Conference on the Human Environment in 1972.² Following this conference the Stockholm Declaration³ set out principles including principle 1 and 2:

1. *Man has the fundamental right of freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and*

¹ <https://pce.parliament.nz/media/agqhairn/pce-submission-nbeb-exposure-draft.pdf>

² Donaldson, D. (2017) Regional Policy Statements and the Consideration of Future Generations, report by Perception Planning for Fish and Game New Zealand.

³ 'Declaration of the United Nations Conference on the Human Environment'
<https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGP1StockD.pdf>

wellbeing, and he bears a solemn responsibility to protect and improve the environment for present and future generations ...

2. *The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.*

9. The World Commission on the Environment then set out principles for sustainable development in the 1987 Brundtland report.⁴ The Brundtland report defined sustainable development as ‘... *development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*’

10. We expect that the wording in the NBEB may have been based on the wording in the Brundtland report, replacing the concept of ‘needs’ with wellbeing. However, the focus of the proposed resource management regime change is to promote positive outcomes, instead of only maintaining the status quo.

11. **Considering this, we recommend that basing the purpose wording on the Stockholm convention may be more appropriate, focussing on protecting and *improving* the environment for present and future generations.** This approach would address any bias in favour of current needs over the needs of the future; a problem which has been recognised in the RMA context.⁵ Care should be taken to ensure the wording does not inadvertently prolong current activities which impact future generations’ well-being. The ‘well-being’ of the current generation may be open to being defined as the status quo, and thus the cost of change may be easy to quantify. The ‘well-being’ of future generations may be less easy to quantify, thus creating a bias in favour of current generations in applying the purpose in cl 3 NBEB as drafted.

12. **In addition, we recommend that the Committee consider including a purpose of restoring and enhancing te Oranga o te Taiao , in addition to ‘recognising and upholding’.** This would reflect the wording in clause 17(1)(a) and would align with the long-term focus of the SPB.

⁴ World Commission on Environment and Development, *Our Common Future*, (Oxford University Press, Oxford, 1987) (‘Brundtland Report’). <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>

⁵ Palmer KC, G. (2017) *Intergenerational Governance: Problems of Legislation*. Policy Quarterly Vol 13, 3, at 68

Information certainty and caution

13. Clause 28 requires that regional planning committees ensure that strategies are based on robust and reliable evidence and mātauranga Māori. ELI supports the intent of this provision, but notes the absence of a clause requiring caution where evidence is incomplete or unreliable. **We submit that planning committees should exercise caution and a level of environmental protection proportionate to the risks and effects involved.** This would align with the wording in the NBEB and would be particularly important here given the focus on longer term planning and the likelihood that information will be less certain when modelling is long term.

Scope and content of regional spatial strategies (RSS)

14. Clause 15 sets out the scope of RSS. Under clause 15(1)(a), RSS must set the strategic direction for the use, development, protection, restoration and enhancement of the environment (natural and built). The requirement to set a strategic direction for both use and protection may create tension. **We submit that RSS should set the direction for the protection and restoration of the natural environment as a precursor to use and development.** Without this, the new legislation may perpetuate the trade-offs that have undermined the implementation of the RMA. This would also better enable strategies to uphold and maintain te Oranga o te Taiao. We request that the Committee consider making this clear via amendments the purposes of the SPB or the NBEB, as well as cl 15.
15. We support the requirement that RSS set the direction for 'restoration and enhancement' of the environment. This is appropriate given the long term focus, and the goal of the reform in promoting positive outcomes.
16. Clause 15 also provides that RSS must support the efficient and effective management of the environment. There may be unintended consequences in specifically supporting 'efficient' management of the environment. 'Efficiency' without definition may be interpreted in several unrelated ways (we made a submission on this matter in relation to the NBEB, and do not repeat this here, but note for example that 'efficient' use of resources can lead to unintended consequences of environmental decline).⁶ **The use of this term should be clarified to avoid**

⁶Dench and Morgan, 'Unintended Consequences to Groundwater from Improved Irrigation Efficiency' Agricultural Water Management 245 (2021) 106530

unintended consequences which increase degradation of the natural environment, and exposure to climate change related risk. The timeframe over which this term applies should be clarified to ensure it is a long-term consideration. The main goal of cl 15(1)(c) should be focussed on effectiveness in relation to the purpose of the system. **To be meaningful, ELI recommends that there should be outcomes and measures of effective management (i.e., these may be the purpose and system outcomes set out in the NBEB).**

17. The scope and content provisions lack assurance that content relating to outcomes for the natural environment, will be included in RSSs, for example:

- (a) Clause 17(a) refers to ‘areas that may require protection, restoration, or enhancement.’ A spatial planning committee could theoretically meet this requirement by naming a few cultural heritage areas to be protected and not protect any areas for environmental reasons (‘areas’ is the only qualifier as to what might need protection/enhancement/restoration). **We submit that there should be a specific focus on areas of the natural environment requiring protection. In addition, we submit that cl 17(1)(a) should refer to areas that ‘require, or may require’ protection to ensure that the subclause covers areas which clearly require protection, as well as areas where there is uncertainty.**
- (b) Clause 17 does not include areas of value due to the ecosystem services they provide (existing or potential). To the extent that cl 17 (1)(j) does so in relation to climate change, it does not recognise and secure areas which already do, or could, provide ecosystem services for resilience to climate change impacts in future. **We recommend this provision is expanded to do so.**
- (c) Clause 17 does not include areas where the natural environment is significantly impacted by current or historic land use, or where these impacts will continue or increase over time. This reinforces prolonging current activities even where they do not align with the purpose of the Acts. For example, cl 17 (1)(e) does not anticipate that in some areas changes to rural uses may be ‘appropriate’.
- (d) Clause 18(1)(b) allows for strategic direction on matters that *‘relate to environmental effects best managed at a regional level (such as effects on water catchments or effects caused by greenhouse gas emissions)’*. This is very focussed on environmental effects but does not manage causal activities, for example, how spatial planning could reduce greenhouse gas emissions.
- (e) **If cl 18(1)(b) is intended to capture cumulative effects on the environment at a regional scale, ELI recommends this is explicitly made clear to**

ensure it captures other significant global/regional problems which impact particular areas, for example, plastic and nutrient pollution.

18. While the new resource management system places a heavy emphasis on offsetting and redress, as part of the overall change in direction towards promoting positive outcomes. ELI is concerned that in order to reliably achieve a real net ecological benefit, the system must introduce new mechanisms for positive environmental outcomes.⁷ As drafted, the system sets up an expectation of enhancement without mechanisms for ensuring this will occur. As a starting point, cl 17 provides an opportunity to ensure that sufficient areas are provided for the offset and redress requirements of development, and that these can be managed to reliably deliver on positive environmental outcomes.

19. Overall, ELI notes that the requirement to provide 'strategic direction' is open to decision makers' interpretation, as it is not currently defined. The matters listed at cl 17 and cl 18 appear to be of critical importance to the 'key transformational shift' of planning for positive outcomes,⁸ **ELI recommends clearer prescriptions as to how strategic direction must provide for such important matters.** There appears to be a drafting issue at cl 18. It is difficult to reconcile the directive 'is' of sufficient significance at cl 18(1) with the discretionary 'considers are' of sufficient significance in cl 16(1)(c)(ii). This is a problem because the matters listed in cl 18 are mostly indeterminate and will require a determination.

Considerations, etc., when preparing RSS

20. There is an absence of linkages to several important aspects of the NBEB to ensure RSS do not undermine the goals of the new framework. RSS should be prepared in a way that ensures:

- (a) The environmental outcomes of the system are given effect;
- (b) Compliance with environmental limits and targets (and their timeframes);
- (c) Important environmental information on areas requiring protection generated through the NBE Planning process guides their development.

⁷ Knight-Lenihan, S. Identifying *Limits in domestic Law delivering net ecological benefit: A New Zealand Example* (2022) *urban science*, 6, 93.

⁸ Overview Document, p 7.

21. Clause 24 provides for only general considerations, and puts high importance on optional work (NBEB statements), external government policy and certain iwi/hapū planning. This provision highlights the lack of linkages between RSS and compulsory policy for environmental outcomes. **ELI recommends that an additional similar clause could provide for a tighter alignment with environmental goals.**⁹
22. There is a potential drafting issue at cl 25(2)(a), which could be clarified by specifying what use and development should be assessed (i.e. existing, and/or that under the RSS being developed).
23. Clause 25(2)(b) provides that the committee must consider ‘mātauranga Māori and any technical evidence and advice that the committee considers appropriate.’ The provision is open to discretion of the committee to define what is appropriate. **ELI recommends it prescribe consideration of ‘appropriate mātauranga Māori and scientific advice’ to ensure guidance is provided by scientific advice and take the discretion away from the committee to decide what is appropriate.**
24. The committee, according to cl 25(2)(c) must also consider ‘whether the implementation of the RSS could have effects on the natural environment that have, or are known to have, significant or irreversible adverse consequences.’ It is difficult to interpret what kind of effects would meet this threshold. **This should be reworded to ensure committees take a precautionary approach.**
25. ELI supports the inclusion of mātauranga Māori at cl 28, and recommend that this provision also explicitly recognise the use of scientific advice (subject to our above submission in relation to precaution).

Process for preparing regional spatial strategies

26. Several of the process requirements are more in the nature of statements of intent than prescriptions and need to be properly developed. For example:
- (a) Clause 31 as drafted is a statement of intent. The process requirements stated are aspirational and contain no specific parameters to ensure committees are accountable to the intent.

⁹ This links to the PCE’s recommendation that enduring environmental outcomes should be set in legislation, and the Government be required to issue clear statements as to how it plans to prioritise these over various time scales. Implementing this recommendation would be part of a broader system change which links to the Environmental Reporting Act and is addressed in ELI’s NBEB submission. See Parliamentary Commissioner for the Environment (2022) *Environmental reporting, research and investment Do we know if we’re making a difference?* At p 61-62; 80 – 81; available at <https://pce.parliament.nz/media/0qger2rr/environmental-reporting-research-and-investment-do-we-know-if-were-making-a-difference.pdf>

(b) The requirement in cl 32 to 'encourage participation' is too vague and there is room for interpretation as to what is required. The specific focus on those involved in implementation creates a lever to ensure affected industry parties are always encouraged to participate, while affected public are not assured equal access. This contradicts with the long-term intent, and the provisions relating to future generations.

27. Clause 1 of Schedule 4 defines 'interested parties' for the purposes of preparing RSS. We support the requirements for consultation with interested parties and the public. Of course, interest groups are representatives of the current generation. Given the long-term focus of the Bill, and the need to provide for current and future generations, we are concerned that the interests of current generations may be given more weight than those of future generations. **We recommend that the Committee consider adding measures to address this, such as including a requirement for scientific input on long term planning.** Further, cl 1 subclause (h) refers to 'other groups with an interest greater than that of the public generally.' ELI recommends that the Committee engage with the Parliamentary Counsel Office to ensure this would capture non-governmental organisations and charities with an environmental or other social focus.

28. **We also submit that the process for scientific and mātauranga input in relation to the natural environment could be made clearer to implement the requirements in cl 28 and cl 25 (and our recommended amendments to those clauses).**

Renewal and review of regional spatial strategies

29. Clauses 23 and 48 provide that the strategy is reviewed every 9 years, or if the planning committee decides there has been a significant change. This places a lot of discretion with the committee to determine when change is 'significant'. There are no real links to the extensive monitoring, feedback and oversight provisions set out in the NBEB, or the Environmental Reporting Act to trigger RSS review when environmental outcomes are not met. We note that the Schedule 7 of the NBEB (cl 47) enables review of plans where this is required to avoid significant harm to the environment or human health. Overall, the linkages between environmental outcomes, and the triggers for RSS and/or plan reviews are not defined. **Amendments should acknowledge that significant environmental changes or**

risks might affect both NBE Plans and RSS, and responses by way of review should be coordinated.

30. Clause 49 provides that the committee must adopt a policy that sets out the criteria to be applied when determining whether the test for significant change is met. **ELI recommends a requirement for scientific and mātauranga Māori input into this policy.**

Engagement Agreements

31. Clause 37 creates 'engagement agreements' which act as a mechanism for a regional planning committee and 1 or more 'Māori groups' with interests in the region to record how such groups are to participate in preparing a RSS for the region, and how the groups combined participation is to be funded.
32. Clause 39 states that regional planning committees must initiate engagement agreements by inviting 'Māori groups' to enter into 1 or more agreements. While not explicitly defined, clause 39 states that 'Māori groups' includes the following:
- (a) Iwi authorities and groups that represent hapū
 - (b) Customary marine title groups
 - (c) Other Māori groups with interests in the region
33. In ELI's view, the interaction between clauses 37 and 39 is unclear. Clause 37 states that regional planning committees must engage with *1 or more* of the Māori groups listed in clause 39. However, cl 39 states that the regional planning committee is to invite 'Māori groups' to enter into engagement agreements, without specifying how many it is to invite.
34. If (as is ELI's view) this interaction is to be interpreted as meaning that all 'Māori groups' listed in cl 39 must be invited to enter into engagement agreements, with only one group being necessary to create a RSS, then this interpretation proves problematic, as it lends itself to groups who are well resourced.
35. Of those Māori groups, hapū, or groups that represent hapū, are least likely to respond to invitations, due to a lack of resourcing. This is so, despite hapū being the central autonomous unit of Māori society in many regions throughout New Zealand.

36. While not every hapū will have the infrastructure to respond to invitations, effort must be made to ensure that hapū are included in the creation of a RSS. **It is hapū who exercise kaitiakitanga at a localised level, and therefore any provision that allows hapū to be omitted from RSS development should be remedied.**

General considerations: other matters

37. In our view, hapū Māori must have a greater role in preparing a RSS. As articulated above in the 'Engagement Agreements' section, **resource management reform should reflect the position of hapū exercising kaitiakitanga in their rohe.**

38. Clause 25 states the matters to which regional planning committees must have regard. Subsection (2)(b) states that mātauranga Māori is one such matter to be had regard to, yet the Bill does not specify who is to provide the mātauranga. In ELI's view, mātauranga Māori can only be informed by kaitiaki. This means that the mātauranga provided must be provided by localised hapū, because it is hapū who exercise kaitiakitanga. **Therefore, in our view, those giving mātauranga Māori to regional planning committees must be hapū, who operate at a localised level.**

Concluding remarks

39. ELI recognises the importance of the SPB but submits that a number of significant revisions are required to meet the stated objectives. We hope that our recommendations above will aid the Committee to improve the legislation.

40. **ELI requests to be heard in support of our submission.**