SUBMISSION ON THE RESOURCE MANAGEMENT REFORM BILL
ENVIRONMENTAL DEFENCE SOCIETY

Introduction

1. The Environmental Defence Society ("EDS") is a public interest environmental law group, formed in 1971. It has a membership that consists largely of resource management professionals. The focus of EDS's work is on achieving good environmental outcomes through improving the quality of New Zealand's legal and policy frameworks and statutory decision-making processes.

2. EDS welcomes the opportunity to comment on the Resource Management Reform Bill ("the Bill") which amends the Resource Management Act 1991 ("RMA"), Local Government (Auckland Transitional Provisions) Act 2010 ("LGATPA"), and the Local Government Official Information and Meetings Act 1987.

3. This submission addresses the following matters:

    a. Amendments to section 76 of the RMA

    b. Amendments to section 32 of the RMA

    c. Amendments to the LGATPA

Amendments to section 76 of the RMA

4. EDS strongly opposes the proposed restrictions on district plan rules relating to tree protection.

<u>Why are trees important?</u>

5. Trees are important for a number of reasons. Trees provide a number of ecosystem services: they provide habitat for biodiversity, improve water quality, reduce storm water run-off, reduce erosion, and absorb carbon dioxide. Trees also have amenity values: they have intrinsic aesthetic value, create a feeling of relative naturalness within urban areas, contribute to the pleasantness and aesthetic coherence of an area, screen and buffer the effects of obtrusive activities, provide shelter from strong winds, and provide recreational opportunities. Finally, trees have cultural value as they assist with retaining a distinctive, endemic character by providing habitat and shelter for native species.

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6. In cities the functions and values that trees fulfil and provide cross boundaries. That is, the amenity that a landowner experiences is a function of the trees on his or her site and on neighbouring sites and indeed throughout the city. The removal of a single tree may have minimal effect; however it will result in an impoverished environment if other landowners follow suit.

7. The functions trees perform and the values trees provide are especially important in urban environments, particularly in cities and towns where intensification is occurring. Urban areas will become 'dull' and 'bleak' without the presence of trees and other biodiversity which they support. Trees are an integral part of maintaining a 'liveable city'.

The statutory context

8. Section 5(2) of the RMA provides that sustainable management means managing the use, development, and protection of natural and physical resources to, *inter alia*, sustain the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations and safeguard the life-supporting capacity of air, water, soil and ecosystems. The retention of trees in urban environments is essential to meet the reasonably foreseeable needs of future generations and to safeguard the life-supporting capacity of air, water, soil and ecosystems, for the reasons set out in paragraphs 5 to 7.

9. Section 6 of the RMA provides that the following matters of national importance should be recognised and provided for: the natural character of the coast and fresh water bodies, outstanding natural landscapes and features, and, significant indigenous vegetation and significant habitats of indigenous fauna. The retention of trees in urban environments is essential to recognise and provide for these matters. Of particular relevance is preserving the natural character of the coast and fresh water bodies due to the number of our cities and towns which are located adjacent to the coast or freshwater bodies. We are also concerned about the effect these amendments may have on significant natural areas which must be protected under section 6(c).

10. Section 31 of the RMA sets out the functions of territorial authorities. The functions include: the establishment of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated resources and the control of the effects of the use, development, or protection of land for the purpose of the maintenance of indigenous biological diversity. Trees play an essential role in the performance of these functions, for the reasons set out in paragraphs 5 to 7. For example,

riparian zones are a commonly used tool to mitigate the effects of activities on fresh water bodies and vegetation is a preventative measure against erosion.

11. The New Zealand Coastal Policy Statement 2010 ("NZCPS") requires councils to protect indigenous biological diversity in the coastal environment by avoiding adverse effects of activities on threatened and rare biodiversity and avoiding significant adverse effects (and avoiding, remedying or mitigating other adverse effects of activities) on, *inter alia*, areas of predominately indigenous vegetation in the coastal environment, ecological corridors, and areas important for linking and maintaining biological values (policy 11).

12. Local authorities require tools (such as tree protection rules) to achieve these objectives. If the proposed amendments are enacted local authorities will not have the tools they require to achieve the purpose and principles of the RMA, fulfil their statutory functions and give effect to the NZCPS.

13. In the Auckland context there are two other pieces of legislation of particular relevance.

14. Section 8 of the Hauraki Gulf Marine Park Act 200 ("HGMPA") provides that:

To recognise the national significance of the Hauraki Gulf, its islands, and catchments, the objectives of the management of the Hauraki Gulf, its islands, and catchments are—

> *(a) the protection and, where appropriate, the enhancement of the life-supporting capacity of the environment of the Hauraki Gulf, its islands, and catchments:*
> *(b) the protection and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments…*

Section 8 of the HGMPA must be treated as a NZCPS and must be given effect to (section 10 of the HGMPA).

15. Section 7 of the Waitakere Ranges Heritage Area Act 2008 ("WRHAA") states that the heritage area is of national significance and that its terrestrial ecosystems of prominent indigenous character and other features contribute to its significance. Section 8 of the WRHAA states that the objective of the heritage area are, inter alia:

> (a) To protect, restore, and enhance the area and its heritage features,
>
> (b) To ensure that impacts on the area as a whole are considered when decisions are made affecting any part of it,

(h) to manage … terrestrial ecosystems in the area to protect and enhance indigenous habitat values, landscape values, and amenity values

Regional policy statements, regional plans and district plans must give effect to the purpose and objectives of the WRHAA (section 10 of the WRHAA).

16. Once again local authorities will be unable to perform the functions required by the HGMPA and the WRHAA if the proposed amendments are enacted.

Why are the proposals flawed?

17. It is clear that the alleged mischief that the Bill intends to address is the time and cost devoted to resource consent applications which are seen as achieving little benefit.

18. However, the paragraphs above demonstrate the considerable benefits that retaining trees has for communities and the environment. Those benefits are not 'minor matters'.

19. The amendments would require councils to invest considerable time and expense identifying in their plans each individual property on which groups of trees, or parts of groups of trees, are located. This would result in a pointlessly lengthy and complex set of provisions and it would be a prohibitively costly and time-consuming exercise. The amendments will significantly increase costs on those communities who opt to retain protection in recognition of the numerous benefits trees provide, or, they will mean that council's opt out of tree protection with resultant costs of another kind for communities and the environment. It seems wrong to create a new, larger bureaucratic obligation to overcome a perceived existing one.

20. We consider that the RMA already contains a mechanism for ensuring the costs of regulation do not outweigh the benefits. Section 32 of the RMA is also being amended by this Bill and those amendments are intended to further strengthen the requirements on councils to consider alternatives and evaluate the benefits and costs of the environmental, economic, social and cultural effects of rules. This detailed assessment is far preferable to the broad-brush approach of legislation. We believe that it is through the section 32 process that the assessment of the benefits and costs of tree protection rules should occur.

21. It is ironic that these proposals, which are contained in a Bill aimed at "simplifying and streamlining", will make tree protection "complex and bureaucratic." The proposals will not

achieve the stated aim of reducing the costs on communities stemming from tree protection - instead they are will result in costs of a different kind.

Preferred outcome

22. The discussion above demonstrates the considerable functions and values trees provide. It also points out that tree protection rules are a necessary 'tool' to enable councils to achieve their functions under the RMA and other legislation. It also demonstrates that the RMA already contains a mechanism for ensuring the costs of regulation do not outweigh the benefits.

23. For these reasons, we do not support the proposed amendments to section 76.

An alternative solution

24. EDS has developed a compromise solution, which we believe achieves the Government's aim of reducing the costs associated with tree protection and ensuring accurate definition of protected trees while ensuring the key benefits of tree protection can be achieved in an efficient and cost-effective manner.

25. This alternative distinguishes between **trimming** and **removal** of trees. It provides more freedom for trimming which is a pragmatic compromise that can achieve outcomes such as view protection and sunlight retention while retaining the benefits trees provide.

26. This alternative also addresses the issue of trees in poor health. It provides that a rule must permit the removal of a tree where an approved arborist has certified that its continued protection is inappropriate due to its failing health.

27. This alternative focuses on those definitions of a 'group of trees' that are most likely to achieve the key benefits of tree protection. We accept that rules based on the formula "All trees in a class with defined characteristics in a defined area or zone" (proposed section 76(4C)(b)) do not necessarily focus protection on those trees which offer the key benefits of tree protection discussed above. However, we contend that rules based on the formula of "All trees of one or more named species in a defined area or zone" (proposed section 76(4C)(a)) and "All trees in a named ecosystem, habitat, landscape unit or ecotone" (proposed section 76(4C)(c)) are essential to ensure the key benefits of trees are preserved and that councils are able to perform their functions under the RMA and other legislation.

28. This alternative also proposes different methods for ensuring accurate identification of protected trees. The above groups can be precisely identified using aerial photographs or GPS coordinates. Such methods have considerable benefits over identification by street address or legal description, which would be unnecessarily burdensome for councils and would add complexity and cost to plans.

29. This approach would also prevent councils charging an application fee for resource consents required by tree protection rules. This is common practice but it would ensure that in all cases the cost of protecting trees is shared between all those who benefit from tree protection.

30. EDS therefore proposes the following alternative to the proposed amendments (or words to like effect):

*(4A) However, a rule must not prohibit or restrict the **trimming** of any tree or group of trees in an **urban environment** unless the tree or **group of trees** is—*

(a) specifically identified in a schedule to the plan by street address or legal description of the land, or both, regardless of whether the tree or group of trees is also identified on any map in the plan; or

(b) located within an area in the district that—

(i) is a reserve (within the meaning of section 2(1) of the Reserves Act 1977); or

(ii) is subject to a conservation management plan or conservation management strategy prepared in accordance with the Conservation Act 1987 or the Reserves Act 1977.

*(4AA) However, a rule must not prohibit or restrict the felling, damaging, or removal of any tree or group of trees in an **urban environment** unless the tree or **group of trees** is:*

(a) specifically identified in a schedule to the plan by street address or legal description of the land, or both; or

(b) located within an area in the district that—

(i) is a reserve (within the meaning of section 2(1) of the Reserves Act 1977); or

(ii) is subject to a conservation management plan or conservation management strategy prepared in accordance with the Conservation Act 1987 or the Reserves Act 1977; or

(c) specifically identified in the plan by:

(i) street address or legal description of the land, or both; or

(ii) aerial photographs with an accurate property boundary overlay.

(4AB) A rule must permit removal of a tree if a Council-approved arborist has certified that its continued protection is inappropriate due to its failing health.

(4B) In subsection (4A) and (4AB), ***urban environment*** *means an allotment no greater than 4 000 m^2—*

(a) that is connected to a reticulated water supply system and a reticulated sewerage system; and

(b) on which there is-

(i) a building used for industrial or commercial purposes; or

(ii) a dwellinghouse.

(4C) In subsection (4A) and (4AB), ***group of trees*** *means:*

(a) a cluster, grove or line of trees that is located on the same or adjacent allotments;

(b) all trees of one named indigenous species in a defined area or zone of the plan (for example, all Pohutakawa in the coastal area x);

(c) all trees in a named ecosystem, habitat or landscape unit, or ecotone (for example, all indigenous trees lining a stream corridor).

(4D) In subsection (4A) and (4AB), ***trimming*** *means:*

[definition to be developed which allows a maximum reduction of up to 20% of the size of the tree over the lifetime of the tree]

(4E) The District Council must specifically address any rules promulgated under subsection (4A) or (4AB) in its evaluation report prepared under section 32.

(4F) The District Council must notify personally all landowners whose land may be affected by rules promulgated under subsection (4A) or (4AB) at the time of notification.

(4G) The District Council must not charge a resource consent application fee for rules generated under subsection (4AB).

Amendments to section 32 of the RMA

31. We support changes that would improve the quality of section 32 reports. The Regulatory Impact Statement notes that they key problem with section 32 is issues with capacity, capability and resourcing. It states that legislative changes are likely to have minimal benefit over the status quo unless practice-related options are also implemented. We believe that addressing capacity, capability and resourcing will have greater benefit than legislative amendments.

32. We oppose the amendments that draw particular attention to the opportunity costs for economic growth and employment (proposed section 32(2)(a)(i) and (ii)). The proposed section 32(2)(a) already refers to the benefits and costs of the economic effects that are anticipated from the implementation of the provisions so this amendment will not improve the quality of section 32 reports. On the contrary it is likely to result in unbalanced evaluation reports which place undue weight on one particular aspect of the assessment. It is inappropriate for an environmental statute to place greater weight on economic costs and benefits than environmental costs and benefits. It is essential that all costs and benefits are considered when assessing the efficiency and effectiveness of the provisions in achieving the objectives (which in turn must be the most appropriate way to achieve the purpose of the RMA). We request that the proposed subparagraphs (section 32(2)(a)(i) and (ii)) are deleted.

33. The Regulatory Impact Statement notes that section 32 currently fails to require consideration of the full hierarchy of planning instruments reducing the effectiveness of higher-level documents and increasing the likelihood of decisions inconsistent with high-level objectives. We agree that this issue needs to be addressed. However the proposed

amendments do not cover this matter. We request that amendments are made to the RMA to require planning instruments to be assessed for compliance with higher level documents.

34. We would like to point out that the Third Report of the Land and Water Forum addressed the problems with cost-benefit analysis under the RMA. Recommendation 54 states:

Freshwater-related regulations, policies, plans, and catchment-based limits and management methods (including provision for infrastructure) must be underpinned by a robust understanding of their economic, environmental, social and cultural implications. Central government agencies and regional councils should be required to ensure that:

a. social, economic, cultural and environmental evaluation is undertaken as a core part of all section 32 analyses

b. the detail of section 32 analyses correspond with the scale and/or significance of the plan or policy under consideration

c. section 32 analyses evaluate the effectiveness of a full range of policy options and a full suite of associated methods for achieving objectives and meeting limits

d. the results of analyses are fed back into the national and regional collaborative policy- and plan-making process before decisions are made and before draft provisions are agreed by stakeholders

e. suitable guidance and training is in place to build capacity in the discipline of benefit cost analysis – particular consideration should be given to the provision of standard templates and approved methodologies

f. suitable internal procedures are in place to guarantee the quality of benefit cost analyses.

The recommendations in (a), (b), (c) above are addressed through the proposed section 32(1)(b)(i), 32(1)(c), and 32(2)(a). The recommendations in (e) and (f) will have to be addressed through changes to practice. We would like to highlight that the proposed subparagraphs (2)(a)(i) and (ii) do not fit with the above recommendation. The Land and Water Forum reports are the result of the collaboration of a wide variety of interest groups and therefore are likely to reflect the wishes of New Zealanders in general.

35. We also have concerns with the following aspects of the proposed amendments to section 32:

a. The use of "reasonably practicable" in subsection (1)(b)(i) is inherently uncertain. In *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 in the context of a

regional plan the Environment Court noted reservations regarding the definition, practicalities and enforceability of any provisions relating to the term "reasonably practicable" and concluded that the term should not be used (see [5-108] and [5-181]). The term is also not required in section 32 as the practicality of an option will be assessed during the assessment of the benefits and costs under subsection (2)(a). It is effectively "double-counting". We request that the term "reasonably practicable" is deleted.

b. The proposed section 32 draws attention to the opportunity costs for economic growth that are expected to be lost – but not those to be gained. This would require unbalanced assessments. This is inconsistent with proposed section 32(2)(a) which refers to "benefits and costs" and the Regulatory Impact Statement which notes that an issue may have significant positive or negative economic impact on communities. It is axiomatic that a cost benefit analysis must consider both costs *and* benefits. If our request to delete subsection (2)(a)(i) is not accepted we request an amendment as follows: "economic growth that is anticipated to be increased or reduced".

c. The statement "if practicable" in subsection (2)(b) clearly recognises the difficulties of quantifying certain benefits, particularly environmental benefits. However, there can be a tendency to prefer quantified amounts over those which cannot be quantified. There needs to be recognition that the impracticality of quantifying certain benefits or costs does not undermine their importance and there is to be no simple mathematical exercise of decision-making based on quantified terms. We request that the provision is amended to state that quantified benefits and costs are not to be given greater weight *per se* than those which cannot be quantified.

d. We support the retention of a requirement to assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions. This is a statement of the precautionary principle, which is a central tenet of environmental management. When section 32 was first drafted the area of law relating to the precautionary principle was still emerging. It is now an established international and domestic law principle and as such it is appropriate for reference to be made to it. We request that the provision is altered to use the accepted terminology "the precautionary principle".

e. We consider that there is a need to ensure that the assessment under subsection (1)(b)(ii) does not cloud the central assessment of determining whether the objectives achieve the purpose of the RMA and whether the provisions are the most appropriate way to achieve the objectives. We request that the layout of the section be amended to emphasise the central assessment.

f. We are concerned that subsection 5 could potentially allow the evaluation report to be released after public notification of the proposal. We request that this is amended by adding "the earlier of".

Amendments to the LGATPA

36. The Bill introduces a one-off streamlined plan-making process for the Auckland Unitary Plan. The use of a streamlined plan-making process for the Auckland Unitary Plan is required given its scale and scope. While we accept that the current approach to plan-making requires refinement, we have doubts that the proposed approach will be better or more efficient. If the proposed approach is to be adopted it is essential that strong safeguards are put in place to ensure quality outcomes are achieved.

37. We are opposed to the following aspects of the proposed plan-making process:

a. Clause 124 provides for a regulation-making power in relation to the provisions of Part 4. We oppose this provision, which would allow regulations to add to or override Part 4 at any time without legislative amendment. It is constitutionally obnoxious to allow regulations to essentially override Acts of Parliament. Furthermore, this may open up the process to allegations of corruption as individuals or groups may be seen to be lobbying the Minister to promulgate regulations to alter the process in a way that may benefit them. Paragraph 6 directs that the Minister shall not recommend regulations unless satisfied they are necessary or desirable for the development of the unitary plan, and, consistent with the purposes of the Act. However, this is an insufficient safeguard, particularly given the general nature of the purpose of the Act.

b. In particular, we oppose the proposed sections 5(4)(b) and 5(5). Proposed section 5(4)(b) would allow specified provisions of the RMA to be ignored. The purpose of this unique plan-making process is to ensure a plan can be developed within a reasonable time period. It must still be a robust high-quality plan. There is no

justification for setting aside established provisions of the RMA, especially using regulations. Proposed section 5(5) clarifies that proposed section 5(4)(b) would allow regulations to direct that the unitary plan is not required to give effect to any national policy statement issued under the RMA. National Policy Statements have been through a rigorous process leading to their establishment that has determined their appropriateness to application throughout New Zealand. It is inappropriate that these could be ignored by the plan which will affect New Zealand's largest city. We also note that the above clauses are 'Henry VIII clauses' and should be subject to the assessment of the Legislation Advisory Committee.[1]

c. Section 129 would allow the Hearing Panel to direct that a conference of experts be held. Subsection 6 would restrict the Council's attendance to when it is authorised to attend by the Hearings Panel. We consider that this restriction on the Council's attendance is inappropriate. The Council's experts would have a valuable role to play at such a conference given that it is their expertise that would have led to what is included in the proposed plan. Their absence at any such conference could result in a one-sided conference and not be helpful.

d. Section 132 would allow the Hearings Panel to permit a party to question any other party or witness and permit cross-examination. We are concerned about the impacts of allowing direct questioning or cross-examination of lay submitters. We suggest that this section should provide for questions to be asked of lay submitters only through the Hearing Panel (more closely reflecting the current situation – section 39(2) permits only the chairperson or other member of the Hearing Body to question any party or witness). However, we support allowing cross-examination of expert witnesses, council officers and Ministry for the Environment section 32 auditors.

e. Section 132 states that at each hearing session no fewer than 3 members of the Hearing Panel must be present. Section 155 states that the Hearings Panel shall comprise 3 to 7 members. However, the Bill does not restrict the deliberations and

[1] A Henry VIII clause confers a power to amend, suspend, or override an empowering Act or any other Act, The Regulations Review Committee has noted that "An empowering provision that enables legislation to be amended by regulation provides the Executive with the power to override Parliament. The committee believes that this power should be granted by Parliament rarely and with strict controls" (see the Legislation Advisory Committees 'Guidelines on Process & Content of Legislation').

making of recommendations to those members who were present at the hearing session. This could mean that in some circumstances recommendations are being made by a Panel where less than half of the members were present at the hearing session and heard submissions and evidence on the topic. We suggest a requirement that only those members of the Panel who were present to hear submissions and evidence on a particular topic can be involved in promulgating recommendations on that topic. To allow otherwise would open up the decision to judicial review.

f. We are particularly concerned that section 139(2) would not limit the recommendations of the Hearings Panel to the scope of submissions made on the proposed plan. We consider that this is highly inappropriate and could lead to a substantive recommendation which has not been the subject of evidence. We are additionally concerned because if such a recommendation was accepted by the Council there would be no scope for appeal. We request that this provision be removed.

g. We are also concerned about section 155 which would require the Minister for the Environment and the Minister of Conservation to establish the Hearings Panel. We oppose this provision. The Panel should be appointed by Auckland Council, not Ministers. Consultation with the Auckland Council is insufficient. It is Auckland's Unitary Plan and it is the ratepayers who will be meeting the costs of its preparation. It is appropriate that the democratically elected local representatives appoint the Hearings Panel. It is inappropriate for nationally-elected Ministers to be making such a decision and could undermine the integrity of the process.

h. Section 155 states that the members of the Hearing Panel must have expertise in relation to the RMA, district plans, regionals plans, regional policy statements, tikanga Māori, and Tāmaki Makaurau. However, it does not require the presence of a current or retired Environment Court judge. We consider that it is essential that there is one or more experienced Environment Court judges on the Hearing Panel given the scale of the enquiry and its focus on planning, rather than legal, issues.

i. Section 155 also appears to only allow for the creation of one Hearing Panel. In order for the timeframes to be met it will be essential to have multiple Hearing Panel's operating in parallel. We request amendments to provide for this.

Conclusion

38. EDS requests that:

a. The proposed amendments to section 76 are rejected;

b. In the alternative, the compromise proposed in paragraph 30 is accepted;

c. The proposed amendments to section 32 are amended to address the concerns raised above and, in particular, the concerns raised in paragraphs 32 to 34;

d. The plan-making process for the Auckland Unitary Plan is amended to address the concerns raised above and, in particular, the concerns raised in paragraphs 37(a), (b), (f), (g), and (h).