Christchurch City Council

6 November 2019

Committee Secretariat
Committee Secretariat
Environment Committee
Parliament Buildings
Wellington

Dear Sir/ Madam

Christchurch City Council submission on the Resource Management Amendment Bill 2019

Introduction

1. Christchurch City Council (the Council) thanks the Select Committee for the opportunity to make a submission on the Resource Management Amendment Bill 2019 (Referred to hereafter as the Bill).

2. The Council supports aspects of the Bill while not supporting other parts as expressed below. The Council wishes to appear in support of its submission.

   Removing preclusions on public notification and appeals for subdivision and residential activity resource consents, and restrictions on scope of appeals

3. The Council supports:
   - Clause 24(1) repealing sections 95A(5)(b)(ii) and (iv) (which preclude public notification for residential activity and subdivision that is a restricted discretionary or discretionary activity, and for prescribed activities);
   - Clause 24(2) repealing section 95A(6) (which provides a definition of "residential activity" for the purposes of the above exclusion of public notification);
   - Clause 25(1) replacing section 95B(6)(b) (with the result that a "prescribed activity" under s360H is no longer precluded from limited notification);
   - Clause 25(2) replacing section 95B(7) (with the result that assessment of affected persons for notification no longer includes a "prescribed person" under s360H);
   - Clause 26 replacing section 120(1B) (with the result that a submitter lodging an appeal is not confined to the matters raised in that submission);
   - Clause 71 repealing section 360H (which provides for regulations to prescribe activities precluded from notification and limit who may be an affected person).

4. The changes proposed in respect of prescribed activities, including repeal of section 360H (as described above) are supported. Consideration of activities that should be precluded from public or limited notification, and limits on who may be considered an affected person, should be through a public process that enables submissions, rather than in regulations.

5. With regard to Clause 26 amending section 120(1A), the Council supports the removal of restrictions on appeals against decisions on subdivisions and residential activities, but submits

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that section 120(1A) should be repealed in its entirety to also remove the restriction on appeal rights for decisions on boundary activities.

6. The current preclusions are too broad, particularly the definition of residential activity under section 95A (6), which covers a wide range of both small and large scale developments that have potential to significantly impact on neighbours and the wider environment. It is appropriate that potentially affected persons and the public have the opportunity to participate in the resource consent process, including rights of appeal.

7. The Council also supports removing the restriction on the scope of a submitter's appeal, as new matters can arise during the course of an application.

Repealing regulation-making power for additional fast-track activities

8. The Council supports clause 71 repealing section 360G, thereby removing the power for the Minister to recommend Orders in Council for regulating the fast track application process. Any consideration of the activities that should be subject to a fast-track process should be in a public process that enables submissions, in order to consider a range of views. The development of regulations does not enable such process with input from councils. It would be difficult to adequately determine the types of applications that are suitable for processing in a reduced period of 10 working days and it is unclear whether Councils would have any input into the development of regulations.

Reinstating use of financial contributions
Clauses 74-77 repealing parts of the Resource Legislation Amendment Act that have not yet commenced

9. The Council supports clauses 74-77, repealing the parts of the Resource Legislation Amendment Act 2017 that would have come into force in 2022 and would have deleted the ability to have District Plan provisions and resource consent conditions requiring financial contributions. The provision for conditions requiring financial contributions, if supported by specific financial contribution provisions in the District Plan, enables resource consent applications to be granted where the adverse effects of the proposal would otherwise lead to the application being declined. For example, the District Plan could provide the ability to impose financial contribution conditions where such contributions result in positive effects on the environment to offset adverse effects or where such contributions would provide finance for works, e.g. road works or traffic lights, to deal with traffic effects.

10. Financial contributions could be provided for in the District Plan in a manner that is broader than development contributions, in that development contributions only relate to anticipated growth and the infrastructure a council will need to provide to adequately service that growth.

Enabling applicants to have processing of non-notified resource consent applications suspended
Clause 17(1) amending section 88B(3)
Clause 18 amending the heading above section 88E (7)
Clause 19 inserting new section 88G
Clauses 20-23 making consequential amendments
Clause 23 inserting new section 91D, 91E and 91F.

11. The Council supports these provisions that enable applicants for non-notified resource consent applications to place the processing on hold. It makes practical sense to enable an applicant to suspend the processing of their own application, for example to amend their application in response to concerns regarding environmental effects.

12. The proposed 20 working day timeframe is, however, relatively short, and will require the use of s37 to extend the timeframe when a longer suspension is sought. In practice, applicants do frequently request longer periods of suspension for their application. Providing for a longer suspension timeframe of 40 working days would be more efficient as it would reduce additional processing costs associated with extending the timeframe under section 37, while still ensuring that an application does not remain on hold indefinitely.

13. The submission therefore seeks amendment to 91D(3)(c) so it reads *"a total of ~~20~~40 working days..."*, and 91F(1) so it reads *"Subsection (2) applies if the processing of the non-notified application has been suspended for a total of ~~20~~40 working days..."*.

Enabling consent authorities to suspend processing resource consent applications until fixed administrative charges are paid
Clause 17(2) adding a provision after section 88B(3)
Clause 19 inserting new section 88H.

14. The Council supports these provisions. This amendment is consistent with s36AAB(2) which provides that a consent authority need not process an application until the required charge has been paid.

Extending the time period to lodge retrospective resource consent applications for emergency works under the Civil Defence Emergency Management Act 2002
Clause 59 amending section 330B(3)

15. The Council supports extending the timeframe for lodging retrospective resource consent applications for emergency works under the Civil Defence Emergency Management Act 2002 from 20 to 60 working days. The current 20 day timeframe may not be sufficient for works carried out during or after a state of emergency declared or notified under that Act, when priority needs to be given to immediate response and recovery activities. There may be a need for technical information or investigations to be undertaken to provide a robust retrospective application that can be processed in a timely manner.

16. The Council also seeks that the Bill extends the timeframe for retrospective applications for resource consent prepared under section 330A(2). This would achieve consistency across the provisions for works undertaken in an emergency.

Enabling a Regional Council to review land use consents that it has issued and review conditions of multiple resource consents concurrently
Clause 27 replacing section 128(1)(b) and adding sections 128 (1)(d) and (2A)
Clause 28 adding a new section 129(1)(f).

17. The Council supports the proposed amendments that allow the regional council to undertake a concurrent review of multiple resource consents in the context of the new Freshwater Bill provisions. Making it explicit that the RMA allows the concurrent review of multiple resource consents provides clarity to the regional council, to applicants and consent holders. It will also aid in the provision of consistent, equitable, and effective management.

18. As land use practices often affect freshwater habitats and ecosystems, water quality and quantity, it is important that the Act also provides the ability for regional councils to review the land use consents that they have issued with regard to how they impact on the freshwater system is also provided for.

19. The change to s128(1)(b) changes the time at which the regional council can start a review of existing resource consents when there is a new rule in the regional plan that might warrant further constraints on existing consented activities. Currently s128(1)(b) limits the ability to start the review to a date following the whole of the new regional plan being made operative. The change allowing reviews to be initiated as soon as the relevant rule is operative even if other rules in the plan are not, is supported.

Increasing maximum infringement fees under the RMA
Clause 70 replacing sections 360(1)(bb) and (bc)

20. Council supports these provisions that increase the quantum of infringement fines that may be set by regulations to ensure they are commensurate with the nature of the conduct and that have sufficient deterrent effect. As a punitive enforcement outcome and alternative to prosecution, it is important that infringement fees have such an effect.

21. The proposed maximum infringement fee for individuals of $2,000 is consistent with other fines issued under other legislation. There is, however, a misalignment between the Act and the Resource Management (Infringement Offences) Regulations 1999. The Regulations have not been updated since September 2010 and prescribe a maximum fee for contravention of section 9 of the Act (restrictions on the use of land) of $300. The Council considers this is too low as a maximum for an offence under section 9, and that it certainly doesn't have a deterrent effect. To address this, the Council recommends that the Minister review the Regulations so the maximum infringement fees prescribed are consistent with Clause 70.

Extending the statutory limitation period to file charges for prosecutions under the RMA from 6 months to 12 months
Clause 62 amending section 338(4)

22. Council supports the proposed increase to the limitation period for the filing of charges. This will ensure that Councils have sufficient opportunity to investigate any alleged breaches thoroughly, particularly where specialist consultants need to be engaged.

Enabling the Environmental Protection Authority to take enforcement action under the RMA, not including in relation to excessive noise

- *Clause 4 amending section 2 to change the definition of "enforcement officer" so that the EPA can appoint an enforcement officer and can issue abatement notices, apply to the court for enforcement orders, prosecute for breach, and issue infringement fees*
- *Clause 9 replacing section 42C(f) so that the function of the EPA includes the enforcement function in s 343F*
- *Clause 53 adding EPA to s 311(2) regarding applications to the court for a declaration*
- *Clause 54 amending s 316(2) so that the EPA can apply to the Court for an enforcement order with regard to adverse effects on the environment or to enforce a consent condition that requires the consent holder to use best practicable options (but not to seek change or cancellation of a resource consent due to inaccuracies in the application – there is no change to the section that confines to ability to seek those changes to the consent authority)*
- *Clauses 55-57 making consequential changes to s 324, 325 and 325A regarding the form and content of abatement notices, appeals against them and cancellation of them.*
- *Clauses 58-61and 64-65 making consequential changes to sections 330B, 332, 336, 342 and 343D regarding the EPA enforcement role*
- *Clause 66 adding new sections 343E to 343L which particularise the enforcement powers of the EPA and provision of warrants for EPA's enforcement officers.*

23. It is understood from the Impact Statement supporting these parts of the Bill[1] that the key issues that the Government is seeking to address are a lack of resources/ priority given to compliance, monitoring and enforcement; a lack of capability/ skills; conflicts of interest; and a lack of transparency and accountability.

24. Council recognises that resourcing can be an issue and clause 343F(b) that enables the EPA to assist Council with an enforcement action by agreement is supported. However, this is subject to the EPA being adequately resourced.

25. There are a number of benefits arising from this proposal including the investigation of potential breaches or issues that cross Council boundaries; and to assist smaller authorities with limited resources and expertise. However, there is the potential for overlap in the enforcement action taken between Council and the EPA, which could result in the duplication of resources, inefficiencies and inconsistency in approach to enforcement action. The Impact Statement notes that "*The EPA's role would complement council's functions. The EPA would assist councils, and intervene in the CMA role of councils in certain cases*"[2]. It goes into state that the "*The intervention function could assist: in situations where there is a benefit in the EPA having political independence* (and) *in raising the profile of CME across the sector, resulting in a higher prioritisation of CME work*"[3].

26. It goes onto state that "*A central government enforcement unit could also allow the targeting of specific environmental issues from a national perspective*" [4].

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[1] Paragraph 33; *Impact Summary: Additional proposals for proposed bill to amend the Resource Management Act 1991*, https://www.mfe.govt.nz/sites/default/files/media/Legislation/RIS/appendix-3-impact-summary-additional-proposals-for-proposed-bill-to-amend-rma1991.pdf

[2] Paragraph 37; *Impact Summary: Additional proposals for proposed bill to amend the Resource Management Act 1991.*

[3] Paragraph 39; *Impact Summary: Additional proposals for proposed bill to amend the Resource Management Act 1991.*

[4] Paragraph 40; *Impact Summary: Additional proposals for proposed bill to amend the Resource Management Act 1991.*

27. Having regard to the intent as outlined in the Impact Statement, the Council has concerns with the Bill, which appears to provide the EPA with powers beyond what is necessary or appropriate. The Council considers that there is insufficient justification in the Impact Statement for intervention as referred to above. Intervention is not the most appropriate method in raising the profile of compliance, monitoring and enforcement, nor in circumstances where political interference may be an issue and alternatives should be evaluated. On this basis, the Council seeks that the preamble to s343F states that action or Intervention as provided for under clauses (a) to (c) is subject to Council's agreement. If that change is made, no change is considered necessary to s343G.

28. Notwithstanding the Council's opposition to the powers of intervention by the EPA in the absence of Council agreement, the following points are made in respect of the provisions.

29. The broad definition of "*enforcement action*" in relation to EPA functions in proposed section 343E(1)(a)(i) includes investigation of whether there has been "*a contravention of a provision of this Act*". That term is sufficiently broad to include investigation by the EPA of the Council's exercise of its duties and functions under the Act – such as a duty to keep records, to comply with timeframes, to observe performance of the District Plan. The EPA enforcement role could therefore include seeking declarations that challenge the Council's activities. It does not appear that this was the intent of the Bill, having regard to the Impact Statement as described above.

30. The Council does not support an alternative option presented in the Impact Statement of "*Targeted audits and recommendations*" to "*identify issues with council performance, and to provide recommendations on actions a council may need to carry out*"[5] It could be perceived from this process that Council is not capable of performing its duties. It may reduce the level of confidence in the Council, and create uncertainty for anyone who Council has taken action against, which may be subject to a review by the EPA.

31. The EPA would have the power under s343F and 343G to intervene in an enforcement investigation or other enforcement action that has been started by the Council. But the limits of that power are not clear.

32. it is unclear under proposed 343F(c) and 343H(2) whether it is intended that the EPA power to intervene in enforcement action is limited to enforcement action that is underway rather than action that has been completed. Council considers that this should be clarified in proposed s343F.

33. If this is clarified to make clear that the EPA does not have the power to intervene in completed investigations, it appears from those provisions that if the breach is a one-off incident – not an ongoing action - and a Council has completed its investigation and decided to take no further action, the EPA will not have the power to either take enforcement action itself, or to "intervene" in the Council's enforcement action as it is complete. The Council supports this on the basis that to otherwise allow the EPA to intervene after Council has completed enforcement action creates uncertainty for those subject to the action, who may be the subject of enforcement action by the EPA.

34. If the EPA exercises the power to intervene, section 343G(1)(b)(i) requires the Local Authority to cease any enforcement action in relation to the incident, except for inspections and investigations ((a) or (g) of the definition of enforcement action (343(E)(1)). This means that the

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[5] Paragraphs 42 and 43; *Impact Summary: Additional proposals for proposed bill to amend the Resource Management Act 1991.*

Council could be required to continue inspections or investigations without the power to determine the appropriate action. The resourcing and cost implications of investigation and inspections will sit with Council without the ability to proceed to further action. This is not supported for the reasons expressed earlier in respect of the EPA's proposed powers of intervention unless it is with the agreement of Council.

35. The proposed EPA power under s343F(c) and s343G to intervene, and take over, an enforcement action that has been commenced by the Council – requiring the Council to stop its enforcement action – is subject to the limitation in s343G(2) that "*...the EPA must not intervene in relation to an enforcement action that the local authority has already executed in respect of a person*".

36. Use of the term "executed" in s 343G(2) is ambiguous. It possibly does not bar EPA intervention if enforcement action did not result in formal execution of proceedings. Enforcement can conclude with correspondence and meetings that remedy the situation. If the Council has investigated the matter and is working with a transgressor for the transgressor to right a wrong without further action by the Council being required, then the limitation on intervention by the EPA does not stop the EPA from taking a different enforcement action, such as seeking an enforcement order, and the Council must step aside. Also if the Council has issued an abatement notice, the EPA could intervene, prosecute instead, and the Council must step aside. The Council does not support this on the basis that it could lead to inconsistency in approach and presents a risk that Council's actions to achieve compliance are 'undone' by a different approach.

37. Breaches are often ongoing ones rather than one-off – such as a building breaching a rule, or a discharge. The Canterbury Regional Council at times makes decisions on formal or informal enforcement action regarding breaches by infrastructure providers of resource consents or of a Plan. Despite S343F(2) precluding the EPA's intervention where the local authority has already executed enforcement action, the EPA can take enforcement action in respect of another incident in respect of the same person under S343F(4) i.e. If the same person breaches an obligation the next week, the EPA could take an enforcement action itself, different from that of the Regional Council.

38. The Council does not support s 343G(4) as it creates uncertainty for Council and anyone authorised to use a resource consent issued to Council, who may be the subject of enforcement action concerning an ongoing activity despite it already having been investigated by the local authority.

Clarification that making national environmental standards goes through the same report and recommendation process as that for making a national policy statement

- *Clauses 10-12 amending sections 44, 46A and 48*

39. The Council supports this proposal. It is appropriate that the procedural requirements for a NPS apply to a NES, e.g. public notification of the proposed NES and board of inquiry to which the public can make submissions, and clarification of the considerations required of the Minister.

New specialised planning process for freshwater

- *Clause 13 replacing the collaborative planning process in s 80A with a new section 80A;*
- *Clause 72(2) replacing the collaborative planning provisions in Schedule 1 with new ones for the freshwater planning process.*

40. The Council supports the provision of a new plan making process for a freshwater planning instruments (which in relation to the Christchurch District, will mean all of the Regional Policy

Statement and the Land and Water Regional Plan when they are reviewed, and any changes to them if those changes "relate to freshwater").

41. The process of appointing and the composition of the hearing panel (proposed schedule 1 clauses 57-59) is supported as it ensures a strong technical base and expertise in tikanga Māori and mātauranga Māori, along with elected officials.

42. The provisions in Sub-part 2 of Schedule 1 on Appeals are not supported by Council, particularly clause 54(1), which limits the rights of appeal to the Environment Court to matters raised in that person's written submission and only if the regional council rejected the recommendation of the Panel on that matter. The effect of the change precludes Council from appealing the merits of a decision made by the Regional Council that has accepted the recommendations of the Panel, or a matter raised by another submitter that could impact on Council's activities.

43. While it is recognised that proposal supports a streamlined process to implement the NPS on Freshwater Management, the effect of the changes precludes the ability for appeals where there could be a better outcome achieved. The changes to the Regional Policy Statement and Regional Plans will be wide-reaching over a long period, and affect a range of stakeholders such that a more balanced approach is required.

44. The Council supports the ability for the Hearing Panel to allow Counsel to question and cross examine other parties and witnesses under clause 40(2) on the basis that it may achieve a more robust outcome. However, it should not preclude public participation as may occur with a formal process.

45. The Council also supports clause 42 of schedule 1. Pre-hearings meetings are considered to be an important part of the process in facilitating discussion on outstanding issues before the formal hearing. Submitters should be willing to participate and if they chose not to, it is reasonable that there is not a pathway to go straight to a hearing.

46. The Council does not support clause 48(2) of schedule 1 in providing that the Hearings Panel is not limited in the scope of its recommendations to the Regional Council. The provision for consideration of "*any other matters related to the freshwater planning instrument identified by the panel or any other person during the hearing*" presents a risk to a participatory process i.e. submitters can raise new matters at the hearing; and the Panel could make a recommendation without any submissions and beyond the scope of what was notified. The ability for the Regional Council to then accept the Panel's recommendations that are beyond the scope of submissions inflates this.

47. The Council does not support clause 51(1)(b) in providing the Regional Council with the ability to reject a recommendation of the panel and to substitute it with its own without a rehearing being required. This could contribute to a process that is perceived as unreasonable, particularly where the Regional Council have not heard submissions and do not have all of the information to make an informed decision. It could result in a perverse outcome such that parties to the process consider their efforts during the hearings process have been worthless and to achieve the outcome they are seeking, they must commit additional costs to an appeal.

48. The Council does not support clause 52 of schedule 1, which appears to enable significant variations to address an "an error or omission" if the Chief freshwater Commissioner accepts a request of the Regional Council. There is no prescribed process for notification and submissions if the request is accepted and the Council submits that any variation to address an error or

omission should be subject to a Schedule 1 process to enable participation by submitters and the testing of any change or addition. Under clause 20A of Schedule 1, there is already the ability for corrections to address minor errors without using a schedule 1 process.

Repealing the collaborative planning process (with it being replaced by the freshwater planning process described above)

- *Clause 13 replaces s80A (being subpart 4 of Part 5) with the freshwater planning process.*
- *Clause 72(1) repealing references to the collaborative planning process in Schedule 1 clauses 4 and 21;*
- *Clause 72(2) replaces all of Part 4 of Schedule 1, that is about the collaborative planning process, with a new Part 4 about the freshwater planning process.*

49. The Council has similar views to those expressed in the impact statement for the Bill, which is that feedback from local authorities has indicated that the process is not being used, and is unlikely to be used in the future. Further that this is largely because it is overly complex and time consuming, too onerous, prone to legal risks, overall advantages are not guaranteed, and is overly prescriptive and constraining. The option of collaboration may be used in a non-statutory way.

The exemption from Financial Contributions for Notices of requirement lodged by Minister of Education or Minister of Defence
Clauses 29-35

50. These exemptions are stated to be proposed in order to avoid a risk of unreasonable delays and costs. However, these matters need to be viewed in context. All requirements for designations, whether from the Ministers of Education or Defence or other Requiring Authorities, need to go through the same statutory assessment process which may result in a range of conditions being recommended by the council to deal with adverse effects, not just conditions relating to financial contributions. The statutory process dictates that it is the Requiring Authority that actually makes the decision on the requirement and any conditions. The council only makes a recommendation to the Requiring Authority. The Requiring Authority's decision is subject to appeal.

51. As such, all requirements are potentially subject to a degree of delay. Notably the Requiring Authority already has a high level of control on the conditions on the designation as it makes the decision on the conditions, although that is still subject to the possibility of appeal.

52. In essence, the proposed exemption for requirements from the two Ministers largely implies that no matter how great the adverse effects are of the public work they propose, they should not be required to make a financial contribution to mitigate or offset those adverse effects where no other means were available to deal with those effects. This includes if the Environment Court, on appeal, considered that they should if it were not for the proposed exemption. The costs of those adverse effects will instead be imposed on the community, e.g. if changes to road infrastructure need to be made to deal with the traffic and pedestrian volumes generated.

53. The impact summary for the amendment bill states that financial conditions were previously only included by agreement between the Ministry of Education and the council and that, following a recent Environment Court decision, there is "now" a risk that unreasonable and inappropriate financial contributions may be recommended or imposed. However, the "risk" that financial contributions may be recommended or imposed was provided for in the RMA for

all designations before that Environment Court decision. Further, the Environment Court presumably considered that the financial contribution it imposed was reasonable, appropriate and necessary.

54. The exemption proposed in the Bill does not only mean that "unreasonable and inappropriate" financial contributions could not be recommended or imposed, it means no financial contributions can be recommended or imposed, even if they are reasonable and appropriate. It removes the possibility of what was previously happening before the Environment Court decision being able to continue. Councils would have no legal basis to even suggest that the Ministry of Education agree to such a condition, no matter what the adverse effect that could not be appropriately managed in any other way.

55. The exemption also implies that all the works of these Ministers, including administrative/office facilities, are somehow more deserving of such an exemption than the works of other requiring authorities, such as for the Police, power transmission, state highways and airports, or for that matter, other public facilities such as hospitals, which may not even be designated.

56. The Council acknowledges that the Ministry of Education needs to designate a relatively high numbers of new school sites each year and that compulsory education makes accommodating students a high priority. However, it is not clear from the impact summary that this could not be managed with appropriate resourcing and forecasting, particularly based on the numbers of children that are not yet of school age and immigration trends. Nor that the difficulties in planning for schools is so problematic that the Ministry of Education should be exempt from the possibility of financial contribution conditions where potentially significant adverse effects could not be adequately managed in any other way.

57. The impact summary does not include justification for exempting requirements of the Minster of Defence. The Council notes that there are emergency powers available to the Minister of Defence in the case of an actual or imminent emergency.

Conclusion

58. The Council supports aspects of the Bill, while not supporting others. As expressed earlier, Council has concerns with the exemption proposed from Financial Contributions for Notices of Requirement lodged by the Ministers of Education and Defence, and the proposed new enforcement powers of the Environmental Protection Authority, enabling the EPA to intervene in matters that Council has responsibility for without Council's agreement.

59. Other matters that Council expresses concern on include the new freshwater planning process, including greater discretion to the Hearings Panel in making recommendations on submissions, the scope of decision-making by the Regional Council, and reduced appeal rights.

Thank you for the opportunity to provide this submission.

For any clarification on points within this submission, please contact Mark Stevenson, at 03 941 5583 or mark.stevenson@ccc.govt.nz

Yours faithfully

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