NBA Plan-making briefing, 5 December 2022

Process	The Natural and Built Environment Bill was introduced to Parliament on Tuesday 15 November and has been referred to select committee. Submissions are open until Monday 30th January 2023.
Background	NZPI published a position paper on regional-level planning prior to the release of the NBE Bill. The position paper is available here. This briefing paper assesses the plan-making aspects of the NBE Bill against the positions in that paper.
Documents	The NBA Bill can be found here
Key abbreviations	NBE Bill — Natural and Built Environment Bill SP Bill — Spatial Planning Bill NPF — National Planning Framework RSS — Regional Spatial Strategy NBE Plan — Natural and Built Environment Plans RPC — Regional Planning Committee IHP — Independent Hearings Panel
Summary of the plan-making process	The key changes in the NBE Bill are largely as expected. The Bill is very large. This is partly a reflection of increased prescription from central government, which is intended to bring more certainty into the overall system. Most of the plan-making process is included in Schedule 7 of the NBE Bill. *Summary of the plan-making process:* There are three plan-making processes: 1. standard process, for first plans, full reviews, changes to strategic content 2. proportionate process, where all those directly affected are identified and limited notification is used, or there is no need for the standard process 3. urgent process, to deal with urgent environmental issues arising out of 3-yearly reporting and directions from Minister or NPF. The standard process includes the following key aspects: • A two-step formal consultation process: notification of major regional policy issues, then notification of the NBE Plan. • Three types of submissions: enduring submissions, primary submissions, and secondary submissions. • Evidence must be provided with submissions. • Hearings are held by IHPs, whose appointment is overseen by the Chief Environment Court Judge. • RPCs make decisions to accept or reject the IHP recommendations. • Appeals can be made to the Environment Court against decisions to reject IHP recommendations, and to accept recommendations that go beyond the scope of submissions.

	• Appeals can be made to the High Court on points of law.
Summary of assessment against NZPI positions	Key points for NZPI's pre-release positions on plan-making include: - The NBE Bill goes some way to addressing Te Tiriti o Waitangi and te ao Māori points from our submission. - As anticipated, NBE Plans have to give effect to the NPF and be consistent with RSSs. - The updated version of s32 RMA has been simplified. The implications of this simplification need to be given further consideration to ensure important aspects of policy evaluation have not been lost. - In line with our position, statements of community outcomes and statements of regional environmental outcomes are discretionary rather than compulsory. However, their role and weight in the system needs further consideration – the process for their preparation is flexible and they do not have to comply with any of the planning hierarchy, but they are given significant weight in the preparation of NBE Plans. - The NBE Bill has significantly increased the importance of IHP decision-making, in line with NZPI's position. Significantly, the establishment of IHPs will be overseen by the Chief Environment Court Judge, and accreditation will be overseen by the Minister. - The NBE Bill addresses NZPI's main issues with reduced appeal rights, being poor quality decision-making and the risk of losing beneficial Environment Court processes. - Private plans changes (independent plan changes) are provided for, but the grounds for rejection should be strengthened. - There are two more agile and responsive plan change processes provided for (proportionate and urgent). However, more options could be provided. - There is a new list of matters to be disregarded when preparing plans, intended to shut out NIMBY-ism, which should be supported and consideration given to broadening it.
Detailed assessment *The following sections of this briefing provide detail on the points summarised above, starting with public participation in the plan-making process and then addressing each of the headings from the NZPI position paper on regional-level planning.*	
1. Detail of public participation in plan-making	*Summary of relevant provisions* - There is a requirement for an engagement register to be maintained by the RPC for the purpose of identifying any person who is interested in being consulted in the plan development process. But, there is no mandatory requirement for the people identified to actually be consulted. Rather, the RPC must act in good faith when considering matters known to be of interest to particular persons. (Cl 15, Sch 7) - There are five groups provided with a right to be consulted (and do not need to be on the register): government departments and ministries; local authorities in the region; requiring authorities; iwi authorities; customary marine title groups. (Cl 15, Sch 7)

	- The ability to register to engage in the plan development process must be notified at the same time as the major regional policy issues are notified (cl 16, Sch 7), and there will be 30 days within which to register (cl 19, Sch 7). - For engagement on the major regional policy issues: An engagement policy is required on how an RPC will engage with constituents of each district on the major regional policy issues (cl 17, Sch 17); and a 30 day period for feedback on the major regional policy issues (cl 18, Sch 7). - There are three types of submissions: enduring submissions, primary submissions, and secondary submissions. Evidence must be provided with all submissions. - Cl 20 provides for anyone to make an enduring submission, from the time the major regional policy issues are notified until the NBE Plan is notified. Enduring submissions have the same status as a primary submission – the key difference is they can be provided before notification of the NBE Plan. For enduring submissions, evidence needs to be provided either with the enduring submission or during the primary submission stage. - Consultation during plan preparation is compulsory with relevant Ministers, DOC, constituent local authorities, adjacent local authorities, requiring authorities, iwi authorities of the region, and if the plan relates to the coastal marine area, customary marine title groups in the area. (cl 22, Sch 7). *Comments:* - NZPI supported 'front loading' of the plan-making process and increased engagement early in the plan development process, but there was no detail of what this would look like prior to the bills being released. - The requirements for engagement prior to notification of an NBE Plan or plan change are more prescriptive than under the RMA. Note the change from 'consultation' under the RMA to 'engagement' under the NBE Bill. - There is a two-step formal notification process, with the first being public feedback on major regional policy issues, and the second being the notification of the NBE Plan. - The 'enduring submission' step enables a formal submission to be made prior to notification of the NBE Plan, alongside the first formal feedback stage. It is not entirely clear what the benefit is of providing an enduring submission, particularly with evidence in advance of notification, and it is hard to see why submitters would do this additional step without a benefit. - The requirement to provide evidence at different stages throughout the plan development process needs further consideration. We understand this is intended to require more significant input by submitters earlier in the process. However, there is no definition of 'evidence', and it is not clear what the expectations are around quality and quantity of 'evidence' to be provided with submissions. There is still provision for an IHP to direct a submitter to provide briefs of evidence before a hearing (cl 115, Sch 7), which means the

	evidence provided with a submission is not a substitute for providing evidence at a hearing. In order to change practice and discourage the provision of evidence at the end of the process, the requirements around evidence with submissions needs to be clear. - There is also a need to further consider the impact on lay submitters of the requirement to provide evidence with submissions. This effectively means planners and other experts are needed from the beginning of the process, and this may discourage lay submitters from participating and significantly add to their costs.
2. Better integration of te ao Māori	*Summary of the relevant provisions* - The NBE Bill includes a requirement to 'give effect to the principles of te Tiriti o Waitangi' (s4). - There is provision for an iwi or hapū to provide a statement on te Oranga o te Taiao to the RPC, which can address allocation matters (s106) - There will be at least two Māori members on the RPC, and the Māori 'appointing body' that selects those representatives will have the opportunity to review the draft NBE Plan prior to notification (cl 30, Sch 7). - There are a number of provisions throughout the plan-making part of the NBE Bill and Schedule 7 that protect and preserve Māori interests, rights and responsibilities, such as customary marine title and protected customary rights and Mana Whakahono ā Rohe, and that address the relationship of the NBE Bill to other legislation such as statutory acknowledgements and Treaty settlement legislation. - There are also a number of provisions that address Māori participation in the plan-making system, separate from a role on the RPCs: • Iwi authorities have the right to be consulted on plan development (cl 15, Sch 7) • There is provision for engagement agreements between RPCs and Māori groups that address participation and funding for participation in plan preparation. These are mandatory for the standard process but optional for proportional or urgent plan change processes (cl 9 to cl 13, Sch 7). • IHPs must have skills, knowledge and experience of te Tiriti o Waitangi and its principles; local kawa, tikanga and mātauranga; and Māori in the region (cl 93, Sch 7). *Comments* - NZPI's position was to support giving effect to te Tiriti, rather than the principles. - On first look, the NBE Bill seems to do some of the things suggested in the position paper. Advice from Papa Pounamu would be helpful to fully understand if the provisions go far enough in providing for tino rangatiratanga and te ao Māori. - There should be a mandatory requirement for RPCs to take account of/have regard to/give effect to a statement on te Oranga o te Taiao that is provided by iwi or hapū, in a similar way to the weighting

	given to statements of community outcomes and statements of regional environmental outcomes. For example, they should be added to the list of matters to be given particular regard by RPCs when preparing NBE Plans (s107), and to the list of matters to be had regard to when RPCs are identifying major regional policy issues (cl 14, Sch 7).
3. Relationship of NBE Plans to NPF and RSSs	*Summary of the relevant provisions* - As anticipated, NBE Plans have to give effect to the NPF and be consistent with the relevant RSS (s97). - Conflict resolution is a clear role of NBE Plans, either by resolving conflict in the plan itself or via resource consents (s99). - NBE Plans must have strategic content that reflects the major policy issues of a region and its constituent districts (s102) *Comments* - The success of NBE Plans at resolving conflicts will depend greatly on how far the NFP goes in this regard, and we are yet to see any detail of the content of the NPF. - There appears to be overlap between the role of RSSs and NBE Plans in providing strategic direction for a region. This needs to be clarified.
4. Certainty in plans	*Summary of the relevant provisions* - There is provision to provide more certainty through the use of conditions and requirements for permitted activities (s156). These can include monitoring, certification by a third party, compliance with reports or management plans, requiring work to be done by a third party, requiring reports to be prepared by an iwi, requiring written approvals, and requiring environmental contributions to be made. - In terms of dealing with uncertainty, adaptive management is provided for in the NPF (s86), NBE Plans (s110), and in consent conditions (s223). *Comments* - Our position on certainty in plans related to the role of the NPF and a national digital strategy. The NPF is addressed is another briefing paper, and a national digital strategy is not addressed in the NBE Bill (this is more appropriately addressed outside the legislation). - The scope of conditions or requirements for permitted activities has been broadened, with a clear ability to involve third parties and require written approvals for permitted activities. These changes have the potential to result in greater use of permitted activities in plans, and thereby provide more certainty. - Our position paper supported the use of adaptive management as a way to deal with uncertainty. The provisions in the Bill are brief, but are likely to be sufficient if supporting guidance on applying adaptive management is provided. The linking of adaptive management to consent conditions in s110 may need to be

	broadened out so that use of adaptive management is not limited in this way.
5. Regulatory v non-regulatory measures	*Summary of the relevant provisions* - In line with our position, there is a clear ability for NBE Plans to include non-regulatory methods, provided funding for these measures is in place (s105). *Comments* - This aligns with the NZPI position.
6. Policy evaluation	*Summary of the relevant provisions* - The replacement for s32 RMA is clause 25 of Schedule 7. This requires an evaluation report to: consider the extent to which the proposal is the most appropriate way to achieve the purpose of the Act; examine any alternatives to achieving the purpose of the Act; set out the reasons for selecting the preferred option; and consider the extent to which the implementation of the proposal can be monitored. - There is also a requirement for evaluation reports to be succinct and written plainly; contain a level of detail proportionate to the scale and significance of the proposals; and be user-friendly and encourage a cost-effective process. - Evaluation reports can rely on provisions in the NPF as justification for provisions that implement them. - Regulations will prescribe the form of evaluation reports. *Comments* - Clause 25 is quite simple compared to s32 RMA. There is only one level of assessment, rather than the two-level requirement under s32 RMA of appropriateness of objectives for achieving the purpose of the RMA and efficiency and effectiveness of policies and methods at achieving the objectives. There is no reference to efficiency or effectiveness in clause 25, and therefore none of the additional requirements in s32 RMA of how to assess efficiency and effectiveness. - The simplified nature of clause 25 aligns with NZPI's position that any replacement for s32 should allow for flexibility of evaluation method and process. However, consideration is needed as to whether the provision is now too simple so that it provides no meaningful guidance for policy evaluation. - The NZPI position called for a clear role for mātauranga Māori in policy evaluation and this has not been included in clause 25.
7. Local input to NBA plan-making	*Summary of the relevant provisions* - Four-year plan preparation timeframe: two years to notify plan from the resolution to begin drafting, and two years for submission, hearings, recommendations and RPC decisions (cl 2, Sch 7). Within the first year, the RPC must notify major regional policy issues (cl 16, Sch 7).

	- Statements of community outcomes are provided for in s645 and are prepared at the discretion of the local council. Their purpose is to record a summary of the views of a district or local community. - Statements of regional environmental outcomes are provided for in s643 and are prepared at the discretion of the regional council. Their purpose is to record a summary of the significant resource management issues of the region, or of a district, or local community within the region. - When preparing NBE Plans, RPCs have to have 'particular regard' to statements of community outcomes and statements of regional environmental outcomes (s107). - When identifying major regional policy issues as the first step of NBE Plan development, RPCs need to 'have regard to' statements of community outcomes and statements of regional environmental outcomes (cl 14, Sch 7). *Comments* - The NZPI position was that the legislation should provide sufficient time for meaningful community engagement in plan-making. The two-year time period before notification should allow for meaningful engagement, provided RPCs and secretariats are appropriately resourced. - In line with our position, statements of community outcomes and statements of regional environmental outcomes are discretionary rather than compulsory. Their role and weight in the system needs further consideration – there are minimal requirements for the process to prepare them and they do not have to comply with any of the planning hierarchy, although they have to be given 'particular regard' when preparing NBE Plans and 'regard' when identifying major regional policy issues.
8. A body to support independent commissioners	*Summary of the relevant provisions* - There will be one IHP per region (cl 93) - The Chief Environment Court Judge appoints IHP members from a regional pool of IHP candidates, which includes iwi-approved commissioners. Clause 93 has a list of skills, knowledge and experience for collective membership of the IHP, including legal, planning, te Tiriti, te ao Māori, local community, freshwater quality, quantity and ecology. - The chairperson of an IHP has to be either an Environment Judge or an IHP member who the Chief Environment Court Judge considers has the appropriate skills, knowledge and experience to be the chairperson (cl 93, Sch 7). - All IHP members are required to be accredited by the Minister (cl 97). *Comments* - NZPI's call for an independent body to oversee the training, accreditation and appointment of independent commissioners was based on a need to ensure high quality hearing processes and recommendations. This need has potentially been addressed by the

	provisions in the NBE Bill on IHPs. Significantly, the establishment of IHP will be overseen by the Chief Environment Court Judge, and accreditation will be overseen by the Minister. This represents a significant increase in importance for IHP decision-making, in line with NZPI's position. - The list of skills, knowledge and experience required for IHPs should be considered further to ensure there is nothing missing. - Accreditation should be investigated further, as it is not clear what 'accreditation' actually means, apart from that it is at the discretion of the Minister.
9. Appeals	*Summary of the relevant provisions* - As anticipated, appeals are to the High Court on points of law, except where the RPC rejects IHP recommendations (cl 132, Sch 7). A second exception is provided, where the RPC accepts a recommendation that is beyond the scope of the submissions (cl 133, Sch 7). - IHPs can direct pre-hearing meetings, expert conferencing, mediation and other alternative dispute resolution, cross-examination, and an IHP may commission reports (cl 102). *Comments* - The NZPI position to support limited appeal rights was based on being able to manage the risk of poor quality decision-making and the risk of losing beneficial Environment Court processes. - The risk of poor quality decision-making is addressed by the requirements on IHPs, discussed above. - The risk of losing beneficial Environment Court process is addressed by IHPs having the power to direct those processes for hearings on NBE plans and plan changes. - The increased requirements for public engagement throughout the plan development process, discussed above, encourage early and meaningful engagement by submitters. This gives more time and more evidence for consideration of issues and resolution of disputes, which should lower the need for appeals.
10. IHP process efficiencies	*Summary of the relevant provisions* - Under clause 121, Sch 7, an IHP can direct a proposed plan to be varied up until the deadline for providing its report (within 40 days of hearing closing) to give effect to the NPF or to correct a substantial error in the proposed plan. - Functions of an IHP are set out in clause 102, Sch 7. This includes making recommendations to RPCs on the proposed plan. Principle function is to hear submissions. - An IHP exists until it has completed its functions in relation to the hearing, including any appeals in relation to the hearing (cl 103). It is not clear what function or power an IHP may have during an appeal. *Comments* - These provisions do not appear to provide enough scope for an IHP to recommend changes relating to interpretation or to correct errors after it has released its recommendation report.

	- There is no requirement for IHPs to issue draft recommendation reports for comment. But there is nothing to preclude an IHP from doing this as it is able to determine its own process (cl 102(20)(d)).
11. Private plan changes	*Summary of the relevant provisions: Independent plan changes* - An independent plan change request is made to the relevant local authority (not the RPC) (cl 69 of Sch 7), who considers the request and forwards it to the RPC if appropriate (cl 72 of Sch 7) and can recommend alternative provisions to be notified with the request (cl 75 of Sch 7). - An independent plan change request needs to be accompanied by a list of information set out in clause 70, including an assessment of the contribution to outcomes, limits and targets in the NBE Plan, RSS, and NFP. - Only RPCs and constituent local authorities can initiate a plan change to the strategic content of an NBE Plan (Cl 5 of Sch 7) – independent plan changes cannot request changes to strategic direction. - Grounds for rejecting an independent plan change in clause 73 do not specifically include outcomes, limits or targets, but there are grounds if the request would make the plan non-compliant with the Act, inconsistent with the NPF, or inconsistent with the RSS. - There are rights of appeal to the Environment Court against a decision to reject an independent plan change request (cl 74). - There is provision for cost recovery from the person making an independent plan change request (cl 77 of Sch 7). *Comments* - NZPI's position supported the retention of private plan changes ('independent plan changes' under the NBE Bill), provided they are required to comply with limits, achieve outcomes, and give effect to the NPF. The grounds for rejecting an independent plan change could be strengthened so there is more of a positive requirement to achieve outcomes and comply with limits and targets, rather than the negative requirement to not be inconsistent with the NPF and RSS. In addition, there could be an additional ground of rejection, where an independent plan change is inconsistent with the strategic direction of the NBE Plan.
12. Agile and responsive plan changes processes	*Summary of the relevant provisions* - There are three processes for plan changes: standard process (first plans, full reviews, changes to strategic content) (see 'public participation' section above); proportionate process (where all those directly affected are identified and limited notification is used, or there is no need for the standard process), and urgent process (to deal with urgent environmental issues arising out of 3-yearly reporting, and plan changes directed by the Minister and the NPF) (Cl 6 & 7 of Sch 7) - Proportionate processes exclude the following steps: notice of major regional policy issues, engagement register, secondary submissions (cl 44, Sch 7).

	- Urgent processes exclude the following steps: notice of major regional policy issues, engagement register, enduring submissions, secondary submissions (cl 48, Sch 7). - There is no IHP hearing for proportionate and urgent plan changes. Commissioners are used to hear submissions and make recommendations (cl 55, Sch 7) - There are objection rights to the RPC for submitters against decisions of RPCs on plan changes (cl 66, Sch 7) - Appeal rights to the Environment Court are provided for submitters, and a person who requested an independent plan change, when the proportionate or urgent process is used (cl 67, Sch 7). *Comments* - NZPI's position supported more agile and responsive plan change processes than under the RMA. The proportionate and urgent process options go some way to providing for this. Other options from NZPI's position paper, such as RPCs delegating decision-making and setting bespoke process, could still be considered. - The retention of appeals to the Environment Court for decisions made under the proportionate and urgent process should be supported, as these processes do not have the same safeguards as the standard process.
13. Other issues identified: Matters to be disregarded	The NBA includes a list of matters that must be disregarded when preparing and changing NBE Plans (s108), and in IHP recommendations (cl 126 of Sch 7). This list is also included for consent assessments: - trade competition, - effect on scenic views from private properties or roads, - effect on the visibility of commercial signs, and - adverse effects from the use of land by people on low incomes, special housing needs or disabilities. *Comments:* clarification of what 'scenic views' means is needed. This list is not included for recommendations made under the proportionate and urgent process, and there is no apparent reasons why it should not be.