

Geoffrey Palmer and Richard Clarke

A new Natural Environment Act is Needed—Now

Abstract

This article advocates a new mindset to protect the natural environment following repeal of the Resource Management Act (RMA). The proposed new legislation will be insufficient to protect the natural environment, which has deteriorated during the life of the RMA and now requires urgent action. A new Natural Environment Act is needed that focuses on the natural environment and embraces principles that governmental decision makers are obliged to follow. Limits must be laid down. The principles must be simple and clear and based on the many international law instruments negotiated since the Stockholm Declaration in 1972. New systems of monitoring and enforcement must be devised, with a new environmental watchdog with substantial powers.

Keywords Resource Management Act replacement, natural environment, natural environment principles, Guardians of the Environment

The purpose of this article is to stimulate new thought and action about the next steps to be taken to protect the New Zealand natural environment, in order to uphold our responsibility to future generations.¹

The proposals of the Randerson Report (Resource Management Review Panel, 2020)

to develop a replacement for the Resource Management Act 1991 (RMA) are important and we support them. The proposals may, however, divert attention from the multitude of challenges that the natural environment will still face after the enactment of the replacement. The need for a new mindset or way of thinking about the natural environment is urgent. So

is action. A new programme of work should begin now.

History tells us that episodic efforts made to address environmental issues in New Zealand often result in reform projects that take years to design and enact, and longer to bed in. Then there is a tendency for the government system to neglect the issues for years and fiddle around producing amendments until another major effort is required. Ways around an approach of expediency will have to be found if the interests of future generations in the natural environment are to be catered for. Proper consideration for the future is often sacrificed to the political pressures of the moment. The New Zealand history of climate change policy over the past 20 years provides a graphic illustration of the point.

It hardly requires argument to demonstrate how serious the plight of both the New Zealand natural environment and that of the planet are. We face major environmental problems. Climate change will require massive economic transformation that has hardly begun, but there are many others. The destruction of biodiversity, pollution of the seas, toxic substances, water quality and hazardous waste are only some of them. It is now vital that New Zealand urgently takes steps to protect the natural environment, or what remains of it. It is time for a clear vision, properly articulated, to be pursued with determination.

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The authors were centrally involved in the development of the Resource Management Bill in the late 1980s and 1990: Palmer was the minister responsible for the Bill and Clarke was involved with its drafting. The proposals in this article originate from work undertaken by the authors under a now completed contract with the Ministry for the Environment. The proposals are the authors' own, and the ministry does not currently hold any view on them.

What is needed is to establish a clear set of environmental principles designed to preserve the future of the natural environment, and an obligation on decision makers to follow them. To avoid the day-to-day political pressures, this will need to be done by an Act of Parliament.

The United Nations Environment Programme report *Making Peace with Nature* (2021) underlines the urgency of the crisis.

the navigation lights for helping the natural environment;

- the appointment of guardians for monitoring and oversight of the environment in all its respects;
- a generational environment plan and natural environment directions;
- a glance at the international materials that seem often neglected in New Zealand, but from which much can be learned

1988 book, *In Fairness to Future Generations*. Sustainability and fairness to future generations were designed to drive the Act.

Yet it was not until a 2014 decision of the Supreme Court in the King Salmon case that the proper legal tests were propounded and embedded in the system. It was always intended that the RMA was an environmental protection statute. Instead it morphed into a planning statute. Externalities adversely impacting on the environment were not sheeted home to and reflected in the costs of the activities that engendered them. What went wrong can be summarised. Neither central government nor local government performed well. There was not sufficient central government guidance nor use of the available statutory instruments to produce sound environmental outcomes. Within local government there was confusion and some duplication between territorial authorities and regional councils. Urban development was not handled well. Plans were too numerous and too complicated. And the processes of the RMA became far too complex and various. Further, weak enforcement in New Zealand has been a critical problem.

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As the secretary-general of the United Nations said in his foreword, 'Humanity is waging war on nature. This is senseless and suicidal. The consequences of our recklessness are already apparent in human suffering, towering economic losses and accelerating erosion of life on Earth.' The influential publication *Nature* in a March 2022 editorial expressed the view that 'there's now a consensus that human activities have irreversible environmental effects' and that the 50-year debate on the limits to economic growth needs to be brought to an end and action taken.

Clear messages must be sent to the New Zealand public about what is at stake here. Technocratic approaches will not cut it. The blueprint put forward in the UNEP report shows how loss of biodiversity and ecosystem integrity, with climate change and pollution, is undermining the march to sustainability. The science is clear. The planet cannot take any more.

This article will deal with the following issues in this quick canter across the agenda for the environmental future:

- why the RMA failed;
- why the RMA's replacement is not enough;
- why a new Natural Environment Act is needed;
- what a new Natural Environment Act would do;
- a clear statement of principles (the natural environment principles) that will provide

Why the RMA failed

The RMA was a political response to the National Development Act 1979, which provided for the suspension of Acts of Parliament by Cabinet for any national development project. It was said that delays were intolerable and there were too many processes. The projects involved energy projects, the Clyde Dam and the proposed Aramoana aluminum smelter.

Repealing the National Development Act was one thing. Providing an adequate policy response was another. There had been an adverse independent report on the 1977 Town and Country Planning Act. The Ministry of Works was abolished. In 1986 the Environment Act was passed and the Ministry for the Environment was created. This ministry became the home for RMA reform.

Internationally at the time, the policy development process began a shift towards a sustainable development mindset. The policy development process for the RMA was inspired by the 1987 report of the World Commission on Environment and Development, *Our Common Future*, which enunciated the key principle of sustainability. The purpose provision of the RMA relied on the international thinking. The Act stressed sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations. This vital principle was further developed by the international lawyer Edith Brown Weiss in her

It is a sad commentary on the way New Zealand now does big law reform that, after the 2017 RMA amendments, an Act that had begun life in 1991 at 382 pages was now 796 pages. The approach of passing a big piece of legislation and amending it seriously over time without re-examining the framework is a recipe for soggy incoherence and complexity. It caused the purpose of the RMA to be eroded and protections for the future environment were not delivered. The vision and the planetary boundaries were lost.

It is sad but hardly surprising that over the life of the RMA most environmental indicators have seriously deteriorated. For example, New Zealand net greenhouse gas emissions are now 60% higher than they were in 1990. In 2020 the Stockholm Resilience Centre translated the planetary boundaries to a New Zealand context to help the Ministry for the Environment better understand the responsibility for ensuring a 'safe operating space' for our environment. What the centre found was that New Zealand exceeds its fair share of all five planetary boundaries assessed.

Why the RMA's replacement is not enough

The Randerson Report proposed that the RMA be repealed and replaced. The government has accepted that view. We agree that the RMA should be repealed and replaced, but in our view that will not be

enough to sufficiently protect the natural environment.

The Randerson Report discussed the issues with the natural environment at some length. It recommended new Acts entitled the Natural and Built Environments Act and the Strategic Planning Act, which are to include greater use of specified mandatory limits for certain biophysical aspects of the environment, provision for targets, and greater use of mandatory directions. It also made important recommendations on te Tiriti o Waitangi and te ao Māori, and proposed new legislation for climate change adaptation, especially managed retreat.

Despite these important points, it all depends in the end on how the system is put together, and that depends on the final legislative drafting, which is not yet available. We have examined the report of the Environment Committee which conducted an inquiry on the Natural and Built Environments Bill (Environment Committee, 2021), which canvasses the above issues. But our concern remains that the Randerson Report recommendations are not likely to sufficiently protect the natural environment, due mainly to problems that dogged the RMA, namely:

- There are many New Zealand statutes which have an impact on the natural environment and a multitude of different decision makers throughout New Zealand: see, for example, the Conservation Act, the Local Government Act, the Land Transport Management Act, and the Acts listed in the schedule to the Environment Act. The statutes are not always coordinated or consistent. The Randerson Report applies to only some of these statutes and decision makers.
- A purpose of the Randerson Report is to enable development of land and other resources, subject to environmental considerations. The economic pressure to ignore environmental costs and externalities will continue. The danger is that the natural environment will continue to suffer from not being given sufficient priority.
- The Randerson Report will likely continue the present approach of leaving the protection of the natural environment to central and local government (as well as mana whenua). This approach has generally been a failure under the RMA, largely because of interest group pressure promoting economic growth at the expense of the natural environment. We believe that Parliament (rather than

central or local government) should lay down the key principles for the protection of the natural environment and require them to be adhered to.

Why a new Natural Environment Act is needed

A new mindset is needed throughout the country as to the urgent need to protect the whole of the natural environment. Changing

the natural environment principles. This will force government decision makers to give proper weight to the natural environment in their day-to-day decision making.

A new and powerful environmental watchdog should be established. We suggest that legislation establish a body called the Guardians of the Environment, with the parliamentary commissioner for the environment as chairperson and with greatly

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minds takes more than passing legislation; that is one lesson from the experience with the RMA. We need a new framework that hangs over all of the various statutory regimes to connect them together with a common set of principles that are followed in all of the various contexts.

In 2021 the United Kingdom passed an innovative, far-reaching and ambitious statute, the Environment Act 2021. It contains many features that would be useful in New Zealand. Prime among them are:

- the setting of statutory environmental targets for air quality, biodiversity, water, waste and species abundance, and new tools to help meet those targets;
- a statement of five environmental principles, and the need for all government ministers to consider them when making policy;
- a new Office for Environmental Protection, with enhanced powers of oversight and monitoring.

We believe that New Zealand should follow the UK lead in significantly strengthening legislation protecting the natural environment.

Natural environment principles that are bottom lines for the protection of the natural environment should be set out in a statute. Limits for the protection of the natural environment can be derived from these principles and set from time to time. The statute should also require those making governmental decisions to use reasonable endeavours to ensure that those decisions are consistent with

enhanced powers of oversight and monitoring. It could be said that three general oversight agencies already exist that can deal with environmental issues and complaints from time to time. These agencies are the ombudsman, the office of the auditor-general and the parliamentary commissioner for the environment. Their jurisdiction has been untouched during the various RMA reforms. However, it is our view that, unless oversight is beefed up, systemised and given real teeth, the possibility of policy failure for the Randerson Report reforms will increase.

Environmental issues involve a lot of science and research, and it is not likely that the ombudsman or the office of the auditor-general can carry out serious environmental work. Neither have a specific environment remit; they are general agencies and cover a wide range of government activity.

The parliamentary commissioner for the environment's office as it stands has done excellent work. The office is small and modestly resourced. Given the likely problems in the future, the commissioner needs to be provided with more heft against the bureaucracy of both central and local government, more ability to conduct dialogues with the public, more authority to blow the whistle, a higher public profile, and more capacity to provide analysis that questions the decisions made by the government of the day. And the government should be obliged to table a response in Parliament to recommendations made by the new watchdog system.

A New Natural Environment Act is Needed – Now

The new oversight system will need to exhibit:

- rigorous analytical examination of and warnings concerning likely future environmental issues;
- systematic and comprehensive reporting;
- a forward-looking and proactive approach;
- a high public profile and ability to intervene and blow the whistle;
- capacity to examine and report on the decisions made under the proposed Randerson Report legislation as soon as they are made and upon the subsequent success or otherwise of those decisions;

vision and providing a guiding star for governments and decision makers;

- require those making decisions on behalf of the government, a Crown entity or a local authority that will or may affect the natural environment to use reasonable endeavours to ensure that those decisions are consistent with the natural environment principles and the process principles;
- provide for a generational environment plan and natural environment directions;
- continue the office of parliamentary commissioner for the environment;
- establish a body called the Guardians of the Environment, with the parliamentary

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- rigorous examination and reporting on decisions on environmental limits and targets made by the government.

Climate change, the fate of the planet, and New Zealand's serious biodiversity loss necessitate much better oversight of natural environment issues. In other words, environmental oversight must be rethought to avoid failure. This is not an issue of general oversight of government agencies; it is oversight of a particular but enormous set of issues over which no agency has comprehensive supervision now. The natural environment is vital to New Zealand's future and must not be treated as an externality in decision making. The natural environment is what our society and our economy are built on; it constitutes the guard rails within which we must operate.

The state of the natural environment in New Zealand promises to be a much more important and salient issue in the future than it has been in the past. Today's tools will not be adequate. We suggest that the Environment Act 1986 be repealed and replaced by a new Natural Environment Act.

What a new Natural Environment Act would do

This new Act would:

- state the natural environment principles that are bottom lines for the protection of the natural environment, and various process principles, thus stating a clear

commissioner for the environment as chairperson;

- state the functions and powers of the guardians;
- consequentially amend other environmental legislation, including the legislation that results from the Randerson Report, to make it consistent with this new Act.

Important provisions of the new Act should be entrenched in the same way as various provisions of the Electoral Act 1993 are entrenched. This will mean that the vital provisions of the new Act will be secure against repeal by a simple majority in Parliament.

Natural environment principles

The suggested natural environment principles are as follows:

Enjoyment of natural environment

People should be able to enjoy a healthy and sustainable natural environment, both now and in the future.

Environmental responsibility

People and organisations should have particular regard to kaitiakitanga and the ethic of stewardship of the natural environment and give effect to the concept of te mana o te taiao.

Protection of natural environment

The natural environment should be protected so that the essential processes of nature are not impaired.

Biodiversity

The intrinsic value of biodiversity should be recognised and promoted.

The biosphere

The functioning of the biosphere should be protected and improved by guarding against depletion of the ozone layer and limiting the emission of greenhouse gases.

The sea

Pollution of the sea should be prevented in order to provide for sustainable use and conservation of marine-living resources and prevent damage to human health.

Lakes, rivers, streams and wetlands

The ecological health of lakes, rivers, streams and wetlands, and the fish, plants and other organisms that live within them, should be protected and improved.

Water for human use

Adequate supplies of safe drinking water should be available for people, and sewage and other waste water should be safely disposed of.

Sustainable use and development

Any use or development of the natural environment should:

- be within any relevant environmental limits;
- avoid or remedy any adverse effects of the use or development on the natural environment; and
- not compromise the ability of future generations of people to meet their own reasonably foreseeable needs.

Pollution

The discharge of toxic substances and the disposal of hazardous wastes should be undertaken in a way that prevents damage to the natural environment.

The suggested process principles are as follows:

- positive outcomes for the natural environment are identified and promoted whenever practicable;
- risks of ecosystem degradation or collapse are identified and avoided, remedied or mitigated whenever practicable;
- a precautionary approach is taken where effects on the natural environment are uncertain, unknown or little understood, but have potentially significant or irreversible adverse consequences;
- an environmental impact assessment is carried out for proposed activities that are likely to have a significant adverse impact on the natural environment;
- economic instruments or other measures are used whenever practicable to ensure that those who cause or may cause

damage to the natural environment bear the cost of avoiding, remedying or mitigating that damage;

- rigorous scientific research and analysis is undertaken, and environmental technologies are developed whenever practicable, to facilitate solutions for environmental issues;
- demographic information and policies are taken into account where relevant.

All these principles have been distilled from international treaties and declarations negotiated by consensus and backed by high-quality analysis that began with the Stockholm Declaration of 1972 and has continued to this day, accumulating a formidable body of work that is further discussed later in this article.

The natural environment principles are short. They are easy to understand. They will fit on one page. They can be pinned to the wall in offices, factories, farmyards and schools. If well publicised, these principles should quickly become well known throughout the community and help promote a new mindset in the public on the importance of the natural environment.

However, past mistreatment of the natural environment and ongoing economic pressures will mean that strict adherence to the principles will not always be achievable. The new Act should therefore enable the government to soften the application of the principles by means of the generational environment plan and natural environment directions.

Guardians for monitoring and oversight

As already mentioned, we propose that the Environment Act 1986 be entirely rewritten to implement all the recommendations in this article that require parliamentary enactment. A prime ingredient of that is an oversight mechanism. We propose a new approach to oversight of the natural environment and all other environmental issues in New Zealand. The Environmental Reporting Act 2015 would also need to be strengthened and revised (as is currently proposed), to overcome reporting defects that could impinge upon the effectiveness of the new Natural Environment Act.

The intent is to create a new, well-resourced and powerful environmental watchdog. The parliamentary commissioner for the environment's position would be expanded and enhanced. That person would become chair of a group of environmental guardians who are invested with extensive

powers of oversight, supervision, public statements and enforcement activities.

The parliamentary commissioner is appointed by the governor-general after his or her appointment has been agreed by a motion in the House of Representatives. Three of the guardians should sit *ex officio*, being the prime minister's chief science advisor, the secretary for the environment and the chair of the Climate Change Commission (so long as that commission remains in its present form). The other guardians should be appointed by the prime minister and will need to be top people

- undertaking and encouraging the dissemination of information relating to the natural or built environment;
- encouraging preventive measures and remedial actions for the protection of the natural or built environment.

The guardians should be required to report to the House of Representatives, and to such other persons as they consider appropriate, on the results of any investigation or review they undertake.

The new Act should provide that the guardians will be invested with substantial

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covering a range of environmental skills. All the guardians would be required to act independently in the exercise of their functions, duties and powers.

The oversight functions of the guardians would need to include:

- reviewing the performance and outcomes under all legislation affecting the natural environment;
- reviewing the adequacy of the natural environment principles and the process principles;
- reviewing each generational environment plan and natural environment direction;
- reviewing the adequacy of planning and management of the natural and built environments by local government and other public authorities;
- investigating complaints made by members of the public about the actions or omissions of the government or a local government or public authority in relation to the natural or built environment;
- investigating any matter in respect of which the natural or built environment may be or has been adversely affected;
- at the request of the House of Representatives, reporting to the House on any petition, Bill, or other matter before the House or inquire into any matter that has a substantial effect on the natural or built environment;

powers to enable them to carry out their functions. They should have investigatory powers of the same character as a commission of inquiry under the Inquiries Act 2013; the power to intervene in legal proceedings in the courts and bring applications for judicial review; and the power to give notice to environmental actors (including local authorities) specifying a failure to comply with the new Act and the steps that the guardians consider should be taken in relation to the failure, and requiring the person to respond to the notice saying what steps they propose to take. The guardians should also be authorised to make any public statements they think appropriate.

Generational environment plan and natural environment directions

The new Act should provide for making a generational environment plan that identifies the strategic environmental challenges that New Zealand faces and the measures that must be taken to improve the state of the natural environment over a 25-year time frame. The minister for the environment should be responsible for the preparation of the plan and the minister should be required to consult upon it and publish it in the statutory regulation series. The plan could be amended in the same way as it is prepared, but only in order to improve the natural environment.

Natural environment directions should also be provided for in the new Act. The purpose of these would be to establish environmental limits, targets, milestones, standards and methods in respect of matters of national significance relating to the natural environment. Methods of preparing the directions and amending them should also be specified in the new Act.

International materials

Before concluding, we wish to emphasise again the importance of policy analysts fully considering all the work that has been done at the international level and in other countries on environmental issues. The volume of this work is substantial, and we fear it is often forgotten in domestic New Zealand policy circles. There is always

part of customary international law and therefore binding on nation states. Such international resolutions, declarations, statements of principle and the like by our count now occupy more than 130 pages of carefully negotiated text. These are very helpful, and we have drawn on this material for the recommendations in this article. UN General Assembly resolutions can also be instructive, such as the one that established the format and organisational aspects of the High-level Political Forum on Sustainable Development. Sustainability is, of course, what New Zealand has been trying, but has failed, to achieve.

The United Nations Environment Programme has produced much useful analysis, held many conferences, and published reports on specific topics. There

protections that we have referred to for our proposals for increased accountability, oversight and monitoring in New Zealand. It also should be noted that the UK statute has as a priority the natural environment, echoing the 2018 paper *A Green Future: our 25 year Plan to improve the environment* (HM Government, 2018). Part I of the Act is devoted to improving the natural environment. The Act deals also with nature and biodiversity, waste, water and air. The New Zealand legal system is similar to that of the UK and now they are out of the European Union their legislation may speak more plainly to us. That such an ambitious Act has passed in Britain should be a wake-up call for us, although it is not as bold in some respects as the original proposals for it.

More ambitious still is the massive and comprehensive Environmental Code of Sweden, which was adopted in 1998 and entered into force on 1 January 1999. The rules contained within 15 Acts have been amalgamated in the code. As many similar rules in previous statutes have been replaced with common rules, the number of provisions has been reduced. We have studied this and, while it is perhaps not suitable for our legal system, it shows what determination, and a sense of purpose, can achieve. It speaks loudly to us that New Zealand lags behind.

Other helpful sources include legal principles for environmental protection and sustainable development adopted by the General Assembly in 1986; the Rio+20 Declaration *The Future We Want*; the Johannesburg Declaration of 2002; the World Charter for Nature 1982; Agenda 21, 1992, which contains 40 chapters; and the Convention on Biological Diversity 1992.

Most of the sources mentioned here are to be found in the document supplement to Carlson and Palmer (2019).

Conclusion

New Zealand was at the cutting edge of environmental reform when the RMA statute was enacted in 1991. Processions of people from overseas wanted to know about it and wrote about it in books and international journals. We are no longer at the cutting edge.

International developments have overtaken us. Yet our mindset has not altered. The evidence is to be found in a mass of international and domestic environmental law work in other countries since 1991, which has produced contemporary legislative approaches and widely accepted environmental principles. That work should

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an attraction in reinventing the wheel, even though the analysis may have been done before and is already available. The international material has often been worked over by eminent experts in their field and negotiated by consensus. Many of the environmental problems around the world are similar: climate change, species extinction, pollution from all sources, water quality, land degradation, atmospheric damage, chemical pollution, plastic in the oceans, culminating in how to achieve sustainability.

Since the landmark 1972 conference in Stockholm that produced the Stockholm Declaration, the environment has truly been on the international law agenda. The conference stimulated New Zealand to be active in the environmental space, and in that year New Zealand first created a ministerial environmental portfolio and appointed a minister, Duncan McIntyre.

Many official international meetings have been conducted where treaties, conventions, protocols and declarations have been negotiated. These include both hard law and soft law instruments. Some soft law instruments, such as parts of the 1992 Rio Declaration, may have become by this time

have been many other efforts by the United Nations, but the work is not always easy to find and an effort must be made.

The volume of hard law treaties and multilateral conventions is truly astonishing, and we have relied on some of this material in this article as well. We have found, analysing the published material, that it covers more than 1,300 pages. Again, considering this body of law will help explain where environmental law has come from and, more importantly, where it is going. Literacy in this material is essential. The treaties and conventions cover a remarkable range of topics, including atmosphere, hydrosphere, lithosphere, biosphere, polar regions, economic and trade development, and war damage.

Policy designers in New Zealand also need to examine overseas domestic developments and the work of non-governmental organisations. As already mentioned, the United Kingdom passed in 2021 an innovative, far-reaching and ambitious statute, the Environment Act 2021, and it contains many features that would be useful in New Zealand. Prime among them is the new Office for Environmental

inform New Zealand's approach. The natural environmental issues are now much sharper. And the need is more urgent. New Zealand's response to these issues must be greatly improved and quickly.

New Zealand, as a good international citizen, would be wise not to reinvent the wheel, but rather to translate those

environmental principles into its domestic law. We believe there is a hunger for such principles, particularly among younger New Zealanders. A set of navigation lights is urgently needed to set the directions in which we are heading in critical natural environment areas.

¹ Many of the ideas in this article are drawn from material in Carlson and Palmer (2019), and reviewing environmental literature regularly from before the first edition in 1994 until the most recent edition in 2019, not an experience that produces optimism about the future of the environment for the planet. The literature contains plenty of insights about the actions to take and the principles to be applied, but government action in many countries has lagged behind.

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