

BEFORE THE OTAGO REGIONAL COUNCIL

IN THE MATTER OF

the Resource Management Act 1991

AND

IN THE MATTER OF

the hearing of submissions on the
Proposed Otago Regional Policy
Statement

**LEGAL SUBMISSIONS ON BEHALF OF ARA POUTAMA AOTEAROA,
THE DEPARTMENT OF CORRECTIONS (Submitter # DPR-00102)**

Dated: 9 March 2023

GREENWOOD ROCHE
LAWYERS
CHRISTCHURCH
Solicitor: Rachel Murdoch
(rmurdoch@greenwoodroche.com)

Submitter's Solicitor
Kettlewell House
Level 3, 680 Colombo Street
P O Box 139
Christchurch
Phone: 03 353 0574

1 INTRODUCTION AND SUMMARY

- 1.1 Ara Poutama Aotearoa, the Department of Corrections' (**Ara Poutama** or **the Department**) submission on the proposed Otago Regional Policy Statement (**pORPS**) seeks to include the Otago Corrections Facility (**OCF**) and "community corrections activity" (**CCAs**) in the proposed definition of *regionally significant infrastructure*.
- 1.2 The nature of these facilities and their operation in the wider justice system are described in the evidence of Ms Turner and Mr Dale on behalf of the Department. Those evidence briefs also describe the vital role that these facilities play in supporting the social function and health and safety of the Otago region (and beyond), and the ways in which a planning framework can help or hinder the effective functioning of those facilities.
- 1.3 Based on that analysis, it is Mr Dale's expert opinion that the OCF and CCAs should be identified as *regionally significant infrastructure*, and afforded the additional protection and support provided for by the EIT-INF objectives and policies framework.
- 1.4 Mr Stafford on behalf of the Otago Regional Council (**ORC**) disagrees with that position. In his opinion (expressed in the section 42A report for Chapter 11: Energy, Infrastructure and Transport (**s42A report**)), "*regionally significant infrastructure* [in the pORPS context] *supports, at the regional level, economic and societal functions, and most importantly, interconnectivity (with respect to transport, electricity generation and transmission, communications, three waters, hazard management)*".¹ Based on that criteria (put forward by Mr Stafford), the OCF and CCAs do not, in his assessment, qualify as *regionally significant infrastructure*.
- 1.5 Further submissions received by Horticulture NZ and Royal Forest and Bird Society of New Zealand have also raised concerns regarding the alignment of Ara Poutama's relief with the definition of *infrastructure* in the RMA and in subsidiary national directions.

¹ At [533].

- 1.6 For the reasons set out below, I submit that the existence of those definitions do not preclude the Panel from accepting the Department's relief, and that the approach taken by Mr Stafford falls short of the requirements under section 32 of the Resource Management Act 1991 (**RMA**) for identifying the most appropriate way of achieving the relevant pORPS objectives. In that regard, the analysis undertaken and conclusions ultimately reached by Mr Dale should, in my submission, be preferred.

2 LEGAL FRAMEWORK

- 2.1 The Panel has been comprehensively addressed already on the legal framework which applies to its decisions on the pORPS, so that is not repeated here.²
- 2.2 In that context however, the essential inquiry for the purposes of the Panel's decision on this matter is whether the amended provisions sought by the Department are the most appropriate for achieving the relevant objectives of the pORPS. In accordance with section 32, that analysis requires identification of other reasonably practicable options and an assessment of the efficiency and effectiveness of the provisions of the proposal in terms of their ability to achieve those objectives.³ That analysis must be undertaken at a level of detail that corresponds to the scale and significance of the changes proposed.⁴
- 2.3 Mr Dale has provided that analysis through his evidence, and Ms Turner on behalf of the Department has sought through her evidence to provide additional information on the OCF and CCAs to assist the Panel with its analysis and decision. In that context, there are two matters arising from the evidence that I specifically wish to address.

3 INFRASTRUCTURE DEFINITIONS

- 3.1 As Mr Dale identifies,⁵ *infrastructure* has a specific definition in the RMA which captures communications networks, facilities for three waters,

² See, for example, Opening Legal Submissions for the Otago Regional Council on the Non-Freshwater Parts of the Proposed Otago Regional Policy Statement 2021, 23 January 2023, [2] – [20].

³ Refer Resource Management Act 1991, section 32AA. *Environmental Defence Society Inc v Otago Regional Council* [2019] NZHC 2278 at [111].

⁴ Resource Management Act 1991, section 32AA(1)(c).

⁵ At 6.6 and 6.7.

electricity and transport, airports, navigation installation and ports. It also includes anything described by regulations as a network utility operation.⁶

- 3.2 In my submission, the absence of any specific reference in this definition to Corrections' activities or any other form of social infrastructure does not preclude the Panel from granting the relief sought by the Department. The RMA does not require local authorities to adopt the definitions included in its section 2 in their respective planning instruments. Rather, those definitions inform how those terms are to be understood in the primary legislation (the RMA), "unless context otherwise requires".⁷
- 3.3 The ability to require the nationwide adoption of specific definitions does now exist through the National Planning Standards, the first of which were promulgated in 2019.⁸ As Mr Dale identifies, those Standards direct that where certain terms are used in regional policy statements, those terms must use the definitions prescribed for them in the Standards.⁹ Neither *infrastructure* nor *regionally significant infrastructure* are defined in the Standards. Consequently, the responsibility for, and discretion to, define those terms within plans and policy statements remains with local authorities as part of carrying out their functions under the RMA.
- 3.4 As Mr Dale demonstrates in his evidence,¹⁰ there are multiple examples of planning documents at national and regional levels where the definition of *infrastructure* has been tailored to address particular matters. For example:

- (a) The National Policy Statements for Freshwater Management and Highly Productive Land include definitions of *specified infrastructure*, which encompass (*inter alia*) lifeline utility infrastructure, and infrastructure recognised as *regionally* or *nationally significant* in policy statements or regional plans;

⁶ Resource Management Act 1991, section 2.

⁷ Resource Management Act 1991, section 2.

⁸ National Planning Standards – Definition Standard.

⁹ At 14.1.

¹⁰ At 6.10 – 6.16 and Appendix A.

- (b) The Nelson Draft Regional Policy Statement 2016 identifies quarries, hospitals, emergency services and education facilities as *regionally significant infrastructure*.
- (c) Canterbury Regional Policy Statement 2016 has specific definitions for *regionally significant infrastructure*, *strategic infrastructure* (included in the definition of *regionally significant infrastructure*) and *critical infrastructure*. Each of these contemplate a broader array of infrastructure than what the RMA definition encompasses.
- (d) The Auckland Unitary Plan adopts the RMA definition of *infrastructure*, but expands it to include landfills, national defence facilities, and facilities for air quality and meteorological services.
- 3.5 In my submission, this shift in approach within planning instruments to embracing what Mr Dale describes as “a commonly more expansive” definition of *infrastructure* or *regionally significant infrastructure* is entirely consistent with the direction of travel both at a policy planning level and as we look towards RMA reform.
- 3.6 In that regard, the submission of the New Zealand Infrastructure Commission – Te Waihangā on the pORPS requests a definition of *infrastructure*, including *regionally significant infrastructure*, that encompasses a broader range of services that are necessary for supporting the health and well-being of our communities, including Corrections’ activities.¹¹ That submission aligns with Te Waihangā’s Infrastructure Strategy (**Strategy**) released in 2022, which states:

“Infrastructure is made of layers of connected systems and networks. These deliver the services we depend on like power, water, transport, healthcare and education. What’s the common factor in all this infrastructure? It allows us to share resources so that we can be more connected, healthier, smarter and innovative. In doing so, it improves our lives in many ways and contributes to the wellbeing of all New Zealanders. Infrastructure can be categorised in many ways. One way is to think of it in terms of economic and social infrastructure and the natural environment. Economic infrastructure: This is our energy, telecommunications, transport, waste and water infrastructure. Social infrastructure: This is our hospitals, schools, prisons, parks, libraries and community buildings. Natural environment: There are interconnections and interdependencies between economic and social infrastructure and the natural environment.”¹²

¹¹ Submission 321 at page 2, 10, 11, 12, and 14.

¹² New Zealand Infrastructure Strategy 2022 – 2052 at page 19 (<https://media.umbraco.io/te-waihanganga-30-year-strategy/mrtiklv/rautaki-hanganga-o-aotearoa.pdf>).

To deliver on affordable housing, a net-zero carbon emissions economy and other infrastructure objectives, the planning process needs to be strategic, coordinated, equal to the urgency of the challenge and enabling of the government’s obligation to deliver a broad range of infrastructure services. The planning rules and the consenting process must recognise the unique role of infrastructure in providing services across the economy. Planning and consenting decision-makers need to carefully weigh up local effects against national objectives.”¹³

3.7 Finally (and in line with the vision of that Strategy), the need for a more expansive approach to what constitutes *infrastructure* has been recognised as part of the RMA reform, which has culminated in the following definition proposed for inclusion in the Natural and Built Environment Bill (**NBE Bill**):

Infrastructure means the structures, facilities and networks required to support the functioning of communities and the health and safety of people and includes:

(a) infrastructure provided by a requiring authority [**which would include activities by the Department**]; and

(b) infrastructure provided by a network utility operator; and

(c) eligible infrastructure within the meaning of section 8 of the Infrastructure Funding and Financing Act 2020; and

(d) activities undertaken by Kāinga Ora under section 131 of the Urban Development Act 2020; and

(e) nationally significant infrastructure within the meaning of section 9 of the Urban Development Act 2020; and

(f) district or regional resource recovery or waste disposal facilities; and

(g) a relevant school or institution as defined in the Education and Training Act 2020; and

(h) a hospital care institution within the meaning of section 58(4) of the Health and Disability Services (Safety) Act 2001; and

(i) fire and emergency services facilities

3.8 It is accepted of course that this definition is not binding on the Panel’s decision, and it may change through the course of the legislative process. However, in my submission, it is useful in illustrating a clear policy shift towards broadening our understanding of what constitutes *infrastructure* in our natural and built environments.

3.9 In light of the above it is my submission that identification and recognition of necessary social services and facilities as *infrastructure*

¹³ At page 108.

within planning instruments is not only authorised in terms of the RMA, it is also consistent with a more contemporary approach being taken across the country. In terms of Corrections' facilities specifically, Mr Dale's evidence identifies that the Northland Regional Policy Statement, the Proposed Far North District Plan and Hawkes Bay Resource Management Plan all provide for prisons as *regionally significant infrastructure*. There is also scope for inclusion of prisons as *regionally significant infrastructure* in the Canterbury Regional Policy Statement.¹⁴

- 3.10 In that context, the uncontroverted evidence before you demonstrates the necessary role of the OCF and CCAs in supporting the health and well-being of communities in the Otago region, and in enabling the effective functioning of the justice system as a whole. In Mr Dale's opinion, the importance of those facilities in the regional (and national) context is what warrants (in a section 32 sense) their identification in the pORPS as *regionally significant infrastructure*, and the elevated protection for their ongoing operation that that categorisation provides.

4 RESPONSE TO THE SECTION 42A REPORT

- 4.1 Mr Stafford's recommendation to reject Ara Poutama's relief appears to be based on his opinion that *regionally significant infrastructure* should be limited to "*infrastructure that supports, at the regional level:*

- (a) *economic and societal functions; and,*
- (b) *most importantly, interconnectivity (with respect to transport, electricity generation and transmission, communications, three waters, hazard management)."*

- 4.2 In terms of Mr Stafford's first criterion, I again refer to the evidence of Mr Dale and Ms Turner which clearly establishes:

- (a) the vital societal function that the OCF and CCAs perform at a regional and a national level. This occurs by virtue of their integration with the wider network of Corrections' facilities; and

¹⁴ At 6.11(e) -6.14.

(b) why the efficient, effective delivery and operation of those facilities will support the people and communities of Otago to provide for their well-being and health and safety.

4.3 In his section 42A report, Mr Stafford does not expand on why he considers that “interconnectivity” is the most important indicator of whether infrastructure should be identified in the pORPS as *regionally significant*. Furthermore, it is also unclear why he appears to accept that *defence facilities* would meet that criterion when the OCF and CCAs would not. For the avoidance of doubt it is considered that both *defence facilities* and Corrections facilities meet that criterion.

4.4 In that regard, Mr Stafford’s conclusion is also at odds with the evidence of Ms Turner, which describes the way in which Ara Poutama’s facilities operate as an integrated, interconnected network across the country to support the effective, efficient operation of the justice system, In particular, she notes that:

“The separate components of the network do not operate in isolation of one another, and an individual’s journey through the corrections system is likely to touch a number of different parts of the organisation for the duration of their sentence and interaction with the Department.”¹⁵

“The decision on where individuals are located in the prison network is determined by a range of factors ... Alignment between population (demand) and capacity (beds) in prisons is complex and requires integrated consideration on a regional and national level in order to provide resilience in the network, optimise capacity use, and effectively provide for the safety and well-being of the prison population, their family, facility staff and the wider community.”¹⁶

“The integrated reality of managing the population between prisons and community based facilities, and the links that community based facilities have to community partners and other agencies, helps to support effective engagement between key stakeholders, including Iwi, whanau and the people in our care, reduced reoffending and better outcomes for the community.”¹⁷

4.5 While Mr Dale recognises the interconnected nature of Ara Poutama’s facilities, he does not consider that the interconnectivity or otherwise of the OCF and CCAs should be determinative of whether they are identified as *regionally significant infrastructure*. In his opinion, it is the benefit of those facilities and the importance of their role to the region which are the more appropriate indicators. On his assessment, the OCF and CCAs

¹⁵ At 4.3.

¹⁶ At 5.2 – 5.3.

¹⁷ At 6.5.

*“deliver critical social and cultural benefits for people and communities...[which] are significant and comparable to other similar facilities that are referenced in the proposed definition of regionally significant infrastructure, including defence facilities”.*¹⁸

- 4.6 Accordingly, Mr Dale concludes that identifying OCF and CCAs as *regionally significant infrastructure*, together with the more enabling provisions for their operation, maintenance and upgrade, would better support their protection and development to meet the future needs of those within Corrections’ care (and their communities), while also ensuring any environmental effects of those activities are appropriately managed.¹⁹
- 4.7 In his opinion, that option is the more effective, efficient and appropriate way of achieving the relevant pORPS objectives, including EIT-INF-04 and 05. Any other option would, on his assessment, be at odds with the RMA’s purpose to manage resources in a way which enables people and communities in the Otago region to provide for their wellbeing and health and safety.
- 4.8 I commend Mr Dale’s careful assessment to you, and submit that the conclusions he reaches regarding the Department’s requested relief accord with the requirements of section 32 to *“examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation”*.²⁰

5 CONCLUSION

- 5.1 Based on the evidence before you, I therefore submit that the purpose of the RMA is best achieved in this instance by including the OCF and CCAs as *regionally significant infrastructure* in the pORPS. Doing so both recognises the significant role and benefits that these facilities offer for the people and communities of the Otago region, and consequently ensures that those critical facilities receive the elevated protection provided to *regionally significant infrastructure* through the pORPS objectives and policies.


¹⁸ At 6.26.

¹⁹ At 3.6.

²⁰ *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51 at [59].

5.2 The Department wishes to thank the Panel for the opportunity to speak further to its submission.

DATED this 9th day of March 2023

A handwritten signature in black ink, appearing to be 'R Murdoch', written in a cursive style.

R Murdoch

Counsel for Ara Poutama Aotearoa, the Department of Corrections