

BRF 21-304 Scope and process for possible Public Works Act 1981 review

Ki / To: Minister for Land Information

Rā / Date: 10 March 2021

Ngā mahi e hiahiatia ana / Action Sought

Minita/Minister	Hohenga/Action	Rā Mutunga/Deadline
Minister for Land Information	āmine/agree that scope of a Public Works Act 1981 review is limited to a Process Review under the current premise of the Act	30 March 2021
	āmine/agree to undertake three engagement stages to review the Public Works Act 1981: scope refinement, issue understanding, options development	30 March 2021
	āmine/agree to separately progress the Public Works Act (Whenua Māori) Amendment Bill	30 March 2021
	āmine/agree that deferred policy on Māori Land acquisition is in scope of the Process Review	30 March 2021
	direct officials to develop a Cabinet paper and engagement plan to progress the Process Review	30 March 2021

LINZ Whakapā / LINZ Contacts

Ingoa/Name	Tūnga/Position	Nama waea/ Contact number	Whakapā tuatahi/ First contact
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Te Tari o te Minita ki te Whakaoti / Minister's office to complete

Kounga/ Quality	<input type="checkbox"/> 1 Unsatisfactory	<input type="checkbox"/> 2 Fell short of expectations	<input type="checkbox"/> 3 Met expectations	<input type="checkbox"/> 4 Exceeded expectations	<input type="checkbox"/> 5 Greatly exceeded expectations
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Poto kōrero/
Comments

Pūtake/Purpose statement

This briefing proposes a scope, process, and next steps in relation to review of the Public Works Act 1981 (PWA).

Pānui whāinga/Key messages

- 1 Prior to Christmas 2020, LINZ provided you with advice on three broad approaches for possible reform of the PWA [BRF 21-210 refers]. You requested further information on the possible scope and process of the “middle option”: to amend the PWA to address specific issues with its design and operation within the current scope of the Act (a Process Review).
- 2 The new Act would update and improve the existing law governing public works processes but would not fundamentally change the underlying premises that the PWA sets out, including that:
 - the authority for the Crown and local authorities to acquire or take interests in land needed for a public work is paramount
 - the legislative procedures are fair and transparent for all parties, ensuring good faith negotiation and full compensation to leave landowners no better or worse off following PWA action
 - there is an independent judicial check on the Crown's powers to take interests in land
 - where land is no longer required for a public work, the Crown and local authorities must consider offering the land back (offerback) to former owners.
- 3 Annex 1 sets out the possible scope of a Process Review that is focused on amendments to the existing PWA processes to make these clear, workable, and efficient.
- 4 Annex 1 also sets out a high-level approach to the review, involving three stages: refinement of scope, understanding of issues, and development of options. Taking time to build early and open engagement with Māori alongside developing working groups of affected stakeholders will be critical.
- 5 You may wish to speak to your colleagues to test their views before LINZ proceeds to develop a Cabinet paper and engagement plan. The attached A3 could support that discussion.
- 6 In the meantime, LINZ recommends progressing the Public Works Act (Whenua Māori) Amendment Bill separate from a wider PWA review, to ensure that Māori landowners benefit from the changes the Bill makes to the offerback and compensation process.

Tohutohu/Recommendations

It is recommended that you:

1. **manatu/note** on 25 January, you requested further information on a Process Review which would amend the PWA to address specific issues with its design and operation within the current scope of the Act;

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|---|-------------------------|
| 2. āmine/agree that scope of a Public Works Act 1981 review is limited to a Process Review under the current premise of the Act; | <i>Agree / Disagree</i> |
| 3. āmine/agree to undertake three engagement stages to review the Public Works Act 1981: scope refinement, issue understanding, options development; | <i>Agree / Disagree</i> |
| 4. āmine/agree to separately progress the Public Works Act (Whenua Māori) Amendment Bill; | <i>Agree / Disagree</i> |
| 5. āmine/agree that the deferred policy on Māori Land acquisition is in scope of the Process Review; and | <i>Agree / Disagree</i> |
| 6. āmine/agree to officials proceeding to develop a Cabinet paper and engagement plan to progress the Process Review. | <i>Agree / Disagree</i> |



 Emily Revell

Acting Policy Manager, LINZ

Rā/date: 10/03/2021

 Hon Damien O'Connor

Te Minita mō Toitū te Whenua

Rā/date:

Te Horopaki/Background

- 1 Since the PWA came into force in 1982, there have been significant changes to its operating context and New Zealanders' expectations in relation to the acquisition of land for public works. Despite this, the PWA has not been substantially updated since the 1980s.
- 2 Prior to Christmas 2020, LINZ provided you with advice on three broad approaches for possible review of the PWA [BRF 21-210 refers]:
 - Focus on operational improvements and make legislative changes on an 'as needs' basis.
 - Amend the PWA to address specific issues with its design and operation within the current scope of the Act.
 - Fundamentally reform the PWA, including reviewing its principles and scope.
- 3 You requested further information on possible scope and process for the second approach (the Process Review): to amend the PWA to address specific issues with its design and operation within the current scope of the Act.

Proposed scope of the Process Review

- 4 The Process Review would retain the PWA's current framework of acquisition, disposal, and compensation, but modernise provisions within that framework. Annex 1 includes further information on what would be in and out of scope in this review.
- 5 The scope of the Process Review presents a way to make tangible improvements to update and substantially improve the law for the first time in 40 years. The Process Review could make PWA processes more efficient and modernise the Act.
- 6 The Process Review may also be able to address some of the Waitangi Tribunal recommendations for the PWA to better provide for Māori interests and therefore contribute to improved Māori-Crown relations. However, the Process Review would be unlikely to fully resolve the fundamental tension of fitting Māori land interests into a PWA that was established without Treaty of Waitangi obligation consideration. A fundamental review of the PWA would be required to address this.
- 7 The Process Review would have a similar scope to the PWA review undertaken from 1998 – 2003 (the 2000 review). The 2000 review will be a useful reference point and is complementary to this Process Review. The aim of the 2000 review was to create a piece of legislation that was clear, workable, and flexible, suited to meet future requirements for public works. The review did not progress to legislative amendments. Annex 2 contains more information on the scope and process of the 2000 review.

Proposed approach to the Process Review

- 8 LINZ undertook a workshop in December 2020 with government agencies to develop a good understanding of these agencies' view on the PWA. There is significant interest from agencies and stakeholders for some reform of the PWA. Work on the Whenua Māori reforms has also informed an understanding of Māori perspectives. However:

- there are significant differences in views among government agencies, and between agencies and Māori on key issues – particularly in relation to how the rights of landowners and process efficiency considerations should be balanced
 - other affected landowners have not had an opportunity to be involved in these discussions
 - LINZ does not have a detailed understanding of how the PWA is operating at the local government level, nor how broader stakeholders, including the public, view the PWA.
- 9 Given this, at a high level LINZ suggests the following approach to the Process Review (further details are available in Annex 1):
- a LINZ sets up working groups with representatives of groups that use the PWA, for example local government, to develop a more detailed and comprehensive understanding of the different stakeholder perspectives on the PWA
 - b LINZ refines the scope of the review package
 - c LINZ reports back to you to revisit the scope, including any identified limitations with the scope and whether issues at the margin should be included. For instance, a critical decision could be whether the Crown's ability to compulsorily acquire Māori land is continued (see section on the Whenua Māori Reforms below).
- 10 Should you wish to proceed, LINZ will develop a comprehensive engagement plan in consultation with other agencies, including Te Arawhiti.
- 11 A cornerstone of this work is early and open engagement with Māori. This allows us to gather on the ground information, views, and reactions, and to strengthen the legitimacy of subsequent policy decisions. It will be important to build trust, and it is appropriate that an ongoing relationship is established at the start of the process during the refining of scope stage (including identification of issues, problems, and opportunities).

Interaction with the Whenua Māori reforms

- 12 On 21 January LINZ recommended you submit a legislative bid for the Public Works Act (Whenua Māori) Amendment Bill (the Bill) (BRF 21-243). The Bill forms the third package of reforms led by Te Puni Kōkiri as part of the Whānau Development through Whenua programme¹
- 13 The Bill's progress was paused by the previous Minister for Land Information to allow further consideration of issues raised by two iwi technicians with the draft Bill. Some of the issues raised were in scope of the Bill, and on 17 March LINZ will brief you on recommended minor and technical policy changes to improve the draft Bill.
- 14 There is a risk that the Bill is perceived as not addressing issues of key significance to Māori and that issues raised by the iwi technicians which have not been able to be incorporated

¹ The first reform was the Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Bill, which received Royal Assent in August 2020. The second was the Local Government (Rating of Whenua Māori) Amendment Bill, which is currently at Second Reading.

within the Bill will be raised again at Select Committee. One risk the iwi technicians identified to the Māori-Crown relationship was that the Bill does not protect Māori land from compulsory acquisition. When the Whenua Māori PWA proposals were considered by Cabinet in 2019 [MCR-19-MIN-0054], no consensus was reached on options to address issues with the acquisition of Māori land. These recommendations were deferred for further policy development.

- 15 Additional issues raised by the iwi technicians that are outside the scope of the Bill include whether to expand the PWA definition of successor to more than one generation, and providing for land that was gifted to be returned the same way, ie. by not requiring the former owner to pay for the land.
- 16 The Process Review presents an opportunity to investigate outstanding issues and include them in later legislative change. This could include consideration of policy options to address issues such as the acquisition of Māori Land, successors, and offer back of gifted land. As it is a Process Review, based on the premise that the Crown and local authorities can acquire land that is needed for a public work, you could decide to exclude from scope the blanket prevention of Māori land from being compulsorily acquired. A spectrum of other options could be considered to provide protections, such as leasing the land instead of acquiring it, or providing for additional Ministerial sign off.
- 17 You could stop the Bill with the intention of including the matters that the Bill addresses in the Process Review, however, LINZ recommends that the Bill proceed. Continuing with the Bill will ensure the benefits of the Bill are felt by Māori landowners sooner than would be possible if they were included in a wider PWA review. Any risk of confusion among stakeholders by having the Bill progress and the Process Review begin around a similar timeframe can be managed by clear communication.
- 18 The progress of the Bill is on track to meet the revised timeframe of referral to select committee this year.

There are some risks in starting a PWA Process Review

- 19 Many of the issues managed by the PWA are complex and their consideration is likely to bring up, or reopen, a range of contentious points. Differing perspectives will need to be managed to ensure the reform balances the purpose of the PWA (to acquire land for public works) with the rights and considerations of property owners. Difficult decisions will need to be made, and early partnerships with those affected will be essential.
- 20 Maintaining stakeholder expectations on what outcomes can be achieved within a Process Review scope may be difficult, and a pull towards a fundamental review is expected. The scope refinement step in the process will be critical to manage these expectations up front, and LINZ will report back to you on identified risks following this stage.
- 21 Consultation will raise how the PWA has been applied in the past, particularly in the alienation of Māori land, and the past actions of both the Crown and local government. While Treaty settlements have addressed some of these historic actions, engagement with affected landowners and their descendants will need to be well managed.

- 22 Any review will require significant resource commitment from LINZ and other agencies to meaningfully engage on the issues raised and manage the competing interests, such as other legislative reforms (especially the Resource Management reforms), and the legislative process for the Public Works Act (Whenua Māori) Amendment Bill.

Mātanga kōrero/Consultation

- 23 LINZ has had initial discussions with other government agencies with a role or interest in the PWA,² including holding a workshop to discuss options for reform. Their views have informed this briefing.

Ngā Tāwhaitanga/Next steps

- 24 You may wish to speak to your colleagues to test their views before LINZ proceeds to develop a Cabinet paper seeking approval for the review. The Transport, Local Government and Māori Development Ministers are likely to have views on PWA reform and what a reform process should include. The Minister for the Environment may also have view on how PWA reform might best align with RMA reform. Annex 3 provides background information for these discussions.

Released under the Official Information Act 1982

² Te Arawhiti, Te Puni Kōkiri, Ministry of Transport, Waka Kotahi NZTA, Department of Internal Affairs, and the Ministry of Housing and Urban Development.

Annex 1: A3 on scope and process to facilitate discussions

Released under the Official Information Act 1982

Potential Public Works Act 1981 review – scope and process (not Government policy)

Status quo

System objective: To deal with the right of the Crown and local authorities to acquire or take private land for a public work, the procedures for acquiring the land, and the disposal of land when it is no longer needed for public works.


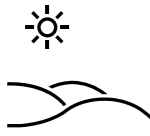
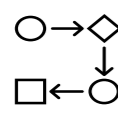


Premise of the Public Works Act 1981 (PWA)

- the authority for the Crown and local authorities to acquire or take interests in land needed for a public work is paramount
- the legislative procedures are fair and transparent for all parties, ensuring good faith negotiation and full compensation to leave landowners no better or worse off following PWA action
- there is an independent judicial check on the Crown's powers to take interests in land
- where land is no longer required for a public work, the Crown and local authorities must consider offering the land back (offerback) to former owners.

Changing context of the PWA

- 1982** the PWA came into force
- 7** legislation recommendations from the Waitangi Tribunal in 2010
- 3** Acts developed to work around PWA processes since 2011
- 312** proclamations to take land signed by the Governor-General between 1998-2019

The scope of review

	In scope - Process Review - Retain the current premise and scope of the PWA - Make technical amendments to the process to make it clear, workable, and efficient	Out of scope - fundamental review - Reconsider all the components of the broader land acquisition system - Reevaluate the objectives of the PWA to reflect a better balance between landowners' right and the public good, Māori interests and Crown acquisition
In line with this scope, indicative areas of exploration could include, but are not limited to...		
Māori land acquisition 	<ul style="list-style-type: none"> - Technical improvements to the PWA process relating to Māori land, to improve transparency and efficiency – helping to facilitate the return and retention of Māori land - For example, investigate lesser interests (eg. leasing land), or adding processes to seek agreement from Māori caucus Ministers to acquire Māori land** <p><i>Note: This retains the fundamental tension of fitting Māori interests into a PWA process that was established without Treaty obligation consideration</i></p>	<ul style="list-style-type: none"> - Reflection of Māori interests and Treaty of Waitangi obligations in a way that facilitates partnership and protection and recognises the special status of Māori land and achieves Māori aspirations - For example, explore ways to enable greater partnerships with Māori <p><i>Note: This considers the full range of recommendations by the Waitangi Tribunal, and is likely to invoke a wider conversation about Māori interests and property owner interests</i></p>
Related systems 	<ul style="list-style-type: none"> - Improved interface with related systems (particularly the resource management, urban development, disaster recovery, land transport management, and local government systems) to avoid unnecessary duplication and get better alignment - For example, investigate the use of PWA powers through other Acts (such as the Local Government Act, the Airport Authorities Act) 	<ul style="list-style-type: none"> - Future-proofed land acquisition system in the context of changing needs - For example, develop a catch-all land acquisition system which addresses the gaps <p><i>Note: This could considerably amend the scope of the PWA. Recent legislation that responds to new challenges facing the Crown has bypassed or modified the use of PWA powers, due to the inflexibility of PWA processes</i></p>
Public work scope 	<ul style="list-style-type: none"> - Extra checks and balances on the definition of public work to give certainty that works are in the public interest - For example, increase transparency on each public work, by prompting early use of fairness criteria of land acquisition used during the environment court process 	<ul style="list-style-type: none"> - Increased oversight and assessment of the public good for land acquisition - For example, develop a process to consider the public good/community interest in decisions on land acquisition, including community consultation <p><i>Note: This could considerably amend the scope of the PWA</i></p>
Modernisation 	<ul style="list-style-type: none"> - Modernisation of the acquisition, disposal, compensation, monitoring and reporting and decision-making processes to reflect realities (eg multiple parties involved) and align with best practice - For example, recognise public works involve multiple Crown agencies and local authorities, address relevant case law 	<ul style="list-style-type: none"> - Modernisation of processes and provision for collaborative urban development and strategic land acquisition - For example, enable local and central government to partner with infrastructure providers and iwi/Māori organisations to deliver works

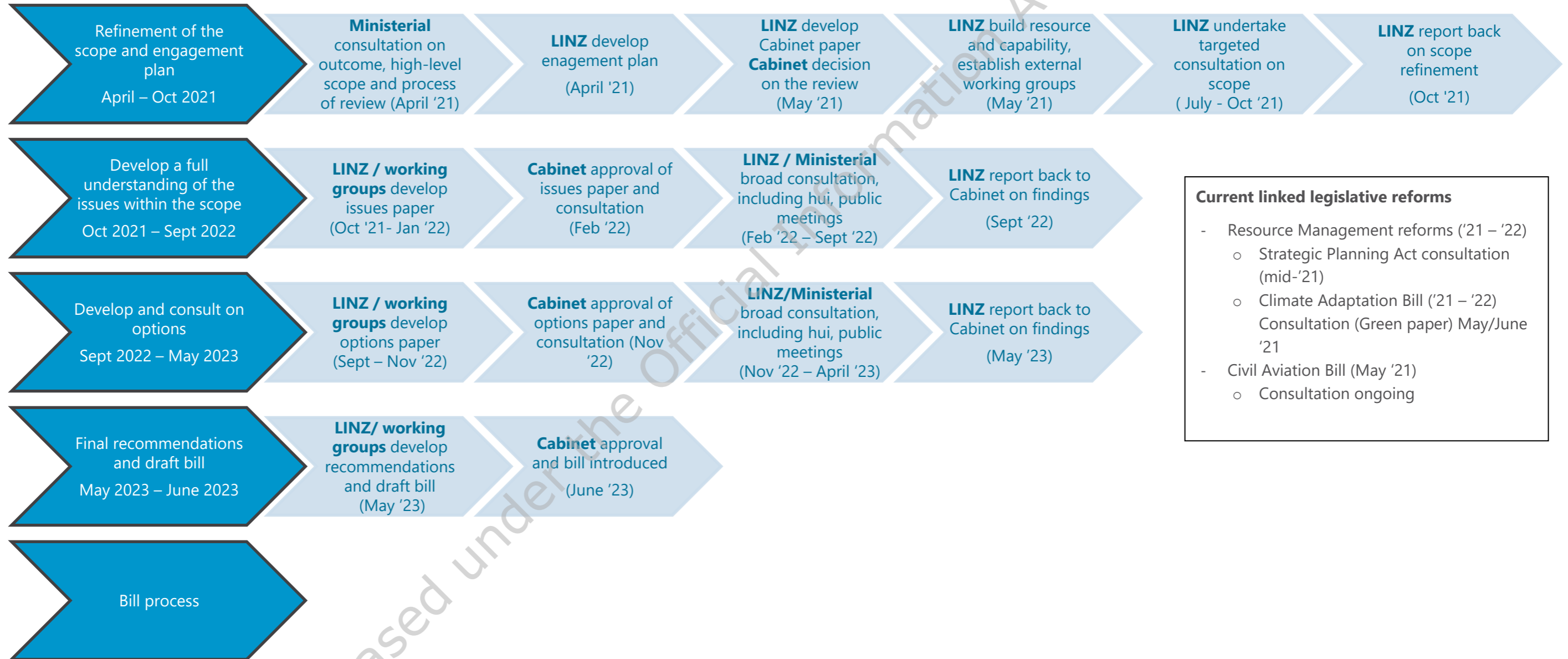
** These relate to the deferred land acquisition provisions of the PWA (Whenua Māori) Amendment Bill.

Draft – not Government policy

Summary

- LINZ suggests a three-stage process to the review: refinement of the scope, understanding the issues and development of options. The review would be in collaboration with working groups representing affected groups.
- A cornerstone of this work should be early and open engagement with Māori. It will be important to build trust and an ongoing relationship, and it is appropriate that that ongoing relationship is established at the start of the process and ensuring sufficient time is given at the beginning

The process



Annex 2: Summary of 2000 review

In the early 2000s, LINZ undertook a review of the Public Works Act 1981. A review was needed for a wide range of reasons including the expansion of land acquisition powers to agencies outside the Minister/Ministry of Works, an increasing awareness of the Treaty of Waitangi, and a need to ensure future demands for infrastructure are met in a consistent and efficient manner. A Bill was not progressed.

Scope

The review focused on five broad subject areas:

- The definition of a public work and who has access to powers under the Act
- Acquisition of land and compensation
- Disposal of land acquired for a public work
- Other matters which included Treaty of Waitangi provisions, roading provisions and issues of compliance with the Act
- A summary of issues which are of significance to Māori

Te Roopu Arataki, a Māori advisory group established to consult on the review, argued that a fundamental review was required to reassess the principles of the PWA and achieve outcomes that meet Māori aspirations. It is likely that Māori stakeholders will have a similar opinion if the Process Review progresses, especially considering the Government's increasing focus on partnership with Māori and the Crown's obligations as a Treaty partner.

Process

The 2000 review adopted the following process:

December 1998	Cabinet agreed to undertake a comprehensive review of the PWA.
Early 1999	Interagency working groups, comprised of government officials, were established to identify issues with the PWA ³
1999 – 2000	A discussion document was created (following input from the working groups) which outlined broad issues and possible options for dealing with these issues.
Dec 2000 – May 2001	Public consultation on the issues and options discussion document, including 16 hui and 6 general meetings. Māori interest groups, users of the legislation and individual landowners were some of the groups that provided comments.
August 2001	The Summary of Submissions document was released in August 2001, collating findings on the five subject groups.
2002	Policy proposals were refined and included in a package of Cabinet papers.
2003	A suite of papers were prepared on the review and a proposed PWA Amendment Bill was given category 4 priority in the 2003 Legislation Programme. However, Cabinet deferred consideration of the proposals in July 2003 due to reviews of other land-related policy, including the Land Act 1948, Resource Management Act 1991, Overseas Investment Act 1973 and Foreshore and Seabed legislation.
2005	LINZ proposed to have a Bill drafted and introduced to Parliament following the 2005 election. This was not progressed, as in February 2005 Cabinet deferred consideration of the proposals.

³ Working group members included officials from LINZ, Ministry of Transport, Department of Conservation, Local Government NZ, Department of Internal Affairs, New Zealand Defence Force/Ministry of Defence, Te Puni Kōkiri, State Services Commission, Courts, Transit New Zealand, Ministry of Education, Crown Company Monitoring Advisory Unit and the Treasury.

Annex 3: Background information for discussions with Ministers

Minister	Possible areas of interest
Hon Kelvin Davis Minister for Māori Crown Relations: Te Arawhiti Minister of Corrections Associate Minister of Education (Māori Education)	<ul style="list-style-type: none"> • Impacts on the relationship between Māori and the Crown • Amendments to include of Waitangi Tribunal recommendations • Scope of the review and how it will address the history of PWA grievance
Hon Dr Megan Woods Minister of Housing	<ul style="list-style-type: none"> • Possible alignment between the Urban Development Act and PWA • Prioritisation of agencies' public works
Hon David Parker Minister for the Environment	<ul style="list-style-type: none"> • RMA reform provides an opportunity to align processes under the PWA with the Strategic Planning Act and Natural and Built Environments Act • Potential changes to designations of network utility operators and requiring authorities through RMA reform and interactions with powers under the PWA
Hon Nanaia Mahuta Minister of Local Government Associate Minister for Māori Development	<ul style="list-style-type: none"> • Impact changes to land acquisition and disposal powers will have on local authorities and service delivery • Possible use of the PWA for climate change adaptation and managed retreat
Hon Willie Jackson Minister for Māori Development	<ul style="list-style-type: none"> • Scope of the review and how it impacts the relationship between Māori and the Crown • Amendments to address Waitangi Tribunal recommendations • How land acquisition provisions in relation to Māori freehold land will be dealt with
Hon Michael Wood Minister of Transport	<ul style="list-style-type: none"> • Use of the PWA for land acquisition for roading purposes • Interactions between an amended PWA and other legislation related to roading • Roles and responsibilities in relation to disposal of land acquired (airport land) • Prioritisation of agencies' public works