LEGISLATION DESIGN AND ADVISORY COMMITTEE

30 November 2016

Scott Simpson MP, Chairperson
Local Government and Environment Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Mr Simpson,

Hurunui/Kaikōura Earthquakes Emergency Relief Bill

1. The Legislation Design and Advisory Committee (**LDAC**) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. The LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It is responsible for the LAC Guidelines (2014 edition), which have been adopted by Cabinet.

2. In particular, the LDAC's terms of reference include these dual roles:
    a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
    b. through its External Subcommittee, scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.

3. The External Subcommittee of the LDAC referred to in paragraph 2b above is comprised of independent advisers, from outside Government, who have been appointed by the Attorney-General. Under LDAC's mandate, that External Subcommittee is empowered to review and make submissions on those bills that were not reviewed by the LDAC prior to their introduction.

4. The Hurunui/Kaikōura Earthquakes Emergency Relief Bill is one that was not reviewed by LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the attached submission. This submission was principally prepared by the following members of the LDAC External Subcommittee: Professor Geoff McLay, Matthew Smith, James Wilding, Jono Orpin, Brigid McArthur and Megan Richards, with input from other members of the Subcommittee.

5. Thank you for taking the time to consider the Subcommittee's submission.

Yours sincerely

Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee

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Dear Mr Simpson,

Hurunui/Kaikoura Earthquakes Emergency Relief Bill

Introduction

1. Thank you for the invitation to speak to the Committee on this significant Bill.

2. The Legislation Design and Advisory External Subcommittee (the **Subcommittee**) has recently begun considering Bills under the mandate given to it by Cabinet. The Subcommittee reviews introduced Bills against the LAC Guidelines (2014 edition) (the **Guidelines**). We focus on legislative design and the consistency of a bill with fundamental legal and constitutional principles. That includes considering the balance between primary, secondary and tertiary legislation.

3. The Subcommittee acknowledges the need for this Bill and the relevance of its emergency context. While a more appropriate and enduring approach might be to amend the emergency powers in section 330, 330A and 330B of the Resource Management Act (RMA) to make them more fit for purpose in the long term, we acknowledge the time pressure that these changes are made under.

4. The Subcommittee has reviewed the Bill and we briefly outline clause-by-clause points for your consideration. We note that this compilation of points was prepared in a very short timeframe. As such, the submission has not had the benefit of our usual development and review process. Accordingly, it represents the Subcommittee's initial views of this Bill. We would be happy to provide a supplementary, more considered submission at a later date, if the Committee considered that would be helpful.

Clause 5(3) – Modified requirements for exercise of emergency powers under section 330 of RMA

5. The section 330A(2) RMA extension of time from 20 to 120 working days in practical terms gives someone almost 6 months to apply for a resource consent. Within that time significant damage may have been done to an environment. For instance, if the activity has affected a freshwater body its impact may not be restricted to the immediate body but it may be affecting other inter-connected freshwater bodies. If the changes made to the environment within that time are then taken into account in determining what is the receiving environment (permitted baseline) against which adverse environmental effects for the resource consent application activity are to be measured, there is the potential for a further degradation of the environment through the operation of clause 5(3).

6. The Subcommittee queries whether in light of these concerns 120 days is too long a period to apply for resource consent under this provision.

Clause 6 – modified application of section 330(2) of RMA to local authority

7. The reference to "when the occupier is not there" seems overly broad. Is the intention to capture only those who have abandoned/permanently left a place, or is it intended to capture occupiers who may happen to be out when the local authority seeks to enter the place? The Subcommittee suggests this should be clarified.[1]

8. Further, the clause might be amended to include a requirement that the local authority make a reasonable attempt to contact and notify the occupier, and may only enter the place if no response is received after a reasonable period in the circumstances.

9. A reasonable attempt to notify the occupier should include a requirement to post the notice on an Internet site maintained by the relevant council.[2]

10. If the council is not able to notify the occupier after a reasonable period, the clause should include an additional requirement to maintain the notice on an Internet site maintained by the council if the occupier is not notified before entry. This seems more appropriate than only leaving a notice on the place if it is in fact abandoned.

Clause 10 – Owner or occupier of rural land may take emergency preventative or remedial actions

[1] "Legislation should not create a power that is wider than is necessary to achieve the policy objective. The extent of a statutory power should have a direct connection to the policy objective that the power was intended to help achieve. The power should be confined to that which is necessary to perform those actions necessary to achieve the purpose of the legislation." LAC Guidelines (2014 edition) at 16.4.

[2] "Legislation should identify what the power is, for what purposes, and in which circumstances it may be exercised. … The following matters should be specified in the legislation: any pre-requisite circumstances or procedural steps (such as consultation) that must be taken before exercising the power; the appropriate process for exercising the power (will depend on the purpose and characteristics of the power, the issues to be resolved, the interests affected, and the qualities and responsibilities of the decision maker);" LAC Guidelines (2014 edition) at 16.5.

11. The natural meaning of significant– "sufficiently great or important to be worthy of attention; noteworthy" – gives much leeway for adverse effects in clause 10(1)(d). The Subcommittee queries whether the balance can be better struck by adding in other safeguards to this clause, for instance by rewording it to (additions underlined): "the activity will not cause or contribute, directly or indirectly to, significant adverse effects beyond the boundaries of the owner's or occupier's rural land".[3]

12. Clause 10(1)(d) seems to assume that so long as preventative or remedial actions do not cause significant adverse effects beyond the boundary of the owner or occupiers land, then the harm or risk of harm is acceptable.

13. The Subcommittee queries whether the clause should require owners/occupiers undertaking emergency preventative or remedial action to install a public notice, or enter information into a public register or website advising the action being undertaking and the likely timeframe for work.[4] This would help ensure any adverse effects that might extend beyond boundaries that are not immediately visible (e.g. fumes or gas) might be better identified and hazards avoided by those likely to be affected.

Clause 11 – Requirement for owner occupier to give notice of emergency or preventative remedial actions undertaken

14. The Subcommittee queries whether the 40 days to give written notice of emergency or preventative remedial actions is too long in light of the broad powers owners/occupiers have under clause 10 and the few other checks on those powers.[5] Without the usual safeguards, a lot of harm could be done to the environment in those 40 days.

15. The Subcommittee suggests a shorter notice period is more appropriate, perhaps even by giving telephone notice to the council rather than written notice. This would at least allow for important local authority input into any potentially damaging or harmful activities.

16. Consideration might be given to allowing the council to require activities to be stopped that it does not consider are reasonably necessary. The Committee should consider what the consequences of notification are.

Clause 13 – Enforcement proceedings relating to Subpart 2 of the Bill

17. The Subcommittee queries whether this limit on enforcement proceedings is required in order to meet the extraordinary circumstances the Bill is addressing. The context to and purpose of

[3] Above at n1.
[4] Above at n2.
[5] Above at n1. See also: "Legislation should include safeguards that will provide adequate protection for the rights of individuals affected by the decision." LAC Guidelines (2014 edition) at 16.6.

the Bill, when coupled with the discretion that the statutory text of the clauses in subpart 2 of Part 2 confer on owners or occupiers of rural land, can be expected to be given significant weight by the Environment Court in any enforcement proceedings that came to be brought.

18. The Subcommittee suggests that such protections should be sufficient to provide an effective safeguard for owners/occupiers of rural land acting in reliance on the rights that have been conferred by subpart 2 of Part 2. Against that background, limiting who can bring enforcement proceedings may seem to be a disproportionate restriction and may engage section 27 of NZBORA.[6]

19. These points also apply to clause 22 of the Bill.

Clause 18 – Application of emergency powers to deemed controlled activity

20. The Subcommittee suggests that this provision should be framed in the positive rather than the negative. This will help ensure the provision is as clear and accessible as possible.[7]

21. The Subcommittee suggests that the requirements councils must comply with in subclauses (a) and (b) could be strengthened by requiring a council to report to the public on its pre-activity consideration of environmental effects and also its monitoring of those effects.[8] At the very least, councils should be required to record those considerations in writing. Without public reporting or a requirement to record in writing there is the potential for these protections to have limited practical effect.

22. The Subcommittee draws the Committee's attention to the fact that the example provided in clause 18 seems to be inconsistent with the provision itself. Clause 18 does not require any consideration of cultural impact or interest, yet it is given as an example of a consideration.

Clause 19(5) – removal of appeal and objection rights relating to submissions on consent applications for deemed controlled activities

23. The Subcommittee is concerned about removal of appeal and objection rights.[9] While the Subcommittee acknowledges the emergency context of this Bill, it asks the Committee to consider whether there are other streamlining options that involve limiting appeals and objections rather than removing them altogether. For example, a fast tracked appeal process could be left to the Environment Court to develop and manage in the exercise of its case

[6] New legislation should be consistent with rights and freedoms in NZBORA. See LAC Guidelines (2014 edition) at Chapter 5.
[7] "Legislation must be easy to use, understandable, and accessible to those who are required to use it." LAC Guidelines (2014 edition) at preface, p 4.
[8] Above n2 and n5.
[9] "Where a public body or agency makes a decision that affects a person's rights or interests, that person should generally be able to have that decision reviewed in some way. The ability to review or appeal a decision helps to ensure that the decisions taken under the legislation are correct and in accordance with the law. Also, the prospect of scrutiny encourages first instance decision makers to produce decisions of the highest possible quality." LAC Guidelines (2014 edition) at 25.

management powers, perhaps with a specific empowering power to that effect coupled with statutory purpose guidance for the exercise of that power.

Clauses 19 and 20 – process for consent authority considering resource consent application for deemed controlled activity and application of RMA

24. The Subcommittee is concerned about the lack of public participation in the form of consultation on consents for deemed controlled activities.[10] Clause 20 provides that consents must not be publicly notified or given limited public notification under the RMA. Instead the process in clause 19 applies, whereby consent authorities must advise the specified persons listed in subclause (2) including "any other person as the consent authority considers appropriate, including the public generally." There may be relevant persons not listed in clause 19(2) who are not able to submit if the consent authority does not consider it appropriate to seek submissions from the public generally.

25. The Subcommittee is concerned that there should be a better process for public consultation that makes it easier for consent authorities to consult with the public in the circumstances and encourages them to do so. The Subcommittee suggests that the following alternative framework would allow greater public participation but not be unduly burdensome in the circumstances:
    a. To make applications for a deemed controlled activity publicly available on the consent authority's website.
    b. To give any member of the public 10 working days to make submission (mandatorily, not just limited to when the consent authority considers appropriate).
    c. To make the task of the consent authority more manageable in the circumstances, to only apply clause 21 (requiring a summary of submissions and the consent authority's responses to the issues raised) to submissions from those persons listed in clause 19(2)(a)-(k) plus any other submissions that raise issues which the consent authority considers are matters of importance which are materially different to the issues raised by the submitters in clause 19(2)(a)-(k).

26. This approach may better balance public participation against overly burdensome process. It seems particularly important to strike the right balance here given that appeal and objection rights are proposed to be removed under clause 19(5).

Conclusion

27. Thank you for taking the time to consider the Subcommittee's submission.

[10] The Guidelines provide that a fair procedure (this may include the right to make submissions and the right to be heard) should usually apply as safeguards on new statutory powers. The Guidelines also note that it may be necessary to include additional safeguards to ensure the rights and interests of individuals are protected What is considered to be an adequate level of protection will increase as the interference with the rights of individuals increases. See LAC Guidelines (2014 edition) at 16.6.

Yours sincerely

Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee