LEGISLATION DESIGN AND ADVISORY COMMITTEE

14 March 2016

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

Dear Mr Simpson,

Resource Legislation Amendment 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, scrutinizing 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 Resource Legislation Amendment 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, Professor Andrew Geddis, Jonathan Orpin, Matthew Smith, Tiana Epati and Simon Mount, with input from other members of the Subcommittee.

5. Thank you for taking the time to consider the Subcommittee's submission. It wishes to be heard on this submission.

Yours sincerely

Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee

LEGISLATION DESIGN AND ADVISORY COMMITTEE

14 March 2016

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

Dear Mr Simpson,

Resource Legislation Amendment Bill

Introduction

1. 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. We raise the below issues.

2. This Bill is the first on which the Subcommittee is making a submission. Given the significance of the Bill, it is one that would normally have been referred to the main LDAC committee for assistance in design. That did not occur in this case only because the LDAC (and its External Subcommittee) came into existence in June 2015, well after the formative stages of this Bill. We have endeavoured to make submissions that we believe will lead to a better Resource Management Act:

Regulation-making power to override local authorities' rules – clause 105

3. Clause 105, new s 360D, allows the Minister, through regulation, to override local government rules/plans that have been created under the Resource Management Act 1991 (**RMA**)/Local Government Act 2002 processes. New s 360D(1) provides:

> The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations –
> (a) to permit a specified land use:
> (b) to prohibit a local authority from making specified rules or specified types of rules:

(c) to specify rules or types of rules that are overridden by the regulations and must be withdrawn:
(d) to prohibit or override specified rules or types of rules that meet the description in subsection (3)(b).

4. The Minister's proposed regulation-making power to override existing local government rules/plans under new ss 360D(1)(a)&(c) potentially raises issues about central executive government overriding directly elected local representatives. The proposed regulation-making power can also be used to override future local government rules/plans under new ss 360D(1)(b)&(d). The Subcommittee submits that although this provision does not amend, override or suspend primary legislation, it does alter the legislative scheme of the RMA which contemplates local authorities making rules, answerable to their local communities for doing so.

5. The Subcommittee notes that the Regulations Review Committee has taken the view that regulation-making powers that affect the decision-making processes of territorial authorities are matters of policy and therefore inappropriate matters for delegated legislation under SO 319(2)(f).[1] Chapter 13 of the Guidelines states that "as a general rule, matters of policy and principle should be included in primary legislation."[2] The Chapter goes on to provide that "While valid reasons do exist for delegating a power to the executive, each decision to authorise the making of delegated legislation should be justified on its own merits."[3] The Subcommittee submits that the Committee must be satisfied that this is a case for exception to the general rule in the Guidelines against including matters of policy in delegated legislation.

6. The Subcommittee also notes that the effect of new s 360D will be to allow central government to override local rules where there is no governance failure. As currently drafted, the powers under s 360D(1) can be exercised where:

   a. in the Minister's opinion, the rules would restrict land use for residential development in a way that is not reasonably required to achieve the purpose of the Act;[4]

   b. in the Minister's opinion, the rules would duplicate, overlap with, or deal with the same subject matter as is included in other legislation and that duplication, overlap or repetition would be undesirable.[5]

7. The proposed threshold for overriding local rules is relatively low. If a power to override decisions is to be conferred then it ought to be subject to more restrictive criteria for its use and

[1] Letter from the Regulations Review Committee to the Local Government and Environment Committee regarding the Affordable Housing: Enabling Territorial Authorities Bill 2008 (189-2) (22 May 2008), cited in R Malone, T Miller and L Archer *Regulations Review Committee Digest* (5th edition, New Zealand Centre for Public Law, 2013).
[2] LAC Guidelines (2014 edition) at 13.1.
[3] Ibid.
[4] In relation to new s 360D(1)(b) or (c).
[5] In relation to new s 360D(1)(d).

balanced by safeguards against its misuse or unintended consequences. For instance, this could be done by:

a. Adding an additional element to the existing criteria for the permanent power under s 360D(1)(d), such as:

    i. requiring the Minister to be satisfied that rule is not reasonably required to achieve the purpose of the Act; or

    ii. requiring a more general governance failure by the local authority.

b. Limiting the definition of "undesirable" in s 360D(3)(b) to "undesirable in light of the purposes of the Act".

8. Clause 105 provides various safeguards to support the exercise of this regulation-making power, including expiry of powers under s 360D(1)(a)-(c) after one year (though s 360D(1)(d) will remain), preparing an evaluation report under s 32 of the RMA, public notification of the regulations,[6] and undertaking a consultation process on the proposed regulations.

9. The Subcommittee notes that the consultation requirements under new s 360D(8)(b) are relatively skeletal and leave the Minister to set the process at the time of making the regulations. Unless this process is adequately fleshed out by the Minister at the time any regulation is considered, the regulation will be vulnerable to review/strike down on judicial review. The Subcommittee submits that the Committee should consider whether it is possible to flesh out those consultation criteria in the statute.

Removal of appeal rights

Streamlined Planning Process

10. The Bill provides for a Streamlined Planning Process (**SPP**). One of the features of the SPP is that there is no right of appeal against a decision made in relation to the SPP.[7] The right to seek judicial review, however, is retained.[8]

11. The RIS explains that the rationale for the removal of appeal rights is that plans take too long to become operative and a significant amount of the time is taken resolving appeals to the Environment Court.[9] The RIS identifies that the reason for this problem is that: "Schedule 1 of

[6] Clause 105, new s 360D(8)(a).
[7] Schedule 1, Part 5, cl 93(1).
[8] Schedule 1, Part 5, cl 93(2).
[9] At [160].

the RMA has no flexibility to provide for plan making processes that are proportional to the scale and nature of the issues involved."

12. The Subcommittee acknowledges the concern that there can be long delays before plans become operative. Nevertheless it may be undesirable for judicial review to be the sole process for challenge. This is because judicial review is primarily concerned with whether the decision was made in accordance with statutory requirements and a fair process. It does not generally allow the Court to consider the substantive merits of the decision. Arguably it is important to preserve some degree of merits review for decisions in relation to plans, because plans and amendments to plans can have significant effects on the property rights of land owners and users.

13. That being the case, the Committee may like to consider other ways of ensuring that the plan-making process is proportional to the scale and nature of the issues involved, rather removing all rights of appeal. For instance, this could be done by:[10]

    a. Preserving appeal rights but imposing time limits on the determination of the appeal.

    b. Limiting the parties that may appeal against a decision made under the SPP, e.g. appeal rights could be limited to directly affected parties.

    c. Providing that decisions made under the SPP may only be appealed to the Environment Court with the leave of that Court. In deciding whether to grant leave the Environment Court could be required to have regard to the interests of justice, including ensuring that any appeal is proportional to the nature and scale of the issues involved.

Consent decisions – clause 135

14. Clause 135 of the Bill proposes to amend s 120 to remove appeal rights in relation to certain decisions that relate to resource consent.

15. This change is part of a group of changes that the RIS explains are designed to address the problem of decisions made at the plan-making stage being subject to potential re-litigation through the consent process.[11] The other changes proposed to address this problem are:

    a. Providing that subdivision is allowed unless it is restricted by a rule in an NES, a plan or proposed plan.[12]

[10] See the Guidelines at 25.9.
[11] At [277].
[12] See RIS at [278].

b. Restricting public input into subdivision applications and residential activities (in residential zones) at the consent stage.[13] Decisions on all subdivision and housing (in residential zones) applications that were anticipated by zoning (so are controlled, restricted discretionary or discretionary activities) will be made without public notification and with limits to the parties who can be considered as being affected.[14]

16. The Subcommittee questions whether it is necessary to remove appeal rights in addition to making these two changes. At present, the only third parties who can appeal against the decision of a consent authority in relation to resource consent are persons who made a submission on the application or review of consent conditions (see s 120(1)(b) of the RMA).[15] The second proposed change (noted in paragraph 15.b above) is to make decisions without public notification. The effect of this will be that in most cases third parties will not have been able to make submissions and therefore they will not have a right of appeal. This would appear to address the concern about re-litigation and make it unnecessary to also limit appeal rights.

17. Further, the risk of removing appeal rights has not been adequately addressed in the RIS. The RIS says that risk "is minimised through all decision makers on hearings being required to be certified through the Ministry for the Environments Making Good Decisions course as well as the publishing of general good practice on the Quality Planning website".[16]

18. The Subcommittee questions whether those safeguards meaningfully will minimise the risks associated with removing appeal rights. Even the best decision makers, acting diligently and in good faith, make mistakes. This is why we generally provide for multiple layers of appeals against the decisions of even expert decision-makers, like judges. General appeals, as opposed to judicial review, allow mistakes that go to the merits to be corrected and should be retained.

No right of appeal against striking out submission – clause 148

19. Clause 148 proposes to exclude appeals being made against a decision of a consent authority striking out a person's submission on an application for a resource consent, a review of a resource consent, or an application to change or cancel a condition of a resource consent.

20. The RIS justifies this on the grounds that it will help focus input from submitters on the most important matters and remove the threat of submissions and appeals on trifling or irrelevant matters, in turn avoiding unnecessary time, cost and uncertainty for affected parties.[17]

[13] See RIS at [279].
[14] see RIS at [280].
[15] There is also a right of appeal for the applicant or consent holder and, in relation to a coastal permit for a restricted coastal activity, the Minister of Conservation.
[16] At [289].
[17] See RIS at [264]-[265].

21. The Subcommittee queries whether the value of any gains from this restriction will not be outweighed by the costs associated with the (short term) increases in uncertainty as practices develop, and are tested through court proceedings, on when it is appropriate to strike out submissions.

22. The Subcommittee also notes the Environment Court's ability to effectively case manage appeals to it, and in doing that to ensure an appeal focuses on what is truly important for RMA purposes. Added to that, most appeals to the Environment Court are nowadays resolved through ADR processes, giving added flexibility to the Court and parties to an appeal to resolve matters in a timely and cost-effective way, relative to the significance of what is in issue.[18]

23. Finally the Subcommittee draws attention to the Guidelines, at 25, which recognise that "The ability to [internally] 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".[19]

24. The Guidelines go on to recognise, at 25.2, that "Judicial review should not be relied on as the sole process of challenge".[20]

Alternative dispute resolution provisions – clause 91

25. The current provisions in cl 91 of the Bill raise a question around legal representation in mandatory Alternative Dispute Resolution (**ADR**). Clause 91 sets out ADR processes and the Environment Court's power to order mandatory ADR. New s 268(3) provides:

> A person (**person A**) may represent a person required to participate in an ADR process (**person B**) only if person A has the authority to make decisions on behalf of person B in respect of matters that may arise during the ADR process.

It is unclear from the current wording and the RIS whether the provision limits legal representation.

26. The Subcommittee submits that legal representation in ADR should not be limited except where specifically justified in the context. The Guidelines state, at 3.1: "New legislation should respect the basic constitutional principles of New Zealand law", including natural justice.[21] Further, at 26.3, the Guidelines state: "Primary legislation that provides for an ADR process should set out

[18] See eg Judge Laurie Newhook, "Effective Mediation", address for workshop arranged by EDS on 13 April 2013 (available online at http://www.eds.org.nz/assets/Past%20events/Newhook,%20Laurie%20(notes).pdf). He recognises that ADR processes have succeeded in resolving something between 60% and 70% of case topics lodged in the Environment Court, and have led to a significant reduction in the backlog cases since their introduction.
[19] LAC Guidelines (2014 edition) at 91.
[20] Ibid at 95.
[21] Ibid at 15.

sufficient safeguards to ensure that the principles of natural justice are adhered to". The right to legal representation is a procedural protection that is fundamental to natural justice. The LAC Guidelines (2001 edition) state that generally, where a decision-making procedure includes an oral hearing, it is appropriate to permit legal representation.[22]

27. The Subcommittee submits that cl 91 should be clarified. If the proposed provision is intended to restrict legal representation in ADR that should be made clear. But, if that is so, then consideration should be given to whether such a restriction is justified.

Disallowable instruments – clause 188

28. Clause 188, new s 37A, provides a regulation-making power for the Minister to prepare and issue EEZ policy statements. It is not clear from the current drafting of the provision whether policy statements are disallowable instruments.

29. Section 38(1) of the Legislation Act 2012 provides:

> (1) An instrument made under an enactment is a disallowable instrument for the purposes of this Act if 1 or more of the following applies:
>
> (a) the instrument is a legislative instrument:
>
> (b) that enactment or another enactment contains a provision (however expressed) that has the effect of making the instrument disallowable for the purposes of this Act:
>
> (c) the instrument has a significant legislative effect.

30. Clause 188 does not clearly meet any definitions in s 38(1) of the Legislation Act. Although new s 37D(4) provides for a policy statement to be approved by Order in Council, it is "issued" by notice in the Gazette, thus precluding it from falling within the definition of legislative instrument in s 4 of the Legislation Act. Nor is it clear that the policy statements have significant legislative effect.

31. The proposed Bill contains no provision that expressly has the effect of making the instrument disallowable for the purposes of the Legislation Act. However, clause 188, new s 37F, provides that policy statements can incorporate material by reference (under s 56 of the Legislation Act, an instrument that incorporates material by reference is a disallowable instrument). New s 37D(5)(e) also requires the Minister to present a copy of the approved statement to the House of Representatives (a requirement for legislative instruments and disallowable instruments under s 41 of the Legislation Act).

32. The Subcommittee submits that the provision be amended to make it clear that the policy statements issued under cl 188 are disallowable instruments, if that is so intended. This would bring the provision into line with Chapter 13 of the Guidelines which states: "If the delegated

[22] LAC Guidelines (2001 edition) at 294.

legislation does not fall within [the definition in s 38 of the Legislation Act], the legislation must make it clear whether or not the instrument is a 'disallowable instrument' and be tabled under the Legislation Act."[23] Clause 37 of the Bill, at new s 58E(5), is an example of the clarity that should be included in cl 188. Clause 37 provides:

> **58E Approval of national planning template**
> …
> (5) The national planning template is a disallowable instrument, but not a legislative instrument, for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

Exclusion of body corporates from Heritage Protection Authorities – clause 84

33. Clause 84 will prevent body corporate Heritage Protection Authorities (**HPAs**) from making heritage orders over private land. The problem identified in the RIS is that body corporate HPAs have an intrusive impact on <u>private land.</u> The way in which cl 84 has been drafted raises two issues:

34. Firstly, the Subcommittee wonders if the policy behind the provision might be better implemented by directly stating which HPAs might make orders over private land, rather than excluding all which are in fact body corporates (especially given that local authorities and Heritage New Zealand Pouhere Taonga are deemed to be body corporates by statute).[24] The policy intention appears to relate to excluding those body corporate HPAs approved under s 188 of the RMA.

35. Secondly, cl 86 of the Bill provides that heritage orders can be transferred to another HPA other than a body corporate. Clause 86 appears to apply to public <u>and</u> private land. The Subcommittee wonders if it fits with the objective to exclude body corporates from transfers of <u>public</u> land when the stated problem in the RIS is to do with intrusion on <u>private</u> land.

36. The Subcommittee submits that cl 84 should be clarified to give effect to the intended policy objective. This would make the provision more consistent with the Guidelines at 1.5 which state that "[t]he provisions of the proposed legislation should be consistent with its purpose and the policy that underlies it".

Conclusion

37. Thank you for taking the time to consider the Subcommittee's submission. The Subcommittee wishes to be heard on this submission.

[23] LAC Guidelines (2014 edition) at 53.
[24] See Heritage New Zealand Pouhere Taonga Act 2014, s 9(2) and Local Government Act 2002, s 12(1).

Yours sincerely

Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee