LEGISLATION DESIGN AND ADVISORY COMMITTEE

28 April 2016

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

Dear Mr Simpson,

Kermadec Ocean Sanctuary 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 Kermadec Ocean Sanctuary 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, David Cochrane, Sean Kinsler, Matthew Smith and Jonathan Orpin, 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

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Dear Mr Simpson,

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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 on Process and Content of Legislation (2014 edition) (the **Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation conforms to accepted legal and constitutional principles. We focus on legislative design and the consistency of a Bill with fundamental legal and constitutional principles.

2. This submission draws attention to points where the Kermadec Ocean Sanctuary Bill is inconsistent with the Guidelines. In some cases, we suggest that the Bill might be amended to improve its overall quality and consistency with the Guidelines. In other cases, we suggest that the Committee should be satisfied that the Bill meets particular requirements of the Guidelines or that departure from them is justified.

3. Against this background we have endeavoured to make submissions that are helpful and we believe will lead to a better quality piece of legislation.

Ruling out compensation – Schedule 1, clause 1

New legislation should respect property rights

4. The Bill expressly provides that no compensation is payable for any loss or damage, or any adverse effect on a right or interest, (including, without limitation, to or on the value of quota or a right to fish) arising from the enactment or operation of the proposed Act.

5. We draw to the Committee's attention that the Guidelines provide that "[t]he Government should not take a person's property without good justification. A rigorously fair procedure is required and compensation should generally be paid. If compensation is not paid, there must be cogent policy justification (such as where the proceeds of crime or illegal goods are confiscated)."[1]

6. The RIS explains that compensation is explicitly ruled out on the grounds of sustainability, protection, and biodiversity.[2] We suggest that the Committee ought to satisfy itself that these policy objectives amount to "cogent policy justification" and that "a rigorously fair procedure" has been followed to rule out compensation completely.

Is ruling out compensation appropriate?

7. The RIS states that ruling out compensation in the Bill is consistent with previous decisions not to compensate for other measures taken to secure the long-term sustainability of marine biodiversity, such as establishing marine reserves. However, the RIS does not provide specific examples of where compensation has been ruled out in the context of sustainability, biodiversity, and protection.

8. The Subcommittee acknowledges the importance of protecting marine biodiversity and securing long-term sustainability. We note, however, that the RIS does not consider alternative options to the current proposal in the Bill. The failure to consider alternative options before the proposal was announced makes assessing the proportionality and appropriateness of ruling out compensation difficult to assess. The Guidelines provide that "[p]ublic consultation is key to ensuring that the Government has all the information it requires to make good law. … Public consultation is not required or possible in all cases. However, a failure to consult may result in valuable perspectives and information being overlooked and also risks unintended consequences. It may also result in a failure to identify alternative means of achieving the policy objective."[3]

[1] LAC Guidelines on Process and Content of Legislation (2014 edition) at 4.
[2] *Regulatory Impact Statement: Establishment of a Kermadec Ocean Sanctuary* (25 February 2016) at [47].
[3] LAC Guidelines (2014 edition) at 1.4.

The relationship of the no-compensation provision to other law

9. The Bill provides that the ruling out of compensation prevails over any inconsistent enactment or rule of law.[4]

10. The Guidelines provide that any conflict or interactions between new and existing legislation should be explicitly addressed in the new legislation: "the new legislation should make clear which provision shall prevail or how it is intended that the two provisions should operate together."[5] Further, Parliament should speak clearly if it wishes to override fundamental rights.[6]

11. While new statutory provisions often will directly or indirectly alter the provisions of other existing statutes, and the common law, there are limited examples in the statute book of provisions stated with such generality to prevail over both statute law and common law.

12. Examples of where this level of generality may be appropriate include the application of repealed offences in criminal proceedings[7]; the court's power to order production of a document for the purpose of determining whether any child or young person is in need care of protection; [8] and the settlement of Treaty of Waitangi claims.[9]

13. We suggest that the Committee might consider whether it might be appropriate to refer to specific inconsistent provisions, even on a "without limitation" basis, that is to expressly state what provisions and rights that Parliament thinks might otherwise have given rise to compensation.

Compensation provisions should be in the main body of the Bill

14. The Guidelines provide that the law must be clear and accessible to those who are required to use it.[10] The provision that rules out compensation is currently found in Schedule 1 of the Bill. The Subcommittee considers that ruling out compensation is a significant matter of policy and should be contained in the Bill itself. It is the Subcommittee's view that including provisions relating to compensation in the Schedule reduces clarity and accessibility.

[4] Schedule 1, clause 1(2).
[5] LAC Guidelines (2014 edition) at 2.2.
[6] *R v Pora* [2001] 2 NZLR 37 (CA) at 50 per Elias CJ and Tipping J. See also *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL).
[7] Crimes Act 1961, section 415.
[8] Children, Young Persons, and Their Families Act 1989, section 62.
[9] For example, Te Arawa Lakes Settlement Act 2006, section 15 and Ngāi Tahu Claims Settlement Act 1998, section 20.
[10] LAC Guidelines (2014 edition) at p 4 and 3.1.

The objective element of the defence for strict liability offences is too high – clause 41

15. To defend a prosecution for a strict liability offence under new section 134EA a defendant must prove that the act or omission was likely to result in less damage than would otherwise have occurred (new section 143EB(2)(a)(iii)).[11] The defendant must prove this in addition to other mandatory limbs of the defence.[12]

16. The Subcommittee acknowledges the desirability of including a high test to deter prohibited behavior and ensure that the sanctuary and marine environment is protected. However, the Subcommittee considers that including an objective test might be difficult for a defendant to prove. For example, if a vessel was sinking and dumped waste in an attempt to prevent sinking, how can a defendant prove the vessel would have sunk if the waste had not been dumped? The most the defendant will have is a reasonable belief at the time that the vessel would sink.

17. The alternative defence requiring a defendant to prove that the action taken resulted from an event beyond the defendant's control (such as natural disaster, mechanical failure, or sabotage) may be too narrow to be a suitable alternative in most situations if a defendant cannot prove the objective test under new section 143EB(2)(a)(iii).

18. We suggest that consideration be given to amending section 143EB(2)(a) by removing subsection (iii). Alternatively, and at the very least, subsection (iii) could be amended to read "was likely to result in less damage than <u>the defendant reasonably believed would likely</u> otherwise have occurred".

19. We note that the strict liability defences are based on sections 341 and 341A of the Resource Management Act 1991 and section 134E of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (**EEZ Act**). The RIS states that linking enforcement and offence provisions to existing legislation will allow for the existing expertise in other regimes to continue to be available and allow enforcement to use existing risk-based frameworks.[13] The Subcommittee does not consider that strict adherence to "precedents" necessarily should override creating appropriate provisions in new legislation.

There should be an appeals process for decisions on applications for authorisation for marine scientific research – clauses 13 – 22

20. The Bill does not provide for appeals from, or an internal review of, Environmental Protection Authority (**EPA**) decisions on authorisations for marine scientific research.

[11] New section 143EB(2)(a)(iii).
[12] New section 143EB(2)(a)(i)-(ii) and (iv). An alternative defence is also available under new section 143EB(2)(b).
[13] RIS at [128].

21. Generally, decisions made by public bodies or agencies should be subject to some form of review. The Guidelines state that "[t]he 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".[14]

22. Judicial review is available regardless of whether a statutory appeal or other complaint mechanism is provided for. However, the Guidelines provide that "judicial review should not be relied on as the sole process of challenge".[15]

23. We suggest that consideration be given to including either an internal review process or appeal process in the Bill, or ideally both in the Bill. On this point, we note that it is not clear why Part 4, Subpart 1 of the **EEZ Act** is not applied in the Bill. Subpart 1 provides for objections to certain EPA decisions and appeals to the High Court on questions of law. We suggest expressly applying Part 4, Subpart 1 if it is intended to apply. If no appeal or internal review process is intended, then we note that the Committee should be satisfied that this departure from the Guidelines is justified.

Kermadec Iwi Authorities impact on EPA decision-making process should be clarified – clauses 14 and 19

24. The Bill provides that an applicant must inform the Kermadec iwi authorities of the proposal and seek their views, and give the Kermadec iwi authorities a reasonable opportunity to provide those views before applying to the EPA for an authorisation for marine scientific research.[16] Applicants are required to detail any change made to proposals as a result of engagement with Kermadec iwi authorities under clause 14.

25. However, the Bill does not expressly provide that the EPA must take into account the views of the Kermadec iwi authorities when deciding whether to authorise an application for marine scientific research. Clause 19 provides that the EPA must authorise the application, unless the proposed research involves particular prohibited activities and it considers the activities are not necessary to achieve the purpose of the research.

26. The Subcommittee has found it difficult to understand how the views of the Kermadec iwi authorities will necessarily flow through into the EPA's decision-making when there are limited grounds for declining an application and no provision requiring the EPA to take the views of the Kermadec iwi authorities into account. The approach also does not appear to reflect the policy

[14] LAC Guidelines (2014 edition) at 25.
[15] LAC Guidelines (2014 edition) at 25.2.
[16] Clause 14.

intention as stated in the RIS: "The EPA will be required to take any information provided by the iwi to the applicant into account."[17]

27. The Guidelines provide that legislation should specify "whether the exercise of [a] power requires the taking into account or exclusion of certain matters (those matters should be identified, and it should be explicit whether or not those matters make up an exhaustive list)."[18]

28. It may be implicit in the proposed provisions that the EPA will take into account the views of Kermadec iwi authorities because their views must be included in an application. We suggest that consideration be given to making this requirement explicit, to ensure that the views of the Kermadec iwi authorities are taken into account. The Bill could be amended by adding a new subsection (c) to clause 17 that reads: "may seek advice from the Kermadec iwi authorities". Additionally, the Bill could include a new clause setting out the factors the EPA must have regard to, including the views of the Kermadec iwi authorities. Similar provisions are provided in section 104 of the Resource Management Act 1991 and section 59 of the EEZ Act. For such a provision to flow through into the EPA's decision-making, clause 19 would also need to include a provision allowing the EPA to decline an application based on the views expressed by the Kermadec iwi authorities.

Conclusion

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

Yours sincerely,

Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee

[17] RIS at [119].
[18] LAC Guidelines (2014 edition) at 16.5.