



LEGISLATION DESIGN AND ADVISORY COMMITTEE

10 December 2017

Deborah Russell MP
Environment Committee
Parliament Buildings
Wellington

Dear Ms Russell

Christ Church Cathedral Reinstatement Bill

1. The Legislation Design and Advisory Committee (**LDAC**) was established by Cabinet in June 2015 to improve the quality and effectiveness of legislation. LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It comprises senior officials and advisers drawn from a range of government departments. It is responsible for the *LAC Guidelines on Process and Content of Legislation* (2014 edition), which have been adopted by Cabinet.
2. In particular, 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 LDAC, referred to in paragraph 2.b above, is comprised of independent advisers appointed by the Attorney-General drawn from private legal practice and from university law schools. Under LDAC's mandate, that External Subcommittee is empowered to review and make submissions on Bills as introduced, usually those that were not reviewed by LDAC prior to their introduction.
4. In relation to this Bill, the urgency with which it was introduced meant that LDAC had only limited opportunity for input, and only after a draft Bill had been completed. For that reason, it was agreed that the External Committee could appropriately review and make a submission on the Bill.

5. The External Subcommittee's submission is attached. Thank you for taking the time to consider it.

Yours sincerely



Paul Rishworth QC

Chairperson

Legislation Design and Advisory Committee



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Christ Church Cathedral Reinstatement Bill

1. The Legislation Design and Advisory External Subcommittee (the **Subcommittee**) has been given a mandate by Cabinet to review introduced Bills against the *LAC Guidelines on Process and Content of Legislation* (2014 edition) (the **Guidelines**). The Guidelines were adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with those principles.
2. The Subcommittee recognises the cultural importance of the Christ Church Cathedral and understands the desire to see work on the cathedral progressed. However, we have concerns regarding the degree of encroachment on established legal principles and existing legislation. We recognise there has been effort made to achieve a balance. We consider that the objectives of swift reinstatement and meeting relevant legal and constitutional principles can be accommodated in a more balanced way.

The effect of the Bill, if passed

3. This Bill is extraordinary in its effect, in enabling a private entity to be exempt from a range of significant legislation, which is directed at:
 - (a) good quality environmental decisions following democratic input (the Resource Management Act 1991 (the **RMA**)), and
 - (b) heritage protection (New Zealand Heritage Pouhere Taonga Act 2014).

4. The processes and standards in those Acts help ensure a good quality outcome. Thus, the requirements they contain are of substantive value. The issue, we see, is really whether those processes can be circumscribed or, put more simply, made faster. So seen, the solution may be partially legislative and partially administrative (ie, in the hands of those responsible for administration of relevant Acts).
5. It is in this light that we make the below submission.

Summary

6. In summary, our view is that there has not been a showing of sufficient urgency to enact this legislation now and with such a shortened process. It would be much more preferable to wait until there is a detailed proposal so as to place a Bill before Parliament that is tailored to the specific consents required or to allow Parliament to vote on a particular streamlined process for granting consents. Either option would avoid the need to delegate to the executive wide ranging powers to amend or override the listed enactments (and to add others). It is not made clear in the Regulatory Impact Statement why there is a need for such urgency.

Extraordinary powers should be given only when there is no alternative

7. We believe that the Bill needs considerable work in identifying what protections and processes may be overridden, and regulating what might replace them. This would allow alternatives to be more fully considered and any extraordinary powers to be narrowly tailored.
8. The policy development that underlies this Bill, insofar as it is apparent from the Regulatory Impact Statement, does not appear to meet the Guidelines.¹ The Select Committee is invited to ask officials to identify which provisions of the scheduled Acts are proposed to be overridden, and why. Those provisions should then be expressly referred to in the Bill, along with the proposed overrides, and explanations provided as to why the overrides are appropriate. Parliament should then be given the opportunity to vote directly on those overrides.
9. Relevantly, when overriding legislation, implicitly dispensed with are a broad range of policies and standards made reflecting that legislation, often built up over years and through hard earned experience, and court decisions under relevant legislation often directed at ensuring it functions as it should. The consequences of overriding may be far reaching, even if confined to one building.

¹ In particular, the principles that relate to considering alternatives, respecting the basic constitutional principles of New Zealand law, and justifying the use of particular legislative tools: see *LAC Guidelines on Process and Content of Legislation* (2014 edition) at 1.2, 3.1, and 13.5.

Two possible alternatives

10. As discussed below at paragraph 15, there is precedent for a Bill that sets out the specific consents required to enable a project to proceed. While this approach would bypass normal process under the RMA, it would allow Parliament to determine for itself whether the consents are appropriate and then to override its own Acts as necessary.
11. Alternatively, if a concern is that the project may be delayed by citizens exercising their rights under the RMA (as is suggested in the Regulatory Impact Statement), a proper course would be for Parliament to consider for itself how those rights ought to be curtailed by voting on a specific streamlined process. We note that the potential for public input that currently exists is the result of a 2016 decision made by a panel of five, led by a former High Court Judge, which was arrived at following a democratic resource management process.²

This is not an emergency policy-making situation and the Bill may have a precedent effect

12. We acknowledge the Bill seeks to introduce safeguards, but Parliament ought to be the ultimate safeguard of protections given by statutes. It is Parliament who passes them and Parliament which should decide when to abrogate them, when knowing the full implications of so doing. Enabling this to be done in a delegated way is not the same.
13. We do not agree that the precedent effect is immaterial. Once use of such provisions extends to simply difficult issues, as opposed to emergency situations, an important line has been crossed.
14. There have been five other Bills containing broad exemptions passed in the last seven years.³ The circumstances of this Bill are not similar. Four of those statutes empowered emergency remedies. Exigent circumstances meant that not all the possible modifications to the law were knowable when the Bills were passed, and attention was properly on dealing with the emergencies at hand.
15. The fifth example, the Pukeahu Act, was not an emergency, but in that case a detailed proposal of what was intended was put properly before Parliament. This can be differentiated from the current Bill. Here there is no detailed proposal, and in fact the lack of a detailed proposal is given by the Regulatory Impact Statement as a reason for conferring the proposed powers.
16. In our view it is preferable that greater certainty be achieved before passing this Bill, or a modification thereof, especially given emergency circumstances do not exist.

² See paragraphs 189 to 244 of the Independent Hearings Panel, Decision 45 (Topic 9.3—Historic Heritage), 30 September 2016 (a copy is **attached**).

³ Canterbury Earthquake Response and Recovery Act 2010, Canterbury Earthquake Recovery Act 2011, National War Memorial Park (Pukeahu) Empowering Act 2012, Hurunui/Kaikōura Earthquakes Emergency Relief Act 2016, Hurunui/Kaikōura Earthquakes Recovery Act 2016.

Overly broad delegated law-making powers

17. The Bill gives the executive the power to override any scheduled enactment. As introduced, the scheduled enactments are the RMA and the New Zealand Heritage Pouhere Taonga Act 2014 (and any plans or other instruments made under them). However, the Bill allows for other Acts to be specified as well. For example, might legislation directed at health and safety be added?
18. Both the power to override specified enactments and the power to specify additional enactments are Henry VIII powers, enabling delegated, executive-made, legislation to override the law of Parliament. The Guidelines state that Henry VIII clauses should only be used rarely, if ever, and, if they are used, must be drafted “in the most limited terms possible”.⁴
19. While the Bill contains some procedural safeguards for when a Henry VIII power may be exercised, the main substantive test seems to be essentially whether the Minister is satisfied that doing so would be a necessary *or desirable* improvement on the normal rules and processes. Together with the broad scope of the Henry VIII powers, this test enables a particularly significant transfer of power from Parliament to the executive.
20. We consider that the extent of the transfer is unjustified. The extent, if any, to which law-making authority is delegated could be reduced while still achieving the underlying aims of the Bill, as noted in paragraphs 10 and 11. It is not clear why the process cannot be slowed to enable a more targeted Bill to be developed.
21. Also, given the intention expressed in the Regulatory Impact Statement is to affect legal rights that citizens might otherwise have, we submit that the Bill ought to require that any changes to the scheduled Acts (as contemplated by cl 18) maintain a significant opportunity for citizens to be heard.

Inappropriate restriction on judicial review

22. The principle reflected in the Guidelines is that legislation should not restrict the right to apply for judicial review.⁵ Judicial review is important because it is the means by which the courts fulfil their constitutional role of ensuring that public powers are exercised in accordance with the law.
23. The Bill limits the right to seek judicial review by requiring any application for review to be made within 28 days if it relates to the exercise of a Henry VIII power. Although the High Court may extend the deadline, a person must apply for an extension before the end of the 28-day period. The Subcommittee understands the desire for certainty and recognises that the current clause is much preferable to a total ouster. However, we are not convinced that the restrictions are a proportionate

⁴ *LAC Guidelines on Process and Content of Legislation* (2014 edition) at 13.5.

⁵ *Ibid* at 25.1.

response to the perceived risk, and submit that at the very least the courts be given a general discretion to allow late claims. We note that judicial review is a discretionary remedy, and that undue delay tells against the courts granting a remedy.

Purpose provision

24. Various of these issues can be seen as stemming from the purpose of the Bill. It could be approached in a different way, focussing on timeliness. For example, it might be directed at facilitating swifter consultation and decision-making processes than would otherwise be the case under existing legislation, in order to facilitate the prompt reinstatement of the Christ Church Cathedral.

Procedural concerns

25. The Subcommittee notes that the Bill was introduced on Monday 4 December, received its first reading the next day, and that only three days have been allowed for lodging written submissions. It is unfortunate that more time has not been allowed for submitters and the Select Committee to consider the Bill, especially given the significant issues it raises.
26. Had more time been available, this written submission would have set out more substantive suggestions for addressing the Subcommittee's concerns. But, in the circumstances, the submission has had to be limited to briefly explaining those concerns and noting possible options for improvement.
27. The External Subcommittee requests to be heard by the Select Committee.

Yours sincerely



Prof Geoff McLay

Chairperson

Legislation Design and Advisory External Subcommittee

Attachment: Independent Hearings Panel, Decision 45 (Topic 9.3—Historic Heritage), 30 September 2016.