



LEGISLATION ADVISORY COMMITTEE

PO Box 180
Wellington 6401

Phone 04 494 9897

Fax 04 494 9859

www.justice.govt.nz/lac

Email sam.miles@justice.govt.nz

10 September 2012

Chair
Transport and Industrial Relations Select Committee
Parliament Buildings
P O Box 18 041
WELLINGTON 6160

Dear *Mr Bennett*

**NATIONAL WAR MEMORIAL PARK (PUKEHAHU) EMPOWERING BILL
35/1**

Introduction

1. The Legislation Advisory Committee was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.
2. The terms of reference of the LAC include:
 - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
 - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

Context

3. The purpose of the Bill is to expedite the building of the National War Memorial Park adjacent to the existing War Memorial in Buckle Street,

Wellington by April 2015, in time for the centenary of the Gallipoli landings of World War I.

4. This is very unusual, expedited legislation. The legislation raises two concerns, both going to the principle of the rule of law.

Displacement of normal planning processes

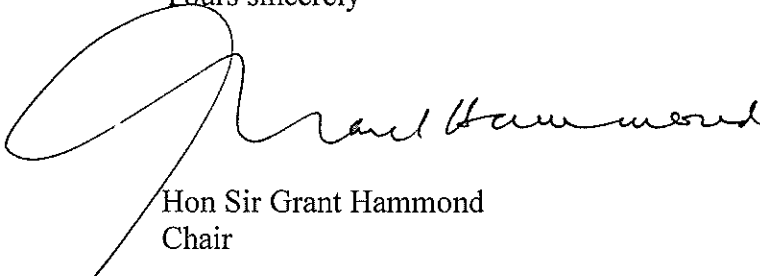
5. The legislation replaces normal planning processes and gives authorisation for construction of a particular plan because, according to the RIS, this is the only way the park as envisaged can be in place by the stated date.
6. The schedules to the Bill specify what is consented and the conditions, in such detail that they in effect set out the design and construction plan for the Memorial Park.
7. Although the Bill grants authorisations and rights directly, it makes them subject to the conditions normally associated with such authorisations and rights. Some conditions require plans or documents to be produced, and the Bill includes a process for independently certifying that these documents satisfy the requirements of the conditions. Rights to compensation under the Public Works Act 1981 are reserved.
8. Essentially then, this is a case of the administration fast tracking a particular project through all the hurdles that are in place for ordinary citizens who want to build something. It is obviously well intentioned. But the number of “good causes” for which government may wish to use its legislative power is unlimited, and citizens can be adversely affected by apparently “worthy” cases as well as less benign ones.
9. The issues involved in proceeding in this manner are not black and white. The fact that something more extensive has not been done until now to commemorate World War I (where, ironically, those who lost their lives did so precisely to uphold the rule of law) does not *have* to mean that something cannot be put in place by 2015, even if it takes legislation to do it. And it is correct that giving the project a relatively easy path through the planning process may still be able to be done in a way that gives most of the protections and comfort that the orthodox procedure would produce. It just does it differently. It has been noted by the highest judicial authority (for instance, Lord Bingham when Lord Chief Justice of England) it becomes a question of the balance struck by the act. Nevertheless the RMA is the law of this country and not every project can get favoured treatment as in the case of sporting events, earthquake recovery, and dam building.
10. This Bill is an awkward precedent and the Committee is troubled that the more this sort of device is resorted to, the easier it seems to do it again. Even seeking to elucidate the principles evolved in the present case is an important thing because itself would form a limiting principle. It is essential to emphasise that this is about a national public monument and not for private advantage.

11. We do not think that this aspect of the bill can be categorised as distinctly infringing the rule of law, particularly because what is granted is granted by Parliament itself. If it were any other institution, our view would very likely be different. But a technique of this kind should be used only with extreme caution.

The dispensing power

12. Clause 24 of the Bill creates what could be called a “dispensing power”. In essence it provides that if something has been overlooked in the consents and associated therewith granted by the bill, then those things can be addressed by the relevant ministers through Orders in Council.
13. In our view this is very troublesome. First, it is not clear to us why the dispensing power is necessary at all. With respect, officials should be asked to carefully explain to the Committee why this “superadded” process is necessary? We have not been able to identify “missing links”, but perhaps officials can.
14. The second aspect of the dispensing power is that it can be exercised by individual ministers, as a matter of discretion. It is a clear part of the rule of law principle that questions of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion. For instance, Parliament itself could pass amending legislation to repair that which had not been approved, in the first instance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Grant Hammond', written in a cursive style. The signature is positioned above the typed name and title.

Hon Sir Grant Hammond
Chair