



LEGISLATION ADVISORY COMMITTEE

PO Box 180
Wellington
6401

Phone 04 978 7057

Fax 04 494 9854

www.justice.govt.nz/lac

Email gina.smith@justice.govt.nz

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The Chair
Local Government and Environment Committee
Parliament Buildings
PO Box 18041
WELLINGTON 6160

**THE EXCLUSIVE ECONOMIC ZONE AND CONTINENTAL SHELF
(ENVIRONMENTAL EFFECTS) BILL**

Introduction

1. This submission is made by the Legislation Advisory Committee (LAC).
2. The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
3. The terms of reference for the LAC include:
 - a. 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:
 - b. To help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative

proposals confirm with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

4. The LAC supports this Bill but wishes to draw the Committee's attention to certain aspects of this Bill on which consideration should be given to amendments to better ensure that this Bill meets the provisions of the LAC Guidelines. The focus areas of this submission are:
 - a. whether clauses 12 and 13 of this Bill as currently drafted achieve the purpose of the Bill as stated in clause 10;
 - b. whether a new subclause (3) should be added to clause 30 to provide that regulations made be within the purpose and principles of Subpart 2 of Part 1 of the Bill, and whether the regulation-making powers generally are satisfactory;
 - c. the addition of more detail on consultation into clause 32 of the Bill;
 - d. the relationship between this Bill and the United Nations Convention on the Law of the Sea 1982;
 - e. the provisions of the Bill relating to existing use rights and transition; and
 - f. the relationship of this Bill with the Marine Reserves Bill.

The Bill and its purpose

5. The Bill is intended to supplement the existing statutory management regimes of New Zealand's Exclusive Economic Zone (EEZ) and extended continental shelf (ECS) by providing for the regulation of activities undertaken that do not currently have their environmental effects regulated.
6. Clause 10 sets out that in doing so the purpose of the Bill is to seek "*to achieve a balance between the protection of the environment and economic development in relation to activities in the exclusive economic zone and on the continental shelf*". The LAC understands this to give effect to Government policy.

Clauses 12 and 13 and the purpose of the Bill

7. As has been stated the purpose of the Bill is to, when regulating activities, achieve a balance between environmental protection and economic development. The LAC has no issue with such a balance being part of the purpose of the Bill.
8. However, it is submitted that the Committee should carefully consider whether the appropriate framework for implementation of such a balance in decision-making under the Bill is in fact correctly established. That is particularly important in light of the LAC Guidelines' emphasis on ensuring that legislation meets its policy objectives.
9. The very broad wording of clause 12 is of concern as it gives little guidance to the decision-maker applying the clause as to how to achieve the balance. It is difficult for a decision maker to weigh broadly expressed considerations, particularly those in paragraphs (a) to (e), which when applied individually may lead to opposing conclusions as to the decision to be made. In these circumstances much will depend on the particular weight the decision maker or makers choose to place on the particular consideration. For

an example, a decision maker who is particularly concerned about the economic wellbeing of New Zealand may place much greater weight on that consideration than any other. On the other hand, a decision maker who is more concerned about adverse environmental effects will be inclined to place much more weight on the consideration in clause 12(a) than the economic wellbeing of New Zealand. Both approaches, on the face of the Bill, appear to be lawful and reasonable, which illustrates the point in its present form that the guidance offered by clause 12 is not particularly helpful. This does not seem to be desirable and also points to the likelihood of lengthy periods of litigation and disagreement as to the practical application of the principles in clause 12.

10. On one view, clause 12 appears to be heavily weighted toward environmental matters. In contrast; the ‘economic development’ aspect of the balancing is dealt with by having as a matter to be considered the rather tepid “the economic well-being of New Zealand”. On that view, it may be preferable in order to ensure that the purpose is best achieved, for that wording to be replaced by a clearer direction such as the “promotion of New Zealand’s economic prosperity” or “maximisation of New Zealand’s economic well-being”.
11. More generally it would be helpful for the Committee to consider and seek advice from the Ministry for the Environment on whether the utility of clause 12 could be improved in order to avoid the difficulties described in paragraph 9.
12. Clause 13 is critical to the operation of the Bill. Amendments to clause 13 might also be useful in ensuring that the effect of the Bill aligns with its purpose. Clause 13 sets out that in achieving the purpose of the Bill, a person performing functions or duties or exercising powers under it that affect the environment is required to make full use of information and resources, base decisions on the best available information, and take into account any uncertainty or inadequacy in the information available. If the information is unsuitable or inadequate the person must favour caution and environmental protection.
13. If favouring caution and environmental protection means that an activity is likely to become prohibited or will not be given a marine consent, the person must first consider whether taking an adaptive management approach will allow the activity to be undertaken.
14. The information principles as drafted favour environmental protection; to the detriment of the balancing exercise set out in clause 10. The wording of the clause should be considered in that light. By way of example, in subclause (3) consideration of any adaptive management approach should look at whether or not this would allow the activity to be undertaken *economically*, rather than simply undertaken. Such an amendment would align clause 13 more closely with the purpose of the Bill.

Clause 30 of the Bill

15. The LAC is concerned that the quality of the draft legislation available to submitters is compromised by the unavailability of the regulations to be promulgated under it, or at the very least some guidance as to how those regulations will be approached. Much of the important detail and key decisions affecting interested parties will in fact be contained in the regulations. Combined with the breadth of the regulation-making power itself, the result is less than satisfactory from a law-making perspective.
16. Clause 30 of the Bill provides a broad power to make regulations relating to:
- a. the provisions of information and keeping of records;
 - b. forms relating to enforcement orders and the appointment of enforcement officers;
 - c. charges to recover costs; and
 - d. other matters.
17. Given the wide nature of the regulation-making power, it is important that the purpose of the power be clearly articulated. That will ensure that only necessary regulations are made pursuant to the clause. To that end a new subclause(3) should be added to provide that:

Regulations made pursuant to this section must be within the purposes and principles of Subpart 2 of Part 1 of this Act.

18. The LAC suggests that the Select Committee review carefully the list of areas that may be classified under regulation 28, particularly to check that there is not duplication or cutting across other existing or draft legislation.. We also query what is meant in clause 28(1)(d) by the words “competition” or “conflict”.
19. No guidance is provided in clause 29 as to how or why particular activities will be classified as prohibited or discretionary or permitted. The LAC recommends that some criteria or guidelines be included

Clause 32 of the Bill

20. Clause 32 requires, except in cases of minor amendments or alterations, a consultation process to occur before regulations are made under either clause 27 or 30 of the Bill.
21. The regulations that are to be made under those clauses will form an essential part of the statutory regime for the environmental management regime for the EEZ and ECS. For example, if an activity is described as a prohibited activity in the regulations then, under clause 38, a person cannot apply for a marine consent for a prohibited activity, or undertake a prohibited activity.
22. Given the importance of the regulations to the environmental management regime it is important that the consultation procedure followed be robust. At present clause 32(2) gives the Minister the ability to determine the consultation procedure to be followed. The

LAC recommends that the Select Committee consider whether that arrangement is appropriate, or whether the clause itself should detail the consultation procedure to be followed.

23. In particular, the LAC recommends that further detail be added to clause 32 to allow for a public pre-notification process. By way of example, it would be appropriate to provide for a minimum one month period of public notification to ensure that submissions can be made and the information is publicly available. That also prevents targeted consultation, which would be inappropriate given the importance of the regulations.

Relationship between the Bill and the United Nations Convention on the Law of the Sea 1982

24. New Zealand is a signatory to the United Nations Convention on the Law of the Sea 1982 (“UNCLOS”). That convention covers, amongst other matters, the international regulation of exclusive economic zones and continental shelves.
25. The Bill as drafted recognises the relationship between the subject matter of the Bill and the subject matter of UNCLOS through clause 11, which requires the Bill to be interpreted, and all persons acting under it to act, consistently with New Zealand’s obligations under UNCLOS.
26. The LAC considers that, given the relationship between the subject matter of the Bill and the subject matter of UNCLOS, it is worthwhile to consider whether the Bill could address matters required by UNCLOS but without giving UNCLOS independent operating effect.
27. The LAC therefore recommends that the Committee ask the Ministry for the Environment for advice as to whether the Bill could address matters required by UNCLOS but without specifically giving UNCLOS independent operating effect. The Committee should also satisfy itself that there is sufficient certainty and agreement as to the meaning of the UNCLOS provisions to justify its elevation to the status of an interpretation tool for the purposes of this legislation. UNCLOS, being an international convention, may fall in future to be interpreted in a manner influenced or guided by other signatory states, in a manner beyond New Zealand’s control.

Existing use rights and transitional provisions

28. Clauses 16, 18, 150 and 151 of the Bill provide for the transition of existing use rights to the new regime. However, the LAC is concerned that the provisions may not adequately protect the interests of those in the resource sector that have interests in the EEZ or ECS, and that this is capable of being an intrusion on personal property rights and in breach of the rule of law.
29. By way of example, clause 16 of the Bill protects certain existing mining activities, but the list is very restricted. That can be contrasted with the broader approach taken in the

Marine and Coastal Area (Takutai Moana) Act 2011, which extends to protecting extensions and subsequent permits. It may be that, in achieving the purpose of the Bill of balancing environmental and economic interests, the list of existing mining activities should be reviewed.

30. Clause 17 of the Bill provides for a transition period where regulations affect an existing activity such that it requires a marine consent to continue. Clause 150 of the Bill provides for a transition period after the Bill comes into force for discretionary activities. In both cases the undertakers of affected activities have six months to apply for the necessary marine consent; once an application is made then the existing activity can continue until such time as the application is determined.
31. Given that the situations contemplated by clauses 17 and 150 may involve interference with pre-existing property rights it is important that sufficient protection is given the holders of those rights. The six month transition period may not be sufficient, particularly given that the requirements for consent applications are unknown. The LAC suggests that the Committee consider whether a more realistic transition period, of perhaps two years, would not be more appropriate.

Marine Reserves Bill

32. The LAC notes the concerns of the Parliamentary Commissioner for the Environment over potential cross-over with the Marine Reserves Bill and would support the Select Committee investigating this to ensure that the any duplication or inconsistency is avoided.

Conclusion

33. The Bill should be supported, with consideration given to amendments.
34. The LAC does not wish to be heard on its submission.



Jeremy Johnson
Member, Legislation Advisory Committee