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Transport and Industrial Relations Committee
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Marine Legislation Bill 2012

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 of 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 conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
4. We refer to our letter of 1 October 2012 in which we asked if we may provide a late submission on this Bill after the LAC's meeting on Wednesday 31 October. The LAC has considered this Bill and wishes to make the following submissions.

Burials at Sea

5. The Bill provides for the regulation of the disposal of human remains in the exclusive economic zone.
6. Clause 96 of the Bill inserts a new s 24H into the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. That section provides that a person may not dispose of human remains in the exclusive economic zone unless the disposal complies with regulations made under that Act and the proposed disposal is certified by the Environmental Protection Authority as complying with the regulations.
7. In addition, it appears that the disposal of human remains is already regulated by section 261 of the Maritime Transport Act 1993. Under that section, “waste or other matter” may only be dumped in the exclusive economic zone in accordance with a permit issued by the Director of Maritime New Zealand. Human remains would fall within the definition of “waste and other matter”.
8. The LAC questions whether the duplication of processes in the Bill, and the duplication of permits/certificates across the two Acts is justified by the potential harm envisaged. We also suggest that this regulation for the exclusive economic zone is inconsistent with the equivalent regulation within New Zealand territorial waters. We recommend that the Committee consider whether the new s24H is necessary.
9. We also bring to your attention that the Law Commission is currently working on a review of the Burial and Cremation Act 1964. The disposal of human remains in the exclusive economic zone and New Zealand’s compliance with its international obligations in that regard, may be better dealt with under that review, and be better contained in resulting legislation.

Duties of regional councils, harbourmasters and port operators

10. The Bill sets out specific duties for regional councils, harbourmasters and port operators without any provisions for the enforcement of those duties.
11. The new Part 3A of the Maritime Transport Act 1994 (MTA) (inserted by clause 6), relates to local regulation of maritime activities. New sections 33C, 33E and 33N in that Part impose broad duties on regional councils, harbourmasters and port operators respectively in relation to maritime safety. There are no provisions for enforcing these duties. In the absence of an enforcement provision, the inclusion of these duties may create confusion in terms of their relationship to the other powers and duties in the Part.
12. We recommend that the purpose of these duties in Part 3A of the MTA be clarified.

Power of harbourmaster to enter and remain on any land or property

13. The Bill provides the harbourmaster with a power to enter and remain on land or property. That power is so broad it may be an unreasonable intrusion on an individual’s interests.

14. The new s33F (1)(b) of the MTA (clause 6 of the Bill) gives harbourmasters a power to enter and remain on any land or property for the purpose of ensuring navigation safety, or enforcing navigation bylaws, regulations or rules. The LAC Guidelines require that a proposed public power should only be conferred if it is necessary to achieve a purpose of the Act concerned.¹ While the power of entry in s33F (1)(b) can only be exercised to achieve the prescribed purpose, the purposes are so broad that the power of entry could not be justified in every case. For example “ensuring navigational safety” would include routine maintenance on navigation aids placed on private land on hills surrounding harbours. Such powers at the very least should be subject to normal notice requirements.
15. We recommend that s33F(1)(b) be amended to more tightly constrain the exercise of this power.

Power of the Director of Maritime New Zealand to prohibit or impose conditions on the use or operation of any port or port facility

16. The Bill provides a power in the Director of Maritime New Zealand that is so broad it may unreasonably limit the use or operation of a port or port facility.
17. New Part 3A of the MTA (clause 6 of the Bill) relates to local regulation of maritime activities. New s33P empowers the Director of Maritime New Zealand to prohibit or impose conditions on the use or operation of any port or port facility when he or she reasonably believes that one of a range of safety concerns is present at a particular port. This is a potentially substantial power that may have significant impact on the port or port facility. Unless provided for emergency situations, such prohibitions or conditions would normally be the subject of delegated legislation with appropriate checks and balances on the making of those requirements.
18. We recommend that s33P be amended so that the power can only be exercised in emergency situations.

Offence of causing unnecessary danger or risk

19. The Bill provides a safety offence that to some extent duplicates offences already found in the Health and Safety in Employment Amendment Act 2002 (HSEA).
20. New section 33Q of the MTA (clause 6 of the Bill) provides that it is an offence to operate, maintain, or service a port or port facility in a manner that causes unnecessary danger or risk to any ship, person, or property. A similar provision is provided in s65 of the MTA in respect of any ship or maritime product.
21. The HSEA creates duties on employers in relation to the safety of employees while at work. Those duties extend to ensuring that other people are not harmed by employees while they are working. While new s33Q (and existing s65 of the MTA) have a broader ambit in that they cover danger or risk to property as well as people, it is likely that in relation to employees at ports or port facilities, there will be a

¹ Legislation Advisory Committee Guidelines, para 8.1.1

duplication of requirements.

22. We recommend that the obligations under s33Q (and s65 of the MTA) be re-examined to ensure that any duplication of obligation is removed as much as possible.

Delegation of bylaw making powers to port operators

23. The Bill (perhaps inadvertently) provides port operators with delegated bylaw making powers. Port operators do not have sufficient public accountability to exercise such powers.
24. New s33S(1) of the MTA (clause 6 of the Bill) permits a regional council to transfer its powers under new Part 3A to another public authority or a port operator, with the specific exception that it cannot transfer its bylaw making power under s33M to a port operator. However, s 33S(2) empowers a public authority to delegate any of those transferred powers to a port operator. Consequently, a port operator may receive a delegated bylaw making power from a public authority to which it was transferred.
25. The Legislative Advisory Committee Guidelines state that three matters should be considered when deciding who to delegate a legislative power to:²
- the importance of the power
 - the relevant expertise of the lawmaker
 - the controls over the exercise of the power.
- The purposes of the bylaws in s33M are mostly technical matters (eg the placing of moorings, the wearing of life jackets), but they also extend to broader matters (eg the regulation and control of ships, the reservation of waters for the use of specified people or ships). In some cases, port operators are companies operating with commercial imperatives. Some port operators are NZX listed companies, others may be private operators. We suggest that the exercise of a bylaw making power by port operators is unjustified because port operators' commercial incentives and lack of public accountability result in an insufficient control over the exercise of the power.
26. We recommend that s33S(2) be amended to exclude the power to make bylaws under section 33M.
27. In addition, new section 33S(3) applies section 17(3) to (6) of the LGA 2002 to transfers from regional councils to public authorities. While section 17(3) might be able to be adapted to apply to public authorities that are not local authorities, it is not at all clear whether and to what extent, or with what implied amendments, section 17(4) and (5) (and therefore (6)) would apply. If a regime is needed then it probably needs to be set out in full. Section 17 really only works for transfers between local authorities.
28. We recommend that s33S(3) be amended to make it more suitable for application to "public authorities" as they are defined in this Part.

² Legislation Advisory Committee Guidelines, para 10.3.3

New rule making power in the Governor General

29. The Bill provides a new rule-making power in the Governor-General with fewer checks and balances than the existing rule-making power in the Minister. It is not clear from the Bill the circumstances in which that new power would be exercised.
30. Under new s36A of the MTA (clause 9 of the Bill) the Governor-General may, on the recommendation of the Minister, make maritime rules for any purpose for which the Minister may make maritime rules. This new method is not subject to the requirement to publish notice of the intention to make a rule in the Gazette and other media, nor to give interested persons a reasonable time to make submissions, as is the case with the Minister's rule-making power. However, they are still subject to a requirement to consult people that the Minister considers appropriate (s446 and new s446A). While this new power could make the rule making process quicker, it is not clear from the Bill what the purpose of this new power is and whether the more limited checks and balances on the power are justified.
31. We recommend that consideration be given to clarifying the respective roles of the Minister and the Governor-General.

Rights of appeal and review

32. The LAC guidelines provide that where possible, legislation should explicitly state the scope of any right of appeal.
33. The new s33P of the MTA (clause 6) provides a right of appeal to the District Court in respect of the Director's decision to prohibit or impose conditions on port operations. It provides no further guidance on the scope of that right.
34. We recommend that the select committee consider whether the nature of decisions under 33P are such that it is appropriate that there be both an appeal as to fact, as well as to law, or whether s33P be amended to limit the right of appeal to questions of law. We note that all of the numerous rights of appeal in the MTA are similarly drafted without further guidance. We suggest that an examination of those appeal rights may be warranted also.
35. The LAC does not wish to be heard in support of the submission.



Sir Grant Hammond
Chair
Legislation Advisory Committee

THE STATE OF TEXAS, COUNTY OF DALLAS.

I, the undersigned, a Notary Public in and for the State of Texas, do hereby certify that the within and foregoing instrument is a true and correct copy of the original instrument filed for record in my office on this 1st day of May, 1901.

Given under my hand and the seal of my office at Dallas, Texas, this 1st day of May, 1901.

Notary Public in and for the State of Texas.

Witness my hand and the seal of my office at Dallas, Texas, this 1st day of May, 1901.

Notary Public in and for the State of Texas.

Attest my hand and the seal of my office at Dallas, Texas, this 1st day of May, 1901.

Notary Public in and for the State of Texas.

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