LEGISLATION ADVISORY COMMITTEE
PO Box 180
Wellington
6401

Phone 04 494 9785
Fax 04 494 9859
www.justice.govt.nz/lac
Email Sarah.Agnew@justice.govt.nz

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The Chair
Primary Production Select Committee
Parliament Buildings
P O Box 18041
Wellington 6160

AQUACULTURE LEGISLATION AMENDMENT BILL

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.

Introduction

4 In relation to this Bill the LAC is mainly concerned that the legislation is clear and accessible to the wider public involved with aquaculture development, and that there are sufficient safeguards against the possible unreasonable exercise of new powers.

Accessibility

5 By amending four acts - the Fisheries Act 1983, the Resource Management Act 1991, the Maori Commercial Claims Settlement Act 2004 and the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004 – this bill is inevitably complex and technical. Understanding the new framework requires very careful cross-referencing between the four acts involved. The legislation and its policy purpose of attracting investment for aquaculture are of vital interest to a wide range of people, including marine farmers, investors, local authorities, government officials, local communities and environmental groups. The RIS makes a preliminary estimate of 5 years to work through local transition issues.

6 In this circumstance the Committee considers that accessibility of the legislation to lay readers is an important consideration, and **suggests that understanding would be assisted by an outline or diagram of the structure of the legislation and of the roles and responsibilities of the various agencies involved.** LAC notes that the useful summary table at the front of the Aquaculture Reform Act 2004, which lists the provisions according to the categories and sequence in which they are likely to occur in practice, is repealed but not replaced.

Appeal Rights

7 The newly created position of Minister of Aquaculture is given several new powers, such as ability to suspend receipt of applications for coastal aquaculture permits and direct applications to be processed together, to be exercised in consultation with consent authorities. The Minister may also recommend regulations that amend coastal plans, after consultation with the Minister of Conservation among others. The Minister of Conservation has various powers, some carried over from the 2004 Act, and in particular can approve an allocation tool to manage high or competing demand, by Gazette notice, in consultation with the Minister of Aquaculture.

8 The effect of these regulatory powers is that the two Ministers can manage aquaculture expansion by regulation and respond to initiatives and circumstances swiftly, particularly in relation to high demand for space.

9 A ministerial decision to amend coastal plans by regulation (clause 96) would potentially overrule a Council’s usual planning processes including the option of a merit appeal to the Environment Court. The Minister’s power to do this has several qualifications, including the requirement to be satisfied that the matters in the proposed regulations are of regional or national significance.

10 The existing right to appeal to the High Court against an aquaculture decision of the Chief Executive of Fisheries, (section 186I Fisheries Act 1983) is repealed by clause 37. The effect of the repeal is that there will be no appeal available on the merits against a determination or reservation by the CE "that the aquaculture activities authorised by a coastal permit will not have an undue adverse effect on fishing". The technical assessment carried out by officials will no longer be able to be challenged by other experts. Potential appellants to the High Court

under s186I currently include the person who requested the decision, any person consulted or who should have been consulted and any person who "has an interest in the decision greater than the public generally".

11 Judicial review of the processes followed by the Ministers or by the CE of Fisheries is the only option for review of these decisions.

12 Chapter 13 of the LAC guidelines relate to appeals. The guidelines state:

> It is generally desirable for legislation to provide a right of appeal against the decisions of officials, tribunals and other bodies that affect important rights, interests, or legitimate expectations of citizens … Appeals serve a private and a public purpose. The private purpose is to scrutinise and correct specific decisions of first instance decision-makers … The public purpose of appeals is to maintain a high standard of public administration and public confidence in the legal system.

13 The guidelines go on to note that, generally, the cost and delay of the appeal process will not be justified where the matter in issue is relatively unimportant or where there is an overwhelming need for finality. It is not clear to the LAC that these mitigating factors are present here. At a minimum, the potential impacts on industry and communities from amending regional coastal plans and from aquaculture decisions could be substantial.

14 No reasons for repeal of the High Court appeal right are given in the publicly accessible documents associated with the Bill. Section 186I was inserted with the 2004 legislative framework for aquaculture and is therefore associated with the previous AMA framework, but other aspects of that are simply adapted to the new regime.

15 The LAC considers that the substantive impact of aquaculture decisions on the industry and the environment warrant a full appeal to the High Court and **suggests that it would desirable for the general merits appeal against aquaculture determinations of the Chief Executive of Fisheries to be retained.**

Judicial Review Timeframes

16 A new timeframe to lodge a judicial review of an aquaculture decision is introduced. It must be lodged within 15 working days after public notification, rather than the existing timeframe of 3 months (clause 38 amending s186J). Another new provision provides that a judicial review application filed to challenge a gazetted allocation decision of the Minister of Conservation in relation to authorisations must also be lodged within 15 days. (clause 90 amending 165L(6)).

17 There is no discussion of the reasons for the 15 day timeframe in either situation. In the latter case the local authority must give public notice of the request to the Minister for a gazetted allocation method as soon as practicable.

18 The LAC considers that the timeframe of 15 working days is far too short to file a judicial review application, particularly when this is the only option for review. Deciding whether to take a costly judicial review case and preparing the

case involves careful consideration. Truncating the time will particularly disadvantage parties affected by the decision who are not already legally represented.

19 **LAC suggests that the three month timeframe should be retained for filing a judicial review of an aquaculture decision and of a gazetted allocation decision of the Minister of Conservation in relation to authorisations**.

Transition

20 It is surmised that outstanding applications subject to the transition provisions will lose existing rights to merit appeals to the High Court. It seems difficult to be confident they will not be disadvantaged by decisions already made in the expectation that the appeal right exists. Presumably appeals already filed by 1 July 2011 when the Act comes into force will continue.

21 **LAC suggests these two points should be clarified in the amending legislation**.

22 The LAC does not seek to be heard on this submission.

Prof John Burrows QC
Member: Legislation Advisory Committee