

BESPOKE LEGISLATIVE SOLUTIONS¹

LDAC has considered the use of legislative power to award resource consents or other outcomes for planning related matters, in preference to the relevant applicant making applications under existing legislation.

LDAC's view is that Parliament should be cautious in legislating bespoke solutions for development projects rather than relying on, or amending, the processes established under existing general law. There will be exceptional circumstances that justify bespoke legislative solutions, but these need to be assessed and justified carefully on the following basis.

The public interest is usually best served by legislation setting general rules and processes. Such rules and processes provide the most predictability and clarity to those to whom they apply and the wider community affected. Enacting bespoke legislation to supersede general rules and processes carries a number of risks:

- Bespoke legislation can increase the complexity in the law, increasing the risk of error and unintended consequences and making it more difficult for the public to know what is the correct law applying to their situation.
- Legislating for particular circumstances risks undermining democratic values and the legitimacy of Parliament, and in some cases may be seen as biasing the system towards interests that are well funded or well-connected and able to lobby for their interests.
- Too many bespoke solutions may undermine the confidence and certainty in the general system, and may incrementally shift the overall balancing of rights and responsibilities under that general system.
- Developing bespoke legislation is resource- and time-intensive for Parliament, Government and submitters, PCO and others. This cost should only be incurred when there is a clear public benefit in the outcome. This cost is often overlooked by proposers of legislative intervention.

Bespoke legislation needs particularly strong justification where there is general law available to deal with the matter, but legislation is seen as being used to circumvent the requirements that would otherwise apply (for example, consultation requirements, participatory rights in consenting processes, compensation, or the ability to appeal or review decisions).

In particular, LDAC considers that bespoke solutions pose an increasing risk to the general system that Parliament has enacted for regulating planning, consenting, property acquisition, construction and building of infrastructure and other building projects. This system is set out in the Resource Management Act 1991, Local Government Act 2002, Public Works Act 1981, Reserves Act 1977, Conservation Act 1987 and others. The general rules have already been adjusted or augmented for some classes of cases (for example, the Housing Accords and Special Housing Areas Act 2013).

¹ This passage is taken from the 2018 LDAC Annual Report (at page 10). Bespoke legislative solutions were one of the "issues of note" during the 2017 – 2018 year.

The question of whether bespoke legislation was appropriate and the nature of the bespoke solution was considered by LDAC this year in relation to the America's Cup Road Stopping Bill and the Christ Church Cathedral Reinstatement Bill.

LDAC considers that the following factors are relevant to whether a bespoke override of the general system is appropriate (whether for development projects or in other contexts) and, if so, to assessing the nature of that override:

- *Are the circumstances sufficiently exceptional such that it is in the public interest to intervene on a bespoke basis?* There needs to be a strong underlying public policy rationale, such as broad national interest considerations making the general law (which might be designed to cater for local or regional interests, or which might involve an overly cumbersome or complex process) inappropriate in the circumstances. Bespoke legislation should not be used as a mere matter of convenience – just because Parliament can override the general system does not mean it should. Nor should bespoke legislation be used to respond to a desire to immunise a particular decision from challenge or to overcome project planning difficulties.
- *Is it clear that the public interest would not be better served by changing the general system?* Have decision-makers considered whether there is a need to change the general system, and determined that the need in this case does not indicate a broader problem? The project should be unique in some way, so that a bespoke solution is preferable to change or augmentation of the general system.
- *Is the bespoke legislative intervention the minimum necessary?* Is the override the minimum legislative intervention necessary to meet the objectives of the project? For example, the America's Cup Road Stopping Bill could have had much wider application and approved associated works, but in fact the option selected was the narrowest approach practicable in the circumstances presented. By contrast, the Christ Church Cathedral Reinstatement Bill proposed a power to override the Resource Management Act 1991 and the Heritage New Zealand Pouhere Taonga Act 2014 by regulations. Although the power was confined to a relatively small physical area and a limited number of Acts, there was a wide discretion as to which requirements would be overridden and how.
- *Has consideration been given to how to address issues covered by the general law in the bespoke legislation?* Have decision-makers checked what will be "lost" (in terms of rights and responsibilities) through the bespoke legislation and given sufficient consideration as to whether these matters should be addressed in the bespoke response?
- *Will the bespoke legislation be subject to parliamentary and public scrutiny in the usual manner?* It is important that, save in exceptional circumstances, the standard law-making practices are followed and that public consultation not be rushed or aimed at a pre-conceived result. A careful process will help avoid errors, ensure important considerations are not overlooked, and is consistent with democratic values.

