



LEGISLATION DESIGN AND ADVISORY COMMITTEE

ANNUAL REPORT

1 July 2018 to 31 December 2019

Report of the Legislation Design and Advisory Committee to the Attorney-General

Annual Report of the
Legislation Design and Advisory Committee
for 1 July 2018 to 31 December 2019

March 2020
Wellington, New Zealand

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CHAIR'S FOREWORD

Tēnā koutou katoa. Nau mai, haere mai.

This is the Legislation Design and Advisory Committee's fourth Annual Report since its establishment in June 2015. It covers the Committee's operation from 1 July 2018 to 31 December 2019. This 18-month reporting period is a one-off, to realign our reporting year to the Parliamentary calendar and the Government's annual legislative programme; both are based on calendar years.

First, some context. Our goal is to *promote good quality legislation*. We do this by providing advice on legislative design during the development of Government Bills, by making submissions to select committees on Bills following introduction, by providing education and training, and by maintaining the Legislation Guidelines. We do this work through committee members appointed by the Attorney-General, with support from a small team within the Parliamentary Counsel Office.

During the first 6 months of this reporting period, the Committee transitioned into a smaller, single committee (around 20 members) made up of experts in law, public policy, and regulatory design. Our current membership is drawn from the public and private sector, and includes public servants, consultants, academics, and practicing lawyers. We now do most of our work through Bill-specific subcommittees drawn from our full membership. We also have an engagement and education subcommittee and a guidelines subcommittee, and periodic meetings of the whole committee. This ability to draw on our full membership enables us to obtain maximum benefit from the breadth and depth of the expertise across our membership.

In the calendar year 2019, the first full year of our new operating model, we considered 31 Bills, through 46 subcommittee meetings and provided advice on 4 others. We also made 5 submissions to select committees. These statistics reveal a significant uplift in activity from the 19 Bills considered in the calendar year 2018. And the feedback from departments demonstrates that we are continuing to add significant value.

But that only tells part of the story. We are seeing policy projects much earlier in the process and our subcommittee approach enables us to have more touch points from early policy design and through the drafting and legislative processes. This has enabled us to influence the legislative design before the project heads along a path that is likely to collide with the Guidelines.

I express my appreciation to the Attorney-General for the significant support for the Committee and its work in the reporting period. As our responsible Minister, this is our key relationship. We

see it as a mark of our success in influencing that we only rarely need to advise the Attorney-General (and through him, Cabinet) of concerns.

And finally I'd like to thank all of our current, temporary and former members (and their employers) for continuing to give their valuable time, without charge, to the work of the committee. It is a true public service. And most importantly I thank our advisers and PCO for all their support for the work of the committee.

Karl Simpson

Chair

Legislation Design and Advisory Committee

INTRODUCTION

The Legislation Design and Advisory Committee (**LDAC**) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. It provides advice on design, framework, constitutional, and public law issues arising out of legislative proposals. It is responsible for the Legislation Guidelines (2018 edition) (the **Guidelines**), which have been adopted by Cabinet.

LDAC seeks to improve the quality and effectiveness of legislation by:

- advising departments in the initial stages of developing legislation, typically when legislative proposals and drafting instructions are being prepared
- maintaining and updating the Guidelines, together with supplementary material, for officials who design, develop, and draft legislation
- scrutinising and making representations to select committees on Bills that raise issues about compliance with the Guidelines
- providing training and education to develop quality legislation consistent with the Guidelines.

LDAC's principal focus is on reviewing legislative proposals and advising departments before Bills are introduced to Parliament.

See **Appendix 1** for LDAC's Terms of Reference.

LDAC REMODELED INTO A SINGLE COMMITTEE

In December 2018 LDAC was merged into a single committee. This change reflected recommendations in PCO's 2018 report on LDAC's operations, which highlighted that the 2-committee structure had proved difficult to operate in practice and had not made the most of LDAC's combined expertise. The Cabinet paper relating to the merger and the Cabinet minute approving this merger are available on LDAC's website at <http://www.ldac.org.nz/>.

Under the new structure:

- There are 18 members including 10 to 12 public service members. The Chair may co-opt up to 3 additional members to work on specific issues or for limited periods. Acting arrangements are made for public service members if they are away or unable to support the committee's work for an extended period. There are alternate arrangements for Crown Law and PCO.
- The committee's pre-introduction work is now done through subcommittees, which enable more focused and in-depth conversation, followed up with letters of advice.

- The Attorney-General approves specific external members to be involved on LDAC pre-introduction Bill subcommittees on the advice of LDAC’s Chair, after consultation with the chief legal adviser of the department for the relevant Bill.
- The committee continues to submit to select committees on Bills and has, on occasion, worked with departmental advisers on issues raised at select committee.
- LDAC meets every 2 months as a full committee, where it discusses key strategic “cross-cutting” issues as well as ongoing regular developments in work on the Guidelines and education and engagement matters.

The operating model flowchart set out in **Appendix 5** reflects the committee’s structure and way of operating. The structure and operating model enable public service and external member expertise to be fully utilised in pre-introduction advice, work on the Guidelines and supporting supplementary material, and the education sessions LDAC holds for the public sector. In summary, the Committee’s work benefits from integrating these different perspectives and drawing on the full range of members’ skills.

MEMBERSHIP AND SUPPORT

LDAC’s membership consists of public service and non-public service members. Some of the public service members are ex officio members (for example, the Chief Parliamentary Counsel) and others are appointed by the Attorney-General. Non-public service members of LDAC are appointed by the Attorney-General.

LDAC’s membership includes experienced government officials with backgrounds in law, policy, and economics; experienced legal practitioners; academics; and regulators. Karl Simpson, Director – System and Regulatory Design, Ministry of Transport, currently chairs LDAC.

See **Appendix 2** for LDAC’s membership.

The PCO provides secretariat, legal, and policy assistance to LDAC. The PCO supports LDAC out of its baseline with the equivalent of one full-time legal and policy adviser and one part-time administrative assistant.

HOW LDAC OPERATES

This reporting period covers the fourth and fifth years of LDAC’s operation. LDAC has continued to develop and refine its processes and operation to offer timely advice. Feedback from departments that LDAC has engaged with has been fundamental to LDAC’s continued development.

Bills are usually identified for LDAC consultation through the annual legislation programme. Officials indicate whether they intend to refer a Bill to LDAC in legislation bids seeking priority for a Bill on the legislation programme. Once a Bill is referred to the committee, a subcommittee of around four members will meet with the relevant department to discuss the Bill. Parliamentary counsel also participate in these discussions.

Before a non-public service member can be appointed to a subcommittee, the Attorney-General must first give consent. Often the subcommittee will meet several times with a department over the course of several months at key stages during legislative development.

Departments are expected to consult LDAC on legislative proposals if the proposal:

- is a significant principal Act
- is likely to impact on the coherence of the statute book (for example, because of a significant degree of overlap or interaction with other legislation)
- is or is likely to be inconsistent with the principles in the Guidelines (particularly those relating to fundamental and constitutional principles).

Departments may also refer a legislative proposal to LDAC if:

- the proposal raises basic framework or design issues, or choice of secondary legislation
- the proposal would benefit from advice on how to best apply or ensure consistency with the Guidelines.

LDAC's role is advisory, its advice is non-binding, and its working style aims to be collegial and helpful. Departments and Ministers determine whether or how to implement LDAC's advice. Ministers must identify in Cabinet papers seeking approval of Bills for introduction (or authorisation for submitting secondary legislation to the Executive Council) whether any aspects of the legislation depart from the principles in the Guidelines. Cabinet papers are expected to explain and justify any departures.

LDAC may report to the Attorney-General when it considers departures from the Guidelines are serious or contentious. If LDAC forms a view that is at odds with a department's or Minister's view about the existence or extent of a departure, LDAC may consider it appropriate to flag this matter for the Attorney-General. In some cases, usually those where it has reported to the Attorney-General, LDAC may include a comment or request its views be recorded in the Cabinet papers.

LDAC reported to the Attorney-General on two Bills in the reporting period.

LDAC may make submissions to select committees on Bills that raise legislative design issues.

In rare cases, the LDAC Chair may decide that it is appropriate to make a submission on a Bill already considered by LDAC before introduction. For example, LDAC may make a submission where the Chair believes there is a significant public interest involved or there are significant matters in a Bill that were not considered by LDAC before the Bill's introduction.

ACTIVITIES DURING 2018/2019

REVIEW OF PRE-INTRODUCTION BILLS AND SUBMISSIONS

In the reporting period (from July 2018 to December 2019), LDAC advised departments on 40 pre-introduction Bills. Thirty of those Bills were new to LDAC in the reporting period, and 10 were carried over from 2017/2018. Of the 40 Bills LDAC advised on in the reporting period, LDAC advised on 35 in 2019. LDAC advised on the remaining five during the six months from 1 July 2018 to 31 December 2018, but did not give further advice in 2019. LDAC advised on a total of 17 Bills from July to December 2018.

LDAC made submissions to select committees on eight Bills from July 2018 to December 2019. Three of those submissions were made in 2018 and the remaining five were made in 2019.

See **Appendix 3** for the Bills on which the Committee made submissions.

Pre-introduction Bills LDAC engaged with and submissions LDAC made in 2018/2019

Total pre-introduction Bills reviewed by LDAC before introduction	40
New to LDAC 1/7/2018 – 31/12/2019	30
Carried over from 2017/2018	10
Total Bills LDAC made submissions on to select committees	8
Total Bills/submissions	48

COMMON ISSUES ARISING IN THE COMMITTEE'S WORK DURING THE PERIOD

Appendix 4 lists the issues that LDAC focused on before introduction and in submissions to select committees after introduction. The issues indicate the common aspects of the Guidelines that

have been a focus in the course of LDAC's work on particular Bills. These are not necessarily trends for the statute book as a whole.

Discussions that LDAC had with departments before introduction most frequently focused on:

- the importance of legislation being easy to use, understandable, and accessible
- assisting departments to identify the policy objective
- the appropriateness of subject matter for an Act or secondary legislation
- the relationship between the new legislation and existing law, particularly the need for legislation to explicitly address any conflicts
- whether a new statutory power should be created, who will hold the power, and the nature of that power
- choosing the most appropriate tools for enforcing legislation and achieving compliance
- the way in which the Treaty of Waitangi, Treaty principles, and Māori interests are recognised in the legislation.

The following are the most common issues on which LDAC made submissions to select committees on Bills after introduction:

- the appropriateness of a matter for secondary legislation
- whether legislation should empower secondary legislation to amend or override an Act
- whether the creation of a new statutory power was appropriate and whether there were sufficient safeguards.

ROLE OF LDAC MEETINGS IN RECURRING ISSUES

All LDAC members meet approximately every two months. These meetings are an opportunity for the Chairs of LDAC pre-introduction Bill subcommittees to report back to the whole committee on the key Guidelines issues the subcommittee engaged on, and the subcommittee's position on key issues. These report backs help to ensure consistent advice across the subcommittees and to identify any recurring themes.

LDAC members (other than the LDAC Chair) are either members of its Guidelines Subcommittee or its Education and Engagement Subcommittee. The Guidelines Subcommittee met approximately every two months during 2019. In addition to developing supplementary material to the Guidelines, this subcommittee's role was to discuss recurring themes and to consider whether LDAC should publish supplementary materials on these and other matters.

ISSUES OF NOTE

PURPOSE AND PRINCIPLES CLAUSES

During the reporting period, LDAC has frequently provided advice on proposals to include purpose and principle clauses in legislation.

LDAC notes that purpose clauses are an attractive way to directly communicate the policy intent of legislation, but carry some challenges and risks. LDAC's view is that, if a purpose or principle clause is to be included in legislation, it:

- needs to be designed to work within the particular legislation (for example, substantive decision-making criteria)
- should seek to perform a useful function
- must be designed to avoid key risks.

One of the key risks to avoid is creating stand-alone rights or duties. A purpose clause is not a substitute for substantive provisions and must be consistent with them.

LDAC has issued supplementary material about purpose and principles clauses to provide more in-depth guidance to agencies on designing them, including:

- different types of purpose clauses
- the role of principles
- risks around purpose and principle clauses.

This supplementary material has been published on LDAC's website.

COMPLIANCE AND ENFORCEMENT REGIMES

Discussions with departments during the reporting period have often included the best ways to achieve compliance with, and enforce, legislation.

LDAC advises agencies preparing a proposed enforcement regime to be clear about their overall compliance and enforcement objective. Agencies are advised to develop a robust rationale behind the different compliance and enforcement tools and levels of offences and penalties. They must ensure that enforcement powers are not too heavy-handed and penalties are commensurate with the gravity of the relevant offence.

This is a developing area of practice. LDAC will look to develop supplementary materials for the design of compliance and enforcement frameworks.

URGENT LEGISLATION

LDAC has observed examples of legislation that have been assessed as urgent and therefore progressed with shortened legislative processes. LDAC notes that legislation may be 'urgent' for

a variety of reasons. The decision to truncate normal legislative process can, however, have both democratic and constitutional implications. It is also more likely to have a detrimental effect on the quality of legislation. LDAC intends to provide some commentary during the next reporting period on these risks, as well as on options to minimise potential harm resulting from truncated legislative processes.

ACCESSIBILITY AND EFFECTIVENESS OF LEGISLATION

The accessibility and effectiveness of the statute book as a whole depends on individual pieces of legislation being clear, coherent, not unduly complex, and up to date.

In the course of its work with departments on legislative proposals, LDAC frequently sees legislation that is heavily amended and inaccessible, and which should be substantially rewritten or revised. While departments usually agree with LDAC's assessment, they are generally focused on the policy matter in front of them and have a sense of urgency, so are often unable or unwilling to broaden the work to review or rewrite existing provisions. This can have a compounding effect over time if new policy is continually grafted on to the existing framework.

LDAC is pleased to see that the Education and Training Bill is a rewrite of the Education Act 1989, which we highlighted as a candidate for rewriting in our 2017 Annual Report.

LDAC also notes that the Electoral Act 1993 (which we have also previously highlighted and is currently on the revision programme) continues to be heavily amended. Three Electoral Amendment Bills have been introduced in the last 2 years, meaning that it is critical that this foundational legislation is reviewed at the next available opportunity.

LDAC encourages departments to discuss options for substantive rewrites or revision with the PCO, in line with departmental legislative stewardship obligations.

LEGISLATION GUIDELINES (2018 EDITION) AND SUPPLEMENTARY MATERIAL

Supplementary material is being prepared for the Guidelines. The objective of each piece of supplementary material will depend on the subject matter. But the common objective is to provide more detailed information or guidance to assist advisers to address questions or issues raised in the Guidelines. The supplementary material will often contain legislative examples to assist advisers to make decisions that are at the margins of issues, and guidance on areas not covered by the Guidelines.

During the reporting period LDAC published supplementary material to chapter 13 of the Guidelines (Statutory interpretation and the Interpretation Act 1999) and supplementary material on the use of exposure draft Bills.

The supplementary material to chapter 13 provides more in-depth guidance on:

- designing purpose and principle clauses
- including different types and what to consider
- designing commencement clauses (including general principles and their different forms).

The supplementary material on exposure drafts provides information and guidance on:

- what an exposure draft Bill is
- when to release an exposure draft Bill, and why
- the process for releasing exposure draft Bills.

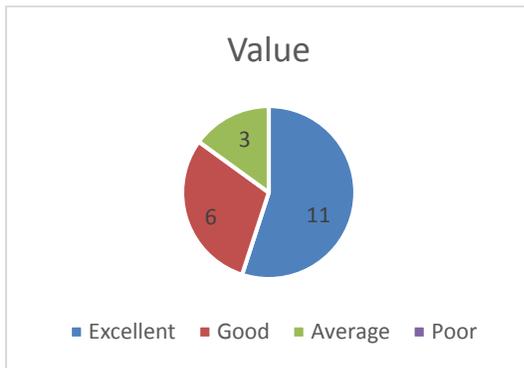
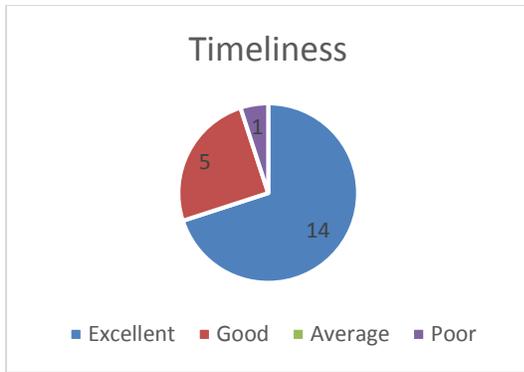
LDAC also published on its website in 2019 two items on issues of note that were first published in LDAC's 2018 Annual Report. They cover bespoke legislative solutions and excluding or limiting the right to apply for judicial review.

FEEDBACK ON HOW LDAC HAS IMPACTED ON THE QUALITY OF LEGISLATION

During the reporting period, LDAC has continued to mostly engage with departments prior to final policy decisions and/or after policy decisions but before drafting is completed.

During 2019, LDAC developed a new feedback survey to assess the value of its engagement with departments on Bills. The new survey better reflected changes in the committee structure. The graphs below show the results received since 1 June 2019 using this revised survey. The responses are from 20 completed surveys.

Results received earlier in the reporting period used the previous survey form and are not reflected in the graphs below. The results of these earlier surveys showed that the majority of departments found LDAC's advice on pre-introduction Bills either satisfactory or very satisfactory in terms of timeliness, knowledge, expertise, and value. The majority implemented LDAC advice and were likely or very likely to proactively engage with LDAC in the future.



EDUCATION PROGRAMME

SEMINARS

The LDAC Education and Engagement Subcommittee meets approximately every two months, and oversees education and training relating to LDAC’s role and the Guidelines. The subcommittee focuses on ways to improve both public and private sector knowledge of the Guidelines and good law-making, and raising LDAC’s profile.

In 2018/2019, LDAC held the following seminars/workshops:

- A seminar on 31 July 2018 on using the Legislation Guidelines to support good legislative design.
- A seminar to the Department of Conservation on 12 November 2018, attended by about 18 DOC staff.
- A seminar on 9 August 2019 on using the Legislation Guidelines to support good legislative design.
- A seminar on 24 October 2019 on mastering the past (and the current) in the future – recurring issues (a seminar covering scenarios relating to transitional and savings provisions, backdated secondary legislation, and validating legislation).

These seminars were well-attended, with the July seminar attended by 75 officials, and approximately 42 officials participating in the later seminars that were held in smaller venues.

OTHER ENGAGEMENT

LDAC has provided education to the public sector through its participation in the Policy to Legislation seminars, hosted by the PCO and the Office of the Clerk, and through a presentation on 25 November 2019 to the Legislation Practice Group of the Government Legal Network.

In 2019, LDAC has sought to extend its education and engagement to the private sector. An article outlining LDAC's role was published in the November 2019 issue of the New Zealand Law Society's magazine, *LawTalk*.

A subcommittee of LDAC members met with members of the New Zealand Law Society's Law Reform Committee on 30 October 2019 and attended the Law Reform Committee's meeting on 29 November 2019 to discuss LDAC's and the Society's respective roles. Topics discussed included LDAC and Law Society submissions and the Society's use of the Guidelines when submitting on Bills.

ACKNOWLEDGEMENTS

LDAC would like to acknowledge the following contributions:

- The PCO for providing and supporting the Secretariat to LDAC.
- The LDAC's public service members' home departments for supporting their membership of the Committee.
- The non-public service members for volunteering their time and expertise.
- Professor Geoff McLay of Victoria University for chairing the External Subcommittee until December 2018.
- Paul Rishworth, QC, for chairing LDAC until December 2018.

Karl Simpson

Chair

Legislation Design and Advisory Committee

APPENDIX 1 – TERMS OF REFERENCE

The terms of reference of the Legislation Design and Advisory Committee are to:

- (a) provide advice to departments in the initial stages of developing legislation when legislative proposals and drafting instructions are being prepared, including to:
 - focus on significant or complicated legislative proposals, basic framework/design issues, instrument choice, consistency with fundamental legal and constitutional principles and impact on the coherence of the statute book;
 - assist departments with the allocation of provisions between primary, secondary and tertiary legislation;
 - provide advice on delegated legislative powers;
 - provide advice on the appropriateness of exposure draft Bills;
- (b) report to the Attorney-General on departures from the Legislation Guidelines (2018 edition) in legislative proposals;
- (c) advise the Attorney-General on any other topics and matters in the field of public law that the Attorney-General from time to time refers to it;
- (d) help improve the quality of law-making by helping to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the Legislation Guidelines (2018 edition) and discouraging the promotion of unnecessary legislation;
- (e) scrutinise and make representations to the appropriate body or person on aspects of Bills which raise matters of particular public law concern;
- (f) undertake training and education work, relating to the LDAC's role and the Legislation Guidelines (2018 edition).

APPENDIX 2 – LDAC MEMBERSHIP

PUBLIC SERVICE LDAC MEMBERS

- Karl Simpson, Director – System and Regulatory Design, Ministry of Transport (Chair)
- Sarah Kerkin, PhD, Chief Advisor to the Deputy Secretary, Policy, Ministry of Justice (Deputy Chair)
- Allison Bennett, Director, Legal Services, Ministry of Business, Innovation and Employment
- Cassie Nicholson (ex officio), Deputy Chief Parliamentary Counsel – Drafting, Parliamentary Counsel Office
- Dagny Baltakmens (ex officio), Principal Solicitor, Office of Legal Counsel, Ministry of Justice
- Fiona Leonard (ex officio), Chief Parliamentary Counsel, Parliamentary Counsel Office
- Graeme Morrison, Policy Lead, Policy and Strategy, Inland Revenue Department
- Jason Gough (ex officio), Senior Crown Counsel, Crown Law
- John Sutton, Principal Policy Analyst, Policy Group, Department of Internal Affairs
- Susan Hall, Manager, Business Law, Commerce, Consumers and Communications, Ministry of Business, Innovation and Employment
- Tania Warburton (ex officio), Advisor (Legal), Policy Advisory Group, Department of the Prime Minister and Cabinet
- Scott Murray (alternate member), Principal Counsel, Parliamentary Counsel Office

The following members joined during the 2018/2019 reporting period

- Dagny Baltakmens (ex officio), Principal Solicitor, Office of Legal Counsel, Ministry of Justice
- Graeme Morrison, Policy Lead, Policy and Strategy, Inland Revenue Department
- Scott Murray (alternate member), Principal Counsel, Parliamentary Counsel Office
- Susan Hall, Manager, Business Law, Commerce, Consumers and Communications, Ministry of Business, Innovation and Employment

The following members left during the 2018/2019 reporting period

- Andrea King (ex officio), Chief Advisor, Courts and Justice Services Policy, Ministry of Justice
- Andrea Speir, Manager Legislation, Ministry for Primary Industries
- Becky MacNeill, Group Manager, Operational Policy, Ministry for Culture and Heritage
- Geoff Daniels, Principal Advisor, Ministry for Primary Industries
- Jacqueline Derby (ex officio), Principal Counsel, Parliamentary Counsel Office
- Jonathan Ayto, Principal Advisor, The Treasury
- Wendy Illingworth (reserve member), Policy Manager, Ministry of Social Development

Paul Rishworth, QC, resigned from his position as Senior Crown Counsel at the Crown Law Office in December 2019, so was no longer a public service member of LDAC, but continued as a non-public service member.

EXTERNAL LDAC MEMBERS

- Brigid McArthur, Partner, Greenwood Roche
- Guy Beatson, Managing Consultant, Beatson Company
- James Wilding, QC, Barrister, Clarendon Chambers
- Jonathan Orpin-Dowell, Barrister, Stout Street Chambers
- Kelly Hanson-White, Manager, Regulatory Frameworks Team, WorkSafe New Zealand
- Māmari Stephens, Reader, Te Kura Tātai Ture, Faculty of Law, Victoria University of Wellington
- Matthew Smith, Barrister, Thorndon Chambers
- Paul Rishworth, QC, Barrister, Britomart Chambers

The following members left during the 2018/2019 reporting period

- Professor Geoff McLay (Chair of the External Subcommittee), Faculty of Law, Victoria University of Wellington
- Professor Andrew Geddis, Faculty of Law, University of Otago
- Jeremy Johnson, Partner, Wynn Williams
- Kate Salmond, Senior Legal and Policy Advisor, Law Commission
- Martha Coleman, Barrister, Martha Coleman Barrister
- Megan Richards, Partner, Minter Ellison Rudd Watts
- Rebecca Rose, Senior Associate, Bell Gully
- Sean Kinsler, Associate, Meredith Connell
- Simon Mount, QC, Barrister, Bankside Chambers

The following members joined during the 2018/2019 reporting period

- Guy Beatson, Managing Consultant, Beatson Company
- Kelly Hanson-White, Manager, Regulatory Frameworks Team, WorkSafe New Zealand

Public service members who have been on leaves of absence have arranged for an acting member from their department. This ability to have acting members has proved valuable, especially in times of high workload for LDAC.

The following were acting LDAC members during the 2018/2019 reporting period

- Adam Rossiter, Senior Solicitor, Legal Services, Corporate, Governance and Information, Ministry of Business, Innovation and Employment (acting for Allison Bennett)
- Bryan Dunne, Advisor, Policy Advisory Group, Department of the Prime Minister and Cabinet (acting for Tania Warburton)
- Matthew Green, Manager Legal Services (Legislation), Legal Services, Corporate, Governance and Information, Ministry of Business, Innovation and Employment (acting for Susan Hall)
- Sam Miles, Principal Policy Analyst, Policy Group, Department of Internal Affairs (acting for John Sutton)

APPENDIX 3 – LDAC SUBMISSIONS

1 JULY 2018 – 31 DECEMBER 2019

Submissions made to select committees are available on the LDAC and Parliament websites.

BILLS

1. Canterbury Earthquakes Insurance Tribunal Bill
2. Crown Minerals (Petroleum) Amendment Bill
3. Taxation (Research and Development Tax Credit) Bill
4. Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill
5. Misuse of Drugs Amendment Bill
6. Education (School Donations) Amendment Bill
7. Referendums Framework Bill
8. Education (Pastoral Care) Amendment Bill

APPENDIX 4 – ISSUES LDAC ADVISED DEPARTMENTS ON BEFORE INTRODUCTION AND IDENTIFIED IN SUBMISSIONS 1 JULY 2018 – 31 DECEMBER 2019

The issues LDAC advised departments on in relation to legislative proposals before introduction and identified in submissions are set out below by chapter and principle of the Guidelines. The chapters most commonly referred to were chapters 1, 2, 3, 5, 12, 14, 18, and 22.

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
Chapter 1 – Good legislative design	Whole chapter	20	
		Total: 20	
Chapter 2 – Defining the policy objective and purpose of proposed legislation	Whole chapter	18	
	The policy objective must be clearly defined and discernible. (2.1)	6	
	The provisions of the proposed legislation should be consistent with its purpose and the policy objective that underlies it. (2.2)	8	1
	Legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective. (2.3)	9	1
	All relevant government departments should be consulted at an early stage. (2.4)	2	
	Public consultation should take place. (2.5)	2	1
		Total: 45	Total: 3
Chapter 3 – How new legislation relates to the existing law	Whole chapter	13	
	Any existing legislation that relates to the same matters or implements similar policies to those of the proposed legislation should be identified. (3.1)	8	
	Any conflict or interactions between new and existing legislation should be explicitly addressed in the new legislation. (3.2)	7	
	New legislation should not restate matters already addressed in existing legislation. (3.3)	3	
	Precedents from existing legislation should only be used if they are consistent with the scheme and purpose of the new legislation. (3.7)	1	
		Total: 32	

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
Chapter 4 – Fundamental constitutional principles and values of New Zealand Law	Whole chapter	5	
	Legislation should be consistent with fundamental constitutional principles, including the rule of law. (4.1)	5	1
	Legislation should be consistent with the principles of the Treaty of Waitangi. (4.2)	2	
	New legislation should respect property rights. (4.4)	1	
	Legislation should be consistent with the right to natural justice. (4.5)	1	1
		Total: 14	Total: 2
Chapter 5 – The Treaty of Waitangi, Treaty settlements, and Māori interests	Whole chapter	9	1
	Māori interests that will be affected by the proposed legislation should be identified. (5.1)	1	1
	If legislation has the potential to come into conflict with the rights or interests of Māori under the Treaty, additional measures should be considered to ensure recognition of the principles of the Treaty or the particular rights concerned. (5.6)	5	
	Clear language is required where legislation is intended to be inconsistent with the principles of the Treaty. (5.7)	1	
		Total: 16	Total: 2
Chapter 6 – New Zealand Bill of Rights Act 1990	Whole chapter	2	
	NZBORA rights should not be limited, or should be subject only to such reasonable limits as can be justified in a free and democratic society. (6.1)	1	
	Any unjustified limitation should be restricted to that which is necessary to achieve the policy objective. (6.2)	1	
		Total: 4	
Chapter 8 – Privacy and dealing with information about people	Whole chapter	3	
	Legislation should be consistent with the requirements of the Privacy Act 1993, in particular the information privacy principles. (8.1)	1	

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
	New legislation should only provide authority for information sharing where the sharing cannot be undertaken using one of the existing mechanisms in the Privacy Act 1993 (for example, an approved information sharing agreement), or where using those mechanisms is not sufficient for the policy purpose. (8.3)	1	
		Total: 5	
Chapter 9 – Treaties and international obligations	New legislation must not be inconsistent with existing international obligations. (9.1)	1	
		Total: 1	
Chapter 10 – Dealing with conduct, people, and things outside New Zealand	Whole chapter	2	
		Total: 2	
Chapter 11 – Applying an Act to the Crown	Whole chapter	1	
	Legislation must state whether or not it binds the Crown. (11.1)	1	
	Legislation should apply to the Crown unless there are good reasons for it not to do so. (11.2)	1	
	Any immunity from civil liability should be separately justified and should not be overly broad. (11.3)	1	
		Total: 4	
Chapter 12 – Affecting existing rights, duties, and situations and addressing past conduct	Whole chapter	5	2
	Legislation should not have retrospective effect. (12.1)	2	
	Legislation should not deprive individuals of their right to benefit from judgments obtained in proceedings brought under earlier law or to continue proceedings asserting rights and duties under that law. (12.2)	1	
	Potential transitional or savings issues should be identified early in the policy development process. (12.3)	5	
	Legislation should not include specific transitional provisions if the generic provisions in the Interpretation Act 1999 satisfactorily address the issues. (12.4)	2	
	All transitional or savings issues that have been identified should be addressed. (12.5)	3	
	All transitional provisions should be contained in the new legislation. (12.6)	2	
		Total: 20	Total: 2

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
Chapter 13 – Statutory interpretation and the Interpretation Act 1999	Whole chapter	3	
	The primary rules of statutory interpretation should be considered when designing legislation. (13.1)	2	
		Total: 5	
Chapter 14 – Delegating law-making powers	Whole chapter	14	2
	Legislation should not authorise secondary legislation to be made in respect of matters that are appropriate for an Act. (14.1)	5	1
	The empowering Act should clearly and precisely define the permitted subject matter of secondary legislation and the purposes for which it may be made. (14.2)	3	2
	The person authorised to make secondary legislation must be appropriate having regard to the importance of the issues and the nature of any safeguards that are in place. (14.3)	2	
	All secondary legislation should be subject to an appropriate level of scrutiny, a good process, publication requirements, and review. (14.4)	1	2
		Total: 25	Total: 7
Chapter 15 – Some specific types of empowering provisions	Whole chapter	3	
	Legislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so, the empowering provision is as limited as possible to achieve the objective, and the safeguards reflect the significance of the power. (15.1)	3	3
		Total: 6	Total: 3
Chapter 16 – Granting powers of exemption	Whole chapter	2	
	There must be good reasons to grant a power of exemption. (16.1)	1	
	Legislation must contain express authority to impose conditions on an exemption. (16.4)	1	
		Total: 4	
Chapter 17 – Authorising the charging of fees and levies	Whole chapter	2	
	Levies should be imposed only if it is appropriate for a certain group to contribute money for a particular purpose. (17.2)	2	

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
	Legislation must set out the manner by which the levy is determined. (17.5)	2	
	Legislation must clearly identify who may be charged the fee or levy and the circumstances in which it may be waived or refunded. (17.6)	1	
	Legislation should identify any procedural requirements that must be satisfied in connection with the fee or levy. (17.7)	1	
		Total: 8	
Chapter 18 – Creating a new statutory power	Whole chapter	13	1
	A new statutory power should be created only if no suitable existing power or alternative exists that can achieve the policy objective. (18.1)		1
	Legislation should identify who holds the new power. The power should be held by the person or body that holds the appropriate level of authority, expertise, and accountability. (18.2)	3	
	Legislation should state the extent to which a new power can be delegated. (18.3)	1	
	Legislation should not create a power that is wider than necessary to achieve the policy objective. (18.4)		1
	Legislation should identify what the power is and for what purposes, and in which circumstances, it may be exercised. (18.5)	5	1
	Legislation should include safeguards that will provide adequate protection for the rights of individuals affected by the decision. (18.6)	2	2
	New powers that are given to a specialist tribunal must be consistent with the particular field of expertise of that tribunal, must be appropriate in light of the procedure adopted by the tribunal, and must not impair the tribunal's independence and impartiality. (18.7)	1	
		Total: 25	Total: 6
Chapter 19 – Requiring decision-makers to consult	Whole chapter	2	2
	Legislation should include a requirement to consult when that is necessary to clearly ensure good decision-making practice. (19.1)		1
		Total: 2	Total: 3

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
Chapter 20 – Creating a new public body	Whole chapter	7	
	A new public body should be created only if no existing body possesses the appropriate governance arrangements or is capable of properly performing the necessary functions. (20.1)	1	
	Legislation should be used to create a new public body only when it is necessary in order to ensure that the body possesses the necessary powers, authority, and appropriate governance arrangements. (20.2)	1	
	Legislation should ensure appropriate accountability arrangements best suited to the relevant functions. (20.3)	4	
		Total: 13	
Chapter 21 – Creating powers of search, surveillance, and seizure	Whole chapter	4	
	New search powers should be granted only if the policy objective cannot be achieved by other means. (21.1)	2	
	New search powers should apply the rules and procedures set out in Part 4 of the Search and Surveillance Act 2012. (21.4)	1	
		Total: 7	
Chapter 22 – Ways to achieve compliance and enforce legislation	Whole chapter	12	
	The Government should not generally become involved in enforcing rules or otherwise regulating in an area where the rules can be reliably enforced by those who are subject to them. (22.1)	1	
	Regulatory options should be effective and efficient, workable in the circumstances that they are required to operate in, and appropriate in light of the nature of the conduct and potential harm they are intended to address. (22.2)	4	
		Total: 17	
Chapter 23 – Creating new, or relying on existing, civil remedies	Whole chapter	3	
		Total: 3	
Chapter 24 – Creating criminal offences	Whole chapter	6	
	Compelling reasons must exist to justify applying the criminal law to conduct. (24.1)	1	
	Legislation must precisely define the prohibited conduct. (24.2)	1	

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
	Legislation should state the mental element (mens rea) required for an offence to be committed. (24.3)	2	1
		Total: 10	Total: 1
Chapter 25 – Creating infringement offences	Whole chapter	4	
		Total: 4	
Chapter 26 – Pecuniary penalties	Whole chapter	4	
	Pecuniary penalties are not appropriate to address truly criminal conduct. (26.1)	2	
	The legislation should describe any defences that are available. (26.4)	1	
	Legislation should provide guidance to the court about how to determine the amount of the penalty. (26.6)	2	
	Legislation should specifically protect against the risk of double jeopardy. (26.7)	2	
	Legislation should prohibit indemnity or insurance for a pecuniary penalty only if that would be consistent with the underlying policy objectives. (26.8)	2	
		Total: 13	
Chapter 28 – Creating a system of appeal, review, and complaint	Whole chapter	4	1
	Legislation should not restrict the right to apply for judicial review. (28.1)	2	
	A person affected by a statutory decision should have an adequate pathway to challenge that decision. (28.2)	1	
		Total: 7	Total: 1
Chapter 29 – Including alternative dispute resolution clauses in legislation	Whole chapter	1	
		Total: 1	

GUIDELINES RAISED IN SUBMISSIONS BY BILL NAME

Name of Bill	Specific guideline/principle
Arms (Prohibited Firearms, Magazines, and Parts) Amendment Bill	12, 15.1, 24.3
Canterbury Earthquakes Insurance Tribunal Bill	4.5, 12, 18, 18.1, 18.6, 19.1
Crown Minerals (Petroleum) Amendment Bill	2.5
Education (Pastoral Care) Amendment Bill	14.4, 18.6, 19, 28
Education (School Donations) Amendment Bill	2.2, 2.3, 18.4, 18.5
Misuse of Drugs Amendment Bill	5, 5.1, 15.1
Referendums Framework Bill	4.1, 14, 14.2
Taxation (Research and Development Tax Credit) Bill	14, 14.1, 14.2, 14.4, 15.1, 19

APPENDIX 5 LDAC OPERATING MODEL

- Note:
- Bills go to ad hoc subcommittees of 4 members, 1 to be chair
 - Submissions referred to LDAC chair for consultation
 - 2-monthly full LDAC meeting to hear report-backs, discuss cross-cutting issues, prioritise next work, consider further supplementary material
 - Supplementary material gets sign off from full LDAC
 - Standing Education & Engagement Subcommittee and Guidelines Subcommittee to progress further work.

