



LEGISLATION DESIGN AND ADVISORY COMMITTEE

ANNUAL REPORT

for the year ended 30 June 2018

Report of the Legislation Design and Advisory Committee to the Attorney-General
Paul Rishworth QC, Chairperson

Annual Report of the
Legislation Design and Advisory Committee
for the year ended 30 June 2018

September 2018
Wellington, New Zealand

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CHAIRPERSON'S FOREWORD

This is the Legislation Design and Advisory Committee's third Annual Report since its establishment in June 2015. It covers the Committee's operation from 1 July 2017 to 30 June 2018.

LDAC and its External Subcommittee have revised and updated the LAC Guidelines (2014 edition), now endorsed by Cabinet and re-named the Legislation Guidelines (2018). Three new chapters have been added, in addition to the review and updating of existing chapters. I record the Committees' appreciation for the work of Linda McIver, Legal and Policy Analyst engaged by the Parliamentary Counsel, who managed the project. Work continues on a set of supplementary materials designed to elucidate particular issues in the Guidelines.

LDAC has continued to engage with departments on legislative proposals. Nineteen bills and proposals were considered in the period covered by this report. The External Subcommittee made submissions on nine Bills. These numbers are lower than those for the previous 12 months, likely due to the general election in September 2017. LDAC also conducted two seminars for departments on aspects of the Guidelines.

This report includes brief comments on three generic issues that LDAC has identified – imposing limitations on judicial review, legislating for bespoke outcomes such as consents, and the impact of digitalisation. The purpose of identifying and commenting upon these issues is to stimulate discussion and assist those considering how policy aims may best be implemented in legislation, consistently with the Guidelines.

I record the Committees' thanks to the Parliamentary Counsel Office which hosts the administrative and secretarial functions of LDAC and the External Subcommittee. We have been exceptionally well served by Delia Cormack, LDAC Secretary from August 2015 to October 2017, Stephen Rivers-McCombs who acted in the role on an interim basis, and, since May 2018, Kathryn McKinnon, current LDAC Secretary, and Beverly Murray, LDAC Advisor.

Paul Rishworth QC

Chairperson

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
- through its External Subcommittee, 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.

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

LDAC's principal focus is on reviewing legislative proposals and advising departments before introduction. Under LDAC's mandate, an External Subcommittee is empowered to review and, if necessary, make submissions on those Bills that were not reviewed by LDAC before introduction.

MEMBERSHIP AND SUPPORT

LDAC comprises senior officials drawn from across the public service with policy and legislative skills and backgrounds in economics, law, and policy. Members are either ex officio or appointed by the Attorney-General from within the public service. Paul Rishworth QC, Senior Crown Counsel at Crown Law, currently chairs LDAC.

LDAC's External Subcommittee is empowered to make submissions to select committees on Bills that were not reviewed by LDAC before introduction. The External Subcommittee comprises independent advisers from outside the public service, appointed by the Attorney-General. The external members are experienced private sector lawyers and academics. Professor Geoff McLay, Victoria University of Wellington, currently chairs the External Subcommittee.

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

The Parliamentary Counsel Office (**PCO**) provides secretariat, legal, and policy support to LDAC. The PCO supports LDAC out of its baseline with the equivalent of one full-time legal and policy adviser and one 0.5 administrative assistant.

HOW LDAC OPERATES

This reporting period is the third year of LDAC's operation. LDAC has continued to develop and refine its processes and operation to offer timely advice. Feedback from departments that have consulted with LDAC, and whose legislative Bills have been the subject of the External Subcommittee's submissions, has been fundamental to LDAC's continued development.

LDAC met every three weeks over the past year, alternating between meetings to consider legislative proposals (attended by departmental officials and parliamentary counsel) and strategic meetings at which members discuss cross-cutting developments and design issues of general application across the statute book.

In addition, if departments and LDAC consider it appropriate, LDAC delegates subcommittees of its members to work closely with officials and parliamentary counsel on legislative proposals. Subcommittees work flexibly within departments' timeframes. Subcommittees generally meet two to three times with officials and parliamentary counsel at key stages during legislative development.

Legislative proposals are identified for consultation with LDAC through the annual Legislation Programme. 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.

The External Subcommittee may make submissions to select committees, but generally will not do so on Bills reviewed by LDAC before introduction.

In rare cases, the LDAC Chairperson may determine it is appropriate for the External Subcommittee to make a submission on a Bill already considered by LDAC before introduction. For example, LDAC may make a submission where the Chairperson believes there is a significant public interest involved or there are significant matters in a Bill that were not considered by LDAC before its introduction.

ACTIVITIES DURING 2017/2018

REVIEW OF LEGISLATIVE PROPOSALS AND BILLS

In 2017/2018, LDAC advised departments on 19 legislative proposals before introduction. Fifteen of those proposals were new to LDAC in the reporting period, and four were carried over from 2016/2017. LDAC delegated subcommittees to provide detailed advice and assistance to officials and parliamentary counsel on 17 of the 19 legislative proposals. Of those subcommittees, 13 will continue to work or be available to assist departments with legislative proposals in the next reporting year until the Bills are introduced. The remaining subcommittees have concluded their work and the proposals were introduced as Bills.

The LDAC's External Subcommittee made submissions to select committees on nine Bills in 2017/2018.

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

Legislative proposals and Bills the LDAC engaged with in 2017/2018

Total legislative proposals reviewed by LDAC before introduction	19
New to LDAC in 2017/2018	15
Carried over from 2016/2017	4
Subcommittees worked closely on	17
Total Bills the External Subcommittee made submissions on	9
To select committees	9
Other submissions (exposure drafts)	0
Total legislative proposals/Bills	28

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

Appendices 4 and 5 list the common issues that LDAC focused on before introduction and in submissions to select committees after introduction. The issues identified 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
- consistency with fundamental constitutional principles, including the rule of law
- the relationship between the new legislation and existing law, particularly the need for legislation to explicitly address any conflicts.

These are the most common issues on which the External Subcommittee has made submissions to select committees on Bills after introduction:

- consistency with fundamental constitutional principles, including the rule of law
- the impact of proposed legislation on rights under the New Zealand Bill of Rights Act 1990
- the creation of criminal offences
- the relationship between the new legislation and existing law.

As noted above, LDAC has separated its regular meetings into those discussing specific legislative proposals, on the one hand, and strategic meetings to discuss cross-cutting and design issues it is seeing across the statute book, on the other. Separating out discussions about cross-cutting and design issues has allowed LDAC to identify common threads and identify areas to extend its influence beyond specific legislative proposals. LDAC uses discussions at strategic meetings as the basis for developing guidance to be included in the Guidelines or supplementary material.

ISSUES OF NOTE

LDAC's consideration of constitutional principles and the relationship between new and existing law in the context of particular Bills over the reporting period has resulted in its developing its thinking on two key issues:

- the exclusion or limitation of the right to seek judicial review by legislation
- the use of bespoke legislative solutions, rather than relying on the general law, particularly in the planning context.

In addition, LDAC has begun to focus on the emerging issues being faced by legislation and its interaction with the moves towards greater digitalisation of government services.

EXCLUDING OR LIMITING THE RIGHT TO JUDICIAL REVIEW

LDAC continues to provide advice on the importance of retaining the right to seek judicial review of decisions made under legislation. In this reporting period, this issue arose with the Christ Church Cathedral Reinstatement Bill and the Electoral (Integrity) Amendment Bill in particular.

Judicial review is the means by which courts fulfil their constitutional role of ensuring public powers are exercised in accordance with law. The possibility of judicial review provides incentive for decision-makers to take into account appropriate matters and follow proper process. Legislation removing the right to judicial review could be seen to immunise unlawful exercise of power from judicial scrutiny. For this reason, legislation attempting to oust judicial review is, in practice, narrowly interpreted by courts and rarely achieves its objective.¹

Often the reason given for seeking to include restrictions on judicial review is to prevent frivolous and ultimately unsuccessful court challenges causing unacceptable delays and frustrating the overall policy objective behind a Bill. But LDAC's view is that removing or restricting the right to judicial review is rarely a proportionate response to the perceived risk.

¹ *Legislation Guidelines*, chapter 28.1, "[b]ecause ouster clauses undermine fundamental principles of constitutional law, the courts give them a narrow interpretation to preserve their ability to review decisions in at least some circumstances. As a result, ouster clauses may not be fully effective even if included."

LDAC considers the better way to reduce litigation risks is to ensure the legislation itself is clear about what it does and does not authorise. Where proper process has been followed and the legislation is clear, the High Court ought to be able to be relied upon to deal expeditiously with any judicial review application.

In the case of the Christ Church Cathedral Reinstatement Bill, LDAC's External Subcommittee expressed concern about procedural restrictions placed on judicial review. The Bill required any application for review to be made within 28 days. The subcommittee noted that, although the High Court could extend the deadline, a person was required to apply for an extension before the end of the 28-day period.

While the subcommittee understood the desire for certainty and the restrictive clause was preferable to a total ouster, it remained unconvinced that the restrictions were a proportionate response to the perceived risk. It submitted that, at the very least, the courts should be given a general discretion to allow late claims. The subcommittee noted that the 28-day restriction could be viewed as simply a bright-line articulation of the court declining relief where there was unexplained delay in bringing proceedings.

In the case of the Electoral (Integrity) Amendment Bill, the ability of parliamentary members expelled from their party to seek judicial review of that expulsion was emphasised by the Attorney-General in his advice that the Bill was consistent with the right of those members to freedom of expression and association. That being so, the External Subcommittee submitted that the Bill ought to be amended to make it clear that the Parliamentary Privilege Act 2014 would not be a barrier to the availability of that judicial review.

LDAC maintains the view that legislation should not remove the right to apply for judicial review. Restrictions placed upon the right should be rare and limited to cases where finality is critical and be proportionate to that objective. The committee intends to provide further education to departments on the actual risks associated with judicial review.

BESPOKE LEGISLATIVE SOLUTIONS

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, which increases the risk of error and unintended consequences and makes it more difficult for the public to know what law applies 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, the 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. Otherwise, legislation is seen as being used to circumvent the requirements that 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).

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, 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 solely 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 secondary legislation. 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 be consistent with democratic values.

IMPACT OF DIGITALISATION OF GOVERNMENT SERVICES ON LEGISLATION

In the past year, LDAC has begun to consider more closely some of the effects on legislative design arising from greater digitalisation of government services. This is a fast-developing area, where the understanding of how legislation best supports and interacts with the digital transformation of government is still at any early stage. LDAC will continue to consider these issues, and develop its thinking, in the context of particular legislative proposals as they arise. It is already clear, however, that greater standardisation of legislation will better support the interaction of legislation and digital services in multiple ways. LDAC notes that the PCO has initiated a programme of standardisation that may assist in this area.

LEGISLATION GUIDELINES (2018 EDITION) AND SUPPLEMENTARY MATERIAL

In April 2018, LDAC finished the significant work of updating and replacing the LAC Guidelines (2014) edition and published the Legislation Guidelines (2018 edition). Changes included new chapters on good legislative design, pecuniary penalties, and requiring decision-makers to consult. Cabinet endorsed the Legislation Guidelines as setting key standards with which LEG papers must indicate compliance, and against which policy and legislative proposals generally should be tested.

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 also contain legislative examples to assist advisers to make decisions at the margins of issues, and guidance on areas not covered by the Guidelines.

LEGISLATION THAT SHOULD BE REWRITTEN OR REVISED

In the course of its work with departments on legislative proposals and in submissions to select committees LDAC has noted the following pieces of legislation that are heavily amended and inaccessible, and should be substantially rewritten or revised. It is not an exhaustive list and there are other statutes that will be suitable candidates for rewrites or for the revision programme (submitted by the Attorney-General under the Legislation Act 2012 to each new Parliament).

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 LDAC's last Annual Report it was stated that LDAC considered the following Acts should be substantively rewritten

or revised at the earliest opportunity in advance of, or as part of, the next set of planned changes to the relevant Act:

- Children, Young Persons, and Their Families Act 1989 now the Oranga Tamariki Act 1989
- Education Act 1989
- Electoral Act 1993
- Telecommunications Act 2001

LDAC is pleased to note that the Electoral Act and the Education Act have been added to the new revision programme for the 2017-2020 parliamentary term.

LDAC encourages departments to discuss options for substantive rewrites or revision with the PCO.

FEEDBACK ON HOW LDAC HAS IMPACTED ON THE QUALITY OF LEGISLATION

Previous feedback from departments was that proactive and early engagement before final policy approvals is likely to significantly increase the value of engaging with LDAC. In this reporting period, LDAC has continued to mostly engage with departments prior to final policy decisions, or after policy decisions but before drafting is completed. The majority of departments surveyed continued to consider the quality of their Bill was improved by working with LDAC and are very likely to proactively engage with LDAC in the future when developing policy/legislation.

Most of the departments who have worked with LDAC before introduction have implemented its advice. Even where LDAC's advice is not implemented, officials consider working with LDAC helps to clarify and test policy thinking.

Officials and parliamentary counsel provided feedback that the External Subcommittee's submissions are valued and provide useful independent scrutiny of legislation. Feedback included statements that the submission clearly set out the issues that had been identified and that the submission constructively provided possible solutions to address issues. Even where submissions did not result in amendments to Bills, officials and counsel commented that submissions provided a basis with which to advise the select committee. The independence of the External Subcommittee is particularly valued.

EDUCATION PROGRAMME

LDAC's standing Engagement Subcommittee oversees education and training relating to LDAC's role and the Guidelines. In 2017/2018, LDAC held the following seminars/workshops:

- A seminar on how to transition existing rights and duties, and addressing past conduct in legislation (9 August 2017)
- A seminar on how to design infringement offence regimes (18 October 2017).

Additionally, the Engagement Subcommittee held a seminar on 31 July 2018 on how to use the Legislation Guidelines to support good legislative design.

These seminars were well-attended with 40–75 officials participating in each of the seminars.

EXPOSURE DRAFT SURVEY

During the reporting period, LDAC also undertook a survey of the public service's use of exposure drafts for legislation. Information gained from this survey will be used by LDAC to develop guidance on when and how best to use exposure drafts.

PARLIAMENTARY COUNSEL OFFICE'S REVIEW OF LDAC AND REPORT TO CABINET

When Cabinet established LDAC, it determined that the PCO, in consultation with interested departments, would report back to Cabinet on the operation of LDAC after two years of operation. The PCO's report to Cabinet was made in August 2018, was summarised in the last annual report, and is available on the LDAC's website at: <http://www.ldac.org.nz/>. In this reporting period, LDAC and the PCO have been working on the areas identified for improvements in that report, with a particular focus on:

- enhancing consistency and integration between the internal members of LDAC and the External Subcommittee
- reviewing procedural levers to achieve more consistent and transparent treatment of, and compliance with, the Guidelines and reporting on engagement with LDAC.

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.
- Professor Geoff McLay, External Subcommittee Chairperson, for chairing the External Subcommittee.
- The External Subcommittee members for volunteering their time and expertise to make submissions to select committees.



Paul Rishworth QC

Chairperson

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 MEMBERS OF LDAC

- Paul Rishworth QC, Senior Crown Counsel, Crown Law Office (Chairperson)
- Allison Bennett, Director, Legal, Ministry of Business, Innovation and Employment
- Andrea King (ex officio), Chief Advisor, Courts and Justice Services Policy, Ministry of Justice (ex officio)
- Andrea Speir, Manager Legislation, Ministry for Primary Industries
- Becky MacNeill, Group Manager, Operational Policy, Ministry for Culture and Heritage
- Cassie Nicholson (ex officio), Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office (ex officio)
- Fiona Leonard (ex officio), Chief Parliamentary Counsel, Parliamentary Counsel Office (ex officio)
- Geoff Daniels, Principal Advisor, Ministry for Primary Industries
- Jacqueline Derby (ex officio), Principal Counsel, Parliamentary Counsel Office (ex officio)
- Jason Gough, Senior Crown Counsel, Crown Law Office
- John Sutton, Principal Policy Analyst, Department of Internal Affairs
- Jonathan Ayto, Principal Advisor, The Treasury
- Karl Simpson, Policy Director, Ministry of Business, Innovation and Employment
- Sarah Kerkin, Chief Advisor to the Deputy Secretary, Ministry of Justice
- Tania Warburton (ex officio), Policy Advisor (Legal), Department of Prime Minister and Cabinet (ex officio),
- Wendy Illingworth, Policy Manager, Ministry of Social Development (reserve member)

The following members joined in 2017/2018

Allison Bennett, Director, Legal, Ministry of Business, innovation and Employment

The following members left in 2017/2018

- Stewart Bartlett, Principal Policy Analyst, Ministry of Social Development

EXTERNAL MEMBERS OF LDAC (EXTERNAL SUBCOMMITTEE)

- Professor Geoff McLay (Chair), Victoria University of Wellington Faculty of Law
- Professor Andrew Geddis, University of Otago Faculty of Law
- Brigid McArthur, Partner, Greenwood Roche
- James Wilding, Barrister, Clarendon Chambers
- Jeremy Johnson, Partner, Wynn Williams
- Jonathan Orpin-Dowell, Barrister, Stout Street Chambers
- Kate Salmond, Senior Legal and Policy Advisor, Law Commission
- Māmari Stephens, Senior Lecturer, Victoria University of Wellington Faculty of Law
- Martha Coleman, Barrister, Martha Coleman Barrister
- Matthew Smith, Barrister, Thorndon Chambers
- 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 left in 2017/2018

- Tiana Epati, Partner, Rishworth Wall & Mathieson

No new members joined in 2017/2018

APPENDIX 3 – EXTERNAL SUBCOMMITTEE SUBMISSIONS

1 JULY 2017 – 30 JUNE 2018

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

Bills

1. Marriage (Court Consent to Marriage of Minors) Amendment Bill
2. Christ Church Cathedral Reinstatement Bill
3. Electoral (Integrity) Amendment Bill
4. Misuse of Drugs (Medicinal Cannabis) Amendment Bill
5. End of Life Choice Bill
6. Corrections Amendment Bill
7. Privacy Bill
8. Earthquake Commission Amendment Bill
9. Administration of Justice (Reform of Contempt of Court)

APPENDIX 4 – COMMON ISSUES LDAC ADVISED DEPARTMENTS ON BEFORE INTRODUCTION 1 JULY 2017 – 30 JUNE 2018

The common issues LDAC advised departments on in relation to legislative proposals before introduction are set out below by chapter of the Guidelines. The most common chapters LDAC advised on before introduction (chapters 1, 2,3, 4, and 14) are further broken down by principles within the chapters.

Relevant Chapter	Specific guideline/principle ²	Number of legislative proposals that raised issue
Chapter 1 – Good legislative design	Legislation must be easy to use, understandable, and accessible to those who are required to use it. (page 8)	Total³: 7 7
	Know the purpose of the proposed legislative change. (page 11)	2
Chapter 2 – Defining the policy objective and purpose of proposed legislation	The policy objective must be clearly defined and discernible. (2.1).	Total: 8 5
	The provisions of the proposed legislation should be consistent with its purpose and the policy objective that underlies it. (2.2)	3
	Legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective. (2.3)	5
	Public consultation should take place. (2.5)	5

² Although LDAC applied the LAC Guidelines (2014 edition) when considering some of these proposals, for consistency this table refers to the relevant chapters of the Legislation Guidelines (2018 edition).

³ These totals refer to the number of legislative proposals that raised issues relating to the relevant chapter. Some Bills raised more than one issue under each chapter. For example, seven Bills raised good legislative design issues under Chapter 1; of those all seven raised issues relating to the Bill being “easy to use, understandable, and accessible”, but only two raised issues relating to know[ing] the purpose of the legislative change.

Relevant Chapter	Specific guideline/principle ²	Number of legislative proposals that raised issue
Chapter 3 – How new legislation relates to existing law	Any existing legislation that relates to the same matters or implements similar policies to those of the proposed legislation should be identified. (3.1)	6
	Any conflict or interactions between new and existing legislation should be explicitly addressed in the new legislation. (3.2)	9
	New legislation should not restate matters already addressed in existing legislation. (3.3)	2
	Relevant common law rules and principles should be identified. (3.4)	2
	Any conflict or interaction between new legislation and the common law should be explicitly addressed in the new legislation. (3.5)	2
Chapter 4 – Fundamental constitutional principles of New Zealand law		Total: 7
	Legislation should be consistent with fundamental constitutional principles, including the rule of law. (4.1)	3
	New legislation should respect property rights. (4.4)	2
	Legislation should be consistent with the right to natural justice. (4.5)	1
	Legislation should not restrict access to the courts. (4.6)	1
	Legislation that overrides fundamental rights and values must use clear and unambiguous wording. (4.10)	1
Chapter 5 – The Treaty of Waitangi, Treaty Settlements and Māori interests	Māori interests that will be affected by the proposed legislation should be identified. (5.1)	1
	New legislation must not be inconsistent with an existing Treaty settlement. (5.2)	1
	The Government must make informed decisions where legislation will affect, or have the potential to affect, the rights and interests of Māori. (5.4)	2

Relevant Chapter	Specific guideline/principle²	Number of legislative proposals that raised issue
Chapter 6 – New Zealand Bill of Rights Act 1990		Total: 4
	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)	4
	Any unjustified limitation should be restricted to that which is necessary to achieve the policy objective. (6.2)	1
Chapter 7 – Discrimination and distinguishing between different groups	Legislation should not discriminate on any grounds prohibited by section 19 of the NZBORA. (7.1)	2
Chapter 8 – Privacy and dealing with information about people	Legislation should be consistent with the requirements of the Privacy Act 1993 and that Act’s 12 information privacy principles. (8.1)	2
Chapter 10 – Dealing with conduct, people and things outside New Zealand	Significant cross-border issues should be identified. (10.1)	1
Chapter 12 – Affecting existing rights, duties, situations and addressing past conduct	Legislation should not deprive individuals of their right to benefit from judgements or to continue proceedings. (12.2)	2
	Potential transitional or savings issues should be identified early in the policy development process. (12.3)	1
Chapter 14 – Delegating law-making powers		Total: 8
	Legislation should not authorise secondary legislation to be made in respect of matters that are appropriate for an Act. (14.1)	7
	The empowering Act should define clearly the subject matter and purposes for creating secondary legislation. (14.2)	1
	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, and review. (14.4)	5

Relevant Chapter	Specific guideline/principle²	Number of legislative proposals that raised issue
Chapter 15 – Some specific types of empowering provisions	Legislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so (15.1) (Appropriateness of Henry VIII powers)	2
Chapter 18 – Creating a new statutory power		Total: 6
	A new statutory power should only be created if no suitable existing power or alternative exists that can achieve the policy objective. (18.1)	3
	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)	1
	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 is necessary to achieve the policy objective. (18.4)	3
	Legislation should identify what the power is and for what purposes, and in which circumstances, it may be exercised. (18.5)	3
Chapter 19 – Requiring decision-makers to consult	Legislation should include a requirement to consult when that is necessary to clearly ensure good decision-making practice. (19.1)	1
Chapter 20 – Creating a new public body		2
	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)	2
	Legislation should ensure appropriate accountability arrangements. (20.3)	1
	Legislation should create a new tribunal only if it is inappropriate to give new powers to an existing tribunal. (20.4)	1
Chapter 21 – Creating powers of search, surveillance, and seizure	New search powers should be granted only if the policy objective cannot be achieved by other means. (21.1)	1

Relevant Chapter	Specific guideline/principle²	Number of legislative proposals that raised issue
Chapter 21 – continued	New search powers should be exercisable only if there are “reasonable grounds to suspect” the factual situation has occurred and “reasonable grounds to believe” evidence will be found. (21.3)	1
	New search powers should apply the rules set out in Part 4 of the Search and Surveillance Act 2012. (21.4)	2
Chapter 22 – Ways to achieve compliance and enforce legislation	Regulatory options should be effective and efficient, workable, and appropriate. (22.2)	2
Chapter 23 – Creating new, or relying on existing, civil remedies	Existing civil remedies should be relied on if they are adequate and appropriate for the purposes of enforcement. (23.1)	1
	New civil remedies should be created only if there is a clear need, if it is necessary to achieve the purpose of the legislation, and no existing civil remedy is appropriate. (23.2)	1
Chapter 24 – Creating criminal offences	Legislation must state the maximum fine. “The maximum penalty should not be disproportionately severe...” (24.7)	1
Chapter 26 – Creating new pecuniary penalties	Legislation should provide guidance to the court about how to determine the amount of the penalty. (26.6)	1
Chapter 28 – Creating a system of appeal, review, and complaint	Legislation should not restrict the right to apply for judicial review. (28.1)	1
	A person affected by a statutory decision should have an adequate pathway to challenge that decision. (28.2)	3
Chapter 29 – Including alternative dispute resolution clauses in legislation	ADR provisions should be included in legislation where the potential nature of the dispute is suitable for determination by ADR. (29.1)	1
Design issues (not corresponding to specific Guidelines chapter)	Exhortatory/aspirational provisions - “Legislation or provisions in legislation that expressly provide they have no legal effect or that are not intended to be enforced risk needless expenditure of public funds and bringing the law into disrepute.” (Chapter 1, Good Legislative Design, at page 15)	3

APPENDIX 5 – COMMON ISSUES LDAC EXTERNAL SUBCOMMITTEE SUBMITTED ON IN 2017/2018

The common issues the LDAC External Subcommittee submitted on in relation to legislative proposals are set out below according to chapters of the Guidelines. The most common chapters the External Subcommittee submitted on (3,4,6, and 24) are further broken down by principles within the chapters where possible.

Relevant Chapter	Specific guideline/principle ⁴	Submissions made on Bills	Frequency
Chapter 2 – Defining the policy objective and purpose of proposed legislation	Legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective. (2.3)	Misuse of Drugs (Medicinal Cannabis) Bill	2
		Administration of Justice (Reform of Contempt of Court) Bill	
	Public consultation should take place. (2.5)	Privacy Bill	1
<hr/>			Total⁵: 3
Chapter 3 – How new legislation relates to the existing law	New legislation should make clear how it relates to existing legislation. (3.2)	Electoral (Integrity) Amendment Bill	1
		End of Life Choices Bill	2
	Any conflict or interactions between new and existing legislation should be explicitly addressed in the new legislation. (3.2)	Corrections Amendment Bill	
<hr/>			Total⁶: 4

⁴ Some of these submissions refer to the LAC Guidelines (2014 edition) chapters and clauses. For consistency, this appendix refers to the chapters in the Legislation Guidelines (2018 edition).

⁵ These totals refer to the number of submissions that raised issues relating to the relevant chapter. Some submissions raised more than one issue under each chapter. For example, five submissions raised issues under Chapter 4, with the submission on the Earthquake Commission Amendment Bill raising more than one issue under Chapter 4.

⁶ These totals refer to the number of submissions that raised issues relating to the relevant chapter. Some submissions raised more than one issue under each chapter. For example, five submissions raised issues under Chapter 4, with the submission on the Earthquake Commission Amendment Bill raising more than 1 issue under Chapter 4.

Relevant Chapter	Specific guideline/principle ⁴	Submissions made on Bills	Frequency
	New legislation should not restate matters already addressed in existing legislation. (3.3)	Marriage (Court Consent to Marriage of Minors) Amendment Bill	1
Chapter 4 – Fundamental constitutional principles of New Zealand Law			Total: 5
	Legislation should be consistent with fundamental constitutional principles, including the rule of law. (4.1)	Earthquake Commission Amendment Bill	1
	Legislation should be consistent with the dignity of the individual and the presumption in favour of liberty. (4.3)	Corrections Amendment Bill	2
		Administration of Justice (Reform of Contempt of Court) Bill	
	Legislation should be consistent with the right to natural justice. (4.5)	Electoral (Integrity) Amendment Bill	2
		Earthquake Commission Amendment Bill	
	Legislation should not restrict the right of access to the courts. (4.6)	Christ Church Cathedral Reinstatement Bill	1
Chapter 6 – New Zealand Bill of Rights Act 1990			Total: 4
	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)		4
	<ul style="list-style-type: none"> Conflict with s 19 of the New Zealand Bill of Rights Act 1990. Right to freedom from discrimination on the grounds set out in s 21 of the Human Rights Act 1993. 	Marriage (Court Consent to Marriage of Minors) Amendment Bill	
	<ul style="list-style-type: none"> Right to Justice. 	Christ Church Cathedral Reinstatement Bill	
	<ul style="list-style-type: none"> Right to Legal Counsel. 	Corrections Amendment Bill	
	<ul style="list-style-type: none"> Right to freedom of expression (section 14 NZBORA). 	Administration of Justice (Reform of Contempt of Court) Bill	

Relevant Chapter	Specific guideline/principle ⁴	Submissions made on Bills	Frequency
Chapter 8 – Privacy and dealing with information about people			Total: 2
	Legislation should be consistent with the requirements of the Privacy Act 1993, in particular the information privacy principles. (8.1)	Earthquake Commission Amendment Bill	1
	The Privacy Commissioner, the Ministry of Justice and, when appropriate, the GCPO should be consulted when developing legislation that may affect the privacy of individuals. (8.5)	Earthquake Commission Amendment Bill	1
Chapter 12 – Affecting existing rights, duties, and situations and addressing past conduct	Legislation should not have retrospective effect. (12.1)	Electoral (Integrity) Amendment Bill	1
Chapter 14 – Delegating law-making powers	Legislation should not authorise secondary legislation to be made in respect of matters that are appropriate for an Act. (14.1)	Corrections Amendment Bill	1
Chapter 15 – Some specific types of empowering Provisions	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)	Christ Church Cathedral Reinstatement Bill	1
Chapter 17 – Authorising the charging of fees and levies	Legislation must set out the manner by which the fee should be determined. (17.4)	Corrections Amendment Bill	1
Chapter 18 – Creating a new statutory power			Total: 2
	A new statutory power should be created only if no suitable existing power or alternative exists that can achieve the policy objective. (18.1)		
	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)	Corrections Amendment Bill	1
	Legislation should not create a power that is wider than necessary to achieve the policy objective. (18.4)	Corrections Amendment Bill	1

Relevant Chapter	Specific guideline/principle ⁴	Submissions made on Bills	Frequency
	Legislation should identify what the power is and for what purposes, and in which circumstances, it may be exercised.	Privacy Bill	1
	(18.5) "A clear statement of the power and how it will be exercised will assist those exercising the power, those people subject to it, and those who may be responsible for settling any dispute over the exercise of it." (page 86)		
	Legislation should include safeguards that will provide adequate protection for the rights of individuals affected by the decision. (18.6)	Corrections Amendment Bill	1
Chapter 24 – Creating criminal offences			Total: 4
	Compelling reasons must exist to justify applying the criminal law to conduct. (24.1)	Administration of Justice (Reform of Contempt of Court) Bill	1
	Legislation must precisely define the prohibited conduct. (24.2)	Administration of Justice (Reform of Contempt of Court) Bill	4
		Misuse of Drugs (Medicinal Cannabis) Bill	
		Privacy Bill	
		End of Life Choices Bill	
	Legislation should state the mental element (mens rea) for an offence to be committed.	Administration of Justice (Reform of Contempt of Court) Bill	1
Design issues (not corresponding to specific Guidelines chapter)	Issue as to when Act should commence.	Electoral (Integrity) Amendment Bill	1
	Exhortatory provisions - "Legislation or provisions in legislation that expressly provide they have no legal effect or that are not intended to be enforced risk needless expenditure of public funds, and bringing the law into disrepute.	Misuse of Drugs (Medicinal Cannabis) Bill	1