



LEGISLATION ADVISORY COMMITTEE

Annual Report 2008

15 December 2008

Report of the Legislation Advisory Committee to the Attorney-General

Rt Hon Sir Geoffrey Palmer, Chairperson

FOREWORD

The Legislation Advisory Committee (LAC) was established by the Minister of Justice in February 1986, and transferred to the Attorney-General's portfolio in 2004. The Law Commission was established at the same time and replaced the former law reform committees. It was considered desirable, however, that the work of one of those committees, the Public and Administrative Law Reform Committee, should continue. The LAC in effect succeeded that committee but with an enlarged role.

The objective of the LAC is to promote good quality legislation. It does this principally through the publication of guidelines for lawyers and policy advisers engaged in designing, developing, and drafting legislation, through the scrutiny of Bills before Parliament, by providing advice and assistance in particular cases, and through education. These different aspects of its work are described in this report.

The LAC consists of experienced government and private sector lawyers, a senior Judge and a retired Judge, experienced law teachers, and senior economists. The members of the LAC are thus able to bring considerable knowledge, skill, and experience to a wide range of issues related to legislation. The LAC receives considerable support from the Ministry of Justice, the Law Commission, and the Parliamentary Counsel Office for which it is grateful.

The LAC is not concerned with the policy objectives of legislation. Its focus is more on good legislative practice and public law issues. It is able to provide guidance to those engaged in the challenging task of producing effective, principled, and clear legislation and also to identify problems with proposed legislation and suggest solutions.

This report outlines the work done by the LAC during the year. In particular, it reports in detail about the scrutiny of Bills before the House and the effect of the

LAC's interventions on those Bills. We also report on submissions made by the LAC to the Regulations Review Committee on several important inquiries. We also comment on the relationship between the LAC and the Legislation Design Committee because, while both agencies perform important and complimentary functions, their respective roles are not always well understood.

Sir Geoffrey Palmer SC
Chair
Legislation Advisory Committee

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FUNCTIONS OF THE LEGISLATION ADVISORY COMMITTEE

1. The terms of reference for the LAC are to:
 - a. provide advice to departments on the development of legislative proposals and on drafting instructions to the Parliamentary Counsel Office;
 - b. report to the Minister and the Legislation Committee of Cabinet on the public law aspects of legislative proposals that the Minister or that Committee refers to it;
 - c. advise the Minister on any other topics and matters in the field of public law that the Minister from time to time refers to it;
 - d. scrutinise and make submissions to the appropriate body or person on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
 - e. help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
2. The Committee sees itself as a watchdog over public law issues, as well as legislative practice. In particular, the Committee sees itself as designing and promoting the LAC Guidelines, which have had wide recognition in a number of countries.

MEMBERSHIP AND MEETINGS

3. The membership of the LAC as at 1 December 2008 is as follows:
 - Sir Geoffrey Palmer SC (Chairperson)
 - Mr Andrew Bridgman
 - Associate Professor Andrew Geddis
 - Mr George Tanner QC
 - Mr Graeme Buchanan
 - Mr Grant Liddell
 - Mr Guy Beatson
 - Mr Ivan Kwok
 - Sir Ivor Richardson
 - Mr Jack Hodder SC
 - Professor John Burrows QC
 - Dr John Yeabsley
 - Hon Justice Robertson
 - Mr Robert Buchanan
 - Dr Warren Young
 - Ms Mary Scholtens QC

4. The representative members on the Committee, as at the 1 December 2008, are as follows:
 - Mr Bill Moore (Parliamentary Counsel Office)
 - Ms Cheryl Gwyn (Crown Law)
 - Mr David Noble (Parliamentary Counsel Office)
 - Ms Katherine Anderson (Department of the Prime Minister and Cabinet)
 - Ms Lauren Perry (Ministry of Justice)

5. In 2008, the LAC met eight times. The meetings were held on the following days:
 - 8 February
 - 28 March
 - 2 May
 - 6 June
 - 18 July
 - 22 August
 - 3 October
 - 12 December

WORK STRUCTURE

6. The LAC's work is divided among its subcommittees. The subcommittees put up proposals to the LAC before advancing significant pieces of work.
7. The five subcommittees are as follows:
 - a. **Guidelines Subcommittee** - chaired by Professor John Burrows QC. This subcommittee deals with the LAC Guidelines.
 - b. **Education and Monitoring Subcommittee** - chaired by Dr Warren Young. This subcommittee devises and implements programmes of education for the private and public sector. These centre on the LAC Guidelines and practical issues regarding the legislative process, such as how to deal with select committees and the Committee of the Whole House.
 - c. **Subcommittee on the Legislative Process** - chaired by Sir Geoffrey Palmer. This subcommittee investigates ways in which the legislative process can be changed to allow non-controversial law reform measures to receive greater attention from the House of Representatives than they do at present.
 - d. **Subcommittee on Delegated Legislation** - chaired by Mr Grant Liddell. This subcommittee considers issues around delegated legislation, in particular, when delegated legislation is appropriate and what safeguards should be in place to ensure the correct balance between primary and delegated legislation.
 - e. **Subcommittee on General Assistance** - chaired by Mr George Tanner. This subcommittee:
 - i. deals with departments or agencies which request help with particular legislative proposals and provides some input and feedback to them;
 - ii. deals with any requests from the Legislation Committee of Cabinet or Ministers; and
 - iii. superintends the writing of any submissions to Select Committees.

WORKLOAD

8. This year the LAC carried out the following work:
 - a. provided advice to agencies and Ministers on the development of legislative proposals;
 - b. scrutinised and prepared submissions on aspects of Bills introduced into Parliament;
 - c. prepared submissions not arising out of particular Bills;
 - d. reviewed and updated the LAC Guidelines Index;
 - e. reviewed and started working on an update to some of the LAC Guideline Chapters; and
 - f. undertook promotional and educational activities relating to the guidelines.

SCRUTINY AND SUBMISSIONS ON ASPECTS OF BILLS INTRODUCED INTO PARLIAMENT

9. The Law Commission's policy and legal advisers, under the supervision of a Law Commissioner, provide reports to the LAC on all Government Bills and some Members and Local Bills introduced into Parliament. This resource is equivalent to a half-time policy and legal adviser. Bills are reported on against the LAC Guidelines. The reports draw attention to any matter that is or may be inconsistent with the Guidelines. The LAC is not concerned with matters of policy, but rather with issues of good legislative practice. The Crown Law Office, rather than the Law Commission, prepares reports on Bills for which the Law Commission has been responsible.
10. The LAC considers the reports and the Bills to which they relate and decides whether or not to take further action. Action the LAC might take includes-
 - making submissions to and appearing before relevant select committees
 - forwarding LAC reports to relevant select committees
 - meeting with or writing to Ministers and officials
 - raising drafting issues with the Parliamentary Counsel Office.
11. During 2008 the LAC prepared 12 submissions to select committees, forwarded 5 reports to select committees, and had a number of meetings with Ministers and officials.
12. Changes were made to a number of Bills as a result of the LAC's involvement. The following are some examples.

Securities (Local Authority Exemption) Amendment Bill

13. The Bill exempted local authorities from the requirement to issue a prospectus for the issue and allotment of debt securities to the public. The LAC was concerned that this Bill left a serious gap in the law and raised a number of inconsistencies within this area of law.
14. As a result of discussions with officials, additional requirements were added to the Bill to enable investors to obtain up-to-date financial statements or interim financial statements both when the securities are offered and during the term of the securities. The Bill was also amended to require the investment statement relating to the securities to state that, unless the securities are guaranteed by the Crown, that they are not guaranteed by the Crown.
15. The Bill was passed on 8 April 2008.

Public Transport Management Bill

16. The Bill enabled local authorities to impose controls on commercial transport operators relating to a wide range of matters affecting the operation of those services. The LAC was concerned at the absence of any mechanism for objecting to the imposition of controls. The LAC raised its concerns with departmental officials as a result of which provisions were included in the Bill to enable operators to appeal to the Environment Court. Other changes were also made to the Bill to take account of matters raised by the LAC.
17. The Bill was passed on 25 September 2008.

Reserve Bank of New Zealand Amendment Bill (No 2)

18. The Bill relates to the regulation of non-bank deposit takers. The LAC was concerned at the wide range of requirements that could be imposed by regulations, particularly those relating to risk management and governance. It was also concerned at the lack of criteria relating to the granting by the Reserve Bank of exemptions from obligations under both the Reserve Bank of New Zealand Act and regulations under the Act.
19. The LAC had discussions about these and other issues with Reserve Bank officials. The Bill was altered so that governance requirements are contained in the Act rather than in regulations and to require non-bank deposit takers to have and comply with a risk management programme. Changes were also made to the Bill to provide criteria for granting exemptions.
20. The Bill was passed on 16 September 2008.

Financial Advisers Bill

21. This Bill introduced new requirements for the regulation of financial advisers. The LAC made two written submission to the Finance and Expenditure Committee in which it raised a number of issues. These included:
- the wide regulation-making power to enable products or classes of products to be classified as financial products and to include certain occupations as financial advisers
 - the complex menu of enforcement powers
 - lack of clarity
 - the absence of criteria for granting exemptions by the Securities Commission.
22. The Bill was significantly changed as result of the LAC's submissions and also as a result of discussions with departmental officials and members of the LAC in their capacity as advisers to the Legislation Design Committee.
23. The Bill was passed on 27 September 2008.

Policing Bill

24. This Bill repealed the Police Act 1958 and replaced it with a modern statute relating to the governance, organisation, and accountability of the police. The LAC made a written submission to the Law and Order Committee and appeared in support of that submission. The submission raised a number of issues relating to:
- certain offence provisions and a penalty provision
 - the power, by Order in Council, to add to or omit from a Schedule of the Bill policing roles that may be carried out by police employees
 - the power to establish a system of professional regulation by regulation.
25. The Bill was amended in line with the LAC's submission.
26. The Bill was passed on 16 September 2008.

Biosecurity and Hazardous Substances and New Organisms Legislation Amendment Bill

27. The Bill clarified the relationship between the Biosecurity Act 1993 and the Hazardous Substances and New Organisms Act 1996 as a result of the decision of the Court of Appeal in *National Beekeepers Association of New Zealand v Chief Executive of Ministry of Agriculture and Forestry* [2007] NZCA 556. The Bill retrospectively validated certain clearances

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28. The LAC was asked by the Primary Production Committee to make a submission on the Bill in relation to the validation issue. The LAC made a written submission to the Committee and advised that it did not consider the validation infringed the principles against retrospective legislation. The validation provision was not changed.
 29. The Bill was passed on 8 April 2008.

Public Health Bill

30. This Bill comprising nearly 400 clauses and 5 schedules replaces the Health Act 1956, the Tuberculosis Act 1948 and associated regulations. The LAC made a written submission to the Health Committee regarding a number of concerns. These included lack of clarity in certain offence provisions, insufficient confinement of coercive powers, excessively wide powers of the Director-General and medical officers of health, power for the Director-General to amend a schedule of the Bill, and certain other more technical considerations.
31. A particular example of a coercive power the LAC considered unsatisfactory was the power of District Courts to require individuals considered unable to care for themselves and who presented a threat to themselves or others to remain in their homes for up to 6 months. The LAC felt this amounted to a form of civil detention for which there were insufficient criteria. The LAC also regarded as objectionable a power for the Director-General to require a person to reimburse the Crown for causing an emergency. Normally, reimbursement would be ordered by a court.
32. The LAC also met with officials from the Ministry of Health and Parliamentary Counsel to discuss issues relating to the Bill.
33. The Health Committee recommended a number of changes to the Bill to address concerns raised by the LAC including an unrestricted power of delegation, the Director-General's power to amend a schedule, a reporting obligation, and the structure of a Part. Apart from these matters, no material changes were made to other provisions.

Regulatory Responsibility Bill

34. This is a Member's Bill. The purpose of the Bill is to improve statutes and regulations by requiring legislation to comply with specified principles and requiring government agencies to provide statements about proposed legislation and legislation after it has been enacted.

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35. The LAC made written submissions to the Commerce Committee and appeared on two occasions before the committee. The LAC reviewed and commented on several alternative options being considered by the committee.
 36. The LAC did not consider the Bill would meet its objectives. It was concerned, in particular, with the risk of making the law-making process justiciable by the courts. The LAC put forward an alternative Bill (Legislation Standards Bill) which would require the Minister responsible for a Bill to table in the House a regulatory impact statement on the Bill and a report stating whether the Legislation Advisory Committee Guidelines had been taken into account. As an alternative to legislation, the LAC proposed that an expert body be established to consider ways in which legislative standards could be improved.
 37. The committee recommended that the Bill should not proceed but endorsed the proposal for an expert taskforce to consider options for improving regulatory quality and decision-making processes.
 38. The Bill was before the House when Parliament rose for the general election in November.

Wanganui District Council (Prohibition of Gang Insignia) Bill

39. This is a Local Bill which empowers the Wanganui District Council to make bylaws designating a public place as a specified place and identifying a gang for the purposes of the Bill. The Bill then makes it a criminal offence to wear or display gang insignia in that place. A person suspected of committing an offence may be arrested without warrant, have the insignia seized, and have it forfeited to the Crown.
40. The LAC considered the matters in the Bill ought to be dealt with under the general law rather than in local authority bylaws and that there could be a disjunction between the policies of local authorities and central government over important law and order issues. The LAC also drew attention to a number of other problems with the Bill including inconsistency with the New Zealand Bill of Rights Act 1990 and the displacement of the ordinary procedure for making bylaws under the Local Government Act 2002. The LAC considered that the Bill should not be enacted.
41. The Law and Order Committee recommended that the Bill proceed subject to a number of amendments which in part address LAC concerns.
42. The Bill was before the House when Parliament rose for the general election in November.

Commerce Amendment

43. The Bill made significant amendments to the Commerce Act relating to regulation of goods and services supplied in markets in which there is little or no competition and no likelihood of a substantial increase in competition. It also provided for specific regulation of electricity and gas lines services and services at airports.
44. The LAC was particularly concerned at the absence of a general merits appeal right against determinations of the Commerce Commission prescribing the application of requirements of specific regulation types to regulated suppliers under the Bill.
45. Representatives of the LAC met with the Minister of Commerce regarding this Bill. The changes made to the Bill only partially took account the LAC's concerns.
46. The Bill was passed on 16 September 2008.

Land Transport Management Amendment Bill

47. This Bill made extensive amendments to the Land Transport Management Act 2003, including a new regional fuel tax, and established the New Zealand Transport Agency. The LAC considered that the proposed amendments (about 100 pages) were so extensive that it would be preferable to incorporate the changes into a new Land Transport Management Act.
48. Representatives of the LAC met with departmental and ministerial officials to discuss this matter. However, no changes were made in this regard.
49. The Bill was passed on 14 July 2008.

Other Work

50. The LAC scrutinised the following Bills but, apart from raising minor matters with departmental officials and Parliamentary Counsel, did not take any other action:
 - Customs and Excise Amendment Bill (No.2)
 - Holidays (Transfer of Public Holidays) Amendment Bill
 - Lawyers and Conveyancers Bill (No.2)
 - Residential Tenancies Amendment Bill
 - Judicial Matters Bill
 - Organised Crime (Penalties and Sentencing) Bill
 - Central North Island Forests Land Collective Settlement Bill
 - Sale of Liquor (Objections to Applications) Amendment Bill
 - Affiliate Te Arawa Iwi and Hapū Claims Settlement Bill
 - Aquaculture Legislation Amendment Bill

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- Reserves and Other Lands Disposal Bill
 - Privacy (Cross-border Information) Amendment Bill
 - Injury Prevention Rehabilitation Compensation Amendment Bill
 - Real Estate Agents Bill
 - Waka Umunga (Māori Corporations) Bill
 - Alcohol Advisory Council Amendment Bill
 - Climate Change (Emission Trading 7 Renewable Preferences) Bill
 - Customs and Excise Amendment Bill
 - Employment Relations (breaks and Infant Feeding) Amendment Bill
 - Walking Access Bill
 - Serious Fraud Office (Abolition and Transitional Provisions) Bill
 - New Zealand – China Free Trade Agreement Bill
 - Unit Titles Bill

51. On some of these Bills, the Committee raised minor points with the drafters.

SUBMISSIONS TO THE REGULATIONS REVIEW COMMITTEE

52. The Regulations Review Committee (RRC) performs the constitutionally important function of providing a key set of checks and balances on executive law-making. The LAC has an interest in delegated legislation, and one of the subcommittees, chaired by Mr Grant Liddell, superintends that interest. The LAC is interested in forging continuous links with the RRC and assisting where appropriate.

Inquiry into Incorporation by Reference

53. The RRC released an original report in 2004 on incorporation by reference. Since then there has been continuing correspondence between the LAC and RRC on the subject.
54. The LAC was invited to make further comment on the subject before the RRC completed their inquiry. A short written submission was sent to the Committee endorsing previous recommendations made by the RRC and supplementary information on model clauses.
55. The RRC released their report on the incorporation by reference at the beginning of September. The report accepted a number of the LAC recommendations, in particular the RRC agreed with the LAC's submission that the model clauses (published by the RRC in 2004) be included in a general piece of legislation so they can be adopted when necessary, rather than having to be repeated separately every time.

Inquiry into the use of Instruments of Exemption in Primary Legislation

56. In April this year the RRC released a discussion document on the use of instruments of exemption in primary legislation and invited the LAC to make a submission.
57. The LAC provided a substantial written submission to the discussion paper in June.
58. The RRC released its report on the use of instruments in primary legislation at the end of September. The report noted and endorsed a number of points raised in the LAC submission.

REVIEW OF THE LEGISLATION ADVISORY COMMITTEE GUIDELINES ON PROCESS AND CONTENT OF LEGISLATION

Indexing and Updating the Guidelines

59. There have been significant additions and alterations to the Guidelines in recent years. The LAC decided a new index for the Guidelines was required. A new index was produced during the year. The LAC is grateful to the Parliamentary Counsel Office for arranging for, and meeting the costs of, publication of the index.
60. The LAC updates the Guidelines on a regular basis. Professor J F Burrows QC chairs the Guidelines Subcommittee. The Subcommittee consulted with users of the Guidelines to ascertain their views about areas that should be covered by the Guidelines or changes to the Guidelines. As a result, the LAC proposes to make the following additions to the Guidelines:
 - revise the chapter on criminal offences so as to cover regulatory offences in greater detail, deal with the liability of corporations and their agents, and change the material on offences that involve a reverse onus of proof in light of the decision of the Supreme Court in *R v Hansen* [2007] NZSC 7;
 - the chapter on Bill of Rights will also be updated to take account of changes made following *R v Hansen* [2007] NZSC 7;
 - revise the chapter on penalties with particular regard to civil penalties and other sanctions and include further guidance on forfeiture and infringement offences;
 - update the chapter on public bodies to cover organisations that do not fit into any of the established categories;
 - add a section on the use of exemption powers in legislation; and
 - revise the section on incorporation of material by reference into legislation in light of recent problems with copyright issues.

Accessibility of the Guidelines

61. The full text of the Guidelines is available in electronic format on the LAC website (<http://www.justice.govt.nz/lac>). The full text comprises the 2001 edition, the 2003 supplement, and the 2006 and 2007 amendments.

RELATIONSHIP WITH THE LEGISLATION DESIGN COMMITTEE

62. The work of the LAC in scrutinising Bills takes place after they have been introduced. This means that it is often too late to make substantial changes. Some of the problems identified by the LAC could have been picked up earlier in the process while the policy for a Bill was being developed and the Bill was being drafted. For these reasons, it was felt that significant or complicated legislation could benefit from high level advice early on.
63. The Legislation Design Committee (LDC) was set up by the Government in 2006 for this purpose. It comprises Rt Hon Sir Geoffrey Palmer SC in his personal capacity as Chair, Secretary to the Treasury, Secretary for Justice, Chief Executive of the Department of the Prime Minister and Cabinet, and the Chief Parliamentary Counsel (or their nominees). Dr Warren Young (Deputy President of the Law Commission) and Professor J F Burrows QC and George Tanner QC (Law Commissioners) are advisers to the LDC.
64. The LDC reports to the Minister of Justice. It is not involved in policy formulation. It is there to discuss projects with departments during the development phase and identify the best ways to implement policy. It is concerned with things like legislative design, instrument choice, and the impact on the coherence of the statute book. Its role is purely advisory. Departments retain responsibility and are free to accept or reject the advice and suggestions the LDC makes.
65. Cabinet recently agreed to a process for the legal advisor in the Department of the Prime Minister and Cabinet, Legislation Programme Co-ordinator in the Cabinet Office, and the Chief Parliamentary Counsel to identify about 15 Bills on the annual legislation programme that might benefit from the LDC's assistance.
66. The LDC uses the LAC Guidelines and the combined experience and expertise of its members. How it responds depends on the issues involved. The LDC will always have an initial meeting with departmental advisers. This may be sufficient to resolve matters especially when a department wants to get an initial reaction to a proposal and ask "can we do it this way, is there a better way, are we on the right track?". Other

legislative proposals may require several meetings and reviews of draft legislation as it progresses.

67. Some of the members of the LAC are also members of, or advisors to, the LDC. This has benefits because the members of the LAC can bring their experience of issues considered by the LAC to bear on issues which the LDC is asked to look at. The fact that the LDC has looked at a proposed Bill does not prevent the LAC from later scrutinising the Bill in detail after it has been introduced and identifying other issues with it. If an issue comes up that relates to a discreet aspect of the Guidelines, departments can still go direct to the LAC for advice. While there is potential for overlap between the LAC and the LDC, it does not present problems in practice.

ACKNOWLEDGEMENTS

68. The LAC has throughout the year, continued to receive the support of the Ministry of Justice, especially in the role of secretary to the Committee. The efficient and consistent way this has been provided by a variety of individuals is appreciated by all members of the Committee.
69. Equally valuable and at the heart of much of the work of the LAC has been the outstanding service provided by the Law Commission. Their researchers have regularly reviewed the legislation put before the Committee and provided thoughtful and considered reports that have been the basis of the LAC's deliberation. The contribution this has made is fully recognised and appreciated by the whole group.
70. Representatives from the Parliamentary Counsel Office have also provided an invaluable service to the LAC by raising concerns and technical amendments with drafters directly. The Committee acknowledges this assistance and is highly appreciative of it.
71. The LAC would also like to acknowledge the assistance of Crown Law in providing reports to the LAC on legislation that the Law Commission has prepared.