



LEGISLATION ADVISORY COMMITTEE

Annual Report 2012

December 2012

Report of the Legislation Advisory Committee to the Attorney-General
from Hon Sir Grant Hammond KNZM, Chairperson

FOREWORD

The government has continued to advance a very full legislative programme. As at 4 December 2012 there were 64 Government Orders of the Day. This is significantly less than the same time in 2011, but it is still a heavy Order Paper.

Given that the Legislation Advisory Committee (LAC) presently engages (at least in a preliminary basis) with all Bills introduced in Parliament, and closely considers the most significant Bills, this has made for a heavy workload for the LAC. In 2012 there were 45 Bills which required full consideration. As will be seen from Appendix 3, some of these were very extensive pieces of legislation. Most of the Bills scrutinised complied with the LAC Guidelines. The Committee was still able to make suggestions for legislative improvement on many of them, which were acted upon in whole or in part.

The matters which have given the Committee greatest cause for concern have been, first, the use of "emergency" legislation in New Zealand, this year connected with on-going powers in relation to the aftermath of the Christchurch earthquake, and the National War Memorial Park in Wellington. Emergency or expedited legislation gives rise to difficulties in any jurisdiction in which it is raised. The Committee is concerned to see that it does not become a "norm", and that such legislation is given the closest possible scrutiny whenever it is used.

A second broad area of concern, most apparent in the sweeping changes to the Social Security and Social Benefits legislation, has been a tendency to provide Chief Executive Officers, or others, with significant numbers of very wide discretions. This is a rule of law issue. It is contrary both to the LAC Guidelines and modern legislative practice. To a large extent the problem can be avoided by earlier and closer consideration of these issues in the legislative design process.

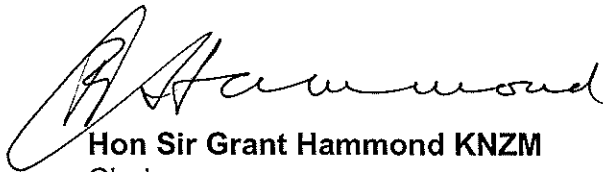
A third area is a creeping tendency in the direction of strict liability provisions.

Fourth, there is the increasingly cluttered and amended state of some – and perhaps too many – significant statutes in this jurisdiction. Every administration is under pressure to advance its forward looking legislative programme. But in our view it is most important that a strong programme of consolidation and rewriting of older statutes, such as the Social Security Act, be engaged.

A review is underway to consider how the LAC can improve its own internal processes. And, as Chair, I continue to liaise with the Attorney-General as to ways in which the legislative process can be improved in New Zealand.

I publicly extend my personal thanks to the members of the committee for their diligent work this year. Those members of the Committee who are from the private sector are essentially doing this important work on a *pro bono* basis. That is within the best tradition of the legal profession.

Finally, we were very saddened by the death of George Tanner QC in January 2012. He was an active and valued member of the LAC from 1996. We lost a good friend and a wise and respected colleague who brought to the LAC his wide expertise, as a former Chief Parliamentary Counsel, and wisdom about the law.

A handwritten signature in black ink, appearing to read 'G Hammond', written in a cursive style.

Hon Sir Grant Hammond KNZM
Chairperson
Legislation Advisory Committee

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INTRODUCTION

The Legislation Advisory Committee (LAC) was established in 1986 to achieve improvements in the quality of legislative practice and public law issues in New Zealand. The LAC is not concerned with the policy objectives of legislation. Its focus is on good legislative practice and public law issues. The LAC achieves this outcome by:

1. Providing independent advice to the Attorney-General, Ministers, select committees and officials on government Bills and public law issues; and
2. Publishing the LAC's *Guidelines on Process and Content of Legislation*. These Guidelines set out the basic legal principles, legislative processes and appropriate legislative content that should always be considered when devising legislation. Cabinet has approved these Guidelines and Ministers and their officials are required to advise the Cabinet Legislation Committee of the steps they have taken to comply with them.

See the Appendix 1 for LAC's terms of reference.

Membership of the LAC is drawn from experienced government and private sector lawyers, representatives of the senior judiciary, experienced law teachers and senior economists. The LAC currently consists of 21 members, either appointed by the Attorney-General or ex officio, made up of senior members from:

- Law Commission – 2 members;
- Private legal practice – 9 members;
- Academia – 2 members;
- Private economist – 1 member; and
- Public Service – 7 members.

See the Appendix 2 for the list of current members.

The LAC receives support from the Law Commission, the Ministry of Justice, Crown Law and the Parliamentary Counsel Office.

This is the Annual Report of the LAC to the Attorney-General for the 2012 calendar year.

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THE LEGISLATION ADVISORY COMMITTEE – 2012

How the LAC operates to achieve its objective has changed over time. Historically LAC would help departments who requested assistance when framing a particularly difficult policy proposal. The current focus of the LAC is to review all government Bills after introduction for their compliance with the LAC Guidelines.

The LAC's review of government Bills is a devolved process. The Law Commission undertakes the analysis of each Bill and reports to the LAC regarding the Bill's compliance with the LAC's Guidelines. The LAC then determines the nature of any required response for non-compliance with Guidelines. The responses can range from informing the department and/or Parliamentary Counsel Office, to making a submission to a select committee.

ACTIVITIES DURING 2012

Review of Bills

In 2012, the LAC considered 47 Bills. The table below summaries the Bills in relation to compliance with the Guidelines.

Bills Reviewed by LAC in 2012	
Bills that did not comply with the Guidelines and LAC made a submission to a select committee (or passed on a Law Commission report) (refer to Appendix 3)	20
Bills had minor non-compliance and LAC engaged with the department and/or Parliamentary Counsel Office on the issue	3
Bills that complied with the Guidelines, and no submission was made	19
Total Bills Reviewed	42

Analysis of bills

The analysis of Bills in light of the LAC Guidelines can throw up a great variety of matters ranging from breaches of rule of law principles to best practice in legislative drafting. The five examples below illustrate the range of matters raised by LAC with select committees in 2012. (Appendix 3 lists all submissions made by LAC and summarises the material issues raised.)

Examples of matters addressed in LAC submissions to select committees include:

1. Wide ranging dispensing powers that can be exercised by individual Ministers as a matter of discretion. (National War Memorial Park (Pukeahu) Empowering Bill);
2. Offences that appeared to be strict liability. The LAC suggested that the offences required greater definition and clarification of their status as strict liability

offences as well as clarification of what, if any, defences were available (Dairy Industry Restructuring Amendment Bill);

3. Displacing the normal resource planning processes (National War Memorial Park (Pukeahu) Empowering Bill);
4. Enforcement powers which impact individual rights and freedoms in situations where the criminal law is not yet engaged. Such powers would normally be confined to urgent situations or the most serious offending (Game Animal Council Bill); and
5. Devolved powers and duties that may be unenforceable, too wide or unnecessary, had unclear rights of appeal against decisions, and the balance between delegated bylaw making powers and public accountability was not appropriate (Marine Legislation Bill).

LAC Guidelines

The LAC Guidelines are a valuable resource for departmental legal teams and those working in government without legal training.

With significant support from the Parliamentary Counsel Office and the Law Commission, the Guidelines are being updated to reflect changes in legislation. The current key focus is the privacy and criminal offences chapters. In addition, the Parliamentary Counsel Office has completed indexing of the contents of the Guidelines to make them more accessible and improve the ease of use.

Other Activities

The LAC, in conjunction with the Office of the Clerk, held a seminar - *The Making of Quality Legislation* - in the Legislative Chamber on 11 July 2012 with over 180 public servants attending. The seminar was chaired by Professor Geoff McLay.

Topics included policy inception and development, legislative drafting, the passage of legislation through the House of Representatives (including select committee processes and the committee of the whole House), and reflections on why good legislation matters.

Speakers included:

- Hon Kate Wilkinson, Minister of Conservation and Food Safety – keynote address;
- Hon Sir Grant Hammond KNZM, President of the Law Commission;
- Guy Beatson, Deputy Secretary Policy, Ministry for the Environment;
- David Cochrane, Special Counsel, Simpson Grierson;
- Lesley Ferguson, Operations Manager (Select Committees);
- Mary Harris, Clerk of the House of Representatives;
- Ivan Kwok, Principal Advisor, Treasury;
- Brigid McArthur, Partner, Greenwood Roche Chisnall;

- Bill Moore, Acting Chief Parliamentary Counsel;
- Fay Paterson, Clerk-Assistant (House);
- Lauren Perry, Manager Constitutional Advisory Panel Secretariat, Ministry of Justice;
- Professor Paul Rishworth, University of Auckland;
- Anthea Williams, Crown Counsel; and
- John Yeabsley, Senior Fellow, NZIER.

The seminar was judged a success and LAC plans to hold further seminars.

ACKNOWLEDGEMENTS

The LAC would like to acknowledge the following contributions:

- The Law Commission for reviewing and providing reports on all Bills considered by the LAC;
- The Crown Law Office for reviewing and providing reports on Bills considered by the LAC that originated with Law Commission reports;
- The Parliamentary Counsel Office for following up the LAC's concerns and technical comments with drafters and officials; and
- The Ministry of Justice for its support to the role of Secretary to the LAC.

Hon Sir Grant Hammond KNZM
Chairperson

APPENDIX 1 – Terms of Reference

The terms of reference of the Legislation Advisory Committee are:

- i. to provide advice to departments on the development of legislative proposals and on drafting instructions to the Parliamentary Counsel Office;
- ii. to report to the Attorney General on the public law aspects of legislative proposals that the Attorney General refers to it;
- iii. to 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;
- iv. to 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;
- v. to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines and discouraging the promotion of unnecessary legislation.

APPENDIX 2 – Membership of LAC

- Hon Sir Grant Hammond (Chair)
- Guy Beatson
- Ivan Kwok
- Anthea Williams
- Professor Andrew Geddis
- Professor Geoff McLay
- Professor Paul Rishworth
- David Cochrane
- Lisa Hansen
- Jeremy Johnson
- David Johnstone
- Brigid McArthur
- Simon Mount
- Megan Richards
- Dr Campbell Walker
- Dr John Yeabsley
- Cheryl Gwyn (ex officio)
- Dr Mark Hickford (ex officio)
- Fiona Leonard (ex officio)
- Bill Moore (ex officio)
- Lauren Perry (ex officio)

The following members left in 2012

- George Tanner QC
- Denese Henare
- Sir Geoffrey Palmer

The following members joined in 2012

- David Johnstone
- Professor Geoff McLay
- Fiona Leonard (ex officio)

APPENDIX 3 – LAC Submissions to Select Committee during 2012

NAME OF BILL (alphabetical order)	MATERIAL ISSUES
Administration of Community Sentences and Orders Bill	<p>LAC suggested rewording to ensure clarity and compliance with standard sentencing principles.</p> <ol style="list-style-type: none"> 1. The totality principle (that the overall sentencing must be appropriate for the totality of offending) should apply to resentencing; 2. Additional conditions imposed on a first sentence where resentencing is not possible, should only be for conditions appropriate at the time of the resentencing; and 3. Assessment of time for offenders in custody should include time waiting for a resentence hearing if it complies with the sentence given (as in the Criminal Procedure Act 2011).
Bail Amendment Bill	<p>LAC suggested two amendments to uphold the rule of law and to conform with the UN Convention on the Rights of the Child.</p> <ol style="list-style-type: none"> 1. A Judge rather than an Electronic Monitoring Assessor should evaluate the merits of applications for electronic monitoring; and 2. The presumption that defendants who have previously received a sentence of imprisonment will not receive bail should not apply to defendants under 18.
Child Support Amendment Bill	<p>LAC queried whether the breach of privacy inherent in the proposal is justified, particularly for those who are meeting their child support obligations. LAC noted that the Privacy Commissioner may not have been consulted.</p> <p>On a practical matter, LAC suggested that parental agreements relied on by the Commissioner of IRD to decide the proportion of care provided by each carer should be in certain form and signed by both parents.</p>
Consumer Law Reform	<p>LAC had two concerns with the appeal rights:</p> <ol style="list-style-type: none"> 1. Lack of procedure for appeals to the District Court from the Registrar of Auctioneers; and 2. The absence of an appeal from the District Court on a question of law. <p>LAC also noted some drafting that does not conform to the Search and Surveillance Bill.</p>

NAME OF BILL	MATERIAL ISSUES
Corrections Amendment Bill	<p>LAC sent the Law Commission's report to the select committee as of possible interest. The report discussed some potential human rights issues raised by the amendments:</p> <ol style="list-style-type: none"> 1. Responsibility for health services (contrary to Ombudsmen Report and UN Standard Minimum Rules); 2. No independent medical oversight of segregation; 3. Qualification to minimum exercise of 1 hour requirement (contrary to Ombudsmen rec); 4. Officials' power to make deemed regulations about the property entitlements of prisoners; and 5. Opening of prisoners' mail.
Crown Minerals (Permitting and Crown Land) Bill	<p>LAC submitted that some important provisions for interested parties need clarification. It is unclear:</p> <ol style="list-style-type: none"> 1. Whether applicants seeking a change to dates for carrying out the work must comply with the previous date; and 2. How the non-disclosure provisions interface with the Official Information Act. <p>It noted that although the Minerals Programme is a core aspect of the new regime there is no longer any periodic review requirement.</p>
Dairy Industry Restructuring Amendment Bill	<p>LAC raised three issues about the offence provisions:</p> <ol style="list-style-type: none"> 1. It considered all the offences require greater definition and clarification about whether they are strict liability and what defences are available; 2. It queried whether offence provisions are the most appropriate enforcement process as the offences can only be committed by Fonterra; and 3. It suggested adding a time limit to ensure criminal liability does not arise unreasonably if information about milk price is not released immediately.
Defence Amendment Bill	<p>LAC sent the LC Report to the select committee as being of possible interest. Two points in the report are that:</p> <ol style="list-style-type: none"> 1. Good employer requirements applying to the state services are excluded so as to favour former military staff where positions are civilianised; and 2. The Ministry of Defence and NZDF will now share personal information but the categories of shared information and possible use of the information are not set out, contrary to the Privacy (Information Sharing) Bill.

NAME OF BILL	MATERIAL ISSUES
Electronic Identity Verification Bill	<p>LAC raised doubts about whether the principles of the Bill can be implemented as:</p> <ol style="list-style-type: none"> 1. There is no provision to reflect the principle that individuals can decide whether to apply for or to use an electronic identity credential; and 2. An individual's "right" to view the usage history of his or her electronic identity is explicitly stated to be unenforceable. <p>LAC suggested that since information privacy principle 11 is excluded for personal information held in accordance with this Act there could be:</p> <ol style="list-style-type: none"> 1. A clear statement that identity information shall not be disclosed except in accordance with the provisions of the Act; and 2. A list of the identity information for which provision is made so that other personal information is governed by principle 11. <p>A number of new offences have high penalties relative to other existing offences and may not be justifiable.</p>
Game Animal Council Bill	<p>LAC submitted that the power given to enforcement officers and honorary enforcement officers (to prevent or stop offending) entails significant interference with individual rights and freedoms in situations where the criminal law is not yet engaged. Such powers are normally confined to urgent situations or the most serious offending.</p> <p>It also queried why the Council is not treated as a Crown Entity, which would impose standard accountabilities.</p>
Heritage New Zealand Pouhere Taonga Bill	<p>LAC worked extensively with officials on this major bill, resulting in changes through a Supplementary Order Paper. LAC also made submissions to the select committee on:</p> <ol style="list-style-type: none"> 1. Powers of entry; 2. Governance of HNZPT; 3. Emergency authority provisions; 4. Appeal and submission rights 5. A lack of bylaw powers; and 6. A number of technical provisions to improve workability.

NAME OF BILL	MATERIAL ISSUES
Lobbying Disclosure Bill (Member's Bill)	<p><i>Update at end of year - 31/10 Minutes note decision to check Law Society's sub and that Chair may prepare a sub.</i></p>
Local Government Act 2002 Amendment Bill	<p>LAC submitted that the Bill creates a heightened litigation risk as the practical implications from the amended wording of the purpose clause are unclear. These include:</p> <ol style="list-style-type: none"> 1. The activities that Parliament wishes to limit should not be left to court determination; 2. Transitional arrangements should be included in relation to current activities that will be restricted; 3. Intended constraints in relation to CCOs and CTOs should be clear; and 4. Clarification of the "most cost-effective" test in relation to activities done as investment, such as underwriting fashion week, sports tournaments, would be helpful. <p>LAC asked the committee to consider the Minister's powers around the appointment and dismissal of Commissioners, in particular:</p> <ol style="list-style-type: none"> 1. The criteria for appointment; 2. Termination without compensation; and 3. Suspension of elections.
Marine Legislation Bill	<p>LAC submitted that several of the new devolved powers and duties are unenforceable, too wide or unnecessary.</p> <ol style="list-style-type: none"> 1. There are no provisions for enforcing the duties for regional councils, harbour masters and port operators; 2. The harbourmaster's power to enter land should be subject to normal notice requirements; 3. The new power of the Director of Maritime NZ should be restricted to emergencies so it cannot unreasonably limit port operations; 4. The nature of the right of appeal against a Director's decision (on fact or question of law) should be stated; 5. Delegated bylaw making powers should not be given to port operators (this may not have been intended) as they lack public accountability; 6. Two other Acts deal with the disposal of human remains at sea, duplication seems unnecessary; and 7. There is duplication with safety offences in the Health and Safety Employment Amendment Act; <p>LAC also queried the purpose of the Governor General's new rule making power and why it is not subject to requirements for the Minister to give notice or consult as at present</p>

NAME OF BILL	MATERIAL ISSUES
Medicines Amendment Bill	LAC submitted that the interface between the Medicines Act 1981 (or the Medicines Amendment Bill) and the Natural Health Products Bill is unclear as products can fall under two or more regulatory regimes.
Mixed Ownership Model Bill	<p>LAC submitted that the status of Mixed Ownership Model (MOM) companies should be clear in the statute, in particular that:</p> <ol style="list-style-type: none"> 1. MOM companies are subject to public audit; and 2. Coverage of the Ombudsmen and Official Information Act continue for the period when they were SOEs, although now removed. <p>LAC also noted that:</p> <ol style="list-style-type: none"> 1. A Minister may be held to account under Standing Orders in relation to MOM companies, although the Ministerial responsibility provision in the SOE Act is removed; and 2. The definition of "Crown" is much broader than in the Public Finance Act, which may have unforeseen consequences for litigation.
National War Memorial Park (Pukeahu) Empowering Bill	LAC submitted that if new matters arise during construction, they should be dealt with by legislative amendment not the exercise of Ministerial discretion. LAC considers that replacing the normal law applying to citizens (RMA in this case) goes to the principle of the rule of law and should be used with extreme caution.
Natural Health Products Bill	<p>LAC drew attention to some standard checks and balances absent from the new regulatory authority (the Director General of Health):</p> <ol style="list-style-type: none"> 1. No criteria for exemptions from product notification; 2. No requirement to provide reasons for decisions to the sponsor of a product; and 3. Unclear whether appeal to the Appeals Committee can be on fact. <p>LAC queried whether appointment to the Appeals and Advisory Committees should be for statutory terms rather than as determined by the Minister, given that the Committees are independent.</p>

NAME OF BILL	MATERIAL ISSUES
<p>Social Security (Benefit Categories and Work Focus) Amendment Bill</p>	<p>LAC's concerns with this bill primarily relate to its long history of amendments, which have left it in a confusing state, below the level expected of legislation in New Zealand. It is a prime candidate for a rewrite. In addition LAC noted that:</p> <ol style="list-style-type: none"> 1. The extent of the discretionary decisions, which can be made by the Chief Executive (and likely delegated further down) cuts across the modern principle of legislation that these types of discretions should not be used. This is a serious rule of law problem; and 2. On the privacy/information sharing front, there are serious concerns, particularly with the interface between the Privacy (Information Sharing) Bill currently before the House. The LAC was concerned that the privacy and information sharing issues in this provision have not been given sufficient scrutiny.
<p>Student Loan Scheme Amendment Bill (No 2)</p>	<p>LAC submitted on two matters with serious consequences for those affected by the legislation:</p> <ol style="list-style-type: none"> 1. The information sharing aspect of the Bill should either not proceed before the Privacy (Information Sharing) Bill is implemented, or the provisions should have a sunset clause; and 2. The definition of "serious default" involves satisfying criteria "to be determined by the Commissioner". There should be more certainty as to when serious default will arise.

APPENDIX 4 – All Bills Reviewed by LAC

Administration of Community Sentences and Orders Bill

Bail Amendment Bill

Building Amendment Bill (No. 4)

Child Support Amendment Bill

Climate Change Response (Emissions Trading and Other Matters) Amendment Bill

Conservation (Infringement System) Amendment Bill

Consumer Law Reform Bill

Corrections Amendment Bill

Crown Minerals (Permitting and Crown Land) Bill

Dairy Industry Restructuring Amendment Bill

Defence Amendment Bill

Electronic Identity Verification Bill

Environment Canterbury (Temporary Commissioners and Improved Water Management) Amendment Bill

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill

Families Commission Amendment Bill

Financial Reporting Bill

Game Animal Council Bill

Habeas Corpus Amendment Bill

Heritage New Zealand Pouhere Taonga Bill

Immigration Amendment Bill

Land Transport Management Amendment Bill

Lobbying Disclosure Bill

Local Government Act 2002 Amendment Bill

Maori Television Service (Te Aratuku Whakaata Irirangi Maori) Amendment Bill

Marine Legislation Bill

Medicines Amendment Bill

Members of Parliament (Remuneration and Services) Bill

Mixed Ownership Model Bill

Mokomoko (Restoration of Character, Mana, and Reputation) Bill

National War Memorial Park (Pukeahu) Empowering Bill

Natural Health Products Bill

Ngai Tamanuhiri Claims Settlement Bill

Ngati Makino Claims Settlement Bill

Ngati Whatua o Kaipara Claims Settlement Bill

Prisoner and Victims Claims (Redirecting Prisoner Compensation) Amendment Bill

Public Finance (Fiscal Responsibility) Amendment Bill

Regulatory Standards Bill

Reserve Bank of New Zealand (Covered Bonds) Amendment Bill

Social Security (Benefit Categories and Work Focus) Amendment Bill

Statutes Amendment Bill (No. 3)

Student Loan Scheme Amendment Bill (No. 2)

Subantarctic Islands Marine Reserves Bill