

LEGISLATION ADVISORY COMMITTEE

Annual Report 2013

December 2013

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

FOREWORD

During 2013 the principal focus of the Legislation Advisory Committee was on the review of bills introduced into Parliament.

The administration of the day had a heavy legislative programme. LAC and Law Commission staff reviewed 38 bills. On 15 of them, submissions were made to a Select Committee, sometimes with appearances by the Chair or other members of LAC. Drafting problems were drawn to the attention of Parliamentary Counsel Office in eight other instances.

There continued to be a wide range of reasons for the submissions made. In some instances there were concerns over breaches of the rule of law; through legislative clarity; to best practice in legislative drafting.

Details of the matters which the Committee took up are set out in Appendix 3. In most instances the Committee was able to recommend steps which improved the quality of the legislation.

The Committee has continued to be concerned about a present need to update and substantially rewrite the LAC Guidelines. These are a valuable resource for legal teams and departments, and those working in government without legal training. The Committee has determined that this should be its principal focus in 2014. Also an LAC website will be constructed. This will be publicly accessible and a valuable resource for lawyers and others concerned with the development of New Zealand legislation.

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, experienced law teachers and senior economists.

The LAC is currently chaired by a senior member of the judiciary and consists of 20 members, either appointed by the Attorney-General or ex officio, made up of senior members from:

- Law Commission – 2 members;
- Private legal practice – 7 members;
- Academia – 2 members;
- Private economist – 1 member; and
- Public Service – 8 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 2013 calendar year.

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THE LEGISLATION ADVISORY COMMITTEE 2013

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 LAC remains available to provide such assistance to departments. However, its focus is also on the review of 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 the Bill and reports to the LAC regarding its compliance with the LAC's Guidelines. The LAC then determines the nature of any required response for non-compliance with the Guidelines. The responses can range from informing the department and/or Parliamentary Counsel Office, to making a submission to a select committee.

ACTIVITIES DURING 2013

Review of Bills

In 2013, the LAC considered 38 Bills. The table below summarises the Bills in relation to compliance with the Guidelines.

Bills Reviewed by LAC in 2013	
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)	15
Bills had minor non-compliance and LAC engaged with the department and/or Parliamentary Counsel Office on the issue	8
Bills that complied with the Guidelines, and no submission was made	15
Total Bills reviewed	38

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 2013. (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. Whether it was preferable for public officials to benefit from an indemnity, rather than an immunity from lawsuit. (State Sector and Public Finance Reform Bill.)
2. The growth in civilly imposed, punitive orders. The LAC submitted that any such proposal should not be progressed without detailed consideration of the practical implications of such orders. It noted that orders with a punitive effect imposed through the civil jurisdiction raise concerns because the checks and balances on the exercise of power are different in the civil jurisdiction than the criminal jurisdiction. (Vulnerable Children Bill.)
3. The creation of new offences. The LAC made two submissions on Bills which created broad offences. The LAC cautioned about the need to draft offences narrowly, in a way that does not unintentionally criminalise benign conduct. (Electoral Amendment Bill and Objectionable Publications and Indecency Legislation Bill.)

LAC Guidelines

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

In 2013, the LAC resolved to rewrite the LAC Guidelines. In the past, the chapters of the Guidelines have been contributed by a number of experts over many years. It is important that the information contained within the Guidelines is preserved.

The two main audiences for the Guidelines are policy officials (many of whom are not legally trained), and departmental lawyers. The LAC holds concerns that the current form of the Guidelines is a bar to accessibility by many policy officials and some departmental lawyers. There is an uneven distribution of technical detail and high level ideas, historical background and real world examples; and the content is not presented in a consistent style. This has likely led to under use by both legal and non-legal officials.

This is a significant missed opportunity for the LAC to impart the wisdom contained in the Guidelines.

Work to reshape the Guidelines will commence in early 2014. It is intended that the guidance will consist of two components, in the form of:

- A new document aimed at non-legally qualified officials. It is intended that the document should be at the forefront of officials' minds when they start working on the policy for new legislation. It will spell out the basic rules, principles and questions for officials to consider, drawn from the existing Guidelines. The document will not be technical but will provide officials with the ability to identify

when they need to consult lawyers and what obvious obstacles are in the way of the policy.

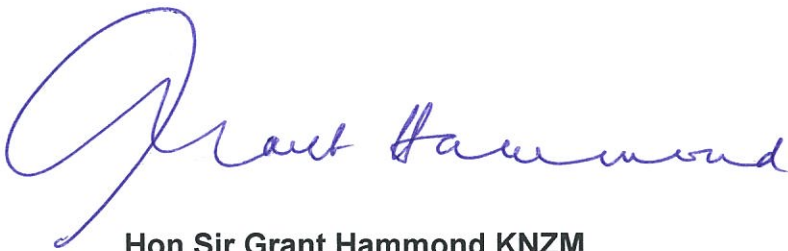
- A “Manual” which will share the same layout as the Guidance but will contain case law, academic discussion, examples raising the same issues, and links to external sources. The Manual will draw heavily on the current Guidelines by reorganising the presentation and updating the content.

It is intended that the new document will be publicly available from early 2015, with the updated “manual” completed by the end of 2015.

ACKNOWLEDGEMENTS

1. The Committee would like to acknowledge the following contributions:

- The Ministry of Justice for its support to the role of Secretary to the Committee;
- 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 Committee’s concerns and technical comments with drafters and officials.



Hon Sir Grant Hammond KNZM
Chairperson

APPENDIX 1 – Terms of Reference

The terms of reference of the Legislation Advisory Committee are as follows:

- 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)
- Professor Geoff McLay
- Professor Andrew Geddis
- Ivan Kwok
- Guy Beatson
- Dr John Yeabsley
- Brigid McArthur
- Megan Richards
- Dr Campbell Walker
- David Cochrane
- Lisa Hansen
- Simon Mount
- Professor Paul Rishworth
- Jeremy Johnson
- Anthea Williams
- David Johnstone
- Dr Mark Hickford (ex officio)
- David Noble (ex officio)
- David King (ex officio)
- Cheryl Gwyn (ex officio)
- Fiona Leonard (ex officio)

The following members left during 2013

- Bill Moore (ex officio)
- Lauren Perry (ex officio)

The following members joined in 2013

- David Noble (ex officio)
- David King (ex officio)

APPENDIX 3 – LAC Submissions to Select Committee during 2013

NAME OF BILL (alphabetical order)	MATERIAL ISSUES
<p>Construction Contracts Amendment Bill</p>	<p>LAC suggested:</p> <ul style="list-style-type: none"> • further consideration of whether alternative or additional mechanisms, such as ring-fencing of payments, would better fulfil the objectives of the Construction Contracts Act 2002 regarding payment problems in the construction industry • the Bill should only apply to construction contracts entered into after the Bill has commenced unless all the parties to the contract agree <p>LAC also suggested that further work is undertaken to determine how court judgements regarding the rights and obligations of parties can be enforced in practice. Alternatively, LAC submitted that where people cannot comply with a determination, a ground for opposition is added to allow for a change of circumstances outside of the defendant's control.</p>
<p>Education Amendment Bill</p>	<p>LAC suggested that:</p> <ul style="list-style-type: none"> • the accountability of school management will be enhanced if sponsors of partnership schools are subject to the Official Information Act and the Ombudsman Act • a definition of 'emergency' should be included to clarify the Secretary's powers of intervention • the new sections which place a duty on schools to ensure every student is able to attain their highest standard of achievement may pose possible litigation risk because of the difficulty for schools to demonstrate this • the rules for regulating teachers' surrender and retention powers should be in place before the Bill comes into force • a teacher's power to require a student to relinquish an electronic device should be limited to viewing a specific item on the device.
<p>Electoral Amendment Bill</p>	<p>LAC submitted:</p> <ul style="list-style-type: none"> • that it is difficult to justify the further restrictions proposed in the Bill that limit the way in which individuals express their political views and party allegiances on election day. There is not sufficient evidence of a pressing problem that would justify the restrictions proposed. • that interpretation problems may arise as a result of: <ul style="list-style-type: none"> ◦ removing the exemption for those wearing items of a similar nature to ribbons, streamers

	<p>and rosettes in a party colour. Removing the exemption may restrict people wearing items such as a blue silk brooch, green tie or red Samoan lei.</p> <ul style="list-style-type: none"> the clause restricting exhibiting party colours, names, emblems, slogans or logos in "view of any public place". The interpretation of this clause may capture, for example, people taking coloured balloons into party headquarters in preparation for an election night event, if it involved carrying the balloons in view of a public street. that it is not clear how a Returning Officer could cause rosettes worn in person to be removed or obliterated and if the Returning Officer has power of entry to remove items displayed in private property when they can be viewed by the public concern regarding how strict liability offences combined with a reverse onus defence will be applied to the display of ribbons and other items worn on the person the lack of an intention requirement regarding the wearing of ribbons/ items in party colours may mean that those simply in ignorance of the law commit a criminal offence it is unclear how the new restrictions will be enforced no comparable democracy has restricted individuals wearing rosettes outside polling booths.
Employment Relations Amendment Bill	<p>LAC suggested that:</p> <ul style="list-style-type: none"> the potential interaction between new section 50K (where the Authority can make a determination with the effect that further bargaining cannot be initiated within 60 days without agreement) and existing section 50J (which allows the Authority to make determinations fixing the terms of the collective unchanged) should be considered further so not to provide a parallel option involving the Authority further clarity is required regarding what actions amount to partial strikes (new Section 95(A)) there are practical benefits of adding a new requirement for a minimum period of notice for partial strikes further consideration should be given to Part 6A to clarify uncertainty about whether the provision applies to particular employers a requirement is added to new section 69OEA to require old employers to give affected employees access to their individualised employee information The requirement on the Authority to provide an oral determination should be changed to require the Authority to provide a written determination no later than three months after the investigation meeting.
Family Court Proceedings Reform	<p>LAC submitted that:</p>

Bill	<ul style="list-style-type: none"> the current provisions concerning family dispute resolution are neither clear nor precise enough to be effective the proposed privilege section does not adequately protect confidentiality of the parties some of the restrictions affecting care of children matters, where parties are prevented from being legally represented in court on most matters prior to defended hearings, are inconsistent with NZBORA.
Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill	<p>LAC suggested the following constraints:</p> <ul style="list-style-type: none"> clarify the conditions where a breach will result in suspension of cancellation clarify the term 'reasonable time' regarding the time for submissions to be made once a notice has been received consider allowing operators to seek a review of suspension and cancellation orders <p>LAC also suggested that the new offences should not be strict liability given the potentially serious consequences.</p> <p>LAC suggested adding and improving the range of safeguards in the Bill. It proposed:</p> <ul style="list-style-type: none"> Introducing appropriate principles underpinning the performance of the GCSB's functions. Introducing an agency approval process in relation to the GCSB's function in s 8C to assist other agencies, consistent with the Search and Surveillance Act 2012. Amending s 14 to strengthen the limitation on intelligence gathering in relation to New Zealanders. Introducing thresholds and safeguards in relation to the sharing of "Incidentally obtained intelligence" with domestic agencies under s 25. Strengthening the Inspector-General's oversight of the activities of the GCSB. Including statutory measures to protect privilege, for consistency with the Search and Surveillance Act 2012. <p>LAC also invited the Committee to consider:</p> <ul style="list-style-type: none"> A judicial process for the issue of warrants relating to New Zealanders. The scope of the GCSB's powers to act without a warrant or other authorisation under s 16. <p>LAC submitted that further clarification should be given to:</p> <ul style="list-style-type: none"> the process local authorities should follow when making a recommendation for establishing a special housing area whether the local authority should be required to consult on the establishment of special housing
Government Communications Security Bureau and Related Legislation Amendment Bill	
Housing Accords and Special Areas Bill	

	<p>areas</p> <ul style="list-style-type: none"> the grounds are for appealing a decision <p>LAC also submitted that the legislation should provide for the Minister to:</p> <ul style="list-style-type: none"> consider specific criteria before terminating a housing accord have regard to district plans when assessing the suitability of the proposed special housing area <p>LAC's other recommendations include:</p> <ul style="list-style-type: none"> detailing, in legislation, the threshold and criteria for selecting special housing areas requiring that notification of consent applications is given to territorial authorities and regional councils requiring the authorised agency to have regard to a housing accord if one exists when considering applications within a special housing area <p>LAC submitted that further consideration should also be given to:</p> <ul style="list-style-type: none"> the allocation of a resource consenting role to the chief executive of a Ministry (as per cl 23) whether the regulation making powers in cl 88 should be more tightly constrained. <p>LAC advised that the parallel plan change appeals (cl 72) may pose a litigation risk.</p>
Industry Training and Apprenticeships Amendment Bill	<p>LAC suggested greater clarification of:</p> <ul style="list-style-type: none"> the Minister's consultation obligations regarding the establishment of new codes the status and enforceability of any code issued by the Minister under new section 13F (e.g. a statement of good practice or a disallowable instrument).
Land Transport and Road User Charges Legislation Amendment Bill 143-1	<p>LAC highlighted concerns about the:</p> <ul style="list-style-type: none"> breadth of the search power warrant in clause 14 of the Bill (LAC suggested amending the across-the-board application of the search power so that it applies to specific offences only) breadth of the power given by the Road User Charges collector under clause 17 to specify road user charges by Gazette notice (LAC submitted that the Bill be amended to provide that a Gazette notice issued by the RUC collector be a disallowable instrument for the purposes of the Legislation Act and that they must be presented to the House of Representatives under section 41 of the Legislation Act).
Objectionable	<p>LAC submitted that the proposed offence of indecent communication with a young person under 16 was</p>

Publications and Indecency Legislation Bill 124-1	<p>too broad and will capture any “indecent” communication sent intentionally by a person aged over 16 to a person aged under 16. The LAC submitted that the offence should be more specifically stated to target the conduct identified and to include an additional element of harmful or exploitative intent on the part of the offender.</p> <p>LAC also submitted on the growing appetite for sentencing presumptions in legislation. This Bill has a presumption of imprisonment for repeat offences involving child pornography. LAC submitted that in the future presumptions should only be adopted where:</p> <ul style="list-style-type: none"> • the offending is such that early imprisonment is required to protect the public from ongoing harm by preventing offending during the term of imprisonment; • early imprisonment will provide an opportunity for intervention and rehabilitation for the offender; and/or • public opinion about the harm of the offending is such that it would support the presumptive imprisonment of the offender.
Public Safety (Public Protection Orders) Bill	<p>LAC suggested amendments to:</p> <ul style="list-style-type: none"> • make rehabilitative treatment for the purpose of facilitating the detainee’s safe reintegration into society an objective of the Bill • make it mandatory for the manager of a residence to implement the review panel’s recommendations on a detainee’s management plan • require a judge to explicitly consider less restrictive options before making a public protection order. • avoid retrospectively imposing a protection order regime on people who have been released that is more restrictive than that which they are currently subject to. • make strip-searches of residents who enter or leave a prison discretionary rather than mandatory • allow the Minister of Justice to remove a member of the review panel for reasons of neglect of duty or misconduct.
State Sector and Public Finance Reform Bill	<p>LAC supported the Law Commission’s submission that the Bill should provide for an indemnity for public service employees, rather than an immunity from lawsuits.</p>
Student Loan Scheme Amendment Bill (No 3)	<p>LAC submitted that:</p> <ul style="list-style-type: none"> • rather than create a new offence under s 162A, the Bill should provide a power to prevent borrowers from leaving New Zealand (as is consistent with the policy intent)

	<ul style="list-style-type: none"> • if the new offence provision remains, then it is recommended that the section is redrafted so that a borrower is required to have actually received notice of a default in order for them to be liable.
Vulnerable Children Bill	<p>LAC expressed concern about the growing tendency for law makers to introduce civilly imposed, punitive orders.</p> <p>LAC submitted that a person who is defending proceedings for a Child Harm Prevention Order, but who has not been convicted of any qualifying offence, should have the benefit of the privilege against self-incrimination.</p> <p>LAC enquired if the requirement for two judges on the Annual Review Panel of the Continuing Justification for a Child Harm Prevention Order was necessary.</p> <p>LAC suggested that the mens rea element or defences for strict liability offences be expressly described in legislation for offences with serious penalties in Part Two.</p>

APPENDIX 4 – All Bills Reviewed by LAC

1. Animal Welfare Amendment Bill
2. Border Processing (Trade Single Window and Duties) Bill
3. Construction Contracts Amendment Bill
4. Copyright (Parallel Importing of Films) Amendment Bill
5. Credit Contracts and Financial Services Law Reform Bill
6. Education Amendment Bill
7. Electoral Amendment Bill
8. Employment Relations Amendment Bill
9. Family Court Proceedings Reform Bill
10. Fisheries (Foreign Charter Vessels & Other Matters) Amendment Bill
11. Government Communications Security Bureau and Related Legislation Amendment Bill
12. Harmful Digital Communications Bill
13. Health and Safety (Pike River Implementation) Bill
14. Housing Accords and Special Areas Bill
15. Industry Training and Apprenticeships Amendment Bill
16. Insurance (Prudential Supervision) Amendment Bill
17. Land Transport and Road User Charges Legislation Amendment Bill
18. Local Electoral Amendment Bill (No 3)
19. Local Government (Auckland Council) Amendment Bill (No 2)
20. Minimum Wage (Starting-out Wage) Amendment Bill
21. New Zealand International Convention Centre Bill
22. Objectionable Publications and Indecency Legislation Bill
23. Parole Amendment Bill
24. Prisoners' & Victims Claims (Continuation & Reform) Amendment Bill
25. Psychoactive Substances Bill

26. Public Safety (Public Protection Orders) Bill
27. Resource Management Reform Bill
28. Royal Succession Bill
29. Social Housing Reform (Housing Restructuring and Tenancy Matters Amendment) Bill
30. Social Security (Fraud Measures and Debt Recovery) Amendment Bill
31. State Sector and Public Finance Reform Bill
32. Student Loan Scheme Amendment Bill (No 3)
33. Telecommunications (Interception Capability and Security) Bill
34. Trustee (Public Trust) Amendment Bill
35. Veterans' Support Bill
36. Victims' Orders Against Violent Offenders Bill
37. Vulnerable Children Bill
38. Waitangi National Trust Board Amendment Bill