



LEGISLATION DESIGN AND ADVISORY COMMITTEE

ANNUAL REPORT
for the year ended 30 June 2016

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 2016

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Wellington, New Zealand

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CHAIRPERSON'S FOREWORD

This is the Legislation Design and Advisory Committee's first Annual Report since its establishment in June 2015. It covers the first year of the Committee's operation, ending 30 June 2016.

During 2015/2016, the Committee's principal focus has been on reviewing draft Bills (and proposals for Bills) identified as benefiting from interaction with the Committee before introduction. The Committee has established protocols and processes to support its Cabinet-mandated functions, including establishing an External Subcommittee, undertaking education work, and maintaining the LAC Guidelines (2014 edition).

During its first year the Committee reviewed 28 legislative proposals before introduction. It delegated subcommittees of its members to provide detailed work and assistance on 20 of those proposals. The Committee received positive feedback from departments who engaged with it.

In February 2016, the External Subcommittee of advisers was established. It may make submissions to select committees on Bills introduced to the House of Representatives that were not reviewed by the Committee before introduction. The External Subcommittee made submissions to select committees on three Bills.

The Committee established an education programme, and held four seminars in relation to its role and covering various aspects of the LAC Guidelines. Engaging with public service officials and departments through seminars has been an important aspect of establishing the Committee and raising awareness of its existence and processes.

Over the next 12 months, the Committee will also focus on preparing a companion manual to support the LAC Guidelines as well as ensuring the Guidelines themselves remain up to date.

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 LAC Guidelines on Process and Content of Legislation (2014 edition) (the **Guidelines**), which have been adopted by Cabinet. The LDAC improves the quality and effectiveness of legislation by:

- (a) providing advice to departments in the initial stages of developing legislation when legislative proposals and drafting instructions are being prepared;
- (b) scrutinising and making representations to the appropriate body or person on aspects of Bills which raise matters of particular public law concern, through its External Subcommittee;
- (c) undertaking training and education work, relating to the LDAC's role and the Guidelines; and
- (d) maintaining and updating the Guidelines and developing the supporting companion document for officials engaged in designing, developing, and drafting legislation.

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

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

MEMBERSHIP AND SUPPORT

The LDAC is comprised of senior members of the public service with expert 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. The LDAC is currently chaired by Paul Rishworth QC, Senior Crown Counsel at Crown Law.

See **Appendix 2** for the list of current LDAC members.

The External Subcommittee is comprised of independent advisers, from outside the public service, who have been appointed by the Attorney-General. Members of the External

Subcommittee are experienced private sector lawyers and academics. The External Subcommittee is chaired by Professor Geoff McLay from Victoria University of Wellington.

See **Appendix 3** for the list of current External Subcommittee members.

The Parliamentary Counsel Office provides secretariat, legal, and policy support to the LDAC. The LDAC Secretary (Legal and Policy Advisor) is currently Delia Cormack of the Parliamentary Counsel Office.

THE LEGISLATION DESIGN AND ADVISORY COMMITTEE 2016

In its first year of operation, the LDAC developed processes to achieve its Cabinet-mandated functions. They are driven by the LDAC's mandate to engage early with departments on legislative proposals, when the most value can be added. The LDAC continues to refine its processes based on experiences to date and feedback from departments that have consulted with it on legislative proposals. The main feedback received from departments who engaged with the LDAC is that proactive and early engagement before final policy approvals is likely to significantly increase the value of engaging with the LDAC. As discussed below, in its first year of operation the LDAC advised on Bills at a range of stages. Its establishment part way through 2015 meant that it had limited scope to engage early on Bills.

Legislative proposals are identified for consultation with LDAC through the annual legislation programme. Because the LDAC was established part way through 2015, the Parliamentary Counsel Office and Department of Prime Minister and Cabinet identified Bills for consultation from the 2015 Legislation Programme. As from January 2016, Ministers have been required to indicate in their legislation bids whether they intend to refer a Bill to LDAC. The Attorney-General may also make recommendations to Ministers about referring a legislative proposal to LDAC when the legislation programme is being settled.

This reporting period, the LDAC met every six weeks. The LDAC has decided that from the next reporting period it will meet every three weeks, considering Bills and strategic matters at alternate meetings. In relation to Bills, its practice is to have an initial meeting with officials and Parliamentary Counsel who are working on a legislative proposal. Following that meeting the LDAC will, if it thinks appropriate, delegate a subcommittee of two to three members to continue working with officials on that proposal.

How subcommittees work on legislative proposals is largely determined by departments' needs in each case. Generally, subcommittees meet with departments two to three times to provide detailed advice over the course of developing legislation.

The role of the LDAC and its subcommittees is advisory, and departments determine whether or how to implement its advice. However, the LDAC may make reports to the Attorney-General if it considers that a legislative proposal significantly and unjustifiably departs from the Guidelines. Ministers and their officials must identify in Cabinet papers seeking approval of Bills for introduction or authorisation for submitting regulations to the Executive Council whether any aspects of the legislation depart from the default principles in the Guidelines. Cabinet papers must explain and justify any departures.

The External Subcommittee may make submissions to select committees on Bills that have not been to the LDAC prior to introduction. The External Subcommittee began reviewing Bills in February 2016. The Secretary provided by the Parliamentary Counsel Office analyses those Bills and reports to the External Subcommittee about the Bills' compliance with the Guidelines. The External Subcommittee then determines whether a submission to select committee is required. Draft submissions to select committees are provided to the LDAC Chairperson for comment and a cover letter from the Chairperson is included with the final submission.

ACTIVITIES DURING 2015/2016

Review of legislative proposals and Bills

In 2015/2016, the LDAC held initial meetings with departments on 28 legislative proposals before introduction. Initial meetings are held with the full membership of the LDAC, and departmental officials and Parliamentary Counsel attend to identify and discuss issues in legislative proposals.

If the LDAC and department consider it helpful, two to three members are delegated to a subcommittee to continue working with officials on the proposal and provide detailed advice and assistance. In 2015/2016, the LDAC delegated subcommittees to provide detailed advice and assistance to departments on 20 legislative proposals. Of those subcommittees delegated, 13 will continue to work or be available to assist departments with legislative proposals in the next reporting year until they are introduced.

The LDAC's External Subcommittee reviewed five Bills after introduction and made submissions to select committees on three Bills (see **Appendix 4**).

| Legislative proposals and Bills the LDAC engaged with in 2015/2016 | |
|--|----|
| Legislative proposals discussed with LDAC at initial meetings before introduction | 28 |
| Legislative proposals that subcommittees provided detailed advice and assistance to departments on before introduction | 20 |
| Bills reviewed by the External Subcommittee after introduction | 5 |
| Bills that the External Subcommittee made submissions to select committees on | 3 |
| Total legislative proposals/Bills | 33 |

Common themes and issues arising in the Committee’s work during the period

The LDAC has advised departments on a range of legislative design and Guidelines issues before introduction. To date, the most common issue the LDAC has advised on is in relation to delegated legislation-making powers, including the scope of empowering provisions in primary acts and the allocation of provisions across primary, secondary, and tertiary legislation. Other common issues the LDAC has advised on include how legislative proposals interface with existing legislation, and best practice for designing purpose statements and principles in legislation.

See **Appendix 5** for the list of common issues considered by LDAC before introduction.

The LDAC has identified the following developing trends in legislative design:

- (a) There appears to be an increasing push for lean, principles-based primary legislation, with increasing amounts of law allocated to delegated legislation.
- (b) In some cases, legislation seems to be increasingly used to attempt to reform an organisation’s operating culture. This trend raises the question whether legislation is the appropriate vehicle for, or necessary to achieve, such policy objectives, and whether alternative options have been fully considered.

It is too early in the LDAC’s life to determine the full scope of these trends or for the LDAC to take a general position about them. The LDAC will continue monitoring the trends identified above and others that will inform its advice and future work on the Guidelines and companion manual.

The External Subcommittee has made submissions to select committees on a range of legislative design and Guidelines issues. Examples of issues submitted on include the clarity and scope of significant statutory powers (e.g. powers of search, surveillance, and seizure), providing for appeal rights in legislation, and ensuring that legislation aligns with policy objectives.

See **Appendix 6** for a list of submissions made by the External Subcommittee and a summary of the material issues raised.

Impact on the quality of legislation

The LDAC has received positive feedback from departments it engaged with on legislative proposals before introduction. Of the departments surveyed in relation to bills, the majority:

- (a) found the LDAC's advice satisfactory to very satisfactory in terms of knowledge/expertise and value;
- (b) implemented the LDAC's advice;
- (c) indicated that they are likely or very likely to proactively engage with the LDAC in the future when developing policy/legislation;
- (d) considered that the quality of their bill was improved through interaction with the LDAC.

Below are two examples of the LDAC's advice and impact on the quality of legislation.

1. Transitional regulation-making powers

The LDAC assisted a department with designing transitional regulation-making powers. The policy objective and context meant that the transitional regulations would be able to amend, override, or suspend primary legislation. The department proposed to allow transitional regulations to be made by:

- (a) Order in Council on the recommendation of the chief executive; and
- (b) the chief executive under delegated authority where the matter relates to minor technical detail, has little impact on the rights of individuals, and would not have a fiscal impact.

The LDAC did not support the proposal to allow the chief executive to make delegated legislation that could override, amend, or suspend primary legislation. The LDAC considered that the proposed power was not consistent with the principles in Chapter 13 of the Guidelines.

The LDAC recommended that, in this case, transitional matters could be better dealt with by:

- (a) requiring transitional regulations that amend, override, or suspend primary legislation be made only by the Governor-General by Order in Council;
- (b) limiting the chief executive's delegated legislation-making power to granting exemptions for classes or individuals; or
- (c) amending the primary Act to remove matters of detail and create more flexibility for such matters to be dealt with through administrative discretion (in addition to transitional regulations made by Order in Council).

The department amended the proposal based on the LDAC's advice by removing the proposed chief executive's power to make transitional delegated legislation. This was reflected in the preferred option in the department's Cabinet paper and regulatory impact statement.

2. Clarity and accessibility of law

The LDAC assisted a department with a Bill that empowered the relevant minister to give a notice (in certain prescribed situations) which in turn created significant management powers for unelected officials.

The LDAC was concerned that the notice provisions were not sufficiently clear, transparent, or accessible to the public or those who were to be empowered by them.

The LDAC was also concerned that the proposed management powers were not subject to sufficient safeguards.

The department met with the LDAC to discuss these concerns and subsequently amended the draft Bill based on LDAC's advice. The notice provisions were improved by:

- (a) clarifying the matters of which the relevant minister must be satisfied and those to which he or she must have regard when giving notice; and
- (b) including a requirement that notice be given by reasonably practicable means of communication as well as published in the *Gazette* notice.

The provisions providing for the manager's powers were improved by:

- (a) setting a time period for reporting by managers on the use of their powers, specifying who must be given a copy of the report, and requiring reports to be published on the relevant websites;

- (b) clarifying that delegated powers not be exercised contrary to the priorities set by the manager; and
- (c) requiring the manager to supervise the delegate so far as is reasonably practicable.

The Bill was introduced with the above amendments.

The impact of the External Subcommittee on the quality of legislation after introduction cannot currently be assessed because the relevant select committees have not reported back on the Bills the External Subcommittee made submissions on. However, select committees have expressly acknowledged and appreciated the External Subcommittee's submissions in the two oral hearings it has attended this reporting year.

Education programme

The LDAC established a standing subcommittee to work on education and training, relating to the LDAC's role and the Guidelines. The education subcommittee has prepared an engagement programme for the 2016 calendar year, comprising:

- (a) four short seminars on specific chapters of the Guidelines;
- (b) a large scale, half-day seminar to be held mid-year; and
- (c) scope for department specific seminars.

In 2015/2016, the LDAC held two short seminars. The first seminar – *Developing Quality Legislation: How the LDAC can help* – introduced the LDAC, its processes, and the Guidelines. The second seminar – *Legislating Consistently with NZBORA* – was held in conjunction with the New Zealand Bill of Rights Act vetting teams at the Ministry of Justice and Crown Law. Both seminars were attended by 50 – 70 public service officials.

The LDAC also held department specific seminars at the Ministry of Business, Innovation, and Employment about the LDAC and the Guidelines, and at the Parliamentary Counsel Office about how the LDAC can work with Parliamentary Counsel.

LAC Guidelines (2014 edition) and companion manual

The LDAC established a standing subcommittee to maintain the Guidelines. The Guidelines subcommittee is preparing further updates to the Guidelines. An amended version of the Guidelines will be presented to Cabinet for approval at the beginning of the next Parliamentary term.

The Guidelines subcommittee is overseeing the development of the companion manual. Work on an initial chapter of the companion manual began in September 2015. The Parliamentary Counsel Office recently agreed to recruit, through the Government Legal Network, a secondee for 12 months to develop the companion manual under the supervision of Professor Geoff McLay at Victoria University of Wellington.

The companion manual will provide supplementary material to support the Guidelines. It will contain case law, academic discussion, examples, and links to external sources. It is intended that the companion manual will be completed by late 2017.

ACKNOWLEDGEMENTS

The LDAC would like to acknowledge the following contributions:

- The Parliamentary Counsel Office for providing and supporting the Secretariat to the LDAC;
- The LDAC members' home departments for supporting their membership of the Committee;
- 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 LAC Guidelines 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 LAC Guidelines 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 2014 revised Guidelines.

APPENDIX 2 – LDAC Membership

- Paul Rishworth QC, Senior Crown Counsel, Crown Law Office (Chairperson)
- Fiona Leonard, Chief Parliamentary Counsel, Parliamentary Counsel Office (ex officio)
- Cassie Nicholson, Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office (ex officio)
- Tania Warburton, Policy Advisor (Legal), Department of Prime Minister & Cabinet (ex officio),
- Jacqueline Derby, Principal Counsel, Parliamentary Counsel Office (ex officio)
- Anthea Williams, Principal Legal Adviser, Ministry for Primary Industries
- Sarah Kerkin, Chief Advisor, Civil and Constitutional, Ministry of Justice
- Karl Simpson, Policy Director, Ministry of Business, Innovation and Employment
- Jonathan Ayto, Principal Advisor, The Treasury
- Geoff Daniels, Principal Advisor, Ministry for Primary Industries
- Becky MacNeill, Director Legal, Ministry for the Environment
- Stewart Bartlett, Principal Policy Analyst, Ministry of Social Development
- John Sutton, Principal Policy Analyst, Department of Internal Affairs (Reserve Member)
- Andrea Speir, Manager Legislation, Legal Services Directorate, Office of the Director-General, Ministry for Primary Industries (Reserve Member)

The following members left during 2015/2016

- David Noble, former Chief Parliamentary Counsel, Parliamentary Counsel Office (ex officio)
- David King, General Manager, Civil and Constitutional, Ministry of Justice (ex officio)

The following members joined in 2015/2016

- Cassie Nicholson, Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office (ex officio)

APPENDIX 3 – External Subcommittee Membership

- Professor Geoff McLay (Chair), Faculty of Law, Victoria University of Wellington
- David Cochrane, Special Counsel, Simpson Grierson
- Brigid McArthur, Partner, Greenwood Roche
- Jeremy Johnson, Partner, Wynn Williams
- Megan Richards, Partner, Minter Ellison Rudd Watts
- Simon Mount, Barrister, Bankside Chambers
- Professor Andrew Geddis, Faculty of Law, University of Otago
- Tiana Epati, Partner, Rishworth Wall & Mathieson
- Sean Kinsler, Associate, Meredith Connell
- Jonathan Orpin, Barrister, Stout Street Chambers
- Matthew Smith, Barrister, Thorndon Chambers
- James Wilding, Barrister, Clarendon Chambers
- Martha Coleman, Barrister, Martha Coleman Barrister

APPENDIX 4 – Bills reviewed by the External Subcommittee after introduction

| | Bill | Submission to Select Committee |
|----|--|---------------------------------------|
| 1. | Resource Legislation Amendment Bill | Yes |
| 2. | Land Transfer | No |
| 3. | Kermadec Ocean Sanctuary Bill | Yes |
| 4. | Wildlife (Powers) Amendment Bill | Yes |
| 5. | Local Government Act 2002 Amendment Bill | No |

APPENDIX 5 – Common issues considered by LDAC before introduction

| Issues and examples | Relevant Chapter of LAC Guidelines (2014 edition) | Frequency in legislative proposals |
|---|--|---|
| Instrument choice <ul style="list-style-type: none"> - Allocating provisions between primary, secondary, and tertiary legislation - Scope of empowering provisions in primary legislation - Transitional regulation-making powers - Developing delegated legislation in tandem with primary legislation | Chapter 13 | 11 |
| NZBORA issues <ul style="list-style-type: none"> - Discrimination | Chapters 5 & 6 | 5 |
| Consistency and interface with existing legislation <ul style="list-style-type: none"> - Umbrella legislation - Transitional regulations | Chapter 2 | 6 |
| Purpose statements and/or principles <ul style="list-style-type: none"> - Best practice for purpose statements - Use of high level principles in legislation | Chapter 1 | 5 |
| Creating statutory powers <ul style="list-style-type: none"> - Delegating powers - Scope of powers - Appropriate safeguards | Chapter 16 | 4 |
| Consultation <ul style="list-style-type: none"> - Process | Chapter 1 | 3 |

| Issues and examples | Relevant Chapter of LAC Guidelines (2014 edition) | Frequency in legislative proposals |
|---|---|------------------------------------|
| Accessibility and clarity of legislation/provision design <ul style="list-style-type: none"> - General vs express design - Flexibility vs accessibility | Chapter 3 | 3 |
| Powers of search, surveillance, and seizure <ul style="list-style-type: none"> - Scope of powers - Statutory thresholds | Chapter 18 | 3 |
| Creating a new statutory body <ul style="list-style-type: none"> - Form of regulators - Interface with Crown Entities Act 2004 | Chapter 17 | 3 |
| Incorporation by reference | Chapter 13 | 1 |
| Infringement offences <ul style="list-style-type: none"> - Creating infringement offences that parallel criminal offences | Chapter 22 | 1 |
| Appeal rights <ul style="list-style-type: none"> - Ousting judicial review - Expressly providing for appeal rights in primary legislation | Chapter 25 | 3 |

APPENDIX 6 – LDAC External Subcommittee submissions to select committees in 2016

| Bill | Material Issues |
|-------------------------------------|---|
| Resource Legislation Amendment Bill | <p>The Subcommittee submitted that:</p> <ul style="list-style-type: none"> • the Committee must be satisfied that provisions allowing regulations to override existing and future local government rules/plans is a case for exception to the general rule in the Guidelines that matters of policy should not be in delegated legislation. • the power to override existing and future local government rules/plans should be subject to stricter exercise criteria, and the process for the requirement to consult should be fleshed out in the Act. • proportional appeal rights should be available in the statute for decisions made in relation to the Streamlined Planning Process. • it may not be necessary to remove appeal rights for certain decisions that relate to resource consent. The concern about re-litigation of consent decisions may be adequately addressed by other proposed changes in relation to resource consent decisions. • the proposal to remove appeal rights against decisions striking out resource consent submissions may create uncertainty that outweighs the value of any gains from removing the right to appeal. The policy objective of encouraging focused submissions and thereby avoiding unnecessary time, cost and uncertainty for affected parties could be achieved through ADR processes in the Environment Court. • the provisions providing for mandatory alternative dispute resolution should not limit legal representation. If that is not the intention, the provision should be clarified. |
| Kermadec Ocean Sanctuary Bill | <p>The Subcommittee submitted that:</p> <ul style="list-style-type: none"> • the compensation provisions should be included in the main body of the Bill, not the schedule, to increase clarity and accessibility of the legislation. • the objective element of the defence for strict liability offences is too high and should be removed or, at the least, should be amended so it is reasonably subjective rather than objective. • the Committee should be satisfied that there is cogent policy justification and that a rigorously fair procedure has been followed to rule out compensation for property rights. |

| | |
|----------------------------------|--|
| | <ul style="list-style-type: none"> • the relationship between the prevailing no-compensation provision and other law could be made clearer by expressly referring to the specific inconsistent provisions, even on a “without limitation” basis, that Parliament thinks might otherwise have given rise to compensation. • an internal review and/or appeal process should be included in the Bill for decisions on applications for authorisation for marine scientific research. The appeal process in Part 4, Subpart 1 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 could apply. • the Kermadec iwi authorities’ impact on the Environmental Protection Authority’s decision-making under the Bill should be clarified. The Bill could include decision-making criteria for authorising marine scientific research, including having regard to the views of the Kermadec iwi authorities. |
| Wildlife (Powers) Amendment Bill | <p>The Subcommittee submitted that:</p> <ul style="list-style-type: none"> • the Committee should be satisfied that the power to intervene to prevent or stop offending is needed given the powers already provided in the Act. The power should either be removed, or alternatively, it should be amended to clarify the relationship with existing powers in the Act. • it is unclear whether the power to intervene to prevent or stop offending is intended to be a warrantless entry power. If it is intended to be a warrantless entry power, the Committee should be satisfied that there is cogent policy justification, the provision should be made clearer so that it is obviously a warrantless entry power, the threshold for exercising the power should be higher, and the provision should make it clear that it does not apply to private dwellings. • the power to stop a person or thing in transit is too broad and should be amended to clarify the purpose of stopping and what a ranger can do once a person or thing is stopped. • it is unclear whether the power to stop confers a power of detention or what a ranger can do if a person refuses to stop. The power should be amended to make this clear. • the power to seize evidential material should include a proportionality check to ensure that the power is a proportionate and reasonable response to the suspected offence and appropriate in the circumstances. • the power to arrest may be wider than necessary to achieve the policy objective. A power to detain may be more appropriate. • the penalty for failing to produce identification and date of birth may be disproportionately |

| | |
|--|---|
| | <p>high and is significantly higher than for a similar offence in the Policing Act 2008.</p> <ul style="list-style-type: none">• The Select Committee gave officials leave to meet with the Subcommittee to discuss points. |
|--|---|