



LEGISLATION DESIGN AND ADVISORY COMMITTEE

ANNUAL REPORT

1 January 2022 to 31 December 2022

Report of the Legislation Design and Advisory Committee to the Attorney-General

Annual Report of the
Legislation Design and Advisory Committee
for 1 January 2022 to 31 December 2022

July 2023
Wellington, New Zealand

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CONTENTS

Chair’s foreword	4
Introduction.....	6
Trends.....	6
The operative provisions promoting the policy objective	6
Treaty provisions in legislation	7
Having a coherent compliance regime	8
The privilege against self-incrimination.....	8
Delegation of law-making powers	9
Conflicts with existing legislation	10
Necessity of legislation	10
The underlying problem	11
LDAC membership and advisory support	12
LDAC structure.....	13
Guidelines work-programme.....	13
Education and Engagement work-programme.....	13
Webinar Summary at a Glance	14
How LDAC operates	14
Activities during 2022	16
Review of Bills and submissions	16
Common issues arising in the Committee’s work during the period	16
Survey Results received on LDAC Advice provided in 2022.....	18
Acknowledgements	18
APPENDIX 1 – Terms of Reference	19
APPENDIX 2 – LDAC membership	20
Public service LDAC members	20
Non-public service LDAC members	20
Appendix 3 – LDAC Operating Model	21
APPENDIX 4 – Issues LDAC advised departments on before and after introduction and identified in submissions	23
Guidelines raised in submissions by Bill or inquiry name.....	28

CHAIR'S FOREWORD



Tēnā koutou katoa. Nau mai, haere mai.

This is the Legislation Design and Advisory Committee's seventh Annual Report since its establishment in June 2015. It covers the Committee's operation for the 2022 calendar year. This reporting period aligns with the Parliamentary calendar and the Government's annual legislative programme.

The Legislation Design and Advisory Committee aims to *promote quality legislation*. We do this by providing advice on legislative design during the development of Government Bills, by making submissions to select committees on Bills following introduction, by providing education and training, and by maintaining the Legislation Guidelines. We do this work through committee members appointed by the Attorney-General, with support from the secretariat that sits within the Parliamentary Counsel Office.

Committee members come from both the public and private sector, and include public servants, consultants, academics, and practising lawyers. We continue to do most of our work through Bill-specific subcommittees drawn from our full membership. This year we started trialling a similar subcommittee approach to our guidance in respect of the Māori | Crown relationship and the development Chapter 5 ("*The Treaty of Waitangi, Treaty Settlements and Māori interests*") of the Legislation Guidelines (2021 edition). The ability to draw on our full membership flexibly enables us to obtain maximum benefit from the breadth and depth of the expertise across our members. Regular meetings of the whole committee are held every two months.

In this reporting period we have seen several key trends. To those familiar with issues of legislative design these trends will not be novel. They include allocating between primary and secondary legislation, ensuring the operative provisions promote the policy objective, approaching Treaty provisions, dealing with conflicts with existing legislation, determining whether legislation is necessary or whether there is a more appropriate non-legislative avenue to take, and designing proportionate and coherent enforcement regimes.

Pressure to develop and implement policy and legislation quickly contributes to all these trends. It's understandable that Governments are focussed on delivering results, and citizens are frustrated by what they perceive to be the often lengthy processes for developing legislation. While working to make legislation as timely as possible it's also vital to remain mindful that the costs of poorly designed legislation can be large and persist for a long time.

In 2022 we ran three more webinars. These received positive feedback and are available on our YouTube channel. We have continued to develop supplementary materials, to provide additional resources in areas we see issues recurring. We made several external appearances in an educational capacity. Many of our members attended several workshops organised by the Parliamentary Counsel Office on – Te Tiriti O Waitangi, provided by Veronica Tawhai and John James Carberry of Te Ata Kura Educators, and the Wall Walk provided by Dr Simone Bull. We are grateful for this invaluable opportunity to develop our knowledge.

Over the reporting period we advised on 28 Bills (pre-introduction). We also made four submissions to select committees. This demonstrates a significant commitment on behalf of the Committee and departmental advisers. The Committee appreciates the effort departments have made to engage with LDAC during this period.

My continued appreciation goes to the Attorney-General for supporting the Committee and its work in the reporting period. I would also like to extend my gratitude to all our current and former members (and their employers) for continuing to give their valuable time, without charge. It is a true public service. And most importantly I thank the Parliamentary Counsel Office for their support for the work of the Committee.



Mark Steel

Chair

Legislation Design and Advisory Committee

INTRODUCTION

The Legislation Design and Advisory Committee (LDAC) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. It provides advice on design, framework, constitutional, and public law issues arising out of legislative proposals. It is responsible for the Legislation Guidelines (2021 edition) (the Guidelines), which have been adopted by Cabinet.

LDAC seeks to improve the quality and effectiveness of legislation by:

- advising departments in the initial stages of developing legislation, typically when legislative proposals and drafting instructions are being prepared;
- maintaining and updating the Guidelines, together with supplementary material, for officials who design, develop, and draft legislation;
- scrutinising and making representations to select committees on Bills that raise issues about compliance with the Guidelines; and
- providing training and education to develop quality legislation consistent with the Guidelines.

LDAC's principal focus is on reviewing legislative proposals and advising departments before Bills are introduced to Parliament.

See Appendix 1 for LDAC's Terms of Reference.

TRENDS

This section of the report discusses key trends LDAC has seen over the reporting period. LDAC is not under the illusion that perfection in process and design is achievable but considers that improvements to current processes are both realistic and desirable.

THE OPERATIVE PROVISIONS PROMOTING THE POLICY OBJECTIVE

LDAC provides advice on clearly defining the policy objective as it is the foundation of the entire legislative design.

A core feature of good legislative design (which also facilitates certainty of the law) is the requirement that all operative provisions are aligned with the policy objective underlying the legislation. LDAC has regularly advised departments to clearly identify and articulate the policy objective at the outset of policy development. This ensures coherency and consistency, and mitigates the risk of unforeseen consequences.

In 2022, LDAC has seen this issue arising most often in regulatory contexts and in the designing of purpose clauses. LDAC's advice has been:

- The regulatory context: it is important that officials have a clear understanding of the conduct intended to be prohibited, and that this is articulated, before designing offences and associated regulatory powers.
- The purpose clause (or alternative form of expressing the policy objective): this should add to the certainty of the legislation and should not go beyond what the substantive provisions can realistically deliver. This avoids uncertainty when applying the legislation which can lead to litigation risks among others.

There are real risks to the clarity and efficacy of the legislation when the operative provisions do not align with the policy objective. The risk of difficulty in interpretation and application of the law results in a lack of clarity for users. This can lead to litigation, confusion, unintended consequences and the degradation of trust and confidence in the law.

Ways of achieving greater clarity and avoiding unintended consequences include: explaining the intent in documents like the Bill's general policy statement; a legislative statement, including well-designed purpose and/or principle clauses in the legislation; speeches by the Minister and advice to the select committee.

TREATY PROVISIONS IN LEGISLATION

Departments continue to identify and prioritise the need to meet the Crown's obligations under the Treaty of Waitangi | Te Tiriti o Waitangi. Specifically, departments are increasingly looking at ways to improve how legislation provides for the identification and protection of Māori interests in statutory decision-making.

Meeting the Crown's obligations under the Treaty | Te Tiriti can be complex. The Māori | Crown relationship is continually developing and as such a single uniform approach would be inappropriate. However, there is a need to improve the consistency of approach across the system.

The government has established an advisory group to support agencies in the development of more considered and coherent Treaty provisions in legislation. The Treaty Provisions Oversight Group or "TPOG" comprises senior representatives from Te Arawhiti, the Ministry of Justice, Te Puni Kōkiri, the Crown Law Office, the Parliamentary Counsel Office and the Department of the Prime Minister and Cabinet. LDAC recommends that officials get in touch with TPOG via its email address: Treatyprovisions@tearawhiti.govt.nz

While distinct, the roles performed by LDAC and TPOG overlap in some key respects of how the design of a Bill can influence how Crown obligations are captured. From a design perspective, LDAC's advice has been that standalone treaty provisions which simply refer to honouring the principles of the Treaty are unlikely to be sufficient to meet the Crown's obligations. Rather, LDAC advises officials to first identify what is required in the statutory context to enable the legislation, and the framework it establishes, to be consistent with Treaty principles.

Once interests are identified, mechanisms for achieving that consistency, including specific references to the Treaty if necessary and appropriate, should be built into the operative provisions of the legislation.

To assist LDAC recommends the document [‘Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design’](#). This document is published by Te Arawhiti and endorsed by Parliamentary Counsel Office/ Te Tari Tohotohu Pāremata, Department of the Prime Minister and Cabinet/Te Tari o te Pirimia me te Komiti Matua, Ministry of Justice, Te Tāhū o te Ture, Te Tari Ture o te Karauna/Crown Law and Te Puni Kōkiri/Ministry of Māori Development.

Legislation should provide clear decision-making pathways for its users. The consequences of lack of clarity can include undermining the policy outcomes, undermining compliance with the Treaty, litigation, and widespread frustration which can lead to social disharmony.

HAVING A COHERENT COMPLIANCE REGIME

Coherent compliance regimes are essential to the success of their objective. Creating a fully developed compliance model that is effective in dealing with the many forms of non-compliance often requires a combination of tools. The combination of tools should form an effective system, and each tool should be proportionate to the form of non-compliance it is intended to address. Officials should also consider who will monitor compliance and enforce the legislation. In many circumstances, the role of achieving compliance and enforcement is given to an expert regulator. A regulator can take many forms.

Proposed legislation should clearly identify what level of regulatory intervention is necessary and who will be responsible for ensuring it is complied with. Where a regulator is required, their role should be clearly set out and clearly linked to the purpose of the legislation.

The more intrusive a regulator’s power, or the more significant the consequences for the individual of the use of the power, the greater the need is for both a strong policy justification and safeguards on the exercise of the power. Justification for powers in an enforcement regime ensures coherency and alignment because regulatory options must be consistent with the purpose of the proposed legislation.

LDAC recommends avoiding the temptation to ‘pick and mix’ bits and tools from various regimes without proper thought to their interaction or analysis of how this will operate in practice. Individual enforcement tools must be justifiable and workable, in both their individual context and in the context of the enforcement regime as a whole. They must ensure that enforcement powers are not too heavy-handed, and penalties are commensurate with the gravity of the relevant offence.

THE PRIVILEGE AGAINST SELF-INCRIMINATION

LDAC has noticed an increase in the incidence of Departments seeking its advice on design issues relating to the gathering and sharing of information. Departments appear to be unsure

about how information gathering powers should interact with the privilege against self-incrimination, particularly in a regulatory context.

In general, LDAC's advice is that information gathering powers should be proportionate to the objective they are designed to achieve. Effective information gathering regimes successfully balance the need to provide regulators with sufficient tools to achieve compliance against the need to protect individual rights and protections. The more invasive a power is, the greater the justification required. Departments ought to be able to justify why a search power is necessary.

Regarding the privilege against self-incrimination, LDAC notes that the privilege predominantly arises in relation to testimonial evidence that is compelled (e.g., verbal evidence via interview, or the creation of a written account document). The application of the privilege to information gathered in a law-enforcement context is relatively straight-forward. Unless expressly overridden in legislation, the privilege will apply.

It is less clear how the privilege ought to apply in a broader regulatory context (e.g., inspections, monitoring, mandatory reporting or enforcing compliance). Uncertainty in legislation increases compliance costs and can lead to unnecessary litigation and unforeseen outcomes. If officials consider that the privilege ought to apply, this ought to be expressly stated in the legislation. For example, section 106(5) of the Commerce Act 1986.

DELEGATION OF LAW-MAKING POWERS

Departments frequently ask for advice on whether the delegation of certain matters to secondary legislation is appropriate. Flexibility is commonly stated as the main justification for the delegation.

Whether delegating legislation-making to secondary legislation is appropriate is heavily dependent on the context and scope of the specific legislative proposal in question. In general terms, matters of significant policy should be included in primary legislation, whereas setting the mechanics of policy implementation will usually be appropriate for delegation.

Delegations should not be used as a tool to deal with undecided or ambiguous aspects of the policy at a later stage. The framework and operating model should be developed to the extent that Parliament (including the relevant Parliamentary select committee) have a clear idea of what the secondary legislation will achieve in terms of its policy. This ensures it can be scrutinised properly during the parliamentary process.

LDAC often advises that matters delegated to secondary legislation should have appropriate safeguards to ensure the secondary legislation is consistent with the purposes and scope of the empowering Act. Safeguards that should be considered include establishing clear limits on the delegated power(s), including mandatory considerations, consultation and notification requirements, and review as required.

LDAC also advises that certain aspects of the proposed delegations are a matter of significant policy that should be included in the primary Act. Too much delegation, or the delegation of key policy matters, has the potential to undermine the transparency and legitimacy of a legislative regime. Likewise, frequent changes to secondary legislation can undermine the certainty of law, especially when these regulations address matters of policy.

LDAC notes the ongoing work to improve access to secondary legislation. LDAC have updated the Legislation Guidelines in 2021 to provide more extensive, practical guidance around delegating powers. Scrutiny of, and access to, secondary legislation will improve over time but there is still a lot of work to be done. LDAC also notes the work of the Regulations Review Committee in relation to the scrutiny of secondary legislation and recommends officials review their [report on best practice for publication of secondary legislation](#). LDAC also notes the ongoing work of the Parliamentary Counsel Office to improve quality of, and access to, secondary legislation, and recommends officials review [PCO's annual report on legislative practices](#).

CONFLICTS WITH EXISTING LEGISLATION

New legislation must fit into the existing body of law in a coherent way. Any conflicts or interactions between the new and existing laws should be explicitly addressed in the new legislation so that it is clear which law prevails. LDAC often asks agencies how the proposed legislation is intended to interact with specific regulatory regimes or legislation.

Having a complete and comprehensive picture of where the proposed legislation fits in the statutory and common law framework, including an understanding of its similarities to, and relationships with, other regimes, is essential in creating sound law and avoiding issues later. This is especially pertinent if there is an intention to reverse a particular judicial decision or trend that has arisen from a series of judicial decisions.

In LDAC's experience, issues of conflicts with existing legislation often occur where there is an expedited or pressured policy development process. Undertaking careful analysis of the existing body of law will be critical to ensure any conflicts or interactions between the policy and existing regimes are appropriately addressed in the new legislation. LDAC encourages further analysis, including consultation with the bodies concerned, before any final decisions are made.

The consequences of conflicts arising can lead to confusion and unnecessary, costly (in money, time, and resource) litigation.

NECESSITY OF LEGISLATION

We continue to see a tendency for new legislation to restate matters that are already addressed in existing legislation. Restating matters increases the risk of unintended consequences arising if the new legislation does not align clearly with the existing legislation. It also creates an incentive for other legislation to restate matters.

At times, it may be more appropriate to give effect to the policy objective through non legislative means like improving the understanding of the existing law through education, rather than through restating existing legislation.

LDAC often provides advice on whether a new piece of legislation is the best vehicle to achieve the policy objective. We have, at times, recommended considering whether specific pieces of existing legislation may provide a better vehicle for an amendment that could achieve the same outcome as the proposed legislation.

There have also been instances where the policy objectives being put forward do not appear to *require* legislation. LDAC acknowledges that Governments have, and do, consider that legislation can play an important role in setting expectations in a more general sense and that this is a legitimate reason for legislating. Legislation can be used to promote social change by articulating aspirations and values, even when they are not wholly enforceable. However, LDAC's view is that such legislation should be used sparingly, as overuse can undermine respect for the rule of law.

At a practical level, this type of legislation creates potential for unintended risks and consequences. Where there is minor, or no legal effect anticipated, it can be easy to miss potential real-world consequences that can occur when legislation is applied in unforeseen scenarios.

This issue was the subject of submissions made by LDAC on the Companies (Director's Duties) Amendment Bill and the Plain Language Act 2022 (we note that aspects of these Bills changed following the select committee stage of the legislative process).

LDAC encourages the use of non-legislative avenues if there is no legal effect intended by the legislative proposal.

THE UNDERLYING PROBLEM

In previous Annual Reports, LDAC have discussed the trend of fast paced legislation. The speed at which legislation is being developed underpins many of the issues identified by LDAC above.

The issue of timelines is exacerbated by growth in the number, size, and complexity of legislation over time. The pressure to work efficiently can at times come at the expense of scrutiny and adequate processes.

The Cabinet Manual 2023 Edition advises that drafting instructions provided to PCO "should allow for realistic timeframes so that agencies have enough time to address policy and legal complexities they identify during drafting, resulting in a good-quality bill that can pass smoothly through the House." PCO can advise on how best to prepare instructions and how to assess realistic timeframes.

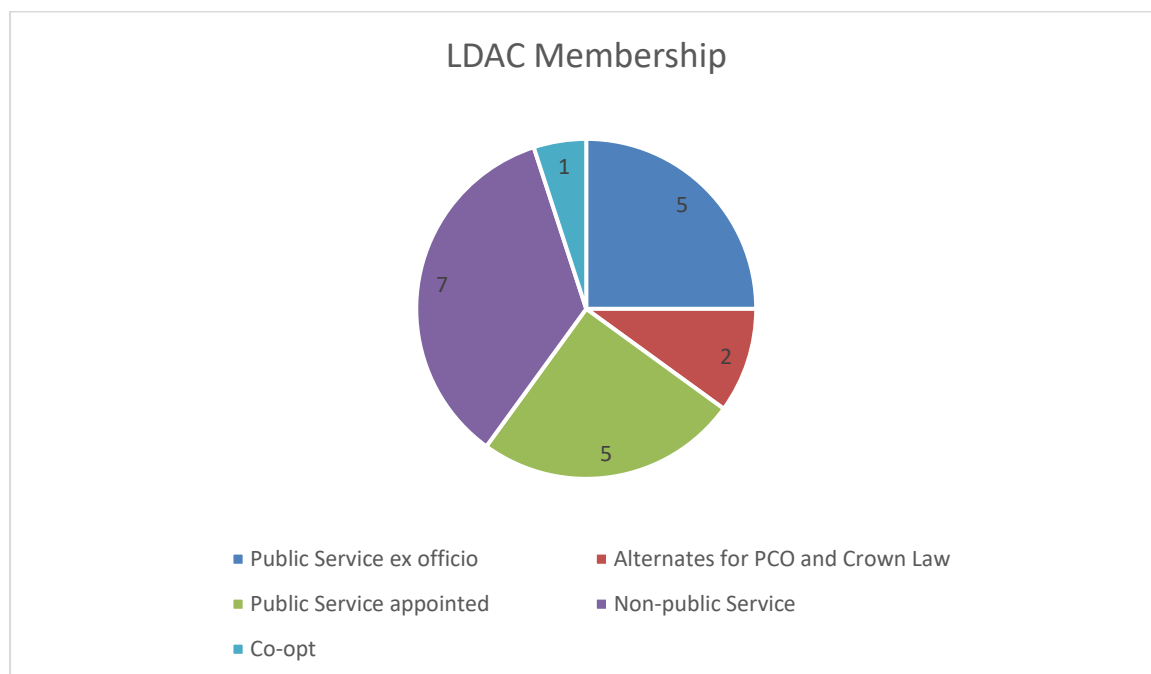
Where possible, “normal” select committee periods (of more than 4 months under Standing Orders) should be adhered to, and all deadlines through the process should account for the complexity and length of the Bill. Although these are not complete solutions, good law is the product of thorough policy analysis and appropriate scrutiny, which require time. Good law provides immeasurable benefits across all facets of society.

LDAC MEMBERSHIP AND ADVISORY SUPPORT

LDAC comprises senior public service officials and non-public service advisers from outside of the core public service. Members are either ex officio or appointed by the Attorney-General. Collectively, they have expert policy and legislative skills, drawing on backgrounds in the public and private sectors, and academia.

There are currently 20 members including 12 public service members. The LDAC Chair may co-opt up to three additional members to work on specific issues or for limited periods. Acting arrangements are made for public service members if they are away or unable to support LDAC’s work for an extended period. There are alternate arrangements for Crown Law and PCO. See Appendix 2 for LDAC’s current membership.

The Parliamentary Counsel Office provides secretariat and advisory support to LDAC out of its baseline. The LDAC secretariat comprises four advisers and an administrator.



LDAC STRUCTURE

LDAC meets every two months as a full committee, where it discusses key strategic issues, as well as regular developments, to support the Guidelines as well as Education and Engagement matters. These meetings are an opportunity for the Chairs of the LDAC pre-introduction Bill subcommittees to report back to the whole committee on the key Guidelines issues the subcommittee engaged on, and the subcommittee's position on key issues. The feedback that is reported back to the whole committee helps to ensure consistent advice across the subcommittees and to identify any recurring themes.

LDAC's pre-introduction work is done through Bill-specific subcommittees drawn from LDAC's full membership. The subcommittees enable more focused and in-depth conversations with departmental advisers who are developing Bills, followed up with written advice. This is sent to departments in the form of a letter of advice.

LDAC continues to review Government Bills introduced and, if necessary, makes submissions to select committees. On occasion, we work with departmental advisers on issues raised at select committee. See Appendix 3 for LDAC's operating model.

In addition to its Bill-specific work, LDAC carries out two other distinct work-programmes: its Guidelines work-programme and its Education and Engagement work-programme.

GUIDELINES WORK-PROGRAMME

The Guidelines work-programme has two main objectives. The first is to ensure that the Guidelines remain up-to-date and fit for purpose. The second is to develop and publish additional advisory material to supplement the Guidelines. While the objective of each piece of supplementary material will depend on its subject matter, the common objective is to provide more detailed information or guidance to assist advisers to address specific questions or issues raised in the Guidelines. Supplementary material to the Guidelines is available on LDAC's website.¹ The full committee now sets the Guidelines work-programme and each individual piece of work is progressed through bespoke subcommittees of around 4 members drawn from LDAC's full membership. This model is based off the Bill subcommittee model, which has proven to be efficient.

EDUCATION AND ENGAGEMENT WORK-PROGRAMME

The Education and Engagement work-programme focuses on ways to improve both public and private sector knowledge of the Guidelines and good law-making.

¹ See 'Supplementary material to the Legislation Guidelines' here: <http://www.ldac.org.nz/guidelines/supplementary-materials/>

In 2022, LDAC held three webinars:

- LDAC Legislation Guidelines Chapters 1 and 2, which covered good design and why it matters, and early design matters
- Legislation Guidelines Chapter 3, on how new legislation relates to the existing law; and
- LDAC Legislation Guidelines Chapters 14 and 15, which covered empowering secondary legislation.

The webinars were well received and can be viewed by following the links on LDAC’s website.

WEBINAR SUMMARY AT A GLANCE

	Chapters 1 & 2	Chapter 3	Chapters 14 & 15
Registrations	175	100	69
Attended	117	60	50
Very useful	77%	63%	47%
Somewhat useful	23%	37%	53%
Solicitor	26%	37%	64%
Policy Adviser	25%	20%	14%
Policy Analyst	23%	1%	4%
Manager	7%	8%	6%

In addition, LDAC partnered with other organisations to deliver various multi-disciplinary presentations including:

- two “Policy to Legislation” seminars for those new to government, hosted by the PCO and the Office of the Clerk; and
- a presentation and a submission to the Youth Parliament Select Committee

LDAC continues to maintain relationships with other cross-government organisations, such as the Office of the Ombudsman, the Policy Project, and the Government Legal Network.

The LDAC committee members made several external appearances in an educational capacity. Many members attended several workshops organised by the Parliamentary Counsel Office as part of its Kaupapa Ako programme in Te Ao Māori. We are grateful for this invaluable opportunity which progressed our knowledge.

HOW LDAC OPERATES

This reporting period covers the seventh year of LDAC’s operation. LDAC has continued to develop and refine its processes and operation to offer timely advice. Feedback from departments that LDAC has engaged with has been fundamental to LDAC’s continued development.

Bills are usually identified for LDAC consultation through the annual legislation programme. Officials indicate whether they intend to refer a Bill to LDAC in legislation bids seeking priority for a Bill on the legislation programme. Once a Bill is referred to LDAC, a subcommittee of around four members will meet with the relevant department to discuss the Bill. Parliamentary Counsel also participate in these discussions.

The Attorney-General is able to approve specific non-public service members to sit on Bill subcommittees on the advice of LDAC's Chair, after consultation with the chief legal adviser of the department for the relevant Bill. In 2020, the Attorney General delegated this approval power to the LDAC Chair.

Departments are expected to consult LDAC on legislative proposals if the proposal is:

- for a significant new principal Act.
- likely to impact on the coherence of the statute book (for example, because of a significant degree of overlap or interaction with other legislation).
- likely to be inconsistent with the principles in the Guidelines (particularly those relating to fundamental and constitutional principles).

Departments may also refer a legislative proposal to LDAC if the proposal:

- raises basic framework or design issues, or choice of secondary legislation.
- would benefit from advice on how to best to apply or ensure consistency with the Guidelines.

LDAC's role is advisory, its advice is non-binding, and its working style is collegial and helpful. Departments and Ministers determine whether or how to implement LDAC's advice. LDAC appreciates the effort departments make to engage with it early.

Ministers must identify in Cabinet papers seeking approval of Bills for introduction (or authorisation for submitting secondary legislation to the Executive Council) whether any aspects of the legislation depart from the Guidelines. Cabinet papers are expected to explain and justify any departures from the Guidelines.

LDAC may report to the Attorney-General when it considers departures from the Guidelines are serious or contentious. LDAC may also include a comment or request its views be recorded in relevant Cabinet papers.

LDAC reports to the Attorney-General sparingly. LDAC is generally able to work through its concerns with the applicable department, but reporting to the Attorney-General is an important option in certain cases, especially where it would be useful for the Cabinet Legislation Committee to have a substantial discussion on the issue.

LDAC may also make submissions to select committees on Bills that raise legislative design issues. In rare cases, the LDAC Chair may decide that it is appropriate to make a submission on a Bill already considered by LDAC before introduction. For example, LDAC may make a submission where the Chair believes there is a significant public interest involved or there are significant matters in a Bill that were not considered by LDAC before the Bill's introduction.

ACTIVITIES DURING 2022

REVIEW OF BILLS AND SUBMISSIONS

In the reporting period (from January 2022 to December 2022), LDAC advised departments on 28 Bills. 25 of the 28 Bills were new to LDAC in the reporting period, and 3 were carried over from previous years. LDAC had 35 meetings with Departments and issued 35 letters of advice and 4 pieces of email advice.

LDAC made four submissions during 2022:

- Companies (Directors Duties) Amendment Bill
- Inquiry into the regulation-making powers in the COVID-19 Response (Vaccinations) Legislation Act 2021
- Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Claims Settlement Bill
- Plain Language Bill

The submissions can be found on LDAC's website.² There was an increase in submissions made by LDAC this year, compared to one made in 2021.

Bills LDAC engaged with and submissions LDAC made in 2022

Total Bills reviewed by LDAC	28
New to LDAC 01/01/2022 – 31/12/2022	25
Carried over from previous years	3
Total Bills LDAC made submissions on to select committees	4
Total Bills/submissions	32

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

Appendix 4 lists the issues that LDAC focused on when advising departments on Bills and in submissions to select committees after a Bill's introduction. The issues indicate the common aspects of the Guidelines that have been a focus in the course of LDAC's work across a number of Bills. These are not necessarily trends for the statute book as a whole.

LDAC's submission on the Companies (Directors Duties) Amendment Bill focused on:

- the necessity to legislate as it relates to unintended and unforeseen consequences;

² See 'Submissions for 2022' here: [2022 | The Legislation Design and Advisory Committee \(ldac.org.nz\)](https://www.ldac.org.nz/2022)

- uncertainty of the interaction with existing legislation; and
- ensuring the policy objective is clearly defined and discernible and the provisions of the legislation should be consistent with that objective.

LDAC's submission on the Inquiry/briefing into the regulation-making powers in the COVID-19 Response (Vaccinations) Legislation Act 2021 and the COVID-19 Public Health Response (Protection Framework) Order 2021 was focussed on:

- the delegation of powers when making secondary legislation during times of crisis;
- consideration to ensuring the best legislative process for emergency legislation; and
- ensuring appropriate safeguards are put in place for bespoke legislation.

LDAC's submission on the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Claims Settlement Bill was focussed on:

- principles to consider when designing legislation that relates to matters that are subject to prospective court decisions or current litigation;
- justification for legislating prior to a relevant court decision; and
- ensuring public are clearly advised of rationale to progressing the Bill.

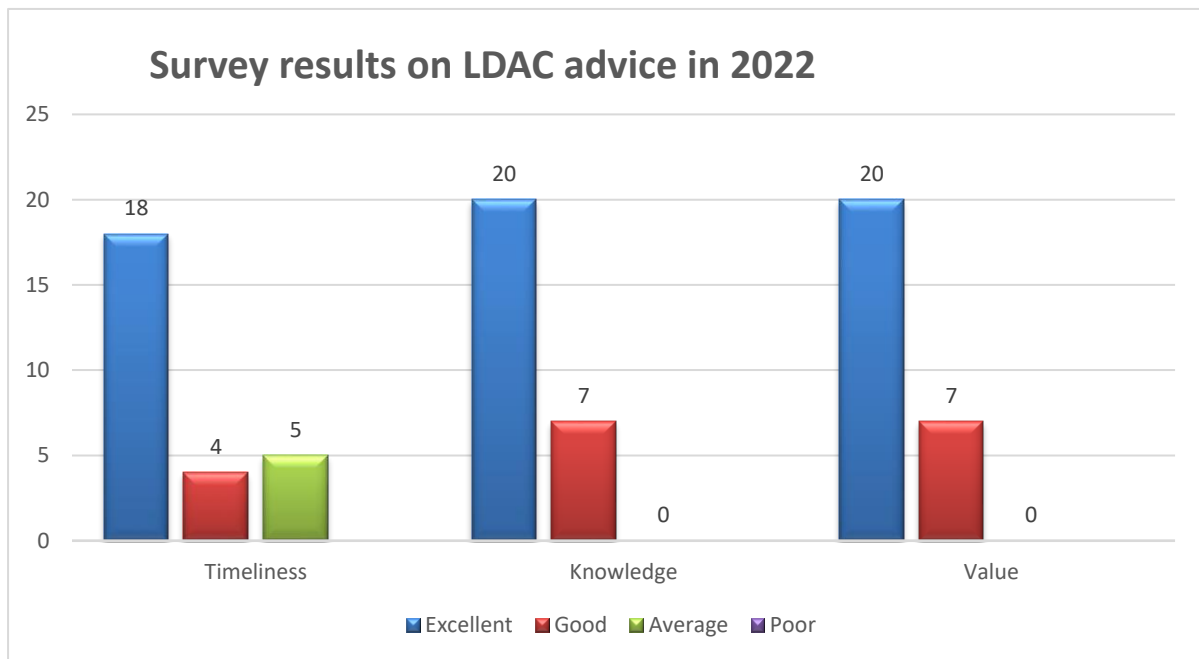
LDAC's submission on the Plain Language Bill was focussed on:

- utilising non-legislative means which could just as well achieve the policy objective;
- lack of adequacy for flexibility in legislation to achieve the policy objective; and
- the scope of the Bill and ensuring the provisions were carefully analysed to avoid the risk of it going beyond its intended policy.

SURVEY RESULTS RECEIVED ON LDAC ADVICE PROVIDED IN 2022

During the reporting period, LDAC has primarily continued to engage with departments prior to final policy decisions, or after policy decisions but before drafting is completed.

The graph below shows the results received in 2022. The responses are from 27 completed surveys relating to LDAC’s timeliness, knowledge and value.



ACKNOWLEDGEMENTS

LDAC would like to acknowledge the following contributions:

- PCO for providing and supporting the Secretariat to LDAC, and for inviting LDAC to training opportunities hosted by the PCO
- both public service and non-public service members for their time this year
- LDAC’s public service members’ home departments for supporting their membership of the Committee;
- departments’ willingness to engage with LDAC; and
- the secretariat for keeping things organised and delivering advice, often under difficult circumstances.

APPENDIX 1 – TERMS OF REFERENCE

Terms of reference of the LDAC	
(a)	<p>provide advice to departments in the initial stages of developing legislation when legislative proposals and drafting instructions are being prepared, including to:</p> <ul style="list-style-type: none"> • 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 and secondary legislation • provide advice on delegated legislative powers • provide advice on the appropriateness of exposure draft Bills
(b)	report to the Attorney-General on departures from the Legislation Guidelines in legislative proposals
(c)	advise the Attorney-General on any other topics and matters in the field of public law that the Attorney-General from time to time refers to it
(d)	help improve the quality of law-making by helping to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the Legislation Guidelines and discouraging the promotion of unnecessary legislation
(e)	scrutinise and make representations to the appropriate body or person on aspects of Bills which raise matters of particular public law concern
(f)	undertake training and education work, relating to the LDAC's role and the Legislation Guidelines.

APPENDIX 2 – LDAC MEMBERSHIP

PUBLIC SERVICE LDAC MEMBERS

Name	Role
Mark Steel (Chair of LDAC)	Director, Regulatory Systems Leadership, Ministry of Business, Innovation and Employment
Sarah Kerkin (Deputy Chair of LDAC)	Chief Advisor, Office of the Deputy Secretary, Policy, Ministry of Justice
Allison Bennett	Director, Legal Services, Ministry of Business, Innovation and Employment
Cassie Nicholson (ex officio)	Chief Parliamentary Counsel, Parliamentary Counsel Office
Dagny Baltakmens (ex officio)	Principal Solicitor, Office of Legal Counsel, Ministry of Justice
Graeme Morrison	Policy Lead, Policy and Strategy, Inland Revenue Department
Jason Gough (ex officio)	Senior Crown Counsel, Crown Law
Karl Simpson (ex officio)	Deputy Chief Parliamentary Counsel - System and Stewardship, Parliamentary Counsel Office
Nicola Wills (Crown Law alternate member)	Team Manager, Public Law, Crown Law Office
Sam Miles	Principal Policy Analyst, Department of Internal Affairs
Scott Murray (Parliamentary Counsel Office alternate member)	Principal Counsel, Parliamentary Counsel Office
Tania Warburton (ex officio)	Advisor (Legal), Policy Advisory Group, Department of the Prime Minister and Cabinet

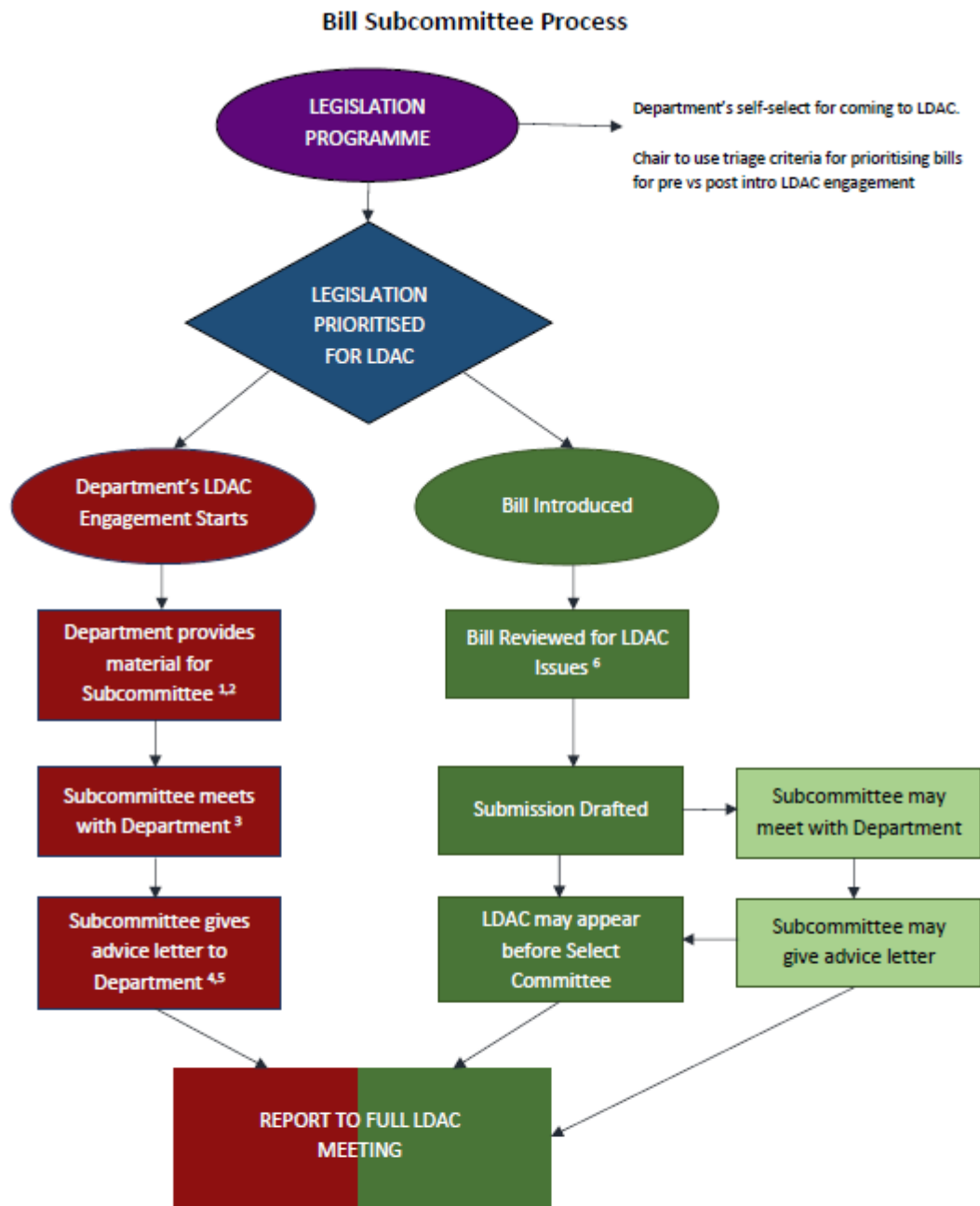
NON-PUBLIC SERVICE LDAC MEMBERS

Name	Role
Brigid McArthur	Partner, Greenwood Roche
Guy Beatson (Deputy Chair of LDAC)	General Manager, Governance Leadership Centre, Institute of Directors New Zealand
Jonathan Orpin-Dowell	Barrister, Stout Street Chambers
Kelly Hanson-White	Chief Advisor Regulatory Excellence, Regulatory Effectiveness Group, WorkSafe NZ
Māmari Stephens (co-opt)	Reader, Te Kura Tātai Ture, Faculty of Law, Victoria University of Wellington
Matthew Smith	Barrister, Thorndon Chambers
Stuart McGilvray	Chief Legal Adviser, Office of the Ombudsman
Paul Rishworth QC	Barrister, Britomart Chambers

The following members left during the 2022 reporting period

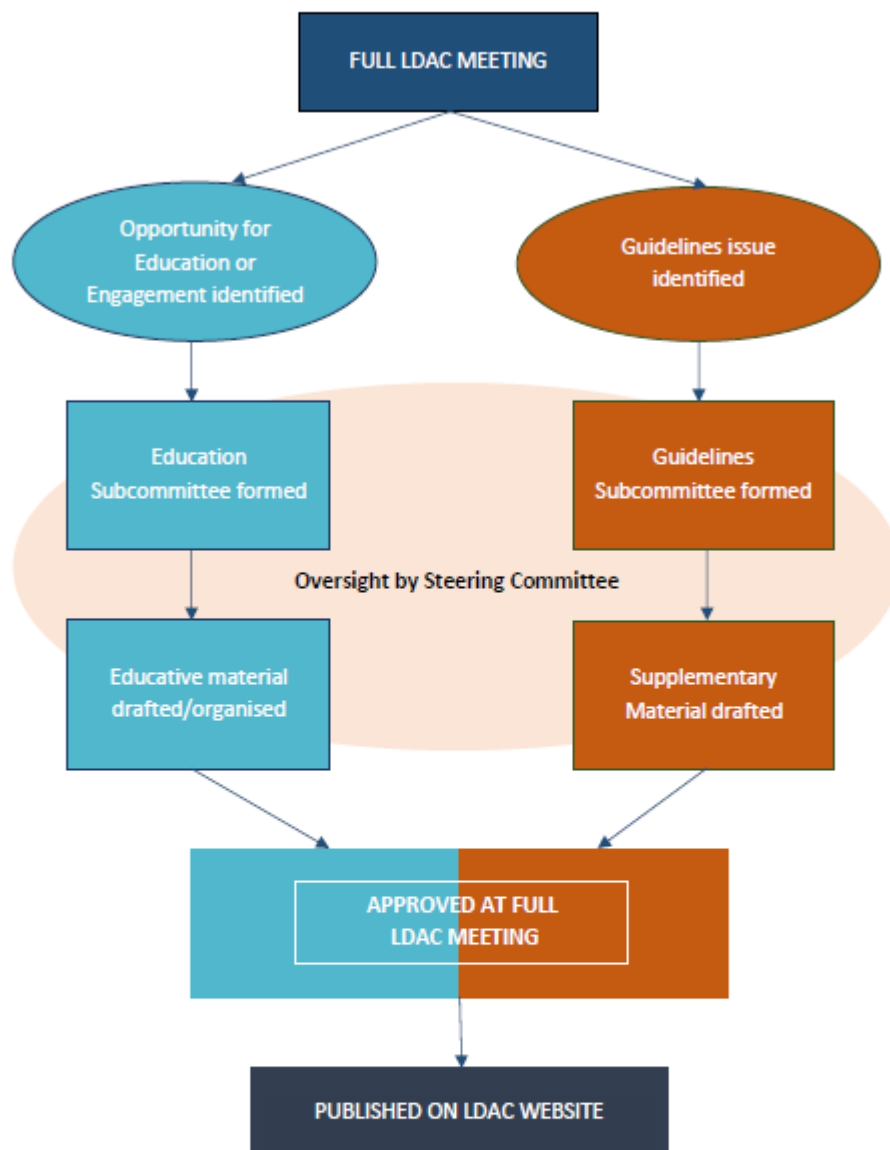
Name	Role
John Sutton	Principal Policy Analyst, Policy Group, Department of Internal Affairs
Justine Falconer	Manager, System Advice, Crown Law

APPENDIX 3 – LDAC OPERATING MODEL



1. Regular time of Thursdays, 10.30 -11.30AM scheduled for Subcommittees
2. Non-public service members to be appointed by AG on advice of Chair (after conflict check and consultation with CLA of department)
3. Department should consult with PCO drafter on issues identified
4. Letter of advice clearly identifies Guideline issues and next steps
5. Report to the AG if concerns noted in the LEG paper (or LDAC considers they should be). Agreed wording to be used for LEG papers.
6. Regular email of recently introduced Bills sent to all members with note of adviser's analysis.

Work Programme



Note:

- Bills go to ad hoc subcommittees of 4 members, 1 to be chair.
- Submissions referred to LDAC chair for consultation.
- 2-monthly full LDAC meeting to hear report-backs, discuss cross cutting issues, prioritise next work, consider further supplementary material.
- Ad hoc Guidelines and Education & Engagement subcommittees to progress further work.

APPENDIX 4 – ISSUES LDAC ADVISED DEPARTMENTS ON BEFORE AND AFTER INTRODUCTION AND IDENTIFIED IN SUBMISSIONS

The issues LDAC advised departments on in relation to legislative proposals and identified in submissions are set out below by chapter and principle of the Guidelines (2021 edition). The chapters most commonly referred to were chapters 2.2, 2.1, 3.2, 2.3 and 14.1.

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
Chapter 1 – Good legislative design	Whole chapter	6	1
		Total: 6	Total:
Chapter 2 – Defining the policy objective and purpose of proposed legislation	Whole chapter	2	1
	The policy objective must be clearly defined and discernible. (2.1)	17	
	The provisions of the proposed legislation should be consistent with its purpose and the policy objective that underlies it. (2.2)	18	1
	Legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective. (2.3)	11	2
	All relevant government agencies should be consulted at an early stage (2.4)	2	
	Māori rights and interests should be identified. (2.5)	4	
	Public consultation should take place. (2.6)	2	
		Total: 56	Total: 4
Chapter 3 – How new legislation relates to the existing law	Whole chapter	9	1
	Any existing legislation that relates to the same matters or implements similar policies to those of the proposed legislation should be identified. (3.1)	7	
	Any conflict or interactions between new and existing legislation should be explicitly addressed in the new legislation. (3.2)	12	
	New legislation should not restate matters already addressed in existing legislation. (3.3)	3	
	Precedents from existing legislation should only be used if they are consistent with the scheme and purpose of the new legislation. (3.7)	2	
		Total: 33	Total: 1

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
Chapter 4 – Fundamental constitutional principles and values of New Zealand Law	Legislation should be consistent with fundamental constitutional principles, including the rule of law. (4.1)	1	
	Legislation should be consistent with the principles of the Treaty of Waitangi. (4.2)	2	
	New legislation should respect property rights. (4.4)	1	
	Legislation should not restrict the right of access to the courts. (4.6)	1	
	Legislation needs to clearly authorise the raising, spending, and borrowing of money (4.8)	2	
	Total: 7		
Chapter 5 – The Treaty of Waitangi, Treaty settlements, and Māori interests	Whole chapter	5	
	Māori interests that will be affected by the proposed legislation should be identified. (5.1)	3	
	New legislation must not be inconsistent with an existing Treaty settlement. (5.2)	1	
	The Government must make informed decisions where legislation will affect, or have the potential to affect, the rights and interests of Māori. (5.4)	1	
	Consultation must target Māori whose interests are particularly affected. (5.5)	4	
	If legislation has the potential to come into conflict with the rights or interests of Māori under the Treaty, additional measures should be considered to ensure recognition of the principles of the Treaty or the particular rights concerned. (5.6)	1	
	Total: 15		
Chapter 8 – Privacy and dealing with information about people	Whole chapter	1	
	Total: 1		
Chapter 9 – Treaties and international obligations	Whole chapter	1	
	New legislation must not be inconsistent with existing international obligations. (9.1)	2	
	Total: 3		
Chapter 10 – Dealing with conduct, people, and things outside New Zealand	Whole chapter	2	
	Significant cross-border issues relevant to the policy area should be identified. (10.1)	1	

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
	Legislation should expressly state when it applies to cross-border situations if these situations are significant and likely to arise often. (10.2)	2	
	Generally, the existing rules of court procedure for commencing proceedings against someone overseas should apply. (10.3)	1	
	Legislation should provide for decisions made by overseas courts or regulators to be recognised or enforced in New Zealand if that would support the policy objective. (10.6)	1	
		Total: 7	
Chapter 12 – Affecting existing rights, duties, and situations and addressing past conduct	Whole chapter	1	
	Legislation should not have retrospective effect. (12.1)	2	
	Legislation should not deprive individuals of their right to benefit from judgments obtained in proceedings brought under earlier law or to continue proceedings asserting rights and duties under that law. (12.2)		1
	Potential transitional or savings issues should be identified early in the policy development process. (12.3)	1	
	All transitional or savings issues that have been identified should be addressed. (12.5)	1	
		Total: 5	Total: 1
Chapter 14 – Delegating law-making powers	Whole chapter	5	
	Legislation should not delegate a power to make secondary legislation in respect of matters that are more appropriate for an Act. (14.1)	11	1
	If the delegated power is, in substance, a power to make the law or alter its content (rather than just apply the law to a particular case), the empowering Act should identify the power as creating secondary legislation. (14.2)	2	
	The empowering Act should clearly and precisely define the permitted scope of secondary legislation and the purposes for which it may be made. (14.3)	8	
	The person delegated a power to make secondary legislation must be appropriate having regard to the importance of the issues and the nature of any safeguards that are in place. (14.4)	4	

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
	All secondary legislation should be subject to an appropriate level of scrutiny, a good process, publication requirements, and review. (14.5)	4	
	Legislation should not empower secondary legislation that is inconsistent with the New Zealand Bill of Rights Act 1990. (14.9)		1
		Total: 34	Total: 2
Chapter 15 – Some specific types of empowering provisions	Legislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so, the empowering provision is as limited as possible to achieve the objective, and the safeguards reflect the significance of the power. (15.1)	2	
	If the commencement of legislation is to be delegated, the need for that delegation must be justified and there should generally be a backstop commencement date. (15.2)	1	
	Incorporation by reference should be used only if there are clear benefits to doing so or it is impractical to do otherwise. (15.3)	1	
		Total: 4	
Chapter 16 – Delegating powers to grant exemptions	Whole chapter	3	
	There must be good reasons to delegate a power of exemption. (16.1)	1	
	Legislation must specify appropriate safeguards to apply to powers of exemption. (16.2)	2	
	Legislation must contain express authority to impose conditions on an exemption. (16.4)	1	
		Total: 7	
Chapter 17 – Authorising the charging of fees and levies	Whole chapter	5	
	Fees should be charged only if the nature of the service or function is appropriate and the fee can be quantified and efficiently recovered. (17.1)	1	
	Legislation must set out the manner by which the levy is determined. (17.5)	2	
		Total: 8	
Chapter 18 – Creating a new statutory power	A new statutory power should be created only if no suitable existing power or alternative exists that can achieve the policy objective. (18.1)	1	
	Legislation should identify who holds the new power. The power should be held by the person or body that holds the appropriate level of authority, expertise, and accountability. (18.2)	3	

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
	Legislation should not create a power that is wider than necessary to achieve the policy objective. (18.4)	1	
	Legislation should identify what the power is and for what purposes, and in which circumstances, it may be exercised. (18.5)	1	
	Legislation should include safeguards that will provide adequate protection for the rights of individuals affected by the decision. (18.6)	1	
		Total: 7	
Chapter 20 – Creating a new public body	Whole chapter	3	
	A new public body should be created only if no existing body possesses the appropriate governance arrangements or is capable of properly performing the necessary functions. (20.1)	1	
	Legislation should ensure appropriate accountability arrangements best suited to the relevant functions. (20.3)	1	
		Total: 5	
Chapter 21 – Creating powers of search, surveillance, and seizure	New search powers should be granted only if the policy objective cannot be achieved by other means. (21.1)	1	
		Total: 1	
Chapter 22 – Ways to achieve compliance and enforce legislation	Whole chapter	4	
	Regulatory options should be effective and efficient, workable in the circumstances that they are required to operate in, and appropriate in light of the nature of the conduct and potential harm they are intended to address. (22.2)	4	
	The role, functions, and powers of a regulator should be linked to the purpose of the regime in which it operates. (22.3)	3	
		Total: 11	
Chapter 23 – Creating new, or relying on existing, civil remedies	Whole chapter	1	
		Total: 1	
Chapter 24 – Creating criminal offences	Whole chapter	2	
	Legislation must precisely define the prohibited conduct. (24.2)	1	
	Legislation should state the mental element (mens rea) required for an offence to be committed. (24.3)	1	

Relevant chapter	Specific guideline/principle	Number of legislative proposals that raised issue	Number of submissions that raised issue
		Total: 4	
Chapter 25 – Creating infringement offences	Whole chapter	1	
		Total: 1	
Chapter 26 – Pecuniary penalties	Whole chapter	2	
		Total: 2	
Chapter 27 – Imposing time limits for enforcement	Whole chapter	1	
		Total: 1	
Chapter 28 – Creating a system of appeal, review, and complaint	A person affected by a statutory decision should have an adequate pathway to challenge that decision. (28.2)	2	
	The rights to bring first and subsequent appeals should not be unreasonably limited. (28.5)	1	
		Total: 3	
Chapter 29 – Including alternative dispute resolution clauses in legislation	Whole chapter	1	
		Total: 1	
Supplementary Material	Bespoke legislative solutions	1	
	Designing purpose provisions and statements of principle	2	

GUIDELINES RAISED IN SUBMISSIONS BY BILL OR INQUIRY NAME

Name of Bill	Specific guideline/principle
Companies (Directors Duties) Amendment Bill	2, 2.3, 3
Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Claims Settlement Bill	12.2
Plain Language Bill	1, 2.2, 2.3
Inquiry into the regulation-making powers in the COVID-19 Response (Vaccinations) Legislation Act 2021	14.1, 14.9