LEGISLATION ADVISORY COMMITTEE SUBMISSION FOR THE COMMERCE SELECT COMMITTEE ON THE REGULATORY RESPONSIBILITY BILL

15 February 2008

PURPOSE OF SUBMISSION AND BACKGROUND

1 We wish to appear and be heard in support of this submission.

2 The purpose of this submission of the Legislation Advisory Committee ("LAC") to the Commerce Committee on the Regulatory Responsibility Bill is as follows:

- First, to reiterate the LAC's general view of the Regulatory Responsibility Bill (as introduced) and comparable legislative measures to address the "quality" of regulatory proposals.

- Second, to respond to the invitation of the Committee dated 14 December 2007 to provide an assessment of the three draft legislative options which we understand were placed before the Committee by the Ministry of Economic Development officials under cover of a paper entitled *Regulatory Responsibility Bill: Legislative Options and Commentary for the Commerce Select Committee* and dated 16 November 2007. That paper analyses and annexes three drafting options organised schematically in the following manner:

  (a) Option 1, which is described as a "disclosure-based option" and predominantly draws upon the disclosure requirements in the current Regulatory Impact Statement (RIS) regime. Option 1 also includes the sub-option of requiring more explicit disclosure of impacts on property and contractual rights.

  (b) Option 2, which contains the disclosure requirements from option 1 above but also includes a "certification" requirement in that the Minister must report on whether a proposed Government Bill complies with the Legislation Advisory Committee's *Guidelines on Process and Content of Legislation* (as published from time to time by the Legislation Advisory Committee). This drafting option appears to be based in part upon the Law Commission's proposal for a Legislative Standards Bill, which was presented at the time of our first appearance before the Committee in August 2007.

(c) Option 3, which is presented as a modified version of the Regulatory Responsibility Bill recast by the Parliamentary Counsel Office from a drafting perspective. It not only contains disclosure and certification requirements but also substantive principles and rules in a fashion that echoes the detailed preoccupations of the Regulatory Responsibility Bill.

3 With a view to assisting the Committee, we **attach** the following material:

- The Law Commission's first submission to the Committee (which was a letter dated 31 January 2007).
- A letter from the Chair of the LAC and President of the Law Commission to Mr Rodney Hide MP dated 30 October 2007, which was subsequently tabled with the Committee in November of last year.
- A re-drafted version of a Legislative Standards Bill that has been prepared by George Tanner QC.

GENERAL POSITION OF THE LAC – AMENDMENT OF STANDING ORDERS RECOMMENDED; LEGISLATIVE OPTIONS OPPOSED

4 The LAC supports a non-legislative option. In particular, it supports amendment of the Standing Orders so that the House of Representatives can properly assess legislative proposals against principles from time to time. The Parliament itself could assume an increased responsibility for assessing legislative proposals (including Private Members' Bills) against particular principles and processes but in a fashion that allows for a political assessment within the House of Representatives. As Law Commission said in its letter of 31 January 2007, which we endorse:

> "If the intention is to ensure that accountability of the executive for compliance with the 'principles or regulatory responsibility' is to be to Parliament, then it would be prudent to explore an amendment to the Standing Orders with a view to enhancing scrutiny and post-legislation review in the House of Representatives. This would permit a much more

> open-textured and flexible approach and would emphasise the accountability of Ministers to Parliament rather than generating litigation in the courts concerning the interpretation of various provisions."[1]

5 For this reason, the LAC does not support drafting options 1, 2 or 3. Options 1 and 2 effectively elevate the Regulatory Impact Statement regime and the LAC's *Guidelines on Process and Content of Legislation* to a status of law in primary legislation. Neither the RIS nor the LAC *Guidelines* warrant elevation in such a way. It would be inapposite to do so. To raise these instruments up to legal-like status is to elevate them to a purpose that they do not and should not have. They are intended to be guidelines, which are inherently flexible. To place the RIS and the LAC *Guidelines* within primary legislation is to misunderstand the object which they serve. The RIS regime alone is insufficient. One needs to take a broad view of "quality"; that is, one that embraces public law values (such as consistency with the New Zealand Bill of Rights Act 1990), as well as economic and social assessments of "quality". Public law values matter and, in terms of the rule of law, are vital.

6 The LAC confirms that it does not support the Regulatory Responsibility Bill, whether as introduced or as drawn up in drafting option 3 of the Ministry of Economic Development paper, for four principal reasons:

- First, it fails a key tenet of the LAC's *Guidelines on Process and Content of Legislation – 2001 edition and amendments*: that is, whether consideration has been given to achieving the policy objective by means other than legislation. The necessity for legislation to achieve the objective of the Regulatory Responsibility Bill is not made out on a demonstrable or empirical basis. In our first submission we noted that "to allow this Bill to proceed could well damage the prospects of achieving worthwhile regulatory reform in an optimum way".[2] We advocated serious consideration of non-legislative options for dealing with the "quality" of regulation rather than pursuing a statutory course of action. Various non-

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1 Ibid, paragraph 12.5.

2 Refer to Rt Hon Sir Geoffrey Palmer, President of the Law Commission, to the Hon Lianne Dalziel, Minister of Commerce, 31 January 2007, at paragraph 4.1.3.

legislative options within the executive branch were outlined in paragraph 37 of the Law Commission's submission dated 31 January 2007 and we would prefer that such options be fully explored and tested before any pronouncement of deficiency or failure can be made. We recommend amending the standing orders of the Parliament as part of a suite of non-legislative options.

- Second, whilst the Regulatory Responsibility Bill purports to reflect orthodox legal principles, there are a number of principles within clause 6 of the Regulatory Responsibility Bill (as introduced) that could be seen as innovative or unorthodox. The initial submission of the Law Commission addressed this question, especially in relation to the "right to property" and the concept of the impairment of "other rights under common law" under clause 6(2).[3]

- Third, a legislative measure such as the Regulatory Responsibility Bill would truncate the ability of the executive branch of government to govern effectively. This is not merely a matter of convenience or administrative efficiency. It is a question of constitutional import. As mentioned elsewhere in the Rt Hon Sir Geoffrey Palmer's letter to Mr Rodney Hide MP dated 30 October 2007 and subsequently tabled with the Committee in November of last year:

> "[T]he government of the day speaks and acts in the name of the sovereign outside of Parliament and derives its own authority and legitimacy from the ballot box. It remains sovereign in its own sphere, subject to the constraints exerted via the legislature and the common law. The query would be whether the Regulatory Responsibility Bill may effect a change in the balance of the relationship in circumstances where the potential effects upon policy formulation and the executive's liberty to govern might not be clearly understood".

- Fourth, it would represent a constitutional shift (and potentially a profound one) in circumstances where the Regulatory Responsibility Bill has not been openly or publicly debated as heralding such a change. It does so, in our view, through endeavouring to codify or crystallise otherwise flexible

principles in primary legislation and in reducing the historical flexibility of policy processes within New Zealand government.

7 In general, the LAC does not favour novel legal options attempting to legislate regulatory "quality", whether *via* substantive principles or mandatory processes in primary legislation in the absence of broader community and expert discussion. It was to this end, therefore, that the suggested objective in the Law Commission letter of 31 January 2007 was the production of a Government White Paper setting out the various options (legislative and non-legislative), which could then be the subject of public consultation before final decisions are taken. It is for this reason also that we now support the amendment of Standing Orders so that the issue of regulatory "quality" can be squarely addressed within the House of Representatives.

IN THE EVENT THAT A LEGISLATIVE OPTION IS REQUIRED

8 The LAC does not favour legislation. Indeed, changes concerning parliamentary scrutiny can be accomplished by Standing Orders of Parliament. If, however, there is to be legislation, then it is vital that the possibly pernicious effects of such a measure are managed and reduced as much as is reasonably possible. We have recommended one possibility in the form of a Legislative Standards Bill, a redrafted version of which we have **attached** and which we prefer to the three drafting options placed before you by officials. The revised form of the Legislative Standards Bill that we propose is deliberately modest and expressly addresses:

- The possibility that the Minister proposing a measure should simply disclose to the House of Representatives that the Legislation Advisory Committee's *Guidelines on Process and Content of Legislation – 2001 edition and amendments* were "taken into account" or considered in formulating/developing the proposal and briefly report on how that was done. The objective would be to require a disclosure statement that would

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[3] Refer to ibid, at paragraphs 29-30.

merely serve to provide an explicitly non-justiciable report to the House of Representatives that could then be subject of political discussion in the House.

- The issue of incorporation by reference and Parliamentary scrutiny of the LAC *Guidelines on Process and Content of Legislation*. We would not wish to suggest incorporation by reference so that the *Guidelines* thereby obtain some independent legal status. However, transparency of processes and standards relied upon is important; that is, public ought to be able to access the "standards" and to be aware of changes to them.

9 We are of the view that disclosing or certifying "consistency" or "inconsistency" with the LAC *Guidelines on Process and Content of Legislation* is problematic for a number of reasons:

- A non-exhaustive range of principles is listed in the checklist and genuine legal and policy disagreements can emerge as to whether an approach is consistent or inconsistent: for instance, whether principles of the Treaty of Waitangi have been complied with or not and alleged non-compliance with fundamental common law principles.

- There can also be legitimate disagreement on the detailed content of the various principles in the LAC *Guidelines on Process and Content of Legislation*.

CONCLUSION

10 In closing, the LAC does not support any legislative options and prefers an amendment to the Standing Orders. In this fashion, a much more open-textured and flexible approach to assessing the "quality" of proposals would be permitted. The political accountability of Ministers to Parliament would be emphasised. If a legislative option is to be supported, then we would recommend support of the Legislative Standards Bill (which we have **attached** to this submission).