



LEGISLATION DESIGN AND ADVISORY COMMITTEE

23 June 2017

Sarah Dowie MP
Justice and Electoral Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Ms Dowie

Arbitration Amendment Bill

1. The Legislation Design and Advisory Committee (**LDAC**) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It is responsible for the LAC Guidelines (2014 edition), which have been adopted by Cabinet.
2. In particular, LDAC's terms of reference include these dual roles:
 - a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
 - b. through its External Subcommittee, scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.
3. The External Subcommittee of LDAC referred to in paragraph 2b above is comprised of independent advisers, from outside Government, who have been appointed by the Attorney-General. Under LDAC's mandate, that External Subcommittee is empowered to review and make submissions on those bills that were not reviewed by LDAC prior to their introduction.¹

¹ Legislation bids identify whether Bills will be referred to LDAC for design advice before introduction. This is determined when Cabinet settles the Legislation Programme. Generally, significant or complicated legislative proposals are referred to LDAC before introduction. Other legislative proposals with basic framework/design issues, matters relating to instrument choice, issues relating to consistency with fundamental legal and constitutional principles, matters under the LAC Guidelines, or with the ability to impact the coherence of the statute book may also be suitable for referral to LDAC.

4. The Arbitration Amendment Bill is a Member's Bill so was not referred to LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the attached submission.
5. Thank you for taking the time to consider the Subcommittee's submission.

Yours sincerely

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Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee



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Arbitration Amendment Bill

1. Introduction

- 1.1. The Legislation Design and Advisory External Subcommittee (the **Subcommittee**) has been given a mandate by Cabinet to review introduced Bills against the LAC Guidelines on Process and Content of Legislation (2014 edition) (the **Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with fundamental legal and constitutional principles.
- 1.2. This submission focusses on aspects of the Arbitration Amendment Bill (the **Bill**) that could be refined to improve the quality of the legislation. While the matters raised by this submission could be termed 'drafting matters', and the Subcommittee would not normally make a submission on matters of drafting, we are making this submission for two reasons. First, the drafting matters all relate to an important provision of the Bill concerning the openness of court proceedings and the freedom of expression guaranteed by s 14 of the New Zealand Bill of Rights Act 1990. Secondly, as this is a Private Member's Bill, the Committee may appreciate receiving submissions of a technical drafting nature, given Parliamentary Counsel have not yet had any involvement with the Bill.
- 1.3. We make suggestions where provisions of the Bill could be amended or reconsidered in light of the principles in the Guidelines.

2. Restrictions on reporting of arbitral proceedings before a court – cl 5, new s 14F

2.1. There appear to be number of areas of uncertainty regarding the scope and application of new s 14F. This is undesirable given the general presumption of openness of court proceedings, and the freedom of expression guaranteed in s 14 of the New Zealand Bill of Rights Act 1990. Guideline 3.1 is relevant and provides:

- New legislation should respect the basic constitutional principles of New Zealand law;
- Clear and unambiguous wording must be used if Parliament wishes to override fundamental rights and values.

Proceedings in open court

2.2. The heading to new s 14F states “Restrictions on reporting of proceedings heard otherwise than in open court”, but it is unclear when proceedings will be heard in open court and when proceedings will be conducted in private. Existing s 14F, which is to be repealed by this Bill, contains a presumption that proceedings will be heard in public. When existing s 14F is repealed it is unclear when proceedings will be heard in public.

2.3. The Subcommittee recommends the heading to new s 14F be amended to remove the words “heard otherwise than in open court” or new s 14F be amended to make it clear when proceedings will be heard in public.

Link with existing s 14G

2.4. Existing s 14G provides for a person to apply for an order under "s 14F" for the whole or part of the proceedings to be conducted in private. However, nothing in the new s 14F will provide for the court to order that proceedings are to be conducted in private. Rather, new s 14F provides for orders to be made concerning the information relating to court proceedings that may be published.

2.5. The Subcommittee recommends existing s 14G be repealed or s 14F be amended to clarify its relationship to an application under existing s 14G for proceedings to be conducted in private.

In what reports may a matter be concealed – s 14F(3)?

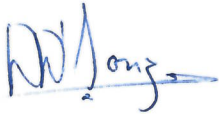
2.6. Where a court has made a direction to publish information about court proceedings in law reports, new s 14F(3) provides for a party to apply to the court for a direction to conceal a matter in those reports. However, it is unclear whether a court has any discretion not to make a direction, given the provision states “the court must, ... make a direction as to the action to be taken to conceal that matter in those reports”.

2.7. The Subcommittee recommends the word “may” be substituted for the word “must” in new s 14F(3) to make it clear a court has a discretion to make a direction whether to conceal a matter in the law reports.

3. Conclusion

3.1. Thank you for taking the time to consider the Subcommittee’s submission.

Yours sincerely

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Brigid McArthur
Chairperson (Acting)
Legislation Design and Advisory External Subcommittee

