



LEGISLATION DESIGN AND ADVISORY COMMITTEE

10 November 2017

Briefing to the Incoming Attorney-General

Introduction

The Legislation Design and Advisory Committee (LDAC) is an expert advisory body established to improve the quality and effectiveness of legislation. It supports the government's commitment to high quality and well-designed legislation by advising departments early in the process of developing policy and legislation. This allows design, framework, public law, and constitutional issues to be addressed early, when the most value can be added.

LDAC supports the Attorney-General's responsibility for maintaining the rule of law. LDAC members are appointed by the Attorney-General and LDAC reports directly to the Attorney-General on legislative proposals that it considers depart from good legislative design and principles in the LAC Guidelines on Process and Content of Legislation (2014 edition) (the Guidelines), which have been adopted by Cabinet.

LDAC's functions are part of a suite of initiatives across government to improve legislative design and quality, including PCO's vision for great law and stewardship of the statute book, the Treasury's focus on regulatory quality and stewardship, and departmental chief executives' regulatory and legislative stewardship obligations. LDAC is more than a compliance exercise for departments; it provides an opportunity for them to test policy and legislative frameworks with a body of experienced legislation and regulatory experts.

This briefing sets out:

- LDAC's role
- Membership and support
- How LDAC advises on legislative proposals
- LDAC's functions in relation to the Guidelines and education
- Current projects and opportunities.

LDAC's role

LDAC was established in 2015 to improve the quality and effectiveness of legislation. It merged and builds on the work of the former Legislation Advisory Committee and Legislation Design Committee. The Legislation Design Committee, chaired by Sir Geoffrey Palmer, operated between 2006 and 2008. It comprised senior public service members and gave high-level design advice to departments preparing

legislative proposals before introduction. The Legislation Advisory Committee operated from 1986 to 2015. Its membership comprised a mix of public service officials and private sector lawyers, economists, and academics. It reviewed introduced Bills against the Guidelines and made submissions to select committees.

LDAC provides advice on design, framework, constitutional and public law issues arising out of legislative proposals. It is responsible for the Guidelines, which have been adopted by Cabinet. LDAC improves the quality and effectiveness of legislation by:

- advising departments in the initial stages of developing policy and 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 as to their compliance with the Guidelines
- providing training and education as to developing quality legislation consistent with the Guidelines.

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

When reviewing legislative proposals, LDAC's principal focus is on giving advice on a Bill before it is introduced to the House, rather than at select committee. However, LDAC subcommittees may also review and, if necessary, make submissions on those Bills that have not been reviewed by LDAC before introduction.

Membership and support

LDAC comprises senior public service officials and a pool of external advisers from the private sector. Members are either ex officio or appointed by the Attorney-General. Collectively, they have expert policy and legislative skills and backgrounds in economics, law, policy, and academia. Paul Rishworth QC, Senior Crown Counsel at Crown Law, currently chairs LDAC. Professor Geoff McLay of Victoria University of Wellington currently chairs the pool of external advisers.

Members are appointed to LDAC for three year terms. The current memberships are due for review in July 2018. **PCO will provide membership recommendations to the Attorney-General in due course.** However, from the first two years' operation it is apparent that a mixture of skills and perspectives is important. Senior public service officials provide expert knowledge on designing regimes and it is valuable to have a spread from different disciplines and different agencies across the public sector. The external advisers provide expertise in particular subject areas and have an external perspective on legislative design that adds rigour to LDAC's analysis.

See **Appendix 2** for LDAC's current membership.

LDAC is currently seeking nominations from the Ministry of Business, Innovation and Employment to replace an existing LDAC member from MBIE who is moving to another government agency (who will remain a member of LDAC). Given MBIE's size and the scope of its regulatory regimes, LDAC considers it is important to have a member from MBIE and to fill this gap before the membership review in July 2018. **LDAC will provide a briefing and recommendation of a new MBIE member shortly.**

PCO provides secretariat, legal, and policy support to LDAC out of its baseline. It currently provides one full-time legal and policy adviser and one 0.5 administrative assistant. PCO also has engaged a legal and policy analyst on a fixed term (12 months, January 2017 – January 2018) to assist in revising the 2014 edition of the Guidelines and developing supplementary material to support the Guidelines.

How LDAC advises on legislative proposals

Legislation bids indicate consultation with LDAC

Legislative proposals are identified as candidates for consultation with LDAC through the annual legislation programme. Ministers identify in legislation bids whether a proposal will be referred to LDAC for design advice. LDAC also reviews legislation bids and advises the Attorney-General if it considers there are proposals that would benefit from LDAC's input but have not indicated that LDAC will be consulted. Departments are expected to consult LDAC on legislative proposals judged likely to benefit from advice (e.g. those that are complex or novel, have significant implications for the statute book, or pose obvious risks under the Guidelines).

LDAC's work with departments before introduction

When working with departments, LDAC generally delegates subcommittees of its members to work closely with officials and parliamentary counsel on legislative proposals. These subcommittees work flexibly within departments' timeframes. Subcommittees generally meet two to three times with officials and parliamentary counsel at key stages during policy and legislative development.

LDAC's role is advisory and its advice non-binding. Its working style aims to be collegial and helpful. Departments and Ministers determine whether or how to implement LDAC's advice. However, LDAC does seek to ensure that issues interacting with the Guidelines are identified and worked through so that decisions are made transparently and in full understanding of their implications.

Ministers indicate compliance with the Guidelines when seeking approval for introduction

A key lever in the system is the Cabinet Manual's requirement for Ministers to identify, in Cabinet papers seeking approval of Bills for introduction, whether any aspects of the legislation depart from the principles in the Guidelines. Cabinet papers are expected to explain and justify any departures. This ensures that there is transparent and informed decision-making by Cabinet.

LDAC is preparing guidance for inclusion in the CabGuide to encourage officials to also address Guidelines issues in policy papers to Cabinet to enable early consideration of any concerns. This guidance should be in place for the new legislation programme.

Reports to the Attorney-General

If LDAC considers departures from the Guidelines are serious or contentious or it has formed a view that is at odds with a department's/Minister's view in relation to the existence or extent of a departure, LDAC may include a comment, or request its views are reflected, in Cabinet papers. If this arises, LDAC will report in advance to the Attorney-General to ensure you are fully advised as to LDAC's concerns. This will also enable you to raise concerns with other Ministers if you wish.

LDAC also provides regular reports to the Attorney-General ahead of sitting weeks to keep the Attorney-General updated about legislative proposals LDAC has advised on and which are before Cabinet.

Submissions to select committees

LDAC may make submissions to select committees, but generally will not do so on Bills it has reviewed before introduction. Submissions have generally been made through ad hoc subcommittees of external advisers (but see below under opportunities for enhancement). 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.

In rare cases, the LDAC Chairperson may determine it is appropriate to make a submission on a Bill already considered by LDAC before introduction – for example, where the Chairperson believes there is a significant public interest involved or there are significant matters in a Bill as introduced that were not considered by LDAC before its introduction.

Strategic meetings

LDAC holds separate meetings to discuss cross-cutting and design issues it is seeing across the statute book. This allows LDAC to identify common threads and identify areas where it can extend its influence beyond specific legislative proposals. LDAC uses discussions at strategic meetings as the basis for developing practice notes which can form the basis of future guidance in the Guidelines and supplementary material.

Some of the cross-cutting issues LDAC has considered to date include the use of statutory provisions intended to have no legal effect, the use of enabling “framework” legislation, and the use of provisions that empower delegated legislation to override, amend, or suspend primary legislation.

Guidelines

Guidance on legislative standards is a vital thread in the fabric of New Zealand's policy and legislative development framework. Between 1986 and 2001, the former Legislation Advisory Committee

produced reports on legislative design and public/constitutional law issues. The first edition of the Guidelines was published in 2001 and was rewritten in 2014 by the former Legislation Advisory Committee.

LDAC is now responsible for and maintains the Guidelines. The Guidelines are approved by Cabinet as best practice guidance for officials designing and drafting policy and legislation. The Guidelines provide guidance on many of the design, constitutional, and public law issues that arise during the policy and legislative development process.

LDAC is currently updating the 2014 edition of the Guidelines and preparing supplementary material to support the Guidelines (see below under current projects and opportunities).

Education

LDAC provides education and training about its role, and the Guidelines, as part of its mandate to improve the quality of legislation beyond the specific proposals it directly advises on. Recent seminars have included presentations on legislating consistently with the New Zealand Bill of Rights Act 1990, designing infringement offence regimes, and designing statutory obligations to consult. Seminars are often for public service officials, but have included LDAC's external advisers and new Members of Parliament, and a public seminar is planned for later in 2017.

Current projects and opportunities

Cabinet approval of updated Guidelines

LDAC reviews and updates the Guidelines every parliamentary term. The Guidelines were fundamentally revised in 2014. LDAC is currently updating the Guidelines which will be presented to Cabinet for approval early in 2018. Many of the amendments are small changes to update or improve the guidance. A few chapters are being substantially updated (including the chapters on pecuniary penalties and delegated legislation). There will also be two new chapters on good legislative design and on including legislative obligations to consult. **LDAC will provide a briefing and a draft Cabinet paper attaching the updated Guidelines early in 2018.**

Supplementary material to support the Guidelines

In 2014, the Guidelines were revised to provide higher level and more accessible guidance. So as not to lose the benefit of detail whilst maintaining accessibility, LDAC decided to create "supplementary material" to support the Guidelines.

The objective of the supplementary material is to provide more detailed information or guidance to assist advisers to address questions or issues raised in the Guidelines, legislative examples to assist advisers to make decisions at the margins of issues, and guidance on areas not covered by the Guidelines.

Supplementary material is not approved by Cabinet. It is intended to be iterative and easily updated by LDAC. The first tranche of supplementary material will be completed in early 2018. Supplementary material will then be collated on an ongoing basis and published by LDAC in regular tranches as required.

Opportunities for enhancement identified in PCO's report to Cabinet on LDAC's operations

When Cabinet established LDAC, it determined that PCO, in consultation with interested departments, would report back to Cabinet on the operation of LDAC after two years of operation.

PCO reported to Cabinet in August 2017 – see **Attachments 1 and 2**. It concluded that LDAC is working well, feedback from departments is positive, and LDAC is adding value to the legislative development process. However, it identified three areas where further improvement can be made.

LDAC's focus in 2018 is to further explore and implement improvements in the three areas PCO identified, which are summarised below. Improvements in these areas can be achieved within LDAC's current Cabinet mandate and without further Cabinet decisions. However, if further work reveals this is not the case, LDAC will provide a briefing accordingly.

- **Defining the role and harnessing the benefits of LDAC's external advisers:**

One of the key objectives of establishing LDAC was to address legislative design and Guidelines issues early in the policy process, before introduction when the most value can be added. To achieve this, the membership was limited to public service officials who would work on legislative proposals before introduction, and the work of external advisers was limited to reviewing and making submissions on Bills after introduction.

However, in practice the two groups have worked more separately than is desirable. This separation between LDAC's public service membership and its external advisers can lead to inconsistencies (in advice and submissions) and does not take full advantage of the expertise of the external members.

LDAC is developing ways it can better integrate its public service and external members. It has started having one to two public service members work with external advisers on ad hoc subcommittees when reviewing and making submissions on Bills at select committee. But it would also be useful to include external advisers that have particularly valuable expertise in relevant subject-matter on pre-introduction subcommittees. Involving external advisers before introduction would add value to LDAC and the departments it advises. However, there are confidentiality and privilege matters that need to be considered and appropriately dealt with. **LDAC will provide a briefing and options on this early in 2018.**

LDAC is also more actively harnessing the external advisers' expertise in developing LDAC's views on principles for good legislation, updating the Guidelines, developing supplementary material, and its education programme.

- **Bridging the gap between early design advice and scrutinising legislative detail:**

Because, as intended, LDAC engages with departments early in the development of legislation, often before drafting has commenced, the full content of completed Bills is not routinely scrutinised for compliance with the Guidelines. This creates a risk of non-compliance with the Guidelines. LDAC is unable to routinely scrutinise Bills it sees because consultation is voluntary, its advice is non-binding and often high-level, and its resources are limited.

LDAC is exploring how it can work with departments to improve their ability to self-vet against the Guidelines, including improving the checklist departments use to self-vet, and providing department specific workshops and seminars on the Guidelines. Further, LDAC has reviewed and refined how it manages its work programme to ensure it is taking a deliberate, risk-based approach to Bills. This will mean LDAC identifies six to seven key Bills each year to take a more in-depth approach. All other Bills referred to LDAC will receive assistance as requested by officials. This framework will be applied to legislation bids submitted for the 2018 legislation programme.

- **Opportunity for LDAC to have greater impact on legislative quality beyond its direct engagement on legislative proposals and Bills:**

Not all Bills can come to LDAC, so it is critical that LDAC's influence extends beyond the sphere of its direct engagement with officials on particular Bills. There are a number of ways LDAC can have impact through:

- education efforts, promotion of the Guidelines, and raising the profile of LDAC and the Guidelines
- using procedural levers to ensure that incentives to consider, and be consistent with, the Guidelines are sufficient, early, and strong
- ensuring that Cabinet is required to be advised about issues of inconsistency so it can take this into account in making decisions on proposals.

LDAC's efforts (discussed above) to improve departments' use of the Guidelines will assist. It will also assist to better embed the Guidelines as an early policy tool and integrate them with other procedural levers to improve legislative design and quality. To that end, LDAC is working with PCO, Cabinet Office, and Treasury to better align the Guidelines checklist with the Cabinet policy paper template, the LEG paper template, PCO's quality assurance processes, and disclosure statement requirements.



Paul Rishworth QC

Chairperson

Legislation Design and Advisory Committee

Appendix 1 – LDAC 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

Public service members of LDAC

- Paul Rishworth QC, Senior Crown Counsel, Crown Law Office (Chairperson)
- Andrea King, Chief Advisor, Courts and Justice Services Policy, Ministry of Justice (ex officio)
- Andrea Speir, Manager Legislation, Ministry for Primary Industries
- Anthea Williams, Principal Legal Adviser, Ministry for Primary Industries
- Becky MacNeill, Group Manager, Operational Policy, Ministry for Culture and Heritage
- Cassie Nicholson, Deputy Chief Parliamentary Counsel, Parliamentary Counsel Office (ex officio)
- Fiona Leonard, Chief Parliamentary Counsel, Parliamentary Counsel Office (ex officio)
- Geoff Daniels, Principal Advisor, Ministry for Primary Industries
- Jacqueline Derby, Principal Counsel, Parliamentary Counsel Office (ex officio)
- Jason Gough, Senior Crown Counsel, Crown Law Office
- John Sutton, Principal Policy Analyst, Department of Internal Affairs
- Jonathan Ayto, Principal Advisor, The Treasury
- Karl Simpson, Policy Director, Ministry of Transport
- Sarah Kerkin, Chief Advisor to the Deputy Secretary, Ministry of Justice
- Tania Warburton, Policy Advisor (Legal), Department of Prime Minister & Cabinet (ex officio),
- Wendy Illingworth, Policy Manager, Ministry of Social Development (reserve member)

External members of LDAC

- Professor Geoff McLay (Chair), Victoria University of Wellington Faculty of Law
- Professor Andrew Geddis, University of Otago Faculty of Law
- Brigid McArthur, Partner, Greenwood Roche
- James Wilding, Barrister, Clarendon Chambers
- Jeremy Johnson, Partner, Wynn Williams
- Jonathan Orpin, Barrister, Stout Street Chambers
- Kate Salmond, Senior Legal and Policy Advisor, Law Commission
- Māmari Stephens, Senior Lecturer, Victoria University of Wellington Faculty of Law
- Martha Coleman, Barrister, Martha Coleman Barrister

- Matthew Smith, Barrister, Thorndon Chambers
- Megan Richards, Partner, Minter Ellison Rudd Watts
- Rebecca Rose, Senior Associate, Bell Gully
- Sean Kinsler, Associate, Meredith Connell
- Simon Mount QC, Barrister, Bankside Chambers

Attachment 1

Cabinet paper, August 2017: Report on Operation of the Legislation Design and Advisory Committee.

Attachment 2

Cabinet minute, August 2017: Report on Operation of the Legislation Design and Advisory Committee.

Attachment 3

Legislation Design and Advisory Committee Annual Report for the Year Ended 30 June 2017.