LEGISLATION DESIGN AND ADVISORY COMMITTEE

24 May 2018

Raymond Huo MP
Justice Committee
Parliament Buildings
Wellington

Dear Mr Huo

Privacy 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 *Legislation Guidelines* (2018 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]

4. The Privacy Bill was not considered by 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.

[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 *Legislation Guidelines*, or with the ability to impact the coherence of the statute book may also be suitable for referral to LDAC.

Yours sincerely

Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee

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Privacy Bill

1. The Legislation Design and Advisory External Subcommittee has been given a mandate by Cabinet to review introduced Bills against the *Legislation Guidelines* (2018 edition) (**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 the principles contained in the Guidelines.

2. Our main submission is that your committee should allow a further opportunity for public comment if it decides to make significant amendments to the Privacy Bill. In making this submission, we also draw the committee's attention to some aspects of the Bill that we believe could be improved.

Allow further public comment on significant amendments

3. We **recommend** your committee invite submissions on any proposal to make significant amendments to the Bill.

4. Legislation needs to be fit for purpose. As the Guidelines state, this requires a legislative proposal to be robustly tested, including through appropriate consultation with the public, experts, and/or interested groups.[2]

5. The Bill is largely based on the Law Commission's 2011 *Review of the Privacy Act 1993* (NZLC R123), and so has the benefit of the work done by the Law Commission to consult on and test the proposals. Technology, however, has moved on since 2011. The law in other jurisdictions has moved on as well, most notably in the form of the General Data Protection Regulation (**GDPR**) approved by the European Union in 2016 (and coming into force on 25 May 2018). So we expect the Bill may need significant amendments to bring it up to date. This seems to be confirmed by the following statement in Justice Minister's first reading speech:[3]

[2] LDAC *Legislation Guidelines* (2018 edition) at 8-9; see chps 2.4 and 2.5.
[3] (10 April 2018) NZPD <www.parliament.nz>.

> The bill is not perfect, and even though it had been languishing around for the best part of five or six years and more work could have been done on it, I felt that it was important to bring the bill to the House now so that there will be plenty of opportunity to change and to improve it.

6. A legislative proposal should ideally be fully formed and up-to-date when it is brought to the House, so that Members of Parliament and the public can consider the Bill on its face from the time of introduction. If significant policy development is to occur at select committee, then the public should at least have a reasonable opportunity to comment on the new policy. Your committee is best placed to decide how this is done for the Privacy Bill, but we note that you recently sought comment on amendments to the Arbitration Amendment Bill by inviting submissions on the departmental report.

Clarify when privacy breaches must be notified

7. We **recommend** the Bill be amended to provide a more certain test for when privacy breaches must be notified.

8. Clause 118 requires an agency to notify the Privacy Commissioner if it becomes aware that a notifiable privacy breach has occurred. A notifiable privacy breach is one that has caused, or risks causing, detriment, injury, significant humiliation, or another kind of harm described in cl 75(2)(b) to the person whom the information is about. An agency commits an offence under cl 122 if it fails to notify the Commissioner.

9. The Guidelines state that criminal offences "must be clearly defined so that people know what is and what is not prohibited".[4] Whether the subject of a privacy breach will, for example, feel humiliated turns on the characteristics of that person. This test is too subjective and uncertain to be the basis on which criminal sanctions are imposed.

10. Similar tests in overseas legislation have an objective element, which is missing from the Bill. The GDPR has a general rule that all data breaches are notifiable, except for those that are unlikely to risk individuals' rights and freedoms. In Australia, the law on mandatory breach reporting, which came into force in February this year, includes an express reasonableness standard. It provides that a data breach must be reported if a reasonable person would conclude that the unauthorised action is likely to result in serious harm to the individual. Canada has also adopted the reasonableness standard in federal law that comes into force in November this year.

Clarify matters regarding fees

11. We **recommend** the Bill be amended to:

    - clarify what constitutes a reasonable charge for the purposes of cl 72; and

[4] *Legislation Guidelines* at chp 24.2.

- clarify when the Privacy Commissioner may determine under cl 97 that a charge has been properly or improperly imposed, as opposed to being reasonable or unreasonable.

Clause 72

12. Under cl 72(2), an agency may impose a charge if:

    (a) the agency assists an individual who asks to access information or have information corrected; and

    (b) the agency makes information available to the individual in compliance with Information Privacy Principle (**IPP**) 6(1)(a) or (b).

13. Under cl 72(3), an agency may impose a charge for:

    (a) making information available in compliance with a request under IPP 6(1)(b); or

    (b) attaching a statement of correction to personal information in compliance with a request under IPP 7(2)(b).

14. Clause 72(4) states that a charge must be reasonable and that, in the case of a charge under cl 72(3)(a), the charge may reflect:

    (a) the cost of the labour and material involved in making the information available; and

    (b) for an urgent request, any costs involved in making the information available urgently.

15. Charges under cl 72 are fees for the purposes of the Guidelines. According to the Guidelines, legislation "must set out the manner by which [a] fee should be determined".[5] A clear statutory basis for determining a fee gives certainty that a proposed fee is authorised and helps those paying the fee to predict how much they will be charged.

16. In our view, it is not sufficiently clear what constitutes a "reasonable" charge under any clause other than cl 72(3)(a). Saying only that a charge must be reasonable does not assist in identifying what costs it is reasonable to cover with the charge. Ideally, the Bill should offer more guidance.

17. The uncertainty is also made worse by the specific reference to charges under cl 72(3)(a) being able to reflect the costs of labour and material involved in fulfilling the request. This could indicate that "reasonable" charges under the other provisions may not reflect those costs. That would seem unusual given that a power to charge a fee is normally included to enable cost recovery,[6] and labour and material costs would presumably be the main costs incurred in fulfilling the other requests for which charges may be imposed.

[5] Ibid at chp 17.4.
[6] Ibid at 79, chp 17.4.

Clause 97

18. Clause 97(2) applies when the Privacy Commissioner completes an investigation into a charge imposed under cl 72. It provides that the Commissioner may determine that a charge is properly imposed, improperly imposed, reasonable, or unreasonable.

19. The Guidelines state that "[a] clear statement of [a statutory] power … will assist those exercising the power, those people subject to it, and those who may be responsible for settling any dispute over the exercise of it."[7] In our view, cl 97(2) is ambiguous for two reasons:

- First, a charge that could be seen as improperly imposed could arguably also be seen as an unreasonable charge, based on the ordinary meaning of those terms. So it is not immediately clear to us when a charge would fall into one category or the other.
- Second, cl 97(1) appears to draw a distinction between charges that are contrary to cl 72 and those that are unreasonable. This creates doubt about what "unreasonable" means in the context of cl 97 because a charge could be contrary to cl 72 either by (a) being charged for a service that, under cl 72(1), must be provided for free or (b) being *unreasonable*, and so prohibited under cl 72(4).

Clarify how the Privacy Commissioner must weigh considerations under clause 18

20. We **recommend** that clause 18 be amended to clarify whether the Privacy Commissioner is required to give equal or different weight to the factors listed there.

21. Clause 18 lists 5 factors that the Commissioner must weigh when performing functions or exercising powers under the Bill. However, the clause states that the Commissioner must "have regard" to some, "take account" of others, and "consider" one of them. Using this variety of words could suggest that the factors are intended to be weighed differently, but that is not certain. For example, while some case law suggests there is a difference in meaning between "have regard to" and "take account of",[8] other judicial comment suggests there is not.[9] Although clause 18 merely carries over what is currently in the Privacy Act 1993, we believe this would be a good opportunity to clarify what is intended.

22. Thank you for considering our submission. We wish to be heard.

Yours sincerely

[7] Ibid at 86.
[8] *R v CD* [1976] 1 NZLR 436 at 437; *Unison Networks Ltd v Hastings District Council* [2011] NZRMA 394 at [70].
[9] *Te Runanga o Raukawa Inc v The Treaty of Waitangi Fisheries Commission* CA178/97, 14 October 1997 at 8.

Prof Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee