LEGISLATION DESIGN AND ADVISORY COMMITTEE

20 April 2017

Kanwaljit Singh Bakshi MP
Law and Order Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Mr Bakshi,

Anti-Money Laundering and Countering Financing of Terrorism 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]

4. The Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill is one that was not referred to LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the attached 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 LAC Guidelines, or with the ability to impact the coherence of the statute book may also be suitable for referral to LDAC.

5. Thank you for taking the time to consider the Subcommittee's submission. It wishes to be heard on this submission.

Yours sincerely

Karl Simpson
Acting Chairperson
Legislation Design and Advisory Committee

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Dear Mr Bakshi,

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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 Anti-Money Laundering and Countering Financing of Terrorism Amendment Bill (the **Bill**) that appear to be inconsistent with the Guidelines or could be refined to improve the quality of the legislation. In particular, the Subcommittee makes the following recommendations:

(a) The definition of "law enforcement purposes" is complex and should be redesigned (clause 5).

(b) Reference to "intelligence gathering and analysis" and "national security and defence purposes" in the definition of "law enforcement purposes" is too broad and should be amended to specify relevant enactments (clause 5).

(c) The power to extend "law enforcement purposes" and "regulatory purposes" by regulations should include a purpose and decision-making criteria to make it clear why and in what circumstances the definitions can be extended (clause 5).

(d) The power to disclose information to government agencies and regulators should be amended to include a requirement that the disclosing person must be satisfied that appropriate protections are or will be in place for the purpose of maintaining the confidentiality of the information or document (in particular, information that is personal information within the meaning of the Privacy Act 1993) (clause 38, new section 139).

(e) The power to disclose information to government agencies and regulators should be amended to include a power for the disclosing person to impose conditions relating to the confidentiality of the information (and in particular, information that is personal information) (clause 38, new section 139).

(f) The chief executive is not the appropriate decision maker to grant exemptions having regard to the scope of the exemption power, the nature of the decision, and the administrative role of the chief executive under the Act. The exemption power should remain with the Minister (clause 51, new sections 157 – 159).

(g) Legislation is not necessary to achieve administrative efficiencies for the exemption regime and should be addressed through operational improvements (clause 51, new sections 157 – 159).

(h) It is best practice for the Ministry to publish links to class exemptions (legislative instruments) on its internet site along with non-class exemptions (clause 51, new section 157).

2. Interpretation – clause 5, new section 5

The definition of "law enforcement purposes" is complex and should be redesigned

2.1. The definition of "law enforcement purposes" is complex because it is framed both too broadly and too narrowly. The definition is framed as "law enforcement purposes includes …" rather than "means …", which leaves the definition open to other meanings not stated. Meanwhile, the meanings that are stated as included are narrow, for example, subparagraph (c)(iii). Combined with the ability to extend the definition by regulations for no clear purpose (see our comments below), this creates a broad and complex definition for a term that is fundamental to the legislation and its impact on individuals. Given the policy considerations inherent in this design, we are not equipped to recommend specific solutions based on the information provided with the Bill on introduction. However, we do recommend that the design of the definition is overhauled to be more straightforward. **We suggest officials reconsider the design of the definition of "law enforcement purposes" and redesign it to be less complex.**

"Intelligence gathering and analysis" and "national security and defence purposes" are too broad

2.2. Clause 5 defines "law enforcement purposes" as including the prevention, disruption, detection, investigation and prosecution of offences under the Acts specified in (c), and the enforcement or administration of the Acts specified in (d) or prescribed in regulations. Paragraphs (a) and (b)

include two broader concepts that are not linked to specific Acts; that is, "law enforcement purposes" includes "intelligence gathering and analysis" and "national security and defence purposes".

2.3. The definition of "law enforcement purposes" impacts the scope and exercise of disclosure and information sharing powers later in the Bill.[1]

2.4. The Guidelines provide that legislation should not create a power that is wider than is necessary to achieve the policy objective.[2] We understand from the Regulatory Impact Statement that the definition of "law enforcement purposes" has been amended to provide for the "effective administration of the AML/CFT regime" including law enforcement purposes, supervisory purposes, intelligence and enforcement of a specified list of enactments.[3]

2.5. **Paragraphs (a) and (b) are too broad. It would be more consistent with the policy objective identified in the Regulatory Impact Statement and the Guidelines if "intelligence gathering and analysis" and "national security and defence purposes" in (a) and (b) were amended to specify relevant enactments.** This would also make exercise of disclosure and information-sharing powers easier and clearer for decision-makers.

Extending the definition of "law enforcement purposes" and "regulatory purposes" by regulations

2.6. Clause 5 provides that the definition of "law enforcement purposes" can be extended by regulations to include the enforcement and administration of any other enactment prescribed by regulations.[4] Similarly, the definition of "regulatory purposes" can be extended by regulations to include the enforcement and administration of Acts prescribed in regulations.[5]

2.7. The terms "law enforcement purposes" and "regulatory purposes" serve as thresholds for the exercise of disclosure and information sharing powers under the regime, including personal information.

2.8. The Guidelines provide that the empowering Act should clearly define the purposes for creating delegated legislation.[6] It is not apparent from the Bill why, or in what circumstances, the definitions would be extended by regulations. **We recommend the legislation should clearly provide a purpose and decision-making criteria to guide decisions and make clear why and in**

[1] See cl 18, new s 46(3), (4) and (8) (Disclosure of information relating to suspicious activity reports) and cl 40, new s 140A (Data access for law enforcement purposes).
[2] LAC Guidelines (2014 edition) at 16.4.
[3] Regulatory Impact Statement: Second phase of reforms to the Anti-Money Laundering and Countering Financing of Terrorism regime at 17.4.1.
[4] See clause 5, new section 5 definition of "law enforcement purposes" subparagraph (d)(vii).
[5] See clause 5, new section 5 definition of "regulatory purposes" subparagraph (b).
[6] LAC Guidelines (2014 edition) at 13.2.

what circumstances the definitions of "law enforcement purposes" and "regulatory purposes" can be extended by regulations. This seems particularly important given the importance of these definitions as thresholds for the disclosure of personal information.

3. Power to disclose information – clause 38, new section 139

3.1. New section 139 provides that specified persons may disclose any information supplied or obtained by it in the exercise of its powers or the performance of its functions and duties under the Act to any other government agency or regulator. Subparagraph (2)(a) provides that a disclosure may only be made, amongst other things, if the disclosing entity is satisfied that the recipient has a proper interest in receiving the information. This provision applies to information including personal information.

3.2. The Guidelines provide that the Government should respect privacy interests and ensure that the collection of information about people is done in a transparent manner and clearly explains the type and amount of information collected and what is done with that information.[7] The Guidelines also relevantly provide:[8]

> Legislation [creating new statutory powers] should include safeguards that will provide adequate protection for the rights of individuals affected by the decision … What is considered an adequate level of protection will increase as the interference with the rights of individuals increases.

3.3. We are concerned that "proper interest" combined with the broad definition of "law enforcement purposes" does not sufficiently limit disclosure of information to assisting the receiving government agency or regulator in the performance or exercise of its functions, powers, or duties under any enactments.[9] This is of particular concern given new section 139 applies to personal information. We note the term "proper interest" is carried over from existing section 139 which expressly does not apply to personal information.

3.4. To protect disclosure of personal information, we recommend the legislation should provide further express safeguards for personal information. **We recommend including a provision that requires the disclosing person to be satisfied that appropriate protections are or will be in place for the purpose of maintaining the confidentiality of the information or document (in particular, information that is personal information within the meaning of the Privacy Act 1993).** Sections 59(4) and 30(2) of the Financial Markets Authority Act 2011 are helpful examples of this kind of protection. **We also recommend creating a power for the disclosing person to impose conditions relating to the confidentiality of the information (and in**

[7] LAC Guidelines (2014 edition) at chapter 7.
[8] LAC Guidelines (2014 edition) at 16.6.
[9] Compare Financial Markets Authority Act 2011, s 30(1)(b).

particular, information that is personal information) when providing information under new section 139. Section 33 of the Financial Markets Authority Act is a helpful example.

4. Chief executive may grant exemptions – clause 51, new sections 157 – 159

4.1. Clause 51, new sections 157-159 provides that the chief executive may exempt reporting entities and transactions (or classes of those) from the requirements of all or any provisions of the Act. This power of exemption currently sits with the Minister in existing section 157.

4.2. The Guidelines relevantly provide:

(a) The person authorised to make delegated legislation must have an appropriate level of expertise, and hold an appropriate office having regard to the importance of the issues and the nature of any safeguards that are in place[10]

(b) It will be appropriate for public service chief executives to hold the power to make delegated legislation where the matter is of minor technical detail, with little or no impact on the rights of individuals.[11]

4.3. **We do not consider the chief executive in this case is the appropriate decision maker having regard to the scope of the exemption power, the nature of the decision, and the administrative role of the chief executive under the Act. We recommend the power remains with the Minister.**

4.4. Our research suggests that exemption powers are usually granted to chief executives only in relation to specific sections or parts of an Act, and are usually tertiary notices or discretionary administrative powers.[12] It is not common for a chief executive to hold an exemption power in relation to "requirements of all or any provisions of the Act". This broader exemption power usually sits with Ministers and is made by Order in Council.[13] The ability to exempt from "requirements of all or any provisions of the Act" goes beyond matters of "minor or technical detail" the Guidelines set out as appropriate for chief executives.

4.5. Exemption powers are usually delegated to chief executives where the decision to exempt requires specific knowledge or expertise particular to the chief executive, and are therefore often delegated to the chief executive of the relevant regulator.[14] However, the chief executive

[10] LAC Guidelines (2014 edition) at 13.3.
[11] LAC Guidelines (2014 edition) at 13.3.
[12] For example, see Food Act 2014, ss 33 and 347; Fisheries Act 1996, ss 103A and 186Q; Customs and Excise Act 1996, s 38F; Immigration Act 2009, s 102(3)-(4).
[13] For example, see Animal Products Act 1999, s 9; Wine Act 2003, s 6; Financial Transactions Reporting Act 1996, s 56(1)(d); Financial Advisers Act 2008, s 154(1)(a).
[14] The regulatory roles in this Act are the AML/CFT Supervisors. However we do not think AML/CFT Supervisors are the appropriate decision-makers in this case because the fact there are different Supervisors for reporting entities would be complicated and unworkable. Another option might be to make the Minister the decision-maker acting

under this Act does not fulfill a regulatory role and it is unclear what specific knowledge or expertise the chief executive has that is necessary to exercise this exemption power. Further, the considerations in subclause (3) are policy considerations that are not appropriate for a chief executive in an administrative (rather than regulatory) capacity. In other words, there is insufficient justification for the chief executive to be the decision-maker in this case. We do not consider administrative efficiencies alone are sufficient to justify delegating this power to the chief executive.

4.6. The Regulatory Impact Statement justifies amending section 157 to increase administrative efficiencies.[15] That is, the Ministry of Justice considers the Ministerial exemption power is inefficient and time-consuming, and shifting the power to the chief executive along with improving the considerations for granting exemptions to better reflect the primacy of money laundering and financing terrorism risks over other considerations will improve the effectiveness of the exemption regime.

4.7. We note that the provision does not appear to have been amended to give primacy of money laundering and financing terrorism risks over other factors, meaning the change to the level of decision-maker is the only amendment to section 157. The rest of existing section 157 is rolled over. **We query whether changing the decision-maker to the chief executive will achieve administrative efficiencies sought, and recommend the decision-making power is better left with the Minister. We recommend that administrative efficiencies do not require legislation and can be addressed through operational improvements.**

4.8. We also note that new section 157 takes a varied approach to the status of exemption instruments. Subparagraph (4) provides that all exemptions are disallowable instruments under the Legislation Act 2012, but subparagraph (5) provides that class exemptions must be published under section 6 of the Legislation Act and are therefore legislative instruments as per the definition of "legislative instrument" in the Legislation Act.[16] In practice, this means that class exemptions will be published on the Legislation website and non-class exemptions will be published on an internet site maintained by the chief executive and notified in the *Gazette*. This approach reduces the accessibility to delegated legislation by publishing exemptions in different places. We understand this accessibility issue will eventually be addressed by the Parliamentary Counsel Office's Access to Subordinate Instruments Project. **In the interim we suggest it is best practice for the Ministry to publish links to class exemptions on its internet site along with non-class exemptions.**[17]

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on the recommendation of the relevant Supervisor. However, we consider this would add undue complication to the decision-making process and exemption regime.

[15] At 60.

[16] Legislation Act 2012, s 4 at "legislative instrument" (c).

[17] For example, in practice the Financial Markets Authority publishes individual and class exemptions on its website, although legislation does not required to do so for class exemptions. See Financial Markets Conduct Act 2013, s 571.

5. Conclusion

5.1. Thank you for taking the time to consider the Subcommittee's submission. We wish to be heard on this submission.

Yours sincerely

Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee