



LEGISLATION DESIGN AND ADVISORY COMMITTEE

21 July 2017

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

Dear Ms Dowie

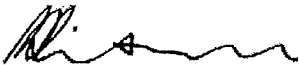
Marriage (Court Consent to Marriage of Minors) Amendment Bill

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 Marriage (Court Consent to Marriage of Minors) 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

A handwritten signature in black ink, appearing to read 'Paul Rishworth', with a stylized flourish at the end.

Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee



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Marriage (Court Consent to Marriage of Minors) 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 Marriage (Court Consent to Marriage of Minors) Amendment Bill (the **Bill**) that appear to be inconsistent with the Guidelines. The Subcommittee notes that it is likely that the Committee will be receiving advice from Ministry of Justice officials and this submission is intended to assist the Committee with that process.

2. *Prescriptive court procedural provisions that override the Family Court Rules 2002 – cl 5, new s 18(3)*

2.1. The new s 18(3) specifies a number of court procedural requirements, including an unusual right for witnesses to be represented by a lawyer.

2.2. It is generally inappropriate for legislation to duplicate court procedural requirements when court rules already deal with such matters. Parliament has already granted rule making powers in respect of family court procedures under s 16A of the Family Court Act 1980. Those powers have been used to make the Family Court Rules 2002, an extensive set of rules and procedures tailored to the needs of the Family Court. The rules comprise more than 500 rules concerning matters such as the requirements for proceedings, hearings, rights to a lawyer, a representative or manager, evidential requirements, conferences, interim proceedings, costs, judgments and records.

2.3. Chapter 2 of the Guidelines provides:

- Any existing legislation that relates to the same matters or implements similar policies to those of the proposed legislation should be identified (2.1)
- New legislation should not re-state matters that are already addressed in existing legislation (2.3)

2.4. Most of the proposed procedural requirements in new s 18(3) are already well provided for by court rules, for example:

- the right of an applicant to be heard in new s 18(3)(a) is provided for in rule 57 of the Family Court Rules 2002;
- the right of an applicant and other witnesses to be represented by a lawyer in new s 18(3)(c) is provided for in rules 80-98 of the Family Court Rules 2002, which also set out the rights of parties to be represented by a next friend, a litigation guardian, a representative or manager, and while any party is entitled to be represented by a lawyer it is highly unusual for a witness to be represented by a lawyer as proposed by new s 18(3)(c);
- the exclusion of members of the public and media from a hearing in new s 18(3)(d) is provided for in ss 11A and 11B of the Family Court Act 1980 and rule 53 of the Family Court Rules 2002;
- the ability of the court to hear evidence that might otherwise be inadmissible in new s 18(3)(e) is not specifically provided for in the Family Court Rules 2002 because evidence is usually by affidavit or in person (as provided for in rules 48-49 and 156-169 of the Family Court Rules). However, s 12A of the Family Court Act 1980 provides for the Court to receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding in respect of the Acts listed in that provision, and an amendment to s 12A of the Family Court Act 1980 could be made to include a reference to the new s 18 of the Marriage Act.

2.5. The Subcommittee recommends that advice be sought from the Ministry of Justice, which is responsible for the administration of the Family Court Act 1980 and the Family Court Rules 2002 made under that Act, on the extent to which the court procedural requirements in new s 18(3) are unnecessary in light of the existing powers and provisions in the Family Court Act and Rules.

3. Conclusion

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

Yours sincerely



Brigid McArthur

Chairperson (Acting)

Legislation Design and Advisory External Subcommittee