



# **ACTIVITIES OF THE LEGISLATION ADVISORY COMMITTEE DURING 2007**

Report of the Legislation Advisory Committee to the Attorney-General

Rt Hon Sir Geoffrey Palmer, Chairperson

1 December 2007

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## LEGISLATION ADVISORY COMMITTEE

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Ms Katherine Anderson, Legal Advisor, Department of the Prime Minister and Cabinet  
Mr Guy Beatson, Ministry of Economic Development  
  
Ms Lauren Perry, Manager, Ministry of Justice  
  
Mr Graeme Buchanan, Deputy Secretary, Legal, Department of Labour  
Professor John Burrows QC, Law Commission  
  
Professor John Farrar, Dean of Law, University of Waikato  
Associate Professor Andrew Geddis, University of Otago  
Mr Jack Hodder, Partner, Chapman Tripp  
Professor Michael Taggart, Auckland University

Mr Ivan Kwok, Treasury Solicitor  
Mr Grant Liddell, Chief Executive and Director, Serious Fraud Office  
Sir Ivor Richardson, Former President of the Court of Appeal  
  
Hon Justice Robertson, Judge of the Court of Appeal  
Ms Mary Scholtens QC, Wellington Barrister  
Mr David Noble, Chief Parliamentary Counsel  
Dr John Yeabsley, Senior Fellow, NZ Institute of Economic Research  
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1 December 2007

The Hon Dr Michael Cullen  
Attorney-General  
Parliament Buildings  
Wellington

Dear Attorney-General

I am pleased to provide you with the annual report of the Legislation Advisory Committee for the period 1 January 2007 to 1 December 2007.

Yours sincerely

Sir Geoffrey Palmer  
**Chair**  
**Legislation Advisory Committee**

## **INTRODUCTION**

### **Purpose of this Report**

1. This is a report to the Attorney-General, as the Minister responsible for the Legislation Advisory Committee (LAC), on the work completed by the LAC in the period from 1 January 2007 to 1 December 2007. This report:
  - a. outlines the membership and work structure of the LAC;
  - b. summarises the work undertaken by the LAC in 2007; and
  - c. offers some observations on trends and developments.

### **Functions of the Legislation Advisory Committee**

2. The terms of reference for the LAC are to:
  - a. provide advice to departments on the development of legislative proposals and on drafting instructions to the Parliamentary Counsel Office;
  - b. report to the Minister and the Legislation Committee of Cabinet on the public law aspects of legislative proposals that the Minister or that Committee refers to it;
  - c. advise the Minister on any other topics and matters in the field of public law that the Minister from time to time refers to it;
  - d. scrutinise and make submissions to the appropriate body or person on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
  - e. help improve the quality of law-making by attempting 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.
3. The Committee sees itself as a watchdog over public law issues, as well as legislative practice. In particular, the Committee sees itself as designing and promoting the LAC Guidelines, which have had wide recognition in a number of countries.

## MEMBERSHIP AND MEETINGS

4. The membership of the LAC as at 1 December 2007 is as follows:

Sir Geoffrey Palmer (Chair)	Mr Grant Liddell
Ms Katherine Anderson	Ms Lauren Perry
Mr Guy Beatson	Sir Ivor Richardson
Mr Graeme Buchanan	Hon Justice Robertson
Professor John Burrows QC	Ms Mary Scholtens QC
Professor John Farrar	Mr David Noble
Mr Jack Hodder	Dr John Yeabsley
Mr Ivan Kwok	Associate Professor Andrew Geddis
Ms Cheryl Gwyn	Professor Michael Taggart
Dr Warren Young	

5. Mr George Tanner was also a member of the LAC until 30 June 2007, and has continued in an advisory capacity. Mr Ian Jamieson and Mr Bill Moore have attended meetings on behalf of Parliamentary Counsel Office.
6. In 2007, the LAC met nine times. The meetings were held on the following days:

2 February	31 August
16 March	12 October
27 April	23 November
8 June	14 December
20 July	

## WORK STRUCTURE

7. The LAC's work is divided among its subcommittees. The subcommittees put up proposals to the LAC before advancing significant pieces of work.
8. The five subcommittees are as follows:
- Guidelines Subcommittee** - chaired by Professor John Burrows QC. This subcommittee deals with the LAC Guidelines.
  - Education and Monitoring Subcommittee** - chaired by Dr Warren Young. This subcommittee devises and implements programmes of education for the private and public sector. These centre on the LAC Guidelines and practical issues regarding the legislative process, such as how to deal with select committees and the Committee of the Whole House.
  - Subcommittee on the Legislative Process** - chaired by Sir Geoffrey Palmer. This subcommittee investigates ways in which the

legislative process can be changed to allow non-controversial law reform measures to receive greater attention from the House of Representatives than they do at present.

- d. **Subcommittee on Delegated Legislation** - chaired by Mr Grant Liddell. This subcommittee considers issues around delegated legislation, in particular, when delegated legislation is appropriate and what safeguards should be in place to ensure the correct balance between primary and delegated legislation.
- e. **Subcommittee on General Assistance** - chaired by Mr George Tanner until 30 June 2007. This subcommittee:
  - i. deals with departments or agencies which request help with particular legislative proposals and provides some input and feedback to them;
  - ii. deals with any requests from the Legislation Committee of Cabinet or Ministers; and
  - iii. superintends the writing of any submissions to Select Committees.

## **WORKLOAD**

9. This year the LAC carried out the following work:
  - a. provided advice to agencies and Ministers on the development of legislative proposals;
  - b. scrutinised and prepared submissions on aspects of Bills introduced into Parliament;
  - c. prepared submissions not arising out of particular Bills;
  - d. reviewed and updated the LAC Guidelines on Process and Content of Legislation; and
  - e. undertook promotional and educational activities relating to the guidelines.

## **ADVICE TO AGENCIES AND MINISTERS ON THE DEVELOPMENT OF LEGISLATIVE PROPOSALS**

10. The LAC provides direct assistance to government agencies to ensure quality of law-making. This includes providing advice on whether legislation gives clear effect to government policy, and encouraging officials to ensure that legislative proposals conform with the LAC Guidelines. In future, some of these functions may devolve to the Legislative Design Committee (LDC).

11. In 2007 the LAC provided advice on the following matters:
  - a. the development of guidelines for infringement offences;
  - b. the Therapeutic Products and Medicines Bill;
  - c. the Regulatory Responsibility Bill (Member's Bill);
  - d. civil and criminal penalty regimes; and
  - e. a Cabinet Office Circular on Delegated Legislation.

### **The development of guidelines for infringement offences**

12. The Ministry of Justice met with the LAC to discuss the Ministry's work on guidelines for infringement offences.
13. The Committee raised concerns that the growth in infringement regimes is bringing the rule of law into disrepute, and that there is a lack of consistency across these infringement regimes, with no mechanism for ensuring uniformity. The Committee considered that anything short of legislative requirements would not provide a real and effective incentive for agencies to adhere to principles in creating infringement regimes.
14. The Committee emphasised the importance of engaging the public in this work.
15. The Committee expressed an interest in being kept informed as work progresses.

### **The Therapeutic Products and Medicines Bill**

16. The LAC considered the Therapeutic Products and Medicines Bill and the wider implications that arise out of this work. The Committee recognised the technical requirements and sensitivities of international negotiations with Australia.
17. The LAC wrote to Ministers and raised the following concerns:
  - there are currently no guidelines for officials undertaking these sorts of negotiations, and officials must proceed on an *ad hoc* basis.
  - There is a need for a whole-of-government approach to be taken in respect to addressing the public law issues that emerge from such relatively novel and comprehensive policy measures.
18. The Committee has communicated its willingness to assist with endeavours to aid trans-Tasman harmonisation in the future.

### **Regulatory Responsibility Bill (Member's Bill)**

19. The Ministry of Economic Development met with the LAC to ascertain the Committee's view on the Regulatory Responsibility Bill (Member's Bill) and to seek the Committee's advice with respect to reporting back to the Minister on the Bill. This followed the Ministry's discussions with the LAC in 2006 on its Review of Regulatory Frameworks.
20. The Committee agreed that there is a need to address the problems raised by the Bill. However, the Committee did not support the solution proposed in the Bill and considered that the Bill should not pass in its present form. The Committee advised that the problems needed an across-government approach to ensure proper scrutiny of legislative proposals at an earlier stage. The LAC has not yet formed a final view on the best mechanism to achieve this objective.
21. The LAC appeared before the Commerce Select Committee on the Bill, making a submission that reflected these points.

### **Civil and Criminal Penalty Regimes**

22. A representative from the New Zealand Law Society met with the LAC to discuss the use of civil penalties in Unsolicited Electronic Messages Bill. At the meeting, the Committee raised a concern around the growth in such regimes, and a lack of guidance for assessing whether a penalty should be civil or criminal in nature.
23. Representatives of the LAC subsequently met with Ministry of Justice officials to discuss work the Ministry is undertaking in this area. Once this work has been completed the LAC may consider preparing guidelines.

### **A Cabinet Office Circular on Delegated Legislation**

24. Officials from the Cabinet Office and the Ministry of Justice met with the LAC to seek the Committee's advice on the development of a Cabinet Office Circular on delegated legislation. The Committee supported the proposed approach and provided feedback on specific points.

## SCRUTINY AND SUBMISSIONS ON ASPECTS OF BILLS INTRODUCED INTO PARLIAMENT

25. The Law Commission provided the LAC with the equivalent of a half-time researcher. Law Commission researchers, under the supervision of a Commissioner, vet Bills introduced into Parliament with reference to the LAC Guidelines. They provide the LAC with a report on each vetted Bill and alert the Committee to any likely inconsistencies between the Bill and the Guidelines.
26. The LAC then reviews the Law Commission reports on the Bills, scrutinises the Bills themselves, and decides whether or not to take further action. The LAC is not concerned with matters of policy, but rather, with questions of good legislative practice.
27. In addition to the advice outlined in the section above, the LAC also scrutinised and made submissions to the relevant department, Minister, or Select Committee on the following Bills:
  - a. *Agricultural Compounds and Veterinary Medicines Bill*. The LAC met with officials to raise concerns about the close connection between the regulators and the industry, and the resulting lack of transparency and multiplicity of regimes. Officials were willing to address the concerns raised, but were encountering difficulties due to the complex nature of the problem. The Committee wrote to the Director-General of the Ministry of Agriculture and Forestry, to draw the Director's attention to problems with the parent Act, inviting the Ministry to consider a more fundamental review of the Act. Officials submitted the letter to the Select Committee, which incorporated changes recommended by the LAC in its report on the Bill.
  - b. *Human Tissue Bill*. Representatives from the LAC met with the Ministry of Health to discuss the Human Tissue Bill. The Committee conveyed its concerns about the need to have a clear, coherent, and simple legislative regime. Officials indicated they would reconsider the Committee's concerns and suggestions as to what the regime ought to be. Officials were invited to discuss this matter further with the Committee.
  - c. *Terrorism Suppression Amendment Bill*. The LAC appeared before the Select Committee to discuss the application of the offence of breach of statutory duty under the Crimes Act 1961.
  - d. *Criminal Proceeds Recovery Bill*. The LAC appeared before the Select Committee to raise concerns relating to retrospectivity, standards of proof, appeal powers, and search and seizure powers.
  - e. *Armed Forces Law Reform Bill*. The LAC wrote to the Minister of Defence setting out the LAC's concerns, in particular, those relating

to judicial appointments, open justice, and the implications for natural justice. Officials put most of these points before the Select Committee.

- f. *Limited Partnerships Bill*. The LAC made a written submission to the Select Committee on clause 27 of the Bill, which limits the liability of a limited partner who does not take part in the management of the business. The Committee indicated that it is not clear why, given the importance of this provision, the matters to be specified in regulations cannot be set out in the primary legislation.
- g. *Immigration Bill*. The LAC did not make a submission on the Bill to the Select Committee, but provided the Committee with a copy of the Law Commission's report on the Bill for the Committee's information. Department of Labour officials were also informed of the content of the report and the LAC's discussion on the Bill.
- h. *Dairy Industry Restructuring Amendment Bill (no 2)*. The LAC made a written submission to the Select Committee to draw the Committee's attention to inconsistencies in the Bill with the search warrant regime and associated procedural framework proposed by the Law Commission. The LAC supports the position taken in the Law Commission report on Search and Surveillance Powers.
- i. *Aviation Security Legislation Bill*. The LAC drew officials' attention to points relating to search and seizure in paragraph 16 of the Law Commission's report on the Bill.
- j. *Securities (Local Authority Exemption) Amendment Bill*. The Committee considered the disclosure regime put forward by the Securities (Local Authority Exemption) Amendment Bill, identifying concerns around restrictions on the information that must be made available to investors and the role of the Securities Commission in relation to Local Authorities. These issues were raised with officials from the Ministry of Economic Development.
- k. *Education (Tertiary Reforms) Amendment Bill*. The LAC met with officials to discuss the definition of stakeholder.
- l. *Births, Deaths, Marriages, and Relationships Amendment Bill 2007*. The LAC met with the Minister of Internal Affairs to discuss issues raised by the Births, Deaths, Marriages and Relationships Amendment Bill. The Committee is concerned about the consistency of this Bill with basic principles of the New Zealand legal system, including that of clear and certain law. The Committee considered that it might be desirable to have a new Act, as the amendment Bill includes substantial changes to the existing Act.
- m. *Trustee Amendment Bill*. The LAC raised with officials, issues around the exercise of discretion by trustees in relation to advisory trustees.

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- n. *Biofuel Bill*. The LAC provided advice to officials on how to confine the powers of search and seizure allowed under the Bill.
  - o. *Public Transport Bill*. The LAC wrote to Land Transport New Zealand to raise issues around the regulatory controls placed on commercial operators and the relationship of these controls with the regional public transport plan. Officials were invited to meet with the LAC.
28. The LAC scrutinised, but did not consider it necessary to take further action on, the following Bills:
- Student Loan Scheme Amendment Bill (No 2);
  - Social Security (Entitlement Cards) Amendment Bill;
  - Protection of Personal and Property Rights Amendment Bill;
  - Statutes Amendment Bill;
  - Mental Health Commission Bill;
  - Fisheries Act 1996 Amendment Bill;
  - Copyright (New Technologies and Performers' Rights) Amendment Bill;
  - Major Events Management Bill;
  - Te Roroa Claims Settlement Bill;
  - State-Owned Enterprises (AgriQuality Ltd & Asure New Zealand Ltd) Bill;
  - Social Security Amendment Bill;
  - International Finance Agreements Amendment Bill;
  - Weathertight Homes Resolution Services (Remedies) Amendment Bill;
  - Criminal Justice Reform Bill;
  - Sedition Bill;
  - Electoral (Integrity) Amendment Bill;
  - New Zealand Geographic Board (Nga Pou Taunaha o Aotearoa) Bill;
  - Social Assistance (Debt Prevention and Minimisation) Amendment Bill;
  - Electricity (Disconnection and Low Fixed Charges) Amendment Bill;
  - Electoral Finance Bill;
  - Building Amendment Bill;

- Gambling Amendment Bill (no 2);
- Family Courts Matters Bill;
- Misuse of Drugs (Classification of BZP) Amendment Bill;
- Broadcasting Amendment Bill;
- Land Transport Amendment Bill (No 4);
- Evidence Amendment Bill (no 2);
- Protected Disclosures Bill;
- Land Transport (Driving License) Amendment Bill; and
- Statutes Amendment Bill.

On some of these Bills, the Committee raised minor points with the drafters.

## **SUBMISSIONS NOT ARISING OUT OF A PARTICULAR BILL**

### **Submission to the Regulations Review Committee**

29. The Regulations Review Committee (RRC) performs the constitutionally important function of providing a key set of checks and balances on executive law-making. The LAC has an interest in delegated legislation, and one of its subcommittees, chaired by Mr Grant Liddell, superintends that interest. The LAC is interested in forging continuous links with the RRC and assisting where appropriate.
30. In 2007 the RRC released the discussion paper, "Inquiry into the Ongoing Requirement for Individual Regulations and their Impact". Representatives from the LAC met with the RRC to gain further clarity as to the RRC's thinking on the matter and how the LAC might best assist. The importance of the ongoing relevance of regulations and the possibility of some process of review were discussed.
31. The LAC provided a written submission on the discussion paper and will appear before the RRC if called upon.

### **Submission to the Standing Orders Committee**

32. The LAC is concerned about the current trend of constructing Bills in minimal parts, and the implications this has for the coherence and readability of the Statute Book.

33. On this basis, the LAC made a submission to the Standing Orders Committee on the need to change the Standing Orders to address the impact the requirement to debate Bills part-by-part is having on the Statute Book. In particular, the submission set out how the current approach can affect the interpretation of statutes by the Courts, and the risks that arise from amending statutes in a manner incompatible with the principal Act.

## REVIEW OF THE LEGISLATION ADVISORY COMMITTEE GUIDELINES ON PROCESS AND CONTENT OF LEGISLATION

### Updated and New Chapters

34. In 2007 the LAC updated the chapters in the LAC Guidelines as follows:
- Chapter 10: Delegated Legislation (part 1)
  - Chapter 18: Alternative Dispute Resolution (ADR)
35. Following extensive consultation these amendments to the Guidelines were approved in July 2007.

### Accessibility of Guidelines

36. The full text of the LAC Guidelines is available in electronic format on the Legislation Advisory Committee website (<http://www.justice.govt.nz/lac>). The full text comprises the 2001 edition, the 2003 supplement, and the 2006 and 2007 amendments.

## PROMOTION AND EDUCATIONAL ACTIVITIES RELATING TO THE GUIDELINES

37. On 9 August the LAC held a seminar on the Revised LAC Guidelines for public servants involved in policy making and legislative processes. The seminar was held at Parliament Buildings and followed the same format as previous seminars for government officials. This seminar focused on new chapters recently incorporated in the Guidelines.
38. Sir Geoffrey Palmer chaired the seminar, which included the following presentations from LAC members:
- a. Mr Ian Jamieson (Chief Parliamentary Counsel), “The *Guidelines* – a Reprise for Government Servants: What they are and why they are important”;
  - b. Professor John Burrows QC (Law Commissioner), “What is New and Why Was it Done?”; and

- c. Sir Geoffrey Palmer (Law Commission President) and Mr Ivan Kwok (Treasury Solicitor), "The New Guideline on Taking Bills Through the House".
39. The seminar concluded with a panel discussion, where guests were able to direct questions to the presenters as well as Mr Graeme Buchanan (Deputy Secretary, Department of Labour) and Mr Grant Liddell (Chief Executive, Serious Fraud Office).
40. There were around 150 people in total who attended the seminar. The majority of attendees that filled out the evaluation form indicated that they found the seminar very useful.
41. In addition, Sir Geoffrey Palmer and Professor John Burrows spoke at the Australia-New Zealand Scrutiny of Legislation Conference (31 July to 2 August), and Mr Grant Liddell chaired a session.

## TRENDS AND DEVELOPMENTS

### Good Legislative Design in New Zealand

42. The LAC is becoming increasingly concerned about the development of quality legislation in New Zealand. The Committee considers that there are features of the New Zealand system which militate against coherence in legislative design. In particular, it is difficult to effectively fix legal problems with Bills after they are introduced. On this basis, the LAC is of the opinion that the design of Bills should be integrated with the policy-making process.
43. The LAC notes in particular, that a weakness with the development of legislation in New Zealand is that there is no comprehensive mandatory process for compliance with the LAC Guidelines. Rather, agencies self-certify adequacy. The Committee does not yet have a final view on the best mechanism for achieving better quality legislation, with work still underway.
44. The LAC is currently looking at the possibility of raising issues around quality legislation at chief executive level. The Committee also raised these issues when submitting on the Regulatory Responsibility Bill.

### **Role of the LAC/LDC**

45. The Legislation Design Committee (LDC) was established in 2006. There is a high level of cross-over of government membership, including the Chair, ensuring a close relationship between both committees. The LDC's role is intended to be complementary to that of the LAC. The LDC currently provides advice aimed at resolving issues and ensuring consistency with the LAC Guidelines at an earlier stage of the process. The LDC is also able to refer projects to the LAC where the issues would benefit from consideration by its broader membership.
46. In 2007, both the LAC and LDC considered on several occasions, the relationship between and roles of the two Committees. The future of the LAC/LDC is an issue that both Committees will consider further in the future.

### **Crown Law Reports to the LAC on Legislation Prepared by the Law Commission**

47. The Law Commission typically prepares reports for the LAC on Bills introduced into the House. However, sometimes the Law Commission is responsible for preparing these Bills. It is inappropriate for the Law Commission to provide a report to the LAC on legislation that the Law Commission has prepared. In such circumstances, Crown Law has agreed to prepare these reports for LAC.

### **Use of LAC Guidelines by Other Jurisdictions and Organisations**

48. The Commonwealth Secretariat is developing generic guidelines on the process and content of legislation that Pacific Island countries can adopt or adapt. The LAC has agreed to allow the LAC Guidelines to be used as a basis for this work. Additionally, the Commonwealth Association of Legislative Counsel has also conveyed admiration for the LAC Guidelines. The Association is considering the possibility of publishing material based on the LAC Guidelines.

### **ACKNOWLEDGEMENTS**

49. The LAC has throughout the year, continued to receive the support of the Ministry of Justice, especially in the role of secretary to the Committee. The efficient and consistent way this has been provided by a variety of individuals is appreciated by all members of the Committee.
50. Equally valuable and at the heart of much of the work of the LAC has been the outstanding service provided by the Law Commission. Their

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researchers have regularly reviewed the legislation put before the Committee and provided thoughtful and considered reports that have been the basis of the LAC's deliberation. The contribution this has made is fully recognised and appreciated by the whole group.

51. The LAC would also like to acknowledge the assistance of Crown Law in providing reports to the LAC on legislation that the Law Commission has prepared.