



LEGISLATION DESIGN AND ADVISORY COMMITTEE

19 March 2018

Raymond Huo MP
Justice Committee
Parliament Buildings
Wellington

Dear Mr Huo

Electoral (Integrity) 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 Electoral (Integrity) Amendment Bill 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.

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.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'P. Rishworth', with a stylized, wavy flourish at the end.

Paul Rishworth QC

Chairperson

Legislation Design and Advisory Committee



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Dear Mr Huo

Electoral (Integrity) Amendment Bill

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 those principles.
2. This submission raises two matters regarding the Electoral (Integrity) Amendment Bill:
 - a. the availability of judicial review, given the Parliamentary Privilege Act 2014; and
 - b. when the Bill should commence.

Ensure the Parliamentary Privilege Act 2014 is not a barrier to judicial review

3. We **recommend** the Bill be amended to ensure that the Parliamentary Privilege Act 2014 is not a barrier to the availability of judicial review as a remedy for parliamentary members who are removed under the Bill's provisions.
4. The Guidelines state that new legislation should make clear how it relates to existing legislation.² The Parliamentary Privilege Act 2014 restricts the courts' ability to consider "proceedings in Parliament", which the Act defines as "all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee" (s 10(1)). Decisions to remove party members under the Bill's provisions could arguably come within this definition. We suggest the Bill be amended to remove any doubt about whether the Parliamentary Privilege Act 2014 Act is intended to prevent the courts reviewing such decisions.

² LAC Guidelines (2014 edition) at chp 2.2.

Consider delaying commencement until after the expiry of the current Parliament

5. We **recommend** the Committee consider delaying the Bill's commencement until after the dissolution or expiry of the current Parliament.
6. The starting point under the Guidelines is that legislation should not have retrospective effect.³ We acknowledge that the Bill may not be retrospective in the sense of changing the legal consequences of past actions or events. But the concept of retrospectivity is not clear-cut,⁴ and we suggest that a conservative approach may be called for in this case, because:
 - a. the law governing when a member of Parliament's seat becomes vacant is, like all electoral law, constitutionally important; and
 - b. the Bill would change the law from what the voters and current members of Parliament understood it to be when they voted and stood for election.
7. Given the constitutional significance of the law being amended, the expectations of voters and members would ideally be protected by delaying commencement of the Bill until after the current Parliament ends. We note that this would be consistent with the usual practice whereby Standing Orders amended by one Parliament do not take effect until the beginning of the next.⁵
8. Thank you for considering our submission. We do not wish to be heard.

Yours sincerely



Prof Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee

³ Ibid at chp 11.1.

⁴ See Ross Carter *Statute Law in New Zealand* (5th edition) at p 614.

⁵ David McGee *Parliamentary Practice in New Zealand* (4th edition) at p 14.