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9 March 2011

Chair
Government and Environment Committee
Parliament Buildings
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**Weathertight Homes Resolution Services (Financial Assistance Package)
Amendment Bill**

1. This submission is made by the Legislation Advisory Committee (LAC).
2. The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the *Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation* (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
3. The terms of reference of the LAC include:
 - (a) to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
 - (b) to 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.

4. The LAC considered the Weathertight Homes Resolution Services (Financial Assistance Package) Amendment Bill at its meeting on 4 March 2011. In addition to more minor drafting matters that have already been referred to Parliamentary Counsel, the LAC has a number of concerns with the Bill. These are:

basic criteria for eligibility for the claimants to enter the scheme are left to Gazette notice;

whether a home owner elects to enter the scheme will impact on the rights of third party builders or others to seek contribution from local authorities under current case law; and

the Bill contains a broad Crown immunity clause that is not readily justified and does not accord with the Department of Building and Housing's own acceptance of responsibility in its Regulatory Impact Statement.

Lack of criteria for "qualifying claimant" – delegation of legislative authority

- 5 Details of the financial assistance package are not covered by the Bill but are left to be dealt with administratively by the chief executive of the Department of Building and Housing. In particular, the criteria for who is a "qualifying claimant" are not set out in legislation. Instead they will be specified by the Chief Executive by notice in the Gazette (s125B).
- 6 It is submitted that the Committee consider amending the Bill to give greater guidance as to the criteria that may be adopted to determine who is eligible under the scheme, and to the running of the scheme, so that potential claimants may be able to review the scheme as gazetted by the Chief Executive, against the intentions of Parliament in creating it.

Effect on Third Parties

- 7 If an eligible homeowner opts into the scheme, the homeowner may not sue or join the participating territorial authority or the Crown (section 125F). Eligible homeowners will still be able to pursue legal action against other parties.
- 8 However s125F also provides that no **other** person may name or join the Crown or a territorial authority either. Thus the rights of other possible defendants (such as builders and architects) may be prejudiced by their not being able to claim against the territorial authority if they consider it has contributed to the loss suffered by the homeowner.
- 9 The Regulatory Impact Statement suggests that this cost may be partially offset by a likely reduction in litigation if councils agree to the scheme, which may "benefit some possible defendants who might otherwise have been included in litigation against the councils."
- 10 The LAC also asks the Committee to consider whether third parties ought to be able to claim a contribution from the territorial authority in circumstances where

its liability would actually amount to more than 25%, but taking into account the 25 % that the local authority would have paid under the scheme.

Crown Immunity Provision

- 11 Proposed section 125E prevents the homeowner from bringing proceedings against the Crown and specified organisations and people to recover damages for any loss or damage that is due directly or indirectly to the repair of a house in accordance with a contribution agreement, or the provision of any financial assistance measures to a claimant. The persons include employees or contractors of the Department of Building and Housing.
- 11 The Regulatory Impact Statement suggested it is appropriate for the Department/Crown to be held accountable for work that it is responsible for. Section 125E instead prevents claims being made against the Crown in relation to this work. The Regulatory Impact Statement also indicates that the financial assistance package scheme design requires the parties to accept the assessor's report as the definitive assessment of the scope of repairs (whereas presently the reports can be challenged). There is no provision to this effect in the legislation, but if this is in fact the design of the package, it makes the limitation of the Crown's liability more significant, as the homeowner has no opportunity to challenge the assessment.
- 12 The default position under the Crown Proceedings Act is that the Crown is vicariously liable for the torts of its servants. In our view the early advice in the Regulatory Impact Statement is more consistent with this general view, and in the absence of a particular justification that there should be no general immunity granted by the Bill.
- 13 Thank you for consideration of this submission. The Committee does not wish to be heard in support of it.

Yours sincerely



George Tanner QC
Acting Chair
Legislation Advisory Committee

