



LEGISLATION DESIGN AND ADVISORY COMMITTEE

14 June 2018

Raymond Huo MP
Justice Committee
Parliament Buildings
Wellington

Dear Mr Huo

Administration of Justice (Reform of Contempt of Court) 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 *Legislation Guidelines* (2018 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, the External Subcommittee is empowered to review and make submissions on Bills as introduced, usually those that were not reviewed by LDAC prior to their introduction.¹
4. The Administration of Justice (Reform of Contempt of Court) Bill was not considered by LDAC prior to introduction. The External Subcommittee has therefore reviewed it and wishes 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 *Legislation 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.

Yours sincerely

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

Paul Rishworth QC

Chairperson

Legislation Design and Advisory Committee



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Dear Mr Huo

Administration of Justice (Reform of Contempt of Court) Bill

1. The Legislation Design and Advisory External Subcommittee has been given a mandate by Cabinet to review introduced Bills against the *Legislation Guidelines* (2018 edition) (**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 the principles contained in the Guidelines.
2. Our submission relates to clause 24 of the Bill which creates an "offence to publish untrue allegation or accusation against Judge or Court".

Removal of clause 24

3. We recommend that clause 24 be **deleted** from the Bill. In its place, we submit that a provision abolishing the common law crime of scandalisation be inserted.
4. We acknowledge that the intention behind clause 24 is to protect the reputation of our Judges and Courts and the central place they hold in our justice system. We accept that Judges are, at times, subject to unjustified and unreasonable attacks. We nevertheless suggest that clause 24 does not comply with the *Legislation Guidelines 2018*, as endorsed by Cabinet.
5. The *Legislation Guidelines* provide that legislation should be consistent with the principle of legality, including, in this case, the value of freedom of expression.² The right to freedom of expression is affirmed in section 14 of the New Zealand Bill of Rights Act 1990. Parliament has in the recent past abolished the law of sedition and is in the processes of abolishing the law of blasphemy, both of which are restraints on freedom of expression in criticising the state or religion. It abolished the law of criminal defamation in 1993.

² *Legislation Guidelines*, chapter 4, clause 4.3

6. This is not to say that restraints may not be appropriate: the laws relating to defamation, harassment and criminalising offensive conduct are examples. But we believe that care should be taken in enacting any statute that takes away the ability of citizens to criticise, even unfairly, unreasonably or incorrectly, the institutions of the State. This is especially so given the chilling effect of such legislation on freedom of expression.
7. Legislation should only be made when it is necessary to achieve the policy objective.³ On reviewing the justifications given by the Law Commission for the offence prescribed by clause 24, we believe that the activities proposed to be covered by this offence, such as harassment of judges, are already adequately provided for in the criminal law, by statutes such as the Harmful Digital Communications Act 2015 or the common law of defamation. The policy objective may, in fact, be undermined by providing greater protection than is extended to members of the public. Public confidence in an institution is seldom fostered through preferential treatment. Given this, we do not believe that a sufficient case has been made for clause 24.
8. We also recommend that the common law of scandalisation be abolished. This common law crime has a poor reputation throughout the Commonwealth as being used in other jurisdictions to stymie legitimate political criticism of the State or of Judges. While we note that it has not been used this way in New Zealand, and it is not the intention of those who have introduced this Bill that this be done in New Zealand, such an undefined common law crime has no place in a free and democratic society.⁴

Changes to the current section

9. We believe that if clause 24 is to be retained contrary to our submission it should be significantly amended to somewhat, albeit imperfectly, ameliorate its effect.
10. Clause 24 appears to create an offence that is triggered simply through the act of intentional publication rather than intentionally publishing something that is false or designed to undermine public confidence in the independence, integrity, or impartiality of the judiciary or a Court.
11. Clause 24(3) does provide a defence where a person can prove that the publication was in fact true or not materially different than the truth. This is not the same thing as intentionally publishing something that the person knew to be false. The requirement to prove truth has been a significant problem in the law of defamation and creates a significant burden on those who are sued under the law of defamation. This might be acceptable in a civil law context but we do not believe that it is appropriate for a criminal law context.
12. We therefore submit that any offence should require the person prosecuted to have intentionally made false allegations or accusations knowing that they were false with the

³ *Legislation Guidelines*, chapter 2, clause 2.3

⁴ *Legislation Guidelines*, chapter 4, clause 4.3

intention for those allegations to undermine public confidence in the independence, integrity, or impartiality of the judiciary or a Court.⁵

13. It is true that such elements might make prosecution of such an offence more difficult. However, we submit that, given the potential difficulties that clause 24 currently poses for important constitutional values, a high standard is appropriate. In fact, it would appear from a review of the Law Commission report and the introductory speeches in support of this Bill that the behaviour that is intended to be captured is the intentional making of allegations that are known to be false.
14. Thank you for considering our submission. We wish to be heard.

Yours sincerely

Prof Geoff McLay



**Chairperson
Legislation Design and Advisory External Subcommittee**

⁵ *Legislation Guidelines*, chapter 24, especially clauses 24.1 - 24.3