



LEGISLATION DESIGN AND ADVISORY COMMITTEE

18 August 2016

Ruth Dyson MP, Chairperson
Government Administration Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Ms Dyson,

Fire and Emergency New Zealand 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. The 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, the 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, scrutinizing 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 the 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 the LDAC prior to their introduction.
4. The LDAC met with officials to initially discuss the fire services reform in February 2016, but a subcommittee of members was not delegated to work closely on the reform before introduction. We consider that in such cases, it is appropriate for the External Subcommittee to make a submission on the Bill after introduction. The External Subcommittee has therefore reviewed the Fire and Emergency New Zealand Bill, and desires to make the **attached** submission. This submission was principally prepared by the following members of the LDAC External Subcommittee: Professor Geoff McLay, Sean Kinsler, James Wilding, Brigid McArthur, Megan Richards, and Matthew Smith, with input from other members of the Subcommittee.
5. Thank you for taking the time to consider the Subcommittee's submission. It wishes to be heard on this submission.

Yours sincerely

Paul Rishworth QC

Chairperson
Legislation Design and Advisory Committee



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Dear Ms Dyson,

Fire and Emergency New Zealand Bill

Introduction

1. The Legislation Design and Advisory External Subcommittee (the **Subcommittee**) has recently begun considering Bills under the mandate given to it by Cabinet. The Subcommittee reviews 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 conforms to accepted legal and constitutional principles. We focus on legislative design and the consistency of a Bill with fundamental legal and constitutional principles.
2. This submission focusses on aspects of the Fire and Emergency New Zealand Bill (the **Bill**) that appear to be inconsistent with the Guidelines or could be refined to increase the quality of the legislation. This submission focusses on the:
 - (a) appropriateness of the levy avoidance arrangements and shortfall penalties regime;
 - (b) regulations relating to the levy; and
 - (c) scope of some of the proposed powers in the Bill.
3. We make suggestions where provisions of the Bill could be amended or reconsidered in light of principles in the Guidelines. We have endeavoured to make suggestions that will result in an accessible and quality piece of legislation.

Levy avoidance arrangements and shortfall penalties – clauses 91 – 98

The Committee should be satisfied that a complex regime based on the tax system is appropriate and justified by the policy objective

4. Under Part 3 of the Bill, insurers, and in some cases policyholders, are liable to pay a levy to Fire and Emergency New Zealand (**FENZ**). The Bill provides FENZ with extensive powers to maintain the integrity of the levy and deter evasive behaviour. FENZ may:¹
 - (a) determine a levy payer’s liability for the levy in order to counteract a levy advantage that a person obtains from or under an avoidance arrangement;
 - (b) impose a shortfall penalty of 20% of the resulting level shortfall if a levy payer does not take “reasonable care” and/or the levy position is unacceptable;
 - (c) impose a shortfall penalty of 40% of the resulting levy shortfall if the person is “grossly careless” in taking a levy position;
 - (d) impose a shortfall penalty of 100% of the resulting levy shortfall if the person take an “abusive levy position”.
5. The Regulatory Impact Statement (**RIS**) provides that the current levy regime in the Fire Services Act 1975 is inadequate because the penalty is too low to be a deterrent, and it provides no general means of responding to larger organisations that deliberately structure their risk and insurance arrangements to avoid paying levies.² The RIS and Departmental Disclosure Statement explain that the proposed regime is based on a modified tax integrity model under the Tax Administration Act 1994.³
6. The anti-avoidance and shortfall penalty regime is unusual in a levy context and we submit that the Committee should be satisfied that it is appropriate and justified. The proposed regime is complex because of the high administrative penalties, the elements and definitions of the offending levy positions, and the matters FENZ must consider when it is determining whether one of the levy positions has arisen and a shortfall penalty is required. Further, we note that the escalating levy positions are capable of a variety of interpretations.
7. The Guidelines differentiate between a tax and a fee or levy. Only Parliament may impose a tax, but a fee or levy making power may be delegated to the executive.⁴ This important distinction is blurred by borrowing aspects of the tax regime and applying them to levies.

¹ Clauses 92-96.

² Department of Internal Affairs *Regulatory Impact Statement: Fire Services Review – detailed policy design* (30 June 2016) at [81].

³ *Regulatory Impact Statement: Fire Services Review – detailed policy design* at [100]-[108] and Department of Internal Affairs *Departmental Disclosure Statement: Fire and Emergency New Zealand Bill* (29 June 2016) at 4.9.

⁴ LAC Guidelines (2014 edition) at Chapter 15.

8. Further, mechanisms that may be appropriate in a tax context are not necessarily appropriate for a levy regime. The Guidelines provide that “precedents from existing legislation should only be used if they are consistent with the scheme and purpose of the new legislation.”⁵
9. The Committee should be satisfied that the proposed anti-avoidance and shortfall penalty regime is justified by the policy objective. There should be a serious risk of levy evasion that justifies this regime.

The Bill should clearly set out when a shortfall penalty can be waived or refunded

10. The Bill relevantly provides that the Minister may recommend regulations that provide for waivers or refunds of the whole or any part of any shortfall penalty⁶ and that set out the circumstances in which, and conditions subject to which, FENZ may waive all or part of a shortfall penalty.⁷ We suggest that these matters should not be prescribed in delegated legislation and that the Bill should clearly set out the circumstances and conditions in which all or part of shortfall penalties can be waived or refunded.
11. The Guidelines provide that as a general rule, matters of policy and principle should be in primary legislation.⁸ We acknowledge that this is not always a clear-cut matter. However, we suggest that it would be more transparent to set out these matters in primary legislation. Further, waivers and refunds of shortfall penalties could have potentially significant consequences for levy payers and should therefore be clearly accessible in primary legislation.
12. We draw the Committee’s attention to sections 130 and 127 of the Customs and Excise Act 1996, and sections 141-142G of the Tax Administration Act which clearly sets out the circumstances in which the Commissioner may use his or her discretion to reduce, waive, or refund shortfall penalties. It would seem to us regulations might add specific grounds that are found desirable from time to time.

Is the proposed dispute resolution scheme appropriate for disputes about shortfall penalties and avoidance arrangements?

13. The Bill provides that FENZ must develop a dispute resolution scheme for resolving disputes on any matter under the Bill or regulations made under the Bill, including disputes relating to levies, shortfall penalties, and avoidance arrangements.⁹ The Bill sets out principles and the broad framework of the dispute resolution scheme. The final scheme is developed by FENZ and approved by the Minister.

⁵ LAC Guidelines (2014 edition) at 2.7.

⁶ Clause 104(3)(e).

⁷ Clause 104(3)(g)(iii).

⁸ LAC Guidelines (2014 edition) at 13.1.

⁹ Part 4, Subpart 5.

14. We question whether a dispute resolution mechanism is appropriate to resolve disputes relating to shortfall penalties, and avoidance arrangements. The RIS provides that a robust, independent dispute process will be available in the event of disagreements around the anti-avoidance regime. It notes that this will be a check and balance on the regime and help reduce uncertainty for levy payers.¹⁰ We agree with this notion in principle, however, we are concerned that the robustness and independence of the dispute process (particularly of the decision-maker) is difficult to determine because the dispute resolution scheme is delegated to FENZ to set.
15. We are also concerned that the nature of avoidance arrangements and shortfall penalty disputes is not appropriate for dispute resolution. The Guidelines relevantly provide that alternative dispute resolution is not appropriate where the dispute relates to the content of legislation, a dispute over the meaning of legislation exists, or fundamental rights or allegations of abuse of power are involved.¹¹ We suspect that the complexity of the anti-avoidance and shortfall penalty regime (particularly the elements of the levy positions and the matters FENZ must consider) will give rise to difficult matters regarding the meaning of the legislation. We submit that such matters are not appropriate for alternative dispute resolution.
16. We would suggest that a review process more akin to that under the Tax Administration Act is more appropriate for what are, in fact, quite serious findings with serious consequences.

Regulations relating to the levy – clauses 104-106

Regulations should be reviewable on grounds of failure to comply with consultation provisions

17. Clause 106(5)(a) provides that regulations relating to the levy are not invalid on the grounds that the consultation provisions in subclauses (2)-(4) are not complied with. We submit that this provision should be removed as it is inconsistent with the general principles in the Guidelines that consultation and judicial review are appropriate safeguards on delegated legislation and that generally legislation should not exclude judicial review.
18. Consultation is an important safeguard on delegated legislation in appropriate circumstances.¹² It allows the public to have input on regulations and helps increase the transparency of the regulation-making processes. Like consultation on primary legislation, consultation in the regulation-making process can contribute to higher-quality legislation, and, significantly in the context of this Bill, better compliance and increased public “buy-in”.¹³ Clause 106(5)(a)

¹⁰ *Regulatory Impact Statement: Fire Services Review – detailed policy design* at [108].

¹¹ LAC Guidelines (2014 edition) at 26.1.

¹² LAC Guidelines (2014 edition) at 13.4.

¹³ LAC Guidelines (2014 edition) at 1.4.

essentially strips the consultation provisions of significance and removes the statutory assurance that regulations relating to the levy will be well-made.

19. The Guidelines specifically suggest that consultation may be appropriate for regulations that set a fee or levy. We draw the Committee's attention to the Guidelines which provide:¹⁴

It may be desirable for the Minister responsible for the empowering Act to consult with existing and potential users of the service, industry groups, or the public more generally before recommending regulations to prescribe a new fee or levy.

20. Clause 106(5)(a) also has the effect of excluding judicial review of regulations on grounds that consultation requirements were not complied with. Judicial review is an important safeguard for delegated legislation. The Guidelines provide that "all delegated legislation should generally be subject to ... judicial review. ... Legislation should not restrict a right of access to the courts to challenge delegated legislation."¹⁵

21. Judicial review helps to ensure that decisions are correct and in accordance with the law, and it encourages first instance decision-makers to produce decisions of the highest possible quality.¹⁶ As currently drafted, there is no incentive for FENZ and the Minister to comply with consultation requirements and thereby ensure that regulations are high quality.

The requirement to consult should be framed objectively

22. The Bill provides that FENZ must consult with the persons "it considers are likely to be substantially affected", or their representatives, about the proposed regulations relating to the levy and the activities it proposes to undertake in the relevant period.¹⁷

23. We suggest that the requirement to consult should be framed objectively. As it is presently drafted, the consultation requirement is subjective and FENZ determines who is likely to be substantially affected. The clause should be amended to read: "FENZ must consult the persons that are likely to be substantially affected ..." This will introduce a higher, objective threshold and provide a better safeguard to ensure that the objectively relevant people are consulted.

¹⁴ LAC Guidelines (2014 edition) at 15.7.

¹⁵ LAC Guidelines (2014 edition) at 13.4.

¹⁶ LAC Guidelines (2014 edition) at 25.

¹⁷ Clause 106(2).

There is an accountability gap between FENZ who consults on the regulations and the Minister who recommends making regulations

24. The Bill provides that FENZ must undertake consultation requirements and that the Minister must be satisfied that FENZ has complied with consultation requirements before recommending making regulations in relation to the levy.¹⁸
25. The Guidelines provide that it is preferable to place statutory powers with the person who has ultimate accountability for the decision.¹⁹ We submit that this principle similarly applies to duties and obligations relating to statutory powers. Decision-makers should be accountable for their decisions, and delegating part of a decision-making process (particularly to a Crown entity such as FENZ) can obscure the line of accountability. It is particularly problematic to delegate part of the decision-making process to a Crown entity in this case because the consultation requirement relates to regulations that will significantly affect interests and liability under the Bill.
26. We suggest that the accountability gap between FENZ undertaking consultation and the Minister recommending regulations should be mitigated. This might be achieved by amending clause 106 to require that the Minister, rather than FENZ, undertakes consultation. Alternatively, and at least, clause 106(1) should be amended to require that the Minister must be “reasonably satisfied” that the FENZ has complied with the consultation requirements in subclauses (2)-(4).

Power to grant exemptions – clause 104(3)(d) and (4)

27. The Bill provides that the Minister may recommend making regulations that provide for an exemption from the levy for any property or class of property.²⁰ The Guidelines provide that legislation must specify appropriate safeguards to apply to powers of exemption. The Guidelines go on to set out safeguards that should generally apply to a power of exemption, including that the power should be exercised consistently with the purposes of the Act.²¹
28. We suggest that clause 104 be amended to include a subclause that expressly requires that the Minister must act consistently with the purposes of the Act when recommending the making of regulations under clause 104(3)(d). This would be in addition to the criteria and safeguards already set out in subclauses (4) and (5).

¹⁸ Clause 106(1).

¹⁹ LAC Guidelines (2014 edition) at 16.2.

²⁰ Clause 106(3)(d).

²¹ LAC Guidelines (2014 edition) at 14.2.

Some of the proposed powers in the Bill are broad, subjective, or unclear

29. We are concerned that some of the proposed powers in the Bill are too broad and are framed subjectively. The Guidelines provide that legislation must clearly set out the scope of a power, who will exercise it, and how it will be exercised.²² Further, a power should not be broader than is necessary to achieve the policy objective.²³ We suggest that the powers below should be amended to introduce further safeguards in light of the breadth of the powers, or amended to improve the clarity of the provision.

- (a) Clause 54 could be improved by better describing what it means “to allow” a fire to be lit. We are unclear where it applies in situations where there is in fact no legal relationship between the person charged and the person who lit the fire.
- (b) Clause 57 – this provision creates an offence where a person leaves a burning or smouldering substance in open air and fails to take all reasonable steps to extinguish the fire, or fails to notify FENZ and continue to endeavor to control and extinguish the fire. We suggest that this provision could be made clearer in terms of what is meant by “leave”. It is not clear how a person could “leave” a burning or smouldering substance and also fail to extinguish it (because they have already left).
- (c) Clause 86(1) – this provision empowers FENZ to require levy payers and insurance intermediaries to provide any information within the person’s knowledge, possession or control that FENZ considers is necessary or relevant for any purpose relating to the administration or enforcement of Part 3 of the Bill. This is an invasive power and should be subject to an objective threshold. We suggest that subclause (1) is amended to read: “... within the person’s knowledge, possession, or control that is reasonably necessary or relevant for any purpose relating to the administration or enforcement of this Part.”
- (d) Clause 137 – this provision empowers FENZ inspectors to restrict or prohibit entry to land or buildings that are sites a fire or any other emergency. This power, somewhat necessarily, is broad in scope. However, we suggest that the Committee should consider whether this decision should be subject to a statutory review or appeal, and whether it should be limited to a time period that is no longer than reasonably necessary in the circumstances.

Conclusion

30. Thank you for taking the time to consider the Subcommittee’s submission. The Subcommittee wishes to be heard on this submission.

²² LAC Guidelines (2014 edition) at 16.

²³ LAC Guidelines (2014 edition) at 16.4.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G P McLay', written in a cursive style.

Professor Geoff McLay

Chairperson

Legislation Design and Advisory External Subcommittee