



LEGISLATION DESIGN AND ADVISORY COMMITTEE

5 March 2020

Darroch Ball MP
Chairperson
Transport and Infrastructure Committee
Parliament Buildings
Wellington

Dear Darroch Ball

Infrastructure Funding and Financing Bill

Introduction

1. The Legislation Design and Advisory Committee (**LDAC**) 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.
2. The LDAC's focus is not on policy, but rather on legislative design and the consistency of a Bill with the principles contained in the Guidelines.
3. Our submission is directed at clauses 12 and 13 of the Infrastructure Funding and Financing Bill (Bill).

Clauses 12 and 13

Effect of proposed provisions

4. Clauses 12 and 13 state that if any of the provisions in one of the specified Acts (the Te Ture Whenua Maori Act 1993 and Marine and Coastal Area (Takutai Moana) Act 2011) is inconsistent with a provision in the Bill the provision in the specified Act will prevail.

Concern about the proposed provisions

5. LDAC has some concerns about whether these clauses best achieve their intended outcome of ensuring any conflict between these Acts has been fully addressed.

6. The salient principle in the Guidelines is that any conflict or interaction between new and existing legislation should be explicitly addressed in the new legislation.¹ The Guidelines provide that where there is an unavoidable or intentional conflict between new legislation and existing legislation, the new legislation should make clear which provision will prevail or how it is intended that the two provisions should operate together.
7. Provisions that clarify which Act prevails if there is inconsistency between Acts are important and useful where a reasonable degree of work has been done to specifically address problematic inconsistencies but there remains a risk of inconsistency (in other words, for cases of “known unknowns”). They reflect a policy decision to prefer one regime over another. For example, section 9 of the Arbitration Act 1996 ensures that Act’s provisions on arbitrations are default general rules, and the specific provisions of other Acts will prevail.
8. Before opting for a global solution, however, the desired outcomes for the particular Bill should be worked through. A more granular assessment is often required to ensure a global solution is best, or if, for example, exceptions should be made in specific cases.
9. Moreover, we caution against a reliance on global solutions to resolve more complex interactions where it is not simply a matter of a choice of two similar, but slightly different, regimes. In this case often more is needed to ensure two Acts can operate together effectively.
10. We note more generally that where an Act states that it prevails over, or is subordinate to, another Act this implies an interaction between those two laws that is qualitatively different from their interaction with every other law. This is why it is common to say that information sharing provisions, for example, do not limit the Privacy Act 1993 – there is a special relationship between those types of provisions.
11. It is LDAC’s view, therefore, that listing of Acts that prevail over other Acts in legislation should be only done where there is clear reason to do so and not simply for the avoidance of doubt. The statute book could otherwise end up with Acts including long lists of prevailing Acts, which would be both problematic and confusing, and create risk where lists are inconsistent or not maintained.
12. For the above reasons, we would encourage the Select Committee to be clear about the nature of the potential inconsistency, what these clauses are intended to address, and whether more specific provisions are legally needed in the Bill to address it, rather than relying on global solutions.
13. After careful further consideration of the interaction of the Bill with these other regimes, it may be these clauses still have a role to resolve residual issues in this case which cannot easily be predicted (or could be redrafted as guides to users about how other provisions of

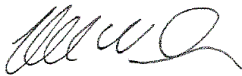
¹ *Legislation Guidelines* (2018 edition), chapter 3.2

the Bill have addressed the interaction between the Acts). In this case, we recommend amending the clauses to be as clear as possible as to their policy intent and legal effect.

Recommendations

14. We **recommend** that the policy intent of clauses 12 and 13 be carefully considered to determine whether these clauses are in fact necessary or desirable to deal with potential inconsistency, or whether a more tailored or different approach is preferable.
15. Thank you for considering our submission. We wish to be heard.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Karl Simpson', written in a cursive style.

Karl Simpson
Chair
Legislation Design and Advisory Committee