



LEGISLATION DESIGN AND ADVISORY COMMITTEE

# **Briefing for the Incoming Attorney-General**

6 November 2020

# Attorney-General

## CONTENTS

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Overview .....	3
Purpose .....	3
Legislation Design and Advisory Committee .....	3
Key messages .....	3
Trends and issues.....	4
Good quality legislation takes time and resources.....	4
Speed through the House is a problem .....	5
Legislating to be seen to do something .....	5
Legislating unnecessarily .....	5
Emergency legislation in a time of crisis.....	6
Disconnect between purpose and detail .....	6
How we help you to influence the system.....	7
Annual legislation programme: engagement with LDAC.....	7
LDAC’s work with departments before introduction.....	7
Ministers indicate compliance with the Guidelines when seeking approval for introduction.....	8
LDAC comments and reports to the Attorney-General .....	8
Select committees.....	8
LDAC membership and advisory support .....	8
Key contacts .....	9
Legislation Guidelines .....	9
Supplementary material to support the Guidelines .....	10
Education .....	10
Conclusion.....	10
Appendix 1 – LDAC Terms of Reference .....	11
Appendix 2 – Factors to consider in deciding whether to consult with LDAC in relation to a legislative proposal .....	12
Appendix 3 – LDAC Operating Model .....	13
Appendix 4 – LDAC Membership .....	14

## OVERVIEW

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### PURPOSE

1. This briefing provides you with information about the role and functions of the Legislation Design and Advisory Committee, including membership and the key trends seen across the system.

### LEGISLATION DESIGN AND ADVISORY COMMITTEE

2. The Legislation Design and Advisory Committee (LDAC) was established in 2015 to improve the quality and effectiveness of legislation. It provides advice on design, framework, constitutional, and public law issues arising out of legislative proposals. It is responsible for the Legislation Guidelines (the Guidelines), which have been adopted by Cabinet.
3. In the calendar year 2019, LDAC considered 31 Bills, through 46 subcommittee meetings and provided advice on 4 others. It also made 5 submissions to select committees. These figures show an increase in activity from the 19 Bills considered in the 2018 calendar year. Feedback from departments demonstrates that LDAC is continuing to add significant value.
4. LDAC seeks to improve the quality and effectiveness of legislation by:
  - advising departments in the initial stages of developing legislation, typically when legislative proposals and drafting instructions are being prepared
  - maintaining and updating the Guidelines, together with supplementary material, for officials who design, develop, and draft legislation
  - scrutinising and making representations to select committees on Bills that raise issues about compliance with the Guidelines
  - providing training and education to develop quality legislation consistent with the Guidelines.
5. LDAC's Terms of Reference set by Cabinet are attached at **Appendix 1**.

### KEY MESSAGES

6. As Attorney-General, you have a central role in ensuring that Government legislation is effective in achieving the Government's policy objectives, while being consistent with the rule of law, constitutional norms and key Crown obligations (including Te Tiriti o Waitangi). You also have a statutory role under the New Zealand Bill of Rights Act 1990 to ensure that inconsistencies with protected rights and freedoms are identified when legislation is considered.
7. Three Government agencies support you to perform these roles: the Parliamentary Counsel Office (PCO), the Crown Law Office (CLO), and the Ministry of Justice.
8. You appoint the members of LDAC in accordance with LDAC's Terms of Reference. All members contribute their time without remuneration, with secretariat and advisory support provided from PCO's baseline. This represents a significant investment by the public and private sector in quality laws and law-making.

## TRENDS AND ISSUES

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9. Legislative development almost never follows an “ideal” process. All Governments have legislative priorities that they are in a hurry to give effect to, exacerbated by New Zealand’s short election cycle. Policy advice generally operates on imperfect evidence, and blank canvasses are rare or non-existent. Democratic processes give rise to compromises, not all of which result in tidy outcomes. Law itself requires interpretation, and every eventuality cannot be imagined in advance – and nor should we try.
10. LDAC is not under the illusion that perfection in process and design is achievable, but that does not mean that we cannot improve on current processes. In this section, we have identified a few key trends that we are seeing – and expect to continue to see over the next term.

### GOOD QUALITY LEGISLATION TAKES TIME AND RESOURCES

11. We are seeing compression of timelines for each stage in the policy and legislative process. In some respects, the legislative system is a victim of its own success: it has proven that, by devoting considerable resource, it can produce quality outputs quickly, most recently in relation to Covid-19 emergency legislation, and there have been relatively few public failures.
12. LDAC’s concern is that there appears to be an ever increasing expectation that all legislation can be expedited all at once. This is putting considerable pressure on the system, under which mistakes are and will be continue to be made, and the quality of legislation will suffer. Appropriate planning and realistic timelines for the development of policy and legislation need to be put in place to reduce this risk. Planning in this way also manages expectations and reinforces what good process looks like across the system.
13. Naturally enough, Ministers and departments tend to see their own projects as the highest priority, and to propose ambitious timeframes for their work without regard to the annual legislation programme. Compounding this tendency, successive Governments have not fully utilised the annual programme’s process to prioritise between different Bill projects or push back on these ambitions. As a result, all horses are backed at once, diverting limited resources away from the highest value use.
14. At some level this lack of prioritisation is a consequence of reality. Governments need to keep a number of irons in the fire, as unexpected barriers frequently arise. But it results in significant risks and is wasteful of time and resources.
15. We recommend that you pay particular attention to timeframes set out in bids for a place in the 2021 Legislation Programme when these are developed (generally in the December to February period). We also recommend that you encourage Ministers to seek justification from departments about whether the legislation is necessary on that timeframe.

## Attorney-General

### **SPEED THROUGH THE HOUSE IS A PROBLEM**

16. We are particularly concerned about a trend for extreme speed through the House, where an extremely short select committee stage (or skipping this stage) is becoming more frequent. “Normal” select committee periods (4 to 6 months under Standing Orders) are always best, as they allow the dust to settle on the Bill, and allow submitters, advisers and lawmakers to gather their thoughts and take a fresh perspective on a Bill. They also recognise that the House and the Government has other business to attend to.
17. But that is not always possible. In our experience, even extremely short select committee stages are usually beneficial to legislative quality. We are, however, reluctant to recommend minimum select committee periods (whether measured in weeks or days), on the basis that this risks becoming the norm. These extremely short select committee processes should be judged on the individual merits and necessity.
18. We recommend that you encourage Ministers to seek justification from departments proposing a shortened select committee process when reviewing bids for the 2021 Legislation Programme.

### **LEGISLATING TO BE SEEN TO DO SOMETHING**

19. Legislating is a powerful tool, and it is tempting to reach for that tool when the Government is under public pressure to “do something”.
20. However, passing new legislation or amending existing legislation will not always be the best solution to a problem. First, while there may be a legislative option, another lever might fix the issue more quickly but less visibly. Secondly, while the Government may not like a particular outcome, the cost of the intervention exceeds the marginal benefit likely to be achieved. One of the reasons for this is that Governments and stakeholders sometimes perceive changing the law to have no cost (and for some stakeholders, it has no cost for them).

### **LEGISLATING UNNECESSARILY**

21. We are seeing a greater tendency for new legislation to restate matters that are already addressed in existing legislation. Restating matters increases the risk of unintended consequences for the new legislation if the restatement gives rise to a disjunct with that other legislation. It also creates an incentive for other legislation to restate matters (or risk an adverse inference if the legislation does not do so).
22. Instead of restating existing legislation, it may instead be more appropriate to give effect to the policy objective through other non-legislative means like improving the understanding of the existing law through education.

## Attorney-General

### EMERGENCY LEGISLATION IN A TIME OF CRISIS

23. The importance of legislation relating to emergencies has most recently been demonstrated in response to Covid-19. LDAC classifies emergency legislation into three broad categories:
- emergency preparedness (for example, the Epidemic Preparedness Act 2006)
  - emergency response (for example, the COVID-19 Public Health Response Act 2020)
  - emergency recovery (for example, the COVID-19 Recovery (Fast-track Consenting) Bill).
24. Sometimes response and recovery are combined, as was the case in some of the legislation relating to the Christchurch and the Kaikōura/Hurunui earthquakes.
25. In practice, an immediate response will inevitably rely on existing legislative tools. However, it is not possible or desirable to legislate accurately and comprehensively for every eventuality in advance. To attempt this would likely result in broad-reaching legislation that would be disproportionate and draconian without a specific context, and give rise to the risk of “misuse”. This is where emergency response legislation plays its role.
26. Departmental regulatory stewardship also plays a crucial role here to provide an ongoing focus on the scope of any emergency legislation administered and any limitations of that legislation. Departments should know and understand their existing emergency response framework to ensure a clear understanding in advance of what can be done when a crisis occurs. Departments should also understand the limits of the legislation, and the triggers for an emergency legislative response.
27. In order to further support the understanding of legislation relating to emergencies, LDAC is developing supplementary material to the Guidelines on the importance of monitoring both emergency legislative powers that are currently in force and the making of emergency response legislation in times of crisis. The guidance aims to help departments decide when, why and how such legislation should be made.

### DISCONNECT BETWEEN PURPOSE AND DETAIL

28. LDAC frequently provides advice on proposals to include purpose and principle clauses in legislation. Purpose clauses are seen as an attractive way of directly communicating the policy intent of legislation, but carry challenges and risks that need to be managed. When a purpose or principle clause is to be included in legislation, it:
- needs to be designed to work within the particular legislation (for example, substantive decision-making criteria)
  - should perform a useful function
  - must be designed to avoid key risks.
29. One of the key risks to avoid is creating stand-alone rights or duties. A purpose clause is not a substitute for substantive provisions that contain the detail of the policy. A purpose clause also needs to be consistent with the substantive provisions.

## Attorney-General

30. We have issued supplementary material to the Guidelines about purpose and principles clauses to provide more in-depth guidance to departments designing them. This has been published on our website.

### HOW WE HELP YOU TO INFLUENCE THE SYSTEM

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#### ANNUAL LEGISLATION PROGRAMME: ENGAGEMENT WITH LDAC

31. A key lever is the annual legislation programme settled near the start of each calendar year. Under Cabinet's requirements for legislation programme bids, departments are expected to engage with LDAC on legislative proposals likely to benefit from its advice. This includes projects that are complex or novel, have significant implications for the statute book, or pose obvious risks under the Guidelines.
32. Ministers identify in legislation bids whether a proposal will be referred to LDAC for design advice. LDAC also reviews legislation bids. It advises you if it considers there are proposals that would benefit from LDAC's input, where the Minister has not indicated in the bid that LDAC will be consulted.
33. LDAC advice is always oversubscribed, so we have to prioritise which Bills we work on. We prioritise proposals using the criteria listed in **Appendix 2**, which relate to design and constitutional matters as set out in the Guidelines.

#### LDAC'S WORK WITH DEPARTMENTS BEFORE INTRODUCTION

34. LDAC advises departments early in the process of developing policy and legislation. This allows design, framework, public law, and constitutional issues to be addressed early, when LDAC can add the most value. This is much more than a compliance exercise for departments; it provides an opportunity for them to test policy and legislative frameworks with a body of experienced legislation and regulatory experts.
35. LDAC's role is advisory and its advice non-binding. Its working style is collegial and responsive. Departments and Ministers determine whether or how to implement LDAC's advice. However, LDAC does ensure that issues interacting with the Guidelines are identified and worked through so that decisions are made transparently and in full understanding of their implications.
36. LDAC's pre-introduction work is done through Bill-specific subcommittees drawn from LDAC's full membership. The subcommittees enable more focused and in-depth conversations, followed up with letters of advice.
37. You may approve specific external members to be involved in LDAC's pre-introduction Bill subcommittees on the advice of LDAC's Chair, after consultation with the chief legal adviser of the department for the relevant Bill. In 2020, the Attorney-General delegated this approval power to the LDAC Chair until such time as it is revoked in writing.

## Attorney-General

38. LDAC's operating model is set out in the flow chart at **Appendix 3**.

### MINISTERS INDICATE COMPLIANCE WITH THE GUIDELINES WHEN SEEKING APPROVAL FOR INTRODUCTION

39. A key lever in the system is the Cabinet Manual's requirement for Ministers to identify, in Cabinet papers seeking approval of Bills for introduction, whether any aspects of the legislation depart from the principles in the Guidelines. Cabinet papers are expected to explain and justify any departures. This ensures that there is transparent and informed decision-making by Cabinet.

### LDAC COMMENTS AND REPORTS TO THE ATTORNEY-GENERAL

40. If LDAC considers departures from the Guidelines are serious or contentious or it has formed a view that is at odds with a department's or Minister's view in relation to the existence or extent of a departure, LDAC may include a comment, or request its views are reflected, in the relevant Cabinet paper. If this arises, we will report in advance to you to ensure you are advised of our concerns. This will also enable you to raise concerns with your Ministerial colleagues if you wish.
41. We report to you sparingly. We are generally able to work through our concerns with the applicable department, but recognise that it is an important escalation option in certain cases, especially where it would be useful for LEG to have a substantive discussion on the issue.

### SELECT COMMITTEES

42. LDAC reviews and, if necessary, makes submissions to select committees. This is usually only on Bills that have not been reviewed by LDAC before introduction. On occasion, we work with departmental advisers on issues raised at select committee. LDAC's submissions are often complementary to Law Society submissions and there is some cross-membership.

### LDAC MEMBERSHIP AND ADVISORY SUPPORT

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43. LDAC meets every 2 months as a full committee, where it discusses key strategic "cross-cutting" issues as well as ongoing regular developments in work on the Guidelines and education and engagement matters. These are a mix of virtual and in person meetings. We will work with your office to find a time when you are able to meet with LDAC alongside one of these meetings.
44. LDAC comprises senior public service officials and a pool of external advisers from the private sector. Members are either ex officio or appointed by the Attorney-General. Collectively, they have expert policy and legislative skills and backgrounds in economics, law, policy, and academia.
45. Members are appointed to LDAC on staggered terms of 2 or 4 years. There are 18 members including 10 to 12 public service members. The LDAC Chair may co-opt up to three additional members to work on specific issues or for limited periods. Acting arrangements are made for public service members if they are away or unable to support LDAC's work for an extended period. There are alternate arrangements for CLO and PCO. See **Appendix 4** for LDAC's current membership.



## Attorney-General

46. The membership terms of six of the seven current appointed external members will expire on 30 June 2021. There is also one public service vacancy, and the term of another public service member due to expire in January 2021.
47. From the first 5 years of operation, it is apparent that a mixture of skills and perspectives is important. Senior public service officials provide expert knowledge on designing regimes and it is valuable to have a spread from different disciplines and different agencies across the public sector. The non-public service members provide expertise in particular subject areas and have an external perspective on legislative design that adds rigour to LDAC's analysis. This broad membership also increases LDAC's reach.
48. LDAC will provide membership recommendations to you early in 2021.
49. PCO provides secretariat and advisory support to LDAC out of its baseline. It currently provides one full-time adviser, one part-time adviser, and one part-time administrative assistant.

### KEY CONTACTS

50. The following table provides you details of your key LDAC contacts:

Contact	Role and contact details
Karl Simpson	Chair of LDAC Director, System and Regulatory Design (Ministry of Transport) <a href="#">Section 9(2)(a)</a>
Sarah Kerkin	Deputy Chair of LDAC Chief Advisor to the Deputy Secretary, Policy (Ministry of Justice) <a href="#">Section 9(2)(a)</a>

### LEGISLATION GUIDELINES

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51. Guidance on legislative standards is important for New Zealand's policy and legislative development framework. Between 1986 and 2001, the former Legislation Advisory Committee produced reports on legislative design and administrative and constitutional law issues. The first edition of the Guidelines was published in 2001 and was rewritten in 2014 by the former Legislation Advisory Committee.
52. LDAC is now responsible for and maintains the Guidelines. The Guidelines are approved by Cabinet as best practice guidance for officials designing and drafting policy and legislation. The Guidelines

## Attorney-General

provide guidance on many of the design, constitutional, and public law issues that arise during the policy and legislative development process. The Guidelines were last updated in March 2018.

53. LDAC is working on revising the Guidelines to reflect the Legislation Act 2019. These changes will be necessary once the Legislation Act 2019 comes into force.

### **SUPPLEMENTARY MATERIAL TO SUPPORT THE GUIDELINES**

54. So as not to lose the benefit of detail whilst maintaining accessibility, LDAC now creates “supplementary material” to support the Guidelines.
55. The objective of the supplementary material is to provide more detailed information or guidance to assist advisers to address questions or issues raised in the Guidelines, legislative examples to assist advisers to make decisions at the margins of issues, and guidance on areas not covered by the Guidelines.
56. Supplementary material is based on the Guidelines and does not require approval from Cabinet. The material is intended to be iterative and easily updated by LDAC to keep pace with developments and matters as they arise during the Bill process.

### **EDUCATION**

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57. LDAC provides education and training about its role, and the Guidelines, as part of its mandate to improve the quality of legislation beyond the specific proposals it directly advises on.
58. Recent seminars have included presentations on using the Guidelines to support good legislative design, and transitional and savings provisions and validating legislation.
59. Seminars are either held directly by LDAC or are in conjunction with other organisations like the Office of the Clerk.

### **CONCLUSION**

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60. The members of LDAC are proud of the work they do to support the delivery of high quality legislation. While often low profile, it is important work. We look forward to supporting you to achieve your Government’s policy objectives with high quality legislation.

## Attorney-General

### APPENDIX 1 – LDAC TERMS OF REFERENCE

Terms of reference of the LDAC	
(a)	provide advice to departments in the initial stages of developing legislation when legislative proposals and drafting instructions are being prepared, including to: <ul style="list-style-type: none"><li>• focus on significant or complicated legislative proposals, basic framework/design issues, instrument choice, consistency with fundamental legal and constitutional principles and impact on the coherence of the statute book</li><li>• assist departments with the allocation of provisions between primary and secondary legislation</li><li>• provide advice on delegated legislative powers</li><li>• provide advice on the appropriateness of exposure draft Bills</li></ul>
(b)	report to the Attorney-General on departures from the Legislation Guidelines in legislative proposals
(c)	advise the Attorney-General on any other topics and matters in the field of public law that the Attorney-General from time to time refers to it
(d)	help improve the quality of law-making by helping to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the Legislation Guidelines and discouraging the promotion of unnecessary legislation
(e)	scrutinise and make representations to the appropriate body or person on aspects of Bills which raise matters of particular public law concern
(f)	undertake training and education work, relating to the LDAC's role and the Legislation Guidelines.

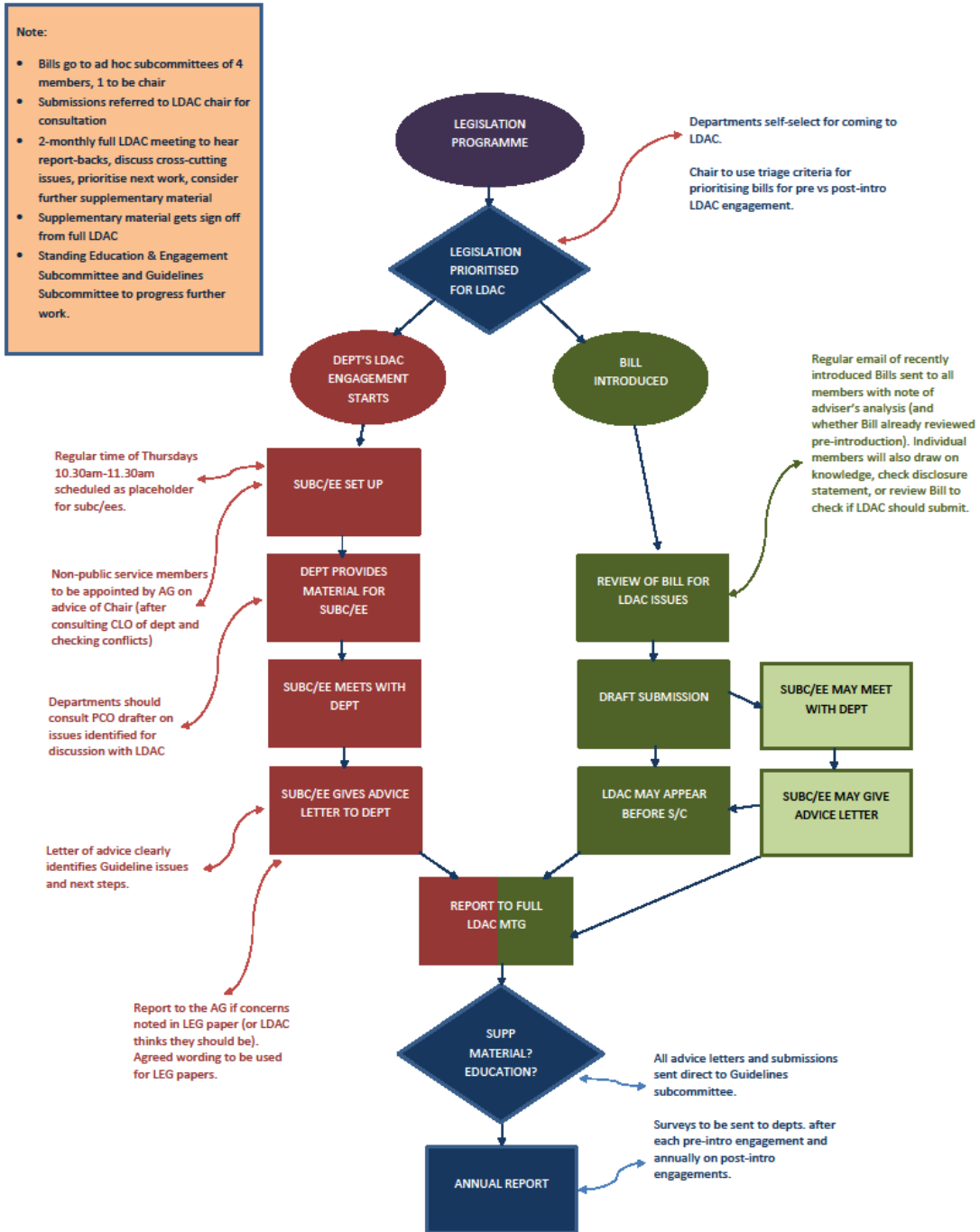
## Attorney-General

### APPENDIX 2 – FACTORS TO CONSIDER IN DECIDING WHETHER TO CONSULT WITH LDAC IN RELATION TO A LEGISLATIVE PROPOSAL

LDAC is likely to be interested in, and departments should consider engaging with LDAC in respect of:

<b>Design issues</b>
<ul style="list-style-type: none"><li>• A legislative proposal that will create a new principal Act.</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal that introduces a new regulatory regime (eg prohibitions plus licensing, creating an agency, etc).</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal that creates special operating regimes that supplant existing regulatory schemes.</li></ul>
<b>Issues of constitutional importance</b>
<ul style="list-style-type: none"><li>• A legislative proposal that creates significant powers to enter or to seize property or compel provision of information or significantly affects property rights.</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal that raises human rights issues.</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal that has special features raising concern such as retrospectivity, or relate to extant legal proceedings, overturn a court judgment, or override contracts or other legal rights.</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal that involves delegation of powers of exemption (or addition), or empowers delegated legislation to override primary legislation (Henry VIII powers).</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal that deals with a topic of constitutional significance (eg on the structure and powers of courts and tribunals, or affecting Parliament, or the workings of the Executive, or the Crown-Maori relationship).</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal that calls upon, and may create broad impacts for, tikanga Māori</li></ul>
<b>Issues involving complex choices</b>
<ul style="list-style-type: none"><li>• A legislative proposal that is likely to impact on the coherence of the statute book (eg because of a significant degree of overlap or interaction with other legislation, the common law, or regulators).</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal that has an international dimension (eg attempting to regulate the conduct of overseas entities operating in New Zealand, or New Zealand citizens operating overseas).</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal that involves complex transitional issues (eg moving an area of regulation and associated dispute resolution procedures into a new procedural paradigm).</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal for a new or significant change to a dispute resolution process</li></ul>
<ul style="list-style-type: none"><li>• Legislative proposals for a new, or significant amendments to an existing, compliance and enforcement regime.</li></ul>
<ul style="list-style-type: none"><li>• A legislative proposal that raises questions of instrument choice (eg involves competing considerations in determining the appropriate divide between primary and secondary legislation)</li></ul>
<b>Other significant issues</b>
<ul style="list-style-type: none"><li>• Legislative proposals whose aims might be obtained by executive and administrative action and do not need empowerment by statute.</li></ul>

Appendix 3 – LDAC OPERATING MODEL



## Attorney-General

### APPENDIX 4 – LDAC MEMBERSHIP

#### Public service members of LDAC

Name	Role
Karl Simpson (Chair of LDAC)	Director, System and Regulatory Design, Ministry of Transport
Sarah Kerkin (Deputy Chair of LDAC)	Chief Advisor to the Deputy Secretary, Policy, Ministry of Justice
Allison Bennett	Director, Legal Services, Ministry of Business, Innovation and Employment
Cassie Nicholson (ex officio)	Deputy Chief Parliamentary Counsel, Drafting, Parliamentary Counsel Office
Dagny Baltakmens (ex officio)	Principal Solicitor, Office of Legal Counsel, Ministry of Justice
Fiona Leonard (ex officio)	Chief Parliamentary Counsel, Parliamentary Counsel Office
Graeme Morrison	Policy Lead, Policy and Strategy, Inland Revenue Department
Jason Gough (ex officio)	Senior Crown Counsel, Crown Law
John Sutton	Principal Policy Analyst, Policy Group, Department of Internal Affairs
Justine Falconer (Crown Law alternate member)	Manager, System Advice, Crown Law
Scott Murray (Parliamentary Counsel Office alternate member)	Principal Counsel, Parliamentary Counsel Office
Stuart McGilvray (co-opt)	Chief Legal Adviser, Office of the Ombudsman
Tania Warburton (ex officio)	Advisor (Legal), Policy Advisory Group, Department of the Prime Minister and Cabinet

#### Non-public service members of LDAC

Name	Role
Brigid McArthur	Partner, Greenwood Roche
Guy Beatson	Managing Consultant, Beatson Company
James Wilding QC	Barrister, Clarendon Chambers
Jonathan Orpin-Dowell	Barrister, Stout Street Chambers
Kelly Hanson-White	Manager, Regulatory Frameworks Team, WorkSafe New Zealand
Māmari Stephens (co-opt)	Reader, Te Kura Tātai Ture, Faculty of Law, Victoria University of Wellington
Matthew Smith	Barrister, Thorndon Chambers
Paul Rishworth QC	Barrister, Britomart Chambers