

In Confidence

Office of the Attorney General

Chair, Cabinet Legislation Committee

## **Adjustment of Legislation Design and Advisory Committee**

### **Proposal**

1. This paper seeks agreement to adjust the make-up of the Legislation Design and Advisory Committee (LDAC) to address issues raised in the 2017 report to Cabinet on LDAC's operation [LEG-17-SUB-0127].

### **Executive Summary**

2. LDAC was formed in 2015 from the merger of the Legislation Advisory Committee and the Legislation Design Committee, and it is an important part of the institutional framework to ensure New Zealand legislation is of a high quality. It helps best achieve the policy objectives of Parliament with clarity and in conformance with constitutional conventions.
3. Cabinet's original concern was to form LDAC as a small, more focussed committee of public service members that would have a greater impact on policy design for legislative proposals. Cabinet decided that LDAC should retain a vetting function and, for that purpose, allowed for the Attorney-General to appoint external advisers (in practice, called the External Subcommittee) who could make submissions to select committees on Bills introduced into Parliament. Cabinet requested PCO to report back to it on LDAC's operation after 2 years.
4. PCO's report to Cabinet in August 2017 highlighted that, although LDAC and its External Subcommittee were working well overall, there were opportunities for enhancement. Some of the key concerns focussed on the limitations on LDAC's effectiveness that arise from the current 2-committee structure. This structure risks providing inconsistent advice and does not make the most of its combined public sector and external adviser expertise.
5. I propose to address these concerns by adjusting the current LDAC's membership to include the External Subcommittee to form a single LDAC, enabling greater cohesion and impact.
6. Under the single LDAC, I propose:
  - 6.1. Generally pre-introduction advice on Bills would be given only by LDAC's public service members; but

- 6.2. Cabinet delegate to me the ability to approve specific external members to be appointed to subcommittees involved in pre-introduction advice on particular Bills. I will do this only when I am satisfied that the benefits outweigh any risk of inhibiting free and frank discussion; and
  - 6.3. Cabinet grant a standing permission for members of LDAC to share information on policy proposals. For example, about strategic “cross-cutting” issues that are relevant to the committee’s work on the Legislation Guidelines, related supplementary material, and education seminars. These would all be subject to appropriate controls.
7. Appointments of members would continue to be made on criteria focussed on their strong interest and abilities in legislative design, relevant expertise (either in specific subject areas or generally), and a commitment to invest time (for external members, on a pro bono basis). For external members, I would consider the risk of conflicts of interest and ensure that strict confidentiality obligations apply. Overall, I would continue to seek a mix of legal, policy, and economic backgrounds, some key subject area expertise, and a diversity of views and perspectives.
  8. I also seek Cabinet’s delegation to amend the Attorney-General’s Protocol for Release of Draft Government Legislation outside the Crown to enable the release of draft legislation to external advisers approved by me on LDAC pre-introduction subcommittees, and to make another change to facilitate consultation with Crown entities on draft legislation.

## **Background**

9. The LDAC is an expert advisory body established in 2015 to improve the quality and effectiveness of legislation. It supports the Government’s commitment to high-quality and well-designed legislation by advising departments early in the process of developing policy and legislation as legislative proposals and drafting instructions are being prepared. This is normally when the most value can be added.
10. LDAC supports my responsibility for maintaining the rule of law. I appoint LDAC members, and LDAC reports directly to me on legislative proposals that it considers depart from good legislative design and principles in the Legislation Guidelines (2018 edition) (the Guidelines). The Guidelines have been adopted by Cabinet.
11. The LDAC was established by merging the previous Legislation Advisory Committee and the Legislation Design Committee [LEG Min (15) 2/2; CAB Min (15) 8/5]. Cabinet’s intent was to address the finding that quality checks on legislation provided by the former Legislation Advisory Committee and Legislation Design Committee were reducing, fragmented, of varying effectiveness, and under strain. Cabinet intended to create a smaller, more focussed committee that would have greater impact on legislative design, and at an earlier stage of the process. As a result, it was established with the following features:

- 11.1. LDAC would have fewer members (in practice, including reserve members, it has generally had about 17 members) and be made up of senior officials from across the public service with expert policy and legislative skills and backgrounds in economics, law, and policy.
  - 11.2. Departments consult LDAC about proposed legislation on a confidential basis before introduction, enabling it to have influence early in the process when significant design decisions are being made.
  - 11.3. LDAC's role is advisory, its process is voluntary, its advice is non-binding, and its working style aims to be collegial and helpful. In exceptional cases, however, it may report to the Attorney-General or record its concerns in papers to the LEG Committee to ensure that there is transparency about trade-offs on particular issues.
  - 11.4. Ministers are responsible for certifying compliance with the Guidelines in LEG papers.
12. A residual "vetting" function was retained and LDAC makes submissions to select committees in appropriate cases (generally only on Bills it has not reviewed before introduction). For that purpose, LDAC was established with a panel of external advisers [LEG (15) 2/2]. In practice, this additional panel of 14 private sector lawyers and academics has operated as a stand-alone committee (called the External Subcommittee).
  13. When it established LDAC, Cabinet agreed that the Parliamentary Counsel Office (PCO), in consultation with interested departments, would report back to Cabinet on the operation of LDAC after 2 years of operation [LEG Min (15) 2/2]. PCO provided that report in August 2017 [LEG-17-SUB-0127].
  14. The PCO report concluded that LDAC was working well, but noted some areas for improvement. A key area was the separation between LDAC's public service membership and its External Subcommittee. Of particular concern was the risk that the 2-committee structure could lead to inconsistencies (in advice and submissions), and did not take full advantage of the combined expertise of the external advisers and public service members. At the time, the PCO report proposed addressing these issues through operational changes under LDAC's current mandate and terms of reference.
  15. However, PCO has advised me that the current structure has continued to be problematic. In light of this advice, I now consider that this issue requires further consideration by Cabinet.

### **Problems with 2-committee structure**

16. PCO's report-back identified the following difficulties with the operation of the current 2-committee structure:

- 16.1. There is a high risk of inconsistencies in advice on how to apply the Guidelines pre-introduction as compared to post-introduction in submissions. This is partly because of the different stage that each committee is advising on, the different perspectives of the membership, and the lack of opportunity for cross-fertilisation of ideas and viewpoints under the current structure. Another factor is that the usual conventions on respecting Cabinet confidentiality prevent public service members easily discussing the issues arising on pre-introduction Bills with external members.
- 16.2. The current structure does not take full advantage of external members' expertise. External members have both practical expertise in particular areas and a general understanding of how regulated communities will be affected and respond to legislation. This information is valuable from a design perspective. However, the opportunities for sharing information between the 2 committees are limited. This is (again) partly because the usual Cabinet confidentiality expectations prevent public service members from sharing case studies with external members, and partly because it is difficult to effectively coordinate a large membership (of up to 31 public service and external members) in a single meeting.
- 16.3. In practice, it is difficult for internal expertise and viewpoints of LDAC to be fed into submissions made by the External Subcommittee. Cabinet originally intended LDAC's public service members to review Bills alongside the external members in making submissions (and approved them "acting independently" in doing so). To date, however, the External Subcommittee has operated largely independently of the main committee.
17. It is clear that, even with these operational difficulties, LDAC adds significant value to the legislative design process. The LDAC's advisory and flexible approach has been influential in shaping issues on Bills. Ministers are regularly addressing Guidelines issues in Cabinet papers. The pre-introduction work on Bills, and the academic and practitioner perspective from the External Subcommittee, have both enabled useful changes to Bills and informed changes in the 2018 Guidelines. The External Subcommittee raises important issues at select committee, and provides an important public face to key issues for legislative design.
18. However, I am concerned that the inconsistency of advice, and the failure to share expertise, that arise from this 2-committee structure will constrain and limit LDAC's impact in significant ways.
19. First, if LDAC is seen as taking a different stance depending on whether it is "speaking" pre- or post-introduction, officials and the public risk being confused about the application of the Guidelines in practice. This will undermine key messages from LDAC, and ultimately its credibility.
20. Secondly, the LDAC will continue to make sub-optimal use of the diverse expertise available to it. The membership of the 2 committees could complement each other. The public service members have deep knowledge about policy analysis and legislative design issues. The External Subcommittee brings both practitioner and

academic expertise in particular areas and a valuable check on what is otherwise often an entirely “within government” process. The failure to reconcile, and build on, these different perspectives is a lost opportunity.

21. The principles set out in the Guidelines should be implemented in practice by a committee that can combine both public service and external perspectives in 1 place, under a structure that allows greater participation in the process of developing legislation from those outside government.

### **Option for adjusting committee membership**

22. I propose to remodel the LDAC membership by merging the committees into a single committee, comprising both public service and external members.
23. A single committee will combine, reconcile, and build on both public service and external perspectives. It will bring together their expertise in 1 place, and will allow greater participation of those outside the government in the development of legislation. However, the risks need to be considered.
24. To be effective and cohesive, the committee must not be too big. I propose reducing the number of members to 18 (from the current 31), with approximately 10 to 12 of the committee expected to be public service members, and the balance to be external members. Given the high workload of the committee, however, I propose that the chair have the ability to co-opt up to 3 additional members to work on specific issues or for limited periods (for example, if another member is away on parental leave).
25. A further key risk relates to LDAC’s pre-introduction role. Currently, officials often engage with LDAC when Government policy is still in the early stages of development and is at its most sensitive. Officials clearly value the ability to have free and frank discussions with LDAC’s public service officials early (when significant value can be added to the legislative design). It is important that there is no chilling effect on officials bringing proposals to LDAC at this stage.
26. I think the focus of the LDAC on good legislative design (rather than policy), the culture of the committee, and good practices around managing any perceived risks will ensure that, in practice, the risk of such a chilling effect arising is low. However, I propose to take a careful approach as follows:
  - 26.1. Generally, I propose to reserve advice on Bills to pre-introduction subcommittees comprised only of public service members (as at present).
  - 26.2. However, I seek a delegation from Cabinet to permit external advisers to be included on pre-introduction subcommittees for specified Bills if I’m satisfied the benefits from doing so outweigh any risk of inhibiting free and frank discussion. My decision would be made on a case-by-case basis following advice from the LDAC chair in consultation with the relevant department’s Chief Legal Adviser.

- 26.3. Given that often draft legislation will also need to be released to external advisers on the pre-introduction subcommittee, the LDAC's chair's advice to me should be informed by the same factors that apply under the 2014 Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown (CO (14) 4) (the Protocol). These factors are set out in full in the Appendix. The key factors in this context are the strengths of the reasons for involving external advisers, the sensitivity of the proposal, and whether release would create a legal risk to the Crown (for example, if I have any concerns about conflicts of interest). To streamline processes, I also propose that Cabinet delegate to me the ability to approve a change to the Protocol to cover the release of draft legislation to external advisers included on LDAC pre-introduction subcommittees on this basis.
- 26.4. To further limit risk (or the perception of risk), external advisers appointed to the LDAC would be bound by confidentiality obligations and there would be other controls in place to enable appropriate disclosure and management of any conflicts of interests. In particular, advisers would undertake not to submit on legislation for clients where they had had pre-introduction involvement via LDAC. Such a role may undermine the independent role that LDAC plays in advising on good legislative design.
- 26.5. I propose to keep use of this delegation under review and will ask PCO to monitor both its benefits and any impacts on officials' engagement with LDAC.
- 26.6. A key benefit of the new structure will be to enable LDAC to share case studies of particular Bills for discussion on key strategic "cross-cutting" issues. These discussions are important and allow LDAC to develop the Guidelines and further supplementary material, and to hold valuable education sessions for the public sector. The risk of conflicts of interest (particularly the risk of any inhibiting effect) in this context is even lower because the focus is on general learning, advice is not being given on the design of particular legislation, and officials are not present. I seek a standing permission from Cabinet for information on pre-introduction policy being developed for legislation to be shared between all members of the LDAC for the purposes only of informing these general discussions. Without this permission the practical benefit of merging the committees will be limited.
- 26.7. Submissions on Bills post-introduction would be undertaken by post-introduction subcommittees of external and public service members. This is consistent with the original Cabinet proposal and, as originally approved by Cabinet, public service members would act independently in making submissions. Generally, submissions to select committees are only made on Bills that LDAC has not seen before introduction. This independent scrutiny role continues to be an important aspect of the LDAC's work.
27. This proposal will provide both internal and external perspectives and expertise in 1 place. It has a simple structure that will make it clearer who the LDAC is. It should help the LDAC build on the combined expertise and knowledge already demonstrated to reach more consistent views. It will be simpler to administer than the current structure.

28. The adjustment in the membership of LDAC will necessitate a reduction in the total number of members. I acknowledge the commitment of time that all members have made, and the important work that they have contributed over the last 3 years, and this proposal in no way takes anything away from that. I propose that the appointments to the combined LDAC are based on the following criteria:

28.1. a strong interest in legislative design, and relevant expertise (either in specific subject areas or generally);

28.2. a commitment to invest time (acknowledging that, for external members, this is on a pro bono basis);

28.3. for external members, a low risk in practice of conflicts of interest arising that may limit their ability to be involved.

Overall, I will continue to seek a mix of legal, policy, and economic backgrounds, some key subject area expertise, and a diversity of views and perspectives on the committee.

### **Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown (the Protocol)**

29. If the Protocol is to be amended (as discussed in paragraph 26.3), it seems opportune to make another needed change to streamline its application to consultation processes.

30. I consider that a limited exception should be included to allow draft legislation to be more easily provided to Crown entities (such as the Privacy Commissioner and ACC) for consultation purposes. Crown entities are frequently consulted on Cabinet policy papers that seek approval to issue drafting instructions (and this is often required by legislation). However, the Protocol currently requires a department's Chief Legal Adviser to certify that releasing the resulting draft legislation to them will not create a legal risk to the Crown. This is an unnecessary additional requirement in the case of Crown entities who are routinely consulted on a confidential basis on draft legislation. It creates hurdles for departments at the time-critical point when they need to consult on draft legislation before taking it to Cabinet.

### **Consultation**

31. The Ministry of Justice, Ministry of Business, Innovation and Employment, Ministry for Primary Industries, The Treasury, State Services Commission, Crown Law Office, Inland Revenue, Department of Corrections, Te Puni Kōkiri, Ministry for the Environment, Ministry of Transport, Ministry of Social Development, Ministry of Education, Ministry of Foreign Affairs and Trade, Department of Conservation, Department of Internal Affairs, Cabinet Office, Land Information New Zealand, Ministry for Culture and Heritage, Ministry of Health, and New Zealand Customs

Service were consulted on this paper. The Department of Prime Minister and Cabinet was informed.

32. LDAC members and the External Subcommittee Chairperson were consulted.

### **Financial Implications**

33. PCO supports LDAC from within its baseline, which was not increased to reflect this work. This paper suggests proposals to enhance LDAC within the current resourcing model within PCO's baseline.

### **Legislative Implications**

34. There are no legislative implications from this proposal.

### **Impact Analysis**

35. These proposals do not involve regulatory options and so the Impact Statement requirements do not apply.

### **Human Rights**

36. These proposals do not have any implications for human rights.

### **Gender Implications**

37. The proposal has no specific gender implications. Criteria for appointing members to the committee will include the representativeness of such appointments.

### **Disability Perspective**

38. The proposal has no specific disability implications.

### **Publicity**

39. At this stage no publicity is planned.
40. I propose to release the paper proactively subject to appropriate redactions as provided under the Official Information Act 1982.

### **Recommendations**

41. The Attorney-General recommends that the Committee:
- 1 **note** the Legislation Design and Advisory Committee (LDAC) was formed in 2015 to engage with departments early in the development of legislative proposals and, by providing advice on design and structure, to improve the quality and effectiveness of legislation, and to help best clarify Parliament's policy objectives and ensure they conform with constitutional conventions;
  - 2 **note** LDAC's role includes the vetting of selected Bills after their introduction against the Legislation Guidelines through a subcommittee of external advisers (the External Subcommittee), working pro bono, to make submissions to select

committees and, in practice, the External Subcommittee has operated largely independently of the LDAC;

- 3 **note** the PCO's 2017 report on LDAC's operations identified that the LDAC is working well overall, but enhancements could be made. In particular, the current 2-committee structure does not optimise its combined public sector and external adviser expertise, and there is a risk of inconsistent pre-introduction and post-introduction advice from the committees, which may limit the LDAC's impact and undermine its credibility;
- 4 **agree** to merge the LDAC and the External Subcommittee into a single committee to combine, reconcile, and build on both public service and external perspectives, and to bring together their expertise in 1 place, which will allow greater participation of those outside the government in the development of legislation;
- 5 **agree** to reduce to 18 the number of members in the combined committee so that there are approximately 10 to 12 public service members (rather than 17) with the balance as external members (6 to 8 rather than the current 14);
- 6 **authorise** the chair to have the ability to co-opt up to 3 additional members to work on specific issues or for limited periods (such as parental leave);
- 7 **authorise** me to approve specific external members to be involved on subcommittees to provide pre-introduction advice on particular Bills on the basis set out in paragraphs 26.2 to 26.5 and subject to appropriate controls, noting in particular that
  - 7.1 the Attorney-General's decision to approve external advisers for involvement in pre-introduction advice on a Bill would be made on a case-by-case basis following advice from the LDAC chair in consultation with the relevant Department's chief legal adviser;
  - 7.2 external advisers approved to be involved in pre-introduction advice on a Bill would be bound by confidentiality obligations and conflict of interest controls (including, in particular, undertakings ensuring that LDAC's independent role is not undermined by advisers submitting on legislation for clients where they have had pre-introduction involvement via LDAC); and
  - 7.3 pre-introduction advice on Bills would generally be limited to LDAC's public service members in a standing subcommittee to minimise the risk of

limiting officials' willingness to engage with LDAC early when proposals are most sensitive;

- 8 **authorise** me to approve an amendment to the 2014 Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown (CO (14) 4) to enable the release of draft legislation to external advisers approved by me to be included in pre-introduction subcommittees;
- 9 **authorise** me to approve a further amendment to the 2014 Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown (CO (14) 4) to enable easier consultation with Crown entities that require consultation as a matter of the Cabinet approval process or by legislation;
- 10 **authorise** all members of the combined LDAC to share information on policy proposals and Bills before and after introduction to the extent relevant to the committee's general discussions, including on the Legislation Guidelines, related supplementary material, and education seminars;
- 11 **note** that, consistent with original Cabinet approvals, submissions on Bills after their introduction would be undertaken by a standing subcommittee of external and public service members, and public service members would act independently in making submissions;
- 12 **authorise** me to appoint members to the combined LDAC to achieve a mix of legal, policy, and economic backgrounds, key subject area expertise, and a diversity of views and perspectives based on the following criteria:
  - 12.1 a strong interest in legislative design, and relevant expertise (either in specific subject areas or generally)
  - 12.2 a commitment to invest time (acknowledging that, for external members, this is on a pro bono basis)
  - 12.3 for external members, a low risk in practice of conflicts of interest arising that may limit their ability to be involved (with strict confidentiality obligations being applied);
- 13 **authorise** me to approve the issue of a new updated Cabinet Office circular to replace Cabinet Office circular CO (14) 4 to advise Chief Executives, Chief Legal Advisers and agencies about the change to the Protocol.

Authorised for lodgement  
Hon David Parker  
Attorney-General

## Appendix

CO (14) 4: Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown

Considerations for release and reference to Crown Law/Attorney-General (paragraph 11)

- 11.1 the reasons why release outside the Crown is sought, and the strength of those reasons;
- 11.2 whether release outside the Crown will create a legal risk for the Crown;
- 11.3 whether the legislation is being drafted at the request of, or in consultation with, non-Crown bodies (for example, Commodity Levies Orders that are prepared at the request of industry bodies);
- 11.4 whether the policy or details underlying the legislation are already in the public arena;
- 11.5 the sensitivity of the subject matter of the draft legislation.