



LEGISLATION DESIGN AND ADVISORY COMMITTEE

21 July 2016

Mark Mitchell MP, Chairperson
Foreign Affairs, Defence and Trade Committee
Parliament Buildings
PO Box 18 041
Wellington 6160

Dear Mr Mitchell,

Trans-Pacific Partnership Agreement Amendment 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 Trans-Pacific Partnership Agreement Amendment Bill is one that was not reviewed by LDAC prior to introduction. The External Subcommittee has therefore reviewed it, and desires to make the **attached** submission. This submission was principally prepared by the following members of the LDAC External Subcommittee: Professor Geoff McLay, Matthew Smith, and Jonathan Orpin, 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

A handwritten signature in blue ink, appearing to read "Rishworth".

Paul Rishworth QC

Chairperson

Legislation Design and Advisory Committee



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Dear Mr Mitchell,

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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. The Trans-Pacific Partnership Agreement Amendment Bill (the **Bill**) is a complex amendment Bill. We acknowledge the inherent difficulty involved in implementing extensive international obligations into already complex existing legislation. We make suggestions that aim to reduce complexity and increase accessibility of the Bill. This submission focusses on the:
 - (a) proposed regulation-making powers in the Copyright Act 1994;
 - (b) scope of performers' rights relating to derogatory treatment in the Copyright Act;
 - (c) proposed powers for Customs officers to detain items suspected of being infringing goods in the Copyright Act and Trademarks Act 2002;
 - (d) proposed regulation-making powers in the Patents Act 2013; and
 - (e) appropriateness of the commencement provision 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.

Regulation-making powers to enable the addition, modification, or narrowing of exceptions to the technological protection measure prohibitions in the Copyright Act 1994 – clauses 42 and 44

The relationship between the technological protection measure provisions and regulation-making powers are complex and should be closely examined by the Committee

4. Clause 44 amends the Copyright Act to provide a regulation-making power that allows the Governor-General (on the Minister's recommendation) to add to, modify, or narrow exceptions to technological protection measure (**TPM**) prohibitions. We suggest that these provisions are unduly complex and should be made clearer and more accessible.
5. The Bill provides that it is prohibited conduct and an offence to deal in devices that circumvent TPMs, provide services to circumvent TPMs, or circumvent access control TPMs.¹ A person who commits an offence is liable on conviction to a fine not exceeding \$150,000 or up to 5 years' imprisonment, or both.² These are significant punishments. The Bill provides a number of exceptions to the TPM prohibitions.³ Further, the Governor-General can make regulations that the exceptions do not apply,⁴ apply with modifications or additions,⁵ and can create new exemptions that do not currently exist in the Bill.⁶
6. We acknowledge that the regime attempts to balance protections for copyright holders by prohibiting the circumventing of TPMs, against not criminalising acts that do not infringe copyright or specified performers' rights. However, the relationship between the prohibition, statutory exceptions, and the powers to make regulations and grant exemptions is dense and difficult to follow. We suggest that the Committee should work with officials to determine whether the provisions can be made more accessible whilst still achieving the policy objective. As part of that work, consideration should be given to whether some of the matters, especially those relating to section 226D (which will essentially trigger offences in relation to TPMs) are appropriate matters for regulation.

¹ Clause 40, new sections 226A – 226AC.

² Clause 42, new section 226C.

³ Clause 42, new sections 226D – 226K.

⁴ New section 226D(2) allows regulations to be made under clause 44 (new section 234(qa)) that prescribe circumstances in which the exception in new section 226D does not apply; new section 226L(2)(a) allows regulations to be made under clause 44 (new section 234(qb)) that provide that the exceptions in new sections 226E – 226J do not apply.

⁵ New section 226L(2)(b) allows regulations to be made under clause 44 (new section 234(qb)) that modify or add to exceptions in new sections 226E – 226J.

⁶ New section 226K allows regulations to be made under clause 44 (new section 234(qb)) that permit acts that circumvent TPMs and that would ordinarily be infringing Acts under the Bill.

The effect of the exemption power in new section 226D should be made clearer

7. New section 226D(1) provides that the prohibitions relating to TPMs do not apply to acts that do not infringe copyright in the TPM work or under the Copyright Act⁷, and do not infringe any specified performers' rights in the TPM work. However, the Minister can recommend regulations that remove this exception in prescribed circumstances.⁸ This provision essentially allows the Minister to criminalise conduct in regulations that would not otherwise be an offence under the Copyright Act. Further, it means that the offence provisions in section 226C do not operate in relation to non-infringing acts until they are triggered by the regulations.
8. The Guidelines provide for a number of matters that should ideally (or in some cases only) be addressed in primary legislation.⁹ One of those matters is the creation of serious criminal offences and significant penalties. We are inclined to the view that the creation of such offences is a matter that should only rarely, if ever, be a matter for delegated legislation. We acknowledge that the proposed offence and penalty are created in the primary Act.¹⁰ However, it strikes us as odd that the power to determine what is and is not a significant criminal offence under the Act is delegated to the executive. We suggest that the Committee should be satisfied that delegating this power to the executive is justified on its own merits and that this is not a power better left to Parliament.¹¹
9. New section 226D(2) is also difficult to follow because it is framed in the negative as an exemption. We suggest that this section could be improved by making it clearer that the provision allows generally non-infringing conduct to be deemed an offence by regulations. For example, new section 226D(2) could be amended to read: "Non-infringing acts in subsection (1) can be deemed to be offences for the purpose of section 226C in the circumstances prescribed by regulations." This frames the power as a positive regulation-making power, rather than an exemption. We consider that it would have the same legislative effect and clarify the effect of the provision and its relationship with the prohibition and statutory exception.

The safeguards on the power in new section 226D(2) should be more robust, and the general safeguards should apply to all regulation-making powers under the statute

10. We suggest that this significant power, whether it is framed as an exemption or regulation-making power, should be subject to more robust safeguards. We make the suggestions below and consider that they would achieve a better balance against the breadth of the proposed powers. The Guidelines provide that "[a]n exemption that varies the scope of legislation or applies to a class of people or things will require a greater level of safeguards than a minor

⁷ Copyright Act 1994, Part 3.

⁸ New section 226D(2).

⁹ LAC Guidelines (2014 edition) at 13.1.

¹⁰ New section 226C.

¹¹ LAC Guidelines (2014 edition) at 14.1.

concession to an individual which does not materially affect the scope or operation of the legislation.”¹²

11. The Guidelines provide a list of safeguards that exemption powers should generally be subject to, including a requirement to give reasons for granting the exemption and clear criteria for granting the exemption.¹³ The creators of the Bill have clearly had regard to the safeguards suggested in the Guidelines, as some of the safeguards are reflected in clause 44(2). However, we make the following further suggestions:

- (a) The requirement that the Minister must consult with the persons or representatives of the persons “that the Minister considers will be substantially affected by the regulations” insufficiently sets out the procedure for what is quite a novel role for a Minister – that is, bringing into force prohibitions and then exempting particular uses for them.¹⁴ At the moment the safeguard relies on the Minister’s view of who will “be substantially affected”. We suggest that the safeguard could be made more robust by setting a procedure that must be followed before these regulations are made. For example, by setting out the extent to which there will be prior public notification and participation.
- (b) More thought should be given to the requirement that the Minister “has had regard to the purposes of [the Copyright] Act”.¹⁵ The Guidelines provide that a power of exemption should be exercised consistently with the purposes of the Act.¹⁶ The proposed wording of this provision is common drafting practice to implement the Guidelines. However, we wonder, given the novelty of these provisions, whether tighter drafting might be appropriate at least in relation to those provisions which can expand what is an infringement under the Act.¹⁷ We suggest that this safeguard be replaced with two separate safeguards. The first, should relate to the exercise of the power and provide that: “the Minister must act consistently with the purposes of this Act when exercising the regulation-making power under 226D(2).” The second addition should relate to the regulation and provide that: “the Minister may make a recommendation only if the Minister ... is satisfied that the regulations are consistent with the purposes of this Act.” We note, however, that there is no express purpose statement in the Copyright Act. Although the common law may establish a relevant test to assist interpreting this provision, we suggest that the overall robustness of the safeguards on this power might be increased by fleshing out the purposes that are relevant to these particular regulation-making powers, in addition to the current requirement that the Minister must have “regard” to the purposes of the Act.

¹² LAC Guidelines (2014 edition) at 14.2.

¹³ Ibid.

¹⁴ New section 234(2)(a).

¹⁵ New section 234(2)(c).

¹⁶ LAC Guidelines (2014 edition) at 14.2.

¹⁷ Ibid.

- (c) The threshold in subsection (d) is framed broadly. We suggest that the Committee should be satisfied that this is appropriate given the importance of the policy objective to avoid criminalising conduct that does not otherwise infringe on copyright or performers' rights. Subsection (d) provides that the Minister must be satisfied that regulations made under section 226D are "necessary or desirable" to prevent it from applying in "inappropriate circumstances", having regard to how the regulations will impact the use of a non-infringing work. In light of the policy objective, it may be more appropriate to have a higher threshold by removing the "or desirable" option and providing examples of "inappropriate circumstances" in the legislation. This would mean that the regulations would have to be necessary and the examples would provide more transparency about the kind of conduct that this provision is intended to apply to.
 - (d) The Subcommittee is also concerned that new section 234(5) would prevent the challenge of regulations on the grounds of failure to properly undertake consultation that would be otherwise required. Given that these regulations would criminalise otherwise non-infringing conduct, the decision to make the regulations should be robustly controlled and provide certainty to the criminal offences they create. We submit that the better way to achieve this is to set a procedure that must be followed for the regulations to be adopted, so that any challenge to the validity of those regulations when infringement proceedings are being brought can be restricted to the question of whether the particular process has been followed. The need for certainty is also important for those who are seeking to rely on exceptions recognised under regulations. The statute should confirm that whether those regulations are valid or not as a result of failing to adopt the proper procedure should not affect infringement proceedings. Alternatively, if the Committee considers that the objective of new section 234(5) is justifiable, we suggest that it may be more appropriate to adopt a procedure like that established in section 379 of the Food Act 2014. That provision requires the chief executive to undertake consultation, following a prescribed process, and the Minister must take the results of that consultation into account before exercising the regulation-making power.
12. We also suggest that the general safeguards in new sections 234(2)(a)-(c) (consultation and requiring consistency with the purposes of the Act) should apply to all regulations made under section 234 of the Copyright Act, not just these new regulation-making powers.

The relationship between the specific statutory exceptions in new sections 226E – J and the general regulation-making powers

13. The Bill expressly provides specific statutory exceptions to the prohibitions on TPMs.¹⁸ Arguably, all of the specific exceptions set out in statute could be captured by regulations made under new section 226K. We note that the Committee should be satisfied that the express design of the exceptions proposed in the Bill is the most appropriate means of achieving the policy objective.
14. If new sections 226E – J and 226L are to be maintained, we suggest that the Committee should address whether the specific exceptions in the Bill provides some *prima facie* accessibility and certainty given that this certainty can be undermined by the proposed power in new section 226L to modify or add to the statutory exceptions by regulations.
15. We support the objective of making currently known exceptions accessible in primary legislation. However, we suggest that the more robust safeguards suggested in paragraphs 11(a)-(d) above in relation to section 226D should also apply to new section 226L.
16. The Committee might also consider whether additional safeguards should be added to the power in new section 226L(2) to modify or add to the statutory exceptions by regulations. For example, it might be appropriate to include a requirement that regulations adding to or modifying statutory exceptions in primary legislation should be subject to confirmation by Parliament or approval by resolution of the House of Representatives. However, we note that the purpose of new section 226L(2) is to assist rather than restrict the rights of those subject to the exceptions.

The relationship between the statutory exceptions and the regulation-making powers should be clearer

17. As presently drafted, the Bill lists express statutory exceptions and the power to grant additional exemptions, and modify or suspend express statutory exceptions is found at the end of this list. This design means that it is not necessarily clear to a person reading an exception provision that the scope of the exception could be affected by regulations.
18. We suggest that the relationship between the exceptions and regulation-making powers could be made clearer by including a reference to the regulation-making powers in each statutory exception. For example, in new sections 226E – J, a new subsection could be added that reads: “this section is subject to regulations. See section 226L (which provides that regulations may modify, add to, or suspend sections 226E – J).” Alternatively, a new provision providing an overview of the clauses could be added at the front of the TPM provisions. Either of these

¹⁸ New sections 226E-J.

options would increase the accessibility of the legislation by sign-posting for users that regulations may affect the scope of exceptions.

Performers' rights relating to derogatory treatment of performances – clause 22, new section 170E, Copyright Act 1994

Should the exceptions to the right relating to derogatory treatment of a performance include fair dealing for the purpose of criticism and review?

19. Clause 22 proposes a new Subpart 1 which provides for performers' moral rights in addition to performers' rights already set out in Part 9 of the Copyright Act. New section 170E provides that a performer's rights are infringed by a person if the person subjects a performance to derogatory treatment by doing the things set out in new section 170F and which are prejudicial to the honour or reputation of the performer. Under section 196 of the Copyright Act, a performer or the person with recording rights can bring proceedings for an infringement of the right relating to derogatory treatment of a performance.
20. The Bill provides statutory exceptions to new section 170E.¹⁹ However, the exceptions do not include fair dealing with a performance or recording for the purposes of criticism, reviews, and news reporting. The Bill expressly provides that the fair dealing exception in section 176 of the Copyright Act does not apply to performers' moral rights in new Subpart 1, including rights relating to derogatory treatment.²⁰
21. The new protection for performers against derogatory treatment of their performance *prima facie* engages the right to freedom of expression in section 14 of the New Zealand Bill of Rights Act 1990. Section 14 affirms that everyone has the right to freedom of expression, including commercial, artistic, and political expression.²¹ We suggest that including a fair dealing exception would better balance the proposed limit against the right to freedom of expression. Alternatively, the Committee should satisfy itself that there is good policy justification for not having a fair dealing exception to this right, having regard to the uncertainty that will exist, at least in the short term, around how free speech concerns will be dealt with in the court when it comes to interpret the inherently open-textured phrase "derogatory treatment".

¹⁹ New section 170G.

²⁰ Clause 30(1).

²¹ We understand that the Ministry of Justice has advised the Attorney-General that the proposed limit on freedom of expression in new section 170E is justified under section 5 of the New Zealand Bill of Rights Act. See Ministry of Justice *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Trans-Pacific Partnership Agreement Amendment Bill* (27 April 2016).

Powers to detain items suspected of being pirated copies or bearing infringing sign – clauses 14 and 96

The threshold to detain goods should be raised to require reasonable suspicion that goods are pirated or counterfeit

22. Clause 14 provides a new power in the Copyright Act that the Chief Executive or a Customs officer may detain an item if the Customs officer has reasonable cause to suspect that the item may be a pirated copy.²² Clause 96 provides a similar power to detain goods under the Trade Marks Act 2002 where a Customs officer has reasonable cause to suspect that goods may be goods on or in physical relation to which an infringing sign is used.²³ We suggest that the threshold to detain these items should be raised.
23. The proposed powers provide that Customs officers must have reasonable cause to suspect that goods may be pirated or counterfeit. It may be more appropriate to require reasonable cause to suspect that goods are pirated or counterfeit copies. The latter approach seems to better reflect the appropriate balance and caution required when exercising search powers and dealing with property rights by detaining goods. The Guidelines provide that new legislation should respect property rights and that search powers should be balanced against the right to be free from unreasonable search and seizure in section 21 of the New Zealand Bill of Rights Act.²⁴
24. The word “suspect” already captures the concept that a Customs officer need not be certain whether or not the goods are in fact infringing goods (and we understand that the policy objective of this provision is to allow rights holders to make applications so that Customs officers can make an informed decision as to whether goods are infringing).
25. We further note in relation to this suggestion that the Trans-Pacific Partnership Agreement (the TPP) requires Parties to provide that its relevant authorities are empowered to initiate border protection measures without a formal complaint from a third party or rights holder, with respect to goods that are suspected of being counterfeit trade mark goods or pirated copyright goods.²⁵ The proposed powers in the Bill therefore go beyond the obligation in the TPP by setting a lower threshold requiring reasonable cause to suspect that goods may be infringing.

Regulation-making power to specify time periods to be excluded from the calculation of “unreasonable delay” when granting patents under the Patents Act 2013 – clause 75

26. Clause 75 provides that the Governor-General may make regulations specifying periods of time that must be disregarded when granting an extension of a patent on grounds of unreasonable

²² New section 135A(1).

²³ New section 135A(1).

²⁴ LAC Guidelines (2014 edition) at 3.1 and 18.

²⁵ TPP, article 18.76(5).

delay.²⁶ We suggest that the Committee should be satisfied that this regulation-making power is necessary and that the matter is appropriate for delegated legislation.

27. The Ministry of Business, Innovation and Employment's Regulatory Impact Statement (**RIS**) provides that the regulation-making power is necessary because the exclusion of time periods for the calculation of "unreasonable delay" was a controversial point during consultation on the policy, and is likely to be a source of dispute. The RIS provides that "to provide certainty to IPONZ, patent owners and third parties, and to avoid disputes, the time periods to be excluded should be specified in Patent Regulations."²⁷
28. Like all statutory powers, regulation-making powers should be necessary to achieve the policy objective.²⁸ We question whether this regulation-making power is necessary and a better approach to dealing with disputes than the matters being litigated and the courts determining what other time periods might be disregarded from the calculation of "unreasonable delay". We suggest that the Committee should be satisfied that this counterfactual is not more suitable and that the proposed regulation-making power is an appropriate means of dealing with potential disputes.
29. Further, the Guidelines provide that delegated legislation is not appropriate for matters of significant policy or procedural matters that go to the essence of the legislative scheme.²⁹ They also provide that delegated legislation may be appropriate to allow for flexibility.³⁰ We suggest that the Committee should be satisfied that the regulation-making power is appropriate in light of these guidelines. The fact that these matters are controversial and likely to be disputed, seems to indicate that they are significant policy matters and go to the essence of the patent scheme, and are therefore not appropriate for delegated legislation. On the other hand, delegated legislation may be an appropriate approach to provide flexibility in an area that may require further certainty in practice.

Commencement provisions – clause 2

30. Clause 2 provides that the Bill comes into force on a date appointed by the Governor-General by Order in Council. The Guidelines provide that there must be cogent policy justification for a commencement date to be delegated to the executive and that simply following past practice is not appropriate justification.³¹ We suggest that the Committee should be satisfied that cogent policy justification exists in this case.

²⁶ New section 111B(3).

²⁷ Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Analysis of Options Relating to Implementation of Certain Intellectual Property Obligations under the Trans-Pacific Partnership Agreement* (8 April 2016) at [42].

²⁸ LAC Guidelines (2014 edition) at 16.1.

²⁹ LAC Guidelines (2014 edition) at 13.1.

³⁰ Ibid.

³¹ Ibid.

Should the commencement provision have an expiry date?

31. We understand that the Bill is intended to come into force once the TPP is adopted. However, the commencement provision does not provide that the Act will expire if the TPP is not adopted. Our research suggests that it is common for legislation implementing international treaties to be brought into force by regulations and to not specify an expiry period. If this legislation is not brought into force, it will become latent and clutter the statute book.
32. We suggest that this approach is not good design and note that past practice, though relevant, should not necessarily determine the approach in this case. We therefore suggest that the commencement provision provide that the Act will expire after five years, or a longer period if it is justifiable, if not brought into force first.

Is the commencement provision framed too broadly?

33. The Bill provides that one or more Orders in Council may be made on different dates for different provisions and different purposes. We question whether “different purposes” is too broad in the context of implementing an international agreement.
34. It is not clear whether the reference to “different purposes” means that the Bill could be brought into force for reasons other than to implement the TPP. Further, it is not clear whether this wording would allow relationships with TPP members to be distinguished from relationships with non-TPP members through enactment. We note that similar wording is common in other legislation and is often used to facilitate phased implementation of changes to law.³² We suggest that the Committee should discuss with officials the reasons for including this provision.

Conclusion

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

Yours sincerely



Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee

³² For example, see the Financial Markets Conduct Act 2013, section 2(2); Hazardous Substances and New Organisms Act 1996, section 1(2); Fisheries Act 1996, section 1(2).