

In confidence

Office of the Attorney-General

Chair, Cabinet Legislation Committee

## UPDATE TO LEGISLATION GUIDELINES (2018 EDITION)

### Proposal

- 1 This paper notes that the Legislation Design and Advisory Committee (LDAC) has updated its *Legislation Guidelines 2018 Edition* (the 2018 Legislation Guidelines) to reflect recent changes made by the Legislation Act 2019, the Secondary Legislation Act 2021 and a number of other changes to key pieces of legislation.
- 2 This paper seeks Cabinet's agreement that the attached *Legislation Guidelines 2021 Edition*, which incorporates the changes made by the LDAC, now replace the 2018 Legislation Guidelines.

### Background

- 3 The LDAC is an independent committee established in 2015 to improve the quality and effectiveness of legislation. It builds on the work of the former Legislation Advisory Committee (which existed from 1986 to 2015).
- 4 The LDAC fulfils its role by advising public service agencies early in the development of policy and legislation, by setting standards through the publication of Legislation Guidelines, and by scrutinising Government Bills that come before Parliament.
- 5 The LDAC's terms of reference are to:
  - 5.1 provide advice to departments in the initial stages of developing legislation when legislative proposals and drafting instructions are being prepared, including to:
    - 5.1.1 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;
    - 5.1.2 assist departments with the allocation of provisions between primary and secondary legislation;
    - 5.1.3 provide advice on delegated legislative powers;
    - 5.1.4 provide advice on the appropriateness of exposure draft Bills;

- 5.2 report to the Attorney-General on departures from the 2018 Legislation Guidelines in legislative proposals;
  - 5.3 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;
  - 5.4 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 2018 Legislation Guidelines and discouraging the promotion of unnecessary legislation;
  - 5.5 scrutinise and make representations to the appropriate body or person on aspects of bills which raise matters of particular public law concern; and
  - 5.6 undertake training and education work, relating to the LDAC's role and the 2018 Legislation Guidelines.
- 6 The publication of the 2018 Legislation Guidelines fulfils a key part of the LDAC's role. The Guidelines include material on issues that are fundamental to the development of legislation and the operation of the rule of law in New Zealand, such as proper processes and fundamental legal and constitutional principles. The primary purpose of the Guidelines is to aid officials who are responsible for developing legislation.
  - 7 To encourage good law-making, the Cabinet Manual requires Ministers to confirm that draft legislation complies with the guidance in the 2018 Legislation Guidelines when submitting bids for bills to be included in the legislative programme, submitting bills for approval for introduction, or submitting regulations to Executive Council (in paragraphs 7.65(e), 7.66 and 7.89).
  - 8 Ministers seeking Cabinet approval to introduce a bill are also required to indicate whether the bill complies with the 2018 Legislation Guidelines. This includes stating whether any aspects of the legislation depart from the Guidelines, and any justification for any variation.

#### **Update to Legislation Guidelines**

- 9 The main changes to the 2018 Legislation Guidelines are to Chapter 13 (Interpretation and application of legislation) and Chapter 14 (Delegating law-making powers). The changes to Chapter 13 are needed because the Legislation Act 2019 (once commenced) will repeal the Interpretation Act 1999 and include new and updated provisions relating to:
  - 9.1 principles of interpretation;
  - 9.2 default definitions;
  - 9.3 rules that apply to the commencement, amendment, and repeal of legislation; and
  - 9.4 rules that apply to time and distance.

- 10 The changes to Chapter 14 are needed because the Legislation Act 2019 and the Secondary Legislation Act 2021 will also implement the secondary legislation reforms. These Acts will together establish one unified and simple category of where previously several overlapping and confusing categories existed.
- 11 Chapter 14 has been updated to provide the guidance underpinning this new category of secondary legislation, and includes guidance on the test to apply and the matters to take into account when considering whether a delegated power should be identified as a power to make secondary legislation.
- 12 Changes to Chapter 14 are also needed to implement the Government's response to one of the recommendations by the Regulations Review Committee (the Committee) following the Inquiry into Parliamentary Scrutiny of Confirmable Instruments [CBC-21-MIN-0017 refers].
- 13 The Government agreed with the Committee's recommendation that the Government take note when the Committee considers the confirmation process may be inappropriate for secondary legislation, so as to ensure the confirmation process is not over-used.
- 14 A new guideline and a link to new supplementary material that provides guidance on when secondary legislation should be subject to parliamentary confirmation has been added to Chapter 14 for this purpose. The new guideline and the link to new supplementary material sets out indicators where the confirmation process is not likely to be appropriate.
- 15 Other changes to the 2018 Legislation Guidelines focus on:
- 15.1 updating guidelines or references as a result of legislative change or the establishment of new agencies;
  - 15.2 improving integration with the Crown's approach to the Treaty of Waitangi, Treaty Settlements and Māori interests;
  - 15.3 correcting errors and reflecting change in style.
- 16 The LDAC adopted, in principle, the changes to the 2018 Legislation Guidelines on 25 March 2021. I now seek Cabinet endorsement that the attached *Legislation Guidelines 2021 Edition* (2021 Legislation Guidelines), now replace the 2018 Legislation Guidelines as the appropriate reference point for Ministers and officials when assessing whether draft legislation is consistent with accepted legal and constitutional principles.
- 17 It is important that public service agencies are aware that the 2018 Legislation Guidelines have been replaced by the 2021 Legislation Guidelines, and of our expectations for their use. I seek Cabinet's approval for the issue of a Cabinet Office circular to notify Chief Executives, Chief Legal Advisers and their agencies of 2021 Legislation Guidelines.

## Further minor changes

- 18 From time to time, there may be a need for further minor or technical updates or changes to be made to the 2021 Legislation Guidelines to keep them up to date and relevant. I consider that the Chair of the LDAC should approve changes of this kind to the 2021 Legislation Guidelines.

## Impact analysis

- 19 A regulatory impact assessment is not required because the changes to the 2018 Legislation Guidelines do not in themselves have any regulatory impact.

## Consultation

- 20 The following departments were consulted on the proposed changes to the 2018 Legislation Guidelines:

Ministry for Culture and Heritage, Inland Revenue Department, Department of Internal Affairs, Ministry of Business, Innovation and Employment, The Treasury, Te Puni Kōkiri, New Zealand Police, Ministry of Transport, Ministry of Defence, New Zealand Customs Service, Oranga Tamariki, Statistics New Zealand, Ministry of Education, Ministry of Justice, Ministry of Housing and Urban Development, Ministry of Foreign Affairs and Trade, Department of Conservation, Office of the Clerk, Ministry for the Environment, New Zealand Security Intelligence Service, Department of Corrections, New Zealand Defence Force, Te Arawhiti, Government Security and Communications Bureau, Public Service Commission, Ministry for Pacific Peoples, Serious Fraud Office, Ministry for Primary Industries, Ministry of Health, Ministry of Social Development and Land Information New Zealand.

- 21 The Department of the Prime Minister and Cabinet and the Crown Law Office, who are both members of LDAC, have been informed.

## Proactive Release

- 22 I intend to release this paper proactively on the LDAC website within 30 business days of final decisions.
- 23 The 2021 Legislation Guidelines will be published on the LDAC website.
- 24 A Cabinet Office circular will be produced to advise departments that the 2018 Legislation Guidelines have been replaced, renamed and published, and to remind them of the Government's expectations that they be used when legislation is being developed.

## Recommendations

25 I recommend that the Cabinet Legislation Committee:

- 1 **note** that the *Legislation Guidelines 2018 Edition* (2018 Legislation Guidelines) have been updated to reflect recent changes made by the Legislation Act 2019, the Secondary Legislation Act 2021 and a number of other changes to key pieces of legislation;
- 2 **note** that the Cabinet Manual requires Ministers to confirm compliance with the 2018 Legislation Guidelines when submitting bids for the legislation programme, submitting Bills for introduction, and submitting regulations to the Executive Council;
- 3 **agree** that the attached *Legislation Guidelines 2021 Edition* (2021 Legislation Guidelines), replace the 2018 Legislation Guidelines as the Government's key point of reference in the Cabinet Manual for assessing whether draft legislation conforms to accepted legal and constitutional principles;
- 4 **note** that Chapter 14 of the 2021 Legislation Guidelines contains a new guideline on confirmation of secondary legislation which fulfils in part the Government response to the Regulation Review Committee's Inquiry into Parliamentary Scrutiny of Confirmable Instruments;
- 5 **agree** that a Cabinet Office circular be issued to notify Chief Executives, Chief Legal Advisers and their agencies of the 2021 Legislation Guidelines and requirements for papers; and
- 6 **authorise** the Chair of the Legislation Design and Advisory Committee to approve minor or technical changes to the 2021 Legislation Guidelines to ensure the Guidelines remain up to date and relevant.

Authorised for lodgement

Hon David Parker  
**Attorney-General**