



LEGISLATION ADVISORY COMMITTEE

PO Box 180
Wellington
6401

Phone 04 494 9785

Fax 04 494 9859

www.justice.govt.nz/lac

Email Sarah.Agnew@justice.govt.nz

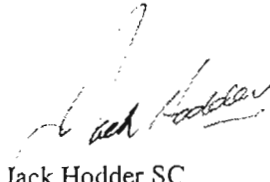
18 January 2011

The Chairperson
Government Administration Committee
Parliament Buildings
WELLINGTON

IDENTITY INFORMATION CONFIRMATION BILL 2010 187-1

- 1 This note is provided on behalf of the Legislation Advisory Committee (“LAC”), recognising that the closing date for submissions has passed but anticipating that, nevertheless, the note may be of some assistance to your Committee.
- 2 The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (“LAC Guidelines”) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.
- 3 The terms of reference of the LAC include:
 - 3.1 to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
 - 3.2 to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.
- 4 The Identity Information Confirmation Bill 2010 (“the Bill”) contemplates that government officials will provide an identity confirmation service to “agencies” (that is, anyone in the private or public sector): clause 7. It will recover cost-based charges for use of that service. The expectation must be that the service will be provided with reasonable care (that is, without negligence).
- 5 It is in this context that the LAC wishes to raise one point, related to clause 18 of the Bill. Clause 18 protects the Crown, its servants, and agents, from liability (including tort) for damages where loss is due directly or indirectly to the use of the confirmation service for an identity information check.

- 6 The ordinary presumption for any service—private or public sector—is that, if the service is provided negligently, subject to agreed terms, a person suffering loss because of that negligence may seek damages to compensate for such loss. That this applies to the services of central government officials is very clear from the policy and tenor of the Crown Proceedings Act 1950.
- 7 Section 6(1) of the Crown Proceedings Act 1950 establishes the Crown’s vicarious liability in tort for wrongs committed by its servants or agents. The Crown Proceedings Act 1950 subjects the Crown to liability in tort to the same extent as a private individual of full age and capacity, and in that respect attempts to place the State in as close a position as possible to private individuals for the purposes of suit.
- 8 However, clause 18(1) of the Bill negatives the Crown’s vicarious liability in tort because it immunises the Crown and its servants and agents from any loss or damage that is due directly or indirectly to the use of the confirmation service for an identity information check. The Bill contains an exception if bad faith or gross negligence can be proven: clause 18(3). (Without dwelling on the topic, the LAC notes that “gross negligence” is an ill-defined and thus unclear concept.)
- 9 In that context, the LAC suggests that there is a question of legislative principle: why should the identity confirmation service be immunised by statute against all claims, including for negligence?
- 10 In other words, clause 18 of the Bill raises an issue in respect of the “basic principles of New Zealand’s legal and constitutional system” detailed in the LAC’s Guidelines. Clause 18 is not consistent with the principle of the rule of law that no-one, including the Crown in the exercise of executive authority, is above the law. The point is illustrated by the fact that this wide immunity, as noted above, is also not consistent with the Crown Proceedings Act 1950.
- 11 Thus we respectfully invite the Committee to consider the LAC’s view that, as a matter of principle, clause 18 could and should be removed from the Bill.
- 12 Thank you for considering this note. If additional detail would assist, please e-mail or telephone the writer (jack.hodder@chapmantripp.com; 04 498 4944).



Jack Hodder SC
for and on behalf of the LAC