



LEGISLATION DESIGN AND ADVISORY COMMITTEE

31 May 2018

Michael Wood MP
Finance and Expenditure Committee
Parliament Buildings
Wellington

Dear Mr Wood

Earthquake Commission 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. LDAC provides advice on design, framework, constitutional, and public law issues arising out of legislative proposals. It is responsible for the *Legislation Guidelines* (2018 edition), which have been adopted by Cabinet.
2. In particular, 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, scrutinising 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 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, the External Subcommittee is empowered to review and make submissions on Bills as introduced, usually those that were not reviewed by LDAC prior to their introduction.¹
4. The Earthquake Commission Amendment Bill, as introduced, was not considered by LDAC prior to introduction. The External Subcommittee has therefore reviewed it and wishes to make the attached submission.

¹ Legislation bids identify whether Bills will be referred to LDAC for design advice before introduction. This is determined when Cabinet settles the Legislation Programme. Generally, significant or complicated legislative proposals are referred to LDAC before introduction. Other legislative proposals with basic framework/design issues, matters relating to instrument choice, issues relating to consistency with fundamental legal and constitutional principles, matters under the *Legislation Guidelines*, or with the ability to impact the coherence of the statute book may also be suitable for referral to LDAC.

5. Thank you for taking the time to consider the Subcommittee's submission.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'P. Rishworth', with a stylized flourish at the end.

Paul Rishworth QC

Chairperson

Legislation Design and Advisory Committee



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Dear Mr Wood

Earthquake Commission Amendment Bill

1. The Legislation Design and Advisory External Subcommittee has been given a mandate by Cabinet to review introduced Bills against the *Legislation Guidelines* (2018 edition) (**Guidelines**). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with the principles contained in the Guidelines.
2. Our submission relates to clause 31A of the Bill. This clause is designed to clarify the purposes for which EQC may release claim-related information (including personal information) and the protections that apply.

Consistency with the Privacy Act 1993

3. We **recommend** that clause 31A(1)(a) of the Bill be amended to use the term "serious threat" rather than "threat" so as to be consistent with information privacy principle 11(f) in the Privacy Act 1993.
4. The Guidelines state that legislation should be consistent with the requirements of the Privacy Act, in particular the information privacy principles. Any override of that Act requires a policy decision and the reasons should be clearly identified in Cabinet papers.²
5. The Departmental Disclosure Statement explains that "clause 31A has been drafted to clarify the circumstances (in addition to those in Privacy Principle 11 of the Privacy Act 1993) in which EQC may disclose information about property and claims."³

² LDAC *Legislation Guidelines* (2018 edition) at 8.1

³ The Treasury *Departmental Disclosure Statement* (Wellington, 12 March 2018) at 7.

6. Three of the four permissible disclosure purposes in clause 31A(1) cover EQC specific matters, that are not addressed in the Privacy Act. These are clearly additional purposes. However clause 31A(1)(a) is different. It states that information may be released for the purpose of “preventing or lessening a threat to public health or public safety or to the life or health of any individual”. This largely replicates privacy principle 11(f), except the word “serious” has been removed. No express explanation has been given as to why a lower threshold is required. We understand that the Privacy Commissioner has not specifically been consulted on this point.
7. Section 2 of the Privacy Act defines what amounts to a “serious threat”. It means a threat that an agency reasonably believes to be a serious threat having regard to the likelihood of the threat being realised; the severity of the consequences if the threat is realised; and the time at which the threat may be realised. A common understanding of how this definition applies in practice has developed over time.
8. Given the broad definition and common understanding of “serious threat”, it is not immediately obvious why the term “threat” has been chosen instead. If the policy intent of the Bill is to adopt a lower threshold, then we suggest that more attention should be drawn to this decision and the reasons behind it should be set out in the select committee’s report.
9. We also note that the Bill intends to exclude “property-related information” from the definition of “personal information” in the Privacy Act. Again, this is a deviation from a well understood phrase in the context of privacy law. We understand that the policy intent is to provide clarity and to encourage EQC to release appropriate information. However, we are concerned that the distinction will deny Privacy Act protections to information that would otherwise be “personal information” under the Act. One alternative approach for the Committee to consider would be for EQC to consult the Privacy Commissioner on a potential guidance document explaining what “personal information” means in the EQC context.

Enforcement mechanism

10. We **recommend** that clause 31A of the Bill should be amended to include a notification requirement.
11. The Guidelines state that rights and obligations need to be matched with enforcement mechanisms and remedies so that people and/or the State can enforce them.⁴
12. The Bill contains the following proposed safeguards around the release of information by EQC:
 - the release must be for one or more of the purposes in clause 31A(1);
 - it must also be in the public interest (clause 31A(2)(a)); and
 - if the information is personal information, confidentiality protections must be in place before the information is released (clause 31A(2)(b))

⁴ LDAC *Legislation Guidelines* (2018 edition) at 4.1

13. The difficulty with these safeguards is that there is no ability to enforce compliance, as there is no requirement to notify the person whose information has been, or will be, disclosed. If that person was notified, they would be in a position to make a complaint to the Privacy Commissioner if they felt that EQC's action interfered with their privacy.⁵ If such a complaint was made the Privacy Commissioner would consider compliance with the safeguards in s 31A in investigating the complaint. This would promote diligent and transparent decision-making. It would also reflect the right to natural justice.⁶
14. We acknowledge that the information privacy principles do not require notification of every release of personal information. However here the interactions between EQC and other agencies, including private insurers, have the potential to have a significant impact on the timely progress and scope of insurance claims. This in turn can have a significant impact on claimants.
15. We note that under Part 9 of the Privacy Act, if personal information is shared under an approved information sharing agreement then the recipient agency may have a notification obligation. It must notify the person whose information it is, if the agency intends to take any "adverse action" based (in whole or in part) on that information. The notification requirement attaches to the adverse action rather than the sharing itself. "Adverse action" is defined broadly as meaning "any action that may adversely affect the rights, benefits, privileges, obligations, or interests of any specific individual".
16. One option for the Committee to consider is whether the Bill could be amended to require EQC to release personal information on a conditional basis. The condition would be that, if the recipient intends to take any adverse action based, in whole or in part, on that information then it must notify the person whose information it is and give them the opportunity to correct it. In practice, this would also enable the person to complain to the Privacy Commissioner about the initial release by EQC, if they had concerns that the safeguards in clause 31A had not been complied with.
17. Thank you for considering our submission. We wish to be heard.

Yours sincerely



Prof Geoff McLay
Chairperson
Legislation Design and Advisory External Subcommittee

⁵ Privacy Act 1993, s 67

⁶ LDAC Legislation Guidelines (2018 edition) at 4.5