

In Confidence

Office of the Attorney-General

Chair, Cabinet Legislation Committee

Access to secondary legislation: policy approvals for the Secondary Legislation (Access) Bill

Proposal

- 1 This paper seeks policy approvals for the drafting of the Secondary Legislation (Access) Bill. The Bill will amend empowering Acts to specify which instruments made under them are secondary legislation and therefore required to be published in accordance with the Legislation Bill. In particular, I seek Cabinet's agreement to the plan for the Bill's introduction, the principles being used to identify secondary legislation, when exemptions from publication, presentation and disallowance provisions of the Legislation Bill should apply, and various transitional matters.

Executive summary

- 2 The Secondary Legislation (Access) Bill (SLAB) is the second of two bills required to implement the Access to Secondary Legislation Project. The first – the Legislation Bill, currently awaiting its second reading – contains reforms to improve access to secondary legislation. It provides that, with limited exceptions, all secondary legislation must be available through the New Zealand Legislation website, presented to the House and subject to disallowance.
- 3 The SLAB, which is in preparation, will determine which instruments made under Acts of Parliament will be subject to the Legislation Bill's requirements. It will amend each provision on the statute book that empowers the making of instruments with legislative effect to classify those instruments as secondary legislation. It will also apply exceptions, where these are required, to the default requirements of the Legislation Bill.
- 4 I seek your agreement to—
 - 4.1 a proposal to split the Bill into 2 tranches, the first of which would be introduced in mid-2019, and the second promoted as an SOP to be referred to the select committee while it is considering the first tranche;
 - 4.2 the criteria being used to identify which provisions in Acts empower the making of instruments with legislative effect, and so will become secondary legislation under the new classification;
 - 4.3 the approach to deciding—
 - 4.3.1 which secondary legislation should be exempt from certain publication and presentation obligations of the Legislation Bill; and

- 4.3.2 which secondary legislation should be exempt from disallowance under the Legislation Bill.
- 4.4 a delegation to the Attorney-General to decide on the nature of the amendments to particular provisions in cases where the application of the criteria is not clear-cut and there is concern about the consequences of amending them in one way or the other;
- 4.5 the legislative approach to be used to progressively apply the publication requirements of the Legislation Bill to secondary legislation drafted by agencies;
- 4.6 miscellaneous approvals in respect of—
 - 4.6.1 exemption from the publication requirements of the Legislation Bill for certain bylaws that can be made by a class of entities that includes, but is not limited to, local authorities;
 - 4.6.2 moving the requirements that confirmable instruments have explanatory notes from individual empowering provisions to the Legislation Bill;
 - 4.6.3 consultation with bodies empowered to make secondary legislation on the draft amendments to their empowering legislation.

5 This paper also updates you on the planning for the implementation of the bills.

Background

About the Access to Secondary Legislation Project

- 6 The Access to Secondary Legislation Project aims to improve access to secondary legislation and to support effective Parliamentary oversight by—
 - 6.1 defining New Zealand’s secondary legislation;
 - 6.2 locating all that secondary legislation for the first time; and
 - 6.3 providing access to all secondary legislation through the New Zealand Legislation website.
- 7 The Project will be implemented through 2 Bills. The first is the Legislation Bill that was reported back by the Justice Committee on 1 June 2018, which provides that, with limited exceptions¹, secondary legislation—
 - 7.1 cannot commence before it is notified or published on the New Zealand Legislation website;
 - 7.2 must be presented to the House of Representatives; and

¹ The key exception at this stage is that secondary legislation made by local authorities will not be required to be listed or published. The other, minor, exceptions are discussed in this paper.

7.3 will be subject to disallowance.

- 8 The second bill, currently known as the Secondary Legislation (Access) Bill (SLAB), is in preparation and will amend each provision on the statute book that empowers the making of instruments with legislative effect. It will classify those instruments as secondary legislation. The definition of "secondary legislation" in clause 5 of the Legislation Bill effectively states that an instrument made under an Act will be "secondary legislation" if the empowering Act says it is. By applying a consistent test to determine what is secondary legislation, the SLAB will replace the existing complex and uncertain definitions of types of delegated legislation. By specifying their status at the outset in empowering legislation, it will also remove the need to apply those uncertain definitions on an ongoing and case-by-case basis to particular instruments, and the resulting legal uncertainty and scope for disagreement.
- 9 The Access to Secondary Legislation Project is Commitment 4 in New Zealand's National Action Plan for the Open Government Partnership (OGP). OGP commitments are subject to independent review and, in the last cycle of reports, the project was awarded "star" status, meaning it was assessed as having a potentially transformative impact.²

Secondary Legislation (Access) Bill – progress and timing

- 10 The SLAB will amend over 600 Acts. While considerable progress has been made in drafting amendments, the work is legally complex and requires the PCO to consult with some 30 agencies that administer the Acts that are being amended. I expect that final drafts of about 2,000 amendments will be ready by the end of June 2019, and all amendments will be ready in the second half of the year. I consider it important to set clear expectations for administering departments about the timeframes for the project, and to make the best use of the time available to progress the Bill through the parliamentary process.
- 11 Accordingly, I propose to split the SLAB into two tranches. The first tranche, comprising approximately half of the total amendments required in the Bill, would be ready for introduction by the end of June 2019. The second tranche would be promoted as a Supplementary Order Paper to be referred to the select committee while it is considering the first tranche. This approach is supported by the Office of the Clerk. Splitting the Bill will assist with clear planning, and allow Parliament to begin considering the amendments sooner than if we waited until a single Bill was completed.

Main approvals for drafting of the Secondary Legislation (Access) Bill

- 12 To draft the SLAB, administering departments and the PCO need to reach a position on which provisions empower the making of instruments with legislative effect, and when exemptions from publication and disallowance of secondary legislation should apply. Building on earlier Cabinet decisions, the PCO has iteratively developed the principles that will inform these decisions. I seek your endorsement of these principles below.

² https://www.opengovpartnership.org/sites/default/files/OGP_Star-Reforms_2018.pdf

- 13 Since it is not always clear how these principles apply to particular empowering provisions, I also seek a delegation to decide how particular provisions should be amended in cases where the decision is not clear-cut and there is concern about the consequences of amending them in one way or the other.

Legislative effect

- 14 Cabinet previously agreed that, in deciding whether or not instruments are secondary legislation, the focus should be on the substantive effect (and not the form) of an instrument: an instrument has legislative effect if it makes the law or alters its content, rather than just applying the law in a particular case (LEG-18-MIN-0041 refers).
- 15 The PCO has elaborated on that decision to clarify what distinguishes an instrument that has legislative effect from one that does not, taking account of the existing test in section 39 of the Legislation Act 2012, relevant case law, academic writing on the topic, and other legislation in New Zealand and overseas. The PCO has tested that guidance with administering agencies, the Legislation Design and Advisory Committee and the Regulations Review Committee.
- 16 In general terms, instruments are likely to have legislative effect—
- 16.1 if they make legal rules that apply generally;
 - 16.2 if they apply to the public or a class of the public; or
 - 16.3 if they create a framework to be applied again and again.
- 17 More specifically, instruments will typically be legislative if they—
- 17.1 regulate conduct (by mandating, requiring, prohibiting, restricting, imposing conditions, etc) where compliance is a pre-requisite for something under the parent enactment or where non-compliance would incur a sanction;
 - 17.2 create, alter, or remove a right, where there is a mechanism for enforcing the right;
 - 17.3 set procedural requirements that must be followed in relation to a legislative right or obligation;
 - 17.4 set the amount of a fee, levy, or other charge;
 - 17.5 delegate a power to make instruments that change the scope of legislation (ie, altering the general categories of who or what the legislation applies to, or the places where it applies), whether by way of application, modification or exemption.
- 18 In practical terms, instruments are clearly legislative if they commence, amend, replace, or repeal other legislation, or set criminal offences and other penalties. Conversely, instruments are not legislative if they merely record case-by-case decisions (for example, decisions by courts or administrative decision-makers),

give effect to transactions, or provide information or non-binding guidance or strategies.

- 19 Instruments are unlikely to have legislative effect—
- 19.1 if they are made under a narrow discretion (ie, by applying clear statutory criteria);
 - 19.2 if they apply only to a particular case (unless the particular case effectively determines the basic scope of the Act);
 - 19.3 if their effect could be achieved by a natural person without legislation (eg, to buy or sell assets, set prices, enter into contracts, set ordinary contract terms and conditions, etc);
 - 19.4 if they express non-binding strategy, policy, or intent;
 - 19.5 if they concern the internal machinery of government (eg, directions under section 107 of the Crown Entities Act 2004);
 - 19.6 if judicial review would be a more appropriate check on the exercise of the power than parliamentary oversight under the Legislation Bill.
- 20 I propose that the principles expressed in paragraphs 16-19 be used to decide which provisions will be amended (or not) to state that the instruments made under them are secondary legislation.

Disallowable instruments that will not become secondary legislation

- 21 The Legislation Bill and SLAB will replace the definition of “disallowable instruments” in the Legislation Act 2012. That definition reflects, in part, the form of those instruments rather than their substantive effect. As a result of applying a substance-based test, some disallowable instruments will not become secondary legislation.
- 22 One consequence of determining that an instrument that is currently disallowable is not legislative in nature, is that the House will no longer be able to disallow that instrument. The PCO has consulted the Regulations Review Committee, which has expressed concern about this aspect of the Bill. The Committee recommends that all disallowable instruments should be classified as secondary legislation. I consider that this would be undesirable. It would perpetuate some of the inconsistencies the bill is intended to resolve by treating instruments that are administrative in nature as if they were legislation without good reason. However, changes to the status of these instruments will be brought to the attention of the House at the time of introduction so the Committee can review them during its examination of the Bill.

Special cases: exemptions and mixed provisions

- 23 There are some special cases I wish to draw to your attention.
- 24 Instruments that grant exemptions from the obligations of an Act or secondary legislation can vary widely. Many exemption powers allow the decision maker to exempt either a class of persons or particular named persons. I propose that the

Bill be drafted with the presumption that an exemption that only applies to particular named persons is not legislative, whereas one that applies to a class of persons is legislative. However, careful scrutiny will be given to exemptions for particular named persons if they are currently disallowable instruments and the presumption may be rebutted if the exemption power includes a power to impose substantive terms and conditions that effectively provide for an alternative legislative framework.

- 25 Some provisions empower a person to make instruments that could be used with either legislative or administrative effects. In some cases, these powers can easily be delineated into separate legislative and administrative powers by way of amendments to the empowering legislation. However, where publishing instruments made under a single empowering provision in two different places would be confusing, or would increase administrative complexity, I propose that all of the instruments made under the provision be classified as secondary legislation.

Exemptions from publication in full

- 26 Generally, the Legislation Bill requires makers of secondary legislation to lodge with the PCO for publication—
- 26.1 "minimum legislative information", that is, key information about secondary legislation including its title, empowering provision, administering agency, and any other information required by regulations. This information is to be used to create an authoritative catalogue of secondary legislation; and, over time,
- 26.2 the full text of secondary legislation.
- 27 To cater for situations in which full publication would either be impracticable or would risk disclosing sensitive information, The Legislation Bill provides for two types of publication exemptions.
- 27.1 If a *complete publication exemption* applies neither the legislation nor its minimum legislative information need be lodged and published. Only Parliament can confer this type of exemption in empowering legislation.
- 27.2 If a *partial publication exemption* applies, the full text of the legislation need not be lodged with the PCO for publication, but "minimum legislative information" about it must be. These may be conferred in empowering legislation, but the Chief Parliamentary Counsel may also exempt legislation that it is impracticable to publish in full on the New Zealand Legislation website (as long as it is published in full elsewhere).
- 28 Complete publication exemptions could be warranted, for instance, for exemptions from the requirement for telecommunications network operators to have full interception capability under the Telecommunications (Interception Capability and Security) Act 2013. The existence of such exemptions could be revealing as to whether network operators have the ability to intercept telecommunications (where this is authorised by a warrant). Currently, they need only be issued to the class of network operators affected by the decision.

- 29 A partial publication exemption would be appropriate, for example, to some notices under section 60 of the Animal Products Act 1999 in relation to animal products intended for export. Those notices may contain information about the requirements of the authorities within importing countries negotiated through confidential trade agreements. The Director-General of Primary Industries currently has the power to restrict access to them.
- 30 Where Parliament has previously expressly authorised the makers to withhold publication of all or part of an instrument because it contains sensitive information, the SLAB will continue these exemptions. The PCO will, however, test with administering agencies that they are as narrowly drawn as is consistent with their purpose.
- 31 In a small number of cases new exemptions may be sought, as previously the legislative character of the instruments has not been recognised (and so nothing is stipulated in respect of their publication). I propose to consider these requests on a case-by-case basis under the delegation this paper seeks for me to approve amendments to particular provisions.

Presentation to the House of instruments with a partial publication exemption

- 32 The Legislation Bill does not automatically exempt secondary legislation with a partial publication exemption from presentation, since not all of that legislation is sensitive. However, some of that legislation may still be sensitive and so unsuitable for presentation to the House.
- 33 To address this, I propose that individual empowering provisions should, if need be, be amended to exempt the instruments in question (or the sensitive parts of them) from presentation, such that—
- 33.1 if parts of an instrument are sensitive, only the parts that are not sensitive are presented; or
- 33.2 if the whole instrument is sensitive, only its minimum legislative information is presented.
- 34 I seek approval to decide on such exemptions on a case-by-case basis where an exemption from presentation is essential, eg, on national security grounds. I will bring any new exemptions to the attention of LEG before the SLAB is introduced.

Exemptions from disallowance

- 35 The Legislation Bill provides that generally the House may, by resolution, disallow any secondary legislation. However, secondary legislation may be excluded from disallowance by listing its empowering provision in Schedule 3 of the Bill.³ In line with earlier Cabinet decisions [SEC-17-MIN-0038 refers], exemptions from disallowance that are currently explicitly set out in legislation will be continued.

³ Currently, Schedule 3 lists every provision for which an Act states that the instruments made under it are not disallowable. This includes some provisions that will not be classified as secondary legislation empowering provisions by SLAB. Since only secondary legislation need be exempted from disallowance, Schedule 3 will be amended to remove those (redundant) provisions from it.

- 36 In a few cases, administering departments have suggested that a new exemption from disallowance might be appropriate (usually because the amendments identify instruments as secondary legislation has rendered their legislative character, and hence the potential for them to be disallowed, apparent⁴). I propose to consider these requests on a case-by-case basis under my proposed delegation to approve amendments to particular provisions. I will bring any new exemptions to the attention of LEG before the SLAB is introduced.

Delegation to decide on amendments to particular provisions

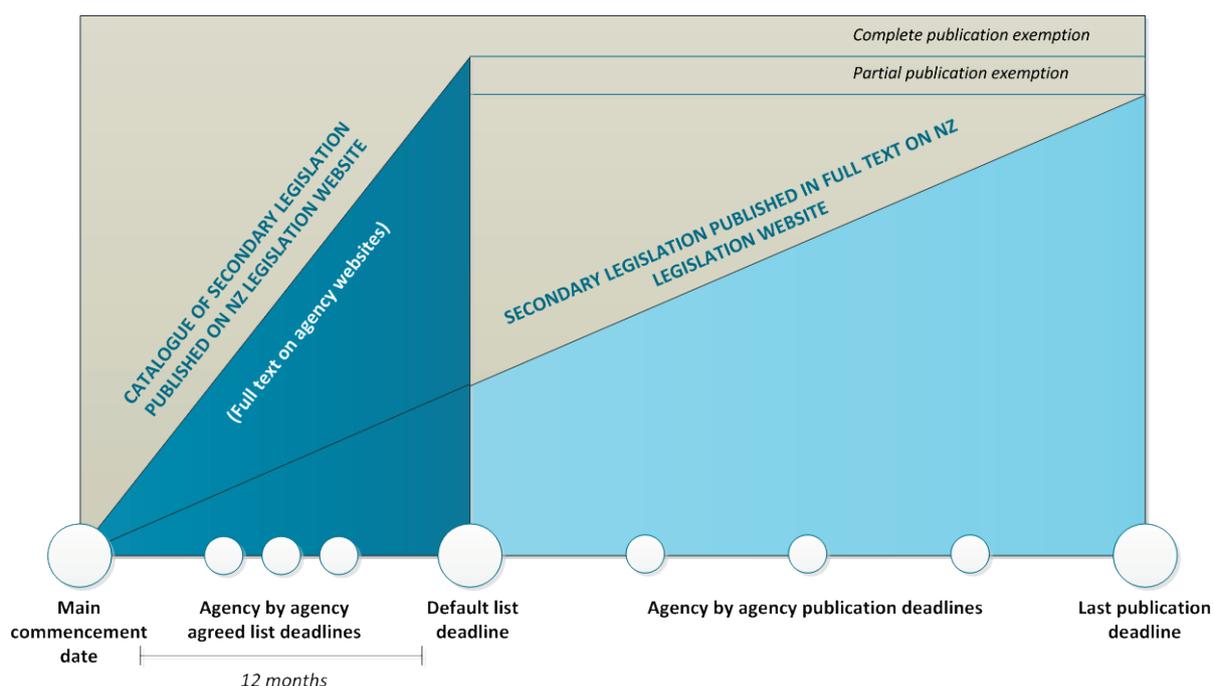
- 37 Owing to the large number of empowering provisions that will be amended by the SLAB there will inevitably be a need for some case-by-case judgements about whether particular provisions should be considered to create secondary legislation or whether an exemption from publication, presentation, or disallowance should apply.
- 38 I propose that authority be delegated to me to decide on the appropriate amendments in cases where the decision is not clear-cut and there is concern about the consequences of amending them in one way or the other.
- 39 I note that exemptions that allow a maker of secondary legislation to withhold its publication, or that exempt it from presentation or disallowance, are likely to attract particular scrutiny at select committee. Since the categorisation of instruments involves a degree of judgement, I expect that the committee will propose a range of changes to particular provisions. As an objective of this initiative is to facilitate Parliament's oversight of secondary legislation, I am comfortable with the select committee revising these judgements.

Transition to the new publication requirements

- 40 The Legislation Bill provides for a staged transition to the new publication requirements. To provide context for the following discussion, Figure 1 illustrates that transition.

⁴ For example, Speaker's directions setting out the entitlements of members of Parliament to travel services under section 23 of the Members of Parliament (Remuneration and Services) Act 2013.

Figure 1: Transition to publication under the Legislation Bill



- 41 On the main commencement date the Legislation Bill will repeal and replace the Legislation Act 2012. The SLAB will also commence (but not all amendments will come into force immediately). From this date, all makers of secondary legislation will have 12 months within which to provide the PCO with a list of their existing in-force secondary legislation. These lists will be published as a catalogue of secondary legislation on the New Zealand Legislation website, but makers will continue to publish the full text elsewhere.
- 42 The 12-month initial list deadline can be brought forward by agreement between the maker of the legislation and the Chief Parliamentary Counsel. Later deadlines can also be set by regulations for specified classes of legislation. Over time, makers will be required to lodge the full text of secondary legislation for publication on the New Zealand Legislation website. The Legislation Bill provides for the setting of publication deadlines for this purpose.
- 43 To enable this transition from a legal perspective, it is necessary to apply the definition of secondary legislation to all relevant instruments on the main commencement date (so that, for example, the interpretation and disallowance provisions of the Legislation Bill apply to all secondary legislation from the repeal of the Legislation Act 2012), but to introduce the new publication obligations progressively as agencies are ready to provide their lists.
- 44 One way of doing this would be to amend each empowering provision twice: once, to insert a statement identifying the instruments made under it as secondary legislation; the second time, to repeal existing publication and notification and requirements, and replace them with the requirement to publish in accordance with the Legislation Bill. That, however, would result in a significantly longer, more complex Bill, and would be more prone to error as a result.
- 45 Instead, I propose that a new transitional provision be included in the Legislation Bill ensure that that these instruments will be secondary legislation immediately

on the main commencement date, even if those SLAB amendments are not yet fully in force.

- 46 To help users of legislation to identify provisions that empower the making of secondary legislation before the SLAB amendments are fully in force, I propose 2 further steps be taken:
- 46.1 The PCO will provide an administrative solution. This may involve publishing a list or directory of empowering provisions that will ultimately be amended by SLAB, or by adding editorial notes to those provisions on the NZ Legislation website.
- 46.2 If necessary to provide greater clarity than this in this transitional phase, I propose that changes could be made to empowering provisions themselves under an expanded editorial power for the Chief Parliamentary Counsel to ensure that empowering provisions correctly reflect their status as secondary legislation and the resulting publication obligations under the Legislation Bill. This power is similar to other editorial powers the Chief Parliamentary Counsel has to update legislation to reflect changes in the law without any change in legal effect.

Miscellaneous approvals

Bylaw-making powers that can be exercised by a class of entities

- 47 A number of provisions empower the making of bylaws by a class of entities that includes, but is not limited to, local authorities. These bylaw-making powers are exercised by—
- 47.1 “administering bodies” of reserves under section 106(2) of the Reserves Act 1977;⁵
- 47.2 “road controlling authorities” under section 22AB of the Land Transport Act 1998⁶; and
- 47.3 “public authorities” under section 12 of the Litter Act 1979.⁷
- 48 These powers are unusual in that—

⁵ Under section 2 of the Reserves Act 1977 “administering body, in relation to any reserve, means the board, trustees, local authority, society, association, voluntary organisation, or person or body of persons, whether incorporated or not, appointed under this Act or any corresponding former Act to control and manage that reserve or in which or in whom that reserve is vested under this Act or under any other Act or any corresponding former Act; and includes any Minister of the Crown (other than the Minister of Conservation) so appointed”.

⁶ The definition of a road controlling authority includes any person having control of a road (which includes a street, motorway, beach, or “a place to which the public have access, whether as of right or not”).

⁷ The definition of a public authority includes an administering body under the Reserves Act 1977.

- 48.1 the class of entities empowered to exercise them is very wide (eg, we understand that there are hundreds reserve administering bodies that are not local authorities);
- 48.2 there are no lists of all of those entities; and
- 48.3 there is no requirement for the bylaws to be published in a central, accessible location (such as the *Gazette*).
- 49 Given the impracticability of identifying all of the makers of these bylaws, I consider it unreasonable to apply the requirements of the Legislation Bill to them (including, in future, revocation of bylaws that are not published in accordance with it). Furthermore, since these powers are also exercised by local authorities (whose legislation is already exempt), access to the bylaws made under them would only be partial.
- 50 While it is desirable that these bylaws ultimately be published in the same manner as other secondary legislation, this is likely to require more extensive changes to empowering legislation than is envisaged in the scope of this project. This should be taken up when the empowering legislation is revisited, or in future work on making secondary legislation made by local authorities more accessible, led by the Department of Internal Affairs [SEC-17-MIN-0038 refers].
- 51 I therefore propose that bylaws made by entities other than local authorities under these provisions be given a complete exemption from publication on the New Zealand Legislation website. Existing publication and notification requirements for those bylaws would be preserved. I note that most of these bylaws are subject to the Bylaws Act 1910 and are therefore not disallowable under either the Legislation Act 2012 or the Legislation Bill.

Change to the Legislation Bill concerning confirmable instruments

- 52 Currently, empowering legislation for instruments that must be confirmed by Act of Parliament requires the explanatory notes to those instruments to indicate that they are confirmable, and the deadline on which they are revoked, if not confirmed.
- 53 Rather than this being required in every individual empowering provision, I propose that the Legislation Bill state this generically. I also propose to make it clear that a failure to include an explanatory note does not affect the validity of the instrument, as this has created unnecessary legal risk.

Approval to consult on draft amendments

- 54 To prepare the SLAB, the PCO has consulted extensively with agencies that administer Acts about the amendments in it. In many cases, those administering agencies wish to consult with other bodies empowered by those Acts to make secondary legislation. To facilitate this process, I seek your approval for drafts of SLAB to be provided to any makers of secondary legislation that administering agencies or the PCO wish to consult.
- 55 SLAB will amend the New Zealand Superannuation and Retirement Income Act 2001. That Act contains a mechanism for political parties to signal their

agreement on the parameters for New Zealand superannuation entitlements and funding. In the case of its amendment, the Minister of Finance must provide a statement to the House of Representatives about the consultation that has taken place with the political parties that are in agreement with the Part proposed to be amended. The amendments will not make any substantive changes to the Act, but the statement by the Minister of Finance is a statutory requirement. I seek your approval to consult political parties on those amendments.

Implementation

- 56 As well as preparing the legislation, the project is planning for the implementation of the Bills.
- 57 To support agencies that administer secondary legislation to meet their obligations, the PCO will establish a service that enables them to lodge information about their secondary legislation (and, over time, the full text of it) for publication on the NZ Legislation website. To do this, the PCO will—
- 57.1 Design, develop and deploy IT solutions, including:
 - 57.1.1 Technology to assist with capturing and loading the initial lists of secondary legislation from agencies.
 - 57.1.2 A lodgement portal that allows makers to submit information in future about new secondary legislation for publication on the NZ Legislation website.
 - 57.1.3 An authoring solution, i.e. a MS-Word drafting template that enables agencies to draft secondary legislation in a structure and a format suitable for publication on the NZ Legislation website.
 - 57.1.4 Changes to the NZ Legislation website to cater for secondary legislation drafted by agencies such that website users are able to find secondary legislation and to see the relationships between primary and secondary legislation and be informed of changes to legislation.
 - 57.2 Provide support (training, documentation, coaching etc.) to help makers and agencies implement the new legislation, cope with the transitional publication arrangements, and adopt the lodgement portal, taking into account the diversity of support needs for different makers and agencies.
 - 57.3 Provide support (training, documentation, coaching etc.) to PCO business units (drafting, publication and IT) to enable them to serve the makers and administering agencies for secondary legislation on an ongoing basis once the project has ended.
- 58 The 1-year default timeframe for the list duty will drive a peak of activity in the lead-up to commencement of the bills, and for one year after. During this time, the PCO will have to—

- 58.1 make the lodgement portal available to often multiple users in the 100+ agencies that make secondary legislation and train users of it;
 - 58.2 assist agencies to prepare and lodge lists of their secondary legislation; and
 - 58.3 identify any agencies that will need a longer timeframe to locate, and provide information on, their legislation so that later deadlines can be set in regulations.
- 59 The PCO has made significant progress on the requirements for a lodgement portal and changes to the NZ Legislation website. The major technology investment for the project will be the lodgement portal. The PCO is exploring the potential to reuse the intellectual property underlying the CabNet system for this purpose, and will procure and build the portal iteratively between now and early 2020 to ensure a smooth roll-out.
- 60 The PCO has also undertaken CE and DCE level engagement with agencies that administer primary legislation and non-departmental makers of secondary legislation. To secure the breadth and depth of engagement needed to test and refine solutions and develop the change management support agencies will need, the project has recruited a reference group of agencies that administer secondary legislation.

Consultation

- 61 The following departments and agencies have been consulted on this paper:
- Crown Law Office
 - Department of Conservation
 - Department of Corrections
 - Department of Internal Affairs
 - Department of Prime Minister and Cabinet
 - Government Communications Security Bureau
 - Inland Revenue Department
 - Land Information New Zealand
 - Ministry for Culture and Heritage
 - Ministry for Primary Industries
 - Ministry for the Environment
 - Ministry of Business, Innovation, and Employment
 - Ministry of Defence
 - Ministry of Education
 - Ministry of Foreign Affairs and Trade
 - Ministry of Health
 - Ministry of Housing and Urban Development
 - Ministry of Justice
 - Ministry of Social Development
 - Ministry of Transport
 - New Zealand Customs Service
 - New Zealand Defence Force
 - New Zealand Police
 - New Zealand Security Intelligence Service

- Office of the Clerk
- Oranga Tamariki—Ministry for Children
- Parliamentary Service
- State Services Commission
- Statistics New Zealand
- Te Puni Kōkiri
- The Treasury.

62 Consultation on aspects of the proposals in this paper was undertaken with the Regulations Review Committee and the Legislation Design and Advisory Committee (LDAC).

63 The Regulations Review Committee was not persuaded that full publication exemptions could ever be justified, but was prepared to wait and review the proposed exemptions once the SLAB is before the House.

Financial Implications

64 The legislative proposals in this paper have no direct financial implications in themselves. [2 sentences redacted]

Human Rights

65 The Legislation Bill is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative Implications

66 Legislation is required to implement the proposals discussed in this paper.

67 The SLAB holds a category 5 priority (to be referred to a select committee in the year) on the 2019 Legislation Programme.

Impact Analysis

68 The Regulatory Quality Team at the Treasury has determined that the regulatory decisions sought in this paper are exempt from the requirement to provide an Impact Assessment as the relevant issues have been addressed in the business case.

Gender Implications

69 A gender analysis has not been undertaken. The Legislation Bill will benefit all users of legislation alike.

Disability Perspective

70 The proposal has no specific disability implications, but will make it easier for people with disabilities to find the law. Changes made to the New Zealand

Legislation website to support the project will take into account the needs of users.

Publicity

71 A press statement will be issued following the introduction of the Bill.

Proactive Release

72 The PCO will publish a copy of this paper on its website.

Recommendations

The Attorney-General recommends that the Committee—

- 1 **note** that the Legislation Bill, which is awaiting its second reading, includes reforms to improve access to secondary legislation by providing that information about secondary legislation made by agencies (and, over time, the full text) be lodged with the PCO for publication on the New Zealand Legislation website
- 2 **note** that the PCO is preparing a companion Bill, with the working title of Secondary Legislation (Access) Bill, to amend provisions in legislation that enable secondary legislation to be made, to clarify that instruments made under these provisions are secondary legislation (and so must be published in accordance with the Legislation Act)
- 3 **agree** that the Secondary Legislation (Access) Bill be split into 2 tranches, the first of which would be introduced in mid-2019, and the second promoted as an SOP to be referred to the select committee while it is considering the first tranche
- 4 **note** that Cabinet has previously agreed that in deciding whether or not instruments are secondary legislation, the focus should be on the substantive effect (and not the form) of an instrument: an instrument has legislative effect if it makes the law or alters its content, rather than just applying the law in a particular case (LEG-18-MIN-0041 refers).
- 5 **agree** that the more detailed principles expressed in paragraphs 16-19 of this paper be used to apply the earlier Cabinet decision, and determine which provisions will be amended (or not) to state that the instruments made under them are secondary legislation
- 6 **note** that as a result of applying the legislative effect principles, a small category of disallowable instruments will not become secondary legislation
- 7 **agree** that the Bill be drafted with the presumption that an exemption that only applies to particular named persons is not legislative, whereas one that applies to a class of persons is
- 8 **agree** that—
 - where provisions empower a person to make instruments that could be either legislative or administrative; and
 - the amendments necessary to distinguish between those types of instruments would result in them being published in a way that is confusing for users, or would increase administrative complexity—all of the instruments made under the provision will be classified as secondary legislation.
- 9 **agree** that exemptions from the publication requirements of the Legislation Bill will be conferred where Parliament has previously expressly authorised the makers to withhold publication of all or part of an instrument

- 10 **note** that Cabinet has previously agreed that existing express exemptions from disallowance for instruments that will become secondary legislation will be preserved [SEC-17-MIN-0038 refers]
- 11 **authorise** me to decide whether particular provisions should be considered to create secondary legislation, or whether an exemption from publication or disallowance should apply, where the decision is not clear-cut and there is concern about the consequences of amending them in one way or the other
- 12 **note** that—
- 12.1 there will be a staggered transition to the new publication requirements of the Legislation Bill, but that
- 12.2 the definition of secondary legislation will apply to all instruments with legislative effect from the commencement of both Bills (as this ensures that only one set of rules concerning the interpretation and disallowance of legislation is in operation at any time)
- 13 **agree** that a transitional provision be included in the Legislation Bill to ensure that all relevant instruments will be secondary legislation immediately on the main commencement date, even if all the SLAB amendments relating to them are not fully in force
- 14 **agree** that an editorial power for the Chief Parliamentary Counsel to ensure that empowering provisions correctly reflect their status as empowering the making of secondary legislation and the resulting publication obligations be added to the Legislation Bill
- 15 **agree** that bylaws made under section 106(2) of the Reserves Act 1977, section 22AB of the Land Transport Act 1998, and section 12 of the Litter Act 1979 be given complete publication exemptions (whether or not they are made by a local authority)
- 16 **note** that empowering legislation for instruments that must be confirmed by Act of Parliament requires the explanatory notes to those instruments to indicate that they are confirmable, and the deadline on which they are revoked, if not confirmed
- 17 **agree** that—
- the requirements for explanatory notes for confirmable instruments be moved from each individual empowering Act to the Legislation Bill; and
 - a failure to include an explanatory note does not affect the validity of the instrument
- 18 **note** that Legislation Bill does not exempt secondary legislation with a partial publication exemption from presentation to the House
- 19 **authorise** me to decide on a case-by-case basis, in order to avoid public disclosure of sensitive information, whether secondary legislation with a partial publication exemption should also be exempt from presentation, such that—

- if parts of an instrument are sensitive, only the parts that are not sensitive are presented; or
 - if the whole instrument is sensitive, only its minimum legislative information is presented
- 20 **agree** that drafts of SLAB may be provided to any makers of secondary legislation for consultation
- 21 **agree** that consultation be undertaken with political parties concerning proposed amendments to the New Zealand Superannuation and Retirement Income Act 2001
- 22 **note** that to implement the bills the PCO will—
- develop technology solutions for agencies to draft secondary legislation in consistent format, and to lodge secondary legislation, and information about it, in accordance with the Legislation Bill’s requirements;
 - make changes to the New Zealand Legislation website to enable the publication of an authoritative catalogue of secondary legislation and, over time, the full text of it;
 - provide support to agencies to adopt the new lodgement solution and comply with the legislation; and
 - establish the processes within PCO to support agencies on an ongoing basis.
- 23 **note** that the PCO will iteratively procure and build a lodgement portal that allows makers of secondary legislation to submit information about it for publication on the NZ Legislation website between now and early 2020.

Authorised for lodgement

Hon David Parker
Attorney-General