

In Confidence

Office of the Attorney-General

Chair, Cabinet Legislation Committee

## **Legislation Act 2019 regulations and commencement order: policy approvals**

### **Proposal**

- 1 This paper seeks approval for the drafting of—
  - 1.1 regulations under the Legislation Act 2019 to—
    - 1.1.1 prescribe how secondary legislation made under new empowering provisions (i.e. empowering provisions enacted after that Act comes into force) must be published and notified;
    - 1.1.2 consequentially amend secondary legislation that sub-delegates powers to make legislation to state that the sub-delegated instruments are secondary legislation;
    - 1.1.3 provide for other minor matters to support the operation of the Act;
  - 1.2 commencement orders to bring the Legislation Act 2019 (except for Part 4), the Secondary Legislation Act 2021 and Part 2 of the Legislation (Repeals and Amendments) Act 2019 into force (which I expect to be in the last quarter of this year).

### **Relation to government priorities**

- 2 This is a routine operational adjustment that requires Cabinet approval.

### **Background**

- 3 The Legislation Act 2019 is a replacement for the Legislation Act 2012 and the Interpretation Act 1999. When brought into force, it will set the legal framework applying to all legislation in New Zealand, including its interpretation, publication, and oversight by Parliament.
- 4 The Legislation Act 2019 contains reforms to the manner in which publication and notification requirements for secondary legislation (that is, legislation made under powers delegated by Parliament to another person or body) are prescribed.
- 5 The Secondary Legislation Act 2021 is a companion to the Legislation Act 2019. It identifies which instruments made under Acts of Parliament are secondary legislation, and therefore subject to the provisions of the Legislation Act 2019. It amends every provision of every Act that empowers the making of instruments with legislative effect to state that those instruments are secondary legislation.

- 6 The Legislation Act 2019, the Secondary Legislation Act 2021, and Part 2 of the Legislation (Repeals and Amendments) Act 2019<sup>1</sup> must be brought into force on the same date (called the “main commencement date”), along with regulations necessary to support the Legislation Act 2019’s operation. Regulations are required to—
- 6.1 prescribe how agencies must publish and notify secondary legislation if it is made under an empowering provision enacted after the main commencement date;
  - 6.2 prescribe the information the PCO is required to notify in the *Gazette* about secondary legislation published by it;
  - 6.3 amend secondary legislation that sub-delegates a power to make other secondary legislation to clarify the status of the sub-delegated legislation; and
  - 6.4 update the Legislation (Official Versions) Regulations 2015 so that they apply to official versions of legislation issued under the Legislation Act 2019.
- 7 Regulations may also be required to amend empowering provisions to clarify the legislative status of instruments made under them (if any provisions are identified that were overlooked or incorrectly amended by the Secondary Legislation Act).
- 8 In the following sections of this paper I seek agreement to the content of the regulations and to the drafting of commencement orders to bring the Acts into force.

### **Publication of secondary legislation**

- 9 Currently, secondary legislation drafted by the PCO is required, by the Legislation Act 2012, to be published on the New Zealand Legislation website ([www.legislation.govt.nz](http://www.legislation.govt.nz)). Secondary legislation drafted by other agencies must be published in accordance with requirements prescribed in each empowering provision. When the Legislation Act 2019 and the Secondary Legislation Act, come into force, publication requirements for all secondary legislation will be set by the Legislation Act as follows.
- 9.1 Secondary legislation made under empowering provisions that were enacted before the commencement of the Legislation Act 2019 will be required to be published in accordance with the requirements that applied immediately before the commencement of the Act (see LEG-19-MIN-0147; CAB-19-MIN-0499)
  - 9.2 Secondary legislation (except that drafted by the PCO) made under empowering provisions enacted after the Legislation Act 2019 comes into

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<sup>1</sup> Part 2 of the Legislation (Repeals and Amendments) Act 2019 repeals the Interpretation Act 1999 and the Legislation Act 2012, which are replaced by the Legislation Act 2019, and amends the Imperial Laws Application Act 1998 and the Local Government Act 2002 to determine how the Legislation Act 2019 applies to imperial legislation and secondary legislation made by local authorities, respectively.

force will be required to be published in accordance with regulations under the Act.

- 10 The Legislation Act 2019, along with proposed amendments to it contained in Part 3 and Schedule 2 of the Legislation (Repeals and Amendments) Act 2019, provides ultimately for all secondary legislation to be published on the NZ Legislation website. However, this will require the implementation of new IT systems and processes in the PCO and other agencies that draft secondary legislation. The Legislation Act 2019 therefore provides for a staged transition.

*How the Legislation Act 2019 and regulations will support access to secondary legislation*

- 11 Although the Legislation Act 2019 preserves existing publication and notification requirements for the time being, access to legislation is still improved by commencing the Act, and by other steps the PCO is taking to implement it.
- 12 First, it will be clear from each empowering provision whether instruments made under it are secondary legislation. Acts of Parliament currently do not usually state when they delegate a power to make secondary legislation. Users must apply the complex definitions of legislative instruments and disallowable instruments in the Legislation Act 2012. As a result it is not apparent whether an instrument makes law, in some cases even to its maker. The Legislation Act 2019 and the Secondary Legislation Act 2021 remove this uncertainty.
- 13 Secondly, whenever a new power to make secondary legislation is enacted, the secondary legislation made under it will be published and notified in a consistent manner. The basic requirements I propose (below) in this paper are that secondary legislation (other than that drafted and published by the PCO) be notified in the *Gazette* and published in full on the website of the body making it.
- 14 Thirdly, the PCO is preparing to publish notes under each empowering provision stating the publication, presentation and disallowance requirements for secondary legislation made under it, so that they are apparent on the face of each relevant Act.
- 15 The Legislation Act 2019 will also enable the PCO and other agencies to make ongoing improvements that support access to secondary legislation. For example, having clarity about what instruments are secondary legislation will enhance agencies' ability to exercise stewardship of their legislation, as required by section 12 of the Public Service Act 2020. Agencies may do this by improving the availability and organisation of their collections of secondary legislation, so that the collections are up-to-date and accessible on their individual websites.
- 16 Furthermore, the Legislation Act 2019 will give the PCO a new function to "provide guidance and other support for, and keep under review, practices relating to the design, drafting, and publication of legislation". The PCO is planning to issue guidance to agencies about good practice in relation to secondary legislation published by them, including expectations about its public availability.

**Publication and notification requirements for agency-drafted secondary legislation**

*Secondary legislation made under new empowering provisions will be published online, free of charge*

- 17 For consistency with the Legislation Act 2019’s goal of electronic publication, I propose that agency-drafted secondary legislation made under empowering provisions enacted after the main commencement date be required to be—
- 17.1 published on an Internet site maintained by or on behalf of the person responsible for publishing the secondary legislation;
  - 17.2 as far as practicable, able to be accessed at, or downloaded from, that Internet site at all times free of charge; and
  - 17.3 notified in the *Gazette* as soon as practicable after it is made.
- 18 Although these are the “default” requirements for secondary legislation made under new empowering provisions, makers of secondary legislation under existing empowering provisions will in future be able to “opt in” to them instead of continuing to apply the old “saved” requirements. This can be done by amending the Legislation Act 2019’s publication regulations to specify empowering provisions to which the new default requirements in those regulations will apply. To avoid a large amount of change in one go, however, I intend that agencies be invited to recommend provisions for inclusion in that list at some point after the Legislation Act 2019 comes into force.
- 19 The requirements in paragraph 17 are the same as those that apply to legislation published by the PCO under the Legislation Act 2019, and implement a recommendation from the Regulations Review Committee’s 2014 *Inquiry into the oversight of disallowable instruments that are not legislative instruments*.
- 20 I note that a requirement to make hard copies of secondary legislation available for purchase at a reasonable price was considered but discarded. The Legislation Act 2019 does not impose such a requirement on PCO-drafted legislation, and in the PCO’s experience few people purchase printed copies.

*Consistent information will be notified in the Gazette for secondary legislation made under new empowering provisions*

- 21 I propose that *Gazette* notices for new secondary legislation will be required to state—
- 21.1 the title of the secondary legislation;
  - 21.2 the date of making;
  - 21.3 the empowering provision;
  - 21.4 the administering agency;
  - 21.5 the website where the secondary legislation is published; and
  - 21.6 that the instrument being notified is secondary legislation.
- 22 The title, empowering provision, and administering agency are included as basic identifying information, and reflect the definition of minimum legislative information in section 5 of the Legislation Act 2019. Including the date of making in a *Gazette* notice for secondary legislation ensures that a presumption (under section 142 of

the Evidence Act 2006) that it was made on that date will apply to it. A statement that the instrument being notified is secondary legislation will enable users of legislation and the Regulations Review Committee to distinguish notices relating to secondary legislation from the many other types of *Gazette* notices.

*The PCO will notify the same information in the Gazette about secondary legislation it publishes*

23 Currently, the Legislation Act 2012 prescribes the information that the PCO must notify in the *Gazette* about new legislative instruments. Under the Legislation Act 2019, that information must be prescribed in regulations.

24 I propose that the PCO be required to notify the same information about new secondary legislation as agencies would be required to (see para 21, above).

*Some sensitive secondary legislation may be exempted from the publication requirements by the regulations*

25 In rare cases, secondary legislation must be exempted from the publication requirements of the Legislation Act 2019 because it contains sensitive information. To cater for such situations, the regulations will list empowering provisions to which the publication and notification requirements do not apply and, if applicable, the grounds on which they do not apply (eg, if only some of the secondary legislation made under a particular provision is sensitive).

26 So that Parliament retains control over exemptions from publication, I expect that any Bill where such an exemption is proposed will itself include the necessary amendment to the Legislation Act regulations (rather than this being left to amending Regulations, which would be less visible to Parliament). In future, when centralised publication comes into force, all exemptions will be set out in Schedule 3 of the Legislation Act 2019.<sup>2</sup> At that time, a transitional regulation-making power in the Legislation Act 2019 will be used to transfer publication exemptions from the regulations to Schedule 3.

## **Other regulations**

*Regulations will amend secondary legislation to reflect sub-delegation of powers to make other secondary legislation*

27 Secondary legislation may authorise the making of other secondary legislation. In such cases, the secondary legislation that sub-delegates a legislative power must be amended to state that the sub-delegated instruments are secondary legislation. The Secondary Legislation Act does not directly amend secondary legislation to insert these statements. Instead, it adds a new regulation-making power as section 147A of the Legislation Act 2019 to enable the required amendments to be made via one set of regulations.

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<sup>2</sup> The version of Schedule 3 that will apply post-centralised publication is currently Schedule 36 of the Secondary Legislation Act 2021.

- 28 The amendments themselves are simple in nature. I therefore simply seek approval for the regulations to be drafted.

*The Legislation (Official Versions) Regulations 2015 will be updated to reflect the new Act*

- 29 Regulations may specify features by which an electronic or printed document is identifiable as an official version of legislation. Regulations that do this already exist under the Legislation Act 2012, but need to be updated to state that they also apply to official versions under the Legislation Act 2019. I propose that the regulations amend the Legislation (Official Versions) Regulations 2015 for this purpose.

*Transitional regulations to correct or clarify the status of instruments*

- 30 The Legislation Act 2019 contains a transitional regulation-making power (clause 19 of Schedule 1) to amend empowering provisions to correctly reflect whether or not they empower the making of secondary legislation, and to ensure that the Legislation Act applies to them appropriately. Its purpose is effectively to fix empowering provisions that were overlooked or incorrectly amended by the Secondary Legislation Act. The power can only be exercised on the advice of the Attorney-General after he has consulted with the Regulations Review Committee.
- 31 To date PCO and agencies have identified no empowering provisions that were overlooked in the development of the Secondary Legislation Bill. They have identified some minor mistakes in how a few of the amendments were drafted and, given the sheer number of amendments in the Secondary Legislation Act, it is likely that a few more will be found. I therefore seek Cabinet's authorisation to agree that regulations be drafted under the transitional regulation-making power if mistakes are discovered.

**Things the regulations won't do**

- 32 I wish to note some matters that were considered for inclusion in the regulations, but not recommended in this paper. Those include—
- 32.1 a requirement for agencies to publish consolidated versions of secondary legislation that is amended;
  - 32.2 a requirement for agencies to make secondary legislation published by them accessible from a single page on their websites.
- 33 Although these requirements would help to ensure that secondary legislation is accessible to users, they would also entail changes to some agencies' processes and websites. Without knowing more about the extent and cost of those changes I consider it premature to legislate these requirements at this time. However, guidance issued by the PCO could cover these aspects. The Legislation Act 2019 will also provide for the Chief Parliamentary Counsel to report annually on practices relating to the design, drafting, and publication of legislation. This will provide an opportunity, once the new Legislation Act is in force, to revisit these matters.
- 34 Finally, regulation-making powers in the Legislation Act 2019 also provide for the regulations to prescribe additional "minimum legislative information" (MLI) as defined in section 5 of the Act. This is intended to be basic identifying information about every item of secondary legislation, and at present includes the title,

empowering provision and administering agency for the legislation. The main reason for prescribing additional MLI would be to ensure the origin and status of agency-drafted secondary legislation published on the New Zealand Legislation website is absolutely clear. Since this will only be an issue after centralised publication begins, I do not recommend prescribing additional MLI at this time.

### **Commencement of the Legislation Act 2019, the Secondary Legislation Act 2021 and Part 2 of the Legislation (Repeals and Amendments) Act 2019**

- 35 I seek your approval for the drafting of commencement orders to bring the Legislation Act 2019 (except for Part 4), Secondary Legislation Act 2021 and Part 2 of the Legislation (Repeals and Amendments) Act 2019 into force. I expect commencement to be in the last quarter of 2021. This will allow time for the regulations to be made and published in accordance with the 28-day rule, and for the PCO to provide communications to agencies about the implications of the new Legislation Act, and prepare and begin to publish the unusually large number of reprints of Acts amended by the Secondary Legislation Act.
- 36 Part 4 of the Legislation Act 2019, which is administered by the Treasury, prescribes disclosure requirements for Government-initiated legislation. The commencement date for Part 4 needs to be later than for other parts of the Legislation Act, to enable the Treasury to first engage with and seek the approval of the House to the range of information that must be included in disclosure statements before Part 4 becomes operative.

### **Attorney-General drafting approvals**

- 37 The Legislation Act 2019 authorises me to issue directions about the legislation that the PCO must draft. These include directions to draft members' Bills, directions to draft secondary legislation that PCO is not otherwise required to draft, and directions not to draft Orders in Council (which the PCO would otherwise be required to draft). For the purposes of initial implementation of the Legislation Act 2019, I intend to give directions that are needed to preserve the *status quo* in terms of what PCO drafts.

### **Approval to consult on draft regulations**

- 38 The PCO has consulted with agencies that administer Acts about the proposals in this paper. In some cases, those agencies may 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 the regulations to be provided to any makers of secondary legislation that administering agencies or the PCO wish to consult.

### **Financial Implications**

- 39 The proposals in this paper do not have financial implications.

### **Legislative Implications**

- 40 The proposals in this paper will be implemented through regulations made by Order in Council under sections 147 and 147A of the Legislation Act 2019, and commencement orders under the Legislation Act 2019, Legislation (Repeals and Amendments) Act 2019 and Secondary Legislation Act 2021.

## **Impact Analysis**

- 41 The Regulatory Quality Team at the Treasury has determined that the regulatory proposals in this paper are exempt from the requirement to provide a Regulatory Impact Statement on the basis that they have no or minor impacts on businesses, individuals or not for profit entities.

## **Population Implications**

- 42 There are no population implications from these policy proposals.

## **Human Rights**

- 43 There are no human rights implications from these policy proposals.

## **Consultation**

- 44 The following government departments and agencies were consulted on this paper: Department of Conservation, Department of Corrections, Department of Internal Affairs, Department of the Prime Minister and Cabinet, 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, Office of the Clerk, Oranga Tamariki—Ministry for Children, Parliamentary Services, Public Service Commission, Public Trust, Reserve Bank of New Zealand, Sport New Zealand, Statistics New Zealand, Te Arawhiti, Te Puni Kokiri, and the Treasury.

## **Communications**

- 45 There will be a public announcement when the regulations and commencement orders are made.

## **Proactive Release**

- 46 I will release this paper proactively, subject to redactions as appropriate under the Official Information Act 1982.

## Recommendations

The Attorney-General recommends that the Committee—

- 1 **note** that when the main provisions of the Legislation Act 2019 (the Act) come into force, the publication and notification requirements for secondary legislation will be set under the Act;
- 2 **note** that the Act will preserve publication and notification requirements for secondary legislation made under existing empowering provisions for the time being;
- 3 **note** that publication and notification requirements for secondary legislation drafted by agencies under new empowering provisions will be set by regulations under the Act;
- 4 **agree** that agency-drafted secondary legislation made under empowering provisions enacted after the Act comes into force be required to be—
  - published on an Internet site maintained by or on behalf of the person responsible for publishing the secondary legislation;
  - as far as practicable, able to be accessed at, or downloaded from, that Internet site at all times free of charge; and
  - notified in the *Gazette* as soon as practicable after it is made;
- 5 **agree** that notice of making of agency-drafted secondary legislation will state—
  - the title of the secondary legislation;
  - the date of making;
  - the empowering provision;
  - the administering agency;
  - the website where the secondary legislation is published; and
  - that the instrument being notified is secondary legislation;
- 6 **agree** that the same information will be required to be notified in the *Gazette* for secondary legislation published by the PCO;
- 7 **agree** that regulations be made to consequentially amend secondary legislation that sub-delegates powers to make legislation to state that the sub-delegated instruments are secondary legislation;
- 8 **agree** that the regulations amend the Legislation (Official Versions) Regulations 2015 so that they apply to official versions of legislation issued under the Act;
- 9 **note** that clause 19 of Schedule 1 of the Act enables regulations to amend empowering provisions to correct or clarify the status of instruments made under them and ensure the Act applies to them appropriately;

- 10 **authorise** me to agree that regulations be drafted under clause 19 of Schedule 1 of the Act to correct technical mistakes in how amendments in the Secondary Legislation Act were drafted, if required;
- 11 **agree** that commencement orders be drafted to bring the Act (except for Part 4), the Secondary Legislation Act 2021 and Part 2 of the Legislation (Repeals and Amendments) Act 2019 into force (which I expect to be in the last quarter of this year);
- 12 **invite** me to issue drafting instructions to the PCO to give effect to the above recommendations;
- 13 **authorise** me to approve minor or technical changes, consistent with the policy set out in this paper, on any issues that arise during drafting; and
- 14 **agree** that drafts of the regulations may be provided to any makers of secondary legislation for consultation.

Authorised for lodgement

Hon David Parker  
**Attorney-General**