

In Confidence

Office of the Attorney-General

Chair, Cabinet Legislation Committee

## **SECONDARY LEGISLATION BILL – TWO SUPPLEMENTARY ORDER PAPERS: APPROVAL FOR RELEASE**

### **Proposal**

- 1 I propose that two Supplementary Order Papers (SOPs) to amend the Secondary Legislation Bill (the Bill) be approved for release.
- 2 The main effect of the first SOP is to—
  - 2.1 update the Bill by including amendments to Acts enacted in 2020;
  - 2.2 amend the commencement clauses of the Bill and the Legislation Act 2019 to align their back-stop commencement dates and ensure amendments that are not commenced by that back-stop date are repealed; and
  - 2.3 amend the Legislation Act 2019 to enable an “opt in” to the future publication requirements for secondary legislation made under existing empowering provisions.
- 3 The second SOP would amend the Legislation Act 2019 to clarify that various notes inserted in legislation by the PCO in exercise of its publication function are not part of the law and make another technical change. As these amendments are outside the scope of the Bill, approval will be sought from the Business Committee for the Committee of the Whole House to consider and adopt them.

### **Policy**

- 4 The Bill is a companion to the Legislation Act 2019. It amends over 2,500 empowering provisions across the statute book to identify the instruments made under them as secondary legislation.
- 5 The Bill was introduced in December 2019 and was reported back by the Regulations Review Committee in June 2020.

### *Updates for Acts enacted in 2020*

- 6 The main thing the first SOP does is update the Bill for legislation enacted in 2020. It amends empowering legislation in accordance with Cabinet’s earlier decisions about the kinds of instruments that should be secondary legislation, or with my approval under Cabinet’s delegated authority (LEG-19-MIN-0031; CAB-19-MIN-0106).

### *Commencement changes*

- 7 The first SOP also includes amendments to the Legislation Act 2019 and the commencement clause of the Bill, for which I seek your approval.
- 8 The commencement changes would:
  - 8.1 Bring amendments to the Legislation Act 2019 into force on the day after Royal assent so that the amendments take effect immediately for the purpose of the regulation-making powers (which will be used before the rest of the Legislation Act 2019 commences).
  - 8.2 Bring regulation-making powers into force on the day after Royal assent to facilitate the making of regulations that need to be in force when the rest of the Act commences.
  - 8.3 Align the backstop commence dates for the legislation. Various provisions of the Legislation Act 2019, the Legislation (Repeals and Amendments) Act 2019, and this Bill will need to come into force at the same time. The back-stop dates of those 2 Acts are therefore amended to align with this Bill.
  - 8.4 Provide that amendments to Acts are repealed if they are not commenced immediately before the backstop date (for example, if the relevant amendments were not effective because the relevant Act had been repealed).

### *Flexibility to apply publication requirements prescribed in regulations*

- 9 The first SOP would also amend the Legislation Act 2019 to enable an “opt in” to the future requirements for publication for secondary legislation. In its present form, the Legislation Act 2019 provides that—
  - 9.1 the current publication requirements for secondary legislation made under existing empowering provisions will be preserved; and
  - 9.2 publication requirements for secondary legislation made under new empowering provisions (ie, ones enacted after the Legislation Act comes into force) will be set in regulations.
- 10 This could result in some makers of secondary legislation having to publish and notify their secondary legislation in different places, depending on whether it is made under an old or a new empowering provision. Some makers will also have out-dated (eg, pre-Internet) publication requirements that it is desirable to move away from. To provide flexibility in these cases, I propose that Legislation Act 2019 be amended so that the publication requirements in regulations can also be applied to secondary legislation made under existing empowering provisions.
- 11 I note that the Legislation Act’s publication regulations will only apply to secondary legislation made under existing empowering provisions if—
  - 11.1 the maker of the secondary legislation agrees; and
  - 11.2 the regulations specify the relevant empowering provisions.

- 12 I intend to bring a separate paper to Cabinet in the coming weeks to seek policy approvals regarding the content of those regulations.

#### *Clarifying the status of notes in legislation*

- 13 The second SOP contains amendments to the Legislation Act 2019 to clarify the status of notes in legislation published by the PCO.
- 14 In the exercise of its publishing function the PCO inserts various editorial notes, metadata, and other information into official versions of legislation to assist users of the legislation. As part of the transitional arrangements in the Legislation Act 2019, the PCO will also be making more extensive use of notes to explain the publication requirements for secondary legislation. New section 79A is inserted to ensure that the status of information of this kind is made absolutely clear: that it is not part of the law. Section 91, which requires the PCO to indicate where editorial powers have been used to make changes to legislation, is reworded for consistency with new section 79A.
- 15 While these amendments will support the PCO's ability to implement the reforms relating to secondary legislation, they also would apply to primary legislation. They therefore go beyond the scope of the Bill as introduced, which only relates to secondary legislation. A further, minor amendment is included to update the definition of Ministry in the section 13 of the Legislation Act 2019 to reflect the Public Service Act 2020, which is also out of scope.
- 16 To enable these amendments to progress, I propose that the agreement of the Business Committee be sought for the Committee of the Whole House to consider and adopt them.
- 17 Some minor editorial changes to the SOPs may be required before they are released. I seek your approval to release the SOPs subject to such changes prior to the Committee of the Whole House stage of the Bill.

#### **Impact analysis**

- 18 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.

#### **Compliance**

- 19 The SOPs comply with:
- 19.1 the principles of the Treaty of Waitangi;
  - 19.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
  - 19.3 the disclosure statement requirements – a supplementary disclosure statement is not required as the SOP makes no material policy changes and does not contain other features that require one;
  - 19.4 the principles and guidelines set out in the Privacy Act 1993; and

19.5 the Legislation Guidelines (2018 edition).

### **Consultation**

20 The following government departments and agencies were consulted on the SOPs: Department of Conservation, Department of Corrections, Department of Internal Affairs, Department of the Prime Minister and Cabinet, Inland Revenue Department, Ministry for Culture and Heritage, Ministry for the Environment, Ministry for Primary Industries, Ministry of Business, Innovation and Employment, 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, Public Service Commission, Reserve Bank of New Zealand, Statistics New Zealand, Te Puni Kokiri, and the Treasury.

### **Binding on the Crown**

21 The Bill does not itself specify whether it will be binding on the Crown. The Acts that will be amended by the Bill are, for the most part, already binding on the Crown.

### **Allocation of decision-making powers**

22 The SOP does not affect the allocation of decision-making powers between the executive, the courts, and tribunals.

### **Associated regulations**

23 The SOPs do not include new regulation-making powers. The first SOP will ensure that regulation-making powers in the Legislation Act 2019 come into force on the day after Royal assent of the Bill.

### **Other instruments**

24 The SOPs do not include provision to make other instruments that are deemed to be legislative instruments or disallowable instruments.

### **Definition of Minister/department**

25 The second SOP updates the definition of Ministry in the section 13 of the Legislation Act 2019 to reflect the Public Service Act 2020.

### **Commencement of legislation**

26 As a result of the first SOP, the amendments to the Legislation Act 2019 and the Legislation (Repeals and Amendments) Act 2019 in the Bill would come into force on the day after Royal assent. The remainder the Bill comes into force on the fifth anniversary of Royal assent, if not commenced earlier by Order in Council.

27 I anticipate that most of the Bill, along with the main provisions of the Legislation Act 2019, will be brought into force 3-6 months after the enactment of the Bill. This will provide time for agencies for agencies to prepare for the new Legislation Act regime.

## Parliamentary stages

- 28 I propose that the SOPs be released prior to the Committee of the Whole House stage of the Bill.

## Proactive Release

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

## Recommendations

The Attorney-General recommends that the Cabinet Legislation Committee—

- 1 **note** that the Secondary Legislation Bill holds a category 3 priority on the 2020 Legislation Programme (to be passed if possible in the year);
- 2 **note** the attached SOPs, the main effect of which is to—
  - 2.1 update the Bill by including amendments to Acts enacted in 2020;
  - 2.2 amend the commencement clauses of the Bill and the Legislation Act 2019 to align their back-stop commencement dates and ensure amendments that are not commenced by that back-stop date are repealed;
  - 2.3 amend the Legislation Act 2019 to clarify that various notes inserted in legislation by the PCO in exercise of its publication function are not part of the law; and
  - 2.4 amend the Legislation Act 2019 to enable an “opt in” to the future publication requirements for specified secondary legislation made under existing empowering provisions.
- 3 **approve** the attached SOPs (subject to any minor editorial changes) for release;
- 4 **agree** that the approval of the Business Committee be sought for the committee of the whole House to consider and adopt the SOP containing amendments regarding the status of publication notes and some other technical corrections to the Legislation Act 2019.

Authorised for lodgement

Hon David Parker  
**Attorney-General**