



Cabinet Legislation Committee

Minute of Decision

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Secondary Legislation (Access) Bill: Policy Approvals

Portfolio **Attorney-General**

On 19 March 2019, the Cabinet Legislation Committee:

- 1 **noted** 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 Parliamentary Counsel Office (PCO) for publication on the New Zealand Legislation website;
- 2 **noted** 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 **agreed** that the Secondary Legislation (Access) Bill be split into two tranches, the first of which would be introduced in mid-2019, and the second promoted as a Supplementary Order Paper (SOP) to be referred to the select committee while it is considering the first tranche;
- 4 **noted** that on 29 March 2019, the Cabinet Legislation Committee (LEG) 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);
- 5 **agreed** that the more detailed principles expressed in paragraphs 16-19 of the paper under LEG-19-SUB-0031 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 **noted** that as a result of applying the legislative effect principles, a small category of disallowable instruments will not become secondary legislation;
- 7 **agreed** 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 **agreed** that all of the instruments made under the provision will be classified as secondary legislation:
 - 8.1 where provisions empower a person to make instruments that could be either legislative or administrative; and

- 8.2 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;
- 9 **agreed** 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 **noted** that the previous government has previously agreed that existing express exemptions from disallowance for instruments that will become secondary legislation will be preserved [SEC-17-MIN-0038];
- 11 **authorised** the Attorney-General 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 **noted** 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 **agreed** 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 **agreed** 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 **agreed** 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 **noted** 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 **agreed** that:
- 17.1 the requirements for explanatory notes for confirmable instruments be moved from each individual empowering Act to the Legislation Bill; and
- 17.2 a failure to include an explanatory note does not affect the validity of the instrument;
- 18 **noted** that the Legislation Bill does not exempt secondary legislation with a partial publication exemption from presentation to the House;

- 19 **authorised** the Attorney General 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:
- 19.1 if parts of an instrument are sensitive, only the parts that are not sensitive are presented; or
- 19.2 if the whole instrument is sensitive, only its minimum legislative information is presented;
- 20 **agreed** that drafts of SLAB may be provided to any makers of secondary legislation for consultation;
- 21 **agreed** that consultation be undertaken with political parties concerning proposed amendments to the New Zealand Superannuation and Retirement Income Act 2001;
- 22 **noted** that to implement the bills the PCO will;
- 22.1 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;
- 22.2 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;
- 22.3 provide support to agencies to adopt the new lodgement solution and comply with the legislation; and
- 22.4 establish the processes within PCO to support agencies on an ongoing basis;
- 23 **noted** 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.

Vivien Meek
Committee Secretary

Present:

Hon Chris Hipkins (Chair)
Hon David Parker
Hon Stuart Nash (part item)
Hon Iain Lees-Galloway (part item)
Hon Tracey Martin
Hon Kris Faafoi
Hon Aupito William Sio
Hon Eugenie Sage
Hon Ruth Dyson (Senior Government Whip)

Hard-copy distribution:

Attorney-General

Officials present from:

Officials Committee for LEG