

Departmental Disclosure Statement

Legislation Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance assessments and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared jointly by The Treasury and the Parliamentary Counsel Office.

The Treasury and the Parliamentary Counsel Office certify that, to the best of their knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

13 May 2014.

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Part One: General Policy Statement

The policy objectives of this Bill are to:

- improve the accessibility of the law by re-enacting the Interpretation Act 1999 in the Legislation Act 2012, so the main provisions of New Zealand legislation that are concerned with parliamentary enactments can be found in one statute; and
- improve the interpretation rules from the Interpretation Act 1999 for the courts and the public by addressing (through some small fine-tuning amendments) a few technical issues identified since 1999; and
- further encourage the production of good legislation by increasing the availability of information about the development and content of new Government-initiated legislation in order to inform the parliamentary and public scrutiny of that legislation; and
- clarify and update the Legislation Act 2012 by making some small related and other amendments, in particular, to take into account the publication of disclosure statements and the legal status of official electronic versions of legislation available online free of charge.

Updating and re-enacting Interpretation Act 1999

The general policy objective is to move the Interpretation Act 1999 into the Legislation Act 2012, which is an Act about legislation in general, to improve accessibility to the principles and rules contained in the Interpretation Act. The Interpretation Act 1999 applies to more than just the interpretation of legislation because it contains standard provisions regarding the commencement and repeal of legislation.

This reform completes the implementation of the Law Commission's recommendation in its report entitled *Presentation of New Zealand Statute Law* (NZLC R104, 2008) to bring together in one statute all of the provisions about legislation. The Legislation Act 2012 brought forward and combined the law on legislation that was contained in the Acts and Regulations Publication Act 1989, the Regulations (Disallowance) Act 1989 and the Statutes Drafting and Compilation Act 1920.

Part 1 of the Bill inserts a new Part 2A into the Legislation Act 2012 that largely carries forward the Interpretation Act 1999 provisions with several technical improvements and clarifications to address developments identified since 1999.

Disclosure statements for Government initiated legislation

The New Zealand Government has, over time, established a range of expectations for the development of legislation that are intended to support the production of robust Government-initiated legislation that also conforms to well-established legal principles. There is no established process, however, that allows members of Parliament, or the public, to readily assess the extent to which the development of a particular piece of legislation has been consistent with those general expectations. There is a concern that some legislation fails to meet these expectations due to a lack of sufficient attention given to the expectations, or to time pressures on the departments that are developing the legislation.

The Bill will insert a new Part 3A into the Legislation Act 2012. The new Part 3A will require the department or departments primarily involved in the development of a piece of Government-initiated legislation to make readily available certain information held by the department about the development and content of that legislation. The production and publication of this information is intended to promote greater attention to existing expectations for the development of legislation, and to support more informed parliamentary and public scrutiny of that legislation. Making this a legislative requirement represents a stronger and more public commitment to disclosure than a solely administrative requirement, and allows assurance to be given that the House of Representatives will continue to be consulted about proposed changes to the form and content of the disclosures required.

The Bill makes clear, however, that this information disclosure obligation on departments is not intended to impose conditions or restrictions of any kind on the content of legislation, on the legislative processes of Parliament, or on the ability of the Government to develop legislation.

Minimum disclosure requirements for Government Bills and amendments to Bills

The Bill requires the chief executive of the relevant department(s) to prepare a disclosure statement for most Government Bills, and for most substantive Government amendments to a Bill, and then to publish that disclosure statement online as soon as practicable after the Bill or amendment becomes available. It imposes a set of minimum disclosure requirements on the chief executive in three broad areas:

- useful background material and policy information concerning the legislation; and
- key quality assurance assessments or processes used to test the robustness of the content of the legislation; and
- significant or unusual features of the legislation that are likely to warrant careful scrutiny.

Minimum disclosure requirements for disallowable instruments

The chief executive of the relevant department or other entity is also required to prepare and publish a disclosure statement for most disallowable instruments drafted by the Parliamentary Counsel Office under section 59(2). The requirement does not apply if the chief executive indicates that there is no relevant information available or that any relevant information has already been published in another disclosure statement. Where a disclosure statement is required for a disallowable instrument, the Bill imposes minimum disclosure requirements in two broad areas:

- useful background material and policy information concerning the legislation; and
- key quality assurance processes used to test the robustness of the content of the legislation.

House of Representatives to be consulted on any additional disclosure requirements

The Bill also acknowledges that the Minister responsible for new Part 3A may propose administrative requirements for the layout or format of a disclosure statement and for

additional information or matters that the chief executive of the relevant department must include in a disclosure statement. Before doing so, however, the Minister must present to the House of Representatives a document that describes the proposal.

Independent review within 5 years

Finally, the Bill requires an independent review of the operation and effectiveness of this new Part of the Legislation Act 2012. The review is to commence within 5 years of new Part 3A coming into force, and the review findings are to be presented to the House and published.

Updating the Legislation Act 2012

Part 3 of the Bill makes some related and other small amendments to the Legislation Act 2012 to clarify, for example, that the Parliamentary Counsel Office's statutory functions include the publication of supporting documents relating to Government Bills, amendments to those Bills, and instruments drafted by the Parliamentary Counsel Office, such as the disclosure statements defined in new Part 3A of the Legislation Act 2012; and to update the way legislation is made available to the public to reflect the way the public are now accessing legislation, particularly in view of the legal status of official electronic versions of legislation available online free of charge.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>For Part 1 of this Bill (concerning incorporation of the Interpretation Act 1999): “Presentation of New Zealand Statute Law” (NZLC R.104), New Zealand Law Commission in conjunction with Parliamentary Counsel Office, October 2008 (accessible at http://www.lawcom.govt.nz/project/presentation-new-zealand-statute-law?quicktabs_23=report).</p> <p>For Part 2 of this Bill (concerning disclosure requirements for government-initiated legislation): “Report of the Regulatory Responsibility Taskforce”, September 2009 (accessible at http://www.treasury.govt.nz/economy/regulation/inforeleases/rrb/taskforcereport).</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>The legislative proposals in Part 1 of this Bill substantially re-enact the current law, and therefore were exempt from the Cabinet requirement to provide a regulatory impact statement.</p> <p>The RIS that most directly relates to the policy matters covered in Part 2 of this Bill is: “Increasing the Visibility of Regulatory Quality Issues”, The Treasury, 29 January 2013 (accessible at http://purl.oclc.org/nzt/f-1541).</p> <p>This itself builds on an earlier RIS provided to inform policy decisions on a different Bill: “Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act?”, The Treasury, 2 February 2011 (accessible at http://www.treasury.govt.nz/economy/publications/informationreleases/ris/pdfs/ris-tsy-rbr-mar11.pdf).</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>It is likely that at least the earlier RIS, dated 2 February 2011, met the normal threshold for receiving an independent opinion on the quality of the RIS from the RIA Team based in the Treasury. However, since both RISs were prepared by a Treasury person closely linked to the RIA Team, alternative Treasury panels were convened to provide an independent opinion to Cabinet.</p> <p>The Treasury RIA panel opinions for both RISs are already publicly available as the relevant Cabinet papers have been previously released, but for convenience these opinions are set out in full in Appendix One of this disclosure statement.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
The features of Option 5 in the RIS dated 2 February 2011, and Package 2 in the RIS dated 29 January 2013, correspond reasonably closely to the policy features of Part 2 of this Bill.	

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
Further impact analysis relevant to Part 2 of this Bill will be feasible once the current administrative trial has been running for a while, but is not available as at the date of finalisation of this statement.	

2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<p>There are no estimates available for any of the potential costs or benefits associated with Part 1 of this Bill. The courts undertake statutory interpretation in deciding many of the cases heard but it is difficult to quantify the potential impact on legal decisions of the incremental changes to the interpretation rules. Greater certainty and clarity will benefit all users of legislation.</p> <p>The latest analysis available on the size of the potential costs of the requirements in Part 2 of this Bill is still that found on pages 12 and 14 of the RIS dated 29 January 2013, accessible at the link provided under Qu.2.3 above. As noted under Qu.2.3.2, the policy features analysed in that RIS are reasonably close to those found in Part 2 of this Bill.</p> <p>The RIS analysis covers the expected annual costs of completing disclosure statements and of monitoring and support to be provided by Treasury, PCO and the Office of the Clerk. It does not, however, include estimates of initial set-up costs, which are not expected to be large but probably depend on the long-term publication solution chosen. As also noted in that RIS, officials have not identified a way to estimate the size of the expected benefits.</p> <p>There is no analysis available on the potential for any group of persons to suffer an unavoidable loss of income or wealth. However, no such losses are expected, because Part 2 of this Bill does not impose obligations or constraints on anyone other than departments.</p>	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES

Part 1 does not create new obligations or standards or impact on existing obligations or standards.

For the disclosure obligations in Part 2 of this Bill, the expected costs outlined on pages 12 and 14 of the RIS dated 29 January 2013 were based on the assumption of an 80% rate of compliance with the full set of disclosure requirements and standards. A higher compliance rate would increase expected costs (as well as expected benefits, though no estimate of benefits was attempted).

While the analysis included provision for monitoring and support effort from Treasury, PCO and the Office of the Clerk totalling around 3 FTE (fulltime equivalent) people per year on an ongoing basis, very little of this time was expected to be spent on the active pursuit of departmental compliance. This information can be accessed at the link provided in Qu.2.3. More active pursuit of departmental compliance by those parties would increase expected costs, and also increase expected benefits if departmental disclosures substantively improved.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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For Parts 1 and 3 of this Bill, no specific steps were taken, as PCO identified no specific international obligations directly relevant to the general rules relating to the interpretation of New Zealand legislation, and considered that the Bill does not affect the general principle that New Zealand legislation is to be interpreted consistently with New Zealand's international obligations.

For Part 2 of this Bill, internal Treasury discussion did not identify any existing international obligations relevant to the Part. MFAT Legal was also approached, with the same result.

Treasury also checked with officials engaged in trade negotiations that the proposed policy would support, or would otherwise be consistent with, any potentially foreseeable commitments in free trade agreements currently being negotiated by New Zealand.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

For Parts 1 and 3 of this Bill, no specific steps were taken, as PCO considered the provisions do not affect the general principle that New Zealand legislation is to be interpreted consistently with the principles of the Treaty of Waitangi.

For Part 2 of this Bill, Treasury concluded that the provisions have no direct effect on the rights and interests of Maori protected by the Treaty of Waitangi or common law, as they simply impose a disclosure obligation on government departments.

However, Treasury recognised that Maori in particular were likely to be interested in a disclosure about new legislative proposals that would support the general expectation that, if possible, legislation should be consistent with the principles of the Treaty of Waitangi. Consequently consideration was given to the possible form and wording of a disclosure requirement relating to the Treaty of Waitangi, and the proposed approach was tested with Te Puni Kokiri, and a law firm that specialises in advising on Maori issues.

This feedback, as well as other comment received, clearly supported a disclosure requirement in this area, but also supported more specific or extensive disclosures on the implications of proposed legislation for the rights and interests of Maori. The mandatory inclusion of more extensive disclosures would, however, be at odds with the general approach adopted in Part 2 for other disclosures about the testing of legislative content, which favours targeted, low cost, disclosures of factual information or existing expert assessments.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

The advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report by the Attorney-General, is generally expected to be available on the Ministry of Justice website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	NO
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
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External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
Information on the external consultation undertaken to support the development of the provisions in this Bill is set out in Appendix Two of this disclosure statement.	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
No additional testing has been undertaken for the provisions in Part 1 of this Bill.	
Information on the additional testing undertaken to support the development of the provisions in Part 2 of this Bill is set out in Appendix Two of this disclosure statement.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
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Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
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Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
Refer to Qu.4.8 and also Appendix Three for information about clause 6, where it inserts a new section 36ZB.	

4.8. Does this Bill create or amend any other powers to make delegated legislation?	YES
<p>Powers to make delegated legislation can be found in:</p> <ul style="list-style-type: none"> • clause 2 (which provides for possible commencement of Part 2 and related amendments by Order in Council earlier than the proposed long-stop date of 1 July 2015); • clause 6, where it inserts a new section 36ZB (which provides that instruments made under an Act can, if necessary or desirable, make consequential amendments to instruments made under another Act); and • clause 9, where it inserts a new section 57R (which provides for an Order in Council to be given that would specify legislative guidelines that department chief executives must have regard to when considering what information they should report in a disclosure statement about particular legislative features in proposed government legislation). <p>Further explanation of these particular powers is set out in Appendix Three.</p>	

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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Appendix One: Further Information Relating to Part Two

Regulatory impact analysis – question 2.3.1

The independent opinion provided by a Treasury RIA Panel to Cabinet on the most recent RIS dated 29 January 2013 was as follows:

“The information and analysis summarised in the RIS meets the quality assurance criteria.

It is complete in covering the option laid out in the National-Act Confidence and Supply Agreement; it provides convincing response to, and analysis of, the issues, given the difficulty of measuring the potential behavioural impacts and costs; and finally, it provides evidence of consultation with affected parties and agencies through several iterations of proposals in a clear and concise manner.”

The independent opinion provided by a Treasury RIA Panel to Cabinet on the earlier RIS dated 2 February 2011 (on which the 29 January 2013 RIS builds) was as follows:

"The information and analysis summarised in the RIS partially meet the quality assurance criteria.

The analysis is of high quality and reaches reasonable conclusions. It is as comprehensive as could be expected, given the limits on options considered (excluding non-legislative options and those legislative options that would involve significant constitutional change), the lack of experience with such legislation overseas, and the limited ability to predict how politicians and officials will react to the rules envisaged.

However, the lack of analysis of non-legislative options is in this case sufficiently important to preclude an assessment of the RIS as fully meeting the quality assurance criteria. The lack of analysis of non-legislative options is perhaps understandable given the Minister's strong focus on a legislative solution, as shown in the Cabinet paper the RIS accompanies.”

Appendix Two: Further Information Relating to Part Three

External consultation – question 3.6

For Part 1 of this Bill (concerning incorporation of the Interpretation Act 1999), the Parliamentary Counsel Office published a discussion paper on its website, entitled “Interpretation Act 1999: A Discussion Paper” dated 6 March 2013, for comment by 16 April 2013. 15 submissions were received and there was general support for the proposal to move the Interpretation Act 1999 into the Legislation Act 2012. The discussion paper can be accessed at <http://www.pco.parliament.govt.nz/interpretation-act-discussion-paper/>

For Part 2 of this Bill (concerning disclosure requirements for government-initiated legislation), a summary of consultation undertaken in the lead-up to policy decisions being taken can be found on pages 18 and 19 of the RIS dated 29 January 2013, accessible at the link provided under Qu.2.3.

Aside from the necessary consultation with government departments (on whom the obligations in Part 2 will fall), this included circulation of a Treasury discussion document in mid August 2012 for targeted consultation with a range of external public law experts, as well as former Regulatory Responsibility Taskforce members and several bodies representing business interests that had previously shown interest in the Regulatory Standards Bill. Feedback was received from 21 individuals or groups through either written comments or face-to-face discussions. As noted above, a summary of this feedback can be found in the RIS. The discussion document itself, “A Revised Regulatory Standards Bill: A Treasury discussion document with indicative legislation”, can be accessed at: <http://www.treasury.govt.nz/economy/regulation/inforeleases/pdfs/reg-2320508.pdf>

After government policy decisions relating to Part 2 of this Bill were taken in March 2013, the disclosure requirements for the live trial, and a legislative draft of Part 2, were discussed with members of the Legislation Advisory Committee at their meeting on 31 July 2013. Members of the Committee had a number of questions about the approach being taken to disclosure, as well as some suggestions for matters that could be looked at further, including possible additional or alternative disclosures and the potential use of disclosure statements by the courts, but did not result in any significant changes to the Bill.

In August 2013, the Office of the Clerk of the House, the Law Commission, and the Privacy Commissioner also had the opportunity to comment on a legislative draft of Part 2, following on from discussions with these bodies during the earlier policy development phase.

- The Office of the Clerk of the House made a number of specific suggestions for improvements to the provisions of Part 2 intended to avoid any legislative enshrinement of particular rules, practices or procedures of the House of Representatives, and these have been picked up wherever possible in the Bill as introduced.
- The Law Commission provided some informal comments intended to make sure officials had thought about the effect of particular requirements, which led to a couple of changes to the wording of particular proposed disclosures and to the

provision for consulting the House about additional matters of content and layout for disclosure statements.

- The Privacy Commissioner indicated comfort with the proposed disclosure about departmental consultation with the Privacy Commissioner.

In March 2014, the Office of the Clerk of the House had a further opportunity to comment on a complete draft of the Bill. The Office of the Clerk of the House provided additional specific comments on details of both Part 1 and 2 of the Bill. Where these comments were consistent with the existing policy intent, most were accepted and addressed through further minor drafting changes.

Other testing of proposals – question 3.7

Two test exercises have been undertaken to support the development of the provisions in Part 2 of this Bill (concerning disclosure requirements for government-initiated legislation):

During September 2012, the Treasury and three other departments (the Ministry of Justice, Ministry of Transport, and Ministry for Primary Industries) attempted test disclosures for 3-4 recent pieces of legislation from their own department, using an early draft template of the disclosure statement provided by the Treasury, and then answered a series of questions about their experience. Feedback provided by the departments following the tests informed:

- the estimates of time and hence cost of preparing disclosure statements reported in the RIS dated 29 January 2013;
- the decision to narrow the range of disallowable instruments that would require a disclosure statement; and
- the case for, and form of, the templates being used in the live trial discussed below.

More recently, with Cabinet agreement, a full, live trial of disclosure statements for government-initiated Bills and substantive SOPs began at the start of August 2013, based on comprehensive guidance and templates developed by the Treasury and a publication solution and website provided by the Parliamentary Counsel Office. The experience of developing the trial has informed the drafting instructions provided on Part 2, and the public availability of disclosure statements during the trial period is intended to further inform the select committee consideration of the provisions in Part 2.

Appendix Three: Further Information Relating to Part Four

Powers to make delegated legislation – question 4.8

Clause 2

This provision contains a power to bring Part 2 of the Bill into force before 1 July 2015.

If the disclosure requirements for government legislation are to operate effectively it will be necessary to give some prior notice to departments, and to put in place some administrative processes, requirements and guidance to assist departmental chief executives to discharge these obligations in a consistent and predictable way. The legislation also requires the responsible Minister to consult the House of Representatives before some important administrative requirements are imposed. This makes it impractical to bring Part 2 into force immediately the legislation receives royal assent.

Instead, the Bill contains a long-stop date by which Part 2 must come into effect, but also provision for it to be brought into force earlier by Order-in-Council if the timing of enactment and the completion of administrative preparations will allow it.

In addition to the limit provided by the long-stop date, safeguards applying to the exercise of this power include potential disallowance by the House of Representatives.

Clause 6, inserting new section 35ZB

This provision would allow an instrument made under one Act to make consequential amendments to an instrument made under another Act, if necessary and desirable.

An Act may amend other Acts and regulations. These changes can be minor and widespread; for instance, updating statutory references or statutory office names as a consequence of the substantive changes in a new Act.

Consequential amendments affecting other Acts may be out of date by the time an Act is passed and brought into force. This may happen where a new Act is introducing complex new policy requiring a new administrative infrastructure and its commencement is delayed until regulations are put in place. The law may not be accessible because people may miss changes to Acts that may or may not be in force that affect other Acts. The proposal will help implement the Act in a flexible and timely way.

The proposal is not to allow Acts to be amended by subordinate legislation. Consequential changes to instruments made under Acts would be able to be made quickly, keeping provisions up to date. The power will only be able to be exercised if it is necessary or desirable.

Clause 9, inserting new section 57R

This provision contains a power to specify particular legislative guidelines that chief executives must have regard to when considering what disclosures to make about proposed government-initiated legislation.

It is desirable that departmental chief executives draw on expert guidance on making good legislation, such as the Legislation Advisory Committee's Guidelines on Process and Content of Legislation, when considering what legislative features might be regarded as significant or unusual (and hence warrant disclosure), and when seeking to identify and describe features of particular identified provisions that will limit or mitigate the potential adverse effects of that provision.

Safeguards applying to the exercise of this power include: an obligation to consult the House of Representatives before recommending the identification of particular legislative guidelines; and potential disallowance by the House of Representatives.