

Departmental Disclosure Statement

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| Secondary Legislation Bill |
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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 products 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 by the Parliamentary Counsel Office.

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

November 2019

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Part One: General Policy Statement

Policy objective

This Bill improves and supports the law relating to the making of secondary legislation. It does so by applying and adjusting the framework of access to, and Parliamentary oversight of, secondary legislation provided for in the Legislation Act 2019 (the **new Legislation Act**).

The new Legislation Act establishes a single category of secondary legislation to replace the current, complicated definitions of legislative instruments and disallowable instruments in the Legislation Act 2012. Having a single category for secondary legislation will make it easier for individuals and organisations to find the law that applies to them and help Parliament to oversee secondary legislation.

Responding to known issues

The Bill responds to the recommendations of the Regulations Review Committee's 2014 *Inquiry into the oversight of disallowable instruments that are not legislative instruments*. In that report, the Committee highlighted the difficulties it faces in identifying which instruments are disallowable. These difficulties are partly because the category of "disallowable instruments" includes any instrument that has a "significant legislative effect" (as defined in section 39 of the Legislation Act 2012).

Whether an instrument has a "significant legislative effect" can be contestable, which introduces uncertainty over which instruments are subject to Parliament's disallowance procedure. To address this problem, the Committee recommended that the government introduce legislation to ensure that every empowering provision states which category the instrument falls into, and to remove the "significant legislative effect" test in the Legislation Act 2012. Together with the new Legislation Act, this Bill implements both those recommendations.

Achieving the policy objective by identifying and amending empowering provisions

The Bill achieves its policy objective by amending, in an Act, each provision that empowers the making of an instrument that the Government considers to have legislative effect, and by making consequential amendments to other provisions. The Bill amends over 2,500 existing empowering provisions in more than 550 Acts. Each relevant empowering provision is amended to state that an instrument made under it is secondary legislation.

Identifying and applying a test for legislative effect

The Bill reflects a judgement about which provisions empower the making of instruments with legislative effect. This has been achieved through extensive consultation with the agencies responsible for the legislation.

Broadly, an instrument has legislative effect if it makes the law or alters its content, rather than just applying the law to a particular case. While there is no definitive, catch-all test for legislative effect, case law, commentary, and legislation in New Zealand and internationally assists when considering the issue.

Instruments tend to be legislative if they—

- regulate conduct where compliance is a prerequisite under the empowering provision, or noncompliance would incur a sanction;
- create, alter, or remove a right where there is a mechanism for enforcing the right;
- set procedural requirements for a legal right or obligation;

- set the amount of a fee or levy; or
- change the scope of legislation whether by way of application, modification, or exemption.

Instruments that commence, amend, or repeal other legislation, or create criminal offences or set penalties, are almost always legislative. 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.

The Bill applies a strong presumption that instruments that primary legislation currently makes expressly disallowable (by either section 38(1)(a) or (b) of the Legislation Act 2012) should be classified as secondary legislation. This means that the House of Representative will retain the ability to disallow these instruments.

It is not the Bill's policy to change the scope or legal effect of empowering provisions or to affect the validity of instruments already made under them.

The Bill amends all relevant legislation enacted up to 1 June 2019. Amendments to legislation enacted after that date will be proposed at the committee of the whole House.

Exemptions

On the new Legislation Act's main commencement date (ie, when the single category of secondary legislation is created), the Bill will continue current exemptions from publication, presentation, and disallowance. The Bill also creates a limited number of new exemptions from disallowance in appropriate situations. For example, new disallowance exemptions have been proposed for directions of the Speaker of the House and determinations by the Minister Responsible for Ministerial Services relating to entitlements of members of Parliament and Ministers to travel services under sections 23, 27 and 32 of the Members of Parliament (Remuneration and Services) Act 2013. These instruments are not expressly stated to be disallowable instruments, but may be disallowable by reason of having a significant legislative effect. New exemptions are proposed to ensure that the Speaker and the Minister are able to determine travel entitlements independently. The instruments will still be published, but control of their content will sit with the Speaker and the Minister, as otherwise members who receive the remuneration and services would be reviewing instruments from which they benefit.

When Schedule 2 of the Legislation (Repeals and Amendments) Act 2019 comes into force, some instruments will be subject to new publication, presentation, and listing requirements. The Bill exempts certain instruments from these requirements where, for example, the instrument affects national security or commercial confidentiality, or is highly sensitive for a similar reason.

Royal prerogative instruments

Although the new Legislation Act removes the current legislative effect test for secondary legislation, it preserves that test for instruments made under the Royal prerogative. This Bill now aligns the approach for prerogative instruments more closely with the methodology applied to other secondary legislation.

Omnibus Bill

The Bill is an omnibus Bill introduced under Standing Order 263(a) and (b). The single broad policy the Bill implements is set out under the "Policy objective" heading above.

Part Two: Background Material and Policy Information

Published reviews or evaluations

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| 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 |
| <ul style="list-style-type: none">• Government Inquiry into the Whey Protein Concentrate Contamination Incident, Report on New Zealand's Dairy Food Safety Regulatory System, December 2013, p.31, accessible at https://www.dia.govt.nz/vwluResources/Government_Whey_Inquiry_Interim_Report_2_Dec_2013/%24file/Government_Whey_Inquiry_Interim_Report_2_Dec_2013.pdf• New Zealand Productivity Commission, Regulatory institutions and practices, June 2014, p 13., accessible at http://www.productivity.govt.nz/inquiry-content/1788?stage=4• Regulations Review Committee's Inquiry into the oversight of disallowable instruments that are not legislative instruments (July 2014), accessible at https://www.parliament.nz/en/pb/sc/reports/document/50DBSCH_SCR56729_1/inquiryinto-oversight-of-disallowable-instruments-that | |

Relevant international treaties

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| 2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty? | NO |
| 2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty? | NO |

Regulatory impact analysis

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| 2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill? | NO |
| The amendments in this Bill are exempt from the requirement as the matters are covered in a business case (following the Better Business Case methodology recommended by the Treasury). | |

Extent of impact analysis available

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| 2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill? | NO |
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| 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 |
| Impacts of the policy have been assessed through the business case and subsequent cost benefit analysis for the processes and systems needed to enable agency-drafted legislation to be published on the NZ Legislation website. The business case and analysis contains information that is potentially budget-sensitive and therefore is not publicly available. | |

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| 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? | NO |
| (b) the nature and level of regulator effort put into encouraging or securing compliance? | NO |

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

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| 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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No specific steps were taken as the PCO identified no specific international obligations affected by the matters the Bill provides for, ie, the identification of instruments as secondary legislation and the application of the Legislation Act 2019 to them.

The Bill however supports the policy of the Legislation Act 2019 to implement international transparency obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago, Chile, on 8 March 2018.

Consistency with the government's Treaty of Waitangi obligations

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| 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? |
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The policies to be given effect to by the Bill do not affect Maori rights or interests protected by the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

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| 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 |
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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

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| 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

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| 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

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| 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 |
| Drafts of the Bill have been consulted on and agreed with the government departments responsible for the administration of each Act amended. In addition, workshops have been held with selected makers of secondary legislation to test drafts agreed with departments. A complete draft was also circulated to the Office of the Clerk of the House to consider prior to introduction. | |

Other testing of proposals

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| 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 |
| The policy details relevant to the Bill have been assessed for workability and completeness with a Project Board comprising internal and external members, a reference group comprised of departmental officials, the Regulations Review Committee, the Legislation Design and Advisory Committee and individual departments | |

Part Four: Significant Legislative Features

Compulsory acquisition of private property

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| 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

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| 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

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| 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

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| 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

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| 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

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| 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

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| 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 |
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The Bill consists of a series of Schedules that amend all statutory empowering provisions that have been identified as empowering the making of secondary legislation.

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| 4.8. Does this Bill create or amend any other powers to make delegated legislation? | YES |
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The Bill consists of a series of Schedules that amend all statutory empowering provisions in Acts that have been identified as empowering the making of secondary legislation.

Any other unusual provisions or features

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| 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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