

In Confidence

Office of the Attorney-General

Chair, Cabinet Legislation Committee

LEGISLATION BILL: APPROVAL TO RELEASE A SUPPLEMENTARY ORDER PAPER

Proposal

- 1 I propose that the attached Supplementary Order Paper (SOP) to amend the Legislation Bill (the Bill) be approved for release.
- 2 The SOP—
 - 2.1 enables the Bill to be enacted and commenced early (together with the companion Secondary Legislation Bill, yet to be introduced) to define one coherent class of secondary legislation
 - 2.2 provides flexibility around the commencement of the requirement for makers of secondary legislation to lodge their secondary legislation with the PCO
 - 2.3 makes various minor or technical improvements identified since the Bill was reported back by the Justice Committee in June 2018.

Policy

- 3 The Bill was introduced in June 2017 and was reported back by the Justice Committee in June 2018.
- 4 In September 2019, Cabinet agreed that the Bill be amended to enable it and its companion bill, the Secondary Legislation Bill, to be commenced, without immediately triggering obligations on makers of secondary legislation to lodge information about secondary legislation with the PCO (LEG-19-MIN-0147; CAB-19-MIN-0499). Those amendments—
 - 4.1 retain the current publication requirements for agency-drafted secondary legislation from the Bill's commencement until the PCO establishes a lodgement service to enable agencies to submit secondary legislation and information for publication on the New Zealand Legislation website
 - 4.2 provide for the PCO to make those saved publication requirements easy for users to find
 - 4.3 provide for a later implementation of the publication requirements set out in Part 3 of the Bill.

- 5 In March 2019, Cabinet authorised an expanded editorial power for the Chief Parliamentary Counsel to ensure that empowering provisions correctly reflect their status as empowering the making of secondary legislation (LEG-19-MIN-0031; CAB-19-MIN-0106).
- 6 In April 2018, Cabinet authorised me to approve minor changes to the Bill should they be desirable to ensure smooth implementation of the interim means of compliance with New Zealand's obligations under the CPTPP until the Bill has fully commenced (LEG-18-MIN-0041; CAB-18-MIN-0141). I have approved a small change so that the instruments that fall within the scope of those obligations align with the definition of secondary legislation.

SOP to the Bill

- 7 The SOP gives effect to these policy decisions in the following ways. Provisions in Part 3 of the Bill that relate to the publication of secondary legislation and information about it on the New Zealand Legislation website are, in effect, relocated to a schedule for later commencement. Those provisions include—
 - 7.1 the duties of the PCO to publish minimum legislative information and secondary legislation drafted by agencies (those duties are now confined, on commencement, to PCO-drafted legislation)
 - 7.2 the duties for makers of secondary legislation to lodge minimum legislative information and secondary legislation with the PCO
 - 7.3 the prohibition on secondary legislation coming into force before it is published in accordance with the new Legislation Act
 - 7.4 provisions relating to exemption of secondary legislation from publication on the New Zealand Legislation website, including the power of the Chief Parliamentary Counsel to exempt some instruments from publication in full.
- 8 In place of these provisions, makers of secondary legislation will in most cases be required to continue to publish in accordance with the publication requirements set out in empowering legislation immediately before the commencement of the Bill and Secondary Legislation Bill. Similarly, publication requirements to implement the CPTPP for secondary legislation with international transparency obligations continue to apply. However,—
 - 8.1 the PCO may make minor modifications to pre-existing publication requirements to the extent necessary to ensure they still work effectively in light of other amendments made to the empowering provision
 - 8.2 for empowering provisions in legislation enacted in the future, where there is no specified publication requirement, secondary legislation must be published in ways that meet generic minimum requirements to be set by regulations under the new Legislation Act.
- 9 The PCO is authorised to record and publish the applicable publication requirements that applied immediately before the commencement date of the

relevant provisions of the Bill (with minor modifications referred to above). This will help the PCO to ensure that those publication requirements are easy to find.

- 10 Provisions relating to the publication of agency-drafted legislation (now contained in Schedule 6 of the Bill) can be commenced at a later date. As a consequence of this—
 - 10.1 The purpose clause (clause 3(2)(c)) is amended so that, on commencement, it states that the Bill “provides for” (rather than “requires”) all legislation to be published in one place. When the publication obligations relating to secondary legislation drafted by agencies are commenced, the original purpose clause will be reinstated.
 - 10.2 The deadlines for agencies to lodge details of all secondary legislation with the PCO for publication on the New Zealand Legislation website (currently 1 year from the commencement of the Bill with the power to extend this up to 5 years by Order in Council for specified classes of secondary legislation) will be tied instead to the commencement of the publication obligations in relation to agency-drafted secondary legislation.
- 11 The SOP makes changes to ensure that the class of secondary legislation will cover instruments made under empowering provisions that are identified, by the companion Bill, as making secondary legislation once they are enacted. This will apply even if the commencement of particular amendments or classes of amendments needs to be deferred. This will ensure legal continuity of the class of secondary legislation. To minimise the risk of confusion, the Chief Parliamentary Counsel’s editorial powers are expressly extended to enable editorial changes that set out the legal effect of these transitional provisions.
- 12 The SOP relocates the requirements from Part 2A of the Legislation Act 2012 for agencies to publish instruments in a way that satisfies international transparency obligations under the CPTPP. It updates those requirements slightly to specify that only instruments that are secondary legislation fall within the scope of those obligations.
- 13 The SOP also includes a number of other amendments to the Bill to address minor technical and drafting issues. None of these changes requires Cabinet decisions.
- 14 Some minor editorial changes to the SOP may be required before it is released. I seek your approval to release the SOP subject to such changes by 15 October.

Impact analysis

- 15 The Regulatory Quality Team at the Treasury has determined that the regulatory decisions sought in relation to the proposal concerning access to secondary legislation are exempt from the requirement to provide an Impact Assessment as the relevant issues have been addressed in the business case.

Compliance

- 16 The SOP complies with:

- 16.1 the principles of the Treaty of Waitangi;
- 16.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
- 16.3 the disclosure statement requirements – a supplementary disclosure statement has been prepared and is attached to the paper;
- 16.4 the principles and guidelines set out in the Privacy Act 1993; and
- 16.5 the LDAC Guidelines on the Process and Content of Legislation (2018 edition).

Consultation

- 17 The following government departments and agencies were consulted in the development of policy proposals: Crown Law Office, Department of Conservation, Department of Corrections, Department of Internal Affairs, Department of the Prime Minister and Cabinet, Government Communications Security Bureau, 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, New Zealand Security Intelligence Service, Office of the Clerk, Oranga Tamariki—Ministry for Children, Parliamentary Service, State Services Commission, Statistics New Zealand, Te Puni Kōkiri, and the Treasury.
- 18 The draft SOP was referred to the Ministry of Justice, the Treasury, the Ministry of Foreign Affairs and Trade, the Department of the Prime Minister and Cabinet, the Office of the Clerk, and the State Services Commission.

Binding on the Crown

- 19 The SOP does not itself specify whether it will be binding on the Crown. However, the provisions in the SOP will be binding on the Crown once the Bill is enacted because the relevant parts of the Bill (including the sections to be amended by the SOP) will be binding on the Crown.

Allocation of decision-making powers

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

Associated regulations

- 21 The regulation-making power to set minimum requirements for publication is expanded slightly to enable it to apply immediately on commencement.

Other instruments

- 22 The SOP does not include provision to make other instruments that are deemed to be legislative instruments or disallowable instruments. A power for the Chief Parliamentary Counsel to issue directions relating to publication of instruments with international transparency obligations under CPTPP is carried forward from the Legislation Act 2012. Those directions will be secondary legislation.

Definition of Minister/department

- 23 The SOP repeats, for ease of access, a definition of Ministry previously in the Bill (previously, “department and Ministry” were defined in the same paragraph in clause 13).

Commencement of legislation

- 24 Currently, the Bill provides that it comes into force on the third anniversary of Royal assent, unless individual Parts are commenced earlier by Order in Council.
- 25 The SOP amends this so that, if it is not brought into force earlier, the Bill comes into force on the fifth anniversary of Royal assent (LEG-19-MIN-0147; CAB-19-MIN-0499). This will allow the other provisions of the Bill, along with the Secondary Legislation Bill, to be commenced very soon after they receive assent while ensuring that there is a reasonable amount of time to implement the IT and business process changes in the PCO and agencies. The explanatory note of the SOP sets out the reasons for commencement by Order in Council.

Parliamentary stages

- 26 The SOP should be released by 15 October 2019, and the Bill should be enacted by the end of 2019.

Proactive Release

- 27 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 Legislation Bill holds a category 3 priority on the 2019 Legislation Programme (to be passed if possible in the year);
- 2 **note** the attached SOP, which—
 - 2.1 enables the Legislation Bill to be enacted and commenced early (together with the companion Secondary Legislation Bill, yet to be introduced) to define one coherent class of secondary legislation;
 - 2.2 provides flexibility around the commencement of the requirement for makers of secondary legislation to lodge their secondary legislation with the PCO;

- 2.3 makes various minor or technical improvements identified since the Bill was reported back by the Justice Committee;
- 3 **approve** the attached SOP (subject to any minor editorial changes) for release;
- 4 **agree** that the SOP be released by 15 October 2019.

Authorised for lodgement

Hon David Parker
Attorney-General