

SECONDARY LEGISLATION BILL
Third Reading

LEGISLATIVE STATEMENT

Presented to the House in accordance with Standing Order 272

This legislative statement supports the third reading of the Secondary Legislation Bill.

Objective

The policy objective of the Bill is to define, unambiguously, what constitutes secondary legislation in New Zealand, and therefore what the House of Representatives has oversight over through the disallowance process. It does this by amending each provision that empowers the making of instruments with legislative effect to state that those instruments are secondary legislation (and must be published in accordance with the new Legislation Act). The Bill will also set out a small number of exemptions from the disallowance, publication and presentation requirements of the Legislation Act 2019 where these are warranted by the nature of the instruments in question.

Background

Secondary legislation is legislation made under powers delegated by Parliament to another person or body.

Some secondary legislation (such as regulations made by the Governor-General) is drafted by the PCO, published on the NZ Legislation website, and is clearly subject to the oversight of the House. However, many instruments are made by Ministers, officials and specialised bodies inside and outside government. These are drafted by over 100 agencies, and published in accordance with requirements prescribed separately in hundreds of provisions across the statute book. They are often not explicitly stated to be legislation (they may be called “notices”, “directions”, or even “codes of practice”) making them hard to distinguish from the thousands of other administrative instruments generated by government each year. Whether they are subject to the oversight of the House depends on whether they have a “significant legislative effect” – a test set out in section 39 and the Legislation Act 2012. The scope for legitimate divergences of view on whether an instrument does or does not have significant legislative effect makes the boundaries of this category contestable, and introduces uncertainty over which instruments are subject to the oversight of the disallowance procedure.

The Legislation Act 2019 solves this problem by defining an instrument as secondary legislation if it is stated by an Act to be secondary legislation. This Bill will insert the requisite statements at relevant points across the statute book, so that it is absolutely clear what instruments are secondary legislation, and what law applies to them.

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*, which 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 currently found in the Legislation Act 2012.

Amendments to identify secondary legislation

Schedules 1 to 32 of the Bill contain the amendments relating to instruments that will become secondary legislation. The amendments insert statements into each relevant empowering provision that the instruments made under them are secondary legislation, and update references to the Legislation Act 2012 and Interpretation Act 1999. They also remove any specific requirements in empowering Acts about presentation, disallowance or publication, as these will in future be regulated consistently by the Legislation Act 2019.

The Act provides ultimately for secondary legislation drafted by agencies other than PCO to be published centrally on the New Zealand Legislation website. However, the scale of the task of

identifying and republishing all secondary legislation means that this process must be staged. So initially the publication requirements for secondary legislation that applied immediately before the commencement of the Legislation Act 2019 will be preserved.

The criterion for identifying instruments as secondary legislation is that they have legislative effect – in broad terms, that they make or alter the law, rather than applying it in a particular case. In deciding whether or not instruments are secondary legislation, the focus is on the substantive effect, and not the form of an instrument. In very general terms, an instrument makes the law if it—

- makes legal rules that apply generally:
- applies to the public or a class of the public: and
- creates a framework that applies again and again.

The Bill amends over 2,500 empowering provisions in about 550 Acts.

Exemptions from the publication, presentation and disallowance requirements of the Legislation Act 2019

The Bill exempts a small number of instruments from the publication, presentation, and disallowance requirements of the Legislation Act 2019. These exemptions are required because the content of the instruments in question is sensitive or because it would be constitutionally inappropriate for the House to be able to disallow them.

Schedules 35 and 36 contain the exemptions that will apply under new Schedule 3 of the new Legislation Act. There are 2 versions of new Schedule 3 as follows:

- one (in Schedule 35) is a replacement schedule that will apply initially when the new Legislation Act commences (when existing publication requirements are preserved). This version contains the presentation and disallowance exemptions that will be applicable at that time:
- the other (in Schedule 36) is a replacement schedule that will apply when the centralised publication requirements are commenced in the new Legislation Act. This version adds the publication exemptions that will then be relevant.

The Bill was prepared on the basis that exemptions that are currently explicitly set out in legislation will be continued. The Regulations Review Committee considered the exemptions to ensure that they are justified, and has recommended the removal of a few.

Amendments to the Legislation Act 2019 relating to the framework for secondary legislation

The Bill makes a number of adjustments to the framework for secondary legislation in the Legislation Act 2019. Notable among these are:

- Schedule 34, which inserts a new Schedule 1A into the Legislation Act 2019 to identify instruments made under the Royal prerogative that are secondary legislation.
- The amendment in Schedule 33 that inserts a new section 83A into the Act that requires the Chief Parliamentary Counsel report annually on the extent to which makers of secondary legislation have relied on presentation exemptions. This will provide a mechanism for the House to oversee the use of these exemptions.