



Briefing about orders made under section 70 of the Health Act 1956

Interim report of the Regulations Review
Committee

November 2021

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Chris Penk
Chairperson

Briefing about orders made under section 70 of the Health Act 1956

Recommendation

The Regulations Review Committee has considered a briefing to review orders made under section 70 of the Health Act 1956. We recommend to the Government that it:

- encourage the Director-General of Health to ensure that future section 70 orders requiring periods of isolation and quarantine specify criteria to guide decisions about when those periods must end
- ensure that all revoked and expired section 70 orders, and previous versions of current orders, are published on a government website
- provide additional legislative drafting support to the Director-General of Health.

Background

The role of the Regulations Review Committee (RRC) under Standing Order 326(1) is to examine all regulations. This function has important constitutional significance in assisting Parliament to retain control over the content of all laws made under powers that Parliament has delegated to the Executive.

Our role is to check that the Executive does not use the powers that Parliament has delegated to it to make law in ways that were not intended by Parliament. We do not examine the policy behind secondary legislation, but instead consider whether instruments are made in accordance with the intention of Parliament as set out in the empowering enactment. We also examine secondary legislation to ensure it is consistent with constitutional principles.

This scrutiny function is particularly important during periods of emergency or other crisis, such as the current outbreak of COVID-19. During periods of emergency secondary legislation is used to manage extraordinary circumstances and may adversely affect the rights and freedoms that New Zealanders usually enjoy.

The RRC has previously reported on its scrutiny of secondary legislation (and powers to make secondary legislation) in response to emergency circumstances.¹ The final report of the 52nd Parliament's RRC on its briefing to review secondary legislation made in response to COVID-19 covered, amongst other types of secondary legislation, orders made under section 70 of the Health Act 1956 by medical officers of health (section 70 orders).

¹ In response to the Christchurch earthquakes: *Inquiry into Parliament's legislative response to future national emergencies (I.16B)*, December 2016; and in response to the outbreak of COVID-19: *Briefing to review secondary legislation made in response to Covid-19 (Final report)*, August 2020.

Those orders were the first legislation to impose isolation and quarantine, to close premises, and to restrict movement and gatherings across the whole of New Zealand.

Section 70 orders are part of a class of secondary legislation that are not required to be drafted by the Parliamentary Counsel Office or published on the Government's legislation website.² Before the outbreak of COVID-19, the Ministry of Health drafted secondary legislation fairly infrequently. For obvious reasons, entities that draft secondary legislation infrequently do not tend to retain expertise in that skill set. It was unsurprising, therefore, that section 70 orders made by medical officers of health in response to the sudden outbreak of COVID-19 in early 2020 raised concerns in terms of the grounds for bringing secondary legislation to the attention of the House in Standing Order 327(2).

The RRC of the 52nd Parliament wrote to the Director-General on several occasions noting particular concerns with the section 70 orders and acknowledging the very challenging circumstances in which they were made. Those concerns included questions about whether the orders were covered by the power in section 70, unauthorised sub-delegation of powers, inappropriate incorporation of material by reference, and unclear drafting. Our predecessor's intention was to assist the ministry to improve the legislative quality of future notices. Its August 2020 report noted significant improvement over time in those orders, particularly when they began to be drafted by the Parliamentary Counsel Office and were published on the New Zealand Legislation website.

In May 2020, the COVID-19 Public Health Response Act 2020 was enacted. From that point, secondary legislation to impose isolation or quarantine, to close premises, and to restrict movement and gatherings across New Zealand were imposed under orders made by the Minister of Health (and subsequently, the Minister for COVID-19 Response) under sections 9 and 11 of that Act.³ That Act also gives the Director-General of Health equivalent powers, but only within the boundaries of a single territorial authority district. To date, the Director-General has not used the powers under that Act.

However, in 2021, the Director-General and other medical officers of health have—from time-to-time—continued to use the powers in section 70 of the Health Act 1956 to require isolation or quarantine, and medical testing, for COVID-19 across New Zealand. A full list of the section 70 orders scrutinised by the RRC is in Appendix B.

Purpose of this report

This report describes our scrutiny of section 70 orders, makes recommendations to improve them, and provides guidelines for making secondary legislation under emergency circumstances by entities that draft legislation infrequently. Those guidelines have been developed from the lessons we have learned from our scrutiny and will be relevant to all

² They are unusual in that they were not required to be presented to the House of Representatives under section 41 of the Legislation Act 2012. However, that changed when the Legislation Act 2019 came into force on 28 October 2021. Section 70 orders are now required to be presented under section 114(1) of that Act.

³ Those powers were amended in August and December 2020. Further amendments are proposed in the COVID-19 Public Health Response Amendment Bill (No 2), which was reported on by the Health Committee on 11 November 2021.

agencies charged with making secondary legislation that is not drafted by the Parliamentary Counsel Office, whether in emergency circumstances or not.

The nature of the section 70 orders made in 2021

All of the section 70 orders made so far in 2021 have been made under sections 70(1)(e), (ea), and (f) of the Health Act 1956.⁴ They require certain people to be isolated or quarantined and to report for medical examination and testing for COVID-19. They vary by scope. Some apply only to very specific locations (a gym or a school). Many apply to people who have had contact, or may have had contact, with a person who has tested positive for COVID-19. Two orders applied to people who have tested positive for COVID-19 (one applied only in Auckland and the other applied anywhere in New Zealand).

Our scrutiny of the 2021 section 70 orders

It is clear to us that, when they were made, all of these orders related to very urgent circumstances. Legislation made under urgency often results in deficiencies, such as a lack of clarity or precision in the description of the requirements. Our expectation is that entities with powers to make law will quickly follow up any deficiency in emergency law with amendments and improvements. Further, they will put in place procedures for ensuring continual improvements in future legislation to minimise the occurrence of deficiencies. Where an entity that does not usually make law finds itself frequently making law in emergency circumstances, our expectation is that the entity will take urgent steps to address any gaps in its experience and expertise in making law to ensure the high quality of that legislation.

Despite the advice provided by the RRC of the 52nd Parliament in respect of section 70 orders made in 2020, we were disappointed to find concerns in one form or another with most of the section 70 orders made in 2021. Most of those concerns relate to the clarity and precision of the description of the requirements. We have also had concerns about the failure to publish some orders. None of the concerns relate to the orders being outside of the empowering provisions.

To date, we have written to the Director-General on eight occasions describing our concerns with the 2021 section 70 orders. Of particular note are the following concerns.

Unclear end points for the required period of isolation or quarantine

These end points have been described in various section 70 orders as follows:

- “Until they are contacted by the Public Health Unit or the national contact tracing service and they receive further instructions”.
- “Until they receive further direction from a medical officer of health”.

⁴ Those provisions allow a medical officer of health to require a person to:

- report themselves or submit themselves for medical examination at specified times and places
- report, or submit themselves for medical testing, at stated times and places
- be isolated, quarantined, or disinfected.

- “For a time as advised by, or on behalf of a medical officer of health, but no longer than 14 days from the date of their last potential exposure to COVID-19, as set out in guidance published on the Ministry of Health website.”
- “Clause 3 applies for 14 days from the onset of symptoms or positive COVID-19 test (if they remain asymptomatic), including 72 hours symptom free, and they meet the criteria for release for isolation as determined by a medical officer of health or health practitioner responsible for their care.”

Requirements to isolate or quarantine clearly impinge on a person’s right to freedom of movement. Of course, all rights are subject to appropriate limits that are proportionate to the public objective being served in the circumstances. We consider that legislation that encroaches on fundamental rights must do so in clear and unambiguous language. We recognise that medical officers of health have powers to make verbal orders under section 70. However, the omission of any criteria in the order for how a medical officer of health should decide to end an isolation period leaves considerable uncertainty for people who are subject to that isolation.

Use of jargon

In some orders, people were required to work out whether they were a close contact or casual contact in order to understand what requirements applied to them. The meanings of these terms were not described in the orders. When we noted these concerns to the Director-General, he responded that those phrases were retained to help triage callers to Healthline. In our view, the requirements in legislation must be clear for the persons who are subject to them, not just for the people who are enforcing them.

Reference to information on the Ministry of Health website that was not there or was difficult to find, or that conflicted with the order

In the orders relating to locations of interest in Australian states, the orders stated that people who had been at those locations of interest must be tested at a time and place set out on the ministry’s website. In contrast to the earlier locations of interest in Wellington, the website did not contain information on the appropriate time and place for testing Australian contacts. We suspect that information was given orally by Healthline instead.

One order stated that particular people must isolate or quarantine and that a failure to do so risked a \$4,000 fine or imprisonment. However, according to the website information referred to in the order, some of those people only had to monitor themselves for symptoms.

Imprecise language that has significant consequences

One location of interest order referred to rules published on the website as “guidance”. However, those rules formed part of the legal requirement that could support a conviction under section 72 of the Act. It was misleading to refer to them as “guidance”, which implies that they are recommended but not compulsory.

Similarly, another order stated “A person to whom this direction applies should also do the following...”. We considered it was unclear whether the matter was compulsory, or merely recommended. The word “should” usually indicates something is not compulsory, but that is not likely to have been the intention in this case.

Lack of publication

We were unable to find some orders on any Government website. Also, at some point, the ministry stopped publishing revoked or expired orders and earlier versions of orders still in force. This is problematic because it makes it difficult to provide scrutiny and accountability for that earlier legislation.

Responses from the Director-General of Health

The Director-General of Health was generally welcoming of our comments and addressed each of our concerns. In relation to minor matters of clarity and inconsistency with the website, he undertook to make changes. Indeed, we have noticed significant improvement over the course of the year in the clarity and precision of the drafting of section 70 orders and references to external information.

However, on other matters, he gave us an explanation of the requirements in the orders from a public health perspective but did not address the constitutional problems underpinning our concerns. For example, in response to our concern that one order did not contain the date on which it was made, the Director-General responded that dating the order was not always possible depending on the manner in which the orders are signed.

Unclear end point for isolation or quarantine

In relation to the unclear end points for the period of isolation or quarantine, each time this was raised the Director-General responded along the lines that the public health risks being managed required flexibility that could not be achieved with greater prescription of the criteria to determine the end point. He also mentioned that urgency prevented greater prescription.

We consider that leaving the criteria for the end of restrictions unspecified and open to be determined by medical officers of health or health practitioners raises the following problems:

- Different medical officers of health or health practitioners could apply different criteria to different circumstances.
- The person who is subject to the restrictions cannot know when the restrictions will end.
- Without specifying the criteria to be applied, there is no accountability on medical officers of health and health practitioners that they are applying their powers appropriately.

We are concerned that leaving the end point for isolation and quarantine to be determined according to unspecified criteria may make this requirement an undue trespass on rights and liberties in terms of Standing Order 327(2)(b). We appreciate that the need for flexibility requires scope for the decision-makers to exercise their professional judgement. However, that need is not incompatible with the constitutional principle that the law must be certain. Setting the parameters of those decisions in legislation can be done in a manner that enables the professional judgement of the health practitioners to be applied flexibly in individual circumstances. Not setting the parameters of those decisions in legislation risks the requirements being an undue trespass on rights.

Recommendation

We recommend to the Government that it encourage the Director-General of Health to ensure that future section 70 orders requiring periods of isolation and quarantine specify criteria to guide decisions about when those periods must end

Publication of orders

We received an unsatisfactory response to our request that revoked and expired orders, together with previous versions of current orders, be published on a government website. This is required for transparency and to enable scrutiny of the law by the public and Parliament. The Director-General considered that publishing a long list of historical orders was likely to cause confusion for the public seeking to locate the current notice. He assured us that the ministry is maintaining a record of historical versions of orders and that they can be requested under the Official Information Act 1982.

We note that the empowering provision does not contain any publication requirements for most section 70 orders. This may have been common in 1956 but is unusual in the modern era. Despite that, there is a clear constitutional requirement that legislation must be accessible.

We consider that it is possible to publish non-current orders on a website in manner that would not confuse the public. Indeed, we think this is essential to enable scrutiny of the secondary legislation by Parliament and the public. We note that, due to the failure to publish past orders, we cannot be certain that we have scrutinised all section 70 orders made in 2021.

Recently, some improvements have occurred in the publication of section 70 orders. Most orders are now dated, and the title of the order on the website gives some indication of its content. The most recent orders ensure that the title on the PDF version reflects the title on the website version.

Recommendation

We recommend to the Government that it ensure that all revoked and expired section 70 orders, and previous versions of current orders, are published on a government website.

Summary

When secondary legislation is used by the Government to respond to an emergency, the RRC plays an essential role in scrutinising that legislation. Its scrutiny ensures that the significant powers granted to the executive branch of government are exercised within appropriate limits.

We are, of course, aware of the pressures on the Government caused by the pandemic, and we approach our work with that in mind. For that reason, our expectation is that entities making secondary legislation in response to the outbreak of COVID-19 will respond openly to our concerns, address the underlying constitutional issues, and achieve improvement at an appropriate pace.

We consider that the improvements to section 70 orders have been uneven. They are much clearer than at the beginning of 2021. However, the Director-General's responses give the

impression that he is understandably emphasising his public health responsibilities but the scope of the responsibility to make law under section 70 does not always appear to be fully appreciated. We note that the RRC of the 52nd Parliament began providing feedback on section 70 orders in April 2020.

Drafting legislation is a specialist skill. It requires a high degree of written precision and an understanding of the constitutional principles for the design of legislation. Our scrutiny of section 70 orders (and that by the RRC of the 52nd Parliament) has given us an appreciation of the challenges faced in this regard by entities that only infrequently draft legislation and are doing it at speed. To assist those entities, we have collated guidance about the steps they should take towards drafting constitutionally sound secondary legislation. This guidance can be found in Appendix C.

Recommendation

We recommend to the Government that it provide additional legislative drafting support to the Director-General of Health.

Appendix A

Committee procedure

We have considered this briefing between 25 August 2021 and 24 November 2021.

Committee members

Chris Penk (Chairperson)

Chris Bishop (from 31 August 2021)

Rachel Brooking

Steph Lewis

Hon Eugenie Sage

Toni Severin

Penny Simmonds (until 31 August 2021)

Vanushi Walters

Appendix B

Section 70 orders scrutinised by the RRC to date in 2021

Title	Subject	Date made
Direction of the Director-General of Health under sections 70(1)(e), 70(1)(ea), 70(1)(f) and 70(1)(h) of the Health Act 1956 made on 23 February 2021 in relation to Papatoetoe High School Attendees	Papatoetoe High School— isolation and medical testing	23 February 2021
Order under section 70 Health Act issued on 5 March 2021 relating to City Fitness Gym at Hunters Plaza	City Fitness Gym at Hunters Plaza—self-isolation, medical examination and testing	5 March 2021
Direction under section 70 of the Health Act 1956	Locations of interest in Wellington	25 June 2021
Direction under section 70 of the Health Act 1956	Locations of interest in Western Australia	29 June 2021
Direction under section 70 of the Health Act 1956	Locations of interest in Northern Territory	29 June 2021
Direction under section 70 of the Health Act 1956	Locations of interest in Victoria	29 June 2021
Direction under section 70 of the Health Act 1956	Locations of interest in Queensland	30 June 2021
Direction under section 70 of the Health Act 1956	Locations of interest in New South Wales and Australian Capital Territory	30 June 2021
Locations of interest	Locations of interest	17 August 2021
Household contacts of a person who has been at a NZ location of interest	Isolation and quarantine of household members of persons who attended a location of interest	18 August 2021
Direction under section 70 of the Health Act 1956 [household contacts]	Isolation and quarantine of household members of persons who attended a location of interest	20 August 2021
Locations of interest in New Zealand	Locations of interest	29 August 2021

Household members of a person who has been at a NZ location of interest or who has been categorised as a close contact	Isolation and quarantine of household members of persons who attended a location of interest	29 August 2021
Requirements for any person in the Auckland health district who has returned a positive test for COVID-19	Isolation and quarantine of any person in the Tamaki-Makaurau Auckland health district who returns a positive test for COVID-19	29 August 2021
Direction under section 70 of the Health Act 1956 relating to Upper Hauraki	Isolation and quarantine, monitoring locations of interest and symptoms—persons who left Upper Hauraki	20 September 2020
Direction under section 70 of the Health Act 1956 relating to Upper Hauraki	Isolation and quarantine, monitoring locations of interest and symptoms—persons who left Upper Hauraki	21 September 2021
Direction under section 70 of the Health Act 1956—Persons who have returned a positive test for COVID-19	Isolation, quarantine, medical examination and testing of every person who has returned a positive test for COVID-19	8 October 2021
Direction under section 70 of the Health Act 1956—Persons who have returned a positive test for COVID-19	Isolation, quarantine, medical examination and testing of every person who has returned a positive test for COVID-19	15 October 2021

Appendix C

Guidance for designing secondary legislation

About secondary legislation

Under the Constitution Act 1986, Parliament has full power to make laws.⁵ However, New Zealand needs more laws than Parliament has the capacity to make. So Parliament often delegates some of its power to make laws to various entities within the Executive branch of Government. The laws made under these delegations are secondary legislation.

The general principle is that Parliament should set the broad policy and scope of the law in Acts, leaving matters of detail and implementation to be determined by secondary legislation.

Scrutiny of secondary legislation

When Parliament delegates its law-making power, it also scrutinises how that power is exercised to ensure that it is done in the manner Parliament intended. It has established the Regulations Review Committee (RRC) to do this task on its behalf.⁶ In addition to scrutinising all secondary legislation, the RRC examines powers in bills to make secondary legislation and investigates complaints from members of the public about the operation of secondary legislation. The RRC does not examine the policy behind the secondary legislation, but rather whether the secondary legislation was appropriately made. This means whether it was made in accordance with Parliament's intention and with constitutional principles that underpin the rule of law.

When the RRC has a concern with secondary legislation, it has powers that can lead to the disallowance of the instrument. However, disallowance rarely occurs. Instead, the RRC generally writes to the maker of the instrument, setting out its concern and asking the maker to respond. If it is not satisfied with the response, the RRC may invite officials to discuss the matter in person. It may also report to the House on the instrument. If that report includes recommendations to the Government, the Government has 60 working days to respond to the recommendations.

Why guidance is needed

Secondary legislation is sometimes drafted by the Parliamentary Counsel Office, but much of it is drafted by an array of other entities. Many of those entities draft secondary legislation infrequently and so it is difficult to build up expertise.

This guidance is designed for those entities for whom drafting legislation is not part of their core business. It provides advice on concerns that the RRC sees frequently in instruments drafted by these entities. Much of it has been developed from the RRC's scrutiny of orders made under section 70 of the Health Act 1956 in response to the outbreak of COVID-19. But

⁵ Section 15(1), Constitution Act 1986.

⁶ [See here for more information about the Regulations Review Committee.](#)

it is also informed from our routine scrutiny of secondary legislation, particularly those instruments drafted by entities that draft legislation infrequently.⁷

Understand and respect that the instrument made under powers delegated from Parliament is law

Because it is law, secondary legislation must adhere to the constitutional principles for legislation that are designed to uphold the rule of law. Those principles include the following:

- It must be certain and clear.
- It must not unduly trespass on personal rights and liberties.
- It must not contain matter that is more appropriate for parliamentary enactment.
- It must not be retrospective, unless that is expressly authorised by Parliament.
- It must not sub-delegate the power to make the law, unless that is expressly authorised by Parliament.

We cover these matters in more detail below.

The law must be certain and clear

Respect for the rule of law requires, amongst other things, that the law is easily understood. Indeed, if legal obligations or powers are muddled and confusing, people will seek alternative interpretations of the law or ignore it altogether. Alternatively, they may apply their own judgement of what is common sense, resulting in a variety of interpretations. These scenarios degrade respect for and undermine the law. They produce inefficiency and potentially confusion.

The standard of certainty and clarity expected for law is higher than it is for other forms of communication. Entities making secondary legislation should test their instruments with a variety of appropriate readers to ensure that its requirements are easily understood.

It is not sufficient to issue guidance material to enable those affected by the secondary legislation to understand it. Guidance material is merely an interpretation of the law. The law itself must be clear enough to be understood by the target audience. Any communications or guidance material accompanying the secondary legislation should be clearly distinguished from the secondary legislation.

Many ingredients contribute to making secondary legislation certain and clear:⁸

Be clear about concepts

- What is the scope of the power to make the secondary legislation?
- What is mandatory and what is mere guidance?⁹
- What impact does the legislation have on people's rights and freedoms?

⁷ Other sources of guidance for making secondary legislation can be found in the [Regulations Review Committee Digest \(7th Edition\)](#), annual activities reports of the Regulations Review Committee (found on the [committee's page](#) of the Parliament website), and the LDAC's [Legislation Guidelines](#).

⁸ [The Parliamentary Counsel Office provides more guidance on the principles of clear plain English drafting.](#)

⁹ More information is included below.

- What powers is the secondary legislation granting? What duties is it imposing?
- Who will those powers or duties rest on?
- Are there any preconditions for exercising those powers? If so, what are they?
- What will be the consequences of failing to perform a duty? Who will enforce that?
- When granting an exemption, what are the precise requirements that the person will be exempted from?

Be clear about language used

- Use terms and phrases consistently throughout the secondary legislation.
- Do not invent new terms or phrases if there is a term or phrase already used in related legislation that will suffice.
- If a term or phrase is used in a way that does not have its natural meaning or its meaning is not inherently clear (for example, jargon), define the term or phrase or describe where the meaning can be found.
- Avoid archaic language.¹⁰

The law must distinguish what is mandatory from what is merely recommended

We frequently see secondary legislation made by agencies that write excellent communication material but seldom write law. It can be uncomfortable to produce written material in mandatory language. The result can be that the instruments are not clear about the legal requirements.

Right from the beginning of the policy process, there needs to be a clear distinction between aspects of the policy that will be mandatory and those that will be recommended good practice. Keeping this dichotomy clear from the beginning goes a long way towards clear drafting later.

If something is mandatory, it is usually also enforceable. So thought needs to be given to whether there are existing enforcement mechanisms to support the requirements or whether there are powers in the Act for the secondary legislation to create new mechanisms.

Ideally, secondary legislation should not mix mandatory matters and guidance in the same instrument. However, if it must be mixed, the instrument must clearly distinguish between the two, both by the format and the language used.

It should:

- keep mandatory matters and recommended matters in separate sections
- use headings to clearly identify what is mandatory from what is recommended
- use “must” for matters that are mandatory
- reserve “may” for matters that are merely permitted
- avoid using “should” for mandatory matters and reserve its use for guidance only

¹⁰ The Parliamentary Counsel Office provides guidance on avoiding archaic language.

- do not use “shall” because it is not always clear that it imposes an obligation
- use “rules” or “requirements” for sets of matters that are mandatory
- reserve “guidance” for sets of matters that are merely recommended.

Limits on rights and liberties must be justified

Secondary legislation should not unduly trespass on personal rights and liberties. Secondary legislation should be able to be interpreted in a manner that is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990.¹¹ As those rights and freedoms are not absolute, any assessment of consistency of secondary legislation with those rights will take into account whether any limitation on those rights can be demonstrably justified in a free and democratic society.¹²

If it is necessary for secondary legislation to limit rights to achieve the public interest objective of the legislation:

- that reason should be clearly described in an explanatory note to the instrument
- the impact must be limited as much as possible while still achieving the public interest objective.

Sub-delegation

Secondary legislation cannot give a person a power to do something that would amount to making law unless, in the empowering Act, Parliament has expressly permitted the sub-delegation of the lawmaking power.

Applying this rule is not as straightforward as it sounds because there is a subtle distinction between a power to make the law (this is a legislative power) and a power to apply the law (this is an administrative power). Whether a power is legislative or administrative is determined by the specific circumstances.

As a general rule, secondary legislation is probably granting a power to make law if it:

- grants a power to do something that would affect the rights or obligations of a class of person
- grants a power that could affect the overall operation of the secondary legislation, rather than just its application in a particular instance.

However, secondary legislation is probably granting an administrative power if:

- it only affects one person or one group of people
- it sets out clear criteria for making a decision, so that the discretion remaining is quite limited.

¹¹ Section 6, New Zealand Bill of Rights Act 1990.

¹² Section 5, New Zealand Bill of Rights Act 1990.

Exemptions

When secondary legislation uses a power to grant exemptions, it must precisely describe what obligations the people or things are being exempted from. An exemption power is not a power to grant permission to do something. It does not create new rights.

Exemptions that cover classes of people or things have the potential to change the policy of the empowering Act so must be done strictly within the intention of Parliament as it is expressed in the Act. For example, if the empowering Act relates to all vehicle owners, an exemption covering all owners of trucks would be altering the scope of the Act and so would only be appropriate if it was potentially envisaged by Parliament (that is, the power to grant exemptions extends to making class exemptions that could cover truck owners).

Incorporating other material into the secondary legislation merely by referring to it

Sometimes, it may not be practical to include in the secondary legislation all the detail necessary to understand an obligation. In that case, material in another document or on a website may sometimes be referred to in the secondary legislation. This is called “incorporation by reference” and it is controlled by specific rules designed to ensure that the law is certain and clear. Those rules are found in sections 63 to 66 and Schedule 2 of the Legislation Act 2019 (although some Acts set out specific rules that override these rules).¹³

One of the most important things to note is that, as a general rule, amendments to material incorporated by reference into secondary legislation do not automatically become part of the secondary legislation. The amendments must also be specifically incorporated. This rule helps to prevent the law of New Zealand being effectively made by some other entity without the normal safeguards that apply to making legislation.

It is difficult to incorporate material that is frequently amended, such as information on a website, in a way that enables the law to be clear.

Publish secondary legislation in a manner that makes it accessible

The power to make secondary legislation will usually prescribe the manner in which it must be published and notified. If it does not, at a minimum the secondary legislation should be notified in the *Gazette* and published on the maker’s website.

The purpose of publication is to notify people who may be subject to it, the public, and Parliament that it has been made. It is not sufficient merely to keep a record of the law that has been made. It is important that revoked and expired secondary legislation can also be found on the maker’s website for a reasonable period of time (although it will need to be published in a manner that makes it clear that it is no longer in force). This is so that the public and Parliament can compare the current legislation to what has gone before.

Similarly, when an existing instrument is amended, it must be clear to an ordinary reader how the amendments change the instrument. Many entities simplify this process by repealing the previous version and replacing it with a completely new version.

¹³ We note that New Zealand Standards are commonly incorporated by reference but are subject to specific rules. These rules are set out in sections 29 to 32 of the Standards and Accreditation Act 2015.

Other entities publish instruments that describe only how the principal instrument is amended. This method has the advantage of highlighting how the principal instrument has changed. However, its disadvantage is that it cannot be understood as a standalone document. This method is acceptable so long as the principal instrument remains accessible and the description is clear. At the point when understanding the content of the instrument becomes difficult (perhaps after multiple such amendments), it may be time to replace the entire instrument.

Some entities publish unofficial consolidations of instruments that have been amended several times. Those unofficial consolidations may assist the audience to understand their obligations, but they are not the law. The law, in those cases, is the principal instrument and all the amendments.

Other publication techniques to assist certainty, clarity, and scrutiny of secondary legislation are as follows:

- Give secondary legislation a title that clearly identifies its content and the context in which it is made.
- Ensure that secondary legislation includes the date it was made, the title of the entity that made it, and a reference to the power under which it was made.