



Briefing on best practice for publication of secondary legislation

Report of the Regulations Review Committee

February 2023

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Hon Judith Collins
Chairperson

Briefing on best practice for publication of secondary legislation

Recommendation

The Regulations Review Committee has considered a briefing on best practice for publication of secondary legislation, and recommends that the House take note of its report and recommends that the Government provide a copy of this report to all departments and Crown entities that are responsible for making secondary legislation.

Purpose of this briefing

The Regulations Review Committee is a specialist select committee that scrutinises all regulations and reports to the House on any matter relating to regulations. “Regulations” in the Standing Orders means any delegated legislation, including secondary legislation within the meaning of the Legislation Act 2019.¹ Types of regulations include, but are not limited to, rules, Orders in Council, and notices.²

Hundreds of regulations are made each year by Ministers, government departments, and Crown entities. Our committee has the function of scrutinising all of them. During this work, we regularly encounter issues with the way regulation-makers are fulfilling the publication requirements for regulations that are set out in their respective empowering statutes.

When these issues arise, we often write to the makers of the regulations. We remind them of their obligations and recommend that the legislation be published correctly as soon as practicable. Despite these efforts, we repeatedly encounter the same issues; often from the same agencies and regulation-makers.

This report aims to consolidate the various requirements for publication of secondary legislation, and clarify our view on what should be done to fulfil those requirements. We would like to see this report passed on to regulation-making bodies, so that there is an improvement in how secondary legislation is published.

The law should be publicly accessible

New Zealand’s law should be publicly accessible to everyone. It is important that people know what law they are subject to, and any changes made to it. The legislation website (legislation.govt.nz) is a central point for publication of a lot of New Zealand law. It contains all Acts and bills, plus the secondary legislation that is drafted by the Parliamentary Counsel Office (PCO).

¹ Section 5(1) of the Legislation Act defines secondary legislation as “an instrument (whatever it is called) that—(a) is made under an Act if the Act (or any other legislation) states that the instrument is secondary legislation; or (b) is made under the Royal prerogative in a form and for a purpose set out in Schedule 1A” of that Act.

² The terms “regulations” and “secondary legislation” are used interchangeably in this report.

Secondary legislation not drafted by PCO can be harder to find as there is no central place where it is stored. To make this type of secondary legislation more accessible, it is subject to specific publication requirements.

The Legislation Act 2019 made changes to the publication requirements for secondary legislation. The Act came into force on 28 October 2021. Any secondary legislation under empowering provisions that were made after that date must be notified in the *Gazette* and published in full online. Secondary legislation made under earlier empowering provisions retains existing publication requirements.

To help regulation-makers fulfil their publication requirements, each empowering provision contains a table setting out the publication requirements for each instrument.³

In addition to the publication requirements we discuss below, there may be further requirements for certain regulations. We ask that regulation-makers look carefully at their specific empowering provisions to ensure that they are fulfilling all the publication requirements contained in them.

Most secondary legislation must be published on a website

Secondary legislation drafted by PCO must be published on the legislation website

Section 69 of the Legislation Act requires PCO to publish all secondary legislation that it drafts. This can be found on the legislation website. The website also contains links to some secondary legislation drafted by other agencies.

In 2022, PCO launched the “secondary legislation” tab on each Act’s webpage. The tab provides links to all secondary legislation drafted by PCO that is made under the Act. PCO is considering whether these tabs could be used as a foundation for linking an empowering Act to secondary legislation that is drafted by administering agencies. If agencies publish secondary legislation online in a consistent manner, PCO could include a link from the tab to the relevant secondary legislation landing page of the agency that publishes it.⁴

Most other secondary legislation must be published on the maker’s website

Section 73 of the Legislation Act provides that the maker of secondary legislation must comply with applicable publication requirements (if any). Most empowering provisions provide that secondary legislation must be published on the maker’s website. This allows members of the public to easily access the law that is in force.

The Legislation (Publication) Regulations 2021 apply to secondary legislation made under empowering provisions that came into force after 28 October 2021. Clause 3 of the publication regulations sets out the meaning of “published on a maker’s website”.

³ This change was made by the Secondary Legislation Act 2021, which came into force on 28 October 2021—the same day as the Legislation Act.

⁴ [PCO annual report on legislative practices 2021–22](#), pages 17–18. That report contains further information about improving the accessibility of secondary legislation.

Clause 3 states that:

A requirement that secondary legislation or other information be **published on the maker's website** is met if the secondary legislation or information is published on an Internet site—

(a) that is maintained by or on behalf of—

- (i) the maker; or
- (ii) if the maker is a Minister, the Governor-General, or the House of Representatives, the administering agency for the secondary legislation; and

(b) from which members of the public can access and download it free of charge at all times (as far as practicable).

To comply with these requirements, the secondary legislation should be published in full on a website. This could be done by putting the whole text of the instrument on a webpage or by having a document that can be downloaded from the webpage (such as a PDF).

We note that, even for secondary legislation that is not subject to the publication regulations (because the related empowering provision was enacted before they came into force), clause 3 can still be considered best practice.

Gazette links do not constitute publication

A common issue we encounter is that regulation-makers attempt to fulfil the requirement to publish the regulations on an agency's website by publishing a link to the relevant *Gazette* notice. In addition to publishing secondary legislation on their websites, makers of secondary legislation are often also required to notify the making of the regulations in the *Gazette*.⁵ It could be seen as a shortcut to fulfilling both requirements by publishing the regulations in full in the *Gazette* and then posting a link to that *Gazette* notice on the maker's website.

However, we have consistently stated our position to regulation-makers that posting a *Gazette* link on the regulation-maker's website does not constitute publication on that website. Instead, we consider that regulations should be published online in full or made available in a document that is downloadable from that webpage. This enables better access for the public, and an easy way of downloading the legislation. It also does not require familiarity with the *Gazette*.

Material incorporated by reference must be accessible

Section 64 of the Legislation Act provides a general power for secondary legislation to incorporate material by reference. Incorporating material by reference is where legislation gives legal effect to provisions set out in a separate document, without repeating the provisions or content in the text of the legislation itself. This is common for written material that deals with technical matters. It can be impracticable to include the material in the legislation itself because its size could make the legislation difficult to use or access.

If material is incorporated by reference, the chief executive of the administering agency must ensure that copies of the material are publicly available. To do so, clause 3 of Schedule 2 of the Legislation Act requires that:

⁵ The steps required for notification in the *Gazette* are found in clause 4 of the publication regulations.

- the material is either:
 - made available on (or via a link on) an Internet site maintained by or on behalf of the administering agency, free of charge, unless doing so would infringe copyright; or
 - in any other case, available for inspection, free of charge, at a place notified on an Internet site maintained by or on behalf of the administering agency; and
- the material is available for purchase, at a reasonable cost, from a place notified on an Internet site maintained by or on behalf of the administering agency; and
- if the material is not in an official New Zealand language, an accurate translation in an official New Zealand language of the material is also available.

Agencies should keep these requirements front of mind when making secondary legislation that incorporates material by reference. It is useful for material to be made available on the same webpage where the secondary legislation itself is published.

CPTPP-related legislation has additional requirements

Some secondary legislation has international transparency obligations under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). These obligations create additional publication requirements for secondary legislation, which are found in section 75 of the Legislation Act. The PCO website contains guidance that can help agencies determine whether their regulations are subject to these requirements.⁶

Of particular note is that legislation must be accessible from the New Zealand legislation website. If this legislation is drafted by PCO, it is published in full on the legislation website. If it is not, then the maker of the legislation must publish it on their own website, and notify PCO (which will then publish it on the legislation website). These requirements can also be found in the table in each empowering provision that sets out the publication requirements for secondary legislation made under that provision.

Amendments to secondary legislation must be clear

As noted above, it is important that the law is easily accessible to those who are subject to it. When changes are made to the law, it should be clear what the changes have been, when they have taken effect, and what the current law is now.

We regularly encounter two opposite issues in this area:

- amendment regulations are published as new versions of the principal regulations in a way that does not make it clear what provisions have been amended
- amendment regulations are published separately from the principal regulations but are not consolidated into a complete version of the principal regulations that contain the amendments.

⁶ <https://www.pco.govt.nz/notifying-cptpp-sl-to-pco/>

The first issue is a problem because it is not clear what has been amended. This means people may not know what new requirements they are subject to, or any changes to the law that affect their lives or businesses.

The second issue is a problem because the current law is not accessible in one place for a person to read. To access the current law a person must read the principal instrument together with every amendment to it, to make sure that what they are reading is accurate.

We consider that it is good practice for agencies to publish secondary legislation in a way that makes any changes identifiable, but also provides an up-to-date consolidated version of a principal instrument in one place. This allows the public to understand what the current law is, and to easily see any recent changes that have been made.

Secondary legislation must be presented to the House

An issue closely related to publication of secondary legislation is the presentation of secondary legislation. We therefore include in this report guidance to agencies on presentation of instruments.

Section 114 of the Legislation Act and a Sessional Order for the 53rd Parliament require secondary legislation to be presented to the House no later than the 16th sitting day after the day on which it was made.⁷ Secondary legislation is subject to this requirement unless its empowering provision specifically provides otherwise. Exceptions are rare.

Presentation is an important check on delegated law-making powers. It provides publicity to the regulations and gives the House oversight of the law-making powers it has delegated. Although it is important, presentation can easily be overlooked by agencies. To help encourage correct presentation of regulations, we have attached the procedural steps for presenting instruments to the House in Appendix B.

⁷ The Sessional Orders can be found on the [Parliament website](#).

Appendix A

Committee procedure

We met between 7 December 2022 and 15 February 2023 to consider this briefing.

Committee members

Hon Judith Collins (Chairperson)
Camilla Belich (until 8 February 2023)
Rachel Brooking (until 8 February 2023)
Steph Lewis (from 8 February 2023)
Hon Eugenie Sage
Toni Severin
Sam Uffindell
Vanushi Walters
Helen White (from 8 February 2023)

Appendix B

Steps for presenting Secondary Legislation to the House

We have created the following list of steps to help organisations present their instruments to the House of Representatives within the required time frame—not later than the 16th sitting day after the day on which it was made:

1. the law-making body makes **two hard copies** of the instrument and a soft copy (a Word doc or PDF formatted, structured, and tagged to increase accessibility)
2. the law-making body sends the copies to the responsible Minister's office
3. the Minister's office staff gives the House Office approval to present the instrument
4. the law-making body delivers **five hard copies** and a soft copy (a Word doc or PDF formatted, structured, and tagged to increase accessibility) to the House Office on the morning of the day on which the instrument is due to be presented to the House
5. the House Office manages the presentation of the instrument to the House.

The organisation's responsibility to present does not end with sending copies of the instrument to the responsible Minister's office. It may need to liaise with the office to ensure that the instrument is presented within the required time frame.