

Disclosure Statements for Government Legislation

Technical Guide for Departments

June 2013



THE TREASURY
Kaitohutohu Kaupapa Rawa

New Zealand Government

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About This Guidance

This guidance document sets out the disclosure requirements in detail, and provides further advice on interpreting and responding to each matter for which a disclosure is required.

This guidance document should be read by departmental policy analysts and legal advisors responsible for the preparation and quality assurance of departmental disclosure statements.

Departmental managers, who will formally certify the finalised disclosure statement on behalf of their department, should also be familiar with the key requirements outlined in the early sections of this document.

The requirements outlined in this document will apply to most government Bills and “substantive” government Supplementary Order Papers for which a paper is submitted to Cabinet from the week beginning 29 July 2013 seeking approval for introduction.

This guidance is expected to be reviewed and replaced when departmental disclosures for government legislation become a legislative requirement, as planned by the government.

This document has been written by the Regulatory Quality Team in The Treasury.

Questions and Feedback

General enquiries about the disclosure requirements, not addressed in this guidance or the associated templates, can be directed to the Regulatory Quality Team in The Treasury: regulation@treasury.govt.nz.

Enquiries about permitted formatting of the templates, or the processing and publication of disclosure statements, can be directed to the Pre-Publication Unit in the Parliamentary Counsel Office: ppu@parliament.govt.nz.

Any comments as to how Treasury could improve this guidance can be directed to guidance@treasury.govt.nz.

Further information

This guidance document supports and supplements advice provided in:

- Cabinet Office Circular CO (13) 3, Disclosure Requirements for Government Legislation (link to come)
- The Quick Guide to Disclosure Statements for Bills and SOPs – June 2013, which can be found at www.treasury.govt.nz/publications/guidance/regulatory/disclosurestatements

Overview: New Disclosure Requirements for Government Legislation

Purpose

The government wants to ensure that its policies get translated into legislation that is robust, principled and effective. To support this aim Cabinet has agreed to certain disclosure requirements for new legislation (both Bills and disallowable instruments) that the government produces.

The requirements draw on existing expectations about what makes good legislation to:

- bring attention to specific features of a piece of proposed legislation and/or the key processes through which it was developed and tested;
- make this information publicly available in an accessible and cost-effective way; and
- thereby facilitate greater and more effective scrutiny of that legislation by Parliament and the general public.

The increased provision of information, and scrutiny of that information, is expected to improve legislative quality over time by increasing the attention given to follow good practices during the development of legislation.

Administrative trial period ahead of proposed legislation

Disclosure is ultimately intended to be a legislative requirement. However, while legislation is being developed for this purpose, Cabinet has directed the Treasury to administratively introduce the disclosure requirements as soon as possible. This guidance outlines the disclosure requirements for an initial administrative period ahead of the passage of legislation. The administrative period starts from the **week beginning 29 July 2013**.

No disclosures required for disallowable instruments during the administrative period

During the administrative period, disclosure statements will only be required for government Bills and associated government Supplementary Order Papers. This will allow testing of the widest range of proposed disclosures while limiting the costs on departments during the initial start-up phase.

Once disclosures become a legislative requirement, disclosure statements will also be required for all disallowable instruments drafted by the Parliamentary Counsel Office (within the meaning of section 38 of the Legislation Act 2012). Disclosure will only be required for a subset of the matters required for Bills. Further guidance on this area will be provided closer to the time.

Learning and adapting during the administrative period

The administrative period is an opportunity to test the content, presentation and production requirements before the legislation is finalised and comes into effect. We are not quite sure whether it will be possible to provide effective disclosures for some matters identified by Cabinet for testing, but we will be giving these a try during the period. And while we have tried to anticipate the main issues and scenarios that departments will face when preparing

disclosures, there may be unforeseen circumstances that we have not provided for in the requirements, guidance, and templates.

Consequently, problems may be encountered, and some adaptations of templates and process requirements may be needed on occasion. There may be times when you will have to exercise your own best judgement on how to:

- complete a particular disclosure within the general expectations outlined;
- work within the structure and formatting of the template; and
- satisfy the disclosure presentation and publication requirements.

We (the Regulatory Quality Team in the Treasury, and the Prepublication Unit in the PCO) would like to hear about any problems you do identify and your proposed approach to addressing these. Ideally, please discuss these with us in advance of settling on an answer, especially if you plan to alter the disclosure statement templates, in case we can help or provide advice on what approaches others have taken.

Monitoring during the administrative period

The Treasury will be monitoring the disclosure statements prepared during this initial period to inform the passage of legislation implementing the proposal, and the future refinement of the operational requirements and processes. The monitoring process may include asking departmental staff to provide feedback from time to time on their experience completing a disclosure statement.

Key Features of the Administrative Requirements

Disclosure must be prepared for all new government Bills and Supplementary order papers as outlined in this guidance and must be presented as a *Departmental Disclosure Statement* in the template provided. The disclosure statement sets out questions that must be answered about processes undertaken in the development of the legislation, and about the content of the legislation. Further information relating to a question is required to be disclosed when a response to a question is affirmative.

A disclosure statement is generally grouped into four parts:

- *Part One: General Policy Statement*

Part One requires that a statement be prepared which outlines the policy objectives that the legislation seeks to achieve. It is intended to assist the reader in understanding the purpose of the policy and what it seeks to achieve.

- *Part Two: Background Information and Policy Information*

Part Two relates to important background material and policy information about the legislation. It is intended to provide ready access to existing material that throws further light on the policy issues addressed by the legislation, and on the early stages to the policy development process.

- *Part Three: Testing of Legislative Content*

Part Three relates to information about the testing of the content of the legislation. It is intended to provide information about the quality assurance work undertaken to test the content of the legislation.

- *Part Four: Significant Legislative Features*

Part Four relates to information about particular features that may be contained in the legislation. It is intended to highlight provisions that provide for significant powers or that are unusual and likely to raise interest.

Guidance on what must be disclosed in each of these parts is outlined from page 14.

Departmental responsibility for preparing disclosure statements

The department(s) responsible for the preparation of a government Bill or SOP must prepare a disclosure statement on behalf of the government for that Bill or SOP.

The disclosure statement is a departmental document, not a Ministerial document. The disclosure should reflect the knowledge and understanding of the department(s) in developing the legislation. Departments are responsible for preparing the disclosure statement because it is intended to factually record:

- processes that the department was responsible for undertaking during the development of the legislation's policy; and
- content of the legislation that the department was responsible for advising on and designing.

Individual departments will need to decide who is best placed within the department to prepare the disclosure statement. This may vary between departments depending on how responsibility for developing policy and legislation is split. However, it is likely that preparation of a disclosure statement will require input from multiple teams within the department. For instance, the policy team will be aware of the processes undertaken during the policy development, but may require input from the legal team on the content or effect of particular provisions contained in the legislation.

Quality assurance

No formal independent quality assurance check is required of the disclosure statement. It is expected that departments will use existing internal quality assurance processes to ensure the quality of disclosure statements they prepare. However, departments may wish to consider developing new processes (or fitting in with existing processes) to ensure that the disclosure they prepare accurately reflects the process undertaken during the policy development and the content of legislation.

As a part of the internal quality assurance of the content of the disclosure statement, departments should ensure that any hyperlinks used to refer to information are active (or ready to be active if the information is not published at this time). Departments must ensure that at the time of publication all linked material is available.

Departmental approval

Disclosure statements are required to be approved on behalf of the department. Departments will need to decide who will be responsible for approving the disclosure statement on behalf of the department. This is likely to be the person who is responsible for the development of the legislation which the disclosure relates to. The introductory material of the disclosure statement must name the department(s) responsible for its preparation.

Timing of disclosure preparation

Departments should begin thinking about preparing the disclosure statement early within the legislative drafting process. Early preparation will result in better disclosure as the policy work is still fresh in the mind, and the key people involved are less likely to have moved on to other tasks or positions. It should also mean that there are not any surprises when the disclosure statement is completed and approved. Parts One and Two of the disclosure statement particularly should be able to be prepared at an early stage as they relate to information from the policy development phase that should have already been completed prior to the drafting of legislation.

The disclosure statement must be prepared so that it is **ready to be submitted to Cabinet when approval is sought to introduce the legislation it relates to**. This will generally be when the legislation is considered by the Cabinet Legislation Committee, although legislation is occasionally submitted to other Cabinet Committees for approval.

Cabinet consideration

The Cabinet Manual expects that *reports of a substantive nature relating to government policy* will be submitted to Cabinet. As the disclosure statement is essentially a departmental report on the process of policy and legislative development for particular pieces of legislation it must be provided to Cabinet for its information.

However, formal Cabinet approval of the disclosure statement is not required as the disclosure statement is a departmental document. It is important though that Ministers are aware of the contents of the disclosure statement before it is published in case it leads them to recommend further work be done on the legislation itself. The disclosure statement will provide useful information about the legislation when Cabinet is considering the whether or not to approve the legislation for introduction.

Public release

All disclosure statements must be published in their entirety when the legislation the disclosure statement relates to is introduced to Parliament. The Parliamentary Counsel Office will arrange for publication electronically when it publishes the legislation on the New Zealand Legislation website. Further detail on providing a disclosure statement to the Parliamentary Counsel Office for publication is available on page 10.

Disclosure for Government Bills

Disclosure is required for all government Bills that are introduced to Parliament except for:

- Imprest Supply and Appropriation Bills;
- Statutes Amendment Bills;
- Regulatory Reform (Repeal) Bills;
- Subordinate Legislation (Confirmation and Validation) Bills; and
- Revision Bills (a new vehicle created by the Legislation Act 2012).

Bills require disclosure in all of the areas outlined from page 14 of this guidance. Disclosure is structured around a series of 'primary questions' which must be answered, and in some instances 'subsidiary questions' which clarify the original response. Further information may be required where the response to a primary or subsidiary question is affirmative.

Disclosure must be completed using the *Departmental Disclosure Statement* template for Bills. The template is intended to ensure consistency of response and assist the Parliamentary Counsel Office in publishing disclosure statements; it can be found on the Treasury's website (www.treasury.govt.nz/publications/guidance/regulatory/disclosure/statements). General instructions on how to complete the template are outlined on page 11.

Disclosure for shared or omnibus Bills

Legislation is expected to reflect a whole-of-government approach rather than the work of individual departments. As such, a single disclosure statement should generally be prepared to reflect the development and content of the Bill. In most instances this should be possible, even where multiple acts may be being amended.

Where responsibility for the policy development of a Bill is shared by multiple departments it is likely to be appropriate for the departments to share responsibility for the preparation of the disclosure statement. This may include:

- the lead department taking responsibility for the disclosure statement;
- joint responsibility of the full disclosure statement; or
- responsibility for different parts of the disclosure statement.

Individual departments can decide which approach is most appropriate for their situation. The introductory section of the disclosure statement should make it clear if responsibility has either been shared jointly, or split for different parts.

There may be limited instances where omnibus Bills are introduced with discrete changes to different acts, but within a broad policy objective (for instance, a Regulatory Reform Bill which collates different initiatives with a broad purpose of reducing business compliance costs). Where this occurs, and a collective disclosure statement is not practical, separate disclosures may be prepared for the different parts of the Bill and then collated by the lead department into a single multi-part document for the complete Bill. The lead department should, however, consult with the PCO and the Treasury before pursuing this option.

Disclosure for Government Supplementary Order Papers

Disclosure is required for “substantive” government amendments to non-exempt government Bills that are introduced as a supplementary order paper (SOP). These will fall into two categories:

- those involving material changes to the policy being given effect by the Bill; and
- those that may not involve material policy changes, but nonetheless would require an affirmative answer to at least one of the questions in Part Three (Questions 3.4 and 3.5 only) or Part Four of the matters for disclosure.

If the SOP meets neither of these criteria, it is not a substantive amendment and no disclosure statement is required. Disclosure is not required for SOPs where the Bill was originally exempt from the disclosure requirements.

Disclosure must be completed using either the *Departmental Disclosure Statement* template for material supplementary order papers or the short-form disclosure template for supplementary order papers. The templates are intended to ensure consistency of response and assist the Parliamentary Counsel Office in publishing disclosure statements; they can be found on the Treasury’s website (www.treasury.govt.nz/publications/guidance/regulatory/disclosurestatements). General instructions on how to complete the template are outlined on page 11.

Amendments involving material policy changes

What constitutes a material changes to a Bill’s policy will be a matter of judgement. Indicators that a policy change is material may include:

- material changes to the nature or size of the potential costs or benefits of the policy;
- the need for further policy approvals from Cabinet;
- the need for an updated or supplementary regulatory impact statement; and
- external consultation on the proposed amendments ahead of tabling the SOP, or a recommendation to refer the resulting SOP back to select committee.

Where material policy changes are proposed, the department should provide a disclosure statement for the amended Bill (that is, the Bill as it would be with the SOP changes incorporated). This is intended to help the reader consider the changes in the context of the Bill and the Bill’s development process as a whole.

Departments can either provide an updated version of the original disclosure statement (most suited to extensive and multi-faceted policy changes), or a supplement to the original disclosure statement (most suited to policy additions or relatively contained policy changes), depending on which is likely to be most helpful for the reader.

A consequence of producing disclosures for the Bill as amended is that it will also pick up any relevant changes made at the select committee stage. These changes can be noted, without any expectation that these need further departmental explanation or justification.

Amendments affecting disclosure for Parts Three or Four

Where the policy changes may not be material, but the amendments have features that would require an affirmative answer to at least one of the questions in Part Three (Questions 3.4 and 3.5 only) or Part Four, the department can provide a short-form disclosure statement for the SOP alone. The short-form disclosure statement would be limited to answering questions in those parts.

Supplementary order papers with no original disclosure

If there was no original disclosure statement (because the Bill was introduced before the disclosure requirements came into force), and the disclosure is required for an (as outlined above), there are two options to complete disclosure.

- If the SOP is to be referred back to a select committee, the department should provide a complete disclosure statement for the amended Bill.
- Otherwise, the department should provide a short-form disclosure statement as outlined above.

Provision and Publication of Disclosure Statements

Circulation of the disclosure statement

Departments must ensure that the approved disclosure statement is provided to their Minister so that it can be provided to Cabinet with the Cabinet paper seeking approval to introduce the legislation to which it relates. The disclosure statement must reflect the final content of the legislation that is to be submitted to Cabinet for approval.

The approved copy of the disclosure statement *should* be provided to the Parliamentary Counsel Office (PCO) for publication at the same time as it is provided to the Minister. Departments *must* ensure that PCO has the final disclosure statement **at least two working days prior to the likely introduction of the legislation**. This is to ensure that PCO has sufficient time to prepare the disclosure statement for publication. If the statement is not provided in time it may not be able to be published in time for the legislation's introduction.

Hard copies of the disclosure statement must be provided with all legislation provided to the Bills Office. Departments are responsible for ensuring that 40 hard copies of the disclosure statement are delivered within half a working day after the date on which the PCO orders the printing of introduction copies of the Bill. The Bills Office will then associate the hard copies with the introduction copies of the Bill.

Publication of disclosure statements

The PCO will publish disclosure statements and maintaining a central online repository of all disclosure statements produced. Disclosure statements will be published electronically only by the PCO.

Approved disclosure statements are to be provided to the PCO at the same time that it is provided to the Minister. If the statement is in the template format PCO will then publish the content provided by the department online at the same time that it publishes the introduction version of the Bill. This will include both html and PDF versions of the disclosure statement.

Once published disclosure statements will be available on the following website (which will be live from the beginning of the administrative period): www.disclosure.legislation.govt.nz.

Disclosure statement and explanatory notes

The disclosure statement will be available through a hyperlink to be contained in the explanatory note of a Bill. The PCO will provide standard wording for text to accompany the URL in the explanatory note of a Bill – stating whether or not a disclosure statement has been prepared and where it can be located.

PCO will also provide the Bill number for the introductory material of the disclosure statement and complete this section when preparing the disclosure statement for publication.

General Instructions for Completing the Disclosure Statement Templates

The information contained in a disclosure statement will be used by a variety of people – from Members of Parliament through to the general public. Many of these people may not have a detailed background in the legislation’s subject matter. The information provided in the disclosure statement needs to be accessible for this broad range of people.

As outlined earlier in this guidance, the appropriate disclosure statement template must be used when completing disclosure. It provides structured responses to the disclosure requirements. The template is designed so that each disclosure question is in a form that enables readers to quickly see the response to a question and easily decide whether to investigate any further information that may be available.

The template lists all of the questions for which disclosure is required. The questions are designed to illicit a response to the existence of a particular piece of information, and then direct to where that information can be found if it exists. Disclosure is only required as outlined in the template.

Responding to disclosure questions in the template

Responses to the questions and any additional information provided **should**:

- be factually accurate and up-to-date;
- fairly and honestly describe what has been done or not done;
- remain neutral in tone;
- be owned by the department and provided independently of Ministers or other parties; and
- be written in plain and simple English, and as concisely as possible.

Responses to the questions and any additional information provided **should not**:

- seek to advocate or sell the Bill;
- exclude or obfuscate inconvenient facts or information; and
- include unnecessary jargon or legalese.

Using the template

Departments must not change the formatting of the template. This is to ensure a consistency of approach across all disclosure statements, and to ensure that the Parliamentary Counsel Office can publish the disclosure statement. Using the formatting styles contained within the template (and outlined below) will mean that departments do not need to make last minute changes for publication to occur.

The following changes to the template are **not allowed**:

- altering the structure of the 'boxed' question and answer format;
- removing any of the primary questions (those numbered x.x.); and
- adding any diagrams, graphics, or tables other than what is already provided for.

The following minor changes to the template **are allowed**:

- subsidiary questions (those numbered x.x.x.) can be deleted where they are not applicable due to the response to the primary question; and
- guidance on the additional information to be provided in response to primary questions should be removed once completed.

When completing disclosure using 'free text' in the boxes provided or appendices, the following formatting styles should be used (to ensure smooth publication):

- Normal paragraph style;
- Single level lists (ordered and unordered);
- Underline (via standard toolbar button only);
- Strikethrough (via standard toolbar button only);
- Bold (via "strong" style only);
- Italic (via "emphasis" style only);
- Heading 2;
- Heading 3; and
- Heading 4.

Deviation from these styles is likely to affect the smooth publication of material into HTML, and result in content not being presented as intended, or content being omitted.

Hyperlinks to external websites, or other pages on the disclosure website (not internal links within the document) must be fully described, i.e. they must include <http://> or <https://>

Hyperlinks

Where possible, departments should generally use hyperlinks to refer to information that answers the disclosure questions rather than attempting to replicate information.

As a general piece of advice, while a hyperlink that takes the reader directly into the relevant report could be used, a better option may be to link to a page about the report that also provides a brief introduction or description, access to the report in alternative formats, and perhaps links to other related material. A single webpage containing links to all available material relating to the development of a particular piece of legislation might be one useful approach that simplifies the preparation of information linked in the disclosure statement.

Sensitive information

Information that may be sensitive should not be provided as a part of any disclosure response. The disclosure statement is intended to be used publically in the consideration of legislation, and information should not be withheld when the statement is published.

Correcting disclosure for content changes

There will be occasions where legislation is submitted to the Cabinet for approval and changes are requested to the provisions in the Bill prior to Cabinet's agreement to the introduction of the Bill. In such instances, where the changes affect the disclosure made, the disclosure statement should be updated to reflect the changes to the content of the Bill. An updated version of the disclosure statement should be submitted to Cabinet alongside the updated draft of the legislation (if applicable), and provided to the Parliamentary Counsel Office no later than two working days before introduction.

Errors in disclosure statements

No changes should be made to the disclosure statement once it has been published and the legislation it relates to has been introduced (with the exception of those changes required as a result of a supplementary order paper). This is to ensure that there are not multiple versions in circulation when the Bill is being considered by Parliament (when the disclosure statement is likely to be most utilised by a wide audience).

Completing Part One: General Policy Statement

The purpose of a general policy statement is to disclose key information that will assist readers to understand the purpose of a Bill.

Standing Order 254 of the House of Representatives already requires all Bills to have “an explanatory note that states the policy that the Bill seeks to achieve”.¹

The nature and quality of the general policy statement in current explanatory notes to Bills is variable and some greater consistency in the quality of information that is provided about the purpose of a Bill would considerably aid the reader.

While a general policy statement will continue to be included in the explanatory note of a Bill, the same information will also provide a useful overview and starting point for anyone considering the content of the associated disclosure statement.

Information to be provided

For consistency’s sake, the text of the general policy statement provided to Parliamentary Counsel (or your IRD drafter) for inclusion in the explanatory note to the Bill should be exactly the same as the text of the general policy statement included in the disclosure statement.

This underlines the desirability of starting work on the disclosure statement soon after drafting instructions have been provided, if the expectations below are to be met.

What is the nature of the further information sought?

Describe the policy objectives that this Bill seeks to achieve, and the reasons for them.

Describe how this Bill goes about trying to meet those objectives and why this approach is necessary or desirable.

A general policy statement should provide a succinct description of the policy objectives sought to be achieved by the Bill, and the reasons for pursuing those policy objectives.

This could draw on material set out in the Cabinet paper that sought agreement to the policy now reflected in the Bill, and/or the Regulatory Impact Statement that accompanied that paper.

This could also include some contextual information about how an inquiry, review or evaluation report to be reported under Question 2.1, or an international treaty to be reported under Question 2.2, is relevant to the Bill.

A general policy statement should also provide a brief description of the methods by which the Bill seeks to achieve those policy objectives and a brief discussion of why those methods were necessary or preferred over other possible alternatives.

¹ Standing Orders are available at: <http://www.parliament.nz/en-NZ/PB/Rules/StOrders/>

Possible alternatives for achieving the objectives of a Bill could have included: letting private arrangements or solutions evolve; using existing legal provisions; increasing enforcement, information or education campaigns; using economic instruments such as taxes, subsidies or tradable property rights; establishing voluntary standards or codes of practice, or facilitating other forms of self-regulation or co-regulation.

The content of a general policy statement should be neutral in tone. A general policy statement is a statement provided by the department about the content and effect of the Bill. A general policy statement must not 'promote' the Bill.

As the Speaker has ruled in relation to explanatory notes, "there is no absolute standard to which an explanatory note must conform [but] an explanatory note must be drafted in factual, not argumentative, terms."²

Agencies may provide further information in addition to the requirement for a general policy statement and in addition to the information provided in response to the other questions in this disclosure statement. Additional information should be included only if it is considered it would be helpful to the reader of the Bill.

For some reasonable (but not perfect) examples of General Policy Statements for Bills, see:³

Objectionable Publications and Indecency Legislation Bill 2013

Government Communications Security Bureau and Related Legislation Amendment Bill 2013

Family Court Proceedings Reform Bill 2012

State Sector and Public Finance Reform Bill 2012

² *Speaker's Rulings 1867-2011 Inclusive*, Ruling 99/2, available at <http://www.parliament.nz/en-NZ/PB/Rules/Rulings/>.

³ These Bills are all available at: <http://www.legislation.govt.nz/>.

Completing Part Two: Background Material and Policy Information

Part Two of the disclosure statement seeks to identify and provide the reader with easy access to background policy material and policy analysis relating to the Bill.

It takes the form of a series of questions requiring a YES or NO response, with further information required to be provided depending on the response given.

- **For Part Two questions, please answer NO unless you are sure the answer is YES**

You can use the text box under the question to clarify, qualify or explain that NO answer if that seems necessary or desirable.

- **The finalised Part Two should not exceed 3 pages in length**, once all instructions and the boxes for any irrelevant subsidiary questions have been removed

This is to ensure readers can quickly skim through the headline questions and YES/NO responses. If longer responses are required for any of the questions, set these out under an appropriate heading in Appendix One, with a reference to Appendix One placed in the text box under the relevant question.

Published reviews or evaluations

Formal inquiries, law reviews, policy or operational reviews, and evaluation reports are a frequent source of recommendations for changes to legislation.

The reports themselves are a particularly valuable resource for those wishing to scrutinise legislation because they are often the result of considerable informed deliberation and consideration of evidence by experts, and will generally acknowledge uncertainties and give clear explanations for any recommendations made. Even when they are not the driver for reform, such reports might be reasonably expected to inform legislative proposals in the policy area to which they relate.

Question 2.1

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/NO]
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What matters are covered by the question?

In general, you should consider for disclosure any report (which might be mandatory or discretionary, independent or in-house, ad hoc or scheduled, local or international) that was:

- the source of, or inspiration for, important aspects of the policy; or
- a catalyst for the development of the policy; or
- a major source of evidence or other input for the analysis underpinning the policy.

Those officials overseeing the policy development process for a Bill will know what reports have informed the underlying policy. A report can inform the policy without necessarily indicating support for, or reaching conclusions aligned with, that policy.

While the most influential reports are likely to be specific to, and produced within, New Zealand, policy thinking and research is international and increasingly exchanged across jurisdictions, so could come from outside New Zealand.

You should also consider for disclosure any other available report that:

- was produced by or on behalf of a department, statutory body, commission of inquiry, or taskforce appointed by or established with the support of the government; and
- reviews or evaluates a specific failure in, or the general operation or effectiveness of, New Zealand's existing law or institutional arrangements in policy areas that will be impacted by the current Bill.

Informed scrutiny benefits from looking at proposed legislation in context, including how well it fits with existing legislation, and the different ways in which the problems to be addressed might be framed.

Inevitably, departmental judgement will need to be exercised over whether the subject matter of a report provides, or continues to provide (given passage of time), relevant context for the Bill.

If there are quite a number of relevant reports, use your judgement as to which most deserve to be listed. The most important criterion should be their level of influence on the policy, but give a degree of preference to reports that can be accessed free online.

What is the nature of the further information sought?

If the answer is **YES**, please provide, for all major reports deemed within scope:

- a suitable citation for the report (title, authoring body, date - and publisher if necessary);
- an active hyperlink to where the report can be accessed for free, or otherwise a sentence indicating how a reader can access the report.

Ideally, no additional information about each report would be necessary here. In the first instance, you could look to use the general policy statement to provide contextual information about, say, how a listed report may have informed the Bill, or the existence of a formal government response.

Example: (for a YES answer, concerning a possible Courts Bill)

Review of the Judicature Act 1908: Towards a New Courts Act (NZLC R126), New Zealand Law Commission, 27 November 2012 (accessible at <http://www.lawcom.govt.nz/project/review-judicature-act-1908-and-consolidation-courts-legislation/report>).

If the answer is **NO**, no further information is required.

Relevant international agreements

Treaties being given effect

It has been estimated that around 20% of New Zealand's public Acts implement international obligations. The majority of these, however, do not clearly acknowledge the particular treaties to which they give effect. External parties can only assess the extent to which a Bill's provisions are consistent with, or go beyond, the international obligations imposed by the treaty if they know that the Bill intends to give effect to a treaty, and if they have access to the relevant treaty text.

National impact analysis

Standing Orders require, and the Cabinet Manual also states, that multilateral treaties and major bilateral treaties of particular significance are to be presented to the House of Representatives for examination, generally before binding treaty action is taken by the government.

To support the examination process, the treaty must be accompanied by a national interest analysis (NIA), prepared in accordance with Standing Orders and approved by Cabinet. The NIA is expected to set out:

- the reasons New Zealand is proposing treaty action,
- the advantages and disadvantages,
- the nature of the obligations imposed,
- the nature of the expected effects and costs of compliance; and
- how the treaty would be implemented in New Zealand (which includes the nature of any legislation required).

Question 2.2

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?

[YES/NO]

What matters are covered by the question?

For the purposes of this question, a treaty is an international agreement between two or more states or other international persons that is:

- governed by international law; and
- intended by the parties to create legally binding obligations.

Treaties can take a variety of forms and names. If you are unsure whether a relevant instrument is a treaty, your department's legal team, or the treaty officer at the Ministry of Foreign Affairs and Trade (email treatyofficer@mfat.govt.nz) may be able to help.

Giving effect to New Zealand action in relation to an international treaty will include:

- giving direct effect to the treaty text by stating that the relevant provisions have the force of law in New Zealand;
- incorporating wording from the treaty into the body of an Act;
- including in an Act obligations that reflect the substance of the treaty provisions;
- authorising the making of delegated legislation to give effect to specified treaties; or
- legislation that addresses New Zealand's withdrawal from, or denunciation of, a treaty.

Action in relation to a treaty should also be taken to include action in relation to:

- parts, amendments, or additions to a treaty; or
- new binding instruments that are made from time to time under the authority of a treaty.

What is the nature of the further information sought?

If the answer is **YES**, please provide:

- a suitable citation for the relevant treaty (or treaty part, amendment, or associated instrument), including full title, date, etc;
- an active hyperlink to the text of the treaty, or a sentence indicating where the relevant treaty text can be accessed for free (which might be in a schedule of the Bill itself); and
- an answer to the subsidiary question (Question 2.2.1).

If the Bill takes action only in relation to a specific part of a treaty, this can be indicated as part of the citation. If the action taken is in relation to withdrawal or denunciation of a treaty, this should also be indicated. Otherwise, you could look to use the general policy statement to provide any further contextual information about how a treaty may be relevant to the Bill.

If the relevant treaty text is not attached as a schedule to the Bill, the best place to go for a suitable hyperlink to the treaty's text is likely to be the Treaties Register Database maintained by MFAT.

The Database is expected to be publicly accessible online from the end of July 2013 at <http://www.treaties.mfat.govt.nz>. Each page of the Database should provide some standard information about each treaty, and either a downloadable PDF version of the Treaty text, or a link to the treaty text on the treaty depository's website.

Example: (for a YES answer, concerning an International Financial Agreements Amendment Bill)

The Bill gives effect to changes to the Articles of Agreement of the International Monetary Fund, agreed by the IMF governors in 2008 and 2010.

The specific changes to the Articles are set out in Schedule 1 and 2 of this Bill.

The Full Articles are set out in Schedule 1 of the International Agreements Act 1961 (accessible at <http://www.legislation.govt.nz/act/public/1961/0003/latest/contents.html>).

If the answer is **NO**, no further information is required. You can also then delete the subsidiary question (Question 2.2.1) from the disclosure statement.

However, if elements of the Bill are intended to give legislative support or force to otherwise non-binding international arrangements or standards, you are welcome to indicate this in the space provided under the headline question.

If you wish to provide a hyperlink to the text of the arrangement, the Treaties Register Database will also contain information and links to the text of some international arrangements entered into by New Zealand.

Example: (for a NO answer, concerning a Patents (Trans-Tasman Patent Attorneys) Amendment Bill)

However, the Bill is intended to implement the Arrangement between the Government of Australia and the Government of New Zealand Relating to Trans-Tasman Regulation of Patent Attorneys, signed in March 2013 (accessible at <http://www.med.govt.nz/business/intellectual-property/proposal-for-trans-tasman-regulation-of-patent-attorneys>).

Question 2.2.1

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?

[YES/NO]

What matters are covered by the question?

You should disclose any reports prepared in accordance with Standing Order 395 that were presented to the House of Representatives at the same time as any treaty identified in the headline question (Question 2.2) above.

What is the nature of the further information sought?

If the answer is **YES**, please provide:

- a suitable citation for the relevant National Interest Analysis (full title, authoring agency, date)
- an active hyperlink to where the National Interest Analysis can be accessed for free.

Unfortunately, it is not always clear where to find the best online source of a published National Interest Analysis (NIA) report. The Parliamentary website might be the most comprehensive and durable source at present, but the NIA is often only published here as an annex to the relevant select committee report. The full hyperlink protocol address for the report is also likely to be long, which is not ideal.

We therefore encourage you to publish any NIA your department produces on your department's website, once it has been presented to the House. If it takes the form of an extended NIA then it might also be accessible on the main RIS page of the Treasury website (<http://www.treasury.govt.nz/publications/informationreleases/ris>).

Example: (for a YES answer, concerning an International Financial Agreements Amendment Bill)

The International Monetary Fund 2008 and 2010 Governance Reforms: National Interest Analysis, of xx 2012, prepared by the Treasury.

This report can be found in Appendix B of the report of the Foreign Affairs, Defence and Trade Committee, accessible at http://www.parliament.nz/NR/rdonlyres/46801933-C3B7-44E7-976F-DBD9EE5740A1/266273/DBSCH_SCR_5780_Internationaltreatyexaminationofthe.pdf.

If the answer is **NO**, please briefly indicate why no National Interest Analysis was prepared.

In most cases, this will be because there was no Parliamentary examination of the relevant treaty.

Regulatory impact analysis

Regulatory impact statements

Cabinet requires government agencies to undertake regulatory impact analysis for any policy proposals submitted to Cabinet that includes discussion of regulatory options. A regulatory impact statement (RIS) summarising the impact analysis undertaken must be attached to the policy submission to Cabinet.

The agency producing the RIS is required to take responsibility for the analysis and advice it contains. The RIS is expected to contain an agency's best advice on the policy problem, the policy objectives, and the identification and analysis of a full range of practical options for addressing these. It must also have attached a signed disclosure statement that highlights any key gaps, assumptions, dependencies, constraints, caveats, or uncertainties concerning the analysis able to be undertaken.

Access to the RIS allows a reader to consider the merits of the policy supported by the Bill alongside other options, drawing on the knowledge and expertise of the agency that ought to know most about the issue within government.

Independent opinion on the quality of a regulatory impact statement

Cabinet requires that an agency opinion on the quality of the RIS is included in the Cabinet submission to which it is attached. If any of the regulatory options are considered likely to have significant impacts or risks, this opinion is provided independently by the RIA Team based in the Treasury. Otherwise it is provided by someone nominated by the chief executive of the authoring agency.

The opinion provided to Cabinet does not express a view on the policy merits of the options presented in the RIS, but assesses the analysis summarised in the RIS against 4 key dimensions – is the material presented: complete; convincing; consulted; and clear and concise?

The relevance of a regulatory impact statement to the policy in the Bill

The primary function of a RIS is to provide analysis and advice to the lead Ministers and Cabinet in advance of them taking policy decisions about how they might respond to an issue. Its role is to inform, rather than to rationalise, the decisions taken.

As a result, the options analysed in a RIS will not always fully or accurately reflect the actual policy decisions subsequently taken by the government, and now reflected in the Bill. This may not be initially obvious to a reader, however, unless told. Identifying the key differences is intended to help a reader assess how relevant the RIS analysis was to the decisions taken by Ministers, and how relevant it still is to understanding the content of the Bill.

Question 2.3.

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?

[YES/NO]

What matters are covered by the question?

You should report any regulatory impact statements that were prepared in accordance with Cabinet requirements, and presented to Cabinet in advance of the relevant policy decisions being taken.

There can be more than one relevant RIS if the Bill covers multiple policy issues, or a progressive series of policy decisions.

Any statements that were not produced by or on behalf of the administering agency, or that were produced or updated after Cabinet policy consideration, are not regulatory impact statements for the purposes of this question. Any such statements could, however, be relevant to Question 2.4.

You should also report any extended National Interest Analysis (NIA) report that:

- incorporates all the Cabinet requirements of a RIS,
- was prepared in accordance with guidance provided by MFAT and The Treasury, and
- was presented to the House of Representatives in accordance with Standing Orders to support the examination of a proposed treaty action.

What is the nature of the further information sought?

If the answer is **YES**, please provide:

- a suitable citation for each relevant RIS, or extended NIA incorporating the RIS requirements (full title, date, authoring agency, etc.);
- active hyperlinks to where each RIS (or extended NIA) can be accessed for free; and
- if any of these RISs is not going to be publicly available, or any of the original RIS content is being withheld, a sentence noting this, with a brief reason;
- an answer to the two subsidiary questions (Question 2.3.1 and Question 2.3.2)..

Consistent with recent practice for hyperlinks to RISs included in the explanatory notes for Bills, two hyperlinks should be provided for each RIS.

- The primary link should be to a page on the authoring agency's website that will provide direct access to the RIS (potentially including an html version, consistent with government web standards).
- The secondary link should be to the main RIS page on the Treasury website, where all RISs are independently published (but only in PDF versions) – see <http://www.treasury.govt.nz/publications/informationreleases/ris>).

Example: (for a YES answer, concerning a potential Legislation Amendment Bill)

Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act?, The Treasury, 2 February 2011.

Increasing the Visibility of Regulatory Quality Issues, The Treasury, 29 January 2013.

Both RISs are accessible at <http://purl.oclc.org/nzt/f-1541> and can also be found and downloaded at <http://www.treasury.govt.nz/publications/informationreleases/ris>.

If the answer is **NO**, please indicate why none was prepared or supplied. You can then delete the two subsidiary questions (Question 2.3.1 and Question 2.3.2) from the disclosure statement.

In most cases, this will be because it met one of the grounds for an exemption set out by Cabinet. Please do not, however, claim an exemption that does not apply – if the agency did not have enough time to prepare one, or it was not made available to Cabinet when Cabinet took the relevant policy decisions, then say so.

Example: (for a NO answer, concerning a Treaty of Waitangi Claims Settlement Bill)

Legislative initiatives that simply implement deeds of settlement for Treaty of Waitangi claims, and do not amend or affect existing regulatory arrangements, are exempt from the Cabinet requirement to provide a regulatory impact statement.

Question 2.3.1

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?

[YES/NO]

What matters are covered by the question?

You should only report an independent opinion on the quality of a RIS if it was provided by the RIA Team based in the Treasury for inclusion in the relevant Cabinet paper.

While independent quality assurance is sought for all RISs, external evaluations continue to show that the opinions provided by the authoring agency still tend to systematically overestimate the quality of the RIS. For this reason, the agency opinions are not considered to be consistently independent and reliable enough to report in the disclosure statement – at least at this point in time.

What is the nature of the further information sought?

If the answer is **YES** for at least one RIS reported under Question 2.3, please provide the verbatim text that was provided by the Treasury RIA Team for inclusion in the Cabinet paper.

If there is more than one RIS, please indicate the RIS to which any or each opinion refers.

Example: (for a YES answer, concerning a potential Legislation Amendment Bill)

Only the RIS dated 2 February 2011 met the threshold for receiving an independent opinion on the quality of the RIS from the RIA Team based in the Treasury. Their opinion for Cabinet on that RIS is set out in full in Appendix One of this disclosure statement.

If the answer is **NO**, please explain why no independent opinion was provided.

In most cases, this will be because it did not meet the threshold for RIA Team assessment.

Example: (for a NO answer)

The RIS identified above did not meet the threshold for receiving an independent opinion on the quality of the RIS from the RIA Team based in the Treasury.

Question 2.3.2

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	[YES/NO]
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What matters are covered by the question?

The focus here is on identifying whether there are key aspects of the policy found in the Bill but not covered by, or different in substance from, any of the options analysed in the RIS.

It does not seek disclosure of situations where the policy details had still to be resolved when the RIS was developed, or situations where the agency has subsequently changed, refined or extended its assessment of the impacts of the policy. These situations could be relevant to Question 2.4 however.

What is the nature of the further information sought?

If the answer is YES , briefly describe: <ul style="list-style-type: none">• the key policy features of the Bill not covered by the RIS, and/or• how any key policy features of the Bill vary from those of the closest policy option analysed in the RIS.
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If the answer is NO , no further information is required.
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However, you may want to take the opportunity to state which of the options analysed in the RIS is a good match to the policy reflected in the Bill.

Example: (for a NO answer, concerning a potential Legislation Amendment Bill) The features of Option 5 in the 2 February 2011 RIS, and Package 2 in the 29 January 2013 RIS, correspond reasonably well with the key policy features of this Bill.
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Extent of impact analysis available

Further impact analysis

There is no existing obligation for agencies to prepare updated impact analysis as the policy is refined and the implementation details are resolved. Nonetheless, a good policy agency will keep a careful eye on the potential impacts and risks as design and implementation issues are fully worked through.

The policy agency needs the ability to assure or alert Ministers during the detailed design phase as to whether the policy proposals are likely to deliver as originally intended, and to advise on the opportunity or need for policy or operational changes. This is particularly important where only limited information on likely impacts was available at the time the key policy decisions were taken.

Identifying costs, benefits, and those incurring substantial losses

Regulatory impact statements provided to Cabinet rarely include estimates of the benefits (unless they come in the form of cost savings), and frequently do not include estimates of the different types of costs that may be incurred. Nor are they always clear about the potential for a policy option to cause a substantial loss of income or wealth to a group of people, unless the impact is both very obvious and direct.

Sometimes this is because the benefits, costs and other indicators of impact are inherently difficult to estimate. But in others it is because the agency:

- lacked the data or time to do the analysis; or
- had not yet developed the policy in sufficient operational detail to allow meaningful or credible estimates or projections to be made.

Both of these latter problems may be able to be resolved by further work and consultation by the agency, including discussion with those who would be responsible for implementation.

It is therefore not unreasonable to expect that estimates of at least some categories of cost and benefit could be available, and the potential impacts for particular affected groups could be clearer, by the time a Bill is ready for introduction, even if this information was not available earlier. A reader is likely to be interested in these estimates and projections – or interested that these are not available at this late stage in the process.

Identifying expected levels of compliance and regulator effort

Amending the law does not guarantee compliance with the law. But if the law imposes obligations or sets standards, the benefits able to be achieved from the legislative change are likely to be affected by the level of effective compliance with those obligations or standards by the regulated parties. Alternatively, non-compliance may give rise to additional costs. If so, conclusions reached about likely levels of compliance or non-compliance will be important to an assessment of the likely benefits and costs of the policy being given effect.

Further, the achieved levels of compliance with legal obligations or standards are likely to be influenced by the nature and level of action taken by a regulatory authority to support compliance. Effort aimed at encouraging and securing compliance would therefore be expected to increase benefits or lower costs, and will itself give rise to costs.

It follows that a discussion of likely compliance or non-compliance levels, and expected regulatory compliance activity, should be an important feature of most regulatory impact analysis.

In practice, regulatory impact statements do not always explicitly discuss anticipated levels of compliance, the nature and level of proposed regulatory compliance activity, and whether these projections are likely to be consistent with each other.

But certainly by the time a Bill is ready for introduction, it is not unreasonable to expect that these questions will have been given proper attention, and the conclusions explicitly factored into the analysis of benefits, costs and risks. Again, a reader is likely to be interested in this information – or in the fact that it is not available when relevant.

Question 2.4

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?

[YES/NO]

What matters are covered by the question?

This covers updated, extended or additional impact analysis, beyond that covered in any of the regulatory impact statements identified earlier.

For the purposes of this question, impact analysis simply means analysis of the costs, benefits, risks and other potential impacts of the policy to be given effect by the Bill. The less specific term is used here to indicate that it need not encompass all the other formal elements associated with the Cabinet requirements for regulatory impact analysis.

You might like to look at this disclosure as an opportunity to pre-empt questions or concerns that external parties may seek to voice about the quality of analysis undertaken, especially if there is limited analysis available in any RIS, or important policy changes have been made since the last RIS was finalised.

Note that impact analysis could be valuable even if there was no earlier RIS required. For example, a regulatory proposal might have qualified for an exemption on the grounds that it was expected to have no or only minor impacts outside of government, but the potential impacts on the government itself might be enough to justify some analysis of likely costs and risks.

Only significant bits of analysis, either produced or commissioned by relevant government agencies, are expected to be reported. However, that analysis need not be comprehensive – it might only examine selected policy elements or selected impacts or risks.

“Become available” here simply means able to be publicly released. It is up to you whether to proactively publish any of the reports.

What is the nature of the further information sought?

If the answer is **YES**, please provide:

- a suitable description or citation for each piece of further impact analysis released (title, date, authoring agency, etc);
- a sentence or two indicating the scope of, and status to be accorded to, that analysis; and
- if possible, an active hyperlink to where that analysis can be accessed for free.

If the answer is **NO**, no further information is required.

Question 2.5

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/NO]
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	[YES/NO]

What matters are covered by the question?

This is a two-part question. For the question in part (a):

- Costs and benefits are viewed from the perspective of national cost benefit analysis. They are not limited to the fiscal impacts for the government, but cover all gains and losses in value wherever they arise within New Zealand – noting that this nets out transfers or redistributions of resources between different parties within the economy.
- The relevant costs and benefits are not just those directly attributable to the specific terms of the Bill. They should also include costs and benefits arising from the way in which the legislation is expected to be applied or implemented, including the likely requirements of delegated legislation enabled by the Bill, and from other discretionary actions facilitated by the legislation.
- Any discussion of size requires judgements about amounts or numbers. They need not be expressed in dollar terms. They need not even be point estimates – they could be expressed as a range, a probability distribution, or an order of magnitude.

For the question in part (b)

- The focus is on identifying any groups of people that might suffer substantial adverse effects from the policy given effect through the Bill.
- The particular adverse effects of interest for disclosure are uncompensated losses in the market value of existing property, or losses in the value of an existing income stream (if these losses would not already be captured in changes to the market value of the person’s tradable property, such as a business).
- These losses of income or wealth might arise from the loss of a valuable property right, or the loss of a right to supply certain goods or services. However, any losses arising from undertaking illegal activity, including the effect of legal penalties that might be imposed, should be ignored.
- Only substantial losses need to be identified. Whether or not a loss is “substantial” is to be judged from the point of view of an affected individual. It should take some account of their remaining income or wealth, and perhaps also the impact on them relative to others.
- The disclosure relates not only to losses directly attributable to the specific terms of the Bill, but also to the potential for losses arising from the way in which the policy of the Bill is expected to be applied or implemented, including the likely requirements of delegated legislation enabled by the Bill, and from other discretionary actions facilitated by the Bill.

What is the nature of the further information sought?

If the answer to (a) is **YES**, please indicate where to find, or otherwise provide a concise summary of:

- the most up-to-date estimates of the categories of benefit and cost for which estimates are available; and
- the categories of identifiable cost or cost savings for which no estimates are available.

This should ideally be a reference to particular pages or parts of a report (such as a RIS) for which an active hyperlink has already been supplied elsewhere in the disclosure statement. Alternatively, use Appendix One to set out a summary of the available estimates, along with any information necessary to interpret or put those estimates in context.

If the answer to (a) is **NO**, please indicate briefly why there are still no estimates available for any of the costs or benefits.

If the answer to (b) is **YES**, please indicate where to find, or otherwise provide a concise summary of the most up-to-date analysis of this potential.

This should ideally be a reference to particular pages or parts of a report (such as a RIS) for which an active hyperlink has already been supplied elsewhere in the disclosure statement. Alternatively, use Appendix One to set out a summary of the analysis.

If the answer to (b) is **NO**, no further information is required.

Question 2.6

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?	[YES/NO]
(b) the nature and level of regulator effort put into encouraging or securing compliance?	[YES/NO]

What matters are covered by the question?

This is a two-part question. For the question in part (a)

- The matters of interest might be levels of compliance with new obligations or standards, or changes to levels of compliance with existing obligations or standards, depending on the nature of the policy.
- It is possible that both levels of compliance and levels of non-compliance matter, as different types of costs can arise from each. The former obviously gives rise to compliance costs, while the latter is likely to give rise to costs (or reduced benefits) attributable to the problem the legislation is trying to fix.
- Effective compliance is not always the same thing as technical or legal compliance. Motivated people will often find creative ways to circumvent the effect of the law, while technically meeting the legal requirements, if the potential exists to do so. Predictions or assumptions about levels of compliance would ideally take account of the potential behavioural response of those expected to comply.

For the question in part (b)

- Strategies used by regulatory authorities to encourage and secure compliance usually encompass a range of actions, such as the provision of information and guidance, education and training, inspection, and enforcement actions and sanctions.
- There may be various agencies involved in efforts to encourage compliance, all of which should be viewed as “regulator effort”.

What is the nature of the further information sought?

<p>If the answer to (a) and/or (b) is YES, please indicate where to find, or otherwise provide a concise summary of the most up-to-date information or analysis available relating to:</p> <ul style="list-style-type: none"> • likely levels of compliance and/or non-compliance (as appropriate) with key obligations that are likely to materially impact on costs and/or benefits; and/or • the likely nature and level of regulator effort to be put into encouraging and securing compliance.
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This would ideally be a reference to particular pages or parts of a report (such as a RIS) for which an active hyperlink has already been supplied elsewhere in the disclosure statement. Alternatively, use Appendix One to set out a summary of the information or analysis, along with any other information necessary to interpret it or put it in context.

In relation to part (a), only compliance with significant obligations or standards need be considered – those likely to have real influence on the benefits or costs of the policy underlying the Bill.

Note that specific information regarding compliance could take the form of expectations or assumptions, rates or levels, changes to rates or levels, and could be defined in terms of either compliance or non-compliance, as appropriate.

In relation to part (b) consider whether the expected nature and level of regulator effort is likely to be sufficient to secure the predicted or assumed levels of compliance.

If the answer to (a) and/or (b) is **NO**, please explain why not.

In some cases the reason the answer is NO will be because the legislation does not create new obligations or standards, or impact on existing obligations or standards.

Completing Part Three: Testing of Legislative Content

Part Three of the disclosure statement seeks to identify, and provide the reader with information about, the internal and external testing that the detailed policy and draft provisions of the Bill have undergone.

It takes the form of a series of questions. Apart from two questions, these require a YES or NO response, with further information to be provided depending on the response given.

- **For questions concerning consultation or testing** (Qu.3.3, Qu.3.4.1, Qu.3.5.1, Qu.3.6 and Qu.3.7), **please answer NO unless you are sure that the answer is YES.**

You can use the text box under the question to clarify, qualify or explain that NO answer if that seems necessary or desirable.

- **The finalised Part Three should not exceed 3 pages in length**, once all instructions and the boxes for any irrelevant subsidiary questions have been removed.

This is to ensure readers can quickly skim through the headline questions and YES/NO responses. If longer responses are required for any of the questions, set these out under an appropriate heading in Appendix Two, with a reference to Appendix Two placed in the text box under the relevant question.

Consistency with New Zealand's international obligations

It has been estimated that, of the New Zealand public Acts known to be affected by international obligations, around 70% of them make no reference to the relevant international treaty or obligation.⁴ Therefore, there is a risk that people considering amending an Act may not be aware of the international obligations that are relevant to such a Bill.

Legislation is expected to be consistent with New Zealand's international obligations. Non-compliance with our international obligations may harm our international standing and invite sanctions. Consequently, all Cabinet papers seeking approval to introduce a Bill must advise whether the Bill complies with relevant international standards and obligations.⁵ Such compliance is routinely claimed. Disclosing the steps that have been taken to determine whether the policy of the Bill is consistent with New Zealand's international obligations will provide an interested reader with information about the likely robustness of that claim.

Question 3.1

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?

⁴ "In Search of International Standards and Obligations Relevant to New Zealand Regulations", Mark Gobbi (2008), New Zealand Yearbook of International Law.

⁵ <http://cabguide.cabinetoffice.govt.nz/procedures/legislation/introducing-a-bill>

What matters are covered by the question?

New Zealand's international obligations may be contained in documents such as international treaties or in the decisions of international bodies to which New Zealand has agreed to be bound.

There are a range of different types of international instrument but the important point is that, regardless of how they are described, they are all binding on New Zealand. For example, international instruments can take the form of an international agreement, an exchange of letters or notes constituting an agreement, a convention, a covenant, a protocol or an international treaty, and all are binding on New Zealand.

For assistance identifying international obligations that may be relevant to a Bill, and for further information about New Zealand's international obligations generally, the following resources may be of assistance:

- Legislation Advisory Committee, *Guidelines on Process and Content of Legislation*,⁶ Chapter 6 "International Obligations and Standards", and Appendix 3, which contains a list of Acts that implement various treaties;
- The Ministry of Foreign Affairs and Trade (MFAT) publishes a list of treaties to which New Zealand is a party;⁷ and periodically issues a list of all treaties New Zealand is currently involved in negotiating or ratifying;⁸
- MFAT is also expected to have their Treaties Register Database publicly accessible online at <http://www.treaties.mfat.govt.nz> by the end of July 2013
- A New Zealand Guide to International Law and its Sources, New Zealand Law Commission, Report 34 (1996);⁹
- Mark Gobbi, "In Search of International Standards and Obligations Relevant to New Zealand Acts" (2007) 4 New Zealand Yearbook of International Law.

For further information about New Zealand's international obligations and particular treaty obligations officials may consult the treaty officer at the Ministry of Foreign Affairs and Trade (email treatyofficer@mfat.govt.nz).

Note that this question is different and much wider in scope than Question 2.2, which seeks only to identify treaties that are being given deliberate effect through the Bill.

What is the nature of the further information sought?

Provide a brief description of the steps that have been taken to determine whether the policy to be given effect by the Bill is consistent with New Zealand's international obligations

⁶ Available at: <http://www2.justice.govt.nz/lac/> .

⁷ <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/Treaty-register.php>

⁸ <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/1-International-Treaties-List/index.php>

⁹ Available at: <http://www.lawcom.govt.nz/project/international-law/publication/report/1996/new-zealand-guide-international-law-and-its-source>

There is no standard process for assessing whether proposed legislation is consistent with New Zealand's international obligations, but it can be broken down into two distinct elements:

- the steps taken to identify whether there are international obligations relevant to the Bill; and
- if relevant international obligations are identified, the steps taken to assess whether the Bill is consistent with those international obligations.

In relation to the former, departments should generally be aware of the international obligations that are relevant to the matters the department is responsible for and should have a list of such international obligations that can be consulted by officials. The steps taken to determine consistency may involve considering this list of international obligations maintained by the department, consulting officials with particular knowledge and expertise in international matters, or discussing the issues with the department's legal team.

As noted above, there are useful sources that can assist departments to identify relevant international obligations, such as Appendix 3 of the Legislation Advisory Committee, *Guidelines on Process and Content of Legislation*, which contains a list of Acts that implement various treaties.

If it is established that there are no international obligations that are relevant to the Bill then the response to this question should simply set out the steps that were taken to reach this conclusion.

In relation to the latter, MFAT will expect to be consulted about proposed legislation that may be relevant to New Zealand's international obligations. If you don't already know the relevant MFAT legal adviser, you can email lgl@mfat.govt.nz

Other steps that may be taken by an agency include: consultation with the agency's legal team; consideration of judicial decisions about the consistency of previous legislation with the international obligations; researching international law sources; considering decisions of international bodies or reviewing legal commentary on the requirements of the international treaty; the legislative approaches taken by other countries; or the judicial decisions of the courts of other countries.

There is no need to refer to the vetting of consistency with the New Zealand Bill of Rights Act 1990, which incorporates a number of important international human rights obligations, as this is already covered by Question 3.3.

Where international obligations have been identified as relevant to a Bill, the response could identify the obligations and their source, and even provide a link, if these obligations are important to the scheme of the Bill. Obviously, a Bill that is intended to give effect to a treaty will include a reference to Question 2.2.

Consistency with the government's Treaty of Waitangi obligations

The Treaty of Waitangi is a constitutionally significant document and part of the fabric of New Zealand society.¹⁰ Legislation is expected to comply with the principles of the Treaty of Waitangi and a Cabinet paper seeking approval for the introduction of a Bill must advise whether the Bill complies with the principles of the Treaty of Waitangi and, if not, the reasons why it does not comply.

Although the Treaty of Waitangi does not directly create legal rights or obligations, the Courts will generally presume that Parliament intends to legislate in accordance with the principles.¹¹ For this reason, it is important that the consistency of a Bill with the principles of the Treaty of Waitangi is carefully considered before the Bill is passed. Disclosing the steps that have been taken to determine whether the policy of the Bill is consistent with the Treaty principles will provide an interested reader with information about the potential robustness of that consideration.

Question 3.2

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?

What matters are covered by the question?

The Courts are an important authoritative source of the meaning of the principles of the Treaty of Waitangi, and have expressed the view that, in interpreting the principles, weight should be given to the opinions of the Waitangi Tribunal.¹² The Court of Appeal has stated that the Treaty of Waitangi enacts a relationship akin to a partnership and its central obligation is to act in good faith and work out answers in a spirit of honest co-operation.¹³

The most relevant obligation arising from the principles of the Treaty of Waitangi that impacts on the preparation of legislation is the obligation for the Crown to consult on major issues. Therefore, if there is real potential for a proposed Bill to affect Māori rights and interests protected by the Treaty of Waitangi, the Crown would normally be expected to consult with Māori prior to introducing the Bill.¹⁴

In some circumstances the Crown's obligations arising from the principles of the Treaty of Waitangi may go beyond consultation and require the Crown to take active steps to protect Māori interests.¹⁵

¹⁰ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210.

¹¹ See the decisions of the Court of Appeal in: *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129; and *Attorney-General v New Zealand Maori Council (No 2)* [1991] 2 NZLR 147.

¹² *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 at 598 per McKay J.

¹³ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 664-667 per Cooke J, 682 per Richardson J, 693 per Somers J, and 704 per Casey J.

¹⁴ The Court of Appeal has said the principle of good faith between the parties to the Treaty "must extend to consultation on truly major issues" *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, 152.

¹⁵ *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 at 560 per Cooke J (CA).

Some of the rights and interests covered by Article 2 of the Treaty of Waitangi are also recognised and protected at common law, such as Māori customary land rights, and hence are in a stronger position than Treaty of Waitangi rights and interests not subject to recognition and protection at common law.

The meaning of the principles of the Treaty of Waitangi, as considered by the Courts and the Waitangi Tribunal, are discussed in some detail in *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*, Te Puni Kokiri, Wellington (2001)¹⁶.

What is the nature of the further information sought?

Provide a brief description of the steps that 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.

There is no standard process for assessing whether proposed legislation raises Treaty of Waitangi issues but, as with determining consistency with New Zealand's international obligations, this can be broken down into two distinct elements:

- the steps taken to identify whether the Bill might have implications for the rights and interests of Māori protected by the Treaty of Waitangi and, in the case of customary interests, also protected at common law; and
- if such rights and interests are identified, the steps taken to determine whether the effect of the Bill on those rights and interests, in light of the Crown's power to govern, is consistent with the principles of the Treaty of Waitangi.

The steps a department might take in relation to these two elements include: discussions with policy advisers with expertise in Treaty of Waitangi and Māori matters; discussions with the department's legal team regarding judicial decisions about the principles of the Treaty of Waitangi; discussions with other officials from agencies such as Te Puni Kōkiri, or informal discussions or consultation with the department's Māori advisers, a Māori advisory group, Iwi groups, or representative Māori organisations.

The CabGuide suggests that the Crown Law Office should be consulted on constitutional matters including those involving Treaty of Waitangi matters. It also suggests that Te Puni Kōkiri should be consulted on all proposals that might have implications for Māori as individuals, communities or tribal groupings. It is useful to remember that Māori are not a single homogenous group, so there may be a need to consider whether different iwi, hapū and whānau have relevant rights and interests.

Further sources:

- Legislation Advisory Committee, *Guidelines on Process and Content of Legislation*,¹⁷ Chapter 5 "Principles of the Treaty of Waitangi".

¹⁶ <http://www.tpk.govt.nz/en/in-print/our-publications/publications/he-tirohanga-o-kawa-ki-te-tiriti-o-waitangi/>

¹⁷ Available at: <http://www2.justice.govt.nz/lac/> .

Consistency with the New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) is designed to affirm, protect and promote human rights and fundamental freedoms in New Zealand, and to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights. The Cabinet Manual expects that Bills will be compliant with the rights and freedoms affirmed in the Bill of Rights Act.

The Attorney-General has a statutory duty to advise the House if any provision of a Bill appears to be inconsistent with any of the rights and freedoms affirmed in the Bill of Rights Act.¹⁸ In the case of a government Bill, this must be done on the Bill’s introduction to the House.

In practice the Ministry of Justice (or Crown Law in the case of Bills in the name of a Justice Minister) provides advice to the Attorney-General about the consistency of all Bills with the Bill of Rights Act. The CabGuide expects that sufficient time will be built into the preparation of government Bills to allow the Ministry of Justice at least two weeks to consider a Bill for consistency.

Government agencies preparing draft legislation should consult the Ministry of Justice as soon as possible to find ways of eliminating or mitigating any potential limitations on rights and freedoms, or establish the justification for any limitations (thus reducing the prospect of a section 7 report).

Question 3.3

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/NO]
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What matters are covered by the question?

This question highlights the advice provided to the Attorney-General to support his/her consideration of consistency with the Bill of Rights Act as required under section 7 of that Act. The CabGuide outlines the process for which such advice is generally provided to the Attorney-General. Agencies should ensure they are familiar with those requirements so that the Ministry of Justice (or Crown Law) can provide their advice to the Attorney-General in a timely way.

Further information about the Ministry’s role and how the Bill of Rights Act applies to the development of legislation is available on the Ministry’s website,¹⁹ and the Legislation Advisory Committee’s, *Guidelines on Process and Content of Legislation*²⁰.

¹⁸ New Zealand Bill of Rights Act 1990, section 7.
¹⁹ “The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector”, Ministry of Justice (2004) <http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector>
²⁰ Chapter 4 “New Zealand Bill of Rights Act 1990 and Human Rights Act 1993” available at: <http://www2.justice.govt.nz/lac/> .

What is the nature of the further information sought?

If the answer is **YES**, please:

- indicate where a copy of the advice may be (or may soon become) available, if the Attorney-General agrees to waive legal privilege.

All advice to the Attorney-General on consistency with the Bill of Rights Act, or a section 7 report of the Attorney-General, is published at the following location (where the Attorney-General waives legal privilege): <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>.

Agencies completing this disclosure statement should confirm with the Ministry of Justice whether any advice to the Attorney-General is likely to be published. In most instances, a standard response as indicated below will be appropriate.

However, in instances where the Attorney-General tables a section 7 report the Ministry's advice is unlikely to be available. Where possible this should be referred to in the disclosure.

Note that the Ministry will not publish its advice, or a section 7 report, until the Bill has been introduced.

Example: (for a YES answer, applicable for any Bill where advice has been provided)

Advice provided to the Attorney-General by the Ministry of Justice, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>

If the answer is **NO**, no further information is required.

It has not been common practice for advice to be provided to the Attorney-General on government Supplementary Order Papers (SOP). In the case of a revised (or supplementary) disclosure statement for a government SOP the response to the question is likely to be No (because advice has not been provided for the Bill in its amended form). However, in this case it would be appropriate to add further information explaining that advice was provided on the Bill as introduced.

Example: (for a NO answer, applicable for a SOP where advice has not been provided)

No advice has been provided to the Attorney-General on this Supplementary Order Paper. Advice provided on the original Bill can be accessed on the Ministry of Justice's website at <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/>

Offences, penalties and court jurisdictions

Offences and penalties can have potentially significant consequences for individuals, so it is important that proposed sanctions are fair, proportionate and well understood. The development of appropriate offence and penalty provisions is an expert task, which needs to take account of things like:

- the different roles and expectations of criminal and civil law;
- the desirability of consistency with existing criminal offences, associated procedural rules and requirements, and New Zealand’s international obligations; and
- the availability of appropriate defences and appeal rights.

The Cabinet Manual requires departments to consult the Ministry of Justice on “all proposals to create new criminal offences and penalties or alter existing ones, to ensure that such provisions are consistent and appropriate”.²¹

The CabGuide further requires the Ministry of Justice to be consulted on policy proposals that “have a direct impact on offending and victimisation” or that “impact on court-based procedures and workloads”²² to ensure such changes are consistent with the procedural and operational requirements of the court system.

Question 3.4

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	[YES/NO]
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	[YES/NO]

What matters are covered by the question?

Disclosure is required whenever a Bill contains any provisions that create, amend or remove offences, penalties, or the jurisdiction of a court or tribunal. Examples would include new offences, increases in existing penalties, the establishment of a new tribunal, or changes to the appeal rights to or from a court.

For the purposes of part (a) of this question:

- “offences” are conduct for which a fine or a term of imprisonment may be imposed upon conviction; and
- “penalties” include civil pecuniary penalties, as well as terms of imprisonment, fines, or orders that could be made by a court as a result of an offence.

For the purposes of part (b) of this question, “the jurisdiction of a court or tribunal” includes:

²¹ Department of Prime Minister and Cabinet, *Cabinet Manual* (2008) paragraph 7.31.

²² <http://cabguide.cabinetoffice.govt.nz/procedures/consultation/departamental-consultation> .

- the types of matters that may be heard by a court or tribunal;
- the powers of a court or tribunal;
- the orders a court or tribunal can make; and
- appeal rights.

What is the nature of the further information sought?

If the answer is **YES** to either or both parts of the question, please:

- identify the relevant provision(s) in the Bill; and
- answer the subsidiary question (Question.3.4.1).

Identify the relevant provision by the clause number of the Bill, and include a brief summary of the effect of the proposed change in respect of the offence, penalty or jurisdiction of the court or tribunal.

If the answer is **NO** to both questions, no further information is required. You can also delete the subsidiary question (Question 3.4.1) from the disclosure statement.

Further sources:

- Legislation Advisory Committee, *Guidelines on Process and Content of Legislation*, Chapter 12 “Criminal Offences”.²³
- Guidelines for New Infringement Schemes (approved by Cabinet in March 2008), Ministry of Justice.²⁴

²³ Available at: <http://www2.justice.govt.nz/lac/>

²⁴ Available at <http://www.justice.govt.nz/publications/global-publications/i/infringement-guidelines>

Question 3.4.1

3.4.1. Was the Ministry of Justice consulted about these provisions?

[YES/NO]

What matters are covered by the question?

This covers consultation with the Ministry of Justice by agencies other than the Ministry of Justice. If you are the Ministry of Justice, you can answer NO, as appropriate internal consideration and discussion should be assumed to have occurred as a matter of course.

Consultation with the Ministry of Justice could take various forms, including phone discussions, emails, meetings with Ministry of Justice officials, or the receipt of comments from the Ministry of Justice.

Departmental questions about offences and penalties can be sent to:

offenceandpenaltyvet@justice.govt.nz.

What is the nature of the further information sought?

If the answer is **YES**, please :

- describe the nature and extent of the consultation undertaken; and
- the nature of any action taken to address issues raised.

The answer to Question 3.4.1 is likely to involve a brief description of:

- the matters or Bill provisions the Ministry of Justice was consulted about, and the form the consultation took;
- the issues that were raised in consultation, most likely by the Ministry of Justice but possibly by the agency preparing the Bill; and
- the actions taken, if any, in relation to those matters or Bill provisions, to address concerns raised by the Ministry of Justice, or otherwise a short explanation of why no action was taken.

If the Bill is large and involves quite a few issues, try to keep the description of the issues as short as possible. The aim is to convey the nature and extent of the issues consulted on. If similar issues arose in respect of a number of clauses try to group the clauses together so an issue only has to be identified once.

If the answer is **NO**, no further information is required.

You may, however, choose to take the opportunity to briefly explain why the Ministry of Justice was not consulted.

This might be because you are the Ministry of Justice!

Privacy issues

People generally care about the privacy of their personal information, and if they are required or agree to provide personal information to government agencies, businesses or other organisations for specific purposes, then they have strong expectations about how those agencies will deal with that information.

The Privacy Act 1993 contains a range of requirements concerning how personal information is dealt with, including:

- the information privacy principles that set out the standards for how personal information should be collected, stored, used, disclosed and the rights people have to access and seek correction of their personal information (s 6);
- the public register privacy principles in Part 7;²⁵
- information sharing provisions in Part 9A;
- information matching rules in Part 10;
- the sharing of law enforcement information in Part 11;
- the transfer of personal information outside New Zealand in Part 11A;

A Bill that provides for personal information to be dealt with in some way may override the requirements of the Privacy Act 1993. Consequently, it should be subject to careful scrutiny and be able to be fully justified.

A Cabinet paper seeking approval to introduce a Bill must advise whether the Bill complies with the principles and guidelines in the Privacy Act. If the Bill raises privacy issues, the Cabinet paper needs to indicate whether the Privacy Commissioner agrees that they comply with all relevant principles.²⁶

The Privacy Commissioner also has a statutory function to examine proposed legislation that provides for the collection of personal information by any public sector agency or the disclosure of personal information by one public sector agency to another public sector agency.²⁷

Question 3.5

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?	[YES/NO]
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²⁵ See the “Drafting Suggestions for Departments Preparing Public Register Provisions” produced by the Privacy Commissioner, available at: <http://privacy.org.nz/news-and-publications/guidance-notes/drafting-suggestions-for-departments-preparing-public-register-provisions/>

²⁶ <http://cabguide.cabinetoffice.govt.nz/procedures/legislation/introducing-a-bill>

²⁷ Privacy Act 1993, s 13(1)(f).

What matters are covered by the question?

This disclosure requires the identification of any provisions in a Bill that relate to how personal information is dealt with, because these may depart from the general privacy standards established by the Privacy Act 1993. The information privacy principles in section 6 of the Privacy Act 1993 set out the requirements for personal information.

“Personal information” is defined broadly in the Privacy Act 1993 and “means information about an identifiable individual”.^{28m}

Consequently, disclosure will be required if a Bill creates or amends provisions that:

- specify when or how information about an individual is collected or held;
- require personal information to be collected;
- restrict access to personal information;
- specify when or how personal information can be used or disclosed;
- authorise or require personal information to be disclosed in particular circumstances, including information sharing and information matching;
- establish a system for uniquely identifying individuals (e.g. by assigning an identifier such as driver licence or passport number or using biometrics such as fingerprints);
- authorise agencies to use a common unique identifier for individuals;
- establish or modify a public register; or
- enable the transfer of personal information outside New Zealand.

The Legislation Advisory Committee's *Guidelines on Process and Content of Legislation* contains more detailed information about privacy implications.²⁹

What is the nature of the further information sought?

If the answer is **YES**, please:

- identify the relevant provision(s) in the Bill; and
- answer the subsidiary question (Question.3.5.1).

Identification of the relevant provisions should include the clause number of the Bill and a brief summary of the provision's effect. It could also explain how it might depart from the Privacy Act requirements or standards.

If the answer is **NO**, no further information is required. You can also delete the subsidiary question (Question 3.5.1) from the disclosure statement.

²⁸ Privacy Act 1993, s 2.

²⁹ Chapter 15 “Privacy and the Fair Handling of Personal Information” available at: <http://www2.justice.govt.nz/lac/> .

Question 3.5.1

3.5.1. Was the Privacy Commissioner consulted about these provisions?

[YES/NO]

What matters are covered by the question?

Consultation with the Privacy Commissioner could take various forms, including phone discussions, emails, meetings with officials from the Office of the Privacy Commissioner, or the receipt of comments from the Privacy Commissioner.

What is the nature of the further information sought?

If the answer is **YES**, please:

- describe the nature and extent of the consultation undertaken; and
- the nature of any action taken to address issues raised.

The answer to Question 3.5.1 is likely to involve a brief description of:

- the matters or Bill provisions the Privacy Commissioner was consulted about, and the form the consultation took;
- the issues that were raised in consultation, most likely by the Privacy Commissioner but possibly by the agency preparing the Bill; and
- the actions taken, if any, in relation to those matters or Bill provisions, to address concerns raised by the Privacy Commissioner, or otherwise a short explanation of why no action was taken.

If the Bill is large and involves quite a few issues, try to keep the description of the issues as short as possible. The aim is to convey the nature and extent of the issues consulted on. If similar issues arose in respect of a number of clauses try to group the clauses together so an issue only has to be identified once.

If the answer is **NO**, no further information is required.

You may, however, choose to take the opportunity to briefly explain why the Privacy Commissioner was not consulted.

External consultation

External consultation in advance of introducing legislation has a range of practical benefits, including:

- the opportunity to gain a better understanding of the problem, and the earlier identification of potential problems with a proposed policy solution, leading to better quality and more durable legislation;
- increased public buy-in, because people are more likely to accept the legitimacy of proposals arising out of a fair and open process in which they have had the opportunity to participate; and
- ultimately, improved understanding of the law and better rates of compliance.

There are no established requirements for external consultation in advance of the introduction of government Bills, but the Cabinet Manual invites Ministers to consult external organisations or undertake a wider process of public consultation with citizens or affected parties before policy decisions are finalised and a Bill is introduced. It also notes that several rounds of consultation may be needed on significant or complex legislation.

While there is usually an opportunity for external parties to comment on a Bill as part of the select committee process, the expectation that external consultation will also occur in advance of introducing a Bill has grown in recent years. This reflects a range of forces, including the wider impact of more open government, the reduced cost of consultation via the internet, and the realisation that substantive policy changes are much harder to make once a Minister or agency has invested time and effort, and secured the necessary political or interest group support, to get a legislative initiative through the policy process to the point of introduction.

Question 3.6

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/NO]
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What matters are covered by this question?

- For the purposes of this question, external consultation is formal consultation undertaken by or on behalf of the government with people or bodies that are not government departments or Ministers.

This means it will include consultation with government bodies that are not departments, such as Crown entities, SOEs, or Offices of Parliament.

- It is not, however, intended to cover consultation of a political nature between members of the government and other MPs or political parties, or informal consultation and discussion.
- The question recognises that consultation can occur at different and multiple points in the policy development process, right up to and including release of an exposure draft of a Bill for comment prior to introduction.
- The consultation need not have covered all aspects of the policy in order to be counted. The matters covered by the consultation will be part of the further information provided.

- The question encompasses external consultation that may have already been reported in responses to earlier questions – e.g. consultation with the Privacy Commissioner, or reporting on the steps taken to determine consistency with the principles of the Treaty of Waitangi. Cross reference can be made to earlier answers as part of the further information sought.

What is the nature of the further information sought?

If the answer is **YES**, for each relevant consultation exercise, please refer the reader to an Appendix, and use the Appendix to briefly:

- describe the form that consultation took, what it covered and when it occurred; and
- summarise the nature and extent of feedback received.

Where possible, cross refer or provide links to existing information about external consultation undertaken, rather than repeat material already available from other answers or in other documents.

It is likely, for instance, that external consultation undertaken during the main policy phase will have been described in any regulatory impact statement reported under Question 2.3, and so reference can be made to the relevant pages of a RIS accessible from the link provided in the text box associated with that question.

If the answer is **NO**, no further information is required.

You may, however, choose to take the opportunity to briefly explain why no external consultation was undertaken.

Other testing of proposals

The testing of legislative proposals seeks to ensure that legislation will work as intended, by identifying and avoiding unintended consequences, and by checking that the legislation provides for all likely matters and circumstances that may arise.

While there are no explicit government requirements for testing, PCO asks their instructing departments to confirm that the proposals will work in all relevant scenarios and to check the proposals with the operational people who will undertake the day-to-day administration of the legislation. This would seem to demand some testing or careful assessment of operational requirements.

Question 3.7

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/NO]
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What matters are covered by this question?

This covers testing or assessment processes not already covered by responses to earlier questions. The focus is on testing to ensure the Bill’s provisions are workable and complete, but may also encompass work done to refine analysis of likely benefits, costs, and risks.

Testing may describe a wide range of approaches and techniques including:

- live trials;
- simulations based on scenarios or past data;
- regulatory “pre-mortems” (which involve assuming that a regulatory intervention has failed, speculating on what may have led to the failure and then working out what you might be able to do differently to prevent that failure);
- systematic risk assessment; or
- business analysis and business process modelling.

What is the nature of the further information sought?

If the answer is YES , please provide: <ul style="list-style-type: none">• a brief description of the nature and extent of this testing; and• a brief description of any further scheduled testing that is yet to be completed.

If the answer is NO , no further information is required.
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Completing Part Four: Significant Legislative Features

Part Four of the disclosure statement seeks to identify, and provide the reader with explanations for, the presence of particular powers or unusual features in a Bill, which may warrant careful scrutiny because the matters have potentially significant implications or depart from well-established legal presumptions.

It takes the form of a series of questions requiring a YES or NO response, with further information required to be provided depending on the response given.

- **For Part Four questions, please answer YES unless you are sure the answer is NO**

This is the opposite of the rule for Part Two and most of the Part Three questions. You can use the text box under the question to clarify, qualify or explain that YES answer if that seems necessary or desirable.

- **The finalised Part Four should not exceed 3 pages in length**, once all instructions have been removed

This is to ensure readers can quickly skim through the headline questions and YES/NO responses. If longer responses are required for any of the questions, set these out under an appropriate heading in Appendix Three, with a reference to Appendix Three placed in the text box under the relevant question.

Compulsory acquisition of private property

Compulsory acquisition of private property has potentially significant implications for individuals, who are thereby deprived of the benefits obtainable from ownership without their consent. Compulsory acquisition gives rise to a high risk of unfairness to the property owner.

There is a strong presumption in our legal system that when legislation expropriates real property, it will compensate the owners. The presumption originates from clause 29 of the Magna Carta that protects the right to justice. This presumption is also reflected in Part 5 of the Public Works Act 1981, which provides that where land is compulsorily acquired for public works, compensation in the form of the land's market value is to be paid to the owner.

Question 4.1

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	[YES/NO]
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What matters are covered by the question?

“Compulsory acquisition” describes the way in which property is taken. A compulsory acquisition involves the transfer of all of the owner’s property rights to the person or body compulsorily acquiring the property. The former owner is left with no rights to the property.

“Property” is a broad term and its ordinary meaning includes both real and personal property, tangible and intangible property, and any estate or interest in property.

“Private” includes individuals, legal persons or groups of such individuals or legal persons who are not public in the sense that they are not part of the government or state. Therefore, “private property” will exclude property owned by the Crown, Government departments or statutory bodies where surplus assets would be returned to the Crown if the body was abolished or wound up (for example, SOEs, Crown-owned entities, local authority trading enterprises, schools, polytechnics and universities).

A compulsory acquisition can be contrasted with a regulatory taking. A regulatory taking affects some of the owner’s property rights but still leaves the owner with some rights to their property. For example, the Freshwater Fish Farming Regulations (Amendment No.3) 1983 prohibited the sale or removal of live marron from a fish farm unless in the possession of a Crown employee. The Regulations were a ‘regulatory taking’ as they prevented the owner exercising their right to sell their property but not a compulsory acquisition for the purposes of this Question 4.1 as the owner retained full ownership and control of the marron.

A compulsory acquisition does not include penalties such as forfeiture or the seizure of property as part of a criminal investigation. Any such issues should be disclosed in Question 3.4(a) in relation to consultation with the Ministry of Justice on penalties or when considering the consistency of a Bill with the New Zealand Bill of Rights Act 1990 (see, for example, Question 3.3 and section 21 of the New Zealand Bill of Rights Act 1990 relating to the right to be free from unreasonable search and seizure).

The following types of provisions could result in the compulsory acquisition of private property:

- a power to transfer shares in a company from one person to another;
- a power to direct the Registrar-General of Land to transfer land from one person to another; or
- a power to acquire fishing quota from an owner.

The following would not be a compulsory acquisition of private property:

- a ban on logging trees, as the trees are not compulsorily acquired but the owner is simply prevented from logging them;
- conferral on a lessor of a right of first refusal on any sale of the lease by the lessee, as the change to the terms of the lease is not a compulsory acquisition of the lease (see, for example, the Maori Reserved Land Amendment Act 1997); or
- the surrender of property pursuant to a condition on a subdivision consent, as the developer has the option of not proceeding with the subdivision.

What is the nature of the further information sought?

If the answer is **YES**, please:

- identify the provision(s) that will or could result in the compulsory acquisition;
- explain why provision for compulsory acquisition is necessary; and
- identify and explain the nature of any features that will mitigate the potential adverse effects of the compulsory acquisition.

When explaining why the compulsory acquisition is necessary you should explain why this method was considered preferable to the alternatives that were considered. For example, was a more limited takings provision confined to particular ownership rights a feasible option? If so, explain why compulsory acquisition was considered preferable.

The most important mitigating feature is probably to explain whether compensation will be payable and, if so, how compensation will be calculated and the process for the owner to claim compensation. Other mitigating features could include the very narrow or limited application of the compulsory acquisition provisions, or that the compulsory acquisition may not be unexpected if it has been foreshadowed for some time or contemplated in contractual arrangements between the parties.

Further information that would be helpful to include (but is not required):

- the procedure that will be followed to compulsorily acquire the property;
- the nature and extent of property expected to be compulsorily acquired; and
- the possible adverse consequences of the compulsory acquisition for owners of property and third parties.

If the answer is **NO**, no further information is required.

Charges in the nature of a tax

It is a fundamental constitutional principle that Parliament, and Parliament alone, can levy money for the Crown. This has its origins in article 4 of the Bill of Rights 1688 (UK) and is reaffirmed in section 22 of the Constitution Act 1986, which provides that it is not lawful for the Crown to levy a tax except by or under an Act of Parliament.

The imposition of a tax, which is a compulsory exaction of money not related to any benefit received, can have potentially significant impacts on the financial rewards or costs individuals face from their actions or activities, with consequential effects on the economic choices they make. Therefore it is important that the potential taxpayers are well aware that a tax is proposed, and that Parliament provides for appropriate safeguards when it grants discretionary powers over taxes to another party.

Question 4.2

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	[YES/NO]
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What matters are covered by the question?

This is not intended to require disclosure of all provisions that impose a tax. A tax, excise or duty imposed where the rate of tax is itself specified in an Act, and where the tax paid will form part of the general revenue of the Crown, does not need to be disclosed under this question as it will be very clear that Parliament is setting a tax, and that the revenue is not for a specific purpose. Examples include the imposition of income tax by s.BB1 of the Income Tax Act 2007, and imposition of totalisator duty by s.4 of the Gaming Duties Act 1971.

This question does, however, seek disclosure of any provisions that create or amend the imposition of a charge (by whatever name) that is to be set to meet the costs of specified functions, at rates to be specified by someone other than Parliament, and is in the nature of a tax. The Legislation Advisory Committee Guidelines (Chapter 3 , Part 4) suggest that a fee, levy or charge can be viewed as having the nature of a tax if it:

- is greater than cost recovery
- does not bear a clear relation to the cost of the function performed or service provided to those paying the fee or charge; or
- is compulsory, for a public purpose and enforceable by law, regardless of whether it is less or more than cost recovery.

For this to be lawful, it will need to have been expressly authorised by Parliament in an Act, in accordance with s.22 of the Constitution Act 1986. Otherwise a legislative reference to fees will be presumed to only authorise charges for a particular identified service supplied to the person required to make payment, that bear a clear relationship to the cost of supplying the service - for which no disclosure is proposed through this question.

There are a number of judicial decisions that consider fees and whether they are actually in the nature of a tax. For example, the High Court has held that a levy in excess of the costs incurred or services provided will be a tax.³⁰

There can be no doubt the councils' concession that the levies in question were taxes was correct. The waste levy is a tax, as it involves the compulsory exaction from licensees of moneys not related to services received or costs incurred. It is intended to fund general waste management strategies not connected to the specific activities of the licensees.

As the Auditor-General sets out in the good practice guide *Charging fees for public goods and services*:³¹

Setting a fee that recovers more than the costs of providing the goods or services could be viewed as a tax. Unless expressly authorised by statute, this would breach the constitutional principle that Parliament's explicit approval is needed to impose a tax. Accordingly, any authority given to a public entity to charge a fee is implicitly capped at the level of cost recovery.

Examples of taxes include a regional fuel tax under the Land Transport Management Act 2003, non-earner levies under the Accident Compensation Act 2001 where the levy payer is not the beneficiary of the services funded by the levy, and the levy on contracts of insurance for fire that funds the New Zealand Fire Service.

What is the nature of the further information sought?

If the answer is **YES**, please:

- identify the provision(s) that create or amend the imposition of a fee, levy or charge in the nature of a tax;
- describe the nature and extent of the taxing power;
- explain why the taxing power is necessary; and
- explain the nature of any safeguards that will apply to the taxing power to ensure it is properly constrained and used appropriately.

When describing the nature and extent of the taxing power, describe:

- what the taxing power will apply to (and who will pay the fee, levy or charge);
- how the fee, levy or charge will be calculated;
- how much money is expected to be collected;
- what the money will be used for.

When explaining why the taxing power is necessary you should explain why this method was considered preferable to the alternatives that were considered, such as a fee for service or payment out of general taxation.

³⁰ *Carter Holt Harvey Ltd v North Shore City Council* [2006] 2 NZLR 787 (HC). See also, *Haliburton v Broadcasting Commission* CA14/99 15 July 1999; *Mount Cook National Park Board v Mount Cook Motels Limited* [1972] NZLR 481 (CA), citing *Re a Bylaw of the Auckland City Council* [1924] NZLR 907; *Air Caledonie International and Others v Commonwealth of Australia* [1988] 82 ALR 385 (HCA).

³¹ *Charging fees for public sector goods and services*, Office of the Controller and Auditor-General (2008) at [1.6].

Safeguards that might apply to the taxing power include:

- clarity about the range of functions, and types of costs, for which costs can be recovered;
- provision for consultation on the level of costs to be recovered, and/or on the basis on which charges will be calculated;
- provision for reporting on costs and revenues, and service levels provided
- provision for refunds and waivers, and for handling cases of hardship or disputes; or
- mechanisms that will ensure the tax applies fairly between those subject to the tax and those not subject.

Example: (for a YES answer, concerning the Land Transport Management Amendment Bill 2007)

Clause 31 will insert a new subpart 3 into Part 2 of the Act to enable regional fuel taxes to fund capital projects.

Proposed section 65P will enable an Order in Council to be made prescribing the rate of the regional fuel tax. The tax will be paid by wholesale distributors to the New Zealand Transport Agency, who will be responsible for distributing the revenue to the agencies responsible for the projects to be funded by the tax. The tax will be limited to a maximum of 10c per litre of petrol or diesel for up to 35 years.

The regional fuel tax will provide additional funding for regional capital projects that are a priority and that would not otherwise be funded within the timeframe desired by the region.

Regional land transport committees will be required to prepare and consult on proposed regional fuel tax schemes, which will then be forwarded to the Ministers of Transport and Finance for them to decide whether to recommend to the Governor-General the making of an Order in Council to approve a regional fuel tax scheme. The Ministers will have to be satisfied that a regional fuel tax will contribute to an integrated, safe, responsive, and sustainable land transport system, and will result in net benefit to the region. Commercial non-road fuel users will obtain refunds. An Order in Council will be a regulation for the purposes of the Regulations (Disallowance) Act 1989 and the Acts and Regulations Publication Act 1989.

If the answer is **NO**, no further information is required.

Further sources:

- Guidelines for Setting Charges in the Public Sector, The Treasury, Wellington, (December 2002); and
- Report of the Regulations Review Committee on the Inquiry into the constitutional principles to apply when Parliament empowers the Crown to charge fees by regulations.³²

³² (1989) AJHR, I. 16C.

Retrospective effect

It is a general expectation and requirement of the rule of law that legislation should only apply prospectively. Retrospective provisions should only be enacted if they can be fully justified.

The prime concern regarding retrospective legislation is that it can take away rights or defences or make unlawful those things that were lawful when they were done. For example, the most egregious example of retrospective legislation is the retrospective creation of criminal offences making conduct unlawful that was lawful at the time it was undertaken. The concerns about the retrospective creation of offences are expressed in the prohibition on retrospective offences contained in section 26(1) of the New Zealand Bill of Rights Act 1990.³³

The most important element in justifying a retrospective provision is to identify the extent (if any) to which people will be adversely affected. This information will determine whether or not the provision can be justified.

This principle of not legislating retrospectively is supported by the interpretative principle in section 7 of the Interpretation Act 1999 that enactments do not have retrospective effect.³⁴ More specific provisions to similar effect exist in section 10A of the Crimes Act 1961, section 4 of the Criminal Justice Act 1985, section 6 of the Sentencing Act 2002, and section 25(g) of the New Zealand Bill of Rights Act 1990.

Question 4.3

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	[YES/NO]
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What matters are covered by the question?

There are a number of different types of retrospective legislation and some of the more common examples to which Question 4.3 applies are noted below.

Note that the terms “retrospective” and “retroactive” are often used interchangeably as their ordinary meanings are identical and mean “taking effect from a date in the past”. Retroactive is sometimes used to describe a subset of retrospective effects when existing rights or obligations are altered ‘retroactively’ or from the date those rights or obligations arose. This guidance simply uses the term retrospective and no distinction is sought to be made between those situations that are retrospective and those that may be retroactive.

³³ See further the Ministry of Justice guidance on retrospective penalties in s 26(1) NZBoRA: <http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector/section-26-retroactive-penalties-and-double-jeopardy#section25.i>

³⁴ While the presumption in s 7 of the Interpretation Act 1999 will mean provisions will be given prospective effect where they can, this will not apply where the context clearly indicates Parliament intended the provision to be given retrospective effect.

Retrospective application from an earlier date

An Act may state “this Act is deemed to have come into [X date]” being a date that precedes the date the Act is passed. The Act then applies to matters that have already occurred and potentially alters the rights or obligations of actions those matters that have already occurred.

Retrospective application to events that have already occurred

Legislation can also be made retrospective by applying to things already done. For example, section 10 of the Illegal Contracts Act 1970 provides that it “shall apply to contracts that were made before or after the commencement of this Act”. In this way the Act applies retrospectively to contracts entered into before the Act was passed.

Validating legislation

Actions carried out without lawful authority and situations where there may be doubt about whether an action is lawful are frequently validated using retrospective legislation. The retrospective aspect of the validation is likely to be obvious as the provision will state that certain actions that have already taken place “are hereby validated and deemed to have been lawfully done”. The validation may occur in situations where everyone was acting under the same mistaken assumption that what they were doing was lawful or there may have been some doubt as to the lawfulness of their actions. For example, in 2006 the Auditor-General reported to Parliament that appropriations for Parliamentary services for members of Parliament had been used for election purposes and these were outside the scope of the appropriation. Parliament validated this expenditure in the Appropriation (Parliamentary Expenditure Validation) Act 2006.

Reversing the effects of a court decision

Legislation sometimes reverses the effects of a court decision, although this is usually controversial as it is contrary to the principle that legislation should not deprive individuals of the right to benefit from the judgments they obtain in proceedings brought under earlier law. See for example, section 8 of the Biosecurity Amendment Act (No 2) 2008 that reversed the Court of Appeal’s decision in *National Beekeepers’ Association of NZ v Chief Executive of the Ministry of Agriculture and Forestry* [2008] NZCA 1.³⁵

Legislation that applies prospectively may appear to have a retrospective effect but is not retrospective for the purposes of Question 4.3

Legislation that applies prospectively, but applies to existing situations requires particular care to ensure it clearly sets out which procedures will be affected by the new provisions. This will usually be done by way of carefully drafted savings and transitional provisions. For example:

- prospective changes to procedures can have a retrospective appearance because the change to the procedures will apply to persons who are already part way through the process and thus can be seen to affect expectations based on the rules that existed at the time the person commenced the process; or

³⁵ For further information on the issues associated with the reversal of court decisions, see Legislation Advisory Committee, *Recurring Issues*, Report No. 9 (1996), Section VI and Appendix 1.

- a new tax that applies prospectively will still change people's expectations of decisions they have already made, based on the fact that no tax existed at that time they made those decisions.

These types of prospective amendment to existing procedures are not retrospective, even though they may appear to have a retrospective effect, and so are not covered by this Question 4.3.

What is the nature of the further information sought?

If the answer is **YES**, please:

- identify the clause(s) that provide for retrospective application, and the matters to which this relates;
- explain why the retrospective provision is necessary; and
- identify and explain the nature of any features that will mitigate the potential adverse effects of the retrospective provision.

When explaining why a retrospective provision is necessary you will need to first describe the conduct or situations the retrospective provision will apply to, identify whether any persons will be adversely affected and, if so, how many people will be affected and for how long.

It is this retrospective impact on people's rights and obligations that is the most important aspect of a retrospective provision. Some retrospective provisions are beneficial and therefore desirable as remedial provisions, while some will be so unfair that they will constitute a breach of the New Zealand Bill of Rights Act 1990. There are many types of retrospective provision that sit somewhere between these two extremes and the extent of the unfairness to the rights and obligations of people will determine whether the provision can be justified or not.

Types of retrospective legislation that are beneficial and hence not objectionable

It is important to identify whether people will be adversely affected by retrospective legislation because some types of retrospective legislation can be beneficial and these are generally not objectionable, for example:

- sometimes it may be justifiable for Parliament to reverse the effects of a court decision that interprets and applies a provision in a statute, particularly where the court decision does not reflect what Parliament intended when it enacted the provision. However, it is important that the legislation reversing the court decision allow the person who brought the legal proceedings to keep the benefits of their litigation, for example, a damages award, or a right granted or confirmed by the court that some decision or action was unlawful. Ideally, legislation reversing the effects of a court decision will only need to apply prospectively;³⁶

³⁶ See, for example, the Weathertight Homes Resolution Services (Remedies) Amendment Act 2007 that reversed the effects of the High Court decision in *Hartley v Balemi* HC Auckland CIV 2006-404-002589, 29 March 2007 to make it clear that the Weathertight Homes Tribunal is able to award general damages, including those for mental stress or anxiety, in relation to a successful leaky building claim. The Act did not reverse the decision itself and nor did it apply retrospectively, but carefully specified the way in which it applied to existing claims.

- Parliament also sometimes clarifies the application of the law prior to legal proceedings being commenced as this can be a more efficient way of providing certainty than leaving the matter to be resolved by court proceedings;
- a retrospective tax exemption, rebate, reduction in tax rate or backdating of monetary entitlement will not be seen as unfair by the people to whom it applies;
- tax changes and other forms of budget legislation are often retrospective to the date the proposed change was publicly announced, as this prevents people changing their financial affairs to take advantage of an announced tax change before it is enacted;
- decriminalising conduct should apply retrospectively, see for example, the retrospective effect of the Homosexual Law Reform Act 1986, which provides that a person cannot be prosecuted for conduct that at the time it occurred was illegal, but is no longer illegal; or
- the Illegal Contracts Act example noted above was beneficial for those it applied to even though it was retrospective because it provided new more flexible remedies for persons who had already entered contracts that were illegal.

When identifying and explaining any mitigating features of the retrospective provision, consider the following:

- does the retrospective provision apply as narrowly as possible to achieve its object?
- does the retrospective provision apply fairly between those subject to the provision and those not subject to the retrospective provision?
- is the retrospective provision imposed for a particular purpose or for a limited period of time?
- has the retrospective provision been widely discussed with, or expected by, those who will be subject to it?

If the answer is **NO**, no further information is required.

Strict liability or reversal of the burden of proof for offences

The purpose of this disclosure is to identify strict and absolute liability offences and other types of reversal of the burden of proof for offences as they can have a significant impact on a person’s rights.

Legislation should not provide that it is the responsibility of an alleged offender in court proceedings to prove innocence, for example, by disproving a fact the prosecution would otherwise be obliged to prove, unless there is adequate justification. The concern is that a reversal of the burden of proof may lead an accused person to be convicted despite the existence of a reasonable doubt as to their guilt. Recognition of this principle appears in s 25(c) of the New Zealand Bill of Rights Act that provides “everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.”

Question 4.4

4.4 Does this Bill:	
(a) create or amend a strict or absolute liability offence?	[YES/NO]
(b) reverse or modify the usual burden of proof for offences, including for civil liability under a civil pecuniary penalty regime?	[YES/NO]

What matters are covered by the question?

Strict and absolute liability offences generally only require proof of the prohibited act or state of affairs. The prosecution is not required to prove all or some mental or fault elements in the offence.³⁷

There is no defence available for an absolute liability offence. A strict liability offence differs from an absolute liability offence in that a defence is available if the defendant can show that they were not at fault or took all reasonable care.

Section 67(8) of the Summary Proceedings Act 1957 used to require the defendant to prove any exception, exemption, proviso, excuse or qualification in a summary offence. However, with the repeal of that provision on 01 July 2013 and the removal of the distinction between summary and indictable offences, any such exception, exemption, proviso, excuse or qualification will not be effective to place a burden of proof on the defendant unless the provision quite clearly places such a burden on the defendant.³⁸

³⁷ See, for example, s 21 of the Freedom Camping Act 2011, which provides that “in prosecuting an offence ..., the prosecution does not need to prove that the defendant intentionally or recklessly committed the offence, or knew that the offence occurred in, or in relation to, a local authority area or conservation land”.

³⁸ See the Supreme Court decision in *R v Hansen* [2007] NZSC 7 that such provisions are likely to be read in a restrictive manner given the importance of the presumption of innocence recognised by s 25(c) of the New Zealand Bill of Rights Act 1990.

A provision that contains an explicit reversal of the burden of proof will require disclosure under Question 4.4, for example:

- offences that provide that any exception, exemption, proviso, excuse, or qualification may be proved by the defendant;³⁹
- offences where the burden of proving that the defendant had a reasonable excuse lies on the defendant.⁴⁰

What is the nature of the further information sought?

If the answer is **YES**, please:

- identify the provision(s) that create or amend the strict or absolute liability offences or that reverse or modify the usual burden of proof for an offence or civil liability;
- explain why the strict or absolute liability offence or the reversal or modification of the burden of proof is necessary (you will need to first describe the conduct or act the strict or absolute liability offence or reversal or modification of the burden of proof will apply to and then explain why the offence or reversal or modification of the burden of proof is necessary); and
- identify and explain the nature of any features that will mitigate the potential adverse effects of the strict or absolute liability offence or the reversal or modification of the burden of proof.

It will be very difficult to justify an absolute liability offence.

For a reversal of the burden of proof to be justified as necessary for a strict liability offence the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt. A strict liability offence will only be justified if it will be easier for the defendant than the prosecution to show why the defendant was not at fault. See the “Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Procedure (Reform and Modernisation) Bill”⁴¹ on the circumstances when a reversal of the burden of proof may be justifiable including when:⁴²

- the defendant is voluntarily involved in a regulated activity;
- the offence would apply in very limited circumstances; and
- the element to be proven is within the knowledge of the person concerned and proof of it would not impose an undue burden on the defendant.

³⁹ See, for example, s 100A of the Civil Aviation Act 1990.

⁴⁰ See, for example, s 168A of the Animal Welfare Act 1999.

⁴¹ Dated 15 November 2010, and available at: <http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/domestic-human-rights-protection/about-the-new-zealand-bill-of-rights-act/advising-the-attorney-general/section-7-reports-published-before-august-2002/section-7-reports-published-before-august-2002>

⁴² Above at [66].

In considering whether the defendant will be better placed than the prosecution to disprove guilt the following factors should be considered:

The nature and context of the conduct being regulated

The Courts have accepted that there is a distinction between truly criminal offences that punish wrongdoing and public welfare regulatory offences that seek to protect the public and prevent future harm. The protections afforded a defendant in requiring the prosecution to prove all elements of an offence are considered lower where the offence is part of regulatory legislation designed to protect public and societal interests, as opposed to truly criminal offences involving moral culpability. For example, where a defendant participates in a heavily regulated area or one that requires a license it will be easier to justify an obligation on the defendant to explain why they breached certain conditions or why they were not at fault.

The reason why the defendant is required to provide evidence or prove on the balance of probabilities that they were not at fault

Sometimes a defendant may be the person who is best placed to explain why they acted in a particular way. For example, in the situation where a defendant is in charge of machinery or a vehicle it may be easier for a defendant to show why they were not at fault than for the prosecution to prove they were careless. In respect of truly criminal offences it has been accepted that the possession of a certain quantity of a drug is evidence of trafficking and it is for the defendant to show they had no intention to supply the drug to another and were in possession of the drug for their own use.

The ability of the defendant to exonerate themselves

If a strict liability offence or reversal or modification of the burden of proof is to be justified the defendant must be in a position to exonerate themselves. How easy will it be for the defendant to obtain the information necessary to establish the relevant defence or that the defendant took all reasonable care? Will the defendant have access to that type of information? Will the defendant be able to understand the information they need to establish the defence?

The level of penalty

Generally, offences where the prosecution is not required to prove all elements of the offence should carry penalties at the lower end of the scale for that type of offence. Public welfare regulatory offence provisions that reverse the onus of proof are more likely to be justifiable where the penalty levels are at the lower end of the scale.

Offences with terms of imprisonment longer than 1 year are generally considered to require the prosecution to prove all the elements of the offence beyond reasonable doubt and are unsuitable to be strict liability offences or to involve a reversal of the burden of proof. A penalty of imprisonment over 1 year is usually associated with an indictable offence.

If the answer is **NO**, no further information is required.

Further sources:

- See Ministry of Justice guidance on s 25(c) of the New Zealand Bill of Rights Act: <http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector/section-25.-minimum-standards-of-criminal-procedure#section25.c>

Civil or criminal immunity

It is a well accepted principle of the rule of law that legislation should apply to all persons equally. An immunity prevents the law applying to the person who receives the benefit of the immunity and is, in principle, inconsistent with the equal application of the law.

Question 4.5

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	[YES/NO]
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What matters are covered by the question?

Immunities are usually conveyed in one of two forms; they are either an immunity from proceedings or an immunity from liability.

An immunity from proceedings could be from all civil proceedings or it could be just in respect of particular proceedings, for example, defamation proceedings.

An immunity from liability is usually an immunity from civil liability only. An immunity from criminal liability will only be justified for very specific offences that were closely identified with the statutory powers and functions the person is required to exercise.

The principle is that an Act does not bind the Crown unless the Act expressly says so. So, where a Bill is silent as to whether it applies to the Crown, no disclosure is required.⁴³

What is the nature of the further information sought?

<p>If the answer is YES, please:</p> <ul style="list-style-type: none"> • identify the provision(s) that create or amend the immunity; • explain why the immunity is necessary (you will need to first describe the conduct or act that immunity is provided for and then explain why the immunity is necessary for that conduct or act); • identify and explain the nature of any features that will mitigate the potential adverse effects of the immunity.

As a general rule, an immunity should only apply to acts in good faith and without negligence. An immunity for reckless or bad faith acts would be extremely difficult to justify.

Situations where it may be acceptable to confer an immunity on a person include:

- persons acting judicially. The system of appeals and review is designed to address any issues relating to errors committed by judges and immunities are commonly granted for persons acting judicially to ensure they can make decisions free from the risk of proceedings being brought against them personally for decisions they have made,⁴⁴

⁴³ Crown immunity arises by virtue of s 27 of the Interpretation Act 1999, which provides: "No enactment binds the Crown unless the enactment expressly provides that the Crown is bound by the enactment."

⁴⁴ See, for example, s 261 of the Resource Management Act 1991, which provides that "no action lies against any member of the Environment Court for anything they say, do, or omit to say or do, while acting in good faith in the performance of their duties."

- persons exercising intrusive statutory powers, particularly where those powers have the potential to cause significant loss to a person if exercised improperly, for example, emergency or disaster relief powers; or
- persons disclosing wrongdoing to a statutory body, so as to encourage such disclosures.

It is important to note that just because a person is exercising a statutory power it does not mean they will be liable and so is not a reason for an immunity. A person exercising a statutory power will not generally be liable as long as the person acts within the scope of the powers. It was for this reason that the Law Commission recommended that specific civil immunities should not generally be included in legislation but instead it should be ensured that statutory powers are adequate for the purpose.⁴⁵

An important mitigating feature for an immunity is to ensure that the immunity extends only to the person and not to their employer or the organisation they are appointed by, so as not to prevent proceedings being brought against the statutory body. This was the conclusion reached by the Law Commission that if an immunity could be justified it should not prevent proceedings against another appropriate defendant such as an employer.⁴⁶

Example: (for a YES answer, concerning the Judicial Matters Bill 2003)

Clause 9 will apply the provisions of Part 1 of Schedule 1 to the Judicial Conduct Commissioner, and clause 4 of Part 1 contains an immunity from proceedings for the Commissioner.

The immunity is from both civil and criminal proceedings and covers anything the Judicial Conduct Commissioner may do or say or report in the intended exercise of their duties under the Act unless acting in bad faith. The Commissioner will be responsible for receiving and processing complaints against members of the judiciary, and deciding whether to recommend a Judicial Conduct Panel be appointed to inquire into a complaint. The benefits of an independent judicial complaints function and a Commissioner who is free to consider complaints against the judiciary without the threat of legal proceedings against the Commissioner personally by complainants who are dissatisfied with the way their complaint is handled are considered to outweigh the rights of complainants to be able to commence legal proceedings against the Commissioner. Decisions by the Commissioner will remain subject to judicial review and that is an appropriate check on the Commissioner's powers and functions.

The immunity does not apply to proceedings for the following offences under the Crimes Act 1961: espionage; wrongful communication retention, or copying of official information; corruption and bribery of an official; corrupt use of official information; or use or disclosure of personal information wrongfully disclosed.

If the answer is **NO**, no further information is required.

⁴⁵ *Crown Liability and Judicial Immunity – A response to Baigent's case and Harvey v Derrick* NZLC, Wellington 1997 [132].

⁴⁶ *Ibid.*

Significant decision-making powers

Some decision-making powers can have a significant impact on a person's rights and interests. The more significant a decision in terms of its potential impact on a person's rights and obligations the more important it is that safeguards are provided in terms of matters such as the independence of the decision-maker, the procedure to be followed, the specificity of the criteria for the decision, and the rights of appeal and review available.

Question 4.6

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?	[YES/NO]
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What matters are covered by the question?

Three requirements must be satisfied before a decision-making power will be one to which Question 4.6 applies. The decision-making power must be (1) "a power to make a determination about", (2) about "a person's rights, obligations, or interests protected or recognised by law" and (3) the determination must be one that could have "a significant impact" on that person's rights, obligations, or interests protected or recognised by law.

(1) The decision-making power must be "a power to make a determination about" a person's rights, obligations, or interests protected or recognised by law

Question 4.6 only concerns decision-making powers that can make a determination *about* a person. There are many decision-making powers in Acts that only indirectly affect persons or affect a class of person and these types of decision-making are not covered by Question 4.6. For a decision to be about a person, the decision must directly affect the person and the person must be the subject of the decision, not just someone who is affected by the decision. The following decisions are examples of determinations about a person:

- a decision by the Commerce Commission to grant clearance to persons wishing to enter into restrictive trade practices (s 58 of the Commerce Act 1986);
- a decision by a refugee and protection officer whether a person is a refugee (ss 134-138 of the Immigration Act 2009);
- appeal decisions by the Social Security Appeal Authority against decisions under the Social Security Act and certain other pieces of legislation about a person's entitlements to certain benefits (s 121 of the Social Security Act 1964);
- a decision by a consent authority about a resource consent that permits the owner to undertake certain activities on their land (s 104 of the Resource Management Act 1991);
or
- a determination of tax liability through a tax assessment.⁴⁷

⁴⁷ *Amaltal Fishing Company Ltd v Commissioner of Inland Revenue* HC Wellington CIV-2007-485-1370, 03 February 2009; (2009) 24 NZTC 23,313.

The following decisions would *not* be determinations *about* a person's rights, obligations, or interests protected or recognised by law:

- decision-making powers concerning the setting of standards, policies, and the approval of codes of practice or rules, the setting of rates;
- policy decisions by Ministers, which are not individuated assessments and are not determinations about a person even where the outcome of that decision has a bearing on the interests of individuals;⁴⁸
- a decision by a territorial authority about a district plan, which may affect a person's property rights but the decision itself is about the plan, not about a person (s 73 of the Resource Management Act 1991);
- a declaration by a biosecurity officer that certain areas are "restricted places" or "controlled areas", which is about the status of certain areas, not about a person (ss 130-131 of the Biosecurity Act 1993);
- a decision by a grants body introducing a time limit for the provision of further information, which is not a determination about a particular applicant;⁴⁹
- a Council decision to dump septic tank waste on a golf course, which is not a determination about a neighbour's rights or interests;⁵⁰
- a report by a health assessor for a sentencing court, which is a report for the sentencing court to make a determination and the report itself does not determine any rights, obligations or interests of the offender;⁵¹ or
- a suspension of a licence as a result of a mandatory statutory sanction, which arose automatically and not as a result of a determination.⁵²

(2) The determination must be about "a person's rights, obligations, or interests protected or recognised by law"

The term "rights, obligations, or interests protected or recognised by law" also appears in s 27(1) and (2) of the New Zealand Bill of Rights Act 1990. They are broad terms and cover a range of legally recognised interests including status, rights in property, personal liberty or privilege, rights in one's livelihood or reputation, and legitimate or reasonable expectations of retaining or obtaining benefits.

(3) The determination must be one that could have a "significant impact" on that person's rights, obligations, or interests protected or recognised by law

⁴⁸ *Manukau City Council v Ports of Auckland Ltd* [2000] 1 NZLR 1 (PC), *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347.

⁴⁹ *Combined Beneficiaries Union Inc v Auckland City COGS Committee* [2008] NZCZ 423.

⁵⁰ See *Chisholm v Auckland City Council* (Unreported, Court of Appeal, CA 32/02, 29 November 2002, Tipping J)

⁵¹ *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352; (2009) 8 HRNZ 770.

⁵² *Henderson v Director of Land Transport Safety New Zealand* [2006] NZAR 216.

The decision-making power must be more than a minor or merely administrative power and must be a significant decision-making power in terms of its potential impact on a person's rights, obligations, or interests protected or recognised by law.

What is the nature of the further information sought?

If the answer is **YES**, please:

- identify the provision(s) that create or amend the significant decision-making power; and
- explain the nature of any safeguards that will apply to the significant decision-making power to ensure it is properly constrained and used appropriately (you will need to first describe the nature and extent of the significant decision-making power and then explain the safeguards that will apply to that power).

There are a range of safeguards that should be applied to decision-making powers. Some of these apply at common law, unless they are excluded, and others must be expressly provided for. The common safeguards for decision-making powers are:

- procedures for decision-making and application of the principles of natural justice;
- criteria for exercise of decision-making power;
- expertise and independence of decision-maker; and
- appeal and review procedures.

The more significant a decision-making power the more important it is that more of these safeguards apply and the harder it will be to justify limitations on how the safeguards apply.

Procedures for decision-making and application of the principles of natural justice

It is important to clearly establish some sort of procedure or guidelines to be followed for exercising a decision-making power. In general, the greater the potential impact of a decision on a person and the more important the right or interest in question, the more extensive the procedural protections that will be required. Applicable procedures will provide a right to a hearing, indicate to the individual affected what the issues are, disclose the information relevant to the exercise of the power, give the individual the opportunity to have legal representation, to call witnesses and cross-examine witnesses, and to present their case and to rebut material put forward to their detriment.

A decision-maker is required to disclose the principles and policies they apply and to give reasons for their decisions, if asked to do so by those affected. These rights are contained in the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987 and it will be very difficult to justify any restrictions or limitations on these rights.

Particular standards have been developed for the procedural requirements for professional disciplinary matters and these standards should be followed in any legislation dealing with professional disciplinary matters.⁵³

⁵³ Public and Administrative Law Reform Committee, *Ninth Report* (1976); Public and Administrative Law Reform Committee, *Tenth Report* (1977); Legislation Advisory Committee, *Guidelines on Process and Content of Legislation* at [8.3.2] available at: <http://www2.justice.govt.nz/lac/>.

Criteria for exercise of decision-making power

The decision-making power should clearly state:

- the powers that can be exercised by the decision-maker;
- the circumstances when the power can be exercised;
- the matters that can be considered;
- the purpose of the power;
- whether the power includes a qualification or condition or a test that has to be satisfied for the exercise of the power;
- the matters or factors to be considered (or not to be considered) by the decision-maker;
- whether the decision-maker is obliged or permitted to consider (or not to consider) certain purposes of the power or legislation; and
- whether the power is discretionary or mandatory once the criteria for its exercise are established.

Expertise and independence of decision-maker

The expertise and independence of a decision-maker can provide an important safeguard for a decision-making power. Specialist expertise for a decision maker will generally be appropriate where the subject matter of the decision involves a specialist or technical area. The greater the potential impact of a decision on an individual, particularly where matters of personal liberty or livelihood are involved the more important it will be that the decision is made by a person with some level of independence from the government of the day.

If a government department may from time to time be required to appear as a party before a tribunal, then that same department should not provide administrative services for the tribunal.⁵⁴ Similarly, where a tribunal is hearing appeals from decisions of a government department the same rule should apply.

Appeal and review procedures

Appeals scrutinise and correct specific decisions of first instance decision-makers, and also help to maintain a high standard of public administration and public confidence in the legal system. The greater the potential impact of a decision on an individual the more likely an appeal will be required. Appeals are generally preferable to judicial review as they can be quicker, cheaper, use specialist experts to hear the appeal, and consider the merits of the decision by reconsidering the facts. However, the emphasis should always be on ensuring the first decision is right. An appeal should only be a safety mechanism, and not a second round of decision-making designed to compensate for the poor quality of the first instance decisions.

Rights of appeal must be created by statute and the appeal body generally operates in the place of the original decision-maker, making their own findings of fact or law or both. In

⁵⁴ Public and Administrative Law Reform Committee, *First Report* (1968).

contrast, the right to judicial review exists independently and the court examines the process by which a decision has been made and determines whether it has been made according to law.

Appeal bodies should generally be comprised of experts in the relevant subject area. The more specialised or technical the subject area the more important it will be for the appeal body to include the relevant subject or technical experts. The more likely it is the appeal will involve legal issues the greater will be the need to have at least one person on the appeal body with some legal expertise. There are a range of choices as to the nature of the appeal and whether it is limited in some way, and the applicable appeal procedure (usually a choice of a rehearing of some matters vs an entirely new hearing of the matter).

Where an appeal is provided for, the need for a second appeal should be carefully considered. A second appeal can be an appropriate way to ensure judicial oversight of decision-making. It is generally appropriate to limit the second appeal to matters of law or to particular issues. While an appeal will generally be of right, it may be appropriate to limit the availability of the second appeal by requiring leave to appeal.

Example: (for a YES answer, concerning [Aquaculture Legislation Amendment Bill \(No 3\) 2010](#))

Clause 35 substitutes new sections 186D to 186GA into the Fisheries Act 1996 containing a power for the Chief Executive to make a decision whether the aquaculture activities authorised by a coastal permit will have an undue adverse affect on fishing.

The procedure for making a decision is set out in the proposed sections and provides for the Chief Executive to consult certain persons before making a decision, make a decision within a specified time, requires the Chief Executive to have regard to certain information, sets out the order in which decisions are to be made where more than one decision is required, specifies certain coastal areas for which no aquaculture decision may be made, the matters the Chief Executive must have regard to when making a decision, requires a decision to be in writing and provide reasons, be notified, and specifies the types of condition that may be included in a decision.

A person may apply for judicial review of the Chief Executive's decision within 15 days of that decision.

If the answer is **NO**, no further information is required.

Further sources:

- Ministry of Justice guidance on s 27(1) of the New Zealand Bill of Rights Act 1990 <http://www.justice.govt.nz/publications/global-publications/t/the-guidelines-on-the-new-zealand-bill-of-rights-act-1990-a-guide-to-the-rights-and-freedoms-in-the-bill-of-rights-act-for-the-public-sector/introduction-to-sections-27-1-to-27-3-the-right-to-justice>
- Legislation Advisory Committee, *Guidelines on Process and Content of Legislation*, Chapter 13 "Appeal and Review" available at: <http://www2.justice.govt.nz/lac/>

Powers to make delegated legislation

The delegation of Parliament’s legislative power is a very significant decision for Parliament to make, and the scrutiny of these powers in Bills is arguably the most important function performed by the Regulations Review Committee. If Parliament is to remain sovereign, it will want to confine such powers to matters of detail, implementation or matters that are minor, and avoid matters of substantive policy or principle.

Question 4.7 – Henry VIII Clauses

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/NO]
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What matters are covered by the question?

Delegated legislation is broadly defined and will include regulations as well as various other types of delegated instrument. For the purposes of Question 4.7 delegated legislation means “disallowable instrument” as defined in s 38 of the Legislation Act 2012⁵⁵ and this includes:

- a legislative instrument (further defined in s 4 of the Legislation Act 2012 and includes an Order in Council and an instrument required by an Act to be published under the Legislation Act 2012);
- an instrument that has a significant legislative effect (further defined in section 39 of the Legislation Act 2012 as an instrument whose effect is to create, alter or remove rights or obligations, and determine or alter the content of the law applying to the public or a class of the public).

The meaning of delegated legislation in Question 4.7 also includes instruments declared not to be a disallowable instrument. Therefore, instruments that fall within the definition of disallowable instrument (above) are covered by this disclosure question notwithstanding the instrument is declared not to be a disallowable instrument.

Question 4.7 requires disclosure of Henry VIII clauses, which are empowering provisions that will enable delegated legislation to expressly or impliedly:

- amend, suspend or override an Act (including the empowering Act);⁵⁶
- define or amend a term in an Act;
- exempt a person from the provisions of an Act or regulation.

⁵⁵ These provisions relating to disallowable instruments in Part 3 of the Legislation Act 2012 are not yet in force but are used here for the purposes of defining the scope of the term “delegated legislation” to which this question applies. Part 3 will come into force on the earlier of the date appointed by the Governor-General by Order in Council or 1 July 2014.

⁵⁶ See, for example, section 6(4) of the Canterbury Earthquake Response and Recovery Act 2010, which provided “an Order in Council made under subsection (1) may grant an exemption from, or modify, or extend any provision of any enactment, including (but not limited to) ...” and then listed 22 Acts to which the provision applied.

What is the nature of the further information sought?

If the answer is **YES**, please:

- identify the provision(s) that create or amend a Henry VIII clause;
- describe the nature and extent of the Henry VIII clause in terms of the type of delegated legislation that could be made pursuant to the Henry VIII clause and the extent to which that delegated legislation will amend, suspend or override some aspect of an Act;
- explain why the Henry VIII clause is necessary; and
- explain the nature of any safeguards that will apply to the Henry VIII clause to ensure it is properly constrained and used appropriately.

Explain why the Henry VIII clause is necessary

Henry VIII clauses are generally difficult to justify as they enable the Executive to change laws Parliament has made, thereby undermining the notion that Parliament is sovereign.

However, there are some very limited circumstances where Parliament has accepted that Henry VIII clauses may be not unacceptable as long as they are also accompanied by appropriate safeguards (see below). Those situations include transitional provisions for a complex reform involving the amalgamation of a large number of statutes, and emergency response measures.

Some examples of the types of safeguards that should apply to a Henry VIII clause

Delegation legislation should be accompanied by certain safeguards and any departure from these should be able to be fully justified:

- the empowering clause should be drafted in the most specific and limited terms possible and must at all times be consistent with and support the provisions of the empowering Act;
- where the empowering clause concerns transitional regulations it should generally be subject to a sunset clause;
- delegated legislation made pursuant to a Henry VIII clause should generally be limited in time, subject to a sunset clause, and subject to confirmation by Parliament; and
- require consultation prior to making the delegated legislation (unless impracticable, e.g., emergency measures).

If the answer is **NO**, no further information is required.

Question 4.8 – Powers to make Delegated Legislation

4.8. Does this Bill create or amend any other powers to make delegated legislation?

[YES/NO]

What matters are covered by the question?

For the definition of “delegated legislation” see Question 4.7 above. This question requires disclosure of any empowering clause that enables the making of delegated legislation. Most stand-alone Acts will contain at least one empowering clause for the making of delegated legislation.

What is the nature of the further information sought?

If the answer is **YES**, please:

- identify the provision(s) that create or amend the ability to make delegated legislation;
- describe the nature and extent of the empowering clause and the types of delegated legislation that could be made pursuant to the empowering clause (this should cover the regulations that will be required to implement the Act, the regulations that are proposed to be made in the foreseeable future, and the other matters for which regulations will be able to be made but which are not currently planned);
- explain why the delegated legislation making power is necessary;
- explain the nature of any safeguards that will apply to power to make delegated legislation to ensure it is properly constrained and used appropriately.

Why is the power necessary?

There are a range of matters for which it is generally accepted it is appropriate to make regulations. It will obviously be easier to justify the need for regulations in these areas and a brief reference to the nature and scope of the regulations that could be made in these areas will be sufficient to answer this question. Matters generally accepted as suitable for regulations⁵⁷ include:

- matters of detail for which it is not appropriate to utilise Parliamentary time, for example, matters of implementation, details of procedures, fees, forms, lists and technical matters;
- unforeseen matters that may be required to implement and administer an Act;
- flexibility in how the Act is applied and matters that may need to be frequently changed; or
- emergency measures or actions requiring an immediate response, for example, epidemic responses, biosecurity responses, civil defence matters.

Matters that fall outside the above areas will be more difficult to justify and responses should set out in some detail why the matters need to be dealt with by regulation. There are some matters that should generally only be included in Acts and not in delegated legislation and

⁵⁷ These matters were initially identified in a 1932 United Kingdom report on delegated legislation, *Report of the Committee on Minister's Powers* (1932), Cmnd 4060, and subsequently approved in a 1962 New Zealand report, *Report of the Committee on Delegated Legislation*, AJHR, 1962, I.18.

delegated legislation in these areas will be particularly difficult to justify. Full reasons should be provided in support of any empowering provision that could make delegated legislation concerning the following matters:

- matters of significant policy, including the creation of new agencies or offices;
- matters affecting fundamental human rights and freedoms, including provisions that alter common law rights;
- serious offences, significant penalties (generally those involving imprisonment), changes to the jurisdiction of a court or tribunal, civil or criminal rights of appeal, or provisions affecting the right to judicial review; and
- retrospective provisions.

Some examples of the safeguards that should apply to the making of delegated legislation

There are a number of safeguards that are commonly expected to apply to delegated legislation and these are:

- procedural safeguards that apply to the making of delegation legislation – where delegated legislation is made by Order in Council it is subject to Cabinet scrutiny, drafting by Parliamentary Counsel, and an expectation that the regulations will not come into force until at least 28 days after their making;⁵⁸
- disallowance, which provides Parliament with the important opportunity to scrutinise and question the provisions of disallowable instruments. Disallowance is currently provided for under subpart 1 of Part 2 of the Legislation Act 2012;
- publication requirements in the Legislation Act 2012 ensure that delegated legislation is accessible. For delegated legislation not subject to the publication requirements the agency responsible for the delegated legislation should ensure it is widely available and ideally available on the internet;
- review by the Regulations Review Committee under Standing Order 314, which provides an effective safeguard on the types of matters addressed in delegated legislation as it provides for the review of delegated legislation against a list of standards set out in Standing Order 315 in response to a complaint, on referral from another Committee, or on the Committee's own motion. The Committee may draw a matter to the attention of the House where it considers the delegated legislation is inconsistent with any of the standards in Standing Order 315;
- consultation requirements, which provide an important safeguard on the making of regulations as they ensure the delegated legislation is prepared after considering the views of the persons who will be subject to the delegated legislation;
- confirmation by the House. This safeguard is often used for delegated legislation that contains Henry VIII clauses that allows the delegated legislation to amend, suspend or override provisions in Acts.

⁵⁸ Cabinet Office Manual, paragraphs [7.84-7.94].

Example: (for a YES answer, concerning the Natural Health Products Bill 2011)

Clause 47 provides for various regulations to be made by the Governor-General by Order in Council on the recommendation of the Minister of Health. The regulations contemplated by the Bill are further referred to in clauses 10, 13, 22, 24, 25, 27, 29, 40, 41, 42, and 46.

The regulations will provide for the matters of detail necessary to support the implementation and operation of the Act. The regulations required in order to implement the Act include regulations prescribing the manner of, and information required for, a product notification, the evidence required to support a health benefit claim, the manner of notification of new ingredients for a natural health product or a licence to manufacture natural health products, the requirements for labelling natural health products, and the manner and time for appeals against a decision of the Authority.

Further regulations may be made concerning the requirements for applications, the criteria for assessing new ingredients, the procedures of the natural health products advisory committee, and the requirements for a code of practice, the manufacture of natural health products and the natural health products database.

The Minister is required to consult interested persons before recommending the making of regulations. Regulations will be drafted by Parliamentary Counsel, subject to Cabinet scrutiny, and not come into force until at least 28 days after their making. Regulations will be subject to the Acts and Regulations Publication Act 1989, disallowance under the Regulations Disallowance Act 1989, and subject to review by the Regulations Review Committee under Standing Order 314.

If the answer is **NO**, no further information is required.

Further sources:

- Legislation Advisory Committee, *Guidelines on Process and Content of Legislation*, Chapter 10 “Delegated Legislation” available at: <http://www2.justice.govt.nz/lac/>

Any other unusual provisions or features

Question 4.9

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?

[YES/NO]

What matters are covered by the question?

This is a 'catch-all' question designed to allow departments to proactively identify and explain the presence of any other unusual provisions that could attract the attention, puzzlement or concern of Parliament or the public.

While this must necessarily rely on subjective judgement, some possible types of unusual provision (not covered by any of the disclosure questions above) include provisions that are inconsistent with the Legislation Advisory Committee *Guidelines on Process and Content of Legislation*⁵⁹ in respect of:

- significant impairment of property rights, contract rights, or common law rights (chapter 7);
- complex or unusual transitional or savings provisions (chapter 7, part 4);
- creation of new agencies or amendment to existing agencies (chapter 9);
- commencement of legislation (chapter 10, part 1);
- search and seizure (chapter 14);
- extra-territorial application (chapter 16).

Other types of unusual provision could include clauses in a Bill that raise issues of consistency with the New Zealand Bill or Rights Act 1990.

What is the nature of the further information sought?

If the answer is **YES**, please:

- identify the provision that is unusual or calls for special comment, and explain what makes it unusual or worthy of special comment;
- describe the nature and purpose of the provision (what the provision does and what it is intended to achieve); and
- explain why the provision is necessary (what are the alternatives, and why was it preferable to the alternatives).

If the answer is **NO**, no further information is required.

⁵⁹ Available at: <http://www2.justice.govt.nz/lac/>