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# Cabinet Office Circular

14 March 2008

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**Intended for:**

All Ministers  
All Chief Executives  
Chief Parliamentary Counsel  
All Senior Private Secretaries  
All Private Secretaries

## **Delegated Legislation: Guidelines for Legislative Instruments that are not Regulations**

### **Key points**

- 1 Primary legislation that delegates to the Executive a power to make an instrument that is legislative in nature should, in general, make the instrument subject to:
  - 1.1 disallowance under the Regulations (Disallowance) Act 1989; and
  - 1.2 publication in the Statutory Regulation series under the Acts and Regulations Publication Act 1989.
- 2 In a very few cases, however, good reasons may exist for departing from this general rule, by not making the instrument subject to either Act. This circular sets out the matters to be considered when assessing whether such a departure is justified. If such reasons exist, they must be set out in the Cabinet paper seeking approval for the introduction of legislation that delegates the law-making power.
- 3 The circular applies to proposals for new primary legislation and for amendments to primary legislation that include delegated law-making powers to make legislative instruments. It does not apply to existing delegated law-making powers, or to delegated powers to make instruments that are not legislative in nature.

## **Legislative instruments should, in general, be made subject to both Acts**

- 4 The general rule is that both the Regulations (Disallowance) Act 1989 and the Acts and Regulations Publication Act 1989 (the Acts) should apply to instruments that are legislative in nature. The disallowance process makes those instruments subject to parliamentary scrutiny, in accordance with Parliament's legitimate interest in ensuring the proper exercise of the delegated power. Publication of the instruments in the Statutory Regulation series (the SR series) provides the public with appropriate access to the legislation that affects them.
- 5 In broad terms, an instrument is legislative in nature if it:
- 5.1 regulates the public generally or any class of the public (including an occupational class); and
  - 5.2 prescribes or imposes obligations, confers entitlements, or creates benefits or privileges.
- 6 Regulations, as defined in the Interpretation Act 1999 and in the Acts, (a copy of the definition is attached at Appendix A), are the most common legislative instruments to be made under a delegated law-making power. Regulations are subject to both of the Acts.
- 7 Occasionally proposals for primary legislation include a power to make an instrument that is legislative in nature but that does not fall within the definition of a "regulation", and which is therefore not subject to either of the Acts. The instrument may, for example, be called a "determination", a "direction," or "guidelines." An example of a legislative instrument of this kind is the code of broadcasting standards issued by the Broadcasting Standards Authority.
- 8 As a result, the delegated legislation would not be subject to parliamentary scrutiny, nor published in the SR series, which may be undesirable. Such an instrument should, as a general rule, be made subject to one or both of the Acts by declaring in the primary legislation that it is a regulation for the purposes of one or both of the Acts.

## **Reasons for departing from the general rule**

- 9 In a very few cases good reasons may exist for departing from the general rule. Cabinet has agreed that where such good reasons exist, they must be set out in the Cabinet paper seeking approval for the introduction of legislation that delegates the law-making power.
- 10 If, therefore, proposed legislation or amendments to legislation include a power to issue an instrument that is legislative in nature, but that does not fall within the definition of a regulation, consideration should be given to:
- 10.1 whether there are good reasons why the instrument should not be made subject to the Regulations (Disallowance) Act 1989 (see paragraphs 11-13); and
  - 10.2 whether there are good reasons why the instrument should not be made subject to the Acts and Regulations Publication Act 1989 (see paragraphs 14-16).

***Disallowance***

- 11 The presumption is that all legislative instruments made under a law-making power delegated by Parliament should be made subject to disallowance under the Regulations (Disallowance) Act 1989, in order to allow them to be scrutinised by Parliament.
- 12 In some situations, however, it may not be appropriate for Parliament to have oversight and control of the proposed instrument. These situations include those where:
- 12.1 the instrument is made by an industry or independent body and is not subject to ministerial approval;
  - 12.2 there are strong policy reasons for a particular institution to control the content of rules without intervention by Parliament, such as university statutes where the principles of academic freedom and institutional autonomy apply, or the freedom of the press as reflected in broadcasting codes of practice;
  - 12.3 it is desirable in the interests of international uniformity to adopt *verbatim* rules formulated in another country or in an international forum (such as APEC standards for electrical appliances).
- 13 In most other circumstances, the instrument should be declared to be a regulation for the purposes of the Regulations (Disallowance) Act 1989.

***Publication***

- 14 All legislative instruments that are subject to disallowance should also be subject to the Acts and Regulations Publication Act 1989, and therefore published in the SR series. In some cases, however, separate publication (ie publication outside the SR series) may be justified.
- 15 Some of the reasons for separate publication may be the same as the reasons why a legislative instrument might not be made subject to disallowance (see paragraphs 12.1-12.3). In addition, separate publication may be justified if, for instance:
- 15.1 the instrument contains technical matters relevant to a particular group, rather than imposing obligations that are of general application or interest to the public, and the benefits of separate publication outweigh any costs of separate publication; or
  - 15.2 publication in the SR series would be impracticable for reasons such as the size or complexity of the instrument.
- 16 In most other circumstances, the instrument should be declared to be a regulation for the purposes of the Acts and Regulations Publication Act 1989.

**Cabinet requirements**

- 17 Every submission to Cabinet seeking approval for the introduction of legislation or amendments to legislation that delegate to the Executive a power to make a legislative instrument that will not be subject to either disallowance or publication in the SR series must set out the justification for the resulting lack of parliamentary scrutiny and reduced public access to legislation.
- 18 Every bill that provides for the separate publication of a legislative instrument outside the SR series should state the reasons for separate publication in the explanatory note to the bill.

- 19 An empowering provision that permits separate publication of a legislative instrument should specify that:
- 19.1 notice must be given in the *Gazette* and any other publication relevant to the individuals or organisations affected;
  - 19.2 the instrument must be made available for inspection free of charge and for purchase at a reasonable price (wherever possible); and
  - 19.3 notice must be given of the places where the instrument can be inspected or purchased.

### **Further guidance**

- 20 Advice on Cabinet's requirements may be sought from the Cabinet Office.
- 21 Advice on the nature of a proposed instrument may be sought from the Parliamentary Counsel Office.
- 22 Further guidance on delegated legislation can be found at chapter 10 of the Legislation Advisory Committee Guidelines on Process and Content of Legislation (<http://www.justice.govt.nz/lac/>). See also the Regulations Review Committee's Inquiry into instruments deemed to be regulations – an examination of delegated legislation, and the government's response to the inquiry.

Diane Morcom  
Secretary of the Cabinet

## Definition of “regulations”

The word “regulations” is defined in section 29 of the Interpretation Act 1999 and section 2 of the Regulations (Disallowance) Act 1989 as:

- (a) regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown;
- (b) an Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment;
- (c) an Order in Council that brings into force, repeals, or suspends an enactment;
- (d) regulations, rules or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand;
- (e) an instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or Acts and Regulations Publication Act 1989 or the Regulations (Disallowance) Act 1989; or
- (f) an instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument referred to above.

The Acts and Regulations Publication Act 1989 defines “regulations” as:

- (a) regulations as defined in paragraphs (a)-(f) above; and
- (b) resolutions of the House of Representatives which
  - (i) revoke any such regulations; or
  - (ii) amend any such regulations; or
  - (iii) revoke any such regulations, and substitute other regulations.