REGULATORY IMPACT STATEMENT

INCREASING THE VISIBILITY OF LEGISLATIVE QUALITY ISSUES

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by, and is the responsibility of, the Treasury. It analyses a legislative option, and a range of supporting non-legislative measures, intended to encourage better quality legislation.

Limits on the Options Analysed

The core analysis in this RIS is limited to measures based on those recommended in an earlier RIS prepared by the Treasury, entitled "Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act?". The analysis is therefore founded on, but does not revisit all of, the matters covered by the earlier RIS.

This earlier RIS, dated 2 February 2011, considered 5 different regulatory options for encouraging better quality legislation, and explained why "Option 5" was Treasury's preferred legislative option. Subsequently, the following commitment was included in the 2011 National-ACT Confidence and Supply Agreement:

> *"The Regulatory Standards Bill will be included in the continuance motion for the new Parliament, and the Minister for Regulatory Reform will work closely with the Minister of Finance to achieve a mutually agreed outcome, based on Treasury's preferred option (option 5)."*

The range of legislation covered by the analysis is limited to legislation proposed or made by the Executive (the government and its agencies). Extending the coverage to include other legislation, such as Local, Private or Members Bills, is not considered, as the responsibility for their preparation falls on the sponsoring member, and Parliament sets expectations for its members through internal rules, such as Standing Orders.

Limitations of the Analysis Undertaken

The nature and rigour of the analysis of options is limited by the need to rely on subjective judgement about the nature and size of the potential behavioural impacts.

That reliance arises because:

- there is limited international experience and analysis of similar legislative requirements in similar institutional settings for us to draw upon; and
- we have no reliable way to predict:
  - the nature and extent of the Parliamentary and public use of the proposed disclosures for Bills and delegated legislation; or
  - the dynamic effects of requirements and expectations that seek to encourage, but cannot force, changes in the attitudes, behaviour and capabilities of politicians and public officials.

The attempted quantification of costs is limited to the expected costs of direct compliance with any obligations proposed. It does not include estimates of further costs that departments may voluntarily decide to incur to improve the effectiveness of

their underlying QA processes, or that external parties may decide to incur to make use of the additional information published.

- Cost estimates for the production of disclosure statements are ballpark figures that draw on existing information about volumes of new legislation, and information about completion times provided by a small number of agencies that produced test disclosures for some pieces of recent legislation.

- Cost estimates for other support arrangements in Packages 1 and 2 are judgements informed by brief discussions with the agencies or people involved.

- Cost estimates for elements of Package 3 are highly speculative, as it identifies areas for development, with further work needed to define specific initiatives.

Consistency with Matters in the Government Statement on Regulation

None of the measures considered in this RIS are likely to have a direct impact on business costs, existing property rights or market competition.

Note that, in principle at least, almost any of the suggested measures could be progressed without passing legislation. The Government is not currently prevented by law from doing any of these things, and no legal sanctions are suggested for any failure to comply with the proposed obligations. The case for a legislative response therefore rests on our judgement that:

- placing the proposed obligations in legislation provides a more credible, enduring commitment to comply that will underpin desirable behavioural change; and

- this advantage is sufficient to exceed the potential disadvantages (the risk of locking in requirements that are not as useful as hoped, and the risk of unexpected judicial involvement).

Interactions with other Legislative Initiatives

The analysis assumes that the chosen package would effectively replace the existing Regulatory Standards Bill, presently being considered by the Commerce Committee.

Some of the legislative proposals here would make use of provisions and terms set out in the new Legislation Act 2012, such as the definition of legislative instruments and disallowable instruments, and the statutory role of the Parliamentary Counsel Office.

Further Policy Work Required

If elements of Package 3 are progressed, further policy work will be required to identify the specific actions to give them best effect. Ideally, that further work would be integrated into the wider Better Public Services reform agenda for the state sector.

Jonathan Ayto
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29 January 2013

REGULATORY IMPACT STATEMENT

INCREASING THE VISIBILITY OF LEGISLATIVE QUALITY ISSUES

Executive Summary

- This Regulatory Impact Statement (RIS) analyses a legislative option and various supporting or complementary measures intended to encourage better quality legislation. The legislative option is limited to one recommended in an earlier Treasury RIS on the potential of a Regulatory Responsibility Act.

- The legislative measure considered is an obligation to publish a disclosure statement for government Bills, substantive government SOPs, and delegated legislation drafted by PCO, at the time that legislation is introduced or published.

- The disclosure statement would be prepared by the administering department. It would flag certain significant powers or unusual features the legislation contains, and provide information about the nature of the quality assurance work undertaken in the process of developing the legislation.

- This disclosure is expected to enhance Parliamentary and public scrutiny of the legislation, by highlighting matters that may be linked to legislative quality. It is also expected to increase departmental attention to quality assurance standards.

- In order to limit risks, it is proposed to legislate only for a basic set of disclosures that we are confident will be workable for almost all Bills and covered delegated legislation. Some extended disclosures would be trialled administratively.

- Incomplete or wrong disclosures will not give rise to legal remedies or sanctions. The incentives for compliance will come from public service respect for the law and reputational effects, supported by clear expectations and timely reminders.

- The proposed content of the disclosure statement has been informed by consultation and testing undertaken by Treasury with departmental and targeted external contacts, supported by a discussion document that incorporated a set of indicative legislative provisions drafted for Treasury by PCO.

- The expected compliance costs of the disclosure statement requirement are low. The support measures give rise to more costs but, in many cases, these could be managed within departmental baselines. Having departments absorb these costs is likely, however, to affect the timeliness and levels of expected compliance.

- Three illustrative packages of measures (plus the status quo option) are considered, which vary in their level of ambition and resource cost. The legislative element is the same for each package, and so the differences between packages relate to the scope of the non-legislative measures proposed.

- While the measures in each package have a common theme and are intended to be mutually reinforcing, it is quite possible to pick and mix individual measures. The key measures in each package are outlined in the summary table below.

- No preferred package has been explicitly identified, but we doubt that the status quo is a durable long-term option. Choices about the range of measures to adopt

come down to a judgement about appetite for change, though the most ambitious package would take a number of years to implement.

- Although the outcomes are uncertain, we believe there is enough potential flexibility in how the measures in Packages 1 to 3 can be implemented to ensure costs do not exceed the realised benefits whatever measures are chosen.

Summary Table

Proposal for change	**Maintain the Status Quo**	**Package One: "Legislate but keep the cost low"**	**Package Two: "Legislate and reinforce with other changes"**	**Package Three: "Legislate and lift attention to existing leg"**
Disclose nature of QA products & processes used to test legislation		Basic	Extended	Extended
Disclose significant powers and unusual features of legislation		Basic	Extended	Extended
Independent review of measures		1-Off within 5 yrs	1-Off within 5 yrs	Every 5 yrs
Provision of guidance and admin support by PCO and Treasury		Yes	Yes	Yes
Stronger mandate for Select Cttees to report on leg quality issues, with support from Office of the Clerk		Yes	Yes	Yes
Tighter RIA requirements in weak areas to complement disclosures			Yes	Yes
Revive the Legislation Design Cttee with a more proactive role			Yes	Yes
Revamp the Cabinet LEG committee, with a stronger mandate to test leg quality and implementation plans			Yes	Yes
Clear Govt expectations for agencies on their stewardship responsibilities for existing legislation				Yes
Reporting requirements for regulatory agencies better tailored to their legal and stewardship responsibilities				Yes
Investigate new Office of Parliament (OoP) role to review performance of existing regulatory regimes				Yes
Estimated Additional Annual Compliance Cost (excl 5 Yr Review)	0	~4 FTE per year (or ~$0.85m pa)	~9 FTE per year (or ~$2m pa)	~$5m pa for OoP >$10m pa for rest

Context: The Regulatory Standards Bill

1. The Regulatory Standards Bill was introduced as a Government Bill in March 2011. Its stated purpose is to improve the quality of legislation by:

    - specifying principles of responsible regulation that are to apply to new legislation and, over time, to all legislation;

    - requiring those proposing new legislation to state whether it is compatible with those principles and, if not, the reasons for the incompatibility; and

    - granting courts the power to declare existing legislation to be incompatible with those principles.

2. The content of the Bill reflects the recommendations of the Regulatory Responsibility Taskforce, a group of external experts appointed by the Government to assess and propose changes to an earlier private members Bill.

3. The Taskforce's report and proposed Bill created sharply divided opinion even before the Bill itself was introduced. As a generalisation, it has attracted support from businesses and business organisations, and criticism from legislative experts, academic commentators, and departments. The Commerce Committee, to which the Regulatory Standards Bill was referred, then produced an interim report in September 2011 to disclose advice received from the Regulations Review Committee, which identifies a range of concerns with the Bill.

4. Following the 2011 election, the National and ACT parties concluded a Confidence and Supply Agreement that included the following commitment:

    > *"The Regulatory Standards Bill will be included in the continuance motion for the new Parliament, and the Minister for Regulatory Reform will work closely with the Minister of Finance to achieve a mutually agreed outcome, based on Treasury's preferred option (option 5)."*

5. All these references can be accessed online from links in the Endnotes on p.20.

Scope of Analysis: Policy Measures Consistent with Treasury's Option 5

6. Option 5 was Treasury's alternative, preferred option for improving the quality of legislation, as identified in the 2011 RIS prepared by Treasury to help the Government decide whether to support the Taskforce's proposed Bill.

7. The core features of Option 5, as described in the 2011 RIS, are reproduced again in **Annex 1**. Rather than require certification of all legislation against a set of pre-specified principles, and allow the courts to test the compatibility of legislation against those principles, the approach proposed in Option 5 is to:

    - require the disclosure, sometimes with explanations, of key features of a piece of legislation to help readers decide where scrutiny is warranted; and

    - strengthen Parliamentary processes for the scrutiny of legislation.

8. Back in 2011, the policy features of Option 5 were described only in indicative terms, and in some cases included alternative options. The purpose of this RIS

is to examine the possible features of Option 5 in more detail. Moreover, noting that the 2011 National-ACT Confidence and Supply Agreement refers only to an outcome "based on Option 5" we also consider the potential to refine or expand on the features originally identified. What remains consistent, however, is:

- the goal of improving the quality of government legislation; and
- the focus on transparency and support for Parliament's legislative scrutiny role, without bringing the courts further into the legislation-making process.

The Nature of the Problem and the Case for Further Action

9. The nature of the problems with the quality of legislation in New Zealand, and the case for taking further action, was more fully canvassed in Treasury's 2011 RIS. For convenience the main points from the 2011 RIS are summarised below.

The quality of legislation matters a lot

The scope for problems, and the consequences of getting it wrong, are considerable because:

- the law can impose significant demands on us;
- legislation is the dominant source of our law; and
- both the stock of legislation and the rate of legislative change is significant.

Good quality legislation has a number of important generic attributes

- It is robustly tested, so it is more likely to deliver on its policy objectives;
- It is consistent with accepted legal and rule-of-law principles;
- It is easy to access, and to understand; and
- It follows a fair and open process of development

NZ legislation is not comparatively bad ...

International surveys do not suggest that New Zealand has fundamental problems with legislative quality – at least relative to other OECD countries.

.... but could still be much better

Many people familiar with the development of NZ legislation, including those opposed to the Regulatory Standards Bill (like the Legislation Advisory Committee), would agree with this quote from the Explanatory Note for the original 2006 Regulatory Responsibility Bill

"In too many cases, [good legal] principles are not fully observed. Far too many Acts and regulations are the result of undue haste, poor quality processes, and inadequate scrutiny."

Why NZ's existing legislative scrutiny arrangements struggle to be effective

Some of the problems with existing scrutiny arrangements are set out in **Annex 2**.

It is suggested that two fundamental challenges underlie and can explain many of the problems experienced with legislative quality and with existing legislative scrutiny and quality assurance arrangements. These challenges, explained in more detail in the 2011 RIS, are:

- the difficulty and growing complexity of the regulatory task in a modern, open, liberal democracy;
- the strong incentives, pressures and human biases that operate on politicians, officials and private interests to push for legislation, to push for it to be made quickly, and to downplay or ignore the risks of poor legislative outcomes.

Objectives and Assessment Criteria

10. Our 2011 RIS suggested that the key objectives for any additional measures to support legislative quality should be to promote one or more of the following:

    - **the delivery of better policy analysis and advice into the decision-making process for potential legislative changes** (because major problems with legislation originate in choices made at the policy phase and it is a lot harder to get agreement to significant policy changes later on);

    - **the translation of policy into legislation that conforms to generally accepted attributes of good legislation** (because these attributes reflect key values that support individual rights and respect for the law); and

    - **more systematic identification and prioritisation of problems or potential improvements in the existing stock of legislation** (because we know legislative mistakes can be made; that legislation can become less effective or redundant over time as the policy environment changes; and assessing the cost and performance of legislation is a neglected and under-resourced task compared with assessing government spending).

11. This does not mean that we expect proposals based on Option 5 to target all three key objectives, or to offer a complete response to the problems and deficiencies described above and in **Annex 2**. As noted in the 2011 RIS, the core features of Option 5 are expected to complement existing measures, and to primarily target the 2nd objective – the translation of policy into good legislation.

12. Our main assessment criteria are the plausible benefits, expected costs, and anticipated risks of any proposed measures. The key issues here are likely to be:

    - the ability to manage risks and costs – since the benefits are uncertain, it is desirable that costs can be cut if the benefits turn out to be limited; and

    - the nature of the incentives created – as the benefits will come mainly from the ability to induce behavioural changes among the key participants.

13. Important indicators associated with the control of risks and costs include:

    - alignment with existing constitutional norms, as constitutional changes can alter the power balance between key roles, and should not be made lightly or without careful consideration of the potential dynamic consequences;

    - compatibility with different regulatory philosophies and frameworks, because broad political and public buy-in is required for enduring success;

    - alignment with current arrangements for the development of legislation, as this offers potential economies and facilitates system integration; and

    - the ability to adapt and amend requirements, in light of both practical experience and the inevitable changes in the legislative environment, supporting institutions, and concepts of good practice.

The case for favouring an "Option 5" approach

14. Before assessing the merits of different packages "based on Option 5", we should recap the reasons for favouring the "Option 5" approach. As noted earlier, the core characteristics of the Option 5 approach are a focus on transparency and support for Parliament's legislative scrutiny role, without bringing courts further into the legislative process. The arguments that support this focus include:

    - Disclosing and explaining policy and process choices made in developing legislation is more accommodating of different regulatory philosophies than reporting on compliance with selected principles stated in fixed form;

    - Enhancing Parliament's role as a guardian and promoter of good legislative policy is squarely in line with existing constitutional norms, whereas this would be an essentially new role if given to a court;

    - The strong public service norm to obey the law, and other reputational effects, provide incentives to comply without creating legal remedies or sanctions that could bring courts further into the legislative process;

    - The provision and scrutiny of additional information on Bills and delegated legislation can be readily integrated into Parliament's existing select committee and Regulations Review Committee processes;

    - The scrutiny of legislation able to be provided by Parliament is far more timely, frequent and predictable than that able to be provided by a court;

    - By building on Parliament's existing role and processes, we reduce the risk of unintended and unexpected outcomes (particularly from court involvement) that could arise from having requirements in legislation, and we are better able to manage the additional costs that may be incurred.

How will this public disclosure improve the quality of legislation?

15. The rationale for the public highlighting of selected features and the quality assurance processes for new legislation is that it will increase the attention paid to the matters disclosed, by both:

    - interested MPs and external parties (because information of potential interest to them will now be far more readily accessible); and

    - legislative decision-makers (because they will have to explicitly identify and explain some of the choices they have made in developing the legislation)

16. This increased attention is, in turn, expected to increase the likelihood that those matters will be addressed in a way consistent with the attributes of good legislation (see page 6), because:

    - for interested MPs and external parties, easier access to information relevant to legislative quality makes it more likely they will comment, and, hence, more likely it gets Parliamentary attention; and

    - for legislative decision-makers, disclosure increases the visibility, and thus reputational cost, of inadequate quality assurance or poor justifications.

17. The increased attention is also likely to encourage relevant oversight agencies to develop better expert guidance on the targeted legislative features, and better guidance and design improvements for the targeted quality assurance processes, which in turn is likely to improve their use and effectiveness.

The case for a legislative response

18. The case for a legislative (rather than administrative) initiative to improve the quality of legislation comes down to a matter of judgement.

- At least in principle, legislation is not essential because there is no immediate proposal to establish a new statutory body, confer a new function on an existing body, or provide for legal sanctions. It would be possible for the Government to voluntarily agree, or for the House to amend Standing Orders to require Ministers, to provide the relevant information.

- Legislation has the further disadvantage that it takes more effort to put in place, makes it harder to fix any unanticipated problems; is less able to accommodate or allow for unusual situations; and it is always possible that the courts will find an unexpected role or give an unexpected interpretation.

- However, an obligation imposed by Parliament on departments delivers a far more credible and enduring commitment to proper disclosure on behalf of the government, and also has a much greater status and profile with the public and government agencies, than administrative requirements or Standing Orders, even without legal remedies or enforcement mechanisms.

- There is plenty of precedent, both domestically and internationally, for using legislation to require the government to disclose information to Parliament.

- Legislation is also the more appropriate vehicle where Parliament wishes to reach down past Ministers, and impose obligations directly on departments.

Possible Packages of Measures for Giving Effect to an Option 5 Approach

19. There are a number of measures that could be adopted to encourage improvements in the quality of legislation that are consistent with the Option 5 approach. Rather than attempt to assess the impact of every permutation, we have identified three illustrative packages of measures (in addition to the status quo) as a way to represent the range of options available.

- Each package has a theme, but most measures are discrete options that can be added to, or subtracted from, any package in a modular way.

- The essential differences between the illustrative packages lie in their level of ambition and, correspondingly, their likely resource costs.

- The legislative core of all packages is the requirement for a disclosure statement to accompany Government Bills, major amendments to Bills, and significant delegated legislation (**see Annexes 3, 4 and 5 for details**).

- Each package is a mix of legislative and non-legislative measures, but the differences between packages relate to the scope of the non-legislative measures (**see Annex 6 for more details of these measures**).

- There are, however, definite limits on the range of disclosures we think are robust enough to be implemented as legislative requirements at this point. We have done some testing of key disclosures, but not enough to yet be confident that all suggested disclosures are workable in all likely situations.

20. The packages are:

"Maintain the Status Quo"

- Continue with the existing regulatory management tools at this time

Package 1: "Legislate but Keep the Cost Low"

- A basic set of disclosures for Bills and delegated legislation, identifying key legislative features and information on quality assurance processes
- Provision of guidance and admin support to departments from PCO/Tsy, and provision of extra select committee support from the Office of the Clerk
- A one-off independent review to commence within 5 years of enactment

Package 2: "Legislate and Reinforce with Other Changes"

Incorporates all the features of Package 1, but also ....

- Some extended disclosures for Bills, and extended coverage of delegated legislation, to be trialled administratively
- Supporting measures to encourage more timely and rigorous identification of potential issues earlier in the legislative development process, such as:
    - Tightening RIA expectations for reporting on expected costs, possible economic losses, likely compliance rates, and implementation plans;
    - Reviving the Legislation Design Committee, with a more proactive role to give advice to departments on complicated legislative projects;
    - A revamped Cabinet Legislation Committee, with a greater mandate to consider legislative quality issues and test implementation plans.

Package 3: "Legislate and Lift Attention to Existing Legislation"

Incorporates all the features of Package 1 and 2, but also ....

- A series of complementary measures intended to significantly lift the attention also given to the management of existing legislation, such as:
    - Clearer expectations of government agencies for the implementation, administration, enforcement, monitoring and review of legislation;
    - Reporting requirements for regulators and administrators of legislation that are better tailored to a regulatory role or perspective;
    - A possible new Office of Parliament role to review how well different regulatory regimes perform against their stated policy objectives.

Analysis of "Maintain the Status Quo"

Core Elements

Agreement not to pursue a Package explicitly based on Option 5 at this time.

Existing regulatory tools and disclosures would continue in place, such as the production and publication of RISs and advice on consistency with NZBoRA. These tools may further develop over time as part of the natural ongoing evolution of the regulatory management system.

Additional Benefits and Expected Costs

None, unless other approaches are pursued as part of a clear alternative strategy.

Consistent with usual assumptions, we do not count the effects of the ongoing evolution of current settings as costs or benefits, as they represent the base case. Nonetheless, it may be worth acknowledging that there is some anecdotal evidence of improvements in the average quality of RISs produced by departments, and of increasing use and direct reference to RISs by those commenting on draft legislation – a trend that we would expect to see continue.

Risks

None, other than noting this may not be a durable long-term option, as the demand for further improvements in regulatory management is expected to strengthen with time

There might also be a bit of disappointment, criticism, or adverse inferences drawn in some quarters after expectations were raised by commitments made and consultation undertaken.

Overall assessment of Status Quo Option

The underlying issues and concerns that have driven demand for a Regulatory Standards Bill remain, and are therefore likely to reappear in this or another form before too long under status quo arrangements. We note that, in New Zealand, this is at least the 4th attempt in 15 years to pursue a legislative option to assist in promoting better legislation.

Domestic and international developments also point to demand for further strengthening of our regulatory management institutions in the future.

- The unfavourable gap in levels of system investment and performance scrutiny between our regulatory management and fiscal management arrangements will tend to grow wider and more obvious as the government beds in departmental 4 Year Plans (for budget management) and better capital asset management practices.
- Key international organisations like the OECD and APEC continue to push good regulatory governance, and countries we routinely look to compare ourselves with continue to experiment with ways to avoid or reduce unnecessary, ineffective or excessively costly regulation.

Nonetheless, not pursuing an initiative based on Option 5 could make sense if there is a judgement that a more compelling option and opportunity may then present itself in the future.

Analysis of Package 1: "Legislate But Keep The Cost Low"

Core Elements of Package

A set of legislated disclosures, to be provided by departments, for govt Bills, substantive amendments to govt Bills, and delegated legislation drafted by PCO (see **Annexes 3, 4 & 5**)

A recommendation to Parliament that select committees be encouraged to give more explicit attention to legislative quality issues in their deliberations on Bills

Provision of administrative support and guidance for departments by PCO and Treasury, and for select committees by the Office of the Clerk

A one-off formal review of experience with the disclosure arrangements, to start within 5 years

Benefits

The expected benefits from the proposed disclosures are discussed in **paragraphs 14-16**, which we are unable to estimate. However, a simple way to think about this might be to consider:

- whether the value of improved legislation from likely extra scrutiny could be reasonably expected to exceed the extra compliance costs identified below (approx $0.85m pa); and
- in the situation where the disclosure requirements induce departments and Ministers to give more care and attention to those issues before they present legislation for scrutiny (which we are also unable to estimate), whether it is reasonable to think that the extra value realised will at least match the extra costs they choose to incur.

Expected Costs

Feedback from consultation, and the testing done for us by a few departments, suggests to us that, with guidance available, an official familiar with the relevant Bill or legislative instrument should be able to complete the disclosure in something like 2 to 3 hours in most cases, with perhaps a bit more time added for QA. Some simpler Bills or instruments are likely to take less, while complex or unusual Bills will inevitably take longer.

We estimate disclosures for delegated legislation will take the same time as for Bills, with less time needed for fewer required disclosures but extra time to complete a general policy statement.

Completion of basic disclosures (and assuming 100% compliance)

- Bills: 100 eligible Bills per year, average 4hrs each (incl QA)
- SOPs: 40 substantive SOPs per year, 50% with material changes, average 4hrs for material changes, 1hr otherwise (incl QA)
- Delegated: 400 eligible instruments per year, average 4hrs each (incl QA)

⇨ 265 days = ~1.2 FTEs per year.

Additional work and support provided to departments by PCO: allow 1.5 FTEs per year

Additional support to the House from the Office of the Clerk: allow 1-1.5 FTEs per year.

⇨ **Total extra compliance costs of around 3.5 - 4 FTEs a year (or ~$0.85m pa).**

A one-off formal review in 5 years might involve the equivalent of another FTE (split across the reviewers, those consulted on the review, and those determining the response)

Key Risks and their Mitigation

Feedback suggests the proposed legislative element of this package avoids the main practical

problems and legal risks identified by critics of the current Regulatory Standards Bill.

In addition, by including an explicit provision that any failures to comply with the required disclosures will not affect the validity of the relevant legislation, we hope to avoid the most obvious legal risk from legislating for disclosures. We also plan to seek legal advice on the likely justiciability of the suggested obligations, and the potential use of disclosures as an aid to statutory interpretation, once draft legislative provisions are available.

The other main risk is that we end up legislating for a disclosure that proves either unworkable in practice or less useful/more difficult than expected, which can't then be changed quickly. The feedback provided and testing undertaken suggest that the precise wording of the legislative requirements is very important, but the risk should be manageable if trialled first, or by not initially legislating for the potential extended disclosures that haven't been well tested.

The programmed review to start within 5 years of operation is an explicit reminder of the need to review progress, and is an opportunity to address any problems or make further improvements.

Analysis of the Subsidiary Indicators:

Ability to adapt and amend package in light of experience?

Good. A conservative approach to use of legislation reduces the risk of locking in unworkable or low value requirements but leaves room for future innovation and development

Alignment with current arrangements for developing legislation?

Very High. Builds primarily on existing processes and roles. It brings together in one place a set of existing or easily produced information and then feeds that information into Parliament's existing scrutiny processes. The main support is provided by existing agencies and is closely aligned with their existing functions.

Consistent with existing constitutional norms?

Yes. Though some may suggest that this is a matter more appropriate for Standing Orders, there is plenty of domestic and overseas precedent for Parliament using legislation to set out requirements for information to be provided to it by the Executive.

Compatible with different regulatory philosophies and frameworks?

Yes. Requires mainly factual reporting on processes and content of legislation. In the limited areas where explanations are required, no fixed normative standard has to be applied.

Overall assessment of Package 1:

This is a **low risk, low cost package**, with the potential to be built on or extended over time. Legislating for the proposed disclosures is expected to increase credibility and standards of compliance, but the package could be progressed administratively in advance of passing the Bill.

Nonetheless it also makes for a pretty low key initiative, best represented as another step forward in the long term effort to promote the production of legislation that is robust, principled, and developed in a fair and open way.

While most of the public law experts we consulted believe the potential benefits are sufficient to make this package worth pursuing, some business interests saw it as far too weak and a lost opportunity to address their concerns with the quality of NZ legislation. Both in a presentational and substantive sense, the main question with this option is "Is it enough?".

Analysis of Package 2: "Legislate And Reinforce with Other Changes"

Core Elements of Package

Incorporates all the features of Package 1, but in addition includes:

Testing some additional disclosures for Bills, and testing the viability and value of extending the range of disallowable instruments for which a disclosure statement is produced;

Tightening the RIA requirements to further target recognised weak areas of analysis, and which would support some of the proposed additional disclosures of legislative effects;

Reviving the Legislation Design Committee (LDC) with a more proactive role to advise departments, and perhaps the Cabinet LEG committee, on legislative design matters;

Revamping the Cabinet LEG committee, with a stronger mandate to test the quality of, and implementation plans for, draft legislation, including review of the disclosure statement.

Benefits

As in Package 1, but enhanced by creating extra and earlier prompts to give attention to legislative quality issues before legislation reaches the Parliamentary scrutiny phase.

Expected Costs

As for Package 1 (around 3.5 - 4 FTEs per year), plus the following additional costs

Completion of more enhanced disclosures (and assuming 80% compliance)

- Bills: 100 eligible Bills per year, average 8hrs extra each (incl QA)
- SOPs: 20 material SOPs per year, average extra 4hrs each
- Delegated: 150 extra instruments per year, average 4hrs each

⇨ 185 days x 0.8 compliance = ~0.7 FTEs per year.

Additional monitoring and support from Treasury and PCO = ~0.3 FTEs per year

Tighten RIA requirements in weak areas (and assuming 70% compliance)

- 160 RISs per year, average 5 extra days x 0.7 compliance = ~2.5 FTEs per year

Resurrecting the LDC and revamping LEG

- 5 LDC members, 15-20 Bills per year, 1 day for prep and meetings = ~0.5 FTEs per year.
- Deptl engagement with LDC, occasional LDC advice to LEG allow ~0.5 FTEs per year
- Increased prep time for LEG paper, extra LEG scrutiny allow ~0.5 FTE per year

⇨ **Total extra compliance costs of around 9 FTEs a year (or ~$2m pa).**

Key Risks and their Mitigation

The proposed extended disclosures may prove unworkable or not worth the extra compliance costs imposed. This can be managed through ongoing monitoring of departmental experience in producing extended disclosure statements and making adjustments to the requirements.

Given the strong pressures to regulate at speed, Ministers may be reluctant to give departments the extra time required to apply or make use of these additional measures, and may be reluctant to commit to meaningful changes to the way that LEG works. Unless senior Ministers stay committed to improving practice, this might eventually lead us back towards Package 1, and having to accept that there will always be difficulties with Bills that are politically important.

Analysis of the Subsidiary Indicators:

Ability to adapt and amend package in light of experience?

Good. Conservative approach to use of legislation reduces risk of locking in unworkable provisions. The additional disclosures would be trialled as administrative requirements initially, and the other supporting arrangements will exist under a Cabinet mandate so can be dropped or changed reasonably easily.

Alignment with current arrangements for developing legislation?

High. As already noted, the base elements from Package 1 build extensively on existing processes and roles. The additional measures represent enhancements or extensions of existing processes and roles or, in the case of the LDC, a role that existed until very recently. The biggest change is that proposed for LEG, which would get a stronger gate-keeping role.

Consistent with existing constitutional norms?

Yes. Though some may suggest that this is a matter more appropriate for Standing Orders, there is plenty of domestic and overseas precedent for Parliament using legislation to set out requirements for information to be provided to it by the Executive.

Compatible with different regulatory philosophies and frameworks?

Yes. The required disclosures involve mainly factual reporting on processes and content of legislation. In the limited areas where explanations are required, there is no fixed normative standard to be applied. The additional measures introduce no new regulatory principles.

Overall assessment of Package 2:

This package represents a noticeable step up in effort and profile over Package 1, but comes with some extra costs. It remains a relatively low risk package.

Adopting the additional measures will send a much clearer message to departments that Ministers expect to see more attention paid to producing good quality legislation, which will help significantly with behavioural change. The additional measures will have less success, however, if Ministers do not allow time in the policy and legislative development process for departments to apply and use them appropriately.

Nonetheless, while departments will notice the difference, the possible merits will be less obvious to external parties who do not usually observe the dynamics of largely internal government processes. We doubt that business interests will have any objections to the additional measures, but it may still be hard to convince them that this package represents a credible response to the problems they perceive with the quality of legislation and the legislative development process.

Analysis of Package 3: "Legislate and Lift Attention to Existing Legislation"

Core Elements of Package

Incorporates all the features of Package 2, but in addition aims to progressively increase departmental attention to the performance of the existing stock of legislation, including by:

Recognising that regulatory regimes have asset-like characteristics, and seeking to introduce equivalents of the basic good management practices we typically apply to other types of asset

Progressively establishing broad Govt expectations for agencies in relation to implementing, administering, enforcing, monitoring, and reviewing legislation

Developing reporting requirements for regulators and administrators of legislation that are better tailored to reflect their legal and stewardship responsibilities

Investigating a substantive new review role for an Office of Parliament which would include undertaking independent reviews/audits of the performance of particular regimes, or aspects of regimes, against their stated policy objectives and good practice expectations.

Benefits

As in Package 2, but seeks an additional range of benefits (which we cannot quantify) from getting existing regulatory regimes to perform better (consistent with our 3rd objective - see page 7), through creating pressure for more active management of the operational aspects of regulation.

Expected Costs

As the additional measures are not concretely specified, it is very difficult to say much about likely costs, other than that there is huge potential scope to introduce more systematic operational practices into regulatory management, with corresponding potential resource implications.

Enhanced agency stewardship of existing legislation: We speculate NZ might have perhaps 200 core regulatory regimes, with 100 warranting regular monitoring/reporting and better periodic review/maintenance. If we assume extra cost per regime when expectations fully implemented @ $100k per year average, then eventual costs could be in the order of ~$10m per year

New role for an Office of Parliament: Likely minimum durable scale of the new role ~$5m per year (based on the Law Commission and NZ Productivity Commission budgets)

Key Risks and their Mitigation

A major risk is our ability to turn these general ideas into concrete and effective initiatives. There are few international precedents for us to draw upon, and Ministers will be challenged to sustain an ongoing commitment to a set of high level ideas that require further development, and might be a significant operational distraction from other things Ministers want to achieve. This could be mitigated by presenting Package 3 as just setting a direction of travel, with a promise to develop more details and consult before any commitment is made to introduce particular measures.

A further risk is the extent of actual adoption or compliance. Developing the necessary capabilities will be a challenge for some agencies. Effort levels are likely to depend on existing operating constraints including resource pressures, the presence or otherwise of an internal champion, and perhaps at the margin the level of monitoring effort and assistance from the lead agency. Perhaps the only way to mitigate this risk is to introduce measures progressively over a number of years.

The proposed regulatory review/audit role for an Office of Parliament is a relatively novel

suggestion. The Auditor-General's performance audit role provides the closest fit, but extending the Auditor-General's role to regulatory regime performance has no clear precedent in Westminster jurisdictions (though the US General Accounting Office does do this sort of work).

Some will also think this role would overlap with the functions of the Law Commission, even though the Law Commission's work programme is directed by the government. Because of these complications, we only propose that the idea be investigated.

Analysis of the Subsidiary Indicators:

Ability to adapt and amend in light of experience?

Reasonably Good. Conservative approach to use of legislation reduces risk of locking in unworkable provisions. Additional disclosures to be trialled as administrative requirements initially, so can be dropped or changed reasonably easily. The progressive development of additional support measures should allow for adaptation, but change might become harder once new roles and reporting requirements get formalised.

Alignment with current arrangements for developing legislation?

Good. Builds extensively on existing processes and roles, but will progressively lead to the development of completely new arrangements.

Consistent with existing constitutional norms?

Broadly. However, the potential new role for an Office of Parliament pushes the boundaries of the traditional performance auditing role of an Office of Parliament in a Westminster system

Compatible with different regulatory philosophies and frameworks?

Not bound to any regulatory philosophy, but will involve a shake-up of existing regulatory frameworks. Looking to manage existing regulatory regimes more like assets is a new perspective on regulatory management, and existing frameworks will be considerably extended by the government setting good practice expectations for a wider range of regulatory management roles.

Overall assessment of Package 3:

This package is really about widening the front on which good regulatory practice is being pursued through promoting more systematic attention to the performance of our existing regulatory regimes. There are no guarantees as to how this might look in practice, just as there are none as to how well it might turn out. The work of developing concrete ways to take this forward has still to be done. There are useful ideas we can borrow from other jurisdictions, but this is also new territory internationally.

There are significant longer term implications for the allocation of administrative resources arising out of adopting this approach. Support for this Package, however, does not involve or imply any commitment to extra costs (beyond those associated with Package 2). Decisions on resourcing can be made at the time concrete proposals are put forward. In practice, therefore, the main risk is not a fiscal one, but the ability to actually deliver on the level of expectation that may be set.

Overall Conclusions and Recommendations

21. The indicative packages of measures outlined above represent different levels of ambition. In each case the level of achievable benefits is uncertain, but we think the risks and costs can be managed so they do not exceed the benefits achieved.

22. It may not matter too much which combination of measures is pursued, but we do recommend a conservative approach to specifying requirements in legislation initially. By trialling more ambitious disclosures as administrative requirements in the first instance, we minimise the risk of locking in unworkable or low value provisions, and improve our ability to manage the level of costs incurred if the disclosure statement approach is less successful than hoped.

23. Legislation offers not only a credible and durable commitment, but also a good foundation around which a range of non-legislative measures can be introduced.

24. Sticking with the status quo is an option, but the underlying concerns that have driven demand and support for a Regulatory Standards Bill would remain, and would be likely to reappear in the form of new proposals before too long.

Consultation

25. Information on consultation that occurred in the lead-up to Cabinet's decision to introduce the present Regulatory Standards Bill can be found in our 2011 RIS.

Treasury discussion document with indicative legislation

26. In mid August 2012, Treasury circulated a discussion document, together with indicative legislative provisions, for a targeted consultation process. It sought early views on the merits and workability of a set of possible provisions for a revised Bill, to help inform Treasury advice. Feedback was sought from:

    - key regulatory or legal contacts in departments and in the Office of the Clerk of the House of Representatives;
    - a variety of external public law experts, including Law Society committees and lawyers from several major law firms,
    - former Regulatory Responsibility Taskforce members, and
    - several bodies representing business interests that have previously shown a strong interest in the Regulatory Standards Bill.

27. Treasury also sought the cooperation of a few departments to attempt test disclosures for a few of their recent Bills or disallowable instruments, and give us feedback on any problems they identified and on the level of effort required.

28. Feedback provided by officials and public law experts elicited a lot of useful comments on the form or scope of suggested provisions. These have influenced the selection, and will inform any drafting, of the legislative provisions suggested. On the whole, the feedback suggested to us that a Bill requiring a set of core disclosures for government Bills and significant delegated legislation is workable, and should impose only small additional compliance costs.

29. Among the public law experts, there was also a general consensus that a Bill along these lines had the potential to establish a useful impact, and was worth progressing. By contrast, former Taskforce members and business bodies made few comments on particular disclosures but, in general, thought the proposal was far too weak and indicated their continued preference for the current Bill.

30. Interestingly, the matters most likely to attract suggestions from external parties for greater disclosure (the LAC guidelines, NZ's international obligations, rights and interests affirmed by the Treaty of Waitangi, and regulatory takings) were basically of the same type – that is, existing quality assurance expectations lacking a specific process or product (though in the case of regulatory takings, not even an existing expectation). As noted in Annex 4, we believe that this type of matter does not make a great disclosure requirement because their scope is broad and often not widely understood, which creates a high risk of either idiosyncratic interpretations or carefully worded, limited responses designed solely to minimise reputational risk.

31. Nonetheless, since they are clearly seen as important, we have made a margin call to include basic disclosures relating to the first two matters – consistency with NZ's international obligations and with the principles of the Treaty of Waitangi – and a disclosure relating to material economic losses, which would cover regulatory takings. But we still reject a disclosure relating to consistency with the LAC guidelines because we think the advisory nature and extremely wide scope of the LAC guidelines means there is no prospect of receiving either a meaningful Yes/No response, or a meaningful description of the process gone through to assess consistency. If a specific quality assurance process or product were to be agreed and introduced by a future government for any of these matters, the likelihood of providing more useful disclosures would be greatly increased.

Formal departmental consultation

32. Formal departmental feedback was sought on a draft Cabinet paper and an earlier version of this RIS. Departments did not identify any substantive concerns with the proposed measures, which contrasts with their earlier comments on the Taskforce's Bill. However, a number of departments noted that the proposals would add to pressure on their resources and, in the absence of additional funding, it will either take departments more time to prepare regulatory advice or require greater prioritisation of their regulatory work.

Implementation

33. For any of the Packages other than the status quo, some lead-in time will be required to develop guidance, templates and systems for the preparation, delivery and publication of the proposed disclosure statements, as well as make consequential changes to Cabinet's LEG requirements and to Standing Orders.

34. Under Packages 2 and 3, further work would be required to revamp or extend existing administrative requirements, and develop new performance expectations for government agencies. These can, however, be introduced progressively and need not precede the implementation of the disclosure statement requirement.

35. There are some resource costs associated with these measures. Most measures can be implemented with or without additional funding to meet those costs but, in

areas like the rollout of new expectations, the absence of additional financial support will affect the speed of implementation and likely levels of compliance.

Monitoring, Evaluation and Review

36. Packages 2 and 3 propose explicit trialling of some extended disclosure requirements that will require the Treasury and PCO to undertake ongoing monitoring of departmental experience in producing disclosure statements. Monitoring is an essential part of the risk management strategy for the Packages.

37. More generally, the proposed disclosures and supporting measures are new requirements that have not been extensively tested, and the nature and size of the behavioural impacts are necessarily speculative. Consequently, an eventual review of experience with the new arrangements will be essential to determining whether they are truly fit-for-purpose and cost-effective and whether amendments or additional measures may be desirable to further improve legislative quality.

38. Our 2011 RIS originally proposed a statutory independent review of the operation of the whole regulatory management system every 5 years as part of Option 5. Experience with statutory review clauses in other legislation, however, has shown them to be a mixed blessing. It has the merit of ensuring an actual review takes place (when intentions and promises are often forgotten or ignored in other circumstances), but anticipating the best timing up-front is hard, and the scope and quality of the review will depend on the enthusiasm of, and other pressures faced by, the responsible Minister or agency at that particular time.

39. On balance, we now suggest that any legislation include provision for a single independent review of the operation of that legislation, which must commence within 5 years of the legislation coming into effect and be completed and tabled within 12 months. Whether the review also addresses wider issues, and the timing of any further reviews, would be left to administrative discretion.

Endnotes

Regulatory Standards Bill, 2011 No.277-1,
http://www.legislation.govt.nz/bill/government/2011/0277/latest/DLM3601205.html

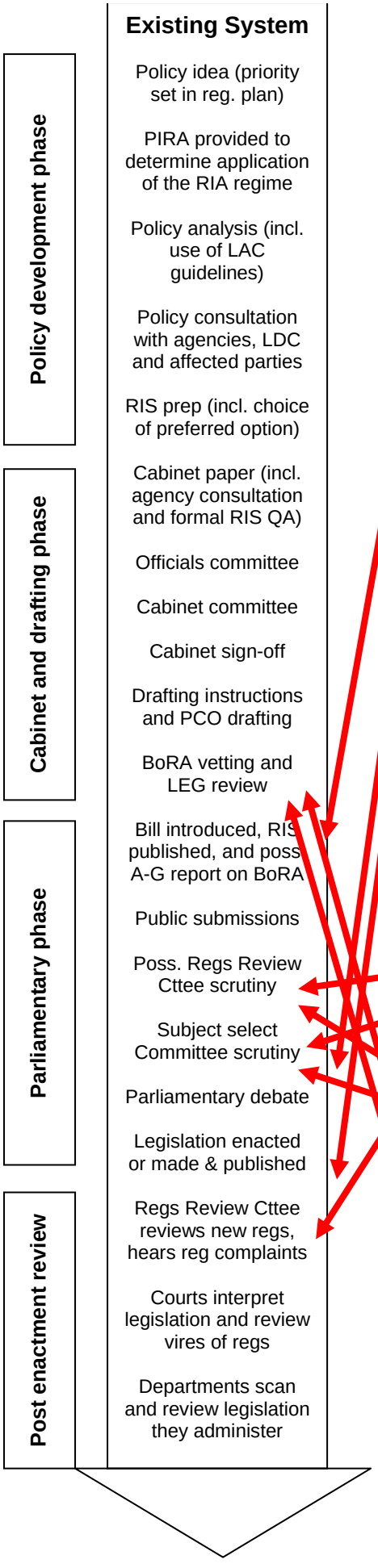
Report of the Regulatory Responsibility Taskforce, 30 September 2009
http://www.treasury.govt.nz/economy/regulation/rrb/taskforcereport

Interim Report on the Regulatory Standards Bill, Commerce Committee, 30 September 2011
http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/8/1/c/49DBSCH_SCR5309_1-Interim-report-on-the-Regulatory-Standards-Bill.htm

Confidence and Supply Agreement with ACT New Zealand, 5 December 2011
http://www.parliament.nz/NR/rdonlyres/5634F13B-7744-4D03-A9F9-EBB0E4F83621/207925/NationalACT_Confidence_and_Supply_Agreement0512201.pdf

Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act?, Regulatory Impact Statement, The Treasury, 2 February 2011
http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-tsy-rbr-mar11.pdf

Annex 1 (from 2011 RIS)



"Option 5"
Strengthening Parliamentary Review

Key Legislative Elements

1. Require the Minister responsible for a Bill, SOP, or regulations to present an explanatory note to the House that:

- provides brief background information about the legislation
- red flags any features of the legislation that indicate that careful scrutiny may be warranted, and justifies those features

2. The matters needing brief disclosure might include:

- the function, expected effects, and need for the legislation
- whether the legislation has been vetted for consistency with human rights legislation, privacy legislation, Treaty principles and NZ's international obligations, and with what conclusion
- what public consultation has occurred
- whether a RIS was prepared, and where it can be accessed

3. The matters needing to be flagged, and possibly justified, for Bills and SOPs (they would be different for regulations) might include whether it:

- adversely affects rights or imposes obligations retrospectively
- takes or impairs private property without compensation
- authorises charging for any function or service where the charge could be set at a level above the cost
- seeks to oust or restrict access to judicial review
- authorises administrative decisions affecting rights and interests without full right of appeal
- confers criminal or civil immunity on any person
- authorises the making of delegated legislation that would amend an Act, or grant exemptions from an Act or regulation.

4. Require the Attorney-General to commission an independent, 5-yearly report on the performance of existing executive and parliamentary processes for developing legislation.

Key Changes to Parliamentary Processes

5. Emphasise Parliament's responsibilities as a gatekeeper of legislative quality by:

- establishing a legislative quality select committee; or
- requiring subject select committees to report to the House on a number of legislative quality criteria.

6. Give Parliament more analytical support for its function of considering legislative quality issues by:

- increasing the specialist resources available to select committees in scrutinising legislative quality; or
- establishing a new Officer of Parliament to consider legislative quality matters and support select committees.

Suggested Supporting Arrangements

7. Greater release of exposure drafts of legislation for consultation.

8. Reinvent LEG as a more substantive test of the quality of draft legislation, supported by LEG papers that explicitly include:

- updated estimates of the costs and benefits claimed when key policy decisions were taken, based on the draft legislation
- information on what, if any, scenario testing has been done
- assessment from relevant expert agencies of Crown legal risk, business cost and competition impacts, and compliance with key legislative principles and NZ's international obligations etc.

Annex 2 (from 2011 RIS)

	Existing System	Key Limitations of Existing Arrangements
Policy development phase	Policy idea (priority set in reg. plan) PIRA provided to determine application of the RIA regime Policy analysis (incl. reference to LAC guidelines) Policy consultation with agencies, LDC and affected parties RIS prep (incl. choice of preferred option)	• Regulatory planning is not particularly strategic or co-ordinated. • Policy analysis capability is not very deep. Guidance on making good legislation exists but is little read due to its length and breadth. • Tight policy timeframes are the norm, constraining the quality of analysis able to be provided to the portfolio Minister and Cabinet. • Portfolio Ministers often decide to act or to narrow the policy choices before the issues and options have been analysed or tested. • LDC has been little used of late, and is blocked from a proactive role. • RISs are often produced too late, so become a compliance exercise. • Only half of the significant regulatory proposals considered by Cabinet since Nov 2008 had RISs that met expected standards.
Cabinet and drafting phase	Cabinet paper (incl. agency consultation and formal RIS QA) Officials committee Cabinet committee Cabinet sign-off Drafting instructions and PCO drafting BoRA vetting and LEG review	• Formal agency consultation, including quality assurance of analysis, is often too short and late to get and address considered feedback. • Officials committees may flag quality issues, but there is no effective gate-keeping done on the need for, or standards of, Cabinet papers. • Cabinet committees deal with large numbers of papers and members have little time to read and fully consider all the material provided. • PCO drafting supports clear, consistent legislation but it must work within its policy instructions and it doesn't draft tertiary legislation. • Outside the BoRA vet, independent or external scrutiny of draft legislation is limited. LEG papers are largely a tick-box exercise and LEG does not operate as a substantive check on legislative quality.
Parliamentary phase	Bill introduced, RIS published, and A-G s.7 report on BoRA Public submissions Poss. Regs Review Cttee scrutiny Subject select Committee scrutiny Parliamentary debate Legislation enacted or made & published	• House time is in high demand, so governments try to get Bills through as fast as they can, including occasional resort to urgency. • The set debates are brief, and often reflect set party positions. • Committee stage debate is now taken part-by-part, with Bills drafted in as few parts as possible, limiting depth of scrutiny and debate. • Referral to select committee and a call for public submissions is the norm, but relies on analytical support from the responsible agency and scrutiny often takes a partisan form. • Advice on legislative standards (s.7 BoRA reports, LAC submissions, RRC comment) has had only mixed success in changing Bills. • Governments can and do make significant amendments by SOP, bypassing RIS requirements, BoRA vetting, public submissions and sometimes select committee scrutiny.
Post enactment/review	Regs Review Cttee reviews new regs, hears reg complaints Courts interpret legislation and review vires of regs Departments scan and review legislation they administer	• RRC's review of regulations does not consider the policy merits. • Disallowance is rarely sought and has only been successful once. • Judicial review applies only to delegated legislation, only tests if it falls within the empowering clause, can be expensive, and has a very uncertain payoff even if successful. • In contrast to government spending, there is no formal or systematic approach to monitoring, measuring, reporting and auditing the cost and performance of existing legislation. • Legislative scanning is still in its infancy, with agencies reluctant to commit resources without obvious prospects of political attention.

Annex 3: Disclosure of Information to Support the Scrutiny of Legislation (included in all 3 Packages)

The core of Option 5 is the proposal that information that might help in assessing the quality of a piece of government legislation should be made readily available to interested external parties at the time a Bill or substantive SOP is introduced, or delegated legislation is enacted.

This annex briefly explains the core features of the proposed disclosure mechanism. The selection of matters to be disclosed is discussed and explained in **Annex 4** and **5**.

Core Proposed Features of the Disclosure Mechanism	
Form of Disclosure	A standalone disclosure statement, distinct from any explanatory note and the legislative instrument itself (though explanatory note may include a link) The original proposal was that the information be provided as part of the explanatory note. There are several reasons for suggesting a change: • the Clerk of the House does not support this option (viewing explanatory notes for Bills as creatures of Standing Orders) • current explanatory notes for delegated legislation remain attached to the instrument, and exist to assist ordinary users to understand what the legislation requires of them rather than to assist with scrutiny • a separate statement (if it is just as accessible as the legislation itself and includes the general policy statement) would provide a clear separation between the material for which the drafter is responsible, and the material for which the department is responsible.
Types of Legislation Covered	All Government Bills, excluding Imprest Supply and Appropriation Bills, Revision Bills, Subordinate Legislation (Confirmation and Validation) Bills, Statutes Amendment Bills, Treaty Settlement Bills that do not amend or affect existing regulatory arrangements, or Bills that provide solely for the repeal of Acts identified as spent. All SOPs in the name of a Minister relating to a covered Government Bill All delegated legislation that is disallowable by the House and drafted by PCO or IRD drafters (in accordance with the new Legislation Act 2012).
Types of Information Disclosed	For Bills • A general policy statement (moved out of the explanatory note) • Information about the quality assurance processes, products and outcomes associated with producing the legislation • Information about particular features or key impacts of the legislation itself that might indicate that careful scrutiny is warranted For Delegated Legislation • A general policy statement • Information about the quality assurance processes, products and outcomes associated with producing the legislation

Responsibility for Content	The administering department or agency will be formally responsible for the content. Where explanations for particular policy choices are sought, however, information from the responsible Minister may be required. The administering department is preferred over other candidates because it is likely to have the best understanding of the legislation and its development while also, consistent with state sector values, being sensitive to having a legal duty to provide complete and accurate disclosures.
Other Responsibilities	PCO and Treasury will share responsibility for the production of appropriate guidance, while PCO will have the main responsibility for determining production requirements and the format for disclosures (including providing any templates). PCO may also be able to provide advice on the accuracy of the department's proposed disclosures relating to the features of, or powers conferred by, a piece of legislation. PCO involvement ensures the disclosure statement is able to be tabled and published on the NZ legislation website at the same time as the legislation itself. As legislative drafters, PCO drafters are also well-qualified to provide departments with consistent advice about meeting the disclosure requirements.
Delivery of Disclosure	A copy of the proposed disclosure statement would be provided to LEG at the time LEG approval is sought for the relevant Bill or instrument The statement would be tabled in the House and placed on the Legislation website alongside and at the same time as the relevant instrument Relevant select committee members, and other MPs on request, would receive a copy of the statement along with a copy of the legislation.
Source of Obligation	The obligation to produce and table the statement would be set out in an Act, along with a core set of mandatory disclosures. Additional disclosures may be specified as administrative requirements. Legislation gives a disclosure requirement more credibility and greater status and profile, but where there is some uncertainty about how a disclosure might work in practice, it is better that it is tested or trialled administratively before enshrining it in legislation
Sanctions and Enforcement	The Act would not provide for any legal sanctions for a failure to meet the disclosure obligations. It should also explicitly provide that any failure to comply with the disclosure obligations will not affect the validity of a particular piece of legislation. It is not our intention that the courts be given a role in enforcing the obligation. The House has its own ways to respond to any failure to meet its expectations for the provision of information. Moreover, the intention of the disclosure is to support better scrutiny of legislative quality, and not to create a new way to invalidate legislation.

Annex 4: Matters Proposed for Disclosure about Bills (included in all 3 Packages)

The objective of the proposed disclosure requirement for Government Bills is to focus more attention on whether a Bill has the attributes of good legislation. It would do this by providing members of Parliament and the public with information to help support their scrutiny of a Bill while it is being considered for enactment by Parliament.

The proposal is limited to Government Bills, because the intention is to legislate for the proposed disclosures and this is only appropriate where the obligations are to be imposed on persons or bodies that are not members of Parliament.

It would, however, be open to the House to agree through amendments to Standing Orders that the same or similar disclosure requirements should apply to Local Bills, Private Bills or Members Bills, which are not the responsibility of the government.

Desired characteristics of matters for disclosure

There are many matters that could be disclosed that might potentially help the reader assess the quality of a Bill. However, the more matters that must be routinely disclosed, or the more detailed the disclosure required, the greater the time and cost of its preparation, and the less accessible the material may become for the average reader. Some selectivity is therefore essential.

Consequently, the choice and form of matters proposed for disclosure has been influenced by a preference for disclosures that are:

- **significant for quality;**
- **clear in concept;**
- **easy to produce;**
- **capable of concise expression; and**
- **likely to minimise potential duplication.**

On the whole, this favours legislative characteristics that are well understood, and quality assurance processes built on established government expectations.

The sources we have drawn upon

For the proposed matters for disclosure we have drawn primarily on:

- existing Cabinet requirements and expectations relating to the development of legislation, for disclosures relating to quality assurance products and processes
- the Legislation Advisory Committee (LAC) guidelines, for disclosures of significant powers and other features warranting careful scrutiny; and
- matters specified for inclusion in the explanatory notes accompanying Bills and delegated legislation in the United Kingdom and Australia.

The merits and risks of the different types of proposed disclosures

The matters suggested for disclosure below fall into seven different categories or types, with the following general merits and risks:

1: A general policy statement for the legislation

A general policy statement provides a succinct statement of the legislation's policy objectives and the way in which it seeks to meet those objectives. It helps the reader interpret the intent of the provisions in the legislation, and is a good starting point for considering the merits and performance of the legislation.

This is a longstanding requirement for Bills, currently included in the explanatory note. Unlike the rest of the explanatory note, however, the prime responsibility for its drafting rests with the administering department rather than the legislative drafter. There is a risk that Parliament will not want the general policy statement moved into the disclosure statement.

2: Established quality assurance products and associated background documents

Established quality assurance products, and other background documents that can inform the consideration of the merits of the legislation, make excellent disclosure requirements because they are easy to identify, usually take a standard form, and do not require the generation of new material.

The fact that they exist as established products tends to mean they cover issues with significant implications for legislative quality. Unfortunately this does not guarantee the product itself is of a high standard. But particularly where it concerns the underlying policy, a poor QA product is usually obvious enough that the reader can use that to form a judgement on the quality of the policy work undertaken, which in turn may inform their view of the likely quality of the legislation on which it is based.

3: Established quality assurance processes, lacking a specific product

Established quality assurance processes, involving consultation with a mandated expert agency, can make good disclosure requirements because it is usually easy to identify whether consultation was required and undertaken, and this generates a pretty simple and concise disclosure.

The disadvantage of not having a specific product to disclose is that the reader will not know what the process threw up, at least without new information having to be generated, and must otherwise rely on the confidence the reader has in the care, expertise and influence of the expert agency consulted.

4: Existing quality assurance expectations, lacking a specific process or product

Existing quality assurance expectations without a standard process or product do not make ideal disclosure requirements because the only informative disclosure involves outlining the process gone through to identify any potential problems. The more specific the expectation the better, as it reduces the length of the disclosure, and is more amenable to the reporting of quite specific actions taken.

The more broadly framed the expectations, such as assuring consistency with NZ's international obligations or with the principles of the Treaty of Waitangi, the greater the risk of idiosyncratic interpretations and levels of disclosure, or alternatively of routine resort to very carefully worded, standardised responses designed to minimise reputational risk rather than to inform a reader.

We do support a disclosure for the two cited expectations above, based solely on their potential significance for legislative quality, but this is a marginal call overall. We have, however, rejected a disclosure for the even more general Cabinet expectation that legislation will be "consistent with the LAC guidelines", as we believe the advisory nature and wide scope of the LAC guidelines means there is no prospect of receiving either a meaningful Yes/No answer or a meaningful description of the process gone through to assess consistency.

5: Significant powers conferred by the legislation

Significant powers conferred by a piece of legislation make a good disclosure because they highlight features that have huge potential to affect the rights and freedoms of individuals. Explicitly acknowledging the relevant powers not only prompts the reader to think about whether the extent of the power is appropriate and necessary, but also think about the nature of the safeguards that should apply to the exercise of the power.

The challenges with this type of disclosure are, first, to set criteria that will consistently capture the most significant powers, and second, to extend the disclosure to include useful explanations without significantly adding to disclosure length or cost.

6: Unusual features of the legislation warranting careful scrutiny

Unusual features make a good disclosure if they indicate a potentially significant risk to individual rights and can be clearly and readily defined and identified. Most such features are "unusual" because they depart from well-established legal presumptions.

A disadvantage of this type of disclosure is precisely that the feature occurs infrequently and so leads to a huge number of "No" disclosures. Another challenge is targeting the feature of most interest, because the underlying legal principles cannot be easily reduced to a simple and stable rule.

7: Potential key impacts of the policy being given effect by the legislation

Singling out potential key impacts of the proposed legislation does not provide an ideal disclosure because impacts are a matter of judgement, and their relative significance a matter of values. Our strong preference would be to refer readers to any RIS provided, which ought to identify all the key policy impacts.

Unfortunately, not all legislative proposals have RISs, the policy may have changed or the policy further fleshed out since the RIS was prepared, and the RIS itself may be based on poor or inadequate analysis. In these circumstances it may be worth asking whether subsequent analysis has occurred that further illuminates key impacts such as costs, any potential significant economic losses, and levels of expected compliance and enforcement.

Specific Matters Proposed for Disclosure

The tables below identify the specific matters for which a disclosure could be sought under one of the seven different types of disclosures identified above.

Basic and extended disclosures

For some of the seven types of disclosures, there are choices to be made between:

- a "basic" disclosure, which is relatively concise, low cost and easy to answer, but may only hint at a possible issue (requiring the reader to investigate further); and

- an "extended" disclosure, which provides additional information useful to the interested reader, but requires more time and effort to produce, and might be difficult to frame in a way that is simple or universally applicable.

As a general rule, we believe:

- the "basic" disclosures will be workable in almost all Bills, and hence are suitable for inclusion in legislation;

- the "extended" disclosures will further lift the attention to good practice, but really need to be trialled or tested for a period to give confidence that each matter is framed in an appropriate and cost-effective way, before any consideration is given to their incorporation in legislation.

At the bottom right hand side of each table below we indicate which requirements we think could be included in the proposed legislation, and which we think should be tested further.

1: A general statement of the policy that the Bill seeks to achieve	
General nature of proposed disclosure: • Describe the policy objectives that the Bill seeks to achieve and the way in which it seeks to meet those objectives	**Legislate for this?** Yes

2: Established Quality Assurance Products (plus Supporting Information)

Products/Information Proposed for Disclosure

Published Reviews or Evaluations (Background Information)

Policy proposals may be driven or significantly informed by earlier policy reviews or evaluations conducted by other parties (e.g. Commissions of inquiry, Law Commission or Productivity Commission reports, government-appointed taskforce's, etc), which are usually published. Reference will often be made to these in a RIS, if a RIS has been prepared (see below).

Regulatory Impact Statement (QA Product)

Regulatory impact analysis is a systematic and evidence-based assessment of the case for government intervention to address a specified problem, and of the likely impacts and risks of different policy options, which may require legislation.

The main product is a summary of analysis undertaken, in the form of a regulatory impact statement (RIS), which is attached to the Cabinet paper seeking relevant policy decisions.

Independent Assessment of RIS (QA Product)

Cabinet also requires a quality assessment of the RIS itself, which (for proposals expected to have significant regulatory impacts) is provided by an independent team based in the Treasury.

International Agreement (Treaty) Text (Background Information)

International agreements (treaties) are the most common and tangible source of New Zealand's international obligations that is relevant to legislation. Around 20 percent of all current public Acts directly implement some aspect of NZ's treaty obligations. Sometimes the text of the treaty will be appended to a Bill, but in other cases the source or text of the relevant international agreement can be hard to find. Access will become easier when MFAT puts their Treaty register publicly online, with links to text included.

National Interest Analysis for Treaties (QA Product)

Before NZ takes any binding treaty action, the relevant treaty is presented to the House, along with a "national interest analysis" that explains the reasons for becoming a party, the nature of the obligations imposed, its expected impacts, and whether it requires any legislative measures. Where a treaty is to be given effect through legislation, the national interest analysis should also incorporate the required elements of a RIS.

Advice on Consistency with the NZ Bill of Rights Act 1990 (QA Product)

The Ministry of Justice or Crown Law undertake an independent vetting process for Bills that results in advice to the Attorney-General on whether the Bill's provisions are consistent with the rights and freedoms affirmed in the NZBoRA and, if not, whether any inconsistency is justified.

General nature of proposed disclosure:	Legislate for this?
• indicate whether QA product or support information exists	Yes
• provide (or provide link to) QA product or support information	Yes

3: Established Quality Assurance Processes (Lacking A Specific Product)

Processes proposed for Disclosure

Consultation with Ministry of Justice on offences, penalties and court jurisdictions

Cabinet requires that the Ministry of Justice be consulted on "all proposals to create new criminal offences and penalties or alter existing ones, to ensure that such provisions are consistent and appropriate". The Ministry provides expert advice on the appropriateness of:

- proposed criminal offences, infringement offences, and civil pecuniary penalty regimes;
- proposed penalty levels;
- the availability of appropriate defences and appeal rights; and
- proposals to create, amend or remove the jurisdiction of a court or tribunal.

Consultation with Privacy Commissioner on privacy issues

The Privacy Commissioner provides specialist advice on privacy issues relating to the collection, storage, use or disclosure of personal information, and 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 any other public sector agency.

When approval is sought to introduce a Bill, Cabinet requires advice on whether the Bill complies with the principles and guidelines set out in the Privacy Act 1993 and, if the Bill raises privacy issues, whether the Privacy Commissioner agrees that they comply with all relevant principles.

General nature of proposed disclosure:	Legislate for this?
• indicate whether legislation has the particular features that would suggest consultation might be appropriate	Yes
• indicate nature of consultation with mandated expert	Yes
• indicate nature of any outstanding issues	No (needs testing)

4: Existing QA Expectations (Lacking A Specific Process Or Product)

QA Response Proposed for Disclosure

Testing that Draft Legislation is Robust and Complete

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

Parliamentary Counsel Office asks instructing departments to confirm that their proposals will work in all relevant practical scenarios, and to check the proposals with the operational people who will undertake the day-to-day administration of the legislation. Trials, simulations, regulatory "pre-mortems", systematic risk assessment, business analysis and business process modelling are some of the possible approaches that may be appropriate.

External Consultation

There are no set requirements for external consultation in advance of the introduction or making of most legislation, although Cabinet has a general expectation that consultation will be fit-for-purpose. However, there appears to be a growing expectation among the public (both here and in other jurisdictions) that policy processes should be more open, allowing external parties to have earlier input before government policy positions start to get locked in.

Action Taken to Assess Consistency with New Zealand's International Obligations

Cabinet requires that all papers seeking approval to introduce or make legislation include an assurance that it complies with relevant international standards and obligations. The advice provided on consistency with NZ BoRA should cover off some key obligations in the areas of human rights, but this represents is only a very limited set of NZ's international obligations.

Action Taken to Assess Consistency with the Principles of the Treaty of Waitangi

Cabinet requires that all papers seeking approval to introduce or make legislation include an assurance that the draft legislation complies with the principles of the Treaty of Waitangi.

General nature of proposed disclosure:	Legislate for this?
• describe the nature and extent of action taken, if any, by the government relating to the relevant QA expectation	Yes
• (for external consultation only) describe the nature and extent of feedback received	No (needs testing)

5: Disclosure of Significant Features or Powers Conferred by the Legislation

Features or Conferred Powers Proposed for Disclosure

Conferral of 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.

The delegation of legislative power is both inevitable and substantial, given pressure on parliamentary time, the increasing technicality of legislative subject matter, and the need of governments to be able to respond to rapidly changing circumstances. However, if Parliament is to remain sovereign, it will want to ensure that it does not delegate substantive matters of policy or principle, and that there are appropriate safeguards on the exercise of the powers that it does choose to delegate.

The question of safeguards becomes particularly important when the power will not be exercised through Order-In-Council, which provides a built-in set of disciplines intended to support legislative quality that includes: Cabinet scrutiny; drafting by Parliamentary Counsel; a default rule of 28 days before it comes into force; and specific publication requirements.

Provision for Fees, Levies and Charges in the Nature of a Tax

While it is not lawful for the Crown to levy a tax except by or under an Act of Parliament, it is not always obvious when a fee or charge imposed for providing a service, or performing a regulatory function, is in the nature of a tax.

For those that may have an obligation to pay, it is important to know what Parliament has authorised, which includes being clear whether the legislation would authorise a fee in excess of cost recovery or that may not bear a close relation to the service provided to an individual.

Conferral of Significant Decision-making Powers Affecting Individuals

Any decision-making powers or discretions that affect the rights, powers, privileges, immunities, duties or liabilities of individuals are potentially significant and should be carefully framed. To quote from the LAC guidelines, "In general, the greater the potential for public powers to impact on individuals, the greater the protections there should be, in terms of 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.".

General nature of proposed disclosure:	Legislate for this?
• Indicate whether legislation includes this particular feature, and identify the relevant clauses	Yes (except for "significant decision-making powers")
• Explain the need for and extent of this power	No (needs testing)
• Explain the nature of any safeguards that will apply to the power to ensure it is properly constrained and used with care	No (needs testing)

6: Disclosure of "Unusual" Features Warranting Careful Scrutiny

Features Proposed for Disclosure

Provisions Having Retrospective Effect

There is a general legal presumption that people should not be held responsible or liable for doing things that were not unlawful at the time it was done. Further, people make decisions about their lives based on the law as it currently stands and retrospective changes can put them at a disadvantage, even where there is no criminal sanction.

Conferral of a Civil or Criminal Immunity

There is a general legal presumption that the law should apply equally to all persons. Provisions that confer immunities on certain persons from civil and criminal liability are a departure from this expectation, which allows those persons to escape from punishment or the provision of redress for harms they may have caused.

Compulsory Acquisition of Private Property

There is a strong legal presumption in NZ that when a government expropriates real property (land and buildings), except as a legal penalty, it will compensate the owners. This presumption is likely to extend to literal expropriations of other kinds of property (e.g. vehicles, shares). Government actions that serve to diminish the value of property (sometimes called regulatory takings) do not, however, attract any similar presumption.

Executive Powers to amend the effect of an Act

The power to amend an Act (a Henry VIII clause), to define the meaning of a term in an Act, or grant an exemption from an Act effectively allows the Executive to replace or override the intent of Parliament, and hence is expected to be granted only rarely, in very limited terms, and with strict controls.

Creation of Strict Liability Offences, or Reversal of the Usual Onus of Proof

These represent two significant aspects of criminal offences that depart from usual legal presumptions relating to intent, and the burden of proof required. The Senate Scrutiny of Bills Committee has a similar disclosure expectation in place for Australian Commonwealth Bills.

Catch-all for Other Unusual Provisions, or Features that Call for Special Comment

While this must necessarily rely on subjective judgement, it provides a useful generic prompt that is fully aligned with the purpose of a disclosure statement. A similar catch-all provision exists in the Legislative Instruments Act 2003 of the Australian Commonwealth.

General nature of proposed disclosure:	Legislate for this?
• Indicate whether legislation includes this particular feature, and identify the relevant clauses	Yes
• Explain the rationale for this feature	Yes
• Explain the nature of any features that might mitigate any potential disadvantages	No (needs testing)

7: Disclosures of Key Impacts of the Policy being Legislated

Features Proposed for Disclosure

Estimates of the Major Categories of Cost, Cost Savings, or Benefits

While the challenges in estimating the likely levels of costs and benefits of a legislative change are greater than some advocates of regulatory impact analysis appreciate, it is nonetheless expected that the different categories of expected cost and benefit will be identified during the policy development process, and estimates will be attempted where this is reasonably feasible.

The Potential to Cause Material Economic Loss to an External Party

It is generally expected that attention will be drawn to the potential for a piece of legislation to impose material economic losses on particular parties arising directly from any restrictions introduced on the use of assets that they hold. While there should be no presumption of compensation for such losses, it is important that these effects are clearly identified, especially when they are material and may fall disproportionately on a particular person or group.

Estimates of Expected Levels of Compliance, and Levels of Enforcement Activity

Where proposed legislation will impose substantive obligations on external parties, the question of securing compliance is likely to arise. Any analysis of likely costs and benefits would be expected to explicitly consider likely levels of compliance and discuss the level and nature of any enforcement activity that may be required to secure that level of compliance.

General nature of proposed disclosure:	Legislate for this?
• If there is a RIS, indicate whether the RIS includes information on this potential impact of the legislation	No (needs testing)
• Indicate whether there is new or more information now available on this potential impact of the legislation	No (needs testing)
• Provide (or provide link to) this additional information on potential impacts	No (needs testing)

Government Changes to Government Bills

Bills are frequently changed to a greater or lesser extent after they have been introduced to Parliament. The select committee process is a major source of changes. Another is amendments presented in the form of Supplementary Order Papers (SOPs), which may be introduced by either government or non-government Members.

Since changes post-introduction can have a significant impact on the content and effect of legislation, it makes sense in principle to also expect a government agency to flag and explain the relevant features of any government amendments proposed outside of the select committee process – just as it would have been required to do if the amendments had been included within the relevant Government Bill on introduction.

However, many changes made by government SOPs are very minor, for example they might correct cross-references and definitions. Requiring disclosures for minor or technical SOPs would result in little useful information for the effort and time involved. This could be overcome by imposing a supplementary disclosure obligation only when the amendments would have materially changed the original disclosure statement.

There are two potential approaches to presenting such a disclosure. One is to provide a supplementary disclosure statement to the original, and the other is to provide a new revised version of the full disclosure statement. The best option may depend on the nature of the proposed changes, which suggests allowing for some flexibility in the approach that may be adopted to presenting the effect of the changes.

Application to Government Supplementary Order Papers	
General nature of proposed disclosure:	**Legislate for this?**
• Indicate whether the proposed government amendments would have materially changed the disclosures that were provided on introduction	Yes
• If so, describe how the original disclosures would have been different	Yes

Annex 5: Matters Proposed for Disclosure about Delegated Legislation (included in all 3 Packages)

The objective of the proposed disclosure requirement for delegated legislation is to provide the public and members of Parliament (especially members of the Regulations Review Committee) with information to support their scrutiny of the legislation.

Standing Orders permit the Regulations Review Committee to examine and report on all regulations, and to investigate complaints from the public on the operation of regulations. Members of the committee can also give a notice of motion to disallow a regulation, which must then be dealt with by the House.

Coverage of Delegated Legislation

There is a huge and extremely diverse range of delegated legislation for which a disclosure statement could in theory be contemplated. But if the intention of providing a disclosure is to inform opportunities for scrutiny, then it makes practical sense to limit coverage to those instruments that are subject to Parliamentary disallowance.

Under the new Legislation Act 2012, the range of delegated legislation that will now be subject to disallowance is likely to increase, including not just Orders in Council but also other instruments defined as having "significant legislative effect". Feedback from departments suggests that this new definition of 'disallowable instruments" is likely to include a range of instruments for which a requirement for separate disclosure statement may not always be useful or cost-effective (e.g. fisheries notices).

Consequently it is proposed that the disclosure obligation should be limited to those disallowable instruments that are drafted by PCO in accordance with the Legislation Act. Further consideration can be given under Packages 2 and 3 to determining whether there might be other types of disallowable instruments that might routinely justify the cost of preparing an accompanying disclosure statement, and testing this administratively.

Matters Proposed for Disclosure

We have similar ambitions for the quality of delegated legislation as we do for primary legislation. Nonetheless, the key concerns for delegated legislation are not always the same as for Bills. It is far less likely, for example, that delegated legislation will be inconsistent with important legislative principles, independently of its empowering Act. However, quality assurance products and processes take on more importance because delegated legislation does not have to go through a challenging select committee process that is informed by public submissions.

The following subset of proposed disclosures for Bills, relating almost entirely to quality assurance processes, seems the most highly relevant to delegated legislation.

Disclosure Statement: Application to Delegated Legislation

(Limited to Legislative Instruments Drafted by PCO)

1: A General Statement of the Policy that the Instrument Seeks to Achieve

General nature of proposed disclosure:	Legislate for this?
• Describe the policy that the Instrument seeks to achieve	Yes

2: Established Quality Assurance Products (plus Supporting Information)

Products/Information Proposed for Disclosure

Published Reviews or Evaluations (Background Information)

Regulatory Impact Statement (QA Product)

Independent Assessment of RIS (QA Product)

International Agreement (Treaty) Text (Background Information)

National Interest Analysis for Treaties (QA Product)

General nature of proposed disclosure:	Legislate for this?
• Indicate whether QA product or support information exists	Yes
• Provide (or provide link to) QA product or support information	Yes

3: Existing QA Expectations (Lacking A Specific Process Or Product)

QA Response Proposed for Disclosure

Testing of Draft Legislation

Consultation

General nature of proposed disclosure:	Legislate for this?
• Describe the nature and extent of action taken, if any, by the government relating to the relevant QA expectation	Yes
• (for the consultation item only) describe the nature and extent of feedback received	No (needs testing)

Annex 6: Outline of Administrative Support Measures

Package 1: Direct Support for the Disclosure Mechanism

Support for Preparation and Publication of Disclosure Statement from PCO and Treasury

To facilitate the timely production by departments of accurate and well-presented disclosure statements, they will need some support, in the form of general templates and guidance for completing the required disclosures, and administrative processes to ensure that the statements are completed, checked and provided to the right people at the right times.

Treasury can assist with initial guidance material and monitoring, but the practical day-to-day administrative oversight would be best provided from PCO. They know the legislation involved, they can advise on legislative principles, they administer the official legislation website where we propose that the disclosure statement be published, and they have the systems to help coordinate the production, presentation and publication of the statement alongside the relevant legislation. There are some additional resource implications for PCO arising from this role, which may be able to be absorbed initially but could potentially impact on the timelines to complete legislative drafting.

Draft Disclosure Statement Accompanies Bill or Regulation to LEG

Provision should be made in the requirements for the Cabinet LEG committee that a draft of the disclosure statement is completed and attached, along with the relevant draft Bill or legislative instrument, to the LEG paper when it is sent to LEG for examination.

More Explicit Select Committee Role

To take advantage of the additional information available to select committees in the disclosure statement, and reinforce the importance Parliament attaches to its legislative scrutiny role, Standing Orders could be amended to require or encourage select committees to report back to Parliament on legislative quality issues. This should mean that select committees would be better primed to consider, and hence more likely to identify and address, legislative quality issues during the select committee process.

The Clerk of the House supported this approach in her submission to the Commerce Committee on the current Regulatory Standards Bill.

Support for Select Committees from Office of the Clerk

To back up this expanded select committee role, the Office of the Clerk could increase the support it provides to committees, including the Regulations Review Committee, on the application of legislative principles to the legislation before them for scrutiny.

This would be in line with the stated intention of the Clerk of the House to build further the support provided by her staff on constitutional and administrative law issues in Bills. It is likely, however, that the Office would need to allocate some additional resource to sustain an appropriate level of support.

Package 2: Other Support Measures for the Disclosure Mechanism

As for Package 1 but also including:

Testing Extra Disclosures for Bills and Extended Coverage of Disallowable Instruments

This would require extra guidance, support, and ongoing monitoring from PCO and Treasury.

Tightening of the RIA expectations in weak areas

Setting some stronger RIA expectations in certain weak areas could increase the value provided by regulatory impact analysis for the scrutiny of legislative proposals. These beefed-up expectations could also reinforce some of the other QA processes for which a disclosure is now proposed, and in a sufficiently timely way that the matter is more likely to get departmental attention before the disclosure statement needs to be provided.

For example, raising expectations about reporting on implementation plans and risks might get departments thinking earlier about how they are going to test any legislative proposals to ensure they work in all relevant scenarios. More explicit expectations around identifying costs, possible economic losses, and likely levels of compliance and enforcement, would usefully anticipate the proposed disclosures of potential key impacts. The RIA requirements could also be used to explicitly ask whether any of the legislative proposals have features that might require consultation with experts like the Ministry of Justice or the Privacy Commissioner.

Revive the Legislation Design Committee, with a more proactive role

The Legislation Design Committee (LDC) was established in 2006 to provide high level input on design, instrument choice and implementation issues for significant or complicated legislative projects, at an early stage of development. It was chaired by Sir Geoffrey Palmer, supported by the Law Commission, and included representatives from the Ministry of Justice, Crown Law, DPMC, Treasury and PCO. Its role was purely advisory, and did not cover policy.

A positive review in early 2008 led Cabinet to agree to give it a more proactive role. LDC was to identify a few Bills on the government's annual legislation programme that might benefit from LDC's expertise, and approach the administering department to offer assistance. However a change of government saw this approach abandoned and LDC fell into abeyance.

Reviving the LDC, with that more proactive role, provides another good way to have design issues important to legislative quality raised in a timely manner with departments through early engagement. Limiting its membership to officials, supported by a department, might make this proactive role more acceptable. Key members might also play a role akin to that of an officials committee for a revamped Cabinet Legislation Committee (see below).

Revamp the Cabinet Legislation Committee (LEG), with a focus on legislative quality

In theory LEG exists to ensure that the policy content of draft Bills is consistent with Cabinet approvals, and meets all Cabinet's requirements for the development of legislation. In practice LEG papers are largely a tick-box exercise and LEG does not provide a substantive check on legislative quality. The requirement to produce a disclosure statement to assist external scrutiny of the accompanying legislation provides the ideal opportunity to change that.

A revamped LEG committee would test the standard of the legislation and legislative development process, based on what the disclosure statement reveals, and could recommend further work if not satisfied. It should also take the opportunity to consider other matters, such as possible Crown legal risk, and to test the adequacy of the implementation plans.

Package 3: Increase Attention to the Existing Stock of Legislation

As for Package 2 but also including:

Introducing an Asset Management Perspective to the Administration of Legislation

The former Chief Parliamentary Counsel and Law Commissioner George Tanner has been quoted as saying "The lack of any systematic process for post-enactment scrutiny means that routine maintenance of some very major pieces of legislation rarely happens. We paint our houses and service our cars, but we don't look after our laws in the same way."

One key to shifting the level of attention to the performance of the existing stock of legislation is to adopt an asset management perspective. Regulatory regimes have asset-like characteristics, in the sense that they are designed to deliver a stream of net benefits to New Zealand over time. An asset management perspective implies that administering agencies will not only hold up-to-date registers of all legislation administered, and have assigned particular people to have oversight of that legislation, but they should also be looking to introduce the regulatory equivalent of some basic asset management practices such as:

- Regular monitoring and reporting on the condition of a significant regulatory regime
- Identification of risks to regime performance, and of risks the regime may pose to others
- Explicit planning for future regime maintenance and investment work

Progressively Develop Expectations for the rest of the Regulatory Management Cycle

The proposed disclosure statement is focussed primarily on the development of legislation. Yet we recognise that good legislation ultimately depends as much, if not more, on the quality of its implementation, administration, enforcement, monitoring and review.

We are now starting to see other governments create general expectations for their agencies in these different areas of the regulatory life-cycle, which they expect their agencies will apply as appropriate to their circumstances. An early example was the UK Hampton principles to guide effective inspection and enforcement. In NZ, the action plans to deliver on Result 9 of the Better Public Services agenda are likely to lead to some clear standards on how government should inform and interact with businesses around their regulatory obligations.

Develop Reporting Requirements for Regulators and Administrators of Legislation

Current reporting requirements for government agencies are framed in a way that suggests they are merely providers of services and stewards of financial resources. They tend to miss the point that these "services" are usually regulatory roles, and that departments also act as stewards of the legislation assigned to them. Formal requirements for reporting on agency performance should be developed to better acknowledge this regulatory perspective.

Investigate a New Review Role for an Office of Parliament

The Tanner quote above acknowledges the lack of any systematic approach to post-enactment scrutiny. It reflects deficits in responsibility, will and resources for monitoring and review of legislation. Without some external pressure, this is likely to remain a major challenge.

One catalyst for change might be a new review role for an Office of Parliament. The financial and performance auditing responsibilities of the Auditor-General ensures ongoing government attention to the efficient and effective use of the resources voted to it by Parliament. Given the significance of the regulatory powers that Parliament confers or delegates to the government, there is a case for asking if similar independent attention should be given, on Parliament's behalf, to how well different regulatory regimes might be performing against their stated policy objectives. The US Government Accounting Office may provide a possible precedent.