Regulatory Impact Statement

Maintaining Fit-for-Purpose Legislative Disclosure Requirements

Agency Disclosure Statement

The Treasury has prepared this Regulatory Impact Statement (RIS), and is responsible for its contents.

It analyses options to reduce the time and cost of making adjustments, which we now anticipate will be needed from time to time, to:

- the mandatory content of disclosure statements for government legislation, and
- the range of secondary legislation for which a disclosure statement is required.

Limits on the Options Considered

The analysis in this RIS is supplementary to, and largely relies on, the case previously made for, and key elements of, the developing disclosure regime for government-initiated legislation. This disclosure regime is intended to help support Parliamentary and public scrutiny of legislation and reinforce good administrative practices for the development of legislation. These matters were addressed in two earlier Treasury RISs:

- "*Regulating for Better Legislation – What is the Potential of a Regulatory Responsibility Act?*", dated 2 February 2011 and released when the government introduced the Regulatory Standards Bill on 15 March 2011,[1] and
- "*Increasing the Visibility of Legislative Quality Issues*", dated 29 January 2013 and released when the government introduced the Legislation Amendment Bill on 20 May 2014. [2]

This third RIS looks at ways to allow the disclosure regime to evolve in a more efficient and timely way. It is acknowledged, however, that this problem only arises because the government proposes to legislate for key elements of the regime, in order to provide a more credible, enduring commitment to disclosure than offered by current administrative practices.

Therefore it is possible that the suggested need for a more flexible approach could undermine the original conclusion favouring a legislative solution. For additional

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1 Accessible at http://www.treasury.govt.nz/economy/publications/informationreleases/ris/pdfs/ris-tsy-rbr-mar11.pdf

2 Accessible at http://www.treasury.govt.nz/economy/regulation/inforeleases/publications/informationreleases/ris/treasury/ivlqi

transparency, Treasury has included the "no legislation" option as a comparator in the summary assessment of options in Tables 2 and 3 of this RIS, but has not changed its view that no legislation is still less attractive than the status quo proposal to legislate because:

- creating a legislative obligation provides a far more visible, credible and enduring commitment by government to disclosure than an administrative measure that Cabinet could end at any time, even without explicit legal penalties for non-compliance
- legislation is the most appropriate way to impose an obligation directly on departments to provide information to Parliament and the public
- since parliamentarians are a key audience for the disclosure statement, it is appropriate that the House has a say in what departments must disclose, and
- there is plenty of existing precedent for the use of legislation to require departments to provide information to Parliament and the public.[3]

Limitations of the Analysis Undertaken

The options identified in this RIS have been assessed using a form of multi-criteria analysis, and does not attempt to quantify the expected costs of each option relative to the status quo.

Known risks of multi-criteria analysis include potentially overlapping criteria that can lead to double-counting of benefits or costs, and criteria weightings that can poorly reflect the relative magnitudes of the costs and benefits they purport to represent. To make it easier for readers to draw their own conclusions, the RIS discloses Treasury's rating of key options against each identified objective and further explains some of the judgements behind those assessments.

Consultation undertaken by Treasury during the process of identifying and analysing the options has been limited to a couple of key agencies, with other departments only consulted at the end of the process. There has been no public consultation.

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Finalised 18 May 2017

[3] For example, the Public Finance Act 1989 requires the Treasury to provide periodic statements on the long term fiscal position, regular economic and fiscal updates, and annual financial statements of the Government.

Executive summary

- The developing disclosure regime for government-initiated legislation contemplates that key elements of the disclosure requirements will be set out in the Legislation Act.
- The case for giving the disclosure regime a statutory backing has been analysed in previous RISs, but putting the requirements into an Act does make it more difficult to fix any problems that may emerge, such as a mandatory disclosure that isn't well targeted, becomes redundant, or proves less useful or more costly to provide than expected.

Demand for periodic adjustments to the disclosure requirements

- Treasury's review of the current administrative trial of disclosure statements suggests that future need for periodic and timely adjustments to the content of disclosure statements may be greater than previously expected, due to ongoing changes to administrative practices for the development and review of legislation, and the need for ongoing experimentation in how best to define and present the required disclosures.
- We seek to reduce the time and cost involved in making periodic adjustments without sacrificing the commitment to disclosure, the opportunity for House input, or the fit with constitutional norms, which the status quo provides.
- There are two particular areas in which we think there will be future demand for periodic adjustments to the disclosure requirements. These are
    - the required content of disclosure statements, and
    - the range of legislation that requires a disclosure statement.

Specifying the required content of disclosure statements

- We identify three ways that the content of disclosure statements could be specified with legislative force but without including details in the Act itself. The preferred option would keep the decision rights of the House close to those intended under the status quo.
- This option provides for the government to propose a core set of disclosures that must cover 4 broad subject areas. The core set must be approved by resolution of the House, but with scope for the government to add further disclosures if it wishes.

Specifying the range of legislation that requires a disclosure statement

- We think that the need for flexibility in the range of legislation requiring a disclosure statement is greatest for secondary instruments, which are numerous, very diverse, and not covered by the current administrative trial of disclosure statements.
- Rather than try to determine the appropriate coverage of secondary legislation in the Act before this has been tested, the preferred option is to allow the government to propose which classes of secondary legislation will require a disclosure statement, subject to approval by resolution of the House.

Status quo

1. The current disclosure requirements for government-initiated legislation are part of a still developing disclosure regime whose main purposes are to:

    - better inform parliamentary and public scrutiny of legislation, and
    - reinforce good administrative practices for the development of legislation.

2. The disclosure regime is one part of a response to general concerns expressed in some quarters about the quality of New Zealand legislation and a view that the existing requirements for developing legislation have not been good enough at ensuring quality. It was developed as an alternative to the more controversial Regulatory Responsibility Bill recommended by a Regulatory Responsibility Taskforce report in September 2009.

3. Key elements of the disclosure regime, as intended to apply when fully operative, are set out in **Table 1**. Until supporting legislation is passed, the regime is operating as an administrative measure applying only to government Bills and amendments.

Table 1: The current planned disclosure regime for government-initiated legislation

Primary Legislation	Parliamentary Rules/Processes	Delegated Instruments	Administrative Rules/Processes
As provided for in the Legislation Amendment Bill (the 2014 Bill)	Standing Orders, etc (Anticipated)	Order-in-Council (Anticipated)	Cabinet Office Circular, Guidance
Chief executive of lead agency must prepare and publish a disclosure statement for: • Govt Bills • substantive Govt SOPs • disallowable instruments drafted by PCO (with various exemptions) Stmt must contain info on a core set of specific matters listed in the Act, generally related to: • the policy background • quality assurance work done • significant or unusual features Govt may add new or more specific disclosures requirements, but must consult the House first Information protected under Official Information Act need not be disclosed Limits placed on court remedies for any failure in disclosure Independent review after 5 years	Disclosures built into a House process for enhanced scrutiny of legislative quality issues by select committees House process established for responding to a Govt proposal to set format or extra content for disclosure stmts House procedure established for complaints about incomplete or absent disclosure statements	Govt may specify legislative guidelines (that chief executive must have regard to when considering certain disclosures)	Govt may specify extra content, format for disclosures (via set templates agreed by Cabinet) Disclosure stmt to be provided to LEG Cabinet committee (when a Minister seeks approval to introduce legislation) Treasury issues guidance/advice for agencies (about completing and publishing the disclosure stmt) Dedicated website for publication of disclosure stmt (provided by PCO)

4. The case for giving legislative backing to the disclosure regime has been addressed in previous RISs (accessible from links provided in the agency statement at the front of this RIS). It includes the arguments that a legislative obligation offers a more visible, credible and enduring government commitment to disclosure than an administrative measure that the government could end at any time, and that legislation is the most appropriate way to ensure the House of Representatives has a say in what information is to be disclosed by departments. Both these features are expected to support greater external attention to disclosure statements, which in turn should encourage departments to pay closer attention to the matters requiring disclosure.

Current administrative arrangements

5. As agreed by Cabinet as an interim measure, departments have been publishing disclosure statements since August 2013 on a dedicated website[4] maintained by the Parliamentary Counsel Office (PCO). A web link to the disclosure statement is included in the Explanatory Note of the relevant Bill or SOP, for ease of access.

6. The Treasury has provided disclosure statement templates and guidance for departments to use during this interim administrative period. At the time of writing, the required disclosures for government Bills fall into four broad subject areas:

   - a general policy statement, matching that provided in the Bill's Explanatory Note
   - links to background material and agency policy analysis relating to the Bill, such as published reviews or evaluations, and regulatory impact statements
   - information about the testing that the Bill has undergone, such as the results of vetting for consistency with the NZ Bill of Rights Act, and a description of consultation undertaken, and
   - information about significant or unusual features in the Bill, such as whether it includes powers to make delegated legislation, or provisions that have retrospective effect.

7. The disclosure statements published to date have covered more material than the list of required content set out in the 2014 Legislation Amendment Bill. This has allowed us to test the viability and potential value of some additional disclosures ahead of settling on a full set of disclosure requirements to apply when the disclosure requirements become law. Based on our analysis to date, we think some recasting of the disclosure templates may help improve the reliability of the information disclosed and reduce the compliance costs for departments, particularly in relation to large or omnibus Bills.

8. There is, under current administrative arrangements, reasonable external interest in disclosure statements. For the six months to the end of April 2017, the number of unique visitors to the disclosure statement website has averaged 1,700 a month.[5]

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4 This website can be accessed at http://disclosure.legislation.govt.nz/

5 Based on the latest available monthly web statistics provided by the Parliamentary Counsel Office

Problem definition

9. The establishment of PCO's Access to Subordinate Instruments Project (the Project)[6] has provided both an opportunity and a reason to review the key legislative features of the disclosure regime to ensure we are still comfortable with its design.

10. The opportunity to review arises from the decision to delay progression of the 2014 Legislation Amendment Bill in order to include the legislative changes required to implement the Project. This has allowed more time to assess the experience to date with disclosure statements under the current administrative arrangements. The reason to review arises from planned or possible changes arising out of the Project, which could increase the range of instruments that would require a disclosure statement unless changes are made to current provisions in the 2014 Bill.

11. An acknowledged risk of putting the disclosure requirements into an Act is that it becomes harder to fix any problems that may emerge, such as particular disclosure requirements that aren't well targeted, become redundant, or prove less useful, more difficult or more costly to provide than expected.

12. Our review has reassessed the risk that some details of the disclosure regime proposed for inclusion in the Legislation Act will prove less durable or more problematic than hoped, giving rise to the need for periodic amendments and their associated costs. We have identified two particular areas where we think it is likely there will be future demand for periodic adjustments to the disclosure requirements currently included in the 2014 Bill.

Legislative risks relating to the required content of disclosure statements

13. The first area of risk is the required content of disclosure statements. The existing administrative trial of disclosure statements has highlighted the potential downside of including even the proposed core set of specific disclosure requirements in primary legislation. We now see greater need and value in being able to make periodic and timely adjustments to the choice and form of the required disclosures.

14. One reason for this reassessment is that the government has continued to make material changes to its administrative expectations and processes for the development and review of government legislation[7]. Because these expectations and processes are the source material for most disclosure requirements, we can expect the ongoing changes to administrative practices to result in future demand for changes to the disclosure requirements themselves.

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6 This project, which is led by PCO, is intended to improve access to New Zealand legislation by ensuring all subordinate legislation is captured and publicly available on the New Zealand Legislation website.

7 For example, in 2015 alone, the government:

- adopted revised guidelines on the process and content of legislation;
- changed requirements for reporting on draft legislation's consistency with those guidelines;
- remodelled the Legislation Advisory Committee and gave the new committee a mandate to engage departments on legislative design issues much earlier in the legislative development process;
- agreed to make greater use of exposure drafts of legislation; and
- asked key agencies to publish a regulatory strategy and plan, and report on the state of their legislation.

15. In addition, our review of disclosure statements has identified some common departmental mistakes (such as failures to identify all relevant features of a Bill, provide all supplementary material requested, or correctly interpret some questions), and some production challenges for departments (such as the time taken to coordinate, complete and QA the disclosures for large or omnibus Bills). This reinforces the need to continue to:

- be selective about what gets disclosed because there are limits on how much information a department can reliably provide in a timely way (as well as a concern that long disclosure statements discourage potential readers), and
- experiment to find the best form for some disclosure questions, and the best structure for the disclosure statement for different sorts of legislation.

Legislative risks relating to the range of legislation requiring a disclosure statement

16. The second area of risk relates to the range of legislation requiring a disclosure statement. A disclosure statement for some types of government Bills, SOPs and disallowable instruments won't add much value, and in other cases it may not be possible to provide a statement in time to support House scrutiny of the relevant legislation.

17. At least some of these situations can be predicted in advance and so can be provided for in the Legislation Act. The 2014 Bill included exemption provisions for all three categories of legislation for which disclosure statements are proposed. The exemptions were either quite specific lists (in the case of government Bills) or reasonably complicated tests (in the case of SOPs and disallowable instruments). It is likely they will not always work well when applied in practice and so an ability to make ready adjustments to the exemptions could help to reduce the legislative risk.

18. The main risk of undesirable outcomes is where the Act fails to provide an exemption in situations where an exemption is warranted.[8] This risk is greatest for disallowable instruments, because they:

- are more likely to generate disclosure statements of limited benefit, as they tend to have less significant legislative effects than changes to primary legislation
- have not yet been tested during the current administrative period for disclosures
- are considerably more numerous than government Bills or SOPs, which means they are likely to generate the greatest compliance costs in aggregate, and
- may soon include a wider range of legislation than they do at present, under proposals associated with the Access to Subordinate Instruments Project.

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8 In the reverse situation, the government can choose to provide a disclosure statement voluntarily, or a select committee can ask the responsible Minister or the administering department for the relevant information.

Objectives

19. The objective is to enable the disclosure regime to operate and evolve efficiently and effectively. That is, we wish to identify a set of institutional arrangements that:

    - can reduce the likely time taken, and cost incurred, to make periodic adjustments to the disclosure requirements when this becomes desirable, but still
    - provide a credible and enduring commitment to disclosure that retains the ongoing support of the House and will promote good administrative practices for the development of legislation
    - respect core constitutional norms, and
    - allow the government some ability to manage the compliance costs of disclosure.

20. How well these objectives are met depend on the way in which the commitment to disclosure is made and expressed. Under the status quo arrangements, most of the detail of the commitment is to be set out in the Legislation Act itself.

Options and impact analysis

21. In the Problem definition section, we identified two areas of potential future demand for periodic adjustments to the disclosure requirements. In both areas we want an easier way to make those adjustments than having to periodically amend the Legislation Act 2012. If these specific requirements are not to be in the Act, however, they will need to be formally specified in another way, with the risk that this could adversely affect other desirable attributes of the disclosure regime.

Options for setting the required content of disclosure statements

22. Besides the status quo, which provides for a core set of required disclosures to be set out in the Act, we identified three other ways in which the required content of disclosure statements could be specified with legislative force. Under all three alternatives, the required content of a disclosure statement would be:

    - set out in a formal notice or instrument, and
    - required to cover four broad subject areas to be set out in the Act.[9]

23. The alternative options (presented in order of increasing House of Representatives involvement) are:

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9 The proposed four broad subject areas, within which all core disclosures included in the 2014 Bill fell, are:
- available background policy material
- the quality assurance work undertaken by the department during the development of the legislation
- any provisions of the legislation considered to be unusual or deserving of special comment; and
- any departures from specified guidelines or standards formally agreed or adopted by the government for the development or content of legislation.

Option 1: The Government must specify in a statutory instrument the required content of disclosure statements (covering the broad subject areas set out in the Act), but the House can resolve to veto the instrument within the statutory notice period

> A delegated legislative power, subject to a negative resolution procedure (veto) exercisable by the House, is the standard way to specify matters of legislative detail that may require periodic updating. Here the standard approach is slightly amended to require the government to act to set the content, and to allow the House to "disapply" the instrument before rather than after it becomes operative.

Option 2: The Government must propose a core set of required disclosures, which must be approved by a resolution of the House, and once the core set is approved, the Government may also specify additional disclosures by administrative direction

> Obtaining House approval for the core set of required disclosures would likely use the affirmative resolution procedure provided for in Standing Order 322, which involves a short select committee consideration before the House debates the motion. The affirmative resolution procedure is sometimes used as an additional procedural safeguard for matters that, but for the need to make timely changes, might normally be set out in an Act.

Option 3: The House can specify the required content of disclosure statements, in the form of rules made by the House

> Under this Option, the House itself has the main active responsibility to determine what information departments need to disclose. The content of disclosure statements would be agreed by resolution of the House, most likely after initiation, deliberation and recommendation by an appropriate select committee.
>
> There is a precedent for House-made statutory rules – the Ombudsmen Act 1975 gives statutory recognition to rules developed and made by the House for the guidance of the Ombudsmen in the exercise of their functions.

24. In **Table 2** below, we have rated these three alternative options, as well as the **status quo** and a "**no legislation**" option, against the key objectives identified earlier. All options are rated relative to the **status quo**. Note that, because the status quo provides for core and other disclosures to be set in different ways, the ratings sometimes need to distinguish between the core and other disclosures. The "**no legislation**" option has been included as an additional comparator because the problems we seek to address would not exist but for the intended use of legislation. Since the reasoning behind the ratings may not be obvious, some further explanation of the assessments against the objectives is provided below.

25. Our general conclusion is that **Option 2** (where the House must approve a set of core disclosures proposed by the government) is the option that best meets the identified objectives overall. It also involves the least change to the House's decision rights from that indicated by the **status quo**.

Table 2: Summary Assessment (against the Status Quo) of Options for Setting Required Content of Disclosure Statements

Option (with preferred option shaded)	Credible Govt commitment to disclosure	House input to setting content	Fit with constitutional & legal norms	Ability to make timely changes to content	Ability to manage costs of compliance
No Legislation • Ministers set all disclosures by administrative means	✗✗✗	✗✗✗(core) ✗✗ (other)	-	✓✓✓(core) ✓ (other)	✓
Status Quo – Core content set in Act • Core set of required disclosures for each type of legislation are set out in the Act • Minister(s) can specify additional (other) disclosures by administrative notice, after consultation with House	-	-	-	-	-
1: Govt must set content, but House may veto • Minister(s) must specify required disclosures by statutory instrument • House can "disapply" any such instrument in the statutory notice period before it comes into force	✗	✗✗(core) ✗ (other)	✗✗	✓✓(core) - (other)	✓
2: Govt sets content, House must approve core • Dept must make disclosures in 4 broad subject areas • Minister(s) must propose core disclosures in those 4 subject areas, to be approved by the House • Minister(s) can specify additional (other) disclosures by administrative notice, once the core set is approved	-	- (core) ✗ (other)	✗	✓✓(core) ✓ (other)	-
3: House can set content • Dept must make disclosures in 4 broad subject areas • House can specify particular disclosures in those 4 subject areas through rules made by the House	-	✓ (core) ✓✓ (other)	✗	✓ (core) ✗ (other)	✗✗✗

Option 1: Content to be specified by Govt in a statutory instrument subject to a House veto

26. The obvious advantage of **Option 1** is that the time and cost of periodic changes to the core content of disclosure statements are significantly reduced compared with that required to amend the Act under the **status quo**. But it also has several problems.

27. The first is that the Act itself will give the House very limited assurance about the content of a disclosure statement, and no substantive opportunity for input on what the statutory instrument will require. This will not encourage the House to show support for, and give attention to, disclosure statements, which we see as critical to the longer term success of the disclosure regime.

28. This problem is exacerbated by the weak leverage and incentive provided by the House's veto right. Exercising the veto could, in some situations, have the perverse outcome of relieving the government from an increased obligation, and depriving the House of information that they would otherwise receive, at least temporarily.

29. The final problem is that the content of disclosure statements is an important feature of the disclosure regime, rather than just a matter of detail. Good legislative practice favours having the core content approved by the House, rather than left to the discretion of the government of the day.

Option 3: Specific content requirements able to be set by the House

30. At the other end of the spectrum of options is **Option 3**, where the House itself would have the ongoing responsibility to determine what information departments need to disclose. The closest equivalent arrangements are probably:

    - the Standard Estimates Questionnaire, which is developed by the Finance and Expenditure Committee for the use by all select committees when scrutinising the government Estimates that accompany annual Appropriation Bills, and

    - rules made by the House for the guidance of the Ombudsmen in the exercise of their functions, as provided for in the Ombudsmen Act 1975.

31. Greater House input is likely to secure stronger House support for the disclosure regime. However, giving the House full responsibility and control of the content of disclosure statements has potential downsides, which makes **Option 3** less attractive overall than the **status quo**. House control of the content, without responsibility for the costs it imposes, creates a real risk that departments will be required to provide:

    - a much greater range and detail of information than under the **status quo**, increasing the compliance costs for departments, and

    - information more appropriately provided by Ministers, such as the consultation undertaken by Ministers or justifications for government policy choices.

32. Either problem could seriously undermine the case for, or sustainability of, the disclosure regime. Compliance costs could exceed the actual value to the users (as has previously happened with the standard Estimates Questionnaire, in our view) and there are potential knock-on consequences for the timeliness and accuracy of the disclosures provided. Requiring information that compromised the perceived political

neutrality of departmental disclosures would make departments and Ministers very uncomfortable with the disclosure regime, unless the legislation includes further protections for departments about what they have to disclose. The 2014 Bill carefully avoided requiring departments to justify government policy choices for this reason.

Option 2: The government sets specific content subject to House review and approval

33. **Option 2** sits between **Options 1 and 3** regarding the level of involvement of the House. It would continue to provide the House with decision rights[10] over the core content of disclosure statements similar to those available under the **status quo**.

34. **Option 2** (like the **status quo**) also provides for a Minister to make decisions on additional disclosures and formats. This is similar to the approach taken to specifying the content of the Estimates (and other information that accompanies the main Appropriation Bill),[11] which we think is a better analogy for the disclosure statement than either the Estimates Questionnaire or rules to guide the Ombudsmen (who, unlike departments, are directly accountable to the House for the performance of their functions).

35. **Option 2** delivers reasonably well against all objectives, with ratings not dissimilar to the **status quo**. They ensure the House has good opportunities for input on the changing content of disclosure statements, but in a way that requires less resource and scarce House time than amending the Legislation Act itself. This ability to make more timely changes is the main area of advantage over the **status quo**.

36. **Option 2** has one small downside compared with the **status quo**. The House discourages use of the affirmative resolution procedure to specify important elements of a statutory regime because they are generally thought to warrant the increased scrutiny provided by inclusion in primary legislation. Nonetheless we think the circumstances might justify a departure from normal legislative practice because:

    - the content requirements are expected to reflect administrative practices that are subject to considerable ongoing change and refinement, and

    - the House has supported use of the affirmative resolution procedure when applied to setting other minimum requirements for reporting to the House (albeit in relation to Offices of Parliament).[12]

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10 Involving select committee consideration, House debate, and a House vote – see Standing Order 322

11 Beyond the minimum content required by the Public Finance Act, the Minister of Finance can require additional information and specify the format for the Estimates, but is statutorily obliged to consult the House if proposing any significant changes

12 The procedure is used to set the annual reporting requirements for Offices of Parliament under the Public Finance Act 1989. See also pg.9 of the Inquiry into the Affirmative Resolution Procedure, Report of the Regulations Review Committee, May 2007.

Options for setting the range of legislation requiring a disclosure statement

37. The second identified area of risk concerns the range of legislation for which a disclosure statement is required. Under the **status quo**, the types of exempt legislation are to be listed or described in full in the Act.

38. Aside from the "**no legislation**" option, we have identified three alternative options to the **status quo**. In each case, the proposal is to target secondary legislation (a new term that will replace disallowable instruments in a rewritten Legislation Act, but slightly broader in coverage), because they present the greatest area of risk of inadequate exemptions. The provisions for Bills and SOPs are not revisited because we have not identified any major problems with the exemptions set for Bills or SOPs under the current administrative arrangements. The alternative options are:

    Option A: The Government may exempt one or more classes of secondary legislation from the requirement to have a disclosure statement, by means of a statutory instrument subject to the comment and approval of the House.

        This approach is similar to that proposed for setting the required content of disclosure statements.

    Option B: The Government may exempt one or more classes of secondary legislation from the requirement to have a disclosure statement, by means of a statutory instrument subject to potential veto by the House.

        This differs from **Option A** in allowing the House only a veto rather than approval.

    Option C: There is no default requirement to provide a disclosure statement for secondary legislation, but the Government may propose classes of secondary legislation that must have a disclosure statement, subject to the approval of the House.

        This approach is closer to the "**no legislation**" option, and represents a more limited commitment to provision of disclosure statements, than **Option A or B**.

39. We rated these alternative options, as well as the **status quo** and a "**no legislation**" option, against our key objectives. These ratings are summarised in **Table 3** below.

40. On balance, we favour **Option C** (no default requirement to provide a disclosure statement for secondary legislation, but the government may specify classes of secondary legislation that must provide a statement, subject to the review and approval of the House).

41. A key factor in preferring the more conservative **Option C** is the ability to manage the costs of compliance, which is vital to the durability of the disclosure regime. As noted in the problem definition, our main concern is the possibility that too few instruments are exempt (so compliance costs exceed benefits). By contrast, too many exempt instruments is less of a problem because the relevant information could still be provided voluntarily or at the request of the House, if it is of interest and value. The ability to manage the compliance costs of disclosures is particularly important for secondary legislation because there is a much greater potential compliance load due to the high volume of secondary legislation produced.

Table 3: Summary Assessment (against the Status Quo) of Options for setting the range of Secondary Legislation requiring a Disclosure Statement

Option (preferred option shaded)	Credible Govt commitment to disclosure	House input to setting range	Fit with constitutional & legal norms	Ability to make timely changes to range	Ability to manage costs of compliance
Status Quo – range of legislation and exemptions set out in Act	-	-	-	-	-
A: Govt can exempt classes of legislation, subject to House comment/approval	-	-	✗	✓✓	✓
B: Govt can exempt classes of legislation, but House can veto	✗	✗✗	✗✗	✓✓✓	✓✓
C: No default requirement, but Govt can add classes of legislation subject to House comment/approval	✗✗	✗	✗	✓✓	✓✓✓
No Legislation	✗✗✗	✗✗✗	-	✓✓✓	✓✓✓

Options A and B: Government has power to exempt classes of secondary legislation

42. **Option A** has similar decision rights to the **status quo**, and would reduce the time and cost of creating an exemption, but the House will face limited incentives to consider and grant an exemption. Consequently, **Option A** won't significantly enhance the government's ability to manage the costs of compliance if we discover the coverage of secondary legislation was set too wide at the outset.

43. **Option B** would considerably reduce the time and cost to the government of creating exemptions, but would not be regarded as good legislative practice. The LAC Guidelines state that exemption powers that vary the scope of an Act should not be the norm, that there must be compelling reasons to grant the power, and that appropriate safeguards must be specified if the power is granted. While provision for the House to veto exemptions is a safeguard of sorts, we doubt this would be seen as adequate.

Option C: Make disclosure statements for secondary legislation discretionary at this point

44. This option involves removing the proposed obligation to prepare a disclosure statement for disallowable instruments and instead allowing the Minister(s) responsible for the disclosure regime to specify the classes of secondary legislation that will require a disclosure statement. The relevant classes of secondary legislation would be set out and approved in the same way as proposed for the content requirements for disclosure statements (see the description of **Option 2** above).

45. In effect, this would allow the cautious, progressive trialling of disclosure statements for different classes of secondary legislation, but with oversight and input from the House. It is a weaker commitment to disclosure than **Options A or B**, but still better than that of the "**no legislation**" option because the House's periodic consideration of a notice on the content of disclosure statements will also provide natural opportunities for dialogue between the House and the government on whether particular classes of secondary legislation should be subject to a disclosure obligation. Most importantly, **Option C** considerably reduces the risk of higher than necessary compliance costs.

Consultation

46. There has been no public consultation on the issues and options discussed in this Regulatory Impact Statement. The options are reasonably technical and primarily about the best way to make a commitment to disclosure rather than about the kind of information to disclose or whether to have disclosure statements for government-initiated legislation.

47. We have had face-to-face discussions with the Office of the Clerk of the House of Representatives and the Ministry of Justice, based on indicative draft legislation provided by PCO. Their input has been very helpful in the process of identifying and refining our preferred option, which we believe they support.

48. Other departments were consulted on a draft version of this Regulatory Impact Statement and the associated Cabinet paper. We received some questions about how the revised provisions might operate in practice, and about the disclosure regime more generally, but no direct comments on the issues and options for changes to the disclosure regime set out above.

Conclusions and recommendations

49. We conclude that there is a set of viable changes to the current developing disclosure regime for government-initiated legislation that:

- can further reduce some of the risks that arise from legislating for key elements of the disclosure regime, and do so without offending key constitutional norms,
- can still deliver a credible and enduring commitment to disclosure that promotes good administrative practices for the development of legislation, and
- is therefore likely to be superior to the **status quo** and "**no legislation**" options.

50. These changes are a combination of:

- **Option 2**, which would require the government to propose a core set of required disclosures within 4 broad subject areas set out in the Act, to be approved by the House, rather than having the required content specified up front in the Act, and
- **Option C**, which would allow the government to specify which classes of secondary legislation must have a disclosure statement, to be approved by the House, rather than having the required classes specified up front in the Act.

51. **Option 2** and **Option C** together should reduce the time taken and cost incurred to make the periodic adjustments to the disclosure requirements that we anticipate will become necessary or desirable in the future, compared to amending the Act under the status quo proposal.

Implementation plan

52. This Regulatory Impact Statement addresses an area of implementation risk (including compliance costs) associated with the evolving disclosure regime for government-initiated legislation. It has also been informed by the administrative trial of disclosure statements that was part of the implementation plan for this disclosure regime.

53. If Cabinet agrees to the changes recommended in this Regulatory Impact Statement, they can be given effect by withdrawing the Legislation Amendment Bill introduced on 20 May 2014, and introducing a revised Bill.

54. We expect the Bill to include transitional provisions, including permitting the required engagement with the House on details of the disclosure regime before the legislative obligation for disclosure statements comes into force. We also expect the Bill to provide for the legislation to come into force after a suitable lead-in time, to allow for the development and approval of guidance, templates and other administrative requirements including an appropriate transition from the current administrative disclosure regime.

Monitoring, evaluation and review

55. The Treasury, or other designated lead agency, will continue to monitor the performance of the disclosure regime after the Legislation Act changes come into force. This is expected to include:

- monitoring whether the required disclosures continue to reflect the government's existing administrative expectations and processes for the development of legislation
- assessing whether disclosure statements for classes of secondary legislation are working effectively, or could be extended to cover more classes, and
- undertaking periodic reviews of a sample of disclosure statements to see how well departments are meeting their disclosure obligations, and getting feedback from regular readers about their experience, perhaps working in conjunction with the Office of the Clerk of the House of Representatives.