

## Supplementary material

### Exposure draft Bills

Although this material has been prepared for exposure draft Bills, much of it is also relevant to releasing draft secondary legislation (such as regulations).

#### What is an exposure draft Bill?

An exposure draft Bill is a version of a draft Bill that is released by a government agency, in whole or in part, outside of the Crown before the Bill is introduced.<sup>1</sup> Exposure draft Bills are drafted by PCO and released by government agencies as part of the consultation process for the legislation.

Releasing an exposure draft of a pre-introduction Bill by the Government is a different process from the release of a Bill by a Select Committee for public consultation following its Introduction. Both processes can test the workability of a Bill's provisions and can enhance legitimacy by giving the public an opportunity to comment on it. However, an exposure draft process is not a substitute for a select committee process: the two processes are controlled by different branches of the State at different stages in a Bill's development.

#### When would you release an exposure draft Bill?

An exposure draft Bill is usually released *after* you receive Cabinet policy approval but *before* you get Cabinet Legislation Committee approval. The process steps for releasing an exposure draft are set out at the end of this material.

You may need further Cabinet policy approvals for any policy changes, or new policy, that emerge from consultation on the exposure draft. For some secondary legislation, the empowering Act, or a treaty, may require consultation on the draft legislation (and not just the policy).

#### Why would you release an exposure draft Bill?

Consultation on an exposure draft allows you to test drafting at a relatively early stage. Releasing draft legislation for consultation can deliver significant value:

- It is a means to ensure that legislation accurately captures its intended policy intent and to test assumptions. This may be especially useful for a Bill that will have a broad or significant effect, is novel in approach or subject matter, or concerns policy of a specialist or technical nature.
- It can provide a level of comfort about the quality of the legislation, test its clarity and usability, check for unintended consequences, obtain detailed technical feedback, and check that it will 'work' as intended.
- It can assist with obtaining stakeholder agreement on policy when agreement is dependent on how the legislation is actually drafted.
- When legislation will be implemented by a non-Crown entity agency or industry it can provide an opportunity for that agency / industry to verify that the legislation can be operationalised as intended.
- It can be used as a vehicle to support engagement with stakeholders on residual policy matters or other more detailed features of regulatory design (for example, fees, infringements, transitional arrangements and penalties). This is particularly useful when your earlier consultation related to high level regulatory proposals.
- It may provide a more effective and efficient means of consultation when public consultation on the policy has already occurred in another forum (such as a Law Commission report).

Consultation on an exposure draft may have the additional benefit of assisting the passage of a Bill through its parliamentary stages. It provides an opportunity for input and resolution of issues before the Bill is submitted to

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<sup>1</sup> This is different from the routine consultation on a draft Bill with other government departments before a Bill is submitted to the Cabinet Legislation Committee for approval.

Select Committee. An exposure draft can also help to ensure that those who will be affected by the legislation are well informed of its likely effect and the transition that will be coming their way if the legislation is enacted. It is important, however, that submitters fully understand that an exposure draft is a *draft* and, as such, is subject to change both by the agency (following submissions) and also as it tracks through the parliamentary processes.

It is worth noting that an exposure draft and the explanations that agencies provide about the clauses in the draft create a paper trail on what the clauses are intended to mean and why they are worded in the way that they are. The potential for later reference to this material by courts (and practitioners) emphasises the importance that agencies publish well-thought-out responses to submissions made on the exposure draft.

Note that consultation on an exposure draft serves a different purpose from consultation on the policy. As such, the release of an exposure draft is not usually an appropriate replacement for consultation (for example, a discussion document) on the policy that sits behind the Bill.<sup>2</sup> Consultation on an exposure draft can result in a different public conversation than consultation on the policy because the policy is more developed as a result of the drafting process. Releasing an exposure draft too early can create risk by setting public and Ministerial expectations about draft provisions before the drafting has been sufficiently well developed.

### **What should you release, to whom, and what are the next steps?**

A department may decide to release *all or part* of the draft legislation to either the public at large or to a specified person or group (often called “targeted consultation”).

If you decide to restrict the release to certain persons, it is important, as with any consultation process, to ensure that doing this will not create, or give an impression of, an unfair advantage. You also need to consider the risk of the draft being shared by recipients more widely than was intended.

It is important to consider what your objectives are for releasing the draft legislation. Submitters should be clear why the legislation is being released, what will happen with submissions, and what the process will be after consultation closes.

To ensure that you realise the full benefits of an exposure draft, provide explanatory material to accompany the draft, and publish both the submissions and your agency’s response to the submissions. In particular, you need to:

- ensure that you provide sufficient information alongside the legislation to describe the underlying policy and any key outstanding issues
- ensure that it is clear to submitters *why* you have released the draft and *what* you are asking them to do with it. For example:
  - if the policy behind a Bill has already been agreed to by Cabinet and the purpose is not to re-litigate the policy, make it clear that the Bill is not being released for re-consultation on the policy but rather on how the policy is expressed in the Bill
  - if there are remaining policy questions on which you are seeking feedback, identify them and consider including specific questions on them
- know what process and next steps will follow after consultation on the draft and communicate this to submitters. Publish submissions, and preferably your agency’s response to submissions, in an appropriate forum (for example, on the agency website) within an appropriate timeframe.

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<sup>2</sup> This may be less the case for technical legislation, such as detailed rules, where consultation on the draft legislation itself may be more useful than consulting on the high level policy intent of the legislation.

Again, it is important that you make submitters aware of the draft nature of the legislation and that, in the case of a Bill, the wording *remains subject to change* until its enactment. Make submitters aware that the exposure draft process does not in any way replace the select committee submission process.

Here are some examples of consultation documents that accompanied exposure drafts that may be useful for reference. Note that these examples have been provided for illustrative purposes only, not as precedents endorsed by LDAC.

#### *Examples of material that accompanied exposure Bills*

[Civil Aviation Bill exposure draft and commentary document](#)

[Financial Services Legislation Amendment Bill: consultation draft](#)

#### *Examples of material that accompanied exposure Regulations*

[Exposure draft of regulations to be made under section 226 of the Telecommunications Act 2001](#)

[Standardised Tobacco Products and Packaging Draft Regulations](#)

It is critical that you allocate sufficient time in your legislative development timeline for the processes associated with the release of an exposure draft. In particular, allow adequate time for submissions to be made, analysing submissions, the agency response to submissions, and PCO drafting time (consult PCO on this).

### **What is the process for releasing an exposure draft?**

There are several steps that **must** be followed before an exposure draft can be released.

Departments are expected to indicate in legislation bids for Bills whether an exposure draft of the Bill will be released for consultation before the Bill is introduced and, if so, provide details. Refer to the relevant [Cabinet Office Circular](#) on requirements for submitting legislation bids.

Refer to paragraph 7.48 of the [Cabinet Manual](#), which provides for the confidentiality of draft legislation. It is good practice to obtain Cabinet approval to release an exposure draft.

It is for the Attorney-General to determine whether to release draft legislation outside the Crown and, as a consequence, potentially waive legal professional privilege.<sup>3</sup> As such, an exposure draft **must not** be released to any person outside the Crown<sup>4</sup> without adhering to the [Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown \(CO \(19\) 2\)](#)<sup>5</sup>. Cabinet's approval for an exposure draft does not replace the need to consider whether the Attorney-General's consent is required under the Protocol.

If the Protocol provides that Attorney-General approval is required before release, talk to the Crown Law Office early to ensure that you allocate sufficient time for the Attorney-General approval process.

You also need to consult the Parliamentary Counsel Office before you release an exposure draft. The PCO will prepare a consultation draft appropriate for release.

These steps are not relevant for secondary legislation made by Ministers or other makers of legislation that do not require Cabinet approval and are not drafted by the Parliamentary Counsel Office.

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<sup>3</sup> Legislation Act 2012, [section 61](#), draft legislation prepared by, or on behalf of, the Parliamentary Counsel Office is subject to legal professional privilege.

<sup>4</sup> The Protocol defines **Crown** as Ministers of the Crown, the departments of the public service as specified in the First Schedule to the State Sector Act 1988, the New Zealand Police, and the New Zealand Defence Force.

<sup>5</sup> Replaces the CO14(4) version as cited in para 7.48 of the Cabinet Manual