

## SUPPLEMENTARY MATERIAL

### Guidance on commencement clauses

#### *General principles for designing commencement clauses*

All Acts and secondary legislation (with limited exceptions) should have a commencement clause. Sometimes the whole Act or instrument will come into force on the same date. Sometimes Parts of the legislation, or individual provisions, will come into force at different times. The general principles in designing commencement clauses are that they must provide:

- certainty about when legislation is in force; and
- adequate public notice of the commencement of legislation (so that people can undertake any preparatory action).

It is still common for legislation to state that it starts on the day after Royal assent or (for regulations that comply with Cabinet's 28-day rule) 28 days after notification in the *Gazette*. However, this timing often does not give sufficient public notice or clarity about the exact commencement date.

Another important factor is the practical context of the particular legislation or those most affected by it. The timing of commencement can create substantial burdens if this practical context is not taken into account (for example, Christmas, the start of financial years, or the impact of other legislation affecting the same sector and commencing at the same time).

These principles usually mean that legislation needs to specifically provide for when its provisions will come into force, preferably with a set date.

The Regulations Review Committee monitors commencement clauses in secondary legislation and is concerned to ensure that a set date is used whenever possible.

Note that if legislation fails to provide for its own commencement, [sections 8](#) and [9](#) of the Interpretation Act 1999 do set default commencement dates (the day after the date of Royal assent for Acts and the day after the date of their notification in the *Gazette* for secondary legislation). However, it is poor practice to rely on the Interpretation Act 1999 for commencement (with limited exceptions, such as Orders in Council that commence other legislation).

### Forms of commencement clause

#### *Commencement on specific date*

Generally, specifying a precise date is the most easily understood method of commencement and provides the most certainty. It does not provide any flexibility however. As a result, you need to set this date to allow enough time for implementation (for example, any regulations needed) and to give adequate notice to the public. If a Bill sets a commencement date, you need to reassess before the Committee of the whole House stage whether it still allows enough time for implementation.

#### **Example of commencement on specific date**

**Outer Space and High-altitude Activities Act 2017, [section 2](#)**

This Act comes into force on 21 December 2017.

### *Commencement by formula*

A formula (for example, 1 month after Royal assent or 28 days after notification in the *Gazette*) provides more flexibility, but can be hard for the public to predict in advance or to calculate with certainty. For example, it is hard for the public to know what constitutes a day or when Royal assent occurred.

A formula is often included in a Bill because it is hard to predict an accurate commencement date with certainty early in the development of legislation. It is good practice to reconsider whether a formula in a Bill's commencement clause can be replaced with a set commencement date once you reach the Committee of the whole House stage if you have a reasonable degree of certainty about when it will be enacted.

If possible, avoid using a formula in secondary legislation. Use a set date instead unless there is a high degree of uncertainty about when it will be made.

The current Legislation Bill will reduce the uncertainty with this type of commencement clause. The Bill will clarify the date on which these types of clauses commence and enable the PCO to make editorial changes to legislation to replace a formula with a set date (once it is set or determined).

#### **Example of commencement by formula**

**Substance Addiction (Compulsory Assessment and Treatment) Act 2017**, [section 2](#)

- (1) Subject to subsection (2), this Act comes into force on the day that is the first anniversary of the date on which it receives the Royal assent.
- (2) Sections 4, 86 to 96, and 116 to 118 come into force on the day after the date on which this Act receives the Royal assent.

### *Commencement by Order in Council*

Delaying the commencement of legislation until a date specified by the Governor-General by Order in Council provides the most flexibility to implement administrative machinery, regulations or other secondary legislation required for the successful implementation of an enactment, before it comes into force.<sup>1</sup> It is useful when there is a clear reason for delay and it is not easy to estimate the exact period of delay.

However, because this method of commencement runs a risk of thwarting the will of Parliament by an Executive that no longer supports the policies of the Act, you must have good reasons for using this method and always include a backstop commencement date. See Chapter 15 for more guidance on commencement by Order in Council.

You need to reassess whether an Order in Council commencement is truly necessary once a Bill approaches the Committee of the whole House stage. At this point, it may be clearer when a Bill is

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<sup>1</sup> Note that this method is not suitable if you need the Act to commence quickly after enactment because time is required to put a commencement Order in Council in place (and comply with the usual "28-day rule").

likely to pass and how long will be needed for preparatory steps before it can commence. If possible, replace the Order in Council commencement with a fixed date commencement.

PCO monitors the extent of legislation that is not yet in force (“latent legislation”) and reports on this annually as latent legislation undermines certainty of the law.

**Example of commencement by Order in Council**

**Land Transfer Act 2017, [section 2](#)**

- (1) This Act comes into force on a date appointed by the Governor-General by Order in Council.
- (2) ...
- (3) Any provision that has not earlier been brought into force comes into force on the day that is 18 months after the date on which this Act receives the Royal assent.

*Commencement by a combination of methods*

**Example of a combination of methods**

**Legislation Act 2019, [section 2\(1\)](#)**

- (1) This Act comes into force as follows:
  - (a) section 147 (which contains regulation-making powers) comes into force on the day after the date of Royal assent:
  - (b) the rest of this Act comes into force—
    - (i) on 1 or more dates set by Order in Council; or
    - (ii) to the extent not brought into force earlier, on the fifth anniversary of the date of Royal assent

In some cases, a combination of methods is needed (but bear in mind the warning about the risks of complexity below).

*Complex commencements*

Exercise caution when you rely on overly complex commencement plans (particularly if some Parts or provisions of the legislation will be commenced significantly in advance of others). The legislation needs to work effectively at each point of time. It is very easy for this to go wrong in practice if there are too many different dates and interdependencies.

*Automatic commencement or commencement dependent on independent events*

Commencements that are automatic or conditional on some independent event (for example, the entry into force of a treaty) are generally not advisable. While they may be effective legally, they will often cause uncertainty to users (who may not know whether or not the event has occurred).

**Further reading on commencement clauses**

Gobbi ‘*When to Begin: A Study of New Zealand Commencement Clauses with Regard to those Used in the United Kingdom, Australia, and the United States*’ (2010) Statute Law Review 31(3), 153.