



To	Hon David Seymour, Minister for Regulation		
Title	Possible approaches to public recourse mechanisms	Report number:	2024-015
Date	17 May 2024	Priority:	Medium
Action Sought	Discuss with officials	Due Date	21 May 2024
Contact Person	Pip van der Scheer, Manager, Regulatory Strategy	Phone	9(2)(a)
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Attachments	Yes	Security Level	IN CONFIDENCE

Executive Summary

1. This report and the attached slide pack are intended to support a discussion on public recourse mechanisms at your meeting with officials on 21 May.
2. At this meeting, we are keen to confirm your objectives for this work and discuss your views on the key choices available.
3. The slide pack covers:
 - how the work on recourse mechanisms fits within the broader work programme
 - intended outcomes and assumptions
 - identification of gaps in the current landscape for public recourse
 - key choices to shape the design of recourse mechanisms.
4. Based on the outcome of this discussion, we propose to work up more detailed options for recourse mechanisms, for your consideration.

IN CONFIDENCE

LEGALLY PRIVILEGED



Recommended Action

5. We recommend that you:
 - a. **discuss** this briefing and the attached slides at your meeting with officials on 21 May
 - b. **agree** that this briefing will not be made public until proactive release of the final Cabinet paper, to ensure that you have sufficient time to consider and make decisions on the Bill.

Agree/disagree

Hon David Seymour
Minister for Regulation



Purpose of report

6. This report and the attached slide pack are intended to support a discussion on possible approaches to public recourse mechanisms as part of strengthening the quality of regulation, at your meeting with officials on 21 May.

Background

7. We previously provided you with a briefing on alternative mechanisms to the courts that would allow individuals and businesses to raise concerns where legislation does not comply with regulatory responsibility principles, and to have those concerns responded to (T2024/763 refers). That advice set out our initial thinking on some potential options, including a specialist tribunal, strengthened Parliamentary mechanisms, and an executive function within the Ministry for Regulation. It also noted the role of the sector reviews in providing an avenue for stakeholders to have their say about the impact of regulatory instruments in specific sectors.

8. 9(2)(f)(iv)

Analysis

Context

9. To inform more detailed advice on options for recourse mechanisms, we are keen to confirm your objectives for this work and your views on the key choices available.
10. As with our previous advice on the principles, we note that there are numerous interdependencies with work currently underway in other workstreams. **Slide 1** has been provided to you previously and sets out work relating to the regulatory responsibility principles in the context of the broader work programme.

Objectives and assumptions

11. **Slide 2** reflects our understanding of your overarching objective and sets out the relevant critical success factors from the previous briefing. We understand from discussion with you that, while you want to ensure people have avenues to complain about regulation that impacts on them, your overall objective is to make it more difficult for poor regulation to be passed, or for it to continue in place.
12. Slide 2 also identifies some assumptions about what recourse mechanisms should broadly cover, how they relate to existing accountabilities and mechanisms, and the nature of the outcomes they deliver.
13. One assumption is that we should look both at mechanisms that focus on the quality of legislation, and at recourse mechanisms that focus on the operation of regulatory systems and their direct impacts on regulated parties. We think these are likely to require different mechanisms.



14. We are keen to get your views on whether:
 - this accurately captures what you want public recourse mechanism(s) to achieve
 - you are comfortable with these assumptions
 - there are any other assumptions we should be making.

Identifying gaps and how they should be addressed

15. **Slide 3** sets out the main existing mechanisms that individuals and businesses can access to complain about regulatory (and other) matters. They fall broadly into parliamentary, executive and judicial mechanisms. **Slide 4** then summarises the scope and focus of these mechanisms, along with the remedies they provide.
16. As noted on **Slide 5**, there are no mechanisms specifically designed for people to complain about the quality of primary legislation, or to proactively raise issues in relation to the impact of regulation – however, strengthening or extending existing mechanisms or obligations could help achieve your objectives (e.g. requiring agencies to consult with regulated parties when reviewing their legislation, or extending the focus of the Regulations Review Committee to cover primary legislation). As noted in Slide 2, we are assuming any new or strengthened mechanisms should not duplicate or unhelpfully cut across the jurisdiction of existing mechanisms.
17. We are keen to get your views on what you see as the main gaps or weaknesses in the current landscape.

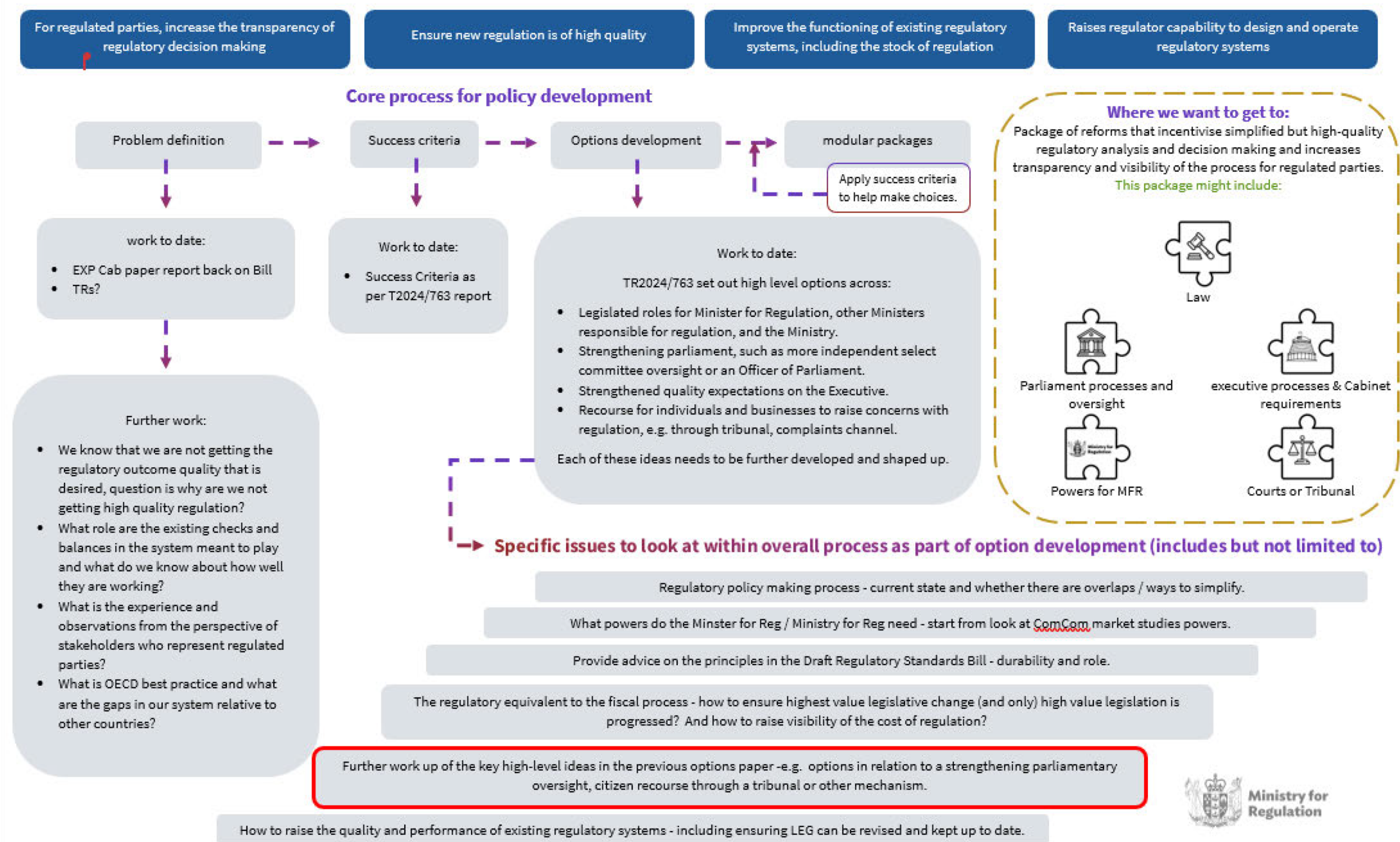
Choices determining the type and design of recourse mechanisms

18. **Slide 6** sets out what we see as some of the first order choices that might determine the type of recourse mechanisms, which relate broadly either to the intended scope of a mechanism, or the intended remedy it offers.
19. **Slide 7** focuses on choices that would determine the design of recourse mechanisms.
20. We are keen to get your views on whether:
 - there are any other first order choices to consider – i.e. before any further design features are considered
 - you have any immediate preferences in relation to these choices
 - there are any other design choices we should be considering
 - you have any immediate preferences in relation to these design choices.

Next steps

21. Based on the outcome of our conversation with you, we propose to provide you with a high-level analysis of options for recourse mechanisms, along with further advice on principles in the Bill.

1. Context: Current work programme



These A3s focus on recourse mechanisms, but there are clear interdependencies across the other workstreams - particularly in relation to work on the principles and sector reviews.

2. Objectives and assumptions

Overall goal is to create strong incentives to ensure new and existing legislation is necessary and high quality

Critical success factors
(ref T2024/763)

- Recourse for individuals and businesses to have their concerns about legislative design and the broader operation of regulatory systems heard and responded to
- Clear accountability for particular legislation and the operation of specific regulatory systems
- Transparency about any steps taken (or not taken) where regulation has been found to be inconsistent with standards

Assumptions
Any recourse mechanism should...

<p>Be based on the quality of legislation and the operational impacts of regulatory systems</p>	<p>Apply to legislation and regulatory systems that are already operational</p>	<p>Avoid cutting across the primary responsibility of the administering agency/Minister for particular systems</p>	<p>Avoid duplicating jurisdiction of existing mechanisms</p>	<p>Follow transparent processes and result in transparent outcomes</p>
<ul style="list-style-type: none"> • Recourse mechanisms would cover issues of legislative development and design, e.g. compliance with standards • Could also cover broader operation of regulatory systems including implementation - but as these are different objectives they are likely to require different mechanisms • Would not consider the overall intent or objective of regulation, nor funding issues 	<ul style="list-style-type: none"> • Recourse mechanisms would focus on legislation that has already been passed and enacted • They would not apply to regulation still going through policy or legislative processes 	<ul style="list-style-type: none"> • Recourse mechanisms would focus on reinforcing the accountability of responsible agencies for their legislation/processes • As part of this, individuals with complaints about particular legislation should still in the first instance go to the responsible Minister/agencies with any complaints • Where an individual is dissatisfied by this response, recourse mechanism could be an escalation point 	<ul style="list-style-type: none"> • Recourse mechanisms would not duplicate or unhelpfully cut across the jurisdiction of existing mechanisms e.g. tribunals or Parliamentary officers - noting that these generally focus on decision-making under specific pieces of legislation • If existing mechanisms are not operating effectively, this should be addressed by improving/strengthening them 	<ul style="list-style-type: none"> • As a starting point, the recourse processes should be transparent, and outcomes should be made public - while ensuring private or commercial material is appropriately protected • Any response from responsible Ministers/agencies should also be public

Does this accurately capture what you want public recourse mechanism(s) to achieve?
Are you comfortable with these assumptions? Are there any other assumptions we should be making?

3. Current landscape for public recourse

This slide sets out some of the main ways in which individuals and businesses can currently make complaints, including in relation to aspects of regulation. The sector reviews will also allow people to voice concerns about the impacts of regulation - although only in relation to the specific areas under investigation.

PARLIAMENTARY



Regulations Review Committee

Parliamentary petitions

Ombudsman

Can consider complaints on the operation of secondary legislation and can draw regulation to the attention of the House

Request that the House take a specific action in relation to any legislation or policy

Considers complaints about the administrative conduct of public sector agencies

EXECUTIVE



Contacting Ministers/agencies

Independent Commissions

Respond to general enquiries about any issue within their responsibility. Some agencies have contact points or internal review/appeal mechanisms

Operate as standing inquiry body to inquire into, investigate and resolve complaints relating to matters within their scope

JUDICIAL



Tribunals

Judicial review

Operate as a body to resolve disputes over facts and/or law as it applies to specific cases

Review the administrative actions or decisions of a public or private administrative body

4. Key design features of existing mechanisms

The existing mechanisms differ across key design features, which are set out in the table below.

Recourse mechanism	Design features			
	What type of issues does the mechanism consider?	Who can raise a complaint?	Does the organisation have discretion to not hear complaints?	What remedies/recourse are available?
Regulation review committee	Secondary legislation. Issues must be related to specific standing orders which are generally focused on consistency with the Primary legislation	Anyone	No, where complaint meets a ground in the standing orders	Declaratory (disallow regs)/recommendation powers <ul style="list-style-type: none"> Power to disallow regulations Government response required to RRC Report within 60 working days
Parliamentary petitions	Covers both administrative primary and secondary legislation, has a wide remit	Anyone	No, if petition meets requirements. Though petitions can be combined or referred to more appropriate body	Recommendation powers <ul style="list-style-type: none"> Committee's Reports are published to Parliament, or referred to Select Committee or relevant Minister Petitions Committee makes recommendations
Ombudsman	Covers both decisions and processes for decisions under primary and secondary legislation. Does not cover quality of legislation	Complaints where complainant has insufficient personal interest can be refused	Yes, on specified grounds (trivial, frivolous, insufficient personal interest, consider an investigation is unnecessary). Also, no complaint is required to investigate	Recommendation powers <ul style="list-style-type: none"> Report concerns to Ministry or table recommendations to Cabinet Issue recommendations and can require agency to respond
Raising with Ministers/agencies	Can raise any matter. Ministers may choose to obtain an independent review or establish a Royal Commission, public or government inquiry	Anyone	Yes, though likely to hear complaint and respond through letter/meeting	Recommendation/amendment powers <ul style="list-style-type: none"> Can inform future work programme, or particular response to complaint If inquiry established, has powers in the Inquiries Act
Independent Commissions e.g. Privacy Commissioner, Independent Police Conduct Authority, Transport Accident Investigation Commission	Depends on the scope of the entity, but generally focused on oversight of a body or an area of practice and investigation of matters within the scope of their functions. Can cover quality of legislation within their scope. Often have investigatory powers of a Commission of Inquiry	Depends on entity	Depends on entity, most have specified process grounds to decline, or where the complaint is trivial. Some entities have quite broad powers to decline (e.g. Privacy Commissioner)	<ul style="list-style-type: none"> Depends on the body For Privacy Commissioner, as part of settling a complaint they have compensatory powers For Independent Police Conduct Authority, its powers are primarily recommendation
Tribunals e.g. Human Rights Review Tribunal, Employment Relations Authority	Depends on the tribunal, includes reviewing government agency decisions or resolving civil disputes between parties by applying the law to the facts as determined by the tribunal. Does not cover quality of legislation	Depends on the tribunal	Depends on the legislation governing the tribunal. Some require a review before claim can be lodged (e.g. Human Rights Review Tribunal claims must be lodged with relevant Commissioner first)	<ul style="list-style-type: none"> Depends on the tribunal, each tribunal has its own powers set out in the relevant legislation Some can make recommendations which require reconsideration of decision (Immigration) Reinstate employees where unjustifiably dismissed (ERA) Damages/compensation Generally, tribunal decisions can be appealed to Courts
Judicial Review	Focused on the way the decision is made. Does not cover quality of legislation	Applicant must be directly affected or have legitimate concern	No	Declaratory/compensatory powers <ul style="list-style-type: none"> Quash decision Prohibit or order action Declaration

5. Possible gaps or weaknesses, and how they could be addressed

While mechanisms to address complaints about particular decisions made under legislation seem to be reasonably well established, accessibility may be an issue for some. Those mechanisms focused on the quality or general impact of legislation tend to involve significant discretion for the recipient about whether/how to respond.

The current landscape has a variety of options for general recourse, including some that allow people to proactively complain about the quality of legislation or about the impact of regulation - though none are designed specifically for that purpose.

Where there are gaps that need addressing, strengthening and/or extending existing mechanisms (e.g. the Regulations Review Committee) could be an alternative to creation of a new mechanism (e.g. a tribunal).

The choices set out on the next slide, along with the design choices on the slide following will help determine what options could be in scope.

Where do you see the key gaps or weaknesses in the current landscape in relation to recourse mechanisms?

6. Key choices for new mechanisms and remedies

We see these as first-order choices about what new mechanisms could cover and deliver

Scope of what's covered

What can be the subject of a complaint e.g. primary or secondary legislation or related administrative measures?

What are the allowed grounds for a complaint e.g. impacts on use and exchange of private property, or on any impacts/issues created by a regulatory system?

Is access to mechanisms limited (e.g. to those directly impacted or to New Zealanders only), or accessible to all individuals and businesses?

Is there discretion in what is considered, or must all issues raised be looked at?

Are complaints just limited to poor quality regulation, or can they also include requests for an area to be regulated or regulated more?

Should mechanisms apply to legislation immediately after it is passed, or should there be some sort of lag mechanism to allow for implementation?

Nature of remedy

What type of remedies are available (e.g. declarations; recommendations; actions)

Are any actions required as a result of these remedies?

Who does the remedy bind or require action/consideration from (e.g. Ministers, agencies, Parliament)?

Are there any other first order choices to consider - i.e. before any further design features are considered?
Do you have any immediate preferences in relation to these choices?

7. Design choices

We see these as second-order choices that focus on the design of recourse mechanisms

Degree of independence

How independent should new public recourse mechanism(s) be from the Government of the day? Is Ministerial oversight or greater independence preferable e.g. tribunals and independent commissions offer greater independence than mechanisms sitting within agencies.

Location

Where in New Zealand's constitutional framework should mechanisms sit e.g. should they sit within Parliament, the Executive or the Judiciary?

Degree of (de)centralisation

To what extent should mechanisms be centralised e.g. a central mechanism could have oversight of the operation of all regulatory systems, as opposed to an approach where responsible agencies are required to offer recourse mechanisms in relation to the operation of their systems?

Level and nature of expertise required

What is the nature of the skills and capability required and how can existing specialist expertise be most efficiently used e.g. a mechanism considering issues about the quality of legislation would need particular skills, but could also draw on the expertise of LDAC?

Cost

What sort of cost parameters do we have in terms of establishment, maintenance of recourse mechanisms e.g. establishing an entirely new body would likely cost much more than improving existing mechanisms?

Are there any other design choices we should be considering?
Do you have any immediate preferences in relation to these choices?