



To	Hon David Seymour, Minister for Regulation		
Title	Decision-making and implementation mechanisms for regulatory reviews	Number	2024-060
Date	5 July 2024	Priority:	Medium
Action Sought	Discuss with officials	Due Date	Tuesday 9 July
Contact Person	Melleny Black, Policy and Strategy Lead	Phone	9(2)(a)
Contact Person	Andrew Royle, Legal Lead	Phone	9(2)(a)
Attachments	Yes	Security Level	IN CONFIDENCE

Executive Summary

1. This briefing follows previous advice on powers for the Ministry for Regulation (Ministry) [2024-041 refers]. It focuses on what happens once the Ministry delivers a regulatory review (Review) report containing recommendations, and how those recommendations can translate through into timely action to improve regulatory systems.
2. In order to create the necessary onus and accountability for change, we consider that a process for decision-making and implementation of a Review should ideally include the following components:
 - timely public transparency of the recommendations of the Review
 - a Government response to the recommendations
 - monitoring progress in delivering the Government response.
3. This briefing is divided into two parts. Part One considers how best to achieve timely transparency and decision making in relation to the Review recommendations. Part Two considers how to monitor progress in delivering the Government response. Part Two also includes some early options we would like to test with you for enhancing the accountability and scrutiny on agencies to deliver. Both parts start from identifying what options are available already, under the status quo.
4. The concept of a Review, what it covers, and how we would go about it, continues to evolve as the Ministry is established and is learning about the challenges people are experiencing with existing regulatory systems.
5. Similarly, in many cases we would expect the status quo arrangements for Ministers and Cabinet to receive, consider and instruct agencies to take action on Reviews will be sufficient. However, we can also foresee situations where a more structured



process for the receipt, release and a Government response to a Review would be beneficial in creating timely action.

6. The key recommendation from this advice is that you seek Cabinet agreement to legislate for a class of Review that would have to be considered, released and responded to by Government within specified timeframes. The rationale for this is to ensure that, even when a Review is highly contentious, the decision-making process is timely and transparent.
7. In developing the options in this paper, we explored a broad range of options for encouraging action in response to Reviews by agencies. We consider that the most effective options will reinforce existing accountabilities and conventions in the public service and wider state service between portfolio Ministers, Chief Executives and (where relevant) Boards. While we have considered alternatives, we believe the best way to create a strong onus for action is to work with, rather than risk confusing, existing accountability arrangements.
8. Following discussion with you, we will continue developing the design of the preferred options.



Recommended Actions

We recommend that you:

- a **note** that this paper provides further advice on the mechanisms to support timely consideration and delivery on the recommendations of a regulatory review (Review) *Noted*
- b **note** that the briefing comprises two parts reflecting phases of the post-Review process
 - i. Part One: Decision-making - receiving, releasing and responding to Reviews; and *Noted*
 - ii. Part Two: monitoring delivery of the Government response
- c **note** that this briefing focusses on ensuring the post-Review process supports:
 - i. Public transparency of the recommendations of the Review; *Noted*
 - ii. A Government response to the recommendations;
 - iii. Monitoring of ongoing maintenance of progress against the Government response.
- d **note** that for Part One, the briefing identifies two approaches to receiving, releasing and responding to Reviews that will meet the objectives:
 - i. Option 1: the status quo, obtaining Cabinet agreement to the desired post-Review process. *Noted*
 - ii. Option 2: enhancing the status quo with a new statutory mechanism provided through the Regulatory Standards Bill.
- e **agree** to officials undertaking further work on the approach set out in Option 2 of Part One *Agree / Disagree*
- f **note** that Part Two explores new statutory mechanisms to support monitoring of the delivery of the Government response to a Review *Noted*
- g **agree** that officials should do further work to develop a statutory power for the Chief Executive of the Ministry to *Agree / Disagree*



require an agency (including a Crown Entity) to provide information on its progress in implementing recommendations resulting from a Review

- h **agree** to discuss with officials the options for how agencies might be required to report on progress in delivering on Review recommendations, as set out in Part Two of this briefing.

Agree / Disagree

Proactive Release Recommendations

- i **agree** that this briefing is withheld until the proactive release of the final Cabinet paper, to ensure that you have sufficient time to consider and make decisions on the Regulatory Standards Bill.

Agree / Disagree

9(2)(a)

Melleny Black

Policy and Strategy Lead

Ministry for Regulation

Date: 5/07/2024

Hon David Seymour

Minister for Regulation

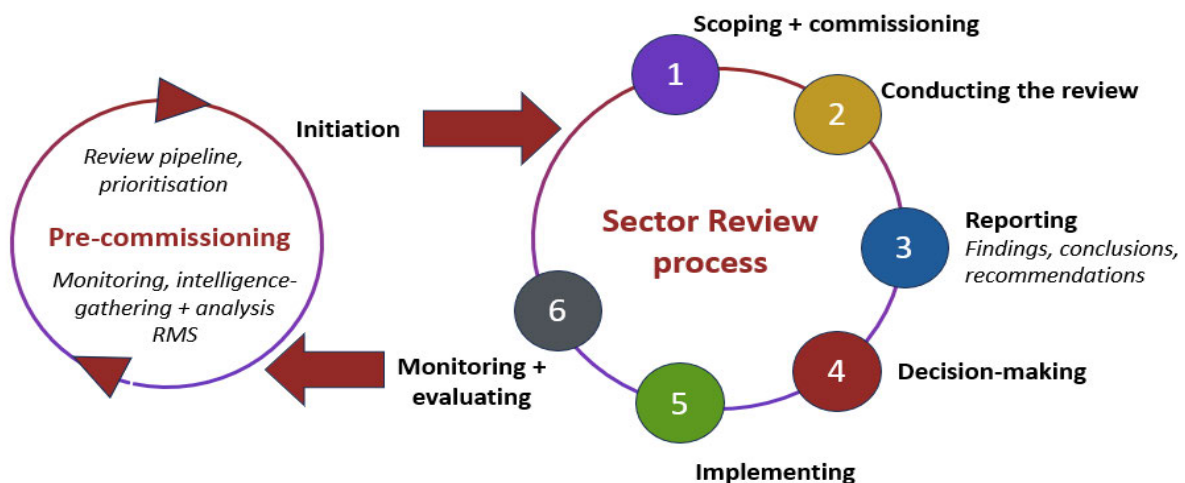
Date:

Purpose of Report

9. This report provides you with options for moving from the recommendations contained in a Ministry for Regulation regulatory review report (Review), to creating timely change in regulatory systems. It focusses on incentivising action through creating processes and mechanisms that will provide:
- timely public transparency of the recommendations of the Review
 - a Government response to the recommendations
 - monitoring progress in delivering the Government response.

Background

10. We previously advised you on proposed approaches for designing statutory powers for the Ministry to effectively undertake different phases of a Review, and for general functions such as monitoring the Regulatory Management System (RMS). Our advice was modelled on existing powers held by other agencies and Crown entities [refer to briefing 2024-041], which we considered may be useful or necessary.
11. You agreed that officials continue developing this work, and we indicated that we would advise you further on options for decision-making and implementation mechanisms.



Context

12. The Ministry for Regulation’s Reviews are intended to take the perspective of those impacted by and subject to regulations. The Reviews will seek to remove, clarify or



streamline regulations where appropriate, and to improve the ease of compliance with regulatory regimes.

13. Governments commission many Reviews that suggest recommendations for change, but these Reviews do not drive change on their own. Where there is no obligation to respond to or implement recommendations, or where the recommendations do not align with the reviewed party's priorities, they can easily be deprioritised. Deprioritisation may occur for many other reasons, such as resourcing or budget constraints, lack of space in the legislation programme or desire to progress work that is perceived as more urgent.
14. Even when recommendations are taken forward, implementation can be slow. This may be due to similar de-prioritisation issues, the time it takes to make legislative changes, or lack of clarity around implementation responsibilities. A slow pace of change risks the recommended changes failing to achieve expected outcomes or having disproportionate costs.
15. You have told us that once a Review is completed, there should be a strong onus on the relevant responsible Ministers and agencies to make changes in a timely manner. The Ministry's view is that the best way to do this will be to develop a robust decision-making and implementation monitoring process that provides transparency and strengthens accountabilities on relevant Ministers and agencies. The process will also need to provide for scenarios where the responsible Minister, agency, or Cabinet does not accept some, or all, of the recommendations.

Key assumptions

16. While the concept of a Review, what it covers, and how we would go about it, continues to evolve, we have made a number of assumptions that have informed the thinking behind this advice. These assumptions are based off our previous advice and discussions with you.
 - The Ministry will undertake its Reviews in an independent manner, and the final report will be owned by, and be the views and recommendations of the Ministry (and may also be supported by the other agencies that have been involved in the Review).
 - That there will be a range of different sizes and styles of Reviews. Some may be initiated primarily by the Ministry (in consultation with yourself) and may be relatively light touch in nature, reporting back just to yourself or a handful of relevant Ministers (e.g. rapid reviews).



- Other Reviews, such as the Early Childhood Education Review, may be more formally established e.g. through agreement by Cabinet to terms of reference, and may result in significant and complex recommendations.
- That Reviews may result in a range of different types of recommendations. To help inform our work we looked at the types of recommendations made by the Victorian Government's Red Tape Reduction programme. These included both legislative and operational changes, of varying complexities. Some recommendations may seek a specific change, while others may be to initiate further policy work by the relevant agency.
- The Ministry will need the ability to undertake Reviews that involve looking at the responsibilities of regulators outside the core public service, such as Crown entities.

Part 1: Transparency and responding to Reviews

17. In this part, we focus on the options for achieving:

- timely public transparency of the recommendations of the Review
- a Government response to the recommendations.

Cabinet agreement to recommendations will be key to making change

18. As most Reviews will have recommendations that impact on other Ministers' portfolios, we consider that the best way to get traction to make change to regulatory systems will be to get Cabinet support for the recommendations. The Cabinet as a collective holds the necessary range of levers to set direction for both public service agencies, and other forms of entity, and to introduce legislation or approve funding to ensure changes occur.

19. Under any option, we would envisage that once a Review is complete you would take the report to Cabinet. Consistent with the Cabinet expectations, the paper to Cabinet would ideally be a joint product with the key relevant Ministers (that is, those Ministers whose portfolios are impacted by the recommendations), but at a minimum there would be an expectation of consultation with those Ministers.

20. The paper submitting the report to Cabinet would set out your advice on the proposed next steps by the Government to the Review recommendations. For instance, that Cabinet agrees to some, or all, of the recommendations set out in the Ministry's report, and that relevant Ministers and departments take specific actions within certain time periods. In the extreme case where there are differing views between relevant Ministers on the recommendations to be put to Cabinet, that advice could contain alternative options for Cabinet consideration. Ultimately, where there are significant



differences in view or a failure to adhere to Cabinet expectations, it is the Prime Minister who has discretion to decide whether a paper is considered by Cabinet.

Option 1 – Fully utilise existing mechanisms under the status quo

21. Existing Cabinet processes, used well and with the agreement of Cabinet colleagues, can provide a pathway for achieving an effective outcome from a Review.
22. The key challenge in achieving a consistent process under the status quo is also one of the strengths of the Executive decision-making process itself – that Cabinet operates through collective agreement and with a high degree of flexibility. For instance, under the status quo there is no requirement for the Government to formally respond to Review recommendations by the Ministry, although it could choose to do so. Timeframes for consideration and release of reports, and any associated Cabinet papers would be uncertain and depend in part on how long Cabinet, supported by other agencies, needed to consider and possibly respond.
23. One option under the status quo to mitigate these issues would be to seek agreement from Cabinet at the beginning of a Review about matters such as how and when the Review recommendations would be made public, and the form and timeframe for the Government response. Potentially, you could seek Cabinet’s agreement to an ongoing set of expectations for how Cabinet will receive, respond, and follow up on agreed actions to Reviews. However, the option would always lie with Cabinet to agree to vary from that approach.
24. In summary, while we consider that it is possible to achieve the desired components of an effective process under the status quo, there may be situations where the complexity or nature of the Review mean that there might be considerable delays. In addition, Cabinet would need to establish its own requirement to respond to the recommendations.

Option 2 – Legislating a process for receiving, releasing, and responding to Reviews

25. As noted above, the status quo arrangements will likely be suitable for considering the recommendations from some Reviews. However, there will be others where the expected nature of the Review recommendations mean that there will be value in having a clear process in place that will be followed on completion.
26. We recommend legislating for a process by which Reviews would be received, released and responded to by Government, with timeframes for each step. Given there will be trade-offs associated with the Government being bound to respond under that process, the legislation would also need to set out when and how a Review would meet the threshold to be progressed along that pathway.
27. The approach we are proposing has some parallels with the Inquiries Act 2013. Under the Inquiries Act, when a public inquiry is completed, the final report must be



presented to Parliament by the relevant Minister. We propose that a similar requirement is put in place for Reviews so that the final Review must be presented to Parliament by the Minister who initiated the Review.

28. We also propose seeking a legislative requirement for the Government to provide a response to the Review to Parliament within a specified timeframe. In addition to making both the Review's findings and the Government's response public, this would provide a potential mechanism for ongoing Parliamentary oversight into the implementation of the Review's findings (discussed below).

Part Two: Monitoring Delivery of the Government Response

29. In this section, we discuss options for monitoring progress in implementing the Government's response and encouraging ongoing timely action.
30. In our analysis, we have considered a range of possible mechanisms that may support timely delivery of the agreed changes. The key issue we came up against was whether the Ministry or Minister for Regulation, as opposed to the responsible Minister or Cabinet, should have powers to in some way step in or give direction to another agency when progress is not being maintained or, in the case of operational matters, a power to direct a specific chief executive or agency when the approach being taken does not align with the Minister/Ministry's view on good practice.
31. Our recommendation is that any approach to ensuring progress in the Government response needs to reinforce, rather than cut across, established accountability arrangements within Government. The powers proposed in this section leave accountability for improving the performance of the regulatory system with the responsible Minister and agency (including monitoring agencies of Crown entities) and instead focus on strengthening existing accountabilities.
32. Below we:
- outline what we can do as a central agency (status quo)
 - recommend an additional power for the Chief Executive of the Ministry to be able to obtain information on implementation progress from other agencies, in order to allow for the Ministry to play a monitoring role if required
 - outline two additional possible ideas for strengthening accountability and progress reporting (Parliamentary and regulated party scrutiny) that we would like to discuss with you.
33. Appendix One outlines some other options that we considered, including the use of directions, and the problems we identified with those options.



What we can do as a central agency

34. As a central agency, we have a responsibility to work with other central agencies to help steward and improve the performance of government, including supporting agencies to make change where directed by Cabinet or Ministers. Some of the options available to us would include the following.

- working with other central agencies to ensure Chief Executive and agency performance expectations reflect requirements resulting from Reviews
- providing capability building support to help lift regulatory practice – for instance through guidance, tools and frameworks, and encouraging knowledge and capability sharing across agencies
- through our second opinion policy advice function, supporting agencies to make any required changes to legislation.

General information gathering powers and standard setting

35. Previous advice provided to you has suggested legislating for the Ministry to have a range of information gathering powers to support monitoring of how well regulatory systems are working. We have also suggested that – like other central agencies - the Ministry should have the power to set standards and issue guidance and instructions. (It may be that use of these powers by the Ministry is appropriately limited to public service departments, and/or that Ministers are required to utilise them for them to apply to Crown entities or wider agencies). These general powers would further increase the effectiveness of the Ministry in being able to monitor, support and encourage timely change following a Review.

Additional power to obtain information to support monitoring

36. To ensure that the Ministry is able to undertake a role in monitoring progress against the recommendations in a Review we propose that the Chief Executive of the Ministry should have a further specific statutory power to require any agency (including Crown entities where a statutory Review is undertaken) to provide information about its progress in implementing recommendations resulting from a Review. While this type of power is unlikely to be used often in practice, there may be situations where it is needed to obtain the required information, particularly in relation to agencies in the broader State sector.

Mechanisms for providing for ongoing reporting on delivery (Parliamentary and regulated party scrutiny)

37. We have also considered options for further strengthening accountability and transparency in relation to how agencies are delivering on Review recommendations. These are pieces of early thinking, but we would like to test the possibilities with you



and whether you would like us to explore them further. These options are based on the idea that accountability for progress will be strengthened when there is a requirement for transparency and an audience that is interested in that information.

Publication of progress through annual report

38. Publication of information in agency annual reports is one potential avenue of providing periodic transparency on how well agencies are delivering against Review recommendations. Incorporating longer-term reporting requirements into agency annual reports would likely reduce the administrative burden on the responsible agency, compared to requiring separate reports. Inclusion in annual reports may also support Parliamentary oversight and accountability, as Select Committees may draw on annual reports as part of scrutinising the performance of agencies.
39. The downside of this approach is that there is now a lot of information that must be included in an agency annual report, and this may not be the easiest way for people who are specifically interested in Review related information to find this.

Regulated party scrutiny

40. A key audience with an interest in monitoring the progress of Government in delivering change will be the relevant regulated parties, and others who were consulted as part of a Review. A somewhat creative option would be to create an obligation (likely through legislation) for agencies to report directly to regulated parties on their progress. While the mechanism and details of this approach would need to be further developed, it would likely have two key strands:
- a requirement for the relevant agency or agencies to periodically publish easily accessible and digestible information on their progress
 - a requirement to meet with regulated parties (or key representatives of regulated parties, possibly identified by the Ministry for Regulation, especially where the regulated parties are widespread or numerous) to allow them to ask questions, or provide feedback, about the changes made.
41. This type of approach would be relatively costly, and thus should probably be limited to a subset of Reviews (such as those established under statute, or a further subset of those). The obligation to report directly to regulated and consulted parties (or their representative) is likely to create a greater degree of “felt” accountability. An example of this sort of approach was taken by the Royal Commission on the Christchurch Terror Attacks, which published quarterly reports that summarised its activities and met regularly (nine times) with the Muslim Community Reference Group.
42. Further work would be needed to determine the appropriate mechanisms for reporting to regulated and consulted parties, if you agree to progressing this option.



Strengthening Parliamentary scrutiny and oversight

43. In Part One of this advice, we recommended creating a statutory pathway for receiving, releasing and responding to some Reviews, which would include the Government response being tabled in Parliament. Our understanding is that if a report is tabled in Parliament the Speaker may designate the report to be a Parliamentary paper. In that circumstance it is automatically referred to a select committee to examine and report to the House within a specified timeframe. Consequently, tabling in the House could potentially create a mechanism for ongoing Parliamentary scrutiny as to whether the Government is delivering on its response to a Review.
44. As previously discussed, the Regulations Review Committee may consider any matter relating to secondary legislation, including complaints about the operation of secondary legislation, and report on it to the House. The Regulations Review Committee also has considerable powers to summon officials and look into regulatory matters.
45. We are already exploring the feasibility of strengthening Parliamentary oversight as a complement to other measures that would be contained in the Regulatory Standards Bill. With your agreement, we could also explore further whether there may be an opportunity to have Review reports referred to the Regulatory Review Committee, and have that Committee play a role in holding the Government to account for improving the functioning of regulatory systems.

Next Steps

46. This briefing is intended to be used for discussion at your meeting with officials on Tuesday 9 July.
47. Following this discussion, the Ministry will undertake detailed design work on your preferred options, including the appropriate checks and balances.



Appendix One

In working our way through the best ways to ensure that Reviews will result in effectively and timely change, we considered a range of alternative options that we do not recommend pursuing further. These primarily related to whether the Ministry or Minister should seek powers from Cabinet, or through statute, to more directly intervene in a regulatory system to make change. For instance:

- a statutory power for the Minister for Regulation to direct an agency, which is outside of their portfolio responsibilities, to undertake specific policy work or make other changes in response to a Review.
- a statutory power for the Ministry for Regulation to direct another agency as to how to undertake a specific operational function (for instance, to change the way it undertakes enforcement activities).

Our assessment is that these types of options would be highly problematic as they cut across existing lines of accountability and responsibility. For instance, with respect to any financial implications that may accompany regulatory change proposals, under the Public Finance Act 1989, ‘responsible Ministers’ are responsible to Parliament for the financial performance of the agencies in their portfolios and for protecting the Crown’s interest in those agencies. In the worst case, should unforeseen complications, issues or costs arise, there may be questions about whether accountability continued to lie with the relevant portfolio Minister and Chief Executive, or had transferred to the Minister and Ministry for Regulation.

Cutting across lines of accountability is likely to have unintended consequences and add complexity to constitutional and regulatory arrangements. Regardless, in our view, in most cases there will be benefit in providing responsible Ministers and agencies with the opportunity to set the process to address Review recommendations themselves. This approach is more likely to lead to greater political and agency buy in and lasting regulatory improvement. In those cases where agencies are not addressing the Review’s recommendations as directed by Cabinet, we would discuss suitable options with you, such as raising the issue with relevant portfolio Ministers or reporting back to Cabinet.

We also considered whether the Minister for Regulation should have a standing power granted by Cabinet to direct the Parliamentary Counsel Office (PCO) to undertake legislative drafting ahead of a Review being considered by Cabinet. The purpose of such a power would be to reduce the time from when the Review recommendations are identified to when legislative change can be introduced.

We note that there are existing mechanisms by which PCO may be asked to draft ahead of policy decisions, although this is usually reserved for urgent matters (such as where an emergency response requires an urgent legislative change).