

Regulatory Impact Statement

A New Workplace Health and Safety Regulator

Agency Disclosure Statement

- 1 This Regulatory Impact Statement has been prepared by the Ministry of Business, Innovation and Employment.
- 2 It provides an analysis of options to identify the most appropriate structure for New Zealand's workplace health and safety regulator. The options are aimed at addressing concerns raised about the effectiveness of current structural arrangements and overall performance of the regulator. The RIS provides analysis of the options for the high-level structure of the regulator and some key design features. Further, more detailed design decisions will be sought in an April Cabinet paper and an associated RIS.
- 3 The analysis in this RIS supports a recommendation to create a new Crown agent as the workplace health and safety regulator. The analysis builds on the work undertaken by the Royal Commission on the Pike River Tragedy (the Royal Commission) and the Independent Taskforce on Workplace Health and Safety (the Independent Taskforce). The analysis is necessarily limited because it is difficult to attribute the problems identified with the health and safety regulatory system to the structure of the regulator. There are various other proposals and work currently underway to address concerns about the regulatory and operational environment for workplace health and safety in New Zealand. These proposals will work in conjunction with each other to support better workplace health and safety outcomes.
- 4 The analysis is based on the proposition that there have been various concerns identified with the way that the regulator is structured and operates. These concerns coincide with relatively poor health and safety outcomes in New Zealand and the high-profile Pike River tragedy. It is not possible to prove a causal link between the structure of the regulator and these outcomes. However, what is most significant is that these issues appear to have led to a loss of confidence by the regulated community in the ability of the regulator to operate effectively with its current structural arrangements.
- 5 There are varying degrees of certainty about the analysis of the options for the structure of the regulator. The analysis is based on organisational theory and the incentives created by different appointment, reporting and accountability provisions. It is also informed by what we know occurs in practice with departments and Crown Entities. The analysis of what would occur under a departmental agency structure is more uncertain because this particular organisational form is largely untested.
- 6 None of the policy options are likely to have the effects that the government has said will require a particularly strong case for regulation.

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Status Quo and Problem Definition

Background to decisions being sought

The Royal Commission on the Pike River Coal Mine Tragedy

- 7 The Royal Commission on the Pike River Coal Mine Tragedy's (the Royal Commission) report released in October 2012 identified a range of problems with the regulatory environment for workplace health and safety¹ and made various recommendations about both the regulation and the appropriate structure for New Zealand's workplace health and safety regulator. The Commission recommended that to improve New Zealand's poor record in workplace health and safety, a new Crown agent focusing solely on workplace health and safety should be established.
- 8 The Government has already responded to the majority of the Commission's recommendations. In the Government's response to the Royal Commission's report, Cabinet noted that the problems at the Pike River Coal Mine coincided with inadequate oversight of the mine by a workplace health and safety regulator that lacked focus, resourcing and inspection capacity. In relation to the recommendation about the new regulator, Cabinet:
 - Invited the Minister of Labour to request the Independent Taskforce on Workplace Health and Safety (Independent Taskforce) to report back to the Minister on the organisational design options for a health and safety regulator identified by the Royal Commission; and
 - Agreed that the Government will consider the most appropriate organisational design for a health and safety regulator following the report back of the Independent Taskforce.

The Independent Taskforce on Workplace Health and Safety

- 9 The Independent Taskforce was established by the Government in April 2012 to undertake a strategic review of whether the New Zealand workplace health and safety system remains fit for purpose.
- 10 In response to the Government's request for design options for a health and safety regulator, in December 2012 the Independent Taskforce also recommended that an independent health and safety regulator in the form of a Crown agent, should be formed.
- 11 The decisions currently being sought are based on the Independent Taskforce's advice on the form of the workplace health and safety regulator. However, we are conscious that Independent Taskforce's final report has not yet been received by the Government. The final report of the Independent Taskforce may impact on the some of the detailed design aspects of the regulator; if this is the case further decisions will be sought from Cabinet along with an associated RIS where appropriate. However, the final report of the Independent Taskforce will not impact on the decision of the form of the workplace health and safety regulator.
- 12 Other recommendations from the Independent Taskforce are likely to result in broader reform of the workplace health and safety legislation and other significant parts of the workplace health and safety system. This work will be progressed on a slightly longer timeframe to the establishment of a new regulator.

¹ The Royal Commission limited its consideration to the underground coal mining workplace health and safety system. The Royal Commission recommended that its recommendations for underground coal mining should be considered where appropriate for application to the wider workplace health and safety system.

Status quo – current workplace health and safety regulatory structures

- 13 Responsibility for workplace health and safety policy and operations primarily sits within the Ministry of Business, Innovation and Employment (MBIE) which administers the Health and Safety in Employment Act (the HSE Act) and enforces the Hazardous Substances and New Organisms Act 1996 (the HSNO Act). MBIE came into existence on 1 July 2012 and took over workplace health and safety responsibilities from the former Department of Labour.²
- 14 There are several other agencies that do work with implications for workplace health and safety. Key agencies are:
- The Civil Aviation Authority – has been designated to administer the HSE Act for civil aircraft while in operation. Maritime New Zealand – has been designated to administer the HSE Act for work on board merchant ships.
 - The Police's Commercial Vehicle Investigation Unit – has staff warranted under the HSE Act to undertake enforcement of workplace health and safety for commercial vehicles.
 - ACC – undertakes injury prevention activities for workplaces under the Accident Compensation Act 2001.
 - Ministry for the Environment – policy agency responsible for the HSNO Act.
 - Environmental Protection Agency – regulates the HSNO Act.
- 15 The Workplace Health and Safety Council is a tripartite body intended to lead and oversee the implementation of the Workplace Health and Safety Strategy. It was established in 2007, in part to meet international Labour Organisation Convention 155, on workplace health and safety at a national level. The Council provides leadership and co-ordination, advising government on workplace health and safety legislation, strategy, standards and policies.

Problem definition

Workplace health and safety outcomes in New Zealand

- 16 It appears that New Zealand has a poor workplace health and safety record compared to other advanced countries.

² The organisation of health and safety functions within MBIE has changed since the Royal Commission submitted its report. At the time of the Royal Commission's consideration the health and safety functions were to be part of a regulatory practice group within MBIE which was intended to be responsible for administering a range of laws and regulation. In anticipation of further structural change, MBIE has reorganised itself to provide a dedicated health and safety group. A dedicated health and safety group within MBIE is the status quo structure the Taskforce considered.

- 17 In its 2012 consultation document, the Independent Taskforce identified that each year over 100 people die from workplaces accidents. In addition:
- Between 700 and 1,000 people die as a result of gradual work-related diseases.
 - Over 6,000 people notify MBIE of a serious harm incident in their workplace.
 - Around 190,000 people claim medical costs from ACC as a result of being harmed at work. Of these:
 - Around 23,000 people are injured seriously enough to be off work for more than a week.
 - Around 370 people are injured seriously enough to require hospital care and be diagnosed with a life threatening condition.
 - New Zealand’s workplace injury rates are about twice that of Australia and almost six times that of the UK.
 - As well as the emotional toll on families and communities the economic and social cost of work related injuries to our nation is around \$3.5 billion dollars.
- 18 In late December 2012 Statistics New Zealand issued a media statement advising that it had quality concerns with work-related indicators and is working to fix them. The release went on to say that it recommends no future use is made of the data on work-related injury in earlier publications until its review is complete. The indicators report on work-related injuries is expected to be published by the end of March 2013. In the absence of that report back, the statistical information referred to above should be treated with some caution.

The regulator

- 19 Both the Royal Commission and the Independent Taskforce have identified a series of concerns about the structure and performance of the current regulator. These concerns are broad-ranging. Some may be more attributable to the regulatory environment within which the regulator operates and some relate to broader issues of resourcing and capability. This RIS only covers problems and responses that relate to or could be associated with the structure of the regulator.
- 20 Problems have been identified with **a lack of national leadership on workplace health and safety and gaps and clarity of regulatory responsibilities**. The Royal Commission noted that there was a lack of national leadership by the department, which has damaged its credibility. The Independent Taskforce noted:

[having] Multiple agencies can lead to public confusion about who does what. The Workplace Health and Safety Council has noted there is currently a lack of clarity in the area of regulatory roles in New Zealand and that this may have implications for health and safety outcomes. Anecdotal evidence suggests there is still confusion after the discontinuation of the “OSH” brand more than seven years ago.

While agency operations frequently complement and reinforce each other, this is not always the case. The Taskforce understands that there is also:

- inconsistent practices across agencies
- overlapping jurisdictions
- a lack of coordination in activity between agencies
- ambiguity regarding the lead workplace health and safety agency for the public in relation to specific events

Multiple agencies were seen as confusing for the public. In particular injury prevention functions of MBIE and ACC were seen as overlapping and lacking in coordination.

- 21 Concerns have also been raised about the current regulator's **focus and culture**. The Royal Commission considered that there was "insufficient departmental focus and expertise regarding health and safety, especially at the senior management levels, caused by its multiple functions, its organisational structures and management gaps in its multi-year strategies and planning, poor performance measures and infrequent self-review". The Independent Taskforce also noted that "Constant restructuring of Government Departments responsible for workplace health and safety was seen as reducing the visibility of the inspectorate."
- 22 At the time of the Pike River tragedy the Department of Labour (DOL) was responsible for regulating workplace health and safety. Since then DOL has become part of the Ministry of Business Innovation of Employment. Aside from the structural change there has also been considerable effort put into the health and safety area, including the establishment of a high hazards group and an extensive change programme in MBIE's delivery of frontline workplace health and safety services with the goal of "becoming a world class health and safety regulator. However, to the extent that these concerns flow from the incentives established through a departmental structure over time, they will continue to be valid.
- 23 Issues have also been identified with the current regulator's **governance arrangements**. In particular, the Royal Commission noted that there was no shared responsibility at governance level, including the absence of an active tripartite body. It also noted that expert advice from the National Occupational Health and Safety Advisory Committee had not been followed, for example, on the need for approved codes of practice.
- 24 The regulator is one part of the overall system that influences workplace health and safety outcomes in New Zealand. It is not possible to prove a causal link between the structure of the regulator and overall health and safety outcomes. However, there are problems relating to the structure which can be addressed.
- 25 In totality, these concerns also reflect that **New Zealand's health and safety regulator does not operate and is not structured in a way that gives confidence** to workers, businesses or the government that it is working effectively to achieve the shared objective of the prevention of harm to people at work. This lack of confidence affects both the ability of the regulator to do its job and the government's and public's trust that workplace health and safety objectives can be achieved. Given the importance of workplace health and safety to the wellbeing of New Zealanders and the economy more generally, this lack of confidence represents a significant problem. Addressing the structure of the workplace health and safety regulator is a necessary step to rebuild public confidence in achieving the sought after step change in New Zealand's health and safety outcomes.

Objectives

- 26 In order for any regulatory supervision system (i.e. administration, enforcement, education policy and strategy development functions) involving the regulator and government to work effectively, the following features are desirable. Some of these objectives are more critical than others to the success of the regulator. Given the problems identified with lack of confidence in the regulator, objectives around public credibility and a primary focus on health and safety, are likely to be critical. These objectives link with independence from government, because this (or at least a perception of independence) is likely to be seen as a precursor to establishing credibility and a primary focus.
- 27 Objectives around policy effectiveness, dealing with poor performance, appropriateness of funding and efficiency of operations are very important considerations and any option that largely fails to meet these objectives would not be feasible. The other objectives of ease of implementation, capability and managing conflicts will depend not only on the regulatory structure but on how it is implemented. These objectives are likely to be critical in the detailed design of the regulator. The preferred option should best meet most of the objectives, while not falling too far below the bar on any.
- 28 The objectives are derived from a combination of the work undertaken by the Royal Commission, the Independent Taskforce, organisational design theory and experience with the operation of regulators:
- **Regulator independence from day-to-day government interference.** This indicates a structure which allows the regulator to be able to carry out administration and enforcement without Government interference, to have the confidence to have a public voice, particularly on issues of enforcement, focus, strategy and resourcing – and to be able to advocate for change where needed. It needs to be able to do this over the medium term.
 - **A primary focus on workplace health and safety.** This indicates a structure which will help ensure that the regulator is, and is seen to be, focussed primarily on workplace health and safety outcomes and is not easily able to be diverted or distracted by other, competing priorities.
 - **Public credibility** – This indicates an ability to connect with the regulated community in an informed manner (i.e have the required expertise and focus) and work with the range of parties that influence health and safety outcomes. The regulator needs to be sufficiently connected and have sufficient capability and capacity to know what is going on in the regulated sector, to understand the impact of its actions and to effectively implement workplace health and safety policy.
 - **Policy effectiveness** – This indicates a structure which ensures workplace health and safety is set within a broader policy, strategic and political context and that there is effective work and coordination on workplace health and safety across government. More specifically, it indicates a structure which enables an elected government to be able to sufficiently control strategy, direction and policy, while maintaining an environment where contestable advice can be given by a regulator with a real say in policy development and that works closely with government on workplace health and safety issues.
 - **Mitigating risk of poor performance**-This indicates a structure that enables the government to deal quickly and effectively with a regulator that is not adequately achieving the objectives set for it.

- **Appropriate level of funding** - This indicates a structure that enables implementation of a funding model which ensures the regulator is sufficiently focussed on priorities, operates efficiently and enables sufficient checks and balances to ensure the funding level is appropriate and proportionate. The structure should also enable the regulator to advocate for and effectively influence funding decisions, and to maintain the ability to do so in medium term.
- **Efficiency of operation** - This indicates a structure that makes the most efficient use of available resources for to it to achieve better workplace health and safety outcomes.
- **Ease of implementation and sustainability** - This indicates a structure that can be implemented quickly and efficiently and is also sufficiently flexible to sustain the regulator's ability to meet the government's objectives over time.
- **Appropriate skills and capability** – This indicates a structure that enables the regulator to recruit and retain skilled and capable staff in key areas, such as enforcement, education and policy development.
- **Management of potential for conflicting roles** – This indicates a structure where risks around conflict of role (e.g. a policy and an enforcement role) can be effectively minimised or mitigated.

29 In considering these objectives, we have recognised that structural decisions may be necessary, but not sufficient, to enable the desired workplace health and safety outcomes. Design details can assist with mitigating some of the risks of options or enhance the effectiveness of options. Non-regulatory design features such as organisational culture, monitoring strategies, resourcing and recruitment can also have a significant impact.

Regulatory Impact Analysis

Risk of taking decisions now

- 30 The form of the regulator is one of a series of issues and measures that are being considered and implemented as a result of the Royal Commission Report, the Independent Taskforce and other operational reviews of the way that workplace health and safety is regulated. This includes a review of workplace health and safety legislation and regulation and a significant change programme within MBIE. The structure of the regulator is only one part of this system and will only be a contributing factor to the overall success of these series of measures.
- 31 Considering and implementing changes to various parts of the overall system at the different times carries some risk. It makes it more difficult to measure the impact of particular changes. There is also the potential for the regulator to be designed in a way that is not a good fit with the eventual nature of the regulation that it will be administering. We do not consider this to be a significant risk in this case, but it is one that needs to be monitored and managed. Certain changes can be made to the functions and powers of the regulator as part of the wider reform of workplace health and safety, as long as they are consistent with the overall purpose of the regulator

- 32 In all of the reform there is a clear ‘direction of travel’. Improvements are being sought to the regulatory environment to ensure that those involved in the system of workplace health and safety are appropriately responsible and accountable for their actions and that the regulator has the necessary governance, structure, resourcing and tools to be able to effectively and efficiently enforce the regulation. The regulator can be set up now to deliver this outcome, and given the significant impact of workplace health and safety on the lives of all New Zealanders it is not appropriate to delay the establishment of the regulator.
- 33 There is also a risk associated with not taking decisions at this stage. The Royal Commission and the Independent Taskforce have both recommended change to the structure. Delaying a government response to those recommendations until after changes to the substantive legislation have been agreed is likely to further diminish public confidence in the system of workplace health and safety.
- 34 One benefit of progressing decisions on the structure of the regulator now is that it enables the regulator to have input into the substantive legislative changes. The establishment of the Financial Markets Authority (FMA) has shown the value of this. The FMA was established in advance of a significant review of financial markets regulation. The FMA has fully participated in and added significant value to the regulatory review. It has been able to do so largely as a result of its close connections with and understanding of the regulated community.
- 35 Given these factors, our view is that a decision on the structure of the health and safety regulator should be taken now.

Scope, functions and structural options

Scope and functions of the regulator

- 36 The Cabinet paper proposes that the that the enforcement functions for workplace health and safety within MBIE (including its functions under the HSE Act, the HSNO Act, and Machinery Act) transfer to the new regulator and that the regulator should have the ability to have voice in policy development, particularly in the design of technical standards.
- 37 However, it is not yet clear whether the Independent Taskforce will recommend functions from other agencies should also transfer to the new regulator or alternatively if it will recommend that the scope of the functions are narrowed from those undertaken by MBIE in order to provide better focus to the new regulator.
- 38 Consideration of whether the new regulator should have additional health and safety functions from those carried out by MBIE will be undertaken as part of the wider reform of workplace health and safety legislation when there has been sufficient time to work through the issues. These issues are therefore outside the scope of this RIS. However this does not prevent an initial decision on structure being taken at this stage.
- 39 The Cabinet paper proposes that the regulator undertake the following functions which are drawn from the Independent Taskforces recommendations, Australian national model law on workplace health and safety and reflect the requirements of the International Labour Organisations (“ILO”) labour conventions that have been ratified by New Zealand:
- a. To advise the Minister on the operation and effectiveness of the primary workplace health and safety legislation (currently the Health and Safety in Employment Act 1992) and workplace health and safety system, and make recommendations for legislative and system changes. This includes identifying and reporting on inconsistencies between the primary workplace health and safety legislation that the agency administers and any other Acts.

- b. To make recommendations to the Minister on the level of any funding, including levies or fees, required to effectively carry out its legislative functions.
 - c. To monitor and enforce compliance with the primary workplace health and safety legislation
 - d. To set technical standards and develop codes of practice as required under the primary workplace health and safety legislation
 - e. To provide guidance, advice and information on workplace health and safety to duty holders under the primary workplace health and safety legislation and to the community
 - f. To promote and support education and training on workplace health and safety matters
 - g. To collect, analyse and publish statistics relating to workplace health and safety
 - h. To foster a co-operative, consultative relationship between duty holders and the person to whom they owe duties and their representatives in relation to workplace health and safety matters
 - i. To engage, promote and co-ordinate the implementation of workplace health and safety, including the sharing of information, with regulators and other agencies that contribute to workplace health and safety.
 - j. Any other functions conferred on the Crown agent by any other act.
 - k. Perform any additional function that the Minister directs under section 112 of the Crown Entities Act 2004.
- 40 These proposed functions are closely linked to the objectives identified for the regulator. The policy function for the regulator to report on the regulatory environment reflects the objectives of adequate funding, public credibility and policy effectiveness. Participation and promotion are closely linked to the objective of credibility. Compliance and enforcement functions will be critical for the regulator to be able to achieve its overall objective of securing the health and safety of people in the workplace.

The structure of the regulator

41 The table below sets out the key features of the feasible options for the structure of the workplace health and safety regulator. Key lower-level design features of the preferred option are addressed in the implementation section.

	Department (status quo)	Departmental agency	Crown agent	Autonomous Crown Entity	Independent Crown Entity
Ease of establishment	No establishment required – status quo	Added to State Sector Act Schedule 1A by Order in Council [if State Sector and Public Finance Reform Bill passed]	Specific enabling legislation required	Specific enabling legislation required	Specific enabling legislation required
Governing body	Governed by Chief executive, appointed and removed by State Services Commissioner	Governed by Chief executive, appointed and removed by State Services Commissioner	Governed by Board, appointed by Minister and removed by Minister at any time, entirely at discretion	Governed by Board, appointed by Minister and removed by Minister at any time for any reason that justifies the removal	Governed by Board, appointed by Governor-General on recommendation of Minister and removed by Governor-General for just cause on Minister's advice after consulting Attorney-General
Ministerial power to direct on government policy	Broad powers, department must give effect to any lawful instruction	Broad powers, department must give effect to any lawful instruction	Entity must give effect to government policy if directed	Entity must have regard to government policy if directed	No Ministerial power, unless express legal provision. But subject to 'whole of government direction'.
Relationship with department	N/A	Departmental agency sits legally within a host department, operates within the policy and funding framework of the host department	No legal relationship but department acts as Minister's monitoring agent	No legal relationship but department acts as Minister's monitoring agent	No legal relationship but department acts as Minister's monitoring agent
Relationship with Minister	Department chief executive is directly responsible to the responsible Minister for all activities of the Department	Departmental agency chief executive is directly responsible to the responsible Minister for clearly defined activities	Board is responsible to the responsible Minister for all decisions and actions of the Crown Entity	Board is responsible to the responsible Minister for all decisions and actions of the Crown Entity	Board is responsible to the responsible Minister for all decisions and actions of the Crown Entity

Assessment of performance	State Services Commissioner assesses performance of chief executive	State Services Commissioner assesses performance of chief executive	Board assesses performance of chief executive. Department assists responsible Minister in assessing board performance.	Board assesses performance of chief executive. Department assists responsible Minister in assessing board performance.	Board assesses performance of chief executive. Department assists responsible Minister in assessing board performance.
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Analysis of structural options

42 The Autonomous Crown Entity and Independent Crown Entity were considered, but were discarded at an early stage. These forms of Crown Entity are less able to be directed by government than a Crown agent, and therefore have a stronger ability to establish independence from government than the other options. However, given the distance from government, this is coupled with less ability to influence government strategy and regulation. Effective participation of the regulator in policy is a critical objective – it was a key factor in the Independent Taskforce’s recommendations to government and will be important to establishing credibility for the regulator. In addition, it is significantly more difficult for the government to deal with poor performance of the regulator in an efficient way than with either a department or a Crown agent.

43 Of the remaining options, the State Services Commission view the departmental form as the default option for any new government agency. Given this, and the recommendations of the Royal Commission and the Independent Taskforce, the primary structural options are the status quo, the Departmental agency and a Crown agent.

- The following table provides an analysis of the remaining options against the objectives.

	Department (status quo)	Departmental agency	Crown agent (preferred option)
Independence from day-to-day government interference	Partially meets objective Run by a CE directly responsible to the Minister. Can be broadly directed by the government. Can be given statutory independence for its roles and functions.	Partially meets objective Run by a CE directly responsible to the Minister. Can be broadly directed by the government. Can be given statutory independence for its roles and functions.	Meets objective Is governed by a statutory board appointed by the Minister. The Entity must give effect to government policy if directed. The Entity is able to obtain the necessary independence from its establishing legislation and the legislation it enforces giving it a clear focus.
Primary focus on workplace health and safety	Does not meet objective MBIE has a wide range of objectives, work and resources are prioritised on a department-wide basis.	Meets objective The departmental agency is able to have a primary focus, with the CE of the agency directly responsible to the Minister for clearly defined activities.	Meets objective A Crown agent is able to have a primary focus established through its governing legislation. Having a focus from legislation is more long-lasting than just ministerial priorities.

<p>Appropriate level of funding</p>	<p>Partially meets objective</p> <p>Internal checks and balances and accountability of CE help ensure spending is efficient and put to appropriate use, so is more assurance than under non-departmental option of efficiency of spend.</p> <p>However, any bids for changes to the regulator's overall level of funding have the potential to be constrained by the department as part of the budget process. It can internally advocate for more funding but public advocacy would not be acceptable. There is therefore less assurance than other options of sustainability of funding levels over time.</p>	<p>Partially meets objective</p> <p>Internal checks and balances and accountability of CE help ensure spending is efficient and put to appropriate use, so is more assurance than under non-departmental option of efficiency of spend.</p> <p>The departmental agency operates within the policy and funding framework of the host department. Any bids for changes to the overall level of funding have the potential to be constrained by the department as part of the budget process. The CE of the agency may be better placed than a manager within a department to advocate for funding, but public advocacy unlikely to be acceptable. There is therefore more assurance than under the status quo, but less assurance than non-departmental options of sustainability of funding levels over time.</p>	<p>Partially meets objective</p> <p>The Crown agent is accountable to the Minister for delivery of outcomes in accordance with agreed outputs and appropriations. This is monitored by the department. There is likely to be less assurance than under departmental models of efficiency of spend.</p> <p>The Crown agent is able to advocate to its monitoring department and Ministers for changes to funding as part of the budget process. This advocacy will not be constrained in the same way as an internal departmental bid for funding. Limited public advocacy may be acceptable.</p> <p>The Crown agent's relationship with the Minister is likely to be more distant than a department's, so therefore may affect its ability to influence prioritisation of new funding.</p> <p>Given the ability of a Crown agent to advocate, there is more assurance than under departmental models of sustainability of funding levels over time.</p>
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<p>Public credibility</p>	<p>Does not meet objective</p> <p>A department is not well placed to have this credibility. Current arrangements were broadly viewed as insufficient by the Royal Commission and Independent Taskforce, and concern has been expressed that because MBIE is a larger, more diverse organisation than the former Department of Labour, an internal regulator is even less likely to be able to maintain necessary credibility and connections.</p> <p>No change to the status quo is likely to send a signal that the Government has not bought into the need for a significant shift in the way the regulator operates.</p>	<p>Partially meets objective</p> <p>In part because of its ability to have a primary focus, a departmental agency is better placed than a department to make connections and gain credibility with the regulated sector.</p> <p>However, the constraints around its independence from government, including its lack of a statutory board and its ability to advocate for funding could both initially and over time lead to scepticism that it will be able to effectively regulate.</p>	<p>Meets objective</p> <p>The combination of a statutory board, its primary focus and its greater separateness from government (in comparison to a department), means that a Crown agent is better able to establish its own identity and relationships with the regulated sector and be seen to be independent from day to day government decision-making.</p> <p>This is likely to be particularly true over time as the agent will not be as affected by changing departmental or Ministerial priorities (while still subject to Ministerial direction).</p>
<p>Policy effectiveness</p>	<p>Partially meets objective</p> <p>Given a department's close relationship with the Minister, policy advice can effectively be positioned within a broader policy and strategic political context. This relationship may also assist the regulator to effectively coordinate workplace health and safety across government.</p> <p>However, a regulator within a department is unlikely to have its own capability, voice and influence over government strategy and regulation, limiting its capacity to provide contestable advice to Ministers on strategy and areas where it has technical expertise, which could diminish the overall effectiveness of the policy</p>	<p>Partially meets objective</p> <p>A Departmental Agency will be close to the Minister and be reasonably well-placed to understand and frame workplace health and safety in the broader policy and political context.</p> <p>While more likely than under a department, a departmental agency may face challenges in developing its own capability and voice over strategy and technical regulation. A department may be reluctant to support the duplication in function (particularly policy advice function) that is likely to be required to enable the agency to provide independent, contestable advice. This could diminish the overall effectiveness of the policy advice provided.</p> <p>While internal advocacy will likely take place, public advocacy by the CE of a departmental agency on policy</p>	<p>Partially meets objective</p> <p>As it is responsible for its own prioritisation decisions and more independent from government direction, a Crown Agent is more likely than a regulator within a department to maintain a capability to provide contestable advice and influence strategy and technical regulation (although it may be more difficult for a Crown Agent to recruit and retain skilled policy staff). Its technical knowledge and greater capacity to build public credibility will also assist its influence.</p> <p>This is offset to some extent by its greater distance from government. Advice provided by the Crown Agent will always be subject to scrutiny of and competing advice from the monitoring department. The distance from government also means that the advice provided by the regulator will be less likely to be positioned within a broader policy and strategic</p>

	<p>advice provided.</p> <p>While the department as a whole is likely to have strong influence – the degree to which the regulator is able to participate in that will be dependent on departmental decisions about organisational design and individual capability.</p> <p>While a department better meets the strategy and coordination parts of this objective than a Crown agent, it is less likely than other options to enable independent regulator advocacy and contestable advice.</p>	<p>issues is also unlikely to be strong.</p> <p>As with a department, a Departmental Agency better meets the strategy and coordination parts of this objective than a Crown Agent. While it is more likely than a department to enable contestable advice, it is likely to be more constrained in this activity than a Crown agent.</p>	<p>political context than with a department.</p> <p>However, the continued role of the department in providing policy advice reduces the risks associated with this.</p> <p>In addition, over the medium to long term the legal separation of the Crown Entity can interfere with its ability to influence because its ability to do so depends on the relationship with the Minister.</p> <p>A Crown agent is less able to meet the strategy and coordination parts of this objective than the other options. However, it will better meet the objectives of provision of contestable advice over time.</p>
Ease of implementation and sustainability	<p>Meets objective</p> <p>Is easily implemented (is the status quo).</p> <p>A department has flexibility to evolve and reprioritise over time to reflect government priorities.</p>	<p>Meets objective</p> <p>Is easily implemented once enabling legislation is passed (requires regulations).</p> <p>A departmental agency has flexibility to evolve over time to reflect government priorities, although potentially less so than a department given it has its own Chief Executive.</p>	<p>Partially meets objective</p> <p>Takes some time to implement (likely a year) as legislative change is required.</p> <p>A Crown agent will need to continue to fulfil its statutory functions over time. The degree of flexibility it has to respond to changing priorities will depend of the level of flexibility in its enabling legislation.</p>
Appropriate skills and capability	<p>Partially meets objective</p> <p>Lack of confidence in the current regulator as well as a lack of primary focus and associated targeted remuneration structures and professional support may limit the ability for a department to recruit and retain skilled specialist and technical staff when compared to a Crown agent.</p> <p>Links to and support from the department may make it easier to recruit and retain policy staff than with a Crown agent.</p>	<p>Partially meets objective</p> <p>Ability to recruit and retain skilled specialist and technical staff will depend on the ability of the departmental agency to develop its own targeted remuneration structures and professional support when compared to a Crown agent.</p> <p>Links to and support from the department may make it easier to recruit and retain policy staff than with a Crown agent.</p>	<p>Partially meets objective</p> <p>The agency's independence will make it easier to develop systems to support recruitment and retention of specialist and technical staff than a department or a Departmental agency. The creation of a new agency and the perception of greater independence may also make the agency a more attractive employer.</p> <p>Conversely, distance from a core department may make it more difficult to develop systems to support recruitment and retention of policy staff than under a departmental model.</p>

<p>Management of potential for conflicting roles</p>	<p>Partially meets objective</p> <p>A department would be a single entity with a range of functions, including enforcement, education and policy. It is important that it has independence in the performance of statutory duties and that it makes investigation and enforcement decisions free from interference. Similarly, policy advice should not be biased to support the activities of the regulator over other objectives.</p> <p>Internal operational separation of these functions is necessary to maintain appropriate independence and to be seen to be doing so.</p>	<p>Meets objective</p> <p>A departmental agency would better enable effective structural separation between investigative, enforcement education and policy functions than a department. This is dependent on it being established in a way that achieves an effective functional split between the roles of the department and the departmental agency, particularly in relation to policy development.</p>	<p>Partially meets objective</p> <p>As with a department, a Crown agent will be a single entity with a range of functions, including enforcement, education and policy. It differs from a department in that there will be some duplication in functions between the agent and the Department and the agent is subject to monitoring by the Department. This provides an additional check and balance on the exercise of its functions.</p> <p>However, some internal separation of its functions will be necessary to maintain appropriate independence and to be seen to be doing so.</p>
<p>Mitigating risk to government of poor performance</p>	<p>Meets objective</p> <p>The Ministerial power to direct and responsibility of the CE to the Minister means that direct feedback can be given and required changes made.</p>	<p>Meets objective</p> <p>The Ministerial power to direct and responsibility of the CE to the Minister means that direct feedback can be given and required changes made.</p>	<p>Partially meets objective</p> <p>The Minister's powers in respect of a Crown agent are less direct than for a department, but are still likely to be effective where there is significant concern about performance.</p> <p>Performance of the CE is assessed by the Board. The Board is responsible to the Minister and the Entity must give effect to government policy if directed.</p>
<p>Efficiency of operation</p>	<p>Meets objective</p> <p>MBIE is able to operate a range of diverse functions using common support services and infrastructure, minimising unnecessary duplication of back-office functions and creating scale efficiencies and the ability to specialise.</p>	<p>Meets objective</p> <p>As a departmental agency shares support services with the host department, it can access all support services of that department with no duplication of function or cost.</p>	<p>Partially meets objective</p> <p>A Crown agent can share support services with other agencies and it is proposed that MBIE would share its services with any new Crown agent. This should minimise potential for unnecessary duplication in back office functions or costs. However, this will be a decision for the agent's board.</p> <p>Additional costs would arise from the need to fund and service a statutory board. This will take time and focus of the CE. As well as board fees, the board will also need access to</p>

			<p>advice in respect of its functions. This is likely to require additional resource to that needed by a department.</p> <p>There is also likely to be some duplication of activity in the policy and strategy areas between MBIE and the regulator. MBIE will also need to devote some resource to monitoring the regulator.</p>
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- 44 There are varying degrees of confidence in this analysis. MBIE’s view is that we can have more confidence predicting how a regulator within a department will operate than under either of the other options, because we can observe the operation of the status quo. Of the other two options, we have more confidence in the analysis of the operation of a Crown agent than a Departmental agency, because the Departmental agency is a new legislative structure that is yet to be tested.). Treasury and SSC have a different view from MBIE in the level of confidence we can have about how a departmental agency will operate because they see it is more of an evolution of existing departmental structures.
- 45 To summarise, the status quo, (a department) partially meets some of the objectives. However, crucially, retaining the current structure in light of the Royal Commission’s and Independent Taskforce’s recommendations for change would send a signal that government has not bought into the need for significant change to the way that the regulator operates. It would therefore not meet the critical objective of public credibility. Under this option, it would also be difficult for the regulatory side of the department to maintain a primary focus on workplace health and safety and its ability to have a real say in strategy and policy will be dependent on ongoing support by the department for maintaining policy capability within the regulator.
- 46 A Departmental agency is a better fit than a department as it partially meets most of the objectives and better meets the critical objectives around independence from government than a department. However, MBIE’s view is that because a Departmental agency does not have a statutory board and still sits within the broader department, we consider there is a real risk that it will not be seen as sufficiently independent to be publicly credible, to over time deliver the workplace health and safety outcomes that are needed. In addition, as a Crown agent is established under statute MBIE believes this form will be a more enduring structure for the regulator. SSC and Treasury have a different view and consider that a departmental agency structure is sufficiently independent to deliver the desired change. SSC and Treasury also believe that because of the flexibility of the departmental agency model (which is not established in statute) this form will be better able to achieve the desired outcomes in the long-term.
- 47 Because the departmental agency model is relatively untested (while recognising it is an evolution of arrangements that do exist), MBIE believes there is also a reasonable level of uncertainty around its ability to meet the policy effectiveness objective. MBIE’s view is that policy effectiveness of the agency will be compromised over time because it would be less likely to maintain capability to be able to provide contestable advice than a Crown agent. SSC and Treasury consider that a departmental agency will deliver greater policy effectiveness because it is closer to Ministers and better connected to its policy department (which hosts it).

- 48 As a Crown agent would have its own board, MBIE's view is that it is more likely to meet the critical objectives around day to day independence, a primary focus on workplace health and safety and public credibility than either of the other options. While this option only partially meets the other objectives, we consider that the risks associated with this can be mitigated and managed through the regulator design and implementation process.
- 49 International literature on independent agencies suggests that while independent agencies are increasingly common (at least amongst economic regulators)³, there is no evidential base that links an independent agency form to better performance. In our view this suggests a case-by-case analysis must be made on the value of a more independent workplace health and safety regulator. The case seems to be reasonably strong here.
- 50 In order to achieve the health and safety outcomes sought there needs to be a significant change in the attitudes, behaviours and capabilities of regulated entities, the regulator and the broader community. This is often described in regulatory literature as regime or institutional change, and it is widely accepted that significant regime change is very difficult and takes a long time, as institutions are inherently 'sticky'⁴. To be effective, the government, as the leader, driver and facilitator of the change process must sustain clarity and consistency of purpose over an extended period, potentially for a decade or more.⁵
- 51 Given this, our view is that an independent agency, underpinned by a strong legislative mandate and powers, and adequate resources is likely to be the optimal agency form for two reasons:
- It is more likely to create a perception that change will occur and that by itself will start to influence attitudes and behaviours in a positive direction. There is a degree of symbolism in creating a strong, single purpose and independent agency, the importance of which cannot be underestimated.
 - Consistency of purpose in an independent agency is likely to be more durable than in a departmental form. While we cannot predict the policy preferences of future governments, we know from risk literature that the political and stakeholder impetus for, and commitment to, change in response to a catastrophe can weaken over time. Some government priorities, in particular the desire to reduce regulatory costs, can compromise regulatory outcomes if not managed carefully.
- 52 The key risks with establishing an independent agency are around the risk of poor performance of the regulator, and efficiency of operations. Efficiency of operations can be mitigated through the proposal to share back office functions – though this is ultimately a decision for the agency's board. Under this model there is likely to be some continuing duplication of policy function, and costs associated with supporting a statutory board. The risk of poor performance, and not meeting the government's objectives, is more significant. Under this option, it would be important for MBIE to develop and effectively implement a strategy for engaging with and monitoring the regulator to ensure that government's objectives are effectively delivered. The strategy will require the Minister, MBIE and central agencies to ensure they actively engage with the agency to ensure it continues to meet the Government's objectives.

³ Gilardi, Fabrizio and Maggetti, Martino (2011) The Independence of Regulatory Authorities, in Levi-Faur, David (ed.), Handbook on the Politics of Regulation, Cheltenham, Edward Elgar.

⁴ General discussion in Mumford, Peter J (2010). Enhancing Performance-Based Regulation: Lessons from New Zealand's Building Control System. Institute of Policy Studies, Wellington, New Zealand, 41. In relation to institutional stickiness, see Thelen, Kathleen and Sven Stinmo 'Historical Institutionalism in Comparative Politics', in Structuring Politics, edited by Sven Steinmo, Kathleen Thelen and Frank Longstreth. Cambridge: Cambridge University Press, 1992.

⁵ Baldwin, Robert and Cave, Martin and Lodge, Martin (2011) Understanding regulation: theory, strategy, and practice. Oxford University Press, Oxford, UK.

Consultation

- 53 The Royal Commission recommended the establishment of a Crown agent to administer workplace health and safety regulation. It did so after reviewing evidence presented to it from a range of parties.
- 54 The Independent Taskforce released its discussion paper “safer workplaces” in 2012. The paper included a section on the role and responsibility of the regulator. This section focussed more on fragmentation of workplace health and safety responsibilities across different agencies than it did on the structure of the regulator. However, it did ask the following questions:
- How effective are the regulators in influencing workplace health and safety outcomes?
 - How could the regulators’ roles and responsibilities be changed to improve their effectiveness in influencing workplace health and safety outcomes?
- 55 Submissions on the discussion paper closed in November 2012. Submissions in response to the consultation document overwhelmingly favoured a stronger regulatory approach, with some specific support for a stand-alone regulatory agency. Specifically, 47 out of the 430 submissions expressed support for a single focus organisation for workplace health and safety and a further 33 submitters went beyond the idea of a single-focus organisation to suggest the establishment of an independent workplace health and safety Crown agency. No submitters expressed opposition to a single focus organisation. Four submitters expressed opposition to the setting up of a Crown agency and three were neutral about it.
- 56 After considering both the Royal Commission’s recommendations and the submissions received on its discussion paper, the Independent Taskforce recommended to the Government that it establish a Crown agent as the workplace health and safety regulator.
- 57 The Acting Minister of Labour has informally consulted with the Chief Executive of Business New Zealand and the President of the Council of Trade Unions on the proposal to establish the workplace health and safety regulator as a Crown agent. Both were comfortable with the proposal.
- 58 The Accident Compensation Corporation, Ministry of Transport, Civil Aviation Authority, Maritime New Zealand, Ministry for the Environment, Environmental Protection Authority, Ministry of Health and Ministry of Justice were consulted on the draft Cabinet paper associated with this RIS paper and the Department of Prime Minister and Cabinet was informed.
- 59 The State Services Commission and the Treasury were also consulted and provided the following comment:

“[We]consider that the most appropriate form for a health and safety regulator is a departmental agency. The departmental agency model is a way of achieving sole focus on health and safety outcomes while avoiding the costs of separation from the Crown.

The nature of changes required to health and safety in New Zealand are likely to require a high degree of ongoing Ministerial engagement and accountability. A departmental agency has a less complicated governance structure than a Crown Agent, which would make it easier for Ministers to engage with the regulator, to advance policy and manage performance. All of the forms canvassed in this paper would require the support of a robust advisory group.

Health and safety is pervasive, which requires significant coordination across government agencies. Our experience shows it is difficult to secure these relationships in a Crown entity. A departmental agency, as part of the legal Crown would increase the integration of health and safety outcomes into broader government objectives, while maintaining statutory independence in respect of its regulatory functions.

Like a Crown Agent, the departmental agency form is designed to enable a strong focus on particular outcomes (such as health and safety) and provide strong accountability for those outcomes. A departmental agency would allow for the development of a strong brand identity and would provide high visibility of health and safety outcomes. A departmental agency would also be required to produce a separate annual report.

Adding another Crown entity to our public management system incurs costs (both direct and transactional). Unlike a Crown Agent, a departmental agency would avoid the costs introduced by separation from the Crown.

The departmental agency form has not been implemented before and we note the Royal Commission's concern that Health and Safety may not be an appropriate area to test the departmental agency. However, the departmental agency form is not experimental, but rather an evolution of the departmental form designed to address issues such as focus, brand identity, and improved visibility of particular outcomes. We also recognise the importance of achieving progress quickly, and a departmental agency could be established sooner and at a lower cost. The model strikes a balance between creating a dedicated focus and independent identity for health and safety while enabling Ministerial accountability and direction, and effective delivery of policy and regulatory change."

60 MBIE acknowledges these concerns, which have been considered in the analysis undertaken. However, MBIE takes a different view on the assessment against several of the key objectives. This corresponds with the discussion in the regulatory impact analysis section of this RIS:

- **Objectives around independence (including public credibility and primary focus).** In the context of the Royal Commission and Independent Taskforce's recommendations, MBIE along with the Royal Commission and the Independent Taskforce views rebuilding public confidence in the regulator as critical. MBIE agrees with the Royal Commission and the Independent Taskforce that the independence of the regulator will be important for rebuilding public confidence. On this basis MBIE believes an agency with a statutory board is required to give the entity the credibility to rebuild the public's confidence in the health and safety regulator. In addition, we consider that establishing the entity through legislation will give it greater stability in the long term to achieve the significant changes needed to health and safety outcomes in New Zealand. By comparison, SSC and Treasury consider that a departmental agency does provide a sufficient level of independence.
- **Policy effectiveness.** MBIE agrees that a departmental agency is likely to be closer to Ministers, and able to more efficiently provide connected, cross-government advice. However, in MBIE's view policy effectiveness will come about through the provision of strong, contestable advice and a public perception that Ministers have access to independent expert advice. We believe that, over time, a departmental agency is less likely to prioritise, resource or be seen to be sufficiently independent to be able to provide advice that meets this goal. However, MBIE accepts that as the departmental agency model has yet to be tested it is difficult to determine the long term outcomes that may occur.

61 Further, as discussed in the analysis, our view is that the concerns and risks identified by SSC and Treasury can largely be minimised and/or mitigated through the design of the regulator.

Conclusions and Recommendations

- 62 The status quo is not recommended because it does not adequately meet a number of the objectives identified. While the risks of proceeding with a decision now ahead of wider reform of the workplace health and safety regime are recognised, these risks are not considered significant and must be counterbalanced against the risks of not proceeding now in light of the Royal Commission and Independent Taskforce recommendations.
- 63 The choice between a departmental agency and a Crown agent is not clear cut and turns on how the different objectives are weighted and views about what will occur in practice under each of the models. A departmental agency is likely to operate more efficiently as there will be less duplication of government activity. In this way, it better aligns with the government's objective of better public services. However, while SSC and Treasury consider that a departmental agency provides sufficient independence, MBIE considers there is a risk that a departmental agency will not be seen as sufficiently independent or a significant enough change from the status quo to regain public confidence in New Zealand's workplace health and safety regulatory system. There is a further risk that its credibility and focus could diminish over time as a result of changing departmental and government priorities. The departmental agency structure is new to New Zealand (while recognising that it is an evolution of existing structures), the legislation enabling it has yet to be enacted, and it is largely untested. MBIE does not share SSC's and Treasury's level of confidence that the outcomes under this structure are largely predictable and consider it is therefore difficult to assess the likelihood of these risks materialising.
- 64 MBIE's view is that, on balance, there is a greater likelihood that a Crown agent will have a structure that enables it to create the necessary short term boost to public confidence and retain an appropriate focus on workplace health and safety regulatory outcomes over the longer term.

Implementation

Design options

- 65 Assuming the preferred option, a Crown agent, is agreed, further issues of design need to be considered. The following key design decisions are proposed to be taken now.
- 66 The board of the regulator would have no fewer than five and no greater than 9 members. This is consistent with the boards of other more recently developed Crown entities, such as FMA and Callaghan Innovation. It provides an appropriate balance to ensure that there is sufficient breadth of expertise and questioning, while preventing the board from becoming paralysed by the need to seek consensus from a large number of members.
- 67 In addition it is proposed that when recommending a person for membership of the regulator's board, the Minister must have regard to the need to ensure that the board has amongst its members knowledge and experience of, and capability in, the following areas:
- Public sector governance
 - Central government processes
 - New Zealand's workplace health and safety environment
 - Perspectives of New Zealand's workplace participants
 - Administration of workplace health and safety legislative and risk management frameworks
 - Business generally.

- 68 The Minister also must not recommend a person for membership of the Crown agent's board unless he or she has first publicised an invitation for nominations from interested parties and considered any nominations received. These governance proposals reflect that while the board set-up achieves the necessary good governance arrangements, achievement of workplace health and safety outcomes needs more. The board will need to be supplemented by tripartite arrangements to ensure the necessary employer and worker representation.
- 69 Transitional provisions will also need to be included to ensure that MBIE health and safety employees can be transferred to the new regulator. These provisions will follow the standard form of other recent public sector transfers of staff. Staff undertaking transferring functions who are offered terms and conditions of employment with the new regulator that are no less favourable will not be eligible to receive redundancy entitlements.
- 70 If agreed, the proposal for a new workplace health and safety regulator will be included in a proposed Health and Safety Reform Bill. This Bill is currently proposed to be drafted and enacted during 2013. This would enable the establishment of the new workplace health and safety Crown agent by 1 December 2013.
- 71 A project team will be established within MBIE so that set-up arrangements can be made to enable the transition to the new agency to occur as soon as the legislation is passed. This team will be set up as soon as Cabinet has made its decisions on the structure of the regulator. The team will develop proposals for transition to the new structure, funding and administrative support for the regulator.
- 72 It is proposed that the new regulator would share many of MBIE's back-office functions in the short term. If this is not agreed by the Crown agent's incoming board or cannot be effectively achieved, it may increase the costs to government of the change in structure.

Monitoring, Evaluation and Review

- 73 The new Crown agent will be subject to ongoing monitoring by MBIE. This will include working with the agent to develop accountability documentation and monitoring its performance and expenditure on a quarterly basis. There will need to be a strong relationship between the Chief Executive of the agent and MBIE, to ensure that any concerns or issues that are identified can be effectively communicated and changes made as necessary.
- 74 There is currently no strategy for monitoring the effectiveness of the form of the regulator or for future review of the structural arrangements. This is because the structure of the regulator is one part of a series of changes to the workplace health and safety regulatory system. The arrangements for monitoring and review will be considered as part of an overall evaluation strategy to be developed in conjunction with the broader suite of regulatory changes that will be recommended as part of the review of health and safety law and regulation. These arrangements will be finalised later in 2013.