To	**Hon David Seymour, Minister for Regulation**		
Title	**Regulatory Standards Bill: Regulatory Reviews Statutory Framework**	Number	**MFR2024-078**
Date	**23 August 2024**	Priority:	**Medium**
Action Sought	**Agree to the recommended actions**	Due Date	**26 August 2024**
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Attachments	**No**	Security Level	**IN CONFIDENCE**

Executive summary

1. This briefing provides you with further advice and seeks your decisions on the statutory framework for Ministry for Regulation (MfR) regulatory reviews, to be included in the Regulatory Standards Bill (the Bill).

2. We recommend that the Bill take a flexible approach to the potential focus areas of regulatory reviews, as these are likely to change over time. Regulatory reviews could cover specific industries or sectors, regulations that cut across sectors, regulations affecting sectors or technologies that are not yet well established in New Zealand, or other regulatory issues.

3. We recommend that MfR regulatory reviews should not be statutorily independent, to facilitate closer working relationships with responsible agencies. Working closely with other agencies would contribute to buy-in and ownership and improve the chances of successful implementation. Having the reviews as a statutory function of the Chief Executive would mean that a level of independence is likely to be read into regulatory reviews, even without a statutory duty to act independently.

4. In briefings to date we have looked at a range of information gathering powers from those held by central agencies to more coercive powers such as those held by the Commerce Commission to support its investigative and compliance monitoring functions and independent inquiries appointed under the Inquiries Act 2013.

5. Since then, we have assessed in more detail what powers and obligations we need to effectively conduct regulatory reviews and consulted the Ministry of Justice and Parliamentary Counsel Office. The information-gathering powers proposed in this briefing apply to public service agencies and wider state services (such as Crown entities) and are comparable with those held by the Treasury and the Public Service Commissioner, taking into account their differing functions. They do not extend to coercive powers of inquiry (e.g. summoning witnesses, obtaining evidence under oath) or requiring information directly from third-party service providers or private individuals. We consider that these more coercive powers are not well-suited to or necessary for conducting regulatory reviews, which primarily have a policy rather than an investigative or compliance monitoring purpose. Where coercive powers of inquiry are needed to investigate an event or series of

events, such as a significant regulatory failure, it will remain open to you to establish an inquiry under the Inquiries Act, and for MfR to support that inquiry.

6. We consider that, as a starting point, using existing statutory and engagement channels to seek information from local government should be sufficient for regulatory reviews. However, we propose to test this approach further during consultation and as we develop further advice on the Bill.

7. The impact of regulatory reviews will be highly dependent on timely decision-making on review recommendations and implementation by responsible Ministers and agencies. A requirement to present to the House the review report together with the government's decisions would provide a mechanism to hold the government to account for its decisions on the report's recommendations and their implementation. If the Minister for Regulation is required to present the paper to the House within 60 working days of receiving the report, this could provide a prompt for Cabinet to consider the report while allowing sufficient time for Cabinet to make decisions on its recommendations.

8. Once decisions are taken by the Minister for Regulation and Cabinet, the onus will be on responsible Ministers and agencies to implement the decisions. We propose that regulatory review recommendations may specify requirements for responsible agencies to report on delivery, such as publishing updates or reporting directly to regulated parties, which could then be agreed and enforced by the responsible Minister and Cabinet.

9. We will incorporate your decisions on the recommendations in this briefing into a request for further advice from the Legislation Design and Advisory Committee (LDAC) on the main components of the Bill. We will also include a summary of the proposals in updated slides for you to use for Ministerial consultation on the Bill.

Recommended action

We recommend that you:

Purpose and focus of regulatory reviews

a	**agree** that the purpose of MfR regulatory reviews should be to improve the quality and performance of regulatory systems	*Agree / Disagree*
b	**agree** that there should not be statutory constraints on the potential focus areas of MfR regulatory reviews, and that in practice the focus areas may be determined through a pre-agreed programme or in response to a particular issue, with prioritisation supported by agreed criteria	*Agree / Disagree*

Scope

c	**agree** that the scope of MfR regulatory reviews should include the design, operation and administration of regulatory systems by public service agencies and state services, and local government regulatory functions	*Agree / Disagree*
d	**agree** that the scope should exclude determining individual applications or decisions, or the civil, criminal or disciplinary liability of a person	*Agree / Disagree*

MfR regulatory reviews should not be statutorily independent

e	**agree** that MfR regulatory reviews should be subject to Ministerial direction in accordance with the existing relationship between Ministers and their agencies set out in the Cabinet Manual	*Agree / Disagree*

Initiation of regulatory reviews

f	**agree** that the trigger for initiating a MfR regulatory review should be that the Minister for Regulation directs MfR to undertake the review and that from a practical perspective, the Minister for Regulation together with the responsible Minister/s may notify or seek the agreement of Cabinet before initiating a review	*Agree / Disagree*
g	**agree** that the Minister for Regulation should set the Terms of Reference for the review, jointly with the responsible Minister or Ministers if appropriate	*Agree / Disagree*

Information-gathering powers

h	**agree** that MfR should have a power to require information from public service agencies for the purposes of determining whether a regulatory review is warranted and when undertaking regulatory reviews	*Agree / Disagree*
i	**agree** that MfR should have a power to require information from wider state services for the purposes of determining whether a regulatory review is warranted and undertaking reviews, with the written approval or direction of the Prime Minister or the Minister responsible for the state service, to maintain vertical lines of accountability	*Agree / Disagree*
j	**agree** that MfR should direct information requests relating to third party service providers to the relevant responsible agency, maintaining vertical lines of accountability	*Agree / Disagree*
k	**agree** that, as a starting point, MfR should direct information requests relating to local government to the relevant agency responsible for the regulatory system, but that we will continue to test this proposal as we develop further advice on the Bill	*Agree / Disagree*
l	**agree** the information gathering powers above should not override an enactment that imposes a prohibition or restriction on the sharing of information	*Agree / Disagree*
m	**agree** that powers to obtain evidence under oath and summon witnesses are not necessary or warranted for regulatory reviews and that if inquiry powers are needed to establish the facts around an event or series of	*Agree / Disagree*

events, such as a significant regulatory failure, the government has available existing legislation such as the Inquiries Act 2013

Procedural obligations

n	**agree** that a requirement for MfR to consult is not necessary for regulatory reviews because existing consultation requirements are sufficient to ensure affected parties will be consulted. The Terms of Reference for a review could specify groups that should be consulted, if necessary	*Agree / Disagree*
o	**agree** that statutory factors that MfR must consider before making review recommendations are not necessary for regulatory reviews and that the Terms of Reference for a review could set out the factors that MfR should consider, depending on the specific circumstances of the review	*Agree / Disagree*

Outcome of regulatory reviews

p	**note** that from a practical perspective, we anticipate that after receiving a MfR regulatory review report, the Minister for Regulation would take a paper to Cabinet, potentially jointly with responsible Ministers, setting out the recommendations they propose to take forward. Ministers could put forward split recommendations in the case that agreement cannot be reached	*Noted*
q	**agree** that the responsible agency and its Minister should be responsible to Cabinet for carrying out Cabinet's decisions on regulatory review recommendations, to maintain vertical lines of accountability	*Agree / Disagree*

Obligation to present to the House regulatory review report and decisions

r	**agree** that the Minister for Regulation should be required to present to the House MfR regulatory review reports together with the government's response to the recommendations, to provide a mechanism for parliamentary examination of the review report and for holding the government to account for its decisions on the report's recommendations and their implementation	*Agree / Disagree*
s	**agree** that MfR regulatory review reports and decisions should be required to be presented within 60 working days (i.e. 3 months) of the report being presented to the Minister, to prompt Cabinet to consider the report while also providing sufficient time for Cabinet to decide its response to the recommendations	*Agree / Disagree*
t	**note** that Regulatory review reports and all material used in the development of the reports, including public submissions, would be subject to the Official Information Act 1982 and the Privacy Act 2020	*Noted*

Obligation to publish reports once presented to the House

u	**agree** that MfR regulatory review reports should be required to be published on the MfR website as soon as practicable after they are presented to the House, to make review recommendations more accessible to regulated parties, the public, and agencies	*Agree / Disagree*

Reporting on implementation of review decisions

v	**agree** that the responsible agency and its Minister should be responsible to Cabinet rather than to MfR for reporting on its implementation of review decisions, to maintain vertical lines of accountability	*Agree / Disagree*
w	**agree** that regulatory review recommendations may specify requirements for responsible agencies to report on delivery, which could then be agreed by Cabinet	*Agree / Disagree*

Next steps

x	**note** that once you have made decisions on this briefing, we will include the proposals in a request for further advice from LDAC and include a summary of the proposals in updated slides for you to use for Ministerial consultation on the main components of the Bill	*Noted*
y	**agree** that this briefing will not be made public until proactive release of the final Cabinet paper, to ensure that you have sufficient time to consider and make decisions on the Bill	*Agree / Disagree*

9(2)(a) [redacted]

Pip van der Scheer
Manager, Regulatory Management System
Ministry for Regulation
Date: 22 August 2024

Hon David Seymour
Minister for Regulation
Date:

Purpose of report

10. The purpose of this paper is to seek your decisions on how Ministry for Regulation (MfR) regulatory reviews should be provided for in the Regulatory Standards Bill (the Bill). We will incorporate your decisions on this paper into slides for you to use for Ministerial consultation on the main components of the Bill.

Context

11. In this briefing, we are defining 'regulatory review' to mean a particular class of review conducted by MfR which is initiated by the Minister for Regulation with a Terms of Reference, involves extensive consultation, reports to Cabinet with recommendations for changes to regulatory systems, and is made public. It does not include lighter-touch, more rapid reviews or triaging of issues by MfR.

12. On 17 January 2024, Cabinet agreed that the Minister for Regulation will develop core functions of the new Ministry, including leading the carrying out of regulatory reviews, in consultation with other Ministers as necessary [CAB 100-24-MIN-0004 paragraph 4.2 refers].

13. In your letter of 30 January 2024 to the Prime Minister outlining your priorities for the Regulation portfolio, you indicated that you expect one regulatory review will be launched per quarter, and that each review would be conducted over six months. At meetings with officials, you have also indicated that conducting regulatory reviews should be a coherent repeatable activity, provided for in statute, and designed so that there is onus on responsible agencies to take action to implement regulatory review decisions.

14. In May, we provided you with information on the types of review and inquiry powers held across the public sector. This information included powers held by public service agencies such as the Treasury and others held by independent entities with investigative or compliance functions, such as the Commerce Commission and independent inquiries established under the Inquiries Act 2013 (briefings 2024-026 and 2024-041 refer).

15. In July, we provided you with advice on options for making review recommendations transparent and strengthening agency accountability for implementing review decisions (briefing 2024-060 refers). When we discussed this briefing with you, we agreed to further explore options for Parliamentary Counsel Office to undertake legislative drafting ahead of a regulatory review being considered by Cabinet. We consider that, should such an option be pursued, it would best sit outside the statutory framework set in the Bill and is therefore not covered in this briefing.

16. MfR is also working on an analytical model for selecting regulatory reviews and a framework to guide how we assess the design, delivery, and practice of regulatory systems, to support regulatory reviews. We will share these with your office once finalised.

Approach taken in this briefing

17. This briefing builds on and refines our previous advice, to provide you with recommendations for the main components of a statutory framework for regulatory reviews.

18. In developing the proposed statutory framework, we have considered whether the powers and obligations are:

- necessary: a new statutory power should be created only if no suitable existing power or alternative exists that can achieve the policy objective[1]
- proportionate: a power should be no wider than is required to achieve the policy objective and purpose of the legislation[2]
- effective: the powers and obligations should support MfR to undertake regulatory reviews effectively, and in a cost-effective manner
- consistent with existing legislation, or have good reasons for being inconsistent
- in line with our view that accountability for regulatory performance should remain with the responsible Minister(s) and agency or agencies.

19. We have consulted the Ministry of Justice, the Office of the Clerk, and Parliamentary Counsel Office on the proposals in this briefing. The Department of Internal Affairs was consulted on proposals relating to local government. LDAC was consulted in June 2024 on earlier advice provided to you on regulatory review powers.

Purpose, focus, and scope of regulatory reviews

Purpose of regulatory reviews

20. The purpose of MfR regulatory reviews should be to improve the quality and performance of regulatory systems. The aim is better quality regulation that achieves its objective and does not impose unnecessary compliance costs or unnecessarily inhibit investment, competition and innovation.

21. 9(2)(h) [redacted]

22. MfR will achieve the purpose of regulatory reviews by:

- considering matters relating to the design, operation, and performance of regulatory systems
- engaging with regulated parties and other key stakeholders on the performance of, and ease of compliance with, regulatory systems
- making recommendations for legislative, operational or other change
- making recommendations to ensure review decisions are implemented in a timely manner and progress on implementation is clear
- ensuring review recommendations are transparent and accessible to the regulated community, the public, and responsible agencies
- supporting greater scrutiny of regulatory systems by Parliament.

[1] Legislation Guidelines 2021
[2] Legislation Guidelines 2021

Focus of reviews

23. We recommend that the Bill take a flexible approach to the potential focus areas and scale of regulatory reviews, as this is something that is likely to change over time. We are currently developing an analytical model for selecting regulatory reviews, which will include criteria for prioritising reviews and a proposed list of review topics. Over time, we suggest that the focus of MfR regulatory reviews could either be determined through a pre-agreed programme or in response to a particular issue, with prioritisation supported through agreed criteria.

24. We anticipate the focus areas of MfR regulatory reviews will be those with the greatest potential to increase productivity and ultimately the welfare of society and may include (but not be limited to) any or all of the following:

- specific industries or sectors
- regulations that cut across sectors
- regulations affecting sectors or technologies that are not yet well established in New Zealand
- regulations that target individuals or other non-firm entities, such as government entities.

Scope

25. We recommend that the scope of the MfR regulatory review function should include:

- the design, operation, and administration of regulatory systems by Public service agencies[3] and State services[4]

[3] **Public service agencies** as defined in section 10(a) of the Public Service Act:
(i) departments
(ii) departmental agencies
(iii) interdepartmental executive boards
(iv) interdepartmental ventures

[4] **State services** as defined in section 5 of the Public Service Act:
(a) means all instruments of the Crown in respect of the Executive Government of New Zealand, whether public service agencies, bodies corporate, agencies, or other instruments; and
(b) includes Crown entities; and
(c) includes organisations named or described in Schedule 4, and companies named in Schedule 4A, of the Public Finance Act 1989; and
(d) includes the education service; but
(e) does not include—
(i) the Governor-General; or
(ii) members of the Executive Council; or
(iii) Ministers of the Crown; or
(iv) members of Parliament; or
(v) organisations listed in Schedule 1 of the State-Owned Enterprises Act 1986; or
(vi) tertiary education institutions; or
(vii) Offices of Parliament; or
(viii) the Office of the Clerk of the House of Representatives; or
(ix) the Parliamentary Service.

- the design, operation, and administration of local government regulatory functions
- parts of a regulatory system, interactions between regulatory systems, regulated sectors, and cross-cutting regulatory issues.

26. Determining individual applications or decisions or the civil, criminal, or disciplinary liability of a person should be out of scope of MfR regulatory reviews.

27. We have considered whether bylaws should be statutorily excluded from the scope of regulatory reviews given the level of autonomy of local government from central government. We consider that excluding bylaws from the scope of reviews could impact the effectiveness of some reviews focused on sectors where bylaws are an integral part of their regulatory system, for example, transport. It would also be difficult to apply from a practical perspective, as some bylaws fulfil a role mandated by central government. Bylaws can also be made by entities other local government, such as school boards of trustees under the Education and Training Act 2020. While local government regulation is unlikely to be a focus of most regulatory reviews, we consider that it should not be specifically excluded in the Bill. However, review Terms of Reference could exclude bylaws from the scope of a review.

28. Determining individual applications or decisions are outside the purpose of regulatory reviews and judicial review or appeal processes are available for these purposes. Determining the civil, criminal, or disciplinary liability of a person is also outside the purpose of regulatory reviews.

Whether regulatory reviews should be subject to Ministerial direction

29. Your decision is required on whether the Bill should include an obligation or duty on MfR to act independently of the Minister for Regulation when conducting regulatory reviews. The key question is whether regulatory reviews are the Minister's reviews (undertaken on the Minister's behalf by MfR) or MfR's reviews carried out independently once the Terms of Reference have been set by the Minister.

30. The default setting is that MfR is directly responsible to the Minister for Regulation and subject to the Minister's decisions on its direction and priorities. Officials are responsible for serving the aims and objectives of Ministers in developing and implementing policy, while maintaining political neutrality.

31. Any intention for MfR to act independently of Ministers in conducting regulatory reviews (as opposed to general policy advice and rapid reviews) would need to be included in legislation to make clear that MfR is not subject to Ministerial direction when performing this function. This would mean, for example, that once the Minister initiates a review, MfR would not consult with the Minister or take direction on its review process.

32. Inquiries under the Inquiries Act 2013 are conducted independently, as are Commerce Commission studies, Law Commission reports, and formerly Productivity Commission inquiries. Reasons for this independence include to increase public trust that reviews are objective and conducted with an open mind, to avoid real or perceived political interference, and to act as a counterbalance to any strong vested interests or significant differences of views. The Public Service Commissioner, Treasury Secretary and Statistics New Zealand also have specific areas of independence established in legislation, even though they are part of the Executive.

33. Requiring regulatory reviews to be conducted independently could increase MfR's credibility in engaging with regulated parties and other non-government stakeholders. Stakeholders might have greater trust that the process will be transparent and free from political interference. This model would be preferred if you place high importance on regulatory reviews being seen by regulated parties and the public as evidence-based and apolitical. While reviews will inevitably involve some judgements, these would be transparent and open to agreement or disagreement by the Minister and Cabinet.

34. Without a statutory obligation to act independently, regulatory reviews would still be undertaken by MfR, but subject to the direction of the Minister in accordance with existing arrangements established in the Cabinet Manual. Having the reviews as a statutory function of the Chief Executive would mean that a level of independence is likely to be read into regulatory reviews, even without a statutory duty to act independently.

35. On balance, we recommend the regulatory review function should not be statutorily independent because:

- a statutory duty to act independently could complicate working closely with other Ministers and agencies, which could reduce the impact of a review. Working closely with other agencies would contribute to buy-in and ownership and improve the chances of successful implementation. It may also provide an opportunity to address any concerns from Ministers early, which may contribute to better reception of the report and buy-in from Ministers
- MfR already has a statutory duty to provide free and frank advice and New Zealand has a strong tradition of a neutral public service. An additional obligation to act independently may not do much more to mitigate any perceptions of political interference.

Initiating regulatory reviews

36. We recommend that the trigger for initiating a MfR regulatory review should be that the Minister for Regulation directs MfR to undertake the review. In a practical sense, this is likely to be in response to advice from MfR that a review should be initiated, however, the Minister may also choose to initiate a review based on external advice. The Minister for Regulation together with the responsible Minister/s may notify or seek the agreement of Cabinet before initiating a review.

37. MfR regulatory reviews should be initiated by the Minister (rather than by MfR) to ensure there is sufficient public interest in undertaking the review to justify the costs to participants, and this is consistent with LDAC advice. Prerequisite conditions for establishing regulatory reviews should be broad in the Bill, to allow for changes in political focus and regulatory management approaches over time.

38. We recommend that the Minister for Regulation should set the Terms of Reference for the review. The Minister may set the Terms jointly with the responsible Minister or Ministers. As above, in a practical sense, MfR would likely consult with responsible agencies to develop a draft Terms of Reference, before presenting it to the Minister for Regulation or joint Ministers for approval. Under the Cabinet Manual, the Minister would likely seek Cabinet agreement to the Terms of Reference.

Information-gathering powers

39. MfR will need to obtain information for the purposes of determining whether a regulatory review is warranted and when undertaking regulatory reviews. We should be able to obtain most information we need based on co-operation and information being willingly shared, without the need for additional compulsion.

40. There may be some situations, however, where a statutory power could be useful to obtain the required information. In briefings to date we have looked at a range of information gathering powers from those held by central agencies to more coercive powers such as those held by the Commerce Commission to support its investigative and compliance monitoring functions and independent inquiries appointed under the Inquiries Act 2013.

41. Since then, we have assessed in more detail what powers and obligations we need to effectively conduct regulatory reviews and consulted the Ministry of Justice and Parliamentary Counsel Office. We have also considered LDAC advice on statutory powers provided in June.

Information from public service agencies

42. We consider a statutory power to obtain required information from public service agencies[5] could be useful as a backstop measure, even if it is infrequently used. We propose the Bill include a model like the Public Service Act 2020 Schedule 3 clause 3, which empowers the Commissioner to require an agency or functional chief executive to supply information about their activities. The Public Finance Act 2001 includes a similar provision in section 79(1).

Information from wider state services

43. A statutory power could also be useful to obtain required information from wider state services[6]. 'State services' includes all entities subject to some level of Ministerial direction or influence, such as Crown entities and crown-owned companies, but excludes the legislative branch (e.g. Officers of Parliament) and the judicial branch. While the Crown Entities Act 2004 provides for the responsible Minister to require information from a Crown entity[7], it would be more efficient for MfR to obtain information directly from the entity, with the appropriate approvals or safeguards.

44. We propose the Bill include a model like the Public Service Act Schedule 3 clause 5, to empower MfR to more directly obtain information from state services that are outside the public service. Under the Public Service Act, the Commissioner must apply its information gathering powers to state services that are not part of the public service if directed by the Prime Minister (in writing) or requested by the Minister responsible for the agency, and may use those powers if requested by the head of the agency.

45. While a power to request information from wider state services directly, without Prime Minister or responsible Minister approval, would be even more efficient, we consider this

[5] **Public service agencies** as defined in section 10(a) of the Public Service Act.
[6] **State services** as defined in section 5 of the Public Service Act.
[7] The Crown Entities Act 2004 section 133 provides that the board of a Crown entity must supply to its responsible Minister any information relating to the operations and performance of the Crown entity that the Minister requests (unless there are good reasons for refusal – see section 134).

approach could create unintended consequences and risk undermining the independence of entities. Crown entities and other wider state services are intentionally structured so that they can be outside the direct influence of the Executive, to varying degrees. Direct information requests from MfR could create the following risks:

- information requests can be behaviour-influencing; the scrutiny of a particular issue by the Executive can inadvertently influence decision making in a statutorily independent function
- MfR could be exposed to criticism that it is trying to influence statutorily independent functions through its information requests
- complying with information requests can be burdensome and time consuming for any agency due to the legal vetting, sign-off, and other process steps involved; for wider state sector entities the burden is likely to be greater as additional scrutiny may be required to ensure compliance with their information disclosure frameworks.

46. A safeguard of Prime Minister or responsible Minister approval for information requests would protect both MfR and the state service entity from criticism that statutory independence is being compromised and ensure that the additional compliance costs of the information request are justified in the public interest.

Information from local government

47. Local government has responsibilities in many regulatory systems, such as resource management, waste management, transport, food, and building. As you are aware, while local government is considered part of the public sector, it has a high degree of autonomy. Statutory mechanisms that central government can use to obtain general information from local government are limited. If there is a potential issue with the performance of a local government body, the Minister for Regulation may be able to refer relevant matters to the Minister of Local Government, who could request information through provisions in the Local Government Act 2002.

48. We consider that, as a starting point, using existing statutory and engagement channels to seek information from local government should be sufficient for regulatory reviews. Where central government agencies have oversight responsibilities relating to local authority functions, MfR could obtain the information from the responsible government agency. For example, under Waste Minimisation (Information Requirements) Regulations 2021, territorial authorities are required to report to the Ministry for the Environment on their spending of levy money and waste minimisation services and facilities. We propose to test this approach further during consultation and as we develop further advice on the Bill.

49. Established links between central and local government are the Department of Internal Affairs and the Local Government Commission. The New Zealand Society of Local Government Managers (SOLGM) and Local Government New Zealand (LGNZ) sector and zone groups (noting that this is a voluntary group for local governments and not all are members) can also provide assistance in engaging with local government.

50. The former Productivity Commission's inquiries into local government topics obtained information from local authorities through a comprehensive engagement process, including seeking submissions on issues, holding engagement meetings, webinars, online

discussion spaces, as well as establishing an expert reference group of leaders in the local government sector.

51. A statutory power for MfR to obtain information from local government directly would be novel and likely to be perceived as undermining the autonomy of local authorities as democratically elected bodies.

Information from third party service providers, private entities, and individuals

52. There may be times where information from third-party service providers is considered necessary to effectively undertake a regulatory review. In these situations, we propose to direct information requests to the responsible agency, rather than directly to the third-party provider. This approach ensures existing lines of accountability are maintained.

53. Regulatory reviews will involve consultation with private entities and individuals as a matter of course, and in most cases, we expect information from these groups will be willingly shared. Private entities and individuals impacted by a particular regulatory system are likely to be naturally incentivised to participate in a review that could result in recommendations for change that may affect them.

54. In situations where information from private entities or individuals is necessary for the effective undertaking of a review, but there are difficulties in obtaining the necessary information, then a different form of inquiry, with stronger powers and protections, would be necessary. The section below deals with inquiry powers.

Information disclosure protections

55. There is a wide variety of sensitive and confidential information held by public service agencies and state services (for example information to support applications for state services, and commercial, defence or security-related information). LDAC advice notes that agencies often hold such information subject to their own statutory regimes or confidentiality arrangements.

56. LDAC advises[8] that generally the government only obtains confidential information coercively where the information aids in the enforcement of law (e.g. Police). We would need to establish that a power to require confidential information is a justified limitation on the right in section 21 of the NZBORA 1990 to be secure against unreasonable search or seizure. In our view, it would not be appropriate to have this power for what is essentially a policy purpose.

57. We therefore propose information disclosure protections in line with those in the Public Service Act, which provides that powers to obtain information from public service agencies and state services do not limit an enactment that imposes a prohibition or restriction on the availability of any information.

58. We also propose that the Protected Disclosures Act 2022, including the obligations on the receiver of protected disclosures, should apply. A protected disclosure is when the discloser believes on reasonable grounds that there is, or has been, serious wrongdoing in or by their organisation, and they disclose in accordance with the Act, and they do not disclose in bad faith. Should MfR receive a protected disclosure during the course of a regulatory review,

[8] Letter from LDAC dated 25 June 2024

MfR would be a "receiver" under the Act and specific obligations around the treatment of confidential information would apply.

Inquiry powers

Including inquiry powers in the Bill

59. The Inquiries Act 2013 provides inquisitorial powers to compel witnesses and examine them under oath, receive and take evidence, and to require the production of documentation. These powers are usually used to establish the facts around an event of public concern, for example establishing what happened in relation to a particular incident or series of events.

60. Inquiries using these quasi-judicial powers are conducted by an independent person or entity, usually with a legal or judicial background. The independence of inquiries is designed to increase public confidence in the process.

61. We do not recommend including inquiry powers in the Bill. We consider that powers to issue summons and obtain evidence under oath, in most cases, are not well suited to or necessary for MfR's regulatory review function. The purpose of regulatory reviews is to improve the quality and performance of regulatory systems, rather than to establish the facts relating to an event of public concern.

62. These inquisitorial powers are not available to Treasury and are only available to the Public Service Commissioner if the Commissioner certifies that it is reasonably necessary to apply these powers to an inquiry or investigation in relation to their function (in which case the Commissioner is required to act independently).

63. It will remain open to you to establish an inquiry under the Inquiries Act should these powers be required, and for MfR to support that inquiry. You would be able to make that decision at the point at which you consider the Terms of Reference for a review.

In the event of a significant regulatory failure

64. In an event such as a significant regulatory failure, the use of inquisitorial powers to summon witnesses and obtain evidence under oath may be justified to establish the specific events or actions that led to the regulatory failure and make recommendations to prevent a future recurrence.

65. The government has a range of existing mechanisms for commissioning an externally led inquiry or investigation into a regulatory failure:

- Royal, public, or government inquiry under the Inquiries Act
- Public Service Commissioner independent inquiry under the Public Service Act
- Auditor-General investigation
- Law Commission report for major or complex issues involving legislation.

66. We have considered but do not recommend an option where the Bill could provide a power for the Minister for Regulation to make available to the MfR Chief Executive specified powers under the Inquiries Act, where the Minister certifies that it is reasonably necessary to apply those powers (similar to the Public Service Act model noted above). In this situation the Chief Executive would likely appoint independent persons or a board to lead the review with MfR acting as the secretariat. MfR is unlikely to have the capacity or specialist expertise to

lead inquiries of this nature, and more suitable alternatives are already available. Instead, in those cases a formal inquiry would be established under the Inquiries Act.

Procedural obligations

67. Statutory procedural obligations, such as consultation, limit, to varying degrees, the Minister's power to establish bespoke procedures for reviews in the Terms of Reference. Crown Law Office guidance points out that powers can also be limited by things not expressly set out in the statute, including common law, the need to exercise the power reasonably, Treaty of Waitangi obligations, and natural justice requirements[9].

Obligations relating to consultation

68. We have considered whether the Bill should include an explicit obligation for MfR to consult affected parties in developing its review recommendations.

69. The Legislation Guidelines[10] note that imposing a legislative obligation to consult is often not necessary, and that the common law duty to consult and natural justice principles are usually sufficient. It will be standard practice for MfR to conduct reviews in line with best practice consultation guidelines. Good reasons to include obligations to consult in legislation include if additional certainty is required about the scope of the obligation.

70. On balance, we do not propose creating a statutory requirement to consult, because existing consultation requirements are sufficient to ensure affected parties will be consulted. The Terms of Reference for a review could specify particular groups that should be consulted, if necessary. In addition, the Bill may include provisions relating to consultation on regulatory proposals, which we expect would apply to any regulatory proposals arising through regulatory reviews.

71. As Treaty partners, the Crown has obligations to take reasonable steps to make informed decisions on matters that affect Māori interests. This is part of the principle of partnership to act reasonably, honourably and in good faith.

Obligation for MfR to consider certain factors before making recommendations

72. We do not propose creating statutory factors that MfR must consider before making review recommendations. Statutory factors that must be considered would be potentially duplicative if we have principles in the Act to which reviews are made to uphold.

73. The Terms of Reference for a review may set out the factors that MfR should consider, depending on the specific circumstances of the review. Ministers will consider a range of factors when deciding which review recommendations to take forward and implement.

Outcome of regulatory reviews

74. As discussed previously, we anticipate that once the Minister for Regulation receives a regulatory review report from MfR, a Cabinet paper would be prepared reflecting the views of the Minister and all relevant agencies. The Cabinet paper could incorporate split recommendations where there is no consensus between the Minister for Regulation and the relevant portfolio Ministers (briefing 2024-060 refers).

[9] Crown Law, The Judge Over Your Shoulder Guide, 2019
[10] Legislation Guidelines 2021, Chapter 19

75. The responsible agency and its Minister should be responsible for carrying out Cabinet's decisions on regulatory review recommendations, to maintain vertical lines of accountability. As discussed in our advice of 5 July (see briefing 2024-060, Appendix 1), we do not recommend including powers in the Bill for the Minister or MfR to directly intervene in a different regulatory system to make change in response to a regulatory review.

76. In our advice of 5 July, we identified options for the process by which the government receives, releases and responds to regulatory review reports. The remaining sections consider these options in more detail and makes recommendations for your decision.

Presentation to the House of regulatory review reports and decisions

77. As noted in previous advice, the impact of regulatory reviews will be highly dependent on timely decision-making on review recommendations and implementation by responsible Ministers and agencies.

78. Requiring MfR regulatory reviews to be presented to the House of Representatives (tabled in the House), together with the government's decisions on the recommendations, would be a way of increasing the impact of regulatory reviews by:

- prompting Cabinet to consider the report in a timely manner
- providing a mechanism for parliamentary examination of the review report, and for holding the government to account for its decisions on the report's recommendations and their implementation.

79. We note that the chance of Cabinet not addressing the review recommendations in a timely manner is likely to be low in most cases if Cabinet has considered the review Terms of Reference. While it could act as an incentive, a requirement to present to the House the report and decisions also does not guarantee that Cabinet will consider and make decisions on the recommendations as a matter of priority.

80. However, if the Bill requires that a regulatory review report and the government's decisions be presented to the House, then this paper could be added to the list of parliamentary papers that are automatically referred to select committees for examination[11]. Under Standing Orders, select committees have broad powers to call for reports, records, and to summon persons to attend committee meetings to give evidence on matters referred to them. While this process would come with a cost in terms of select committee time and resources, it would reflect the importance of regulatory reviews and the investment in them by the government and stakeholders. The additional parliamentary scrutiny could also augment the government's accountability for its implementation of the review's recommendations.

81. We propose MfR regulatory review reports and associated decisions should be required to be presented to the House within 60 working days (i.e. 3 months) of the report being presented to the Minister, to prompt Cabinet to consider the report while also providing sufficient time for Cabinet to decide its response to the recommendations. An alternative would be a requirement to present the report and decisions 'as soon as reasonably practicable' after the report has been presented to the Minister, to provide the government

[11] Under Standing Order 383 and Appendix E. You may wish to signal the intention to propose that the Standing Orders Committee consider such procedural changes in light of the Bill.

with more flexibility. However, setting a maximum timeframe could add impetus to consideration of the report.

Obligation to publish review reports once presented to the House

82. MfR regulatory review reports should be required to be published on the MfR website as soon as practicable after they are presented to the House, to make review recommendations more accessible to regulated parties, the public, and agencies. If the Speaker designates them as parliamentary papers, they will also be published on the Parliament website[12]. Ministers may choose to proactively release the Cabinet paper and minutes showing decisions taken alongside the review report.

83. Regulatory review reports and all material used in the development of the reports, including public submissions, would be subject to the Official Information Act and the Privacy Act.

Obligations relating to reporting on delivery of review decisions

84. Creating obligations for reporting on delivery is another way to ensure agencies implement review decisions in a timely manner and progress on implementation is clear.

85. In our advice of 5 July, we proposed to do further work to develop a statutory power for MfR to require an agency (including a Crown entity) to provide information on its progress in implementing recommendations resulting from a regulatory review (briefing 2024-060 refers).

86. After further analysis, we do not recommend pursuing a power for MfR to require information from agencies on their implementation of review decisions, because it would cut across vertical lines of accountability between the agency and their Minister and Cabinet. In our view, once Cabinet decisions have been taken, the responsible agency and its Minister should be responsible to Cabinet rather than to MfR for reporting on implementation of review decisions.

87. Instead, we propose that MfR regulatory review recommendations may specify requirements for responsible agencies to report on delivery, which Cabinet could agree. Review recommendations could tailor the reporting requirements to the individual circumstances, such as that the responsible agency must publish monthly progress updates, and the content of the updates could be partially prescribed, for example, the action the agency has taken. Recommendations could also include that the responsible agency should meet with representatives of, or specified, regulated parties to provide progress updates on delivery. If a responsible agency fails to carry out the reporting obligations recommended by MfR and agreed by Cabinet, MfR may have cause to undertake a follow up review.

88. You will receive separate advice on MfR's regulatory management system monitoring function and any statutory provisions that may be required for MfR to fulfil that function.

89. In our advice of 5 July, we also canvassed other possible options for monitoring the delivery of review decisions. We have considered but do not recommend pursuing the option of creating a general statutory obligation for responsible agencies to report directly to

[12] Note that it is not unusual for parliamentary papers to be published both on the Parliament website and on the website of the agency concerned (for example, this happens for annual reports).

regulated parties on progress in implementing review decisions, as it would create legal risks and be impractical to implement. For example, in some cases there may be hundreds or thousands of parties that could be considered regulated parties and review participants, possibly without representative bodies, in which case fulfilling the requirement would be both impractical and cost prohibitive for agencies.

90. We also do not recommend pursuing the option of creating a general statutory requirement for agencies to demonstrate their progress on delivery by including information on this in their annual reports. While using an existing report could reduce the administrative burden on agencies, it would not be as accessible to the public and regulated parties as other avenues.

Next Steps

91. Once you have made decisions on the recommendations in this briefing, we propose to:

- include the proposals in a further request for advice from LDAC on the preferred approach for the main components of the Bill
- include a summary of the proposals in updated slides for you to use for Ministerial consultation on the main components of the Bill
- if you decide to proceed with a discussion document prior to seeking Cabinet policy decisions, we would seek your agreement to include the proposals in the scope of this discussion document and proceed to drafting this and the associated Cabinet paper.

92. The proposal in this briefing is exempt from RIS requirements on the grounds that it deals with changes to the internal administrative arrangements of government and has no or only minor impacts on businesses, individuals or not-for-profit entities.

93. As noted previously, we will also provide you with separate advice on:

- our regulatory management system monitoring function and any statutory provisions that may be required for MfR to fulfil that function
- any proposed powers for the Minister for Regulation and/or MfR to set whole-of-government directions or instructions and issue guidance
- options for Parliamentary Counsel Office (PCO) to undertake legislative drafting ahead of a regulatory review being considered by Cabinet. We will assess a range of options including:
    - creating a standing expectation that PCO will work with us as we complete reviews to have indicative drafting ready
    - creating an obligation on PCO to work with us in each case, either as we seek Cabinet approval for the Terms of Reference or by discussion with the Attorney-General
    - working bilaterally with PCO to agree that we will fund, and it will provide, a drafter for our regulatory reviews.