

**Government Response to  
Report of the Regulations Review Committee  
on its  
Inquiry into COVID-19 Secondary Legislation**

**Presented to the House of Representatives**

**In accordance with Standing Order 256**

## **Government response to the Regulations Review Committee's inquiry into COVID-19 Secondary Legislation**

### **Introduction**

- 1 The Government has considered the Regulations Review Committee report in respect of its inquiry into COVID-19 Secondary Legislation
- 2 The Government responds to the Committee Report in accordance with Standing Order 256. The Government must, not more than 60 working days after the Report was presented, present a paper to the House responding to the recommendation of the Committee which are addressed to it.

### **Findings / Recommendations and Government response**

#### **Recommendation 1**

- 3 ***The Regulations Review Committee, in this and the 52nd Parliament, has evaluated all COVID-19 secondary legislation and its associated empowering provisions against the constitutional principles for good legislative design and the grounds in Standing Order 327. Where we have had concerns about the legislation, we have referred our concerns to the Minister and have reported to the House.***

#### **Response**

- 4 The Government notes the work of the Regulations Review Committee.

#### **Recommendation 2**

- 5 ***The appropriate balance was struck between primary and secondary legislation by the COVID-19 Public Health Response Act. However, we consider that the COVID-19 Response (Vaccinations) Legislation Act 2021 should ideally have been stand-alone legislation which clearly set out the parameters of the vaccination mandate regime. Likewise, we agree with submissions that the broad parameters of the protection framework (traffic light regime) should have been set out in primary legislation, with the precise detail of the regime set out in secondary legislation. This would have allowed the COVID-19 Public Health Response (Protection Framework) Order (Protection Framework Order) to carry less of the load and would have allowed it to contain active provisions only.***

## Response

- 6 The Government notes the Committee's finding that COVID-19 Public Health Response Act struck an appropriate balance between primary legislation and secondary legislation.
- 7 The Government disagrees with the finding that the COVID-19 Response (Vaccinations) Legislation Act 2021 should have been stand-alone legislation. In this respect, it notes that the amendments made by the Act were inexorably interwoven with COVID orders predating the passing of the Act. However, the Government agrees that it was important to include parameters on the vaccination mandate regime in primary legislation and notes that this Act achieved this.
- 8 The Government disagrees with the finding that the protection framework ought to have been set out in primary legislation. The Protection Framework Order was made to provide the public with as much certainty as possible about the responses that could be taken to manage the pandemic, while maintaining the ability to adjust the responses as the pandemic developed. In this respect, the Government considers that embedding the parameters of the protection framework in primary legislation would not have provided sufficient flexibility to respond to the pandemic as it developed. We note that the Protection Framework Order was amended 16 times before being revoked on 12 September 2022.
- 9 The Government has not identified any recommended action requiring further response.

## Recommendation 3

- 10 ***Generally, we consider that there have been appropriate safeguards for the making of COVID-19 secondary legislation. However, the obligation in section 14(4) of the COVID-19 Public Health Response Act to keep COVID-19 orders under review is poorly defined and it is unclear exactly what the Minister and the Director-General are required to do to meet this requirement. It would have been better to specify exactly what this requirement means, including the frequency of review and a requirement to publish each review. Moreover, we think improvements need to be made to the safeguards applicable to orders made under section 70 of the Health Act 1956, including to improve the way they are drafted and to align publication requirements with COVID-19 Public Health Response Act orders (particularly to ensure expired orders remain accessible).***

## Response

- 11 The Government notes the general findings of the Committee.

- 12 The Government also notes the Committee's specific findings in respect of possible improvements to the obligation to keep COVID-19 orders under review and the safeguards under section 70 of the Health Act 1956.
- 13 In respect of the obligation to keep COVID-19 orders under review, the Government agrees that improvements could be made to make it clearer at what frequency, or minimum frequency, those reviews need to be undertaken or the criteria that inform the need for review, to the extent practicable in the context of the particular emergency.
- 14 The Government notes that in practice these reviews were undertaken through the public-health risk assessments, the frequency of which changed in response to both the outbreak and the Government response. In the last 12 months the review process has moved to a regular cycle and occurred every 1-2 months.
- 15 In regard to the proposal to require the publication of each review, the Government notes that public health assessments were proactively disclosed during the COVID-19 response and changes to settings were the subject of public announcements.
- 16 In respect of the safeguards, the Government notes that these will be considered further following the conclusion of the Royal Commission of Inquiry into Lessons Learned from Aotearoa New Zealand's Response to COVID-19.

#### **Recommendation 4**

- 17 ***Parliament, including the Regulations Review Committee, has capably performed its role to scrutinise secondary emergency legislation. We think that it is preferable to make use of an existing select committee to review emergency secondary legislation rather than develop a new external scrutiny body, such as the Review Panel that operated in respect of the Canterbury earthquake orders. However, an advantage of that Review Panel was that it reviewed draft orders before they were made and thus had the opportunity to make recommendations in advance, whereas all our reviews have been after the fact. We also note that the Minister was required by the Kaikōura earthquakes legislation to provide a draft order to the committee and have regard to its recommendations on the draft order. Standing Order 326(2) provides that a Minister may refer draft regulations to the committee for consideration and the committee may report on the draft regulations to the Minister. Although we appreciate the tight time constraints operating, we think it would have been preferable if the Minister exercised this option, where practicable and useful, to refer draft COVID-19 orders to the Regulations Review Committee. This would have provided a useful pre-enactment safeguard which would have helped improve the quality of COVID-19 secondary legislation. We acknowledge that referral of draft orders to the committee will not always be practicable. But we recommend that, for future emergencies, consideration be given to referring certain orders in draft to the committee (either under Standing Order 326(2) as part of the committee's existing functions or according to a specific requirement in future emergency***

**legislation). This could be appropriate where the order prioritised a novel approach or led to a substantive restriction on rights. Consideration could also be given to the Regulations Review Committee appointing independent advisers to assist with its review and scrutiny functions.**

## **Response**

- 18 The Government endorses the Committee's general finding that Parliament, and the Committee itself, has capably performed its role to scrutinise secondary legislation.
- 19 The Government also notes the Committee's views that:
- it would be preferable to make use of an existing select committees rather than developing bespoke external scrutiny bodies; and
  - it would have been preferable had the Minister referred draft orders to the Committee either under Standing Order 326(2) or under a specific requirement in future emergency legislation.
- 20 The Government agrees that consideration should be given to referring draft orders to the Committee where reasonably practicable. This has been done in other emergency contexts, including the Hurunui/Kaikoura emergency legislation and the Severe Weather Emergency Recovery Legislation Act 2023. However, it notes that when responding to a public health situation, it will not necessarily be reasonably practicable for draft orders to be referred to the Committee in advance of them coming into effect, as the delays caused by doing so:
- may be contrary to the public health objective of the Order (e.g. where the proposed measures are seeking to prevent or limit an outbreak); or
  - keep existing measures in force longer than is needed (e.g. where a proposed order is seeking to substitute current settings with less restrictive settings).
- 21 Further comment on the comparative benefits of using existing select committees and bespoke review bodies when responding to a rapidly evolving health situation is provided in response to Recommendation 7 below (at paragraphs 34 – 36).

## **Recommendation 5**

- 22 ***We agree that some of the COVID-19 secondary legislation was difficult to navigate and inaccessible. This was particularly acute in relation to the Protection Framework Order and its use of non-active provisions. One of the principles of good legislative design is that the law itself must be clear enough to be understood by the target audience. There has been criticism of the Protection Framework Order for not being sufficiently clear. To some extent, it is understandable that clarity and accessibility suffer in an emergency, when flexibility and basic operability get prioritised over clear***

***expression and structure in the interests of getting the job done as quickly as necessary. But, as submitters pointed out, the Protection Framework Order arose nearly two years into the pandemic at a time when the urgency had arguably diminished. As events in 2021 and early 2022 have demonstrated, public tolerance can be sorely tested if restraints are prolonged. The longer an emergency goes on, the more important it becomes for legislators to continue to bring the public along with them by making the secondary legislation as clear as possible.***

## **Response**

- 23 The Government notes the finding that some COVID-19 secondary legislation was difficult to navigate and inaccessible. It also notes the specific criticisms regarding the clarity and navigability of the Protection Framework Order.
- 24 The Order was structured in this way to provide transparency about all the legislative tools that were available and to ensure that applying those tools could be done quickly and transparently. The alternative approach of re-making the entire order each time had become unsustainable from a resourcing and transparency perspective. For context, in the 10 months prior to the making of the Protection Framework Order, 12 “alert level orders” had been made under the COVID-19 Public Health Response Act 2020. Those orders were then subject to a further 25 amendment orders. In volume, this amounts to roughly 738 pages of legislation.
- 25 In contrast, the Protection Framework Order was made on 30 November 2021 and revoked on 12 September 2022. As noted above, over that 10-month period the Protection Framework Order was amended 16 times, 10 of those amendments were through instruments solely relating to the Protection Framework Order. In volume those 10 instruments amount to approximately 92 pages of legislation. The needs of the response continued to change frequently, including to remove requirements as they became inappropriate.
- 26 The Government also notes that the use of other communication tools reduced the public’s reliance on the Protection Framework Order. The communication tools used include, but are not limited to: frequent public briefings, guidance documents, advertising and the covid-19.govt.nz website.
- 27 However, the Government agrees that, if a similar need for ongoing and urgent legislation arises in the future, consideration should be given as to whether an equally transparent and sustainable model for producing legislation could be designed without the same impact on clarity for users.

## **Recommendation 6**

- 28 ***The committee’s recommendations from 2016 remain relevant and appropriate, although the extent to which each of them applies depends on the nature of the particular emergency. Even three years after the COVID-19 pandemic began, the World Health Organization considered it remained an acute global emergency. The ongoing nature of the underlying health emergency means that response and recovery may***

***need to proceed in tandem for some time, rather than be seen as separate phases of the emergency.***

#### **Response**

- 29 The Government notes the finding of the Regulations Review Committee.
- 30 The Government has not identified any recommended action(s) requiring further response.

#### **Recommendation 7**

- 31 ***We do not intend to modify the committee's 2016 recommendations. However, we note that recommendation 6 from the 2016 report (Orders in Council should be subject to scrutiny before and after they are made) was made against the background of the separate Review Panel for that purpose under the Canterbury Earthquake Recovery Act 2011. We consider that it may be more useful to refer draft emergency secondary legislation to the Regulations Review Committee, under Standing Order 326(2), and allow the Minister to take into account the committee's recommendations, rather than to create a separate review panel for that purpose.***

#### **Response**

- 32 The Government notes the Committee's decision not to modify its 2016 recommendations.
- 33 The Government disagrees with the Committee's view that it may be more useful to refer draft emergency secondary legislation to the Committee as opposed to setting up a distinct Review Panel. In this respect, the Government notes that the functions of the Committee and a Review Panel are distinct. Unlike the Committee, Review Panels can provide input on policy matters and can be designed to fit the needs of the particular emergency – for instance the Severe Weather Emergency Recovery Legislation Act 2023 provides for a review Panel whose membership must be able to reflect local and Māori interests, knowledge and perspectives.
- 34 The Government considers that both types of review of draft emergency secondary legislation may be useful, and neither is prima-facie preferable over the other. As previously noted, both types of review are provided for in the Severe Weather Emergency Recovery Legislation Act 2023.

#### **Recommendation 8**

- 35 ***All emergency secondary legislation should be drafted by Parliamentary Counsel and subject to publication and disallowance.***

#### **Response**

- 36 The Government disagrees with the recommendation that all emergency secondary legislation should be drafted by Parliamentary Counsel.

- 37 The Parliamentary Counsel Office (**PCO**) does not have the resource to draft all emergency secondary legislation. Placing such additional strain on PCO resources would not be sustainable. In this respect, it is noted that at the date of the Committee's report PCO had drafted 358 instruments of secondary legislation made in response to the COVID-19 pandemic.
- 38 In addition, the Government notes that extremely tight timeframes and agency specific expertise mean that agencies should share some of the responsibility for drafting some forms of secondary legislation.
- 39 The Government considers that generally, in this situation, the PCO's resources are best used in assisting agencies by developing templates, undertaking peer review and providing advice on drafting issues for emergency secondary legislation. In this regard, it notes that PCO has established a Legislation Services Panel which is designed to support agencies with, and build their capability in, the development and drafting of their own secondary legislation and related support services. PCO continues to work with agencies to improve the quality of, and access to, secondary legislation as part of its legislative stewardship function.
- 40 In respect of publication and disallowance, the Government notes the default position under the Legislation Act 2019 is that all secondary legislation under future empowering provisions is subject to publication requirements and disallowance. PCO's access to secondary legislation initiative will improve access to that secondary legislation over time.

#### **Recommendation 9**

- 41 ***We also endorse and repeat the recommendation of the Regulations Review Committee of the 52nd Parliament that the Government should facilitate an all-of-government examination of COVID-19 secondary legislation (and powers to make that legislation) to seek ways of improving the quality of secondary legislation in future emergencies. This could be achieved by a cross-departmental review initiated by the Public Service Commission under the Public Service Act 2020 and implemented through an interdepartmental venture under section 33 or a joint operational agreement under section 39 of that Act. Although the terms of reference for the Royal Commission of Inquiry into Lessons Learned from Aotearoa New Zealand's Response to COVID-19 include consideration of legislative settings, we consider an all-of-government review that is specifically focused on examining secondary legislation would be beneficial as well. That is because we think this is an area where those who were involved in making the legislation are likely to have particular insights into what worked well and what could have been improved. A collaborative review by the Government departments that were in the engine room of the legislative response to the pandemic will generate ideas for specific and detailed improvements that can be applied to secondary legislation necessary for a future emergency. These will complement the Royal Commission's findings.***

## **Response**

- 42 The Government disagrees with the recommendation that it should facilitate an all-of-government examination of COVID-19 secondary legislation at this stage.
- 43 The Government agrees that the quality of secondary legislation in emergencies is important.
- 44 It is expected that the Royal Commission of Inquiry into Lessons Learned from Aotearoa New Zealand's Response to COVID-19 will make some recommendations that are relevant to this issue. The Government considers that those recommendations should be considered prior to determining whether an all-of-government examination would be beneficial.

## **Recommendation 10**

- 45 ***We recommend a hybrid approach as set out on page 7 should be used in future emergencies if possible.***

## **Response**

- 46 The Government agrees to the recommendation.

## **Recommendation 11**

- 47 ***We recommend that sunset provisions are subject to appropriate parliamentary scrutiny and that scrutiny of emergency legislation should occur at least once a term, consistent with parliamentary democracy.***

## **Response**

- 48 The Government agrees to the recommendation.