DEPARTMENT OF THE PRIME MINISTER AND CABINET
TE TARI O TE PIRIMIA ME TE KOMITI MATUA

Proactive Release

The following documents have been proactively released by the Department of the Prime Minister and Cabinet (DPMC), on behalf of Hon Andrew Little, Minister of Health:

Health and Disability System Reform Briefings

The following documents have been included in this release:

Title of paper: Health Reform Strategy and Approach to Legislation

Title of paper: Health Reforms: Implementation and Transition Cabinet Paper

Title of paper: Health Reforms: Planning and Accountability Framework

Title of paper: Health Reforms: Implementation of a Consumer Voice Framework

Title of paper: Health Reforms: Legislation Cabinet Paper Summary and Talking Points

Title of paper: Health Reform: Legislation and Transition Update

Title of paper: Health Reforms: Legislating for Public Health Structures

Title of paper: Health Reforms: Legislating Intervention Powers and Obligations Relating to Health New Zealand

Title of paper: Health Reforms: Final Decisions for Legislation

Title of paper: Health Reforms: Implementation Cabinet Paper Summary and Talking Points

Title of paper: Confirming Hauora Māori System Settings

Title of paper: Health Reforms: Employment Relations Settings

Title of paper: Further Policy Decisions for the Health Reform Bill: Cabinet Paper Summary and Talking Points

Title of paper: Health Reforms: Development of the NZ Health Charter and Associated Legislative Provisions

Title of paper: Health Reforms: Independent Alcohol Advice and Research Function and Levy

Title of paper: Health Reforms: Remaining Transitional and Consequential Provisions for Decision

Title of paper: Joint Te Kawa Mataaho/ Health Transition Unit Report: Māori Health Authority – Proposed Application of Crown Entities Act 2004 and Public Service Act 2020

Title of paper: Health Reforms: Draft Cabinet Paper to Approve Bill for Introduction and Health System Principles

Title of paper: Pae Ora (Healthy Futures) Bill: Approval for Introduction at Cabinet

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Briefing

HEALTH REFORMS: LEGISLATING FOR PUBLIC HEALTH STRUCTURES

To	Hon Andrew Little, Minister of Health	**Report No**	DPMC-2020/21-1191
From	Stephen McKernan, Health and Disability Review Transition Unit	**Date**	29 June 2021

Purpose

This note provides you with initial options and proposals for legislating in the Health Reform Bill to support the Government's announced changes to public health structures. We intend to discuss these options with you in our meeting tomorrow, Wednesday 30 June.

Recommendations

It is recommended that you:

1. **Note** that the Cabinet's decisions to establish the Public Health Agency as a business unit of the Ministry of Health, and to create the national public health service within Health New Zealand, do not require explicit legislative provision to give effect to them as both are internal divisions of the two organisations.
2. **Note**, however, the case for some provision in the Health Reform Bill to ensure the prominence of these new arrangements and to make changes to supporting statutory roles and committees.
3. **Agree** that the Bill should amend the Health Act 1956 to require that the Public Health Agency be established as a division of the Ministry of Health. **YES/NO**
4. **Agree** that the purposes of the Agency should be reflected in the legislation as being to:
   i. advise the Director-General of Health on public health matters; and **YES/NO**
   ii. lead and coordinate public health regulatory activity (i.e. including the actions of medical officers of health). **YES/NO**
5. **Agree** that the Bill should require the Minister of Health to establish a public health advisory committee as a standing body to provide independent advice on public health matters. **YES/NO**
6. **Agree** that the Bill should amend the powers of the Director of Public Health in the Health Act 1956 to:

i. exercise the powers of the Director-General of Health to direct medical officers of health without requiring explicit delegation; **YES/NO**

ii. automatically be able to exercise the functions of a medical officer of health in their own right (i.e. without requiring delegation). **YES/NO**

7. **Indicate** any other areas relating to public health structures on which you would wish to receive further advice.

8. **Forward** this briefing to the Associate Minister for Public Health to seek input on these legislative options, ahead of confirming your desired approach.

9. **Agree** to seek authorisation in the current draft Cabinet paper on legislation to make the above decisions and issue drafting instructions to Parliamentary Counsel. **YES/NO**

Stephen McKernan Director **Health Transition Unit**	Hon Minister Andrew Little **Minister of Health**
29 / 06 / 2021	…../…../….

Contact for telephone discussion if required:

Name	Position	Telephone	1st contact
Stephen McKernan	Director, Health Transition Unit	s9(2)(a)	
Simon Medcalf	Health Team Lead	s9(2)(a)	X

Minister's office comments:

- ☐ Noted
- ☐ Seen
- ☐ Approved
- ☐ Needs change
- ☐ Withdrawn
- ☐ Not seen by Minister
- ☐ Overtaken by events
- ☐ Referred to

LEGISLATING FOR PUBLIC HEALTH STRUCTURES

Background

1. Cabinet has agreed to establish the Public Health Agency as a distinct, branded unit within the Ministry of Health, and to establish a national public health service within Health NZ that brings together the 12 public health units, currently organised within DHBs, with the majority of the functions of the Health Promotion Agency.

2. The Health Reform Bill will need to establish the new system entities, set their core purpose, objectives, obligations and functions, and provide clear accountability and direction mechanisms. Given both the Public Health Agency and national public health service will be internal divisions of the Ministry of Health and Health NZ respectively, there is no strict legal need to legislate for their establishment. However, there are matters related to these structures where there may be a case for legislation.

3. As we have previously advised, given the timetable for drafting and passage of legislation to enable the reforms to come into effect in July 2022, it is important to manage risks to the Bill as far as possible. One element of this is the scope of the Bill, which we believe should be focused on the critical requirements for Day 1 and not extend to wider regulatory frameworks that, while there may be strong individual cases for reform, would best be taken forward through other vehicles.

4. We have specifically noted in previous advice that the wider public health regulatory framework (principally that under the Health Act 1956) should be excluded from this Bill. Further changes, such as wider changes to the Health Act to update it, can be made following the Bill's enactment. However, there is a case for the Bill to amend some core components of structures and the public health statutory officers' roles, where such changes are in effect consequential changes as a result of the wider reform programme.

5. This is particularly apposite with respect to strengthening the Director-General's and Director of Public Health's statutory mandate in relation to the national public health service which is to be located in Health NZ. It is important, particularly during the COVID-19 pandemic that the statutory powers relating to infectious disease remain clear, and it remains clear who is able to exercise them. We do not propose any changes to the powers themselves, nor to those who are able to exercise them in practice, but believe it is worth considering a strengthened statutory mandate for the Director of Public Health, rather than relying on delegation.

Options for inclusion in the Health Reform Bill

6. We have identified three areas in which provisions in the Bill may be necessary or helpful to support and embed Government's intentions:

   i. requiring that the Public Health Agency is established as a division of the Ministry of Health;

   ii. requiring that the Minister of Health establish a national public health advisory committee; and

   iii. expanding the powers of the Director of Public Health to lead across the system.

Requiring that the Public Health Agency is established as a division of the Ministry of Health

7. Legislation is not necessary to establish the agency as a branded business unit of the Ministry of Health. However there is a good case for using the Bill to ensure that this is done and to ensure that the Agency is given prominence and a secure legislative footing that matches its intended position in the future system. This would create a firm requirement for the agency to be established, and require primary legislation to unpick the arrangements.

8. In our view, such a provision would provide a strong signal as to the position of the Public Health Agency in the future system, and create more certainty that its role will be enduring. Although it would limit the ease with which future Ministers could make changes, this would be justifiable in providing that clarity and certainty.

9. There is also relevant precedent. The Health Act 1956 already includes a requirement for a Public Health Group to be established as a division of the Ministry of Health[1]. Our provisional view is that this could be repealed and replaced by a similar provision to require the Public Health Agency as a division of the Ministry. The Director-General would retain the ability to establish a distinct group/directorate within the Ministry (and we expect that there would be such a group alongside the Agency); however we do not believe that this requires explicit legislation in the context of the new system arrangements.

10. If required, this provision should then specify the functions of the Agency at a high-level to reflect Cabinet's decisions. Our view is that these should encompass:

    i. advising the Director-General of Health on public health matters. This function would cover in a broad way the totality of the Agency's policy, strategy and advisory roles, including supporting surveillance, intelligence and analysis functions necessary to provide that advice, without a need to specify constituent parts in a way that might risk complication or unintended consequences; and

    ii. leading and coordinating public health regulatory activity (i.e. including the actions of medical officers of health). This would reflect the intended leadership role of the Agency and its relationship to the national public health service in Health New Zealand. The Agency as a whole would not have directive powers in relation to medical officers of health, but these would sit with the statutory role of the Director-General of Health (and perhaps the Director of Public Health, as discussed below).

11. Our aim is that provisions such as that above would be presented as a necessary clarification and consequential amendment to the system structures which are one of the focuses of the Bill. As such, we would intend to limit the risk of opening up the scope of the Bill to the wider public health regulatory framework beyond this Part of the 1956 Act. We will seek Parliamentary Counsel's advice on this issue.

Requiring that the Minister establish a national public health advisory committee

12. Section 14 of the New Zealand Public Health and Disability Act 2000 requires that a public health advisory committee be established by the national advisory committee on health and disability (which has previously been referred to as the National Health Committee). Although the purpose of a public health committee is to provide independent advice to the Minister, the duty to establish it sits with the National Health Committee, which was formally disestablished in 2016.

[1] Section 3E, Health Act 1956

13. The Minister of Health can of course choose to exercise a power to set up an advisory committee on any relevant matter, including public health, under existing powers (Section 11 of the NZPHD Act) which we intend to transpose into the new Bill. However, there is a question as to whether to require the Minister to do so in relation to public health and thereby avoid any uncertainty.

14. The Ministry of Health is developing advice on options for a future independent advisory committee for public health, with the aim of ensuring a robust mechanism for providing this resource (advice was provided to the Associate Minister of Public Health in February 2021). Notwithstanding options regarding the mechanics, terms and membership of such a committee, we believe there is a good case for placing a duty on the Minister to establish it. Unlike most other committees which tend to be established in relation to a specific or temporary issue (for example, to conduct a review), the role of the public health committee would be expected to be both broader and permanent. As with the proposed provision above for the Public Health Agency, this would provide security for the committee and underpin its position in the health system. Moreover, since the above provision is already included in the NZPHD Act, any changes should be within the existing scope of the Bill.

Expanding the powers of the Director of Public Health

15. The Director of Public Health is a statutory role established under Section 3B of the Health Act 1956. The function of the role as specified is to advise the Director-General of Health on public health matters. The Director of Public Health also has an explicit power to provide independent advice or reports to the Minister, whether at the request of the Minister or on their own initiative (though the Director-General must be consulted).

16. Cabinet has agreed that the Director of Public Health should be an important leadership role in the future system, and a key means of connection across public health and between the Ministry, Public Health Agency, and relevant services in Health New Zealand. While the existing legislation above supports this, and we recommend retaining these existing provisions, we believe that there are a small number of additions which could reinforce this role and provide greater leverage for leadership in the future.

17. Firstly, we recommend that the Director of Public Health should be able to exercise the powers of the Director-General to direct medical officers of health and health protection officers. These powers (under Section 7A of the 1956 Act) currently sit with the Director-General but can be delegated to a nominated individual. In our view, the need for formal delegation may act as a barrier to the Director of Public Health being able to effectively direct medical officers of health, and of being recognised in such a system-wide leadership role. We propose that the Director of Public Health should be able to exercise this aspect of the Director-General's powers without explicit prior authorisation or delegation. This should be subject to any direction by the Director-General, to avoid duplicate or contradictory directions and remain clear on accountability to the Director-General. We would not suggest including the power of the Director-General to appoint medical officers of health similarly (other than where delegated by the Director-General) so as to not confuse appointment processes.

18. Secondly, we propose that the Director of Public Health should be automatically able to exercise the functions of a medical officer of health in their own right. At present, this requires an appointment by the Director-General and may occur when, for instance, the Director-General is not qualified in public health medicine, so cannot exercise the powers personally and must appoint a suitable person. Regardless of the qualifications of the Director-General, we believe that the Director of Public Health should always have these

functions, on the assumption that this role would be filled by individuals with public health qualifications and experience.

19. As with the provisions regarding the Public Health Agency, our aim is that these changes would be a consequential amendment to support the delivery of new system structures and its leadership roles. This may present some additional risk to the scope of the Bill, given the interaction with the wider powers of the 1956 Act, although this may be mitigated to some extent by keeping changes limited. We will seek PCO's view and advise should there be a significant risks.

Next steps

20. We propose to discuss the initial options above with you in our meeting on Wednesday 30 June.

21. Subject to your views, we recommend sharing this briefing with the Associate Minister for Public Health, to canvass views on these proposals and any wider options that may be considered within the limits of the Health Reform Bill.

22. It may be possible to revise the current draft Cabinet advice on legislation to incorporate proposals regarding the above, to seek Cabinet approval. However, the timetable for finalising this paper may mean that it is not possible to include these before lodging. In this event, we propose that the Cabinet advice be amended to seek authorisation for you to make policy decisions on the above and to issue drafting instructions to PCO. This would allow for your position on these areas to be communicated in line with other instructions on the Bill.