



## AIDE MEMOIRE

### FPAs – options for incorporating backstop into legislation, with timeframes

<b>Date:</b>	13 December 2021	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2122-1834

<b>Information for Minister(s)</b>
Hon Michael Wood <b>Minister for Workplace Relations and Safety</b>

<b>Contact for telephone discussion (if required)</b>				
<b>Name</b>	<b>Position</b>	<b>Telephone</b>	<b>Privacy of Natural Persons</b>	<b>1st contact</b>
Tracy Mears	Manager, Employment Relations Policy	04 901 8438		✓
Beth Goodwin	Principal Policy Advisor	04 901 1611		

<b>The following departments/agencies have been consulted</b>

**Minister's office to complete:**

- |   |  |
|---|--|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |

**Comments**



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### Purpose

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1. To provide you with advice and options on how the backstop mechanism could be incorporated into the legislation, and how the options impact the timeline for the Bill

Tracy Mears  
**Manager, Employment Relations Policy**  
Workplace Relations and Safety, MBIE

13 / 12 / 2021

## Background

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2. On Monday 8 November 2021, you indicated a preference to introduce the new backstop mechanism after the Bill is introduced, rather than extend the timeframe for introduction beyond March 2022 to incorporate the backstop (BR 2122-1666 refers). We have prioritised drafting instructions for the Bill without the new backstop mechanism and these have now been completed and sent to PCO.
3. Ahead of our meeting with you on 14 December, the attached A3s and this note provide advice and options on how the backstop mechanism could be incorporated into the legislation and sets out how the options impact the timeline for the Bill. It complements the briefing on the backstop policy design which will be provided to you on 16 December 2021.

## There are 3 options for how to incorporate the backstop after introduction

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4. There are three options for incorporating the backstop after the Bill is introduced:
  - Option 1 – Supplementary Order Paper (SOP) introduced at Select Committee with consultation
  - Option 2 – SOP introduced at Select Committee but there is no consultation
  - Option 3 – SOP introduced at Committee of the Whole House.
5. The key differences between the options are the degree of consultation and the order in which parts of the process occur which influences the degree to which parts of the process can occur in parallel. We have estimated the timeframes for each option and included a stylised timeline of the Select Committee process for each option to illustrate the differences in Annex A.
6. Your office asked us to consider a 4 month Select Committee timeframe. This possibility has been explored, where relevant, below. Given a Bill of this size and complexity, a 4 month timeframe creates both timing and quality risks. If the Committee runs out of time, the Bill will be reported back to the House unchanged. Any changes would then need to be incorporated via an SOP at the Committee of the Whole House which would add time to that stage of the process<sup>1</sup>.
7. There are also some common assumptions across all of the options which have been used to underpin the timing estimates including:
  - a. The plan is to introduce the Bill without the backstop on 28 March 2022. If there is a 6 month Select Committee, submissions would be open for 6 weeks (19 May). If there is a 4 month Select Committee, submissions would be open for 3 weeks.
  - b. Preparation of drafting instructions for an SOP will take 4-6<sup>2</sup> weeks. An SOP amends the provisions of a Bill so the Bill has to be finalised before drafting instructions can be issued. Some chunks of instructions can be done in advance but a key task is integration with the existing provisions.

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<sup>1</sup> This recently happened to the Resource Management (Enabling Housing Supply and Other Matters) Amendment Bill.

<sup>2</sup> We estimate that members of the current FPA team (policy and legal) could draft the instructions in 4 weeks. If all of the team is needed to work on the Bill for introduction, additional legal and policy personnel will be brought in but they would take longer to get up to speed - so we estimate the instructions could take 6 weeks. To support the Bill, MBIE has already budgeted for two senior contractors and plans to contract out submissions analysis.

- c. PCO has indicated that it would take 10 weeks to draft the backstop from receipt of the drafting instructions. PCO have said they will add a second drafter to assist with the drafting.
- d. We have assumed the BORA vet can be done on a near-final version of the Bill and the SOP so this is completed simultaneously with the finalisation of the Bill/SOP. We will engage early with the Ministry of Justice to assist with this process.
- e. If the SOP is simultaneously incorporated with other changes from the Departmental Report at Select Committee, the time to draft the revised-track (RT) version will increase from the usual 4-6 weeks to 6-8 weeks.
- f. The time between Royal Assent and Commencement is 3 months. This is to allow time for implementation, finalising and enacting new regulations and amendments to existing regulations. Employment Services has already started on the implementation preparation and will do as much of that work in advance as is possible. Similarly it may be possible to do some work on the regulations in advance, although they cannot be finalised until the Bill is. We can check the commencement timeframe is appropriate during the Select Committee process.
- g. We have assumed there will be no unplanned absences of the FPA team.

*Option 1: Incorporate backstop by sending a SOP to Select Committee, with consultation time*

- 8. Drafting instructions for the SOP could start once the Bill is finalised (28 March). Timeframe estimates are based on drafting instructions taking 4 weeks and 10 weeks for drafting which means the SOP could be ready on 25 July. On this timeline, the SOP would be finished about two months after submissions closed on the Bill. To ensure there was consultation on the SOP, the Select Committee would need to undertake a second consultation. The timeline allows one week for consultation.
- 9. Officials are aware of an SOP being introduced while a Bill is at Select Committee once in recent years: in relation to the Land Transport (Drug Driving) Amendment Bill, whereby an SOP was introduced to specify criminal limits and blood infringement thresholds in the Drug Driving Bill and address several New Zealand Bill of Rights Act issues. In that case, the intent to introduce an SOP at Select Committee was made public when the Drug Driving Bill was introduced in August 2020. To allow consultation on the SOP, the submission timeframe and the Select Committee process was extended a couple of times.
- 10. The backstop SOP and the departmental report would then need to be incorporated together into the RT version of the Bill. The timing estimate for this option is based on the drafting taking 8 weeks.

*Option 2: Incorporate backstop by sending a SOP to Select Committee, but no consultation*

- 11. The timelines would be as above but under this option, the Select Committee would be asked to incorporate the backstop changes in its report back to Parliament, without seeking public consultation on the amendment.
- 12. Similarly to option 1 above, the SOP and the departmental report would then need to be incorporated together into the RT version of the Bill. The size of this task combined with the fixed Select Committee report-back date is likely to increase the risk that the Select Committee would need to extend their report-back date or not meet their report-back time.
- 13. Given the quantity of work, we do not believe that this option could be completed within a 4 month Select Committee period but it may be possible to do it in less than a standard 6 month period if, for example, the consultation period was shortened. However, shortening the consultation period would put the date for completion of the SOP (25 July) at risk as it would

increase the period of time PCO resources were spread between drafting the SOP and supporting the Committee.

*Option 3: Incorporate SOP at the COWH stage after Select Committee*

14. The timelines for the Bill would be as per a standard 4 or 6 month Select Committee process. Annex A shows the timeline for a 4 month Select Committee option. The SOP would need to be drafted to amend the RT version of the Bill. The substance of the RT version of the Bill would need to be completed before the SOP could be drafted. Thus the drafting of the SOP would mean a delay of about 14-16 weeks between the completion of the RT version and the remaining stages in the House.

*Option 4: The backstop could also be incorporated as part of the introduction version of the Bill*

15. For completeness we have compared the timing for incorporating the backstop in the introduction version of the Bill. While this results in a later introduction, it enables consultation on all components of the Bill and has a greater chance of following a standard Select Committee timeframe – a 4 to 6 month process. Annex A shows the timeline for a 4 month Select Committee option but for a Bill of this size, complexity and the high level of interest, a 6-month process is advised. With a 6 month Select Committee, the date for third reading would be 15 December.

## **Preferred option**

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16. We believe all of the options are workable but they each have different advantages, disadvantages and risks. These are summarised in the table attached as Annex B.
17. Both MBIE and PCO prefer option 4 with a 6 month Select Committee process, both because it provides the public the ability to consult on the whole Bill and because it minimises the rework involved in drafting provisions in the introduction version that will then need to be removed via SOP. Early incorporation of all of the provisions of the Bill will make the later stages smoother.

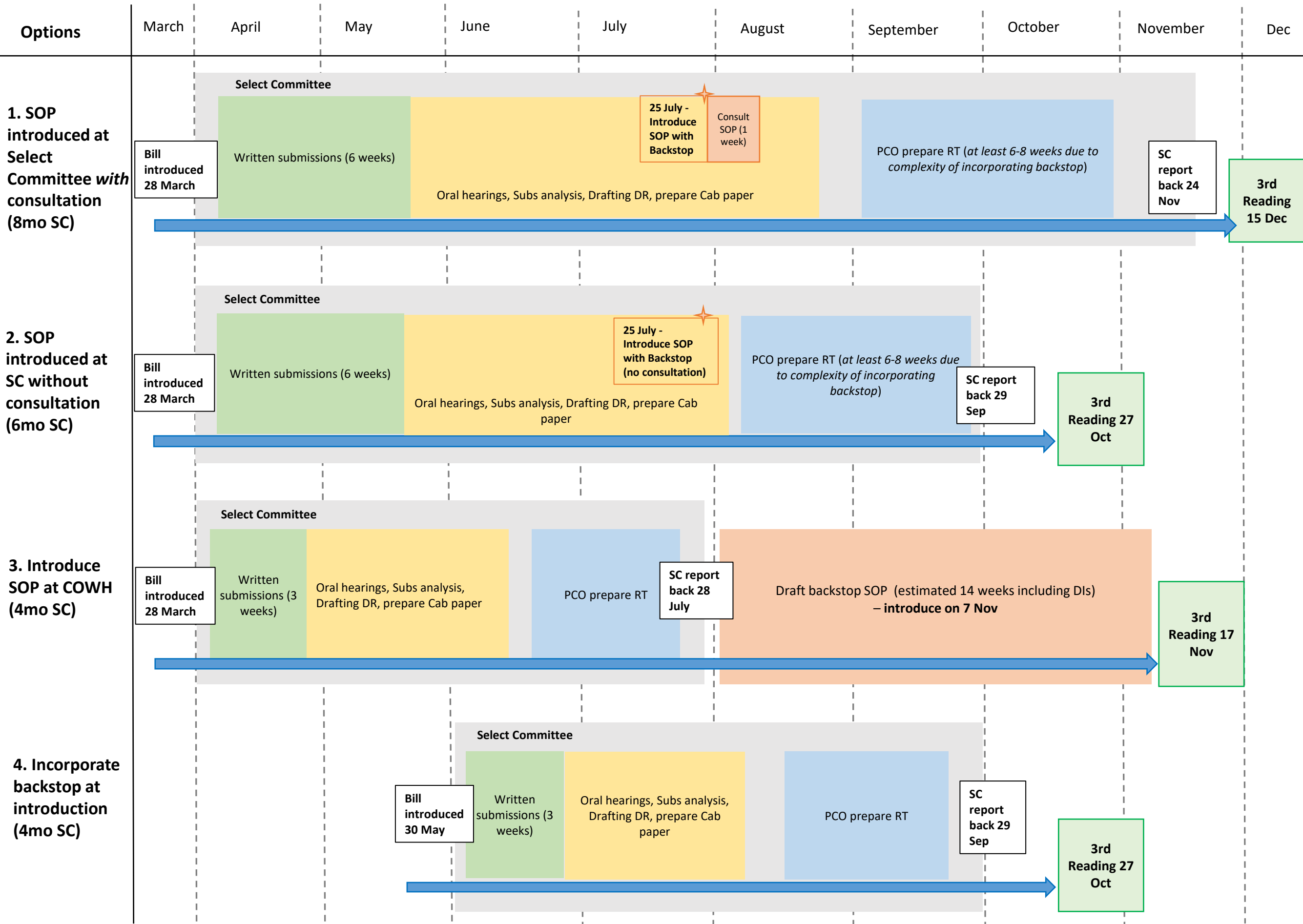
## **Annexes**

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Annex One: Diagram of options, showing Select Committee timeline for each

Annex Two: Table of options, showing benefits and disadvantages

# Annex A: Diagram of options, showing Select Committee timeline for each (2022)



**Annex B: Table of options, showing benefits and disadvantages**

Description of option	Bill introduced	Backstop SOP introduced	Third Reading	Commencement	Benefits	Disadvantages	Risks and mitigants	Inter-dependencies within MBIE's control	Interdependencies outside MBIE's control
<b>1. SOP introduced at Select Committee with consultation (8mo SC)</b>	28 Mar	25 July	15 Dec	Mar 2023	- Consultation	- Stakeholders are asked to consult on a Bill and then on an SOP - SC longer than standard	- Simultaneous work is slower. This is reflected in timeframe.	- Support Bill at SC and drafting SOP concurrently	- SC Chair agrees to consult on SOP - Drafting instructions for SOP have to refer to Bill, so cannot begin until Bill complete - Two weeks for House stages after SC
<b>2. SOP introduced at SC without consultation (6mo SC)</b>	28 Mar	25 July	27 Oct	Jan 2023	- Standard SC timeframe	- No consultation on backstop - SC reports back at start of recess, reduces time gains		- Support SC and drafting SOP concurrently	- SC Chair agrees to accept SOP without consulting on it - Drafting instructions for SOP have to refer to Bill, so cannot begin until Bill complete - Two weeks for House stages after SC
<b>3. SOP introduced at COWH</b>	28 Mar	7 Nov	17 Nov	Feb 2023	- Incorporates 4 months SC process	- Short time for SC consideration. - No consultation on backstop	- If SC runs out of time, Bill is reported back unchanged.	- Prepare drafting instructions for SOP in advance (to the extent possible).	- PCO begins drafting SOP as soon as RT version complete - Two weeks for House stages after SOP introduced
<b>4. Incorporate backstop into introduction version of the Bill</b>	30 May	n/a	27 Oct	Jan 2023	- Reduces rework - Incorporates 4 months SC process - Consultation	- Short time for SC consideration. - SC reports back at start of recess, reduces time gains	- Simultaneous work is slower. This is reflected in timeframe. - If SC runs out of time, Bill is reported back unchanged.		- AG approves drafting in advance of Cabinet decisions - Two weeks for House stages after SC

Interdependencies common across all options		Risks/mitigants across multiple options
<b>Within MBIE's control</b> <ul style="list-style-type: none"> <li>- Policy for regulations finalised concurrent with Bill stages</li> <li>- Front-load implementation preparation, so the only tasks remaining are those which must wait until Bill passes (eg finalise consequential amendments to other regulations), or in response to late changes to the Bill.</li> </ul>	<b>Outside MBIE's control</b> <ul style="list-style-type: none"> <li>- Cabinet agrees to directly accept papers, bypassing CAB Committee(s)</li> <li>- SC prioritises FPA Bill</li> <li>- Two sitting weeks for all remaining House stages.</li> <li>- DIs cannot be finalised and regulations drafted until final Bill is settled</li> </ul>	<ul style="list-style-type: none"> <li>- Stakeholder risks from adding the backstop after introduction. Mitigant: Publicly release backstop Cabinet paper with backstop policy decisions when Bill is introduced.</li> </ul>