



# Cabinet Office

CO (20) 2

## Circular

26 June 2020

**Intended for**

- All Ministers
- All Chief Executives
- All Senior Private Secretaries
- All Private Secretaries
- All officials involved in the preparation of Cabinet papers

## Impact Analysis Requirements

### Introduction

- 1 This circular sets out the requirements for Ministers and agencies seeking approvals relating to government regulatory proposals.
- 2 This circular replaces CO (17) 3, and updates Cabinet's requirements for impact analysis. The changes reflect:
  - 2.1 minor process amendments or clarifications identified following a review of the implementation of the 2017 Impact Analysis Requirements; and
  - 2.2 decisions taken by Cabinet in June 2020 to introduce impact analysis exemptions for declared emergency situations and additional options for urgent regulatory proposals [GOV-20-MIN-0017].
- 3 The Impact Analysis Requirements incorporate the Government Expectations for Good Regulatory Practice.<sup>1</sup> Regulatory agencies are expected to adopt a whole-of-system view, and take a proactive, collaborative approach to the care of the regulatory system(s) within which they work. The Impact Analysis Requirements focus in particular on the expectation that agencies provide robust analysis and advice to Ministers before decisions are taken on regulatory change.
- 4 This circular outlines the purpose and role of the Impact Analysis Requirements and sets out the requirements. It covers the following:
  - 4.1 government regulatory proposals;
  - 4.2 early engagement to support high quality impact analysis;
  - 4.3 exemptions from providing a Regulatory Impact Statement;

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<sup>1</sup> <https://treasury.govt.nz/publications/guide/government-expectations-good-regulatory-practice>

- 4.4 content and form of Regulatory Impact Statements;
  - 4.5 Quality Assurance arrangements;
  - 4.6 the “Impact Analysis” section in Cabinet papers;
  - 4.7 government regulatory proposals with inadequate Impact Analysis; and
  - 4.8 publication of Regulatory Impact Statements and Supplementary Analysis Reports.
- 5 The updated Impact Analysis Requirements set out in this circular apply from 1 July 2020. The Regulatory Impact Statement templates, Quality Assurance criteria, Treasury forms, and guidance on the Impact Analysis Requirements are all available on the Treasury website (<https://treasury.govt.nz/information-and-services/regulation/impact-analysis-requirements-regulatory-proposals>).
- 6 Ministers and Chief Executives should ensure that:
- 6.1 all staff involved in the preparation of submissions for Cabinet and Cabinet committees are familiar with the contents of this circular;
  - 6.2 the material in this circular is conveyed to all Crown entities and State sector agencies that may be involved in policy initiatives relating to government regulatory proposals.

### **Purpose and role of the Impact Analysis Requirements**

- 7 The Impact Analysis Requirements support and inform the government’s decisions on proposals for regulatory change. They are both a process and an analytical framework that encourage a systematic and evidence-informed approach to policy development.
- 8 The Impact Analysis framework involves defining the policy or operational problem that needs to be addressed, identifying the policy objectives and the full range of feasible options for addressing that problem. It also includes analysing those options for their potential impacts and assessing their costs, benefits and risks, carrying out consultation, implementation planning, and arrangements for ongoing monitoring, evaluation and review.
- 9 The Impact Analysis Requirements are intended to help advisers and decision-makers avoid the potential pitfalls that arise from natural human biases and mental short-cuts, including by seeking to ensure that:
- 9.1 the underlying problem or opportunity is properly identified, and is supported by available evidence;
  - 9.2 all practical options to address the problem or opportunity have been considered;

- 9.3 all material impacts and risks of proposed actions have been identified and assessed in a consistent way, including possible unintended consequences; and
- 9.4 it is clear why a particular option has been recommended over others.
- 10 The Impact Analysis Requirements also contribute to the transparency and accountability of government through the routine publication of Regulatory Impact Statements.

### **Government regulatory proposals**

- 11 All policy proposals taken to Cabinet for approval that include a government regulatory proposal must be accompanied by a Regulatory Impact Statement, unless an exemption applies.<sup>2</sup>
- 12 A Regulatory Impact Statement is a government agency document in which the agency provides a summary of its best impact analysis and advice relating to a government regulatory proposal. This impact analysis should be completed and summarised before the Cabinet paper is drafted.
- 13 A “government regulatory proposal” means a proposal that will ultimately require creating, amending, or repealing primary or secondary legislation.<sup>3</sup> This includes proposals that involve:
- 13.1 decisions to introduce legislative changes that are merely enabling (the substantive decisions as to whether and what sort of intervention will be made later), including creating or amending a power to make secondary legislation;
  - 13.2 decisions to create, or amend a statutory authority to charge third parties to cover the costs of a government activity (i.e. cost recovery proposals);
  - 13.3 decisions on discussion documents that have the effect of narrowing down the range of options, including regulatory options, being considered;
  - 13.4 “in principle” policy decisions and intermediate policy decisions, particularly those where regulatory options are narrowed down (e.g. limiting options for further work/consideration);
  - 13.5 seeking negotiating mandates for, or concluding, or seeking approval to sign, treaties with regulatory impacts;
  - 13.6 secondary legislation made by a Minister under an enabling power in an Act and the Minister’s decision is referred to Cabinet for noting;

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<sup>2</sup> The grounds and process for granting exemptions are covered in paragraphs 22 to 29.

<sup>3</sup> “Secondary legislation” means an instrument that is not an Act (primary legislation) but has legislative effect or is stated by an Act to be secondary legislation – see the Legislation Act 2019.

- 13.7 decisions about a regulatory proposal that has previously been announced, for example by a Minister or in a political party manifesto.
- 14 A Regulatory Impact Statement must be provided when papers are submitted to Cabinet committees (or a similar Ministerial group) for policy approval. In rare circumstances, the policy proposal and draft legislation may be submitted together. In these cases, the usual procedure is for the paper to be submitted to the relevant Cabinet policy committee rather than directly to the Cabinet Legislation Committee.
- 15 During the parliamentary process, it often becomes necessary to amend a Bill. The policy content of the amendments may be such that further approvals from Cabinet are needed for new policy or to alter existing policy approvals. If so, the original Regulatory Impact Statement should be updated to indicate how the changes affect the agency's impact analysis (e.g. how they alter the nature and/or magnitude of the impacts).

### **Early engagement to support high quality Impact Analysis**

- 16 Inadequate impact analysis often arises from incomplete problem definition, unclear objectives and a failure to consider all feasible options. As these are key foundations of policy analysis, inadequacies in these areas cannot be easily fixed at a later stage, with consequent impacts on the quality of the impact analysis.
- 17 The Treasury's Regulatory Quality Team and the relevant Treasury policy team will provide feedback on these areas at the request of the agency policy team. This feedback is most effectively provided in the early stages of policy development – for example, during the planning of a consultation exercise or the drafting of a discussion document, which may eventually lead to a regulatory proposal. It will focus on the types of things a Quality Assurance panel would look for in the final assessment of the problem definition, objectives and options identification. Early indications of what is expected should assist agencies to plan and develop their analysis. The feedback will be provided within a reasonable timeframe on a best-endeavours basis.
- 18 It is strongly recommended that agencies seek this feedback, including from their own Quality Assurance panel or specialist. This assistance may be especially valuable when the agency considers that the problem is important in terms of its human, social, economic or environmental impacts, and that the policy process is likely to explore material options to create, amend or repeal primary or secondary legislation.
- 19 This information can be provided as soon as agencies have some initial ideas to test, and before they proceed further with the analysis. There is an engagement form available for this purpose on the Treasury website, or agencies may have their own document, which sets out information on the proposed problem definition, objectives and options.

- 20 If it is already apparent at this point that the Impact Analysis Requirements are applicable (and how they will apply) to the policy exercise, the Treasury will also confirm this as part of the early feedback. Otherwise, this can be confirmed at a later stage.

### **Exemptions from the requirement for a Regulatory Impact Statement**

- 21 While use of the Impact Analysis framework is encouraged and always recommended in the development of advice on any form of government policy initiative, a Regulatory Impact Statement is not required for certain types of government regulatory proposals.

#### ***Technical or case-specific exemptions***

- 22 A Regulatory Impact Statement is not required where a government regulatory proposal:
- 22.1 is suitable for inclusion in a revision Bill (as provided for in the Legislation Act 2012);
  - 22.2 is suitable for inclusion in a Statutes Amendment Bill (as provided for in Standing Orders);
  - 22.3 would repeal or remove redundant legislative provisions;
  - 22.4 provides solely for the commencement of existing legislation or legislative provisions;
  - 22.5 is solely a request to authorise spending in an Appropriation Bill or an Imprest Supply Bill;
  - 22.6 is solely a request for confirmation of secondary legislation that has already been made;
  - 22.7 implements deeds of settlement for Treaty of Waitangi claims, other than those that would amend or affect existing regulatory arrangements; or
  - 22.8 brings into effect recognition agreements under the Marine and Coastal Area (Takutai Moana) Act 2011.

#### ***Technical exemptions available for an emergency***

- 23 In addition, a Regulatory Impact Statement is not required where a government regulatory proposal is:
- 23.1 to make, amend, or to modify or suspend the effect of, primary or secondary legislation, under statutory powers only able to be exercised during a declared emergency or emergency transition period;<sup>4</sup>

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<sup>4</sup> Such as, for example, Immediate Modification Orders made in accordance with sections 14 or 15 of the Epidemic Preparedness Act 2006.

- 23.2 to do one or more of the following:
- 23.2.1 temporarily defer or extend legislative deadlines, or
  - 23.2.2 provide limited temporary exemptions or modifications to existing legislative requirements, or
  - 23.2.3 temporarily enable alternative methods of legislative compliance,
- in situations where a declared emergency has made compliance with existing legislative requirements impossible, impractical or unreasonably burdensome;
- 23.3 to temporarily defer the start date of legislative requirements not yet in force, in order to reduce burdens, or where the Government or affected entities will no longer be ready by the planned start date, as a result of an emergency.

#### ***Minor impacts exemption***

- 24 A Regulatory Impact Statement is not required where the Treasury is satisfied that a government regulatory proposal has no or only minor impacts on businesses, individuals or not-for-profit entities. This might, for instance, be the case for certain changes to the internal administrative or governance arrangements of the New Zealand government, such as the transfer of responsibilities, staff, or assets between government agencies.

#### ***Discretionary exemptions***

- 25 A Regulatory Impact Statement may not be required where the Treasury is satisfied that a government regulatory proposal fits within the following situations:
- 25.1 the relevant issues have already been adequately addressed by existing impact analysis; or
  - 25.2 a Regulatory Impact Statement would substantively duplicate other government policy development, reporting and publication requirements or commitments; or
  - 25.3 the government has limited statutory decision-making discretion or responsibility for the content of proposed legislation;<sup>5</sup> and
  - 25.4 formal Impact Analysis is not the best and most cost-effective way to ensure that Ministers have access to relevant information to inform their decisions.

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<sup>5</sup> Such as, for example, making the minimum necessary legislative changes required to comply with international obligations that, due to previous treaty actions, are automatically binding on New Zealand.

- 26 In addition, a Regulatory Impact Statement may not be required where the Treasury is satisfied that a government regulatory proposal, not covered by other existing Regulatory Impact Statement exemptions, is:
- 26.1 intended to manage, mitigate or alleviate the short term impacts of a declared emergency event or of the direct actions taken to protect the public in response to a declared emergency event; and
  - 26.2 required urgently to be effective (making a complete, robust and timely Regulatory Impact Statement unfeasible).
- 27 An exemption granted under paragraphs 25 or 26 may be subject to conditions, such as the inclusion, provision and/or publication of some specific information, or elements of impact analysis in an alternative form. An exemption granted under paragraph 26 could also depend on a commitment to include a suitable sunset provision, and/or undertake a Post-Implementation Assessment/Review on agreed terms and timing (see paragraphs 49 and 50). Depending on the nature of the conditions, they may be fulfilled before or after the relevant Cabinet paper is submitted.

### ***Seeking an exemption***

- 28 Whether an “emergency technical”, “minor impacts”, or “discretionary” exemption applies is determined by the Treasury based on: the information an agency provides for each proposal or aspects of a proposal; the specific exemption sought; and the agency’s reasons as to why the exemption applies. There is an application form available for this purpose on the Treasury website.
- 29 The process for exemptions sought under paragraphs 25 or 26 is likely to include discussion between the Treasury and the agency. These discussions may include matters such as:
- 29.1 how the Impact Analysis Requirements have already been met;
  - 29.2 why further Impact Analysis is not the best and most cost-effective way to provide Ministers with information relevant to their decision-making;
  - 29.3 the extent to which the government’s decision-making discretion or responsibility is constrained, or decisions have to be taken urgently;
  - 29.4 the potential conditions of any exemption.
- 30 Where an exemption applies, the Treasury will provide the agency with a statement for inclusion in the relevant Cabinet paper (see paragraph 42 below).

## **Content and form of Regulatory Impact Statements**

- 31 The Regulatory Impact Statement templates tailor the form and content of the Regulatory Impact Statement to the nature and significance of the regulatory proposal. These templates are available on the Treasury website.
- 32 Unless agreed otherwise, impact analysis must be presented using the Regulatory Impact Statement template determined by the Treasury following consideration of information provided by the agency about its processes and the particular regulatory proposal. Agencies must use the confirmation form available for this purpose on the Treasury website.
- 33 The Treasury may, on a case-by-case basis, agree that the agency can depart from the Regulatory Impact Statement templates.
- 34 A Regulatory Impact Statement must be signed off by a manager for the responsible agency, and must disclose information to highlight any key gaps, assumptions, dependencies and significant constraints, caveats or uncertainties regarding the impact analysis.

## **Quality Assurance arrangements**

- 35 All Regulatory Impact Statements must also be independently quality assured against the Quality Assurance criteria set out on the Treasury website. The Quality Assurance criteria are the same regardless of who carries out the Quality Assurance.
- 36 Quality Assurance arrangements are determined by the Treasury following consideration of information provided by the agency about its processes and the particular regulatory proposal. Agencies must use the confirmation form available for this purpose on the Treasury website.
- 37 Whether the agency or the Treasury's Regulatory Quality Team is responsible for arranging Quality Assurance is determined by the Treasury based on the following criteria:
  - 37.1 the agency's policy capability and the demonstrated robustness of its in-house quality assurance processes;
  - 37.2 the strength of the agency's regulatory stewardship practice in the affected regulatory system;
  - 37.3 the robustness of the planned policy process;
  - 37.4 the level of significance of the likely impacts; and
  - 37.5 the levels of risk or uncertainty around the likely impacts.



- 38 Where the agency is responsible for arranging Quality Assurance, the agency must ensure it is done by a person or group not directly involved in undertaking the impact analysis or preparing the Regulatory Impact Statement, and nominated by the responsible agency's Chief Executive.
- 39 The decision that the agency is responsible for arranging Quality Assurance is not necessarily final. The conditions on which the decision is made are set out and agreed with the agency. If any of the conditions change (e.g. timeframes become compressed or the policy initiative is re-scoped) then the agency must advise the Treasury's Regulatory Quality Team and the decision will be reviewed.
- 40 A statement by the Quality Assurance assessors on the overall quality of the Regulatory Impact Statement must be provided in the Cabinet paper (see paragraph 43.2 below). The quality assured Regulatory Impact Statement should be lodged with the Minister's Cabinet paper.

### **The "Impact Analysis" section in Cabinet papers**

- 41 Cabinet and Cabinet committee papers that contain government regulatory proposals must contain a section entitled "Impact Analysis".
- 42 If an exemption applies, this section must contain a statement from the Treasury confirming that the proposal, or aspects of it, is exempt from the requirement to provide a Regulatory Impact Statement and, if relevant, any conditions of the exemption.
- 43 If an exemption does not apply, this section must contain two parts, as follows:
- 43.1 a statement by the responsible agency that the Impact Analysis Requirements apply and, therefore, a Regulatory Impact Statement is required and is attached to the Cabinet paper; and
- 43.2 a statement by the Quality Assurance assessors providing an independent assessment of the overall quality of the Regulatory Impact Statement.

### **Government regulatory proposals with inadequate Impact Analysis**

- 44 A government regulatory proposal has inadequate impact analysis if:
- 44.1 there is no accompanying Regulatory Impact Statement and the Treasury has not exempted the proposal from the Impact Analysis Requirements; or
- 44.2 the accompanying Regulatory Impact Statement has not been independently quality assured, or has been assessed as "does not meet" the Quality Assurance criteria.
- 45 The Chairs of Cabinet committees have discretion on whether papers containing government regulatory proposals with inadequate impact analysis are considered.

### ***Supplementary Analysis Report***

- 46 The Treasury may advise the Minister of Finance, and any other Minister with responsibilities for the oversight and operation of the Impact Analysis Requirements, of any government regulatory proposal with inadequate impact analysis.
- 47 If a government regulatory proposal with inadequate impact analysis proceeds to discussion at a Cabinet committee, and substantive decisions are made:
- 47.1 the responsible Minister must provide Cabinet with a Supplementary Analysis Report, to be prepared by or on behalf of the relevant government agency, and
- 47.2 the nature and timing of this report must be agreed by, or on behalf of, the responsible Minister, and the Minister responsible for the oversight and operation of the Impact Analysis Requirements.
- 48 The Supplementary Analysis Report must be Quality Assured and published along with the original Regulatory Impact Statement (if any).

### ***Post-Implementation Assessment/Review***

- 49 A Post-Implementation Assessment or Review<sup>6</sup> may be required as an alternative to the Supplementary Analysis Report in situations, such as urgency, where the Treasury is satisfied that a Supplementary Analysis Report might not be feasible or useful before Cabinet's regulatory decisions are confirmed or implemented.
- 50 If not already agreed by Cabinet, the nature and timing of the Post-Implementation Assessment/Review (including whether, or what type of, quality assurance is expected) will be agreed by or on behalf of joint Ministers as for a Supplementary Analysis Report.

### **Publication of Regulatory Impact Statements and Supplementary Analysis Reports**

- 51 The full text<sup>7</sup> of all Regulatory Impact Statements and Supplementary Analysis Reports must be published on the websites of the administering agency and the Treasury. The URLs (rather than the full text) are to be provided in the Explanatory Note of the relevant Bill, Supplementary Order Paper, or secondary legislation.
- 52 Hard copies of Regulatory Impact Statements, and Supplementary Analysis Reports if any, must be provided to select committees considering a Bill (or to the House of Representatives if the Bill is to be passed under urgency).

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<sup>6</sup> A Post-Implementation Assessment/Review could range from a full review of the performance of a regulatory change after a certain period, including whether it remains appropriate, to a more targeted or earlier assessment of the implementation of a regulatory change to check if any adjustments are desirable.

<sup>7</sup> Subject to any redactions that may be required to withhold sensitive or confidential information.

- 53 When a Regulatory Impact Statement or Supplementary Analysis Report is ready to be published, the agency must send for each Regulatory Impact Statement and Supplementary Analysis Report, the agency website link and an electronic (Word) copy to Treasury's Regulatory Quality Team at [ria.team@treasury.govt.nz](mailto:ria.team@treasury.govt.nz).

### **Further information**

- 54 If you require further advice or information on the Impact Analysis Requirements, please contact the Regulatory Quality Team or your Treasury Policy Team.
- 55 Detailed guidance on meeting the government's Impact Analysis Requirements and preparing a Regulatory Impact Statement is available on the Treasury's website at: <https://treasury.govt.nz/information-and-services/regulation/impact-analysis-requirements-regulatory-proposals>
- 56 The changes set out in this circular will be reflected in due course in the CabGuide (available on the Department of Prime Minister and Cabinet's website at <https://dpmc.govt.nz/publications/cabguide>). If you require further advice or information about Cabinet procedures, please contact the relevant Cabinet committee secretary.

Michael Webster  
Secretary of the Cabinet

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### **Enquiries:**

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