



Guidance Note

Discussion Documents and the Regulatory Impact Analysis Requirements

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The Treasury URL at December 2019 for this document is
<https://treasury.govt.nz/publications/guide/discussion-documents-ria-requirements>

Contents

- Introduction..... 1
 - Purpose 1
 - Background..... 1
 - Scenarios for different types of Discussion Documents..... 2
 - Process and conditions 3
- Annex A: Consultation scenarios and whether and how the Regulatory Impact Analysis requirements apply 5

Introduction

Discussion documents (Documents) are an important part of the policy process, as effective consultation supports informed analysis of regulatory proposals. This practice note supports better quality consultation where Documents function as interim Regulatory Impact Analysis (RIA).

Purpose

The purpose of this note is to set out process requirements for agencies where a Document functions as interim RIA. In particular:

- what happens in different types of consultation scenarios?
- what conditions apply where a Document functions as interim RIA?
- what happens when a Document does not meet the conditions for an interim RIA?
- what happens if a government agency concludes that a Document cannot function as an interim RIA?

Background

The importance of consultation in the policy process

Government agencies undertaking consultation during the policy development process results in better quality regulatory proposals that are more likely to achieve their objectives. A consultation process acknowledges that those who are going to be affected by regulation will have information and perspectives that are different from those within government. The other practical benefits of consultation include:

- increased scrutiny of officials' analysis and advice
- durability as better designed policies are less likely to need amendment once they are implemented
- increased public buy-in and acceptance as stakeholders are more likely to accept a proposal they have been involved in developing, and
- improved understanding and increased compliance.

Best practice is set out in the Treasury effective consultation guidance, in particular sections 3.6 and 3.7 <https://treasury.govt.nz/sites/default/files/2018-03/ia-effective-consultation-guidance-note.pdf>

We draw agencies' attention to the following expectations in the guidance:

- *Identifying options* – the status quo scenario projected forward, one or more non-regulatory options, and one or more regulatory options. If feasible options, or options that respondents are likely to think feasible, are deliberately excluded, then the document should explain why.
- *Options analysis* – preliminary views on the impacts (costs, benefits, likely behavioural changes, and risks).
- *Effective questions* – suggested questions that attempt to get better information from stakeholders, eg, do you agree with the problem statement? Do you agree with the options analysis? What impacts are not included here?

Discussion Documents and the RIA Requirements

The preparation of Documents on potential regulatory changes is subject to the RIA requirements. The RIA guidance¹ and Cabinet Office circular 17(3)² state that RIA applies (amongst other things) to:

- the release of discussion documents that include options that may lead to regulatory change, and
- “in principle” policy decisions and intermediate policy decisions, particularly those where regulatory options are narrowed down (eg, limiting options for further work/consideration).

Agencies can apply to the Treasury Regulatory Quality Team (RQT) for a discretionary approval for the Document to be considered an interim RIA. This means that an interim RIA is not required alongside the Document.

The standard conditions of approval are that the Document must meet the effective consultation expectations, and that the agency RIA panel or QA expert must verify that this is the case.³ A statement to this effect must be included in the Regulatory Impact Analysis section of the Cabinet paper.

Scenarios for different types of Discussion Documents

Discussion documents come in different formats and serve different purposes. The following sets out the most common scenarios. We cannot anticipate all scenarios, as there are continually new ones arising. If government agencies are unsure about whether or how your Document complies with the RIA requirements, contact RIA.Team@treasury.govt.nz

- **Discussion Documents that function as Interim Regulatory Impact Analysis:** This sort of Document will address all feasible options, contain interim analysis of those options, and questions, consistent with the effective consultation expectations.
- **Discussion Documents that seek stakeholder views on a limited number of options:** By implication, Ministers will have narrowed down options to address a defined problem, and therefore made in-principle decisions. Such Documents are subject to the RIA requirements. The agency will therefore need to prepare a separate RIA to address the gaps in the Document.
- **Discussion Documents that seek stakeholder views on an issue or defining a problem, but don't include options to address the issue:** These Documents are typically done at a very early stage of the policy process and will be seeking stakeholder views on whether there is a problem or issue to be addressed, and if so what it might be. Documents of this sort do not narrow down options nor amount to in-principle decisions. The RIA requirements therefore do not apply.
- **Discussion Documents that set out a problem and a proposed solution:** These Documents will set out for stakeholder feedback a defined problem and one preferred option to address it. In this instance, the Minister/agency has explicitly narrowed down the options. The agency will therefore need to prepare a separate RIA to address the gaps in the analysis.

¹ <https://treasury.govt.nz/sites/default/files/2017-07/ia-cabinet-requirements-guide.pdf>

² <https://dpmc.govt.nz/publications/co-17-3-impact-analysis-requirements>

³ The RIA guidance states that formal QA is not required on DDs and that a QA statement is not required for the Cabinet paper (p30). The RIA guidance does state that advice and feedback from QA assessors is helpful etc. As RQT approval is conditional upon QA of DDs, the RIA guidance is not contradictory, but RQT will amend the guidance to clarify this issue.

Working Groups and Committees

Often a Working Group or Committee will do its own consultation and then report to the responsible Minister with their recommendations. Typically, the agency then advises the Minister on the Committee's recommendations and then prepares a RIA on any subsequent regulatory proposals to go to Cabinet.

As the agency will need to do RIA on any regulatory proposals that come from the Working Group or Committee, it would make sense for the agency to seek as far as possible to ensure that good impact analysis is built into the Committee's terms of reference. For example, the terms of reference should ask them to clearly define the problem/s and objective/s, and describe and assess feasible options. This may not always be possible, but if it can be done, it helps avoid the prospect of having to deal with recommendations that not been sufficiently tested and where alternatives have not been considered.

At the very least, the agency should be applying RIA processes in its advice to the Minister on the Working Group's or Committee's report. The earlier agencies instil RIA disciplines into the process, the better the opportunity to get the fundamentals right, eg, quality problem definition and options identification. This in turn should position the agency well to complete quality analysis to support final regulatory decisions.

The responsible agency should discuss with RQT any scenarios that fall outside those outlined above.

Process and conditions

Early in the process of preparing a Document, the agency should submit a process confirmation form to RQT. At that point, the agency should specify the nature of the Document, ie whether it is likely to meet the expectations for effective consultation. (There is a field to this effect in the process confirmation form).

If the agency is in any doubt about whether the Document will meet the effective consultation expectations, they should discuss this with their contact in RQT RIA.Team@treasury.govt.nz

The following sets out the process and conditions that apply when government agencies' confirm, or not, that the Document meets the effective consultation expectations:

Scenario 1: The agency advises that the Document will meet the effective consultation expectations

If the agency confirms that the Document will meet the effective consultation expectations, (ie, it includes all feasible options, options analysis, and effective questions), then RQT will provide the agency with the following wording to be inserted in the Regulatory Impact Analysis section of the Cabinet paper:

"The discussion document functions as an interim Regulatory Impact Assessment. The [responsible agency's] Quality Assurance panel or independent QA expert have reviewed the discussion document and confirms that it is likely to lead to effective consultation and support the delivery of Regulatory Impact Analysis to inform subsequent decisions..."

The Agency RIA panel/QA expert may then insert a sentence commenting on the quality of the Document, with reference to the expectations in the effective consultation guidance, and/or any areas that will need to be addressed in the final RIA, eg, information gaps.

The agency's QA panel or expert are responsible for confirming that the final Document does meet the effective consultation requirements. If the panel is unable to confirm this, the agency is required to complete an interim RIA to address the gaps in the analysis (Scenario 3).

The agency should seek advice from RQT as relevant and advise RQT of any such changes.

Scenario 2: The agency advises that it will be unable to meet the effective consultation expectations and prepares a separate RIA to accompany the discussion document

If the agency concludes that it will be unable to meet the effective consultation expectations in the Document, RQT will advise the agency to develop a RIA to be annexed to the Cabinet paper. The RIA may be published along with the Document for consultation purposes at the discretion of the agency and/or Minister.

The agency RIA panel or QA expert should assess this RIA against the quality assurance criteria set out in the RIA guidance. Given the stage of the policy process, there will be some obvious differences to doing QA on a final RIA:

- The main focus of QA should be on the front end of the RIA, ie, problem definition, objectives/criteria, options identification. Other sections of the RIA (implementation, monitoring, evaluation and review and in particular consultation) will be incomplete or partial and will need less focus.
- Assessors should ask themselves whether there is sufficient information to support the decisions Ministers are being asked to make in the Cabinet paper.
- Assessors should identify any gaps in the information that will need to be addressed in the final RIA.

RIA panels/QA experts should provide a QA statement for the RIA in the Regulatory Impact Analysis section of the Cabinet paper. The statement should provide the reasons why the Document did not meet the effective consultation expectations; a RIA is therefore required; and that RIA meets, partially meets or does not meet the QA criteria.

Neither the RIA nor the Document may be altered after the QA assessment, except in consultation with the agency panel or QA expert.

Scenario 3: The agency initially advises that the Document will meet the effective consultation expectations, but when the Document is reviewed, the agency RIA panel/expert considers that it does not meet the requirements

The agency's QA panel or expert should require the agency to do a separate interim RIA to address the gaps in the analysis.

The agency should seek advice from RQT as relevant and advise RQT of any such changes.

The interim RIA must be quality assured and annexed to the Cabinet paper as in scenario 2, with a statement on quality as in scenario 2.

Annex A summarises the consultation scenarios, whether and how the RIA requirements apply, and the conditions.

Annex A: Consultation scenarios and whether and how the Regulatory Impact Analysis requirements apply

Scenario	Do the RIA requirements apply?	Is an interim RIA required?	Conditions
A. Discussion Documents that function as Interim Regulatory Impact Analysis	Yes	No	Agency QA panel/expert must confirm that the Document will likely lead to effective consultation and support delivery of RIA to inform subsequent decisions.
B. Discussion Documents that seek stakeholder views on a number of options	Yes	Yes	Agency QA panel/expert must confirm that: <ul style="list-style-type: none"> a the Document will likely lead to effective consultation and support delivery of RIA to inform subsequent decisions, and b assess the interim RIA against the QA criteria.
C. Discussion Documents that seek stakeholder views on an issue or defining a problem, but don't include options to address the issue	No	No	N/A
D. Discussion Documents that set out a problem and a proposed solution	Yes	Yes	Agency QA panel/expert must confirm that: <ul style="list-style-type: none"> a the Document will likely lead to effective consultation and support delivery of RIA to inform subsequent decisions, and b assess the interim RIA against the QA criteria.