



Guidance Note

Effective Consultation for Impact Analysis

December 2019

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1. Introduction

This Guidance Note provides guidance on how to conduct consultation and tips for producing meaningful, clear discussion documents for government policy initiatives which involve proposals to create, amend or repeal primary or secondary legislation (a 'government regulatory proposal'). The material in this document has been revised following a review of the 2017 regulatory impact analysis changes and subsequent clarification of the process around discussion documents.

Further information

The formal requirements for all government regulatory proposals are set out in the Cabinet Office circular: CO(17)3: Impact Analysis Requirements available at <https://dpmc.govt.nz/publications/co-17-3-impact-analysis-requirements>.

There is further guidance in the revised Cabinet Manual, available at <https://dpmc.govt.nz/our-business-units/cabinet-office/supporting-work-cabinet/cabinet-manual>.

The Guide to Cabinet's Impact Analysis Requirements provides guidance on how to meet the formal requirements for regulatory proposals. The Guidance Note on Best Practice Impact Analysis provides guidance on the policy development of regulatory proposals. Both are available on Treasury's Regulation webpage at <https://treasury.govt.nz/impact-analysis-requirements-regulatory-proposals>.

2. The purpose and implications of consultation

The purpose of consultation is two-fold: to gain information to assist with policy development; and to inform stakeholders about what's happening. This section explains the key features of effective and efficient consultation, and provides general guidance for preparing discussion documents that meet Cabinet's Impact Analysis Requirements.

2.1. The value of consultation to high quality Impact Analysis

Undertaking consultation during the policy development process can result in better quality regulatory proposals that are more likely to achieve their objectives. Having a consultation process acknowledges that those who are going to be affected by regulation may have access to more and better information about the real world impacts of proposals than the government officials who are developing them. This information can be critical to developing regulatory proposals that maximise the benefits, minimise the costs and avoid unintended consequences. Consultation therefore provides an important safeguard against regulatory failure.

The practical benefits of consultation include:

- better information, contributing to better quality regulatory proposals
- increased scrutiny of officials' analysis and advice, allowing potential problems with a proposal to be identified early
- durability as better designed policies are less likely to need amendments once introduced
- increased public buy-in/acceptance as stakeholders are more likely to accept a proposal they have been involved in developing, and
- improved understanding and increased compliance (therefore improved regulatory effectiveness).

2.2. Costs and risks

While there are a number of benefits from consultation, there is also a risk that the consultation process will not achieve the desired outcomes. Policy makers need to consider who they are consulting and what they are consulting on to ensure that the process is effective and efficient.

Poorly designed consultation can be time consuming (both for stakeholders and officials) and fail to improve the policy design. Over-consulting stakeholders creates a risk of consultation fatigue where stakeholders are disinclined to be involved in future consultation processes. If the consultation process is poorly targeted or vague, the feedback received from stakeholders is unlikely to significantly improve policy.

2.3. Timing

The benefits from consultation arise throughout the policy process: from correctly identifying the nature and source of the problem and identifying feasible alternative options and the associated costs, benefits and risks; through to practical design and implementation issues.

When designing policy, it is important to ensure that the policy addresses the source of the problem rather than the symptoms and is correctly targeted, to avoid “over-regulation”. Stakeholders often have better access to empirical information on the size of problem as well as day-to-day experience with the nature of the real issues. In addition, stakeholders’ practical experience can help identify potential unintended effects that policy makers have not considered. Stakeholders may also suggest more practical solutions to achieve the policy objectives.

As consultation can add value at all the various stages of analysis, it is important that for it to be considered and planned for at the very outset of the policy development process. Undertaking consultation late in the process limits the benefits that can be gained, as it can be too late to substantially alter the policy design.

What does efficient and effective consultation look like?

Essentially, good consultation is fit for purpose and tailored to both the nature and magnitude of the proposals, and the needs of stakeholders. One size does not fit all.

Principles for effective and efficient consultation have been developed and published by a number of organisations. A summary of these is provided in the following table.

Features of efficient and effective consultation	
Continuous	Undertaken throughout policy development process.
Timely	Realistic timeframes for stakeholders to respond. Undertaken early enough to have an impact on policy design.
Targeted	Need to consult relevant groups, including Māori.
Appropriate and accessible	The way the consultation is carried out should be tailored to the information needs and preferred engagement styles of those being consulted such as email, meetings and written submissions. It should also be scaled to the magnitude and proposed impact of the proposal.
Transparent	Stakeholders should understand how feedback was incorporated in policy development. Officials also need the capability to understand feedback to be able to incorporate (eg, may need to bring in technical expertise).
Clear	Consultation scope and objectives (including decisions already made) should be clear to stakeholders.
Co-ordinated	To the extent possible, processes should be co-ordinated across policy areas/sectors.

3. Preparing consultation material

This guidance for preparing discussion documents follows the same Impact Analysis Framework as the general guidance in the previous section, but it is directed at eliciting good quality feedback from respondents through targeted questions in consultation material.

The quality of a discussion document will affect not just subsequent policy work and decision-making, but also the public's trust in officials to provide good policy advice based on reliable evidence. Consultation from a discussion document can and often will be the richest source of information and ideas available to officials in the course of policy development. They can start or challenge policy debates and, more importantly, they can provide officials with an opportunity to test analysis and to collect information to assess the likely impacts of alternative policy and regulatory options.

A discussion document should outline any (preliminary) conclusions from previous consultation exercises. If there has been substantial prior consultation (eg, workshops, international meetings etc.), then respondents should be advised and the outcomes summarised.

Cabinet's Impact Analysis Requirements apply to discussion documents that include options that may lead to legislative or regulatory changes, and where Cabinet approval is sought for the release of the document. The discussion document should therefore be prepared with the goal of enabling effective consultation with stakeholders and the eventual need to produce high quality impact analysis in mind. This will be easier if the discussion document follows the impact analysis framework as far as possible given the stage of policy development. It will also help to ensure that the discussion document provides a clear articulation of proposed regulatory changes to stakeholders, experts and the general public (i.e. a clear problem statement for stakeholder comment, and fairly canvassing a full range of viable potential options to address the identified problem). This guidance note sets out best practice for achieving these objectives.

Where explicit decisions are being sought from Cabinet in order to narrow down the options presented in a discussion document, a Regulatory Impact Assessment (RIA) is required for those decisions. If the regulatory proposals are potentially significant and the discussion document is not narrowing the options, the Regulatory Quality Team (RQT) and/or the agency may provide formal quality assurance of the discussion document, because it is effectively substituting for a RIA.

Where the regulatory proposals are less significant, Quality Assurance is the responsibility of the agencies themselves. In order to ensure that responsibilities are clear, agencies should submit a Process Confirmation Form (PCF) to RQT before submitting a discussion document to Cabinet. This will enable RQT to make a determination on the significance or otherwise of the proposal and thus the appropriate template and who will be responsible for Quality Assurance.

As set out above, the Regulatory Impact Assessment that accompanies final policy proposals will be assessed against the Quality Assurance Criteria. The quality of the consultation via a discussion document will therefore weigh heavily in this assessment.

3.1. How are Regulatory Impact Assessments and discussion documents different?

A Regulatory Impact Assessment is the department's document, but a discussion document need not be—discussion documents can be issued in the name of Ministers. Because a discussion document may be issued by a Minister, it does not require sign-off by the responsible manager. It will, however, be necessary to discuss in the document any gaps in information or any limitations on the scope of potential policy decisions. It may therefore be important to make explicit any matters on which submissions are specifically not invited

A Regulatory Impact Assessment is not an advocacy document—but a discussion document can be. A Regulatory Impact Assessment should be officials' best advice on impacts, presented dispassionately and without prejudice. A discussion document, on the other hand, can (and sometimes ought to) be more provocative, more leading.

If assertions are used to justify particular positions or analysis in a discussion document, it is important that respondents are explicitly invited to challenge the assumptions, analysis and conclusions supporting the options being advocated. These submissions and challenges should be received and considered in good faith. The major feedback from consultation, and the Agency's responses, should be summarised in the Regulatory Impact Assessment that accompanies final Cabinet in-principle recommendations.

Depending on the intended audience, a discussion document can be more or less technical than a Regulatory Impact Assessment. A Regulatory Impact Assessment should be written for an informed, but non-expert decision-maker. By default, the Regulatory Quality Team recommends that discussion documents be pitched at around the same level, unless the intended audience is:

- Broader, in which case respondents might need a more basic introduction to the policy question being discussed, or
- Narrower (say, a small population of experts), in which case respondents are likely to possess some degree of technical knowledge.

3.2. Questions that work

Questions should serve at least two functions: to invite challenge and to improve information. The best discussion documents keep questions as open as possible but are explicit about what is being sought.

Ideally, questions appear immediately after any assertion or hypothesis that can be challenged or augmented, and officials' analytical frameworks may be summarised with a flow chart linking key questions and decision points to the different stages in the policy process. For longer documents, it might be useful to also include a consolidated list of question (eg, as an appendix), so that it is clear which parts of the document the individual questions relate to.

The rest of this section is structured to follow a general Impact Analysis framework, as found in a Regulatory Impact Assessment. Each section concludes with some recommended questions.

3.3. What is a good description of the status quo for a discussion document?

A good discussion document should include a description of the current arrangements and how they are likely to evolve without further regulatory change. In other words, document should outline a base case (or a 'do-nothing' scenario) that says, "Suppose we took none of the regulatory options considered here: what would happen?"

Examples of possible questions for the status quo section:

- Do you agree with this characterisation of the status quo? If not, please provide evidence to support your views.
- How would you describe the status quo? What other factors should be considered?

3.4. Problem definitions in discussion documents

The problem definition needs to do more than identify the gap: it should discuss its size and importance. If uncertain about the reality or size of the problem, Agencies should use questions to test thinking:

- Do you agree with this characterisation of the problem? If not, why not?
- In your view, what are the problems with the current regulatory settings?
- How important are these problems?
- How important are they to the New Zealand public?
- What are the consequences of continuing to follow (or not follow) international practice in terms of New Zealand's public interests?
- What evidence should we examine to inform further analysis of the problems?

3.5. Objectives

The objectives should be clear and should have the potential to be observable; stating what evidence would suggest a particular objective or desired outcome had been achieved. Following a clear statement of the relevant objectives, a discussion document should ask:

- Have we identified the correct objectives?
- What objectives should we use to assess and rank options?

3.6. Identifying options

A Regulatory Impact Assessment and a discussion document that incorporates Impact Analysis should include a representative range of feasible options. There might be an infinite range of feasible options, but there is no need to include every single possible variation. Unless past decisions limit the set of options that can be consulted on, a discussion document should identify and describe at least:

- the status quo scenario projected forward—where no further regulatory changes occur (behaviour may still be expected to change over time)
- one or more non-regulatory options (eg, education, industry self-regulation), and
- one or more regulatory options, including what would happen without regulation (if different from the status quo).

If deliberately excluding feasible options, or options that respondents are likely to think are feasible, this section should explain why.

A consultation document that only requests feedback on a particular set of options without considering alternatives (sometimes referred to as a ‘white paper’) is unlikely to meet Cabinet’s Impact Analysis Requirements—unless a good quality Regulatory Impact Assessment is annexed to the paper for consultation.

Questions about the identification of options could include:

- Do you agree that these are the correct options to consider? If not, why not?
- What options should we consider to solve the problem (either as identified in this document, or as you identify the problem)?
- Please suggest options not discussed here. Of the options discussed, please say which options should not be considered. In both cases, please explain why.

3.7. Options analysis

The questions for discussion documents may depend on the quality and quantity of evidence gathered so far—agencies may have limited information at the consultation stage of a policy process and should be open about that. Respondents may be aware of impacts that officials and decision-makers might not appreciate.

Discussion documents should set out agencies’ preliminary views on impacts (costs, benefits, likely behavioural changes, and risks) and attempt to get better information from stakeholders. Consultation should seek sources of information, identification of other parties potentially affected by options (including an indication of likely winners and losers), valuation methods and views on whether there are any other matters that may not have been considered appropriately.

Consultation questions should test agencies' consideration of options and impacts. Consultation for high quality Impact Analysis should aim at assessing the likelihood of the impacts being revealed—including probabilities and the projected net-benefit values of best- and worst-case scenarios.

- Do you agree with the impact analysis of this option (or these options)? If not, why not? Please provide evidence to support your answer.
- What are the impacts of this option? It is usually best to ask about impacts and risks option-by-option.
- How should we value these impacts?
- What impacts are not included here?
- What is the net impact of this option?
- How likely is it that this option could result in greater benefits than those discussed here? How likely is it that this option could result in greater costs than those discussed here? What do you think is the likely best- and worst-case scenario?
- Who gains from this option and by how much? Who loses and by how much?
- What sources of information should we use to assess expected costs and benefits and to assess risks?

3.8. Implementation

Stakeholders who are more closely engaged with or affected by the government agency that enforces or monitors the status quo will have an interest in next steps, and may be able to advise whether the options are actually able to be implemented as envisaged by agencies. The plans for implementation should be clearly articulated so that stakeholders can have an indication of whether plans will be effective and whether the timeframes are achievable.

Questions might include:

- Do you agree with the proposed implementation and monitoring arrangements? If not, please provide evidence to support your view.
- How should the proposal considered in this document be implemented and monitored?

3.9. Monitoring, evaluation and review

The plans for on-going monitoring, evaluation, and review should be presented to stakeholders early—even if they are likely to be administered in the same way as other operational policies by the Agency. Some of the information will come from stakeholders who are more closely engaged with or affected by the government agency that enforces or monitors the status quo. The plans for how stakeholders are expected to continue engaging with agencies should be clearly articulated so that stakeholders can have an indication of likely compliance costs.

Useful questions might include:

- Do you agree with the proposed monitoring arrangements? If not, please support your view.
- How should the proposal considered in this document be monitored?
- What should be monitored? To whom should results be reported?

4. Discussion documents must be clear

A Regulatory Impact Assessment that meets Cabinet’s Impact Analysis Requirements will be clear and concise—a discussion document may require more detailed information but it should still be clear and concise. The language and presentation of the discussion document should be informed by the prior knowledge of the parties being targeted for consultation. Discussion documents that are long and difficult to read will not aid effective consultation.

We recommend planning for internal or external independent reviewing of discussion documents. Independent reviewers can be highly effective where they are not subject experts, and may be able to identify ways to adjust a document to better seek a wide range of submissions.