



# GUIDE TO REGULATION

What is regulation **2**

Regulatory models **3**

Attributes of good regulation **4**

How to decide if a regulatory or non-regulatory solution is appropriate **5**

Key steps when undertaking an impact analysis for regulatory proposals **6**

Implementation of regulation **8**

Useful resources **9**







## What is regulation?

Regulation can mean the formal and informal rules, norms and sanctions that work together to shape people's behaviour or interactions in pursuit of a broad goal or outcome. Regulation can also be defined as the rules by which governing institutions impose obligations or constraints on the way something is done, or the way people behave. To many people, the term means the laws that they must comply with. In New Zealand, the main forms of regulation include:

- > Acts of Parliament (also called primary legislation)
- > Statutory regulations, rules or bylaws, proclamations, notices and warrants, and orders that can be made under an Act of Parliament (also called secondary legislation).

Primary legislation contains the fundamental principles and policies of the law. Parliament can delegate the ability to make secondary legislation to another person or body, including the Executive Council, ministers, certain departmental officials, independent bodies, and local authorities. Such secondary legislation can only be made where an Act of Parliament expressly allows it to occur.

Secondary legislation usually only deals with matters of detail or implementation (rather than fundamental policy), matters of a technical nature, or matters likely to require frequent alteration or updating. Regulations should not, in general, deal with matters of substantive policy, have retrospective operation, seek to levy taxes, or contain provisions that seek to amend primary legislation. Regulations are subject to judicial review and can be disallowed by the House of Representatives.<sup>1</sup>

## Why use regulation?

Regulation is usually justified on the basis that a market or sector alone is not able to achieve certain desired policy objectives without a form of intervention. In some cases, an argument is made for the Government to intervene to help achieve policy objectives.

## Other ways to achieve policy objectives

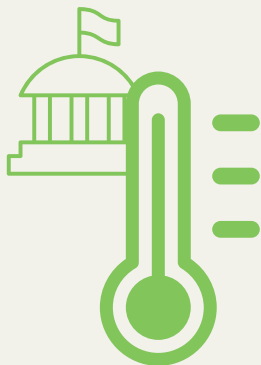
Making regulation is only one way of achieving policy objectives. Common alternatives or complementary measures to formal regulation, either on their own or as a collective package, might include:

- > industry self-regulation
- > information, awareness-raising, or education campaigns
- > partnership and networking agreements
- > capacity building
- > public ownership
- > strengthening enforcement of existing legislation
- > voluntary codes of practice or standards
- > economic or market-based interventions, such as taxes or subsidies.

# Regulatory models

There are a range of different regulatory models, which can be distinguished by the level of government intervention involved.

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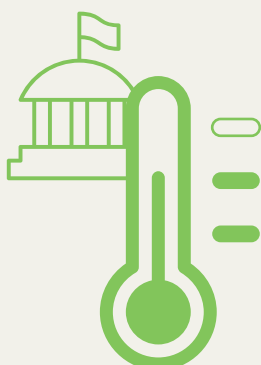


## Full government regulation (high level of government intervention)

This involves the government making the rules (for example, by passing legislation). Regulatory responsibility is generally vested in government agencies, as they can enable, prohibit, control, monitor, or enforce certain activities. It is often used when the risks of market or regulatory failure are significant, and a government agency is best suited to undertake the regulatory role.

In some situations, there can be joint government regulation. For example:

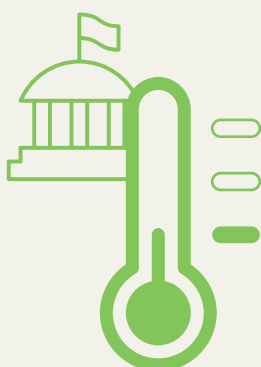
- > sharing regulatory responsibility between central, regional, and local levels of government
- > where there are shared regulatory roles between central government agencies.



## Co-regulation (medium level of government intervention)

This occurs when government agencies and the industry whose behaviour is being regulated collaborate to develop, administer, and enforce rules governing market behaviour. This model is the middle ground with aspects of both full government regulation and self-regulation (described below). It can range from formal government endorsement of industry self-regulation to the government passing laws to support and clearly define the rules.

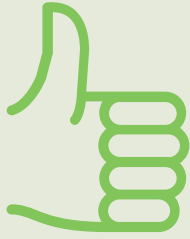
Co-regulation is often used to regulate professions where there is a need to restrict market entry and apply binding rules on all members of a group – for example, lawyers, medical practitioners, and accountants.



## Self-regulation (medium to low level of government intervention)

This occurs when rules that govern market behaviour are developed, administered, and enforced by the people whose behaviour is to be governed. It is sometimes called industry-led regulation. It does not always mean there is a total absence of government involvement. There may be additional legislation — for example, consumer protection, health and safety, contract, competition, and company legislation — imposing generic rules across many industries, professions, or sectors.

Self-regulation requires the industry to have the incentive and ability to influence the behaviours of people and organisations within its own sector. It also requires the trust and confidence of the government and the public. Self-regulation may not be appropriate if the consequences of regulatory failure are significant (for example, a risk of death, serious injury, or significant financial loss), or if there is a need for independence and impartiality in the regulatory role.



## Attributes of good regulation

Once the need for regulation has been established, there are some key design attributes that should be considered when developing it. Key steps for undertaking an impact analysis for regulatory proposals are described on page 6 of this Guide. Good regulation has eight main features:<sup>ii</sup>

- > **Effective:** Regulation should achieve its intended objectives in a clear and easy to understand manner. It needs to be workable, properly enforced, and periodically reviewed to ensure it continues to meet its objectives, especially if circumstances change. Regulation should focus on the specific policy problem.
- > **Efficient and growth-compatible:** All options to achieve policy outcomes should be considered, including regulatory and non-regulatory interventions. Economic objectives should be given an appropriate weighting relative to other specified objectives. If government intervention is justified, the intervention with the least adverse effect on market competition, property rights, and individual autonomy and responsibility should be implemented. Proposals with the greatest net benefit to society should be preferred.
- > **Proportionate, fair and equitable:** Any burden or costs from regulation needs to be proportionate to the benefits expected from it. Regulatory solutions need to be appropriate to the actual risk or problem.
- > **Transparent and accountable:** Regulation should be developed in an open and transparent manner. This includes providing information to the public on the nature and size of the problem, and the objectives of the intervention. Appropriate and open consultation should occur before proposals are finalised. Implementation and enforcement of regulation needs to be transparent. Parties need to clearly understand the purpose and content of regulation, the consequences of failing to comply with it, as well as their rights and obligations in the situation. Regulators must be able to justify their decisions, as they are subject to public scrutiny.
- > **Certain and predictable:** Regulation needs to be applied and interpreted in a consistent way, and different regulators need to work harmoniously with each other. The regulatory regime should be predictable, with similar actions, behaviours, or omissions treated consistently during enforcement. This ensures people can fully understand what is expected of them. Clear guidance should be provided to better enable voluntary compliance.
- > **Flexible and durable:** Where appropriate, a goals-based or performance-based approach should be considered, setting clear targets that take account of the needs of those being regulated. This gives people flexibility as to how they meet such targets and fulfil their obligations and responsibilities. This may help reduce compliance costs and facilitate efficient and innovative approaches to achieving compliance. It is also important that any regulatory system has the capacity to develop to meet changing circumstances or new information about the performance of the regulatory framework. For more about regulatory systems and stewardship, refer to our **Guide to Regulatory Stewardship**, available in hard copy or on our website <https://www.allenandclarke.co.nz/resources/>
- > **Consistent and aligned:** Relevant international standards and practices should be considered to maximise the benefits from trade and cross-border flows of people, capital and ideas, although care should be taken to avoid compromising important domestic objectives and values. Policy proposals should also be well-aligned and conform with legal and constitutional requirements to avoid unintended gaps and duplicative or inconsistent requirements.
- > **Supported by capable regulators:** The regulator needs the right capability and capacity, including the people, systems, and resources to operate an effective regulatory regime.



# How to decide if a regulatory or non-regulatory solution is appropriate

Selecting the most appropriate means of implementing a policy goal is critical to success. In recent years, there has been considerable reform within government to establish a sound decision-making framework for choosing the best implementation approach.

Having an open mind as to whether regulation is required and undertaking a sound regulatory impact analysis (RIA) during the policy-making process are critical factors to inform policy development and ensure good decisions are made.

## Impact analysis and its place in the policy-making cycle

Impact analysis has been defined as “a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives.”<sup>iii</sup> It is “a fundamental tool to help governments to assess the impacts of regulation ... [which] is used to examine and measure the likely benefits, costs and effects of new or existing regulation”.<sup>iv</sup>

The Government requires that sound impact analysis informs and actively contributes to policy development. Impact analysis is required for regulatory proposals taken to Cabinet for approval.

This includes proposals that involve the potential introduction of new legislation (for example, bills or regulations), or changes to, or the repeal of, existing legislation. Such proposals must consider whether the problem can be adequately addressed through non-regulatory or private arrangements and ensure that any proposed regulatory solutions are in the public interest.

If undertaken properly, impact analysis forms an integral part of good policy-making. It is factored in from the outset and is undertaken during the policy development process. It is not a procedural ‘tack on’ or last step to be undertaken during the policy approval process.

The Government’s Impact Analysis Requirements support and inform decision-making on regulatory proposals. They are both a process and an analytical framework and encourage a systematic and evidence-based approach to policy development.<sup>v</sup> This approach requires that a range of feasible options for addressing policy or operational problems is identified; the different impacts of each option are considered; and the benefits of the preferred option not only exceed the costs, but also deliver the highest level of net benefit.

# Key steps when undertaking an impact analysis for regulatory proposals

## Describing the status quo



- > Describe the key features of the current situation
- > Explain the current market conditions or social arrangements
- > Identify existing legislation or regulation
- > Describe other existing interventions or programmes
- > Consider any relevant government decisions or policies

## Identifying the nature and scale of the problem



- > Describe the problem from society's point of view
- > Explain the root cause of the problem (not just the symptoms)
- > Assess the nature and size of the problem, and the adverse outcome(s) if there is no further government intervention
- > Identify who is likely to be affected by the adverse outcome(s), and how widespread the outcomes could be felt
- > Identify costs and benefits as far as possible
- > Explain why the problem has not been addressed by non-regulatory means

## Defining the objectives



- > Describe the objectives, outcomes, goals, and targets being sought in relation to the problem identified
- > Specify the objectives broadly enough to allow consideration of all relevant alternative solutions
- > Note if the objectives are subject to constraints (for example, timing, budget or previous policy decisions)
- > Ensure the objectives are clear and focus on the desired outcome, not the means of achieving it
- > State if there is more than one policy objective, or a conflict between two objectives, or if any objectives are weighted more heavily than others (and why)

## Understanding the implications of Te Tiriti



- > Refer to the Department of the Prime Minister and Cabinet's (DPMC's) Te Tiriti o Waitangi analysis<sup>vi</sup>
- > Apply Te Tiriti at each stage of regulatory development, working through the questions in the DPMC analysis for each of the articles of Te Tiriti
- > Ensure that the customary interests of Iwi, hapū, and whānau are considered
- > If the regulation impacts at a local level, those hapū and marae most affected must be consulted
- > Māori should be active partners in any regulatory design affecting their interests, outcomes and wellbeing

## Identifying feasible options



- > Identify the full range of options or approaches available to achieve the objectives and address the problem (both regulatory and non-regulatory)

## Analysing the options



- > Identify the full range of impacts (costs, benefits, and risks) for each option against the status quo, and provide a qualitative description. This will include potential cultural, compliance, economic, environmental, fiscal, regulatory, and social impacts. There will be direct and indirect (flow-on) impacts
- > Identify how the options will affect all New Zealanders, and how they will affect Māori. Consider what any unintended impacts might be and how these could be mitigated
- > Analyse how the options demonstrate good government within the context of Te Tiriti. Consider whether there are any legal and/or Te Tiriti settlement obligations for the Crown
- > Identify Te Tiriti/Māori interests in this issue, and how these have been ascertained
- > Analyse how the options are meeting the good-faith obligations of the Crown
- > Consider impacts on New Zealand's international obligations. Be clear about any implications of any non-compliance with international treaties and/or other international instruments
- > Quantify the impacts as best as possible. Try to put a dollar value on the impacts to the greatest extent practicable. If the impacts cannot be quantified, be open about this. Describe them qualitatively and cite any evidence or assumptions
- > State the net benefit/cost for each option
- > Analyse the incidence of impacts, including who bears the costs and reaps the benefits, and if there are disproportionate impacts, and how these fall
- > Identify and analyse the risks for each option. Explain the weighting of different risks. Discuss the probability of these risks occurring and their likely magnitude

## Consultation



- > Build in time to ensure consultation is undertaken early and throughout the policy process. For more on consultation, see our Guide to Engagement, available on our website or in hard copy from mid-2021 <https://www.allenandclarke.co.nz/resources/>
- > Contact the Treasury's regulatory quality team early in the policy process
- > Identify who is likely to be affected by or have an interest in the proposals
- > Consult with Māori as early as possible. This may include Te Puni Kōkiri, iwi, hapū, and whānau
- > Identify what information is needed to assist the policy development and how stakeholders will be informed about what is happening
- > Consult with stakeholders on the problem definition, the range of feasible options and the impacts of the options. Ask specific questions on costs and benefits and where these fall
- > Consider framing a Discussion Document consistent with a Regulatory Impact Statement. This will help to get consultation feedback that supports and informs the final Regulatory Impact Statement
- > Build in time to consult with other government departments on the proposals

## Other key steps



- > Describe the conclusions and recommendations
- > Describe how the preferred option will be implemented (some factors to consider are noted on page 8)
- > Describe the agency's plans for monitoring, evaluating, and reviewing the proposed regulation over time to check it has performed well and has a greater net benefit than other options

The key product of the impact analysis process is a document called a Regulatory Impact Statement. This document summarises the agency's best advice and is provided in the appropriate Treasury template.<sup>vi</sup>

The Regulatory Impact Statement accompanies Cabinet papers seeking ministerial decisions on policy proposals that have regulatory implications. Impact analysis should be completed and summarised in a Regulatory Impact Statement before Cabinet papers are drafted.



# Implementation of regulation

No matter how well designed any regulatory intervention is, it could still fail unless properly implemented. The following factors are important to help ensure effective implementation —

## Plan your implementation

Successful implementation does not just happen: it needs to be properly planned. Consider implementation issues during your engagement with Māori and consultation processes. Engage early with the people who will implement or administer the new or changed regulation. Ask stakeholders how to enable them to comply as easily as possible. Agencies should include an implementation phase in their core work programmes. Invest time in thinking through the implications of the new intervention and how to make it work well.

## Testing new regulation

Consider what techniques to use to test or pilot regulation with stakeholders, to ensure changes are robust before it goes live. For example, consider why regulation could fail and what could go wrong, in order to prevent regulatory failure.

## Reasonable timing

Introducing new regulation often involves setting a transition period before it comes into force. This is to allow affected groups a period to adapt and prepare for new requirements, adjust their systems and processes, and sell or dispose of anything that may not comply with new regulation.

A transition period also gives the implementing agencies time to put in place systems and processes to support and administer the new intervention.

## Good prior consultation + enabling voluntary compliance

If the policy development process is effective and timely, including timely engagement/partnering with Māori, and with other stakeholders as appropriate, then new or revised regulation should not come as a surprise to anyone. Good stakeholder communications and publicity when regulation is made or comes into force also ensures that affected groups know what is happening, why, and when. Agencies often publish guidance or other resources, and/or hold workshops to help stakeholders understand their obligations, and to facilitate voluntary compliance.

## Agency enforcement + coordination

Agencies should have a clear enforcement policy for the regulation they administer. Enforcement needs to be consistent, follow due process, be visible, and target the key risks or non-compliances. Enforcement roles and responsibilities need to be clear. Sometimes, operational agreements between agencies can clarify jurisdiction and responsibilities. Enforcement officers need to be well trained and supported in the use of their powers.

## Monitoring + evaluation

Regulation, like any intervention, should be reviewed to check it is still fit for purpose and achieving its objectives. Monitoring is important to enable fast learning and adjustments. Monitoring and evaluation will provide optimal benefits if it is factored in during policy development and implementation. For more on best practice evaluation, refer to our **Quick Guide to Evaluation** and our resource on **Planning for Evaluation** available in hard copy or on our website <https://www.allenandclarke.co.nz/resources/>.

# Useful resources

## New Zealand resources

1. The Treasury. 2017. Government Expectations for Good Regulatory Practice. <https://www.treasury.govt.nz/publications/guide/government-expectations-good-regulatory-practice>
2. The Treasury. 2017. Best Practice Impact Analysis. <https://www.treasury.govt.nz/sites/default/files/2018-03/ia-bestprac-guidance-note.pdf>
3. The Treasury. 2020. Guide to Cabinet's Impact Analysis Requirements. <https://www.treasury.govt.nz/sites/default/files/2020-06/guide-cabinet-ia-requirements-june2020.pdf>
4. The Treasury. 2020. Cabinet's Impact Analysis Requirements at a glance. <https://www.treasury.govt.nz/sites/default/files/2017-06/RIS-impact-analysis-requirements-at-a-glance-june2020.pdf>
5. The Treasury. 2019. Best Practice Monitoring, Evaluation and Review. <https://www.treasury.govt.nz/sites/default/files/2019-12/guidance-note-monitoring-evaluation-review.pdf>
6. The Treasury. 2019. Effective Consultation for Impact Analysis. <https://treasury.govt.nz/sites/default/files/2019-12/guidance-note-effective-consultation-impact-analysis.pdf>
7. The Treasury. 2019. Discussion Documents and the Regulatory Impact Analysis Requirements. <https://www.treasury.govt.nz/sites/default/files/2019-12/guidance-note-discussion-documents-ria-requirements.pdf>
8. Parliamentary Council Office. 2016. A Guide to Working with the Parliamentary Counsel Office. <http://www.pco.govt.nz/working-with-the-pco/>
9. Legislation Design and Advisory Committee. Legislation Guidelines: 2018 Edition. <http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/>
10. Cabinet Office, Department of the Prime Minister and Cabinet. 2017. The Cabinet Manual. <https://dpmc.govt.nz/sites/default/files/2017-06/cabinet-manual-2017.pdf>
11. Cabinet Office, Department of the Prime Minister and Cabinet. 2017. The CabGuide. <https://dpmc.govt.nz/publications/cabguide>
12. Mumford, Peter. 2011. "Best practice regulation: Setting targets and detecting vulnerabilities", Policy Quarterly 7, no. 3 (August): 36-42. <https://ojs.victoria.ac.nz/pq/article/view/4389/3882>
13. Yeabsley, John and Chris Nixon. 2017. "Quality regulation: why and how?", Policy Quarterly 13, no. 3

(August): 50-54. <https://ojs.victoria.ac.nz/pq/article/view/4666/4150>

## Selected international resources

14. OECD. 2020. Regulatory Impact Assessment, OECD Best Practice Principles for Regulatory Policy. <https://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm>
15. OECD. 2020. Introductory Handbook for Undertaking Regulatory Impact Analysis. <https://www.oecd.org/gov/regulatory-policy/44789472.pdf>
16. OECD. 2008. Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers. <http://www.oecd.org/regreform/regulatory-policy/40984990.pdf>
17. OECD. 2012. Recommendation of the Council on Regulatory Policy and Governance. <http://www.oecd.org/gov/regulatory-policy/2012-recommendation.htm>
18. OECD. 2009. Regulatory Impact Analysis: A Tool for Policy Coherence. <http://www.oecd.org/gov/regulatory-policy/ria-tool-for-policy-coherence.htm>
19. Better Regulation Taskforce (UK). 2003. Principles of Good Regulation. <https://webarchive.nationalarchives.gov.uk/20100407173247/http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf>
20. Office of Best Practice Regulation (Australia). Guidance for Policymakers. <https://www.pmc.gov.au/regulation/guidance-policymakers>
21. Department of the Prime Minister and Cabinet. 2020. Te Tiriti o Waitangi / Treaty of Waitangi analysis. <https://dpmc.govt.nz/our-programmes/policy-project/policy-methods-toolbox/treaty-waitangi-analysis>

## Endnotes

- i. This definition is drawn from a range of sources. See references 1, 2, 12, 13, 14, 16, 18 and 19.
- ii. These attributes are drawn from a range of sources. See references 1, 2, 12, 13, 14, 16, 18 and 19.
- iii. See useful resources no. 18.
- iv. See useful resources no. 16.
- v. The template to be used depends on the proposal in question and discussions with Treasury's regulatory quality team. This could include using the Impact Summary Template or the Full Impact Statement Template.
- vi. See useful resources no. 21.
- vii. See useful resources no. 4.





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### We have proven expertise in:

- > helping agencies plan for, and implement regulatory stewardship responsibilities
- > developing regulatory and non-regulatory solutions for policy problems
- > developing legislation and regulations in various countries
- > undertaking regulatory impact analysis and drafting Regulatory Impact Statements
- > legal analysis and the design of regulatory instruments
- > project and programme management
- > producing Cabinet papers and drafting instructions
- > consultation and engagement with a wide range of sectors
- > evaluations and reviews of legislation, programmes, processes and agencies
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