

Framework for Regulatory Impact Analysis (RIA) in South Africa

1. Introduction

Regulatory Impact Analysis (RIA) is a tool that is used to analyse the objectives of a regulatory proposal, the risks to be addressed by the regulation and the options for delivering the objectives.

The objectives of RIA include the following:

- assess the significant impacts, both positive and negative, of a regulatory measure;
- systematically examine the impacts arising or likely to arise from government regulations and communicate this information to decision makers;
- encourage public consultation to identify and measure benefits and costs;
- assess regulations on a case-by-case basis to see whether they contribute to government's socio-economic objectives;

Thus RIA makes transparent the benefits of different regulatory options for various stakeholders, the implications for compliance and the state's cost of enforcement.

RIA must be introduced early in the process, not least because one of the key questions in the initial analysis should be whether regulation is the best tool to deal with the problem. It is recommended that an initial RIA be conducted while government is contemplating the introduction of a new regulation or amendment to a regulation, and another detailed RIA once the regulations have been developed in detail.

2. Location

2.1 Location of the RIA unit - nothing on functions and roles

Studies revealed that a two-tier system, with a central office and RIA units within government departments be adopted. In February 2007, Cabinet approved that the Central RIA Unit (CRIU) should be located in the Cabinet office under the political leadership of the Deputy President, with technical assistance from the Policy Coordination and Advisory Services (PCAS) in the Presidency and the National Treasury. No central unit formalized yet. No idea of staffing. Presidency of policy unit has 4 vacancies.

2.2 Location of the RIA function in departments

The location of the RIA function within national government departments should be left to the sole discretion of the departments. However, key suggestions are made:

- Wherever it is located in the departments, the departmental RIA function needs to have direct access to the DG's office and the department's highest policy-making body.

- At the same time, the staff performing the RIA function needs to be at some distance from policy makers to ensure that RIA retains its integrity.
- Since all regulatory proposals need to pass through the departmental RIA office, even if only to decide that a RIA is not required, the RIA office either needs to be located in a unit through which all regulatory proposals already pass, or, if it is to be an independent office, internal departmental procedures will need to be adjusted to ensure that all regulatory proposals pass through the departmental RIA office.
- Although the RIA and M&E functions need to be kept analytically distinct, it is important that they be aligned with each other. The reason for this is that prospective RIA always depends to a certain extent on an assessment of the efficacy of the existing regulatory system.
- As with the central RIA function, it is not necessary to locate the departmental RIA function in a single office. The RIA function could be allocated between several offices, provided this is properly coordinated.

3. Scope of application of RIA

RIA would have to be applied both to primary legislation and subordinate legislation at the national level, for three main reasons. First, subordinate legislation can have a much greater social and economic impact than primary legislation. If the purpose of RIA is to ensure that regulation that has a significant impact is properly prepared, RIA should be applied both to primary and secondary legislation.

Secondly, much primary legislation takes the form of framework legislation. International practice, and the experience of the pilots, indicates that this type of regulation is not particularly amenable to RIA. In this case, it makes sense to identify the need for RIA at the framework legislation stage, but to defer the detailed RIA to the subordinate legislation stage. Thirdly, there has been a discernible decrease over the last few years in the quantity of national primary legislation enacted, and a corresponding increase in the production of subordinate legislation. If RIA is to make an impact on the overall quality of the law-making process in South Africa, it must therefore be applicable to subordinate legislation.

The main difference between the law-making process for primary and subordinate legislation is that a final RIA would not be required for the latter type of regulation. The absence of a formal requirement that Cabinet consider significant regulation also means that the CRIU/coordinating committee would not automatically be advised of significant subordinate legislation via the Cabinet process.

It is recommended that a scoping RIA be required for all framework legislation, and that the scoping RIA specify whether a further, mid-level RIA is required for further subordinate legislation.

4. The analytic content of RIA

The analytical categories and the depth of analysis used in RIA should be considered in relation to the purposes served by RIA. One purpose of RIA is to encourage regulators to look more widely than they otherwise might when devising new regulation. For instance, regulators might be required to look at the impact of regulation on employment,

even where the creation of employment is not a specific area of concern for that regulator. Another purpose of RIA is to coordinate the work of different regulators. The preparation of a RIA statement may thus encourage a department to assess the variety of regulation in a particular sector and to consider afresh how such regulation could be coordinated, even if that regulation is not under the direct control of the department.

The RIA should be required at three stages of the law-making process for national primary legislation (i.e. acts of parliament):

- (1) at the initial stage, when the decision whether or not to regulate is still being considered (**scoping RIA**)
- (2) just before the proposed regulation is considered by Cabinet (**mid-level RIA**); and
- (3) at the parliamentary stage, just prior to the tabling of the bill (**final RIA**).

A scoping RIA would state the policy objective, formulate the problem the regulatory proposal is intended to address, quantify the scale of the problem where possible, specify a range of options for consideration and consultation, and indicate whether further RIA was required. A mid-level RIA, on the other hand, would engage in detailed analysis of all the options under consideration, looking at the social and economic costs and benefits of each option, and the risks associated with each option, based on information obtained during the initial consultation process and other information-gathering and analytic techniques (including, but not limited to, economic analysis). The final RIA would re-iterate all this information, but provide greater detail on the recommended option, on the basis of further consultation and analysis. In particular, the final RIA would be required to set out an implementation plan for the recommended option, the enforcement methods and sanctions to be used, and the monitoring and evaluation system to be applied.

The three stages of the RIA process for national primary legislation would obviously build on each other. In summary form, the analytical categories are as follows:

Formulation of problem: The first step in performing an RIA is to clearly formulate the problem that the proposal is intended to address, quantifying the scale of the problem where possible.

Statement of policy objective: The next step is to state the policy objective that the regulatory proposal seeks to promote, taking care to align the statement of the policy objective with government's Programme of Action.

Consultation: Consultation is a central component of RIA and must be conducted at each stage. Systematic public consultation procedures with affected interest groups – ranging from informal discussion to formal procedures – are needed to ensure the widest possible input into regulatory decision-making. Interest groups should be consulted widely and in a timely fashion. It is also important to make active and innovative attempts to look beyond organised interests to find ways to elicit the views of marginalized groups.

Identify options: It should not be presumed, particularly in the initial and pre-Cabinet RIA stages, that regulation or a specific regulatory solution is the only option to address the problem. A wide range of options should be identified early on, including alternatives to regulation as well as the 'do nothing' option.

Evaluation of options: Each option identified should be evaluated against a set of criteria. The proportionality principle should apply and the RIA should only address

issues and questions that are relevant and feasible within the resource and data constraints and that are appropriate to the stage of the RIA.

Impact on economic growth: How will the proposal impact on economic growth?

Competition implications: Will the option improve South Africa's international competitiveness? Will the option promote or reduce internal (i.e. domestic) competition?

Small business implications: For instance, will the option lead to a proportionately higher increase in administrative costs for small firms than for large firms?

Broad based black economic empowerment impacts: For instance, what will be the proposal's impact on equity ownership in the economy?

Employment Effects: The evaluation of the options should consider any direct employment impacts and where possible should make an initial assessment of any indirect impacts.

Distribution and equity impacts: The absolute impacts of the options on poverty alleviation should be evaluated as well as the impacts of the options on the distribution of income and resources.

Poverty reduction: The direct and indirect impacts of the options on poverty alleviation should be analysed and quantified where possible.

Income distribution: For instance, will the option reduce the income gap between the poorest 25% of the population and the wealthiest 25%?

Geographical distribution: For instance, does the option have a differential impact on a region or regions?

Racial equity: For instance, is the option positive, negative or neutral in its impact on historically disadvantaged groupings?

Vulnerable groups impacts: The impact of policy alternatives on vulnerable groups in society should be understood. Some of the vulnerable groups that might be relevant for consideration include: women; female-headed households; child-headed households; girls; refugees and asylum seekers; persons living in rural areas; persons living in informal settlements; homeless persons; low-income groups; persons with disabilities; older persons; persons living with HIV/AIDS; persons affected by HIV/AIDS. The intention of the analysis is to ensure that the chosen option does not impact negatively on vulnerable groups in society or alternatively that any negative impacts of the option on vulnerable groups can be mitigated. Questions would include: Are some groupings not able to access benefits of the proposed option because of their vulnerable status?

Health impacts: The impact of alternative regulatory actions on health need to be considered in the light of the major health problems facing the country and the burden that these place on individuals and the economy. Questions to be asked include: What are the direct health impacts or risks of the option?

Environmental impacts: The impacts of the alternatives on natural resources and environmental quality should be appraised. Direct and indirect impacts should be considered. Questions here include: What are the likely impacts of the alternatives on the use of renewable resources?

Enforcement: What are the current levels of compliance? What enforcement methods are proposed?

Implementation costs: The implementation costs are defined here as those costs incurred by government in the implementation of the policy.

Compliance costs: The compliance costs are defined here as the costs of compliance with the measure by those affected by it.

Recommendation: The recommendation section is to be completed only at the final RIA stage once all the options have been analysed and evaluated against one another.

Summary of evaluation of options: The evaluation of the proposed options should be made using a broad cost-benefit assessment. In those cases where financial and

economic costs and benefits can be stated in monetary terms with a relatively high degree of certainty then these can be compared using traditional cost-benefit approaches. In many cases costs and benefits will have been analysed and expressed in other units (such as impacts on health indicators) or simply in qualitative terms. In these cases there are multi-criteria decision-making approaches available that assist in formalising decision-making using a range of criteria.

Implementation plan: At the final RIA stage an implementation plan should be presented that outlines how the new measure will be implemented taking into account the lessons learned during the RIA process.

Communication strategy: A strategy for communicating the new regulation or other measure must be provided.

Monitoring and evaluation: A monitoring and evaluation plan is required only at the final RIA stage once a preferred option has been chosen.

Phase 3 did not include further consideration of these categories. They must accordingly be understood as suggestions for further discussion. It is not necessary to reach finality on these categories in order to decide whether to implement RIA. The purpose of including these categories in this report is to illustrate the sort of analytic categories that are likely to inform RIA, in order to facilitate the decision on whether to implement RIA.

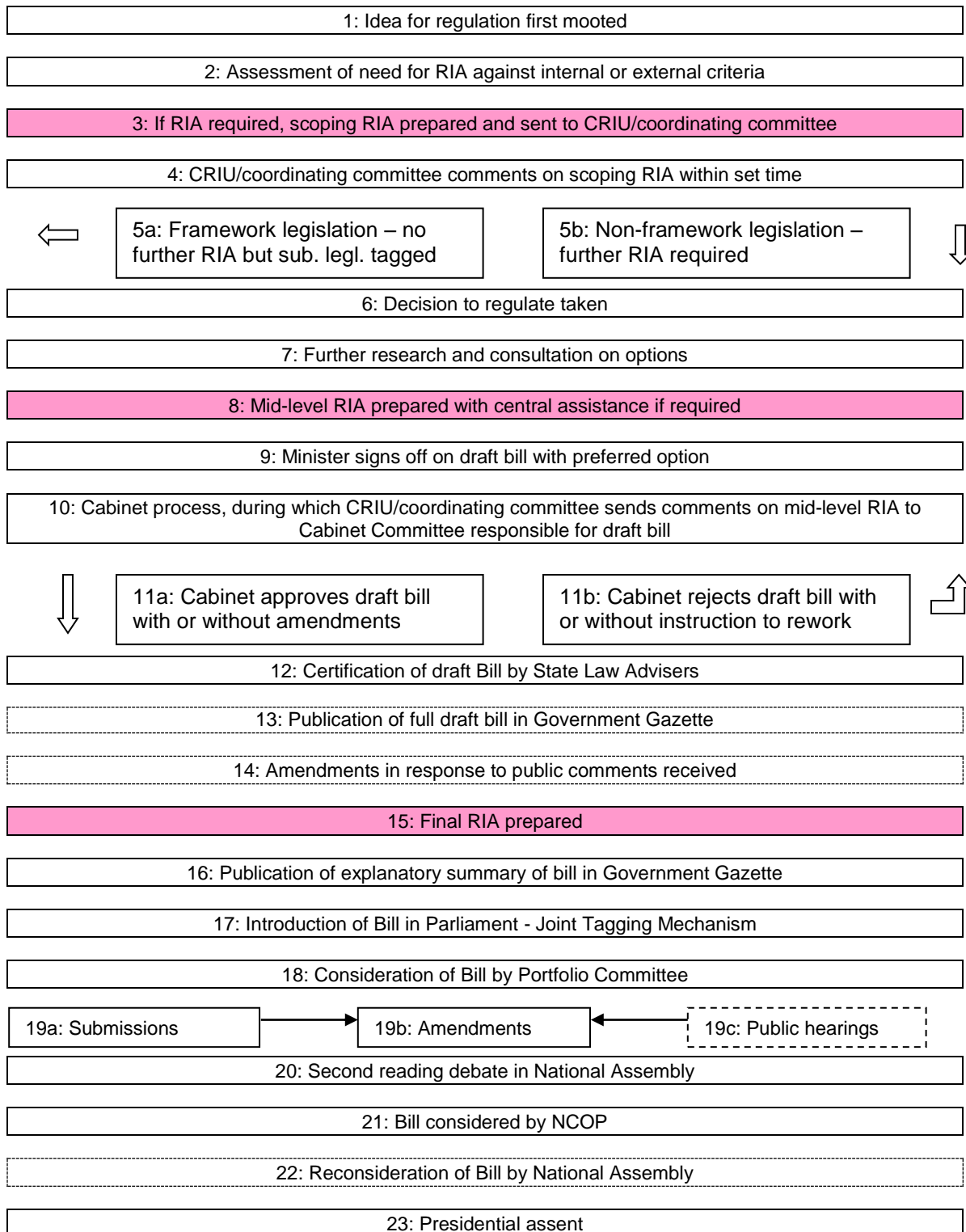
5. Process and functions

This section describes how the existing law-making process for primary and secondary legislation in South Africa would need to be amended in the process of implementing RIA.

5.1 Suggested stages of law-making process for primary legislation

Table 1 below presents suggested stages of law-making process for primary legislation:

Table 1: Stages of law-making process for primary legislation:



5.2 Suggested stages of law-making process for subordinate legislation

The suggested stages for the law-making process for subordinate legislation are outlined in table 2 below:

Table 2: Stages for the law-making process for subordinate legislation

1: Idea for regulation first mooted
2: Assessment of need for RIA against internal or external criteria
3: If RIA required, scoping RIA prepared and sent to CRIU/coordinating committee
4: CRIU/coordinating committee comments on scoping RIA within set time
5: Decision to regulate taken
6: Further research and consultation on options
7: Mid-level RIA prepared with central assistance if required
8: Minister signs off on subordinate legislation on strength of recommendation made in mid-level RIA

Annex 1: DRAFT RIA Template

Title of proposal

In full

Purpose and intended effect of measure

The objective

State clearly what the proposal or proposed regulation intends to do. What effects will it have and on whom?

The background

Give a brief resumé of the problem, the current legislative framework and why it needs to change.

Risk assessment

What risk is the regulation addressing? Can it be quantified, e.g. how many people are affected, and how?

Summary

Executive summary of the RIA

Options

Option 1: Do nothing

Option 2: (e.g.) Get the industry to impose a voluntary code of practice/self-regulation

Option 3: ...

Highlight potential risks associated with the options, describing the likelihood of them occurring and their effect if they were to occur.

Benefits

Option 1:

Option 2:

Option 3: ...

Based on the options evaluation; focusing on issues most closely related to government objectives

Costs

Implementation costs

Option 1:

Option 2:

Option 3: ...

The direct costs to government

Compliance costs: The costs of compliance by those affected

Other costs: Indirect costs that may occur due to the new measure.

Enforcement and sanctions

How will the proposal be enforced?

Monitoring and review

How is the effectiveness of the legislation to be measured and when?

Consultation

Within government: List those departments and agencies consulted

Public consultation: Describe consultation process and list stakeholders

Summary and recommendation

Explain in a paragraph or two which option is recommended and why. Be careful that this summary does not introduce any new thoughts that have not been explained elsewhere in the document.

Declaration

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed

Date

Name, title, department

Contact Point

All RIAs should also give a contact point for enquiries and comments. This should consist of a name, address, telephone number and email address.