

**Investigation of the Possibilities for Regulatory
Impact Analysis in South Africa**

Executive Summary

Phases 1 – 3

**PREPARED FOR
THE PRESIDENCY AND THE NATIONAL TREASURY
BY A CONSORTIUM LED BY SBP**

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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. In doing so it makes transparent the expected costs and benefits of options for different stakeholders (such as other parts of government and small businesses) – the implications for compliance as well as the cost of enforcement for government. A properly conducted RIA systematically examines the impacts arising or likely to arise from government regulations and communicates this information to decision makers. RIA also encourages public consultation to identify and measure benefits and costs. The underlying rationale for RIA is that regulations need to be assessed on a case-by-case basis to see whether they contribute to government's socio-economic objectives. As it is an empirical approach to decision-making it minimises the use of value judgements.

Background to the project

At the end of 2004, the Presidency and the National Treasury commissioned a study to look into the implementation of RIA in South Africa. The project was awarded to a consortium led by SBP.

The RIA study ran from January to September 2005, and was segmented into three phases:

- The relevance of RIA for South Africa and lessons learned from other countries – Phase 1
- The design of an appropriate RIA tool for South Africa and RIA pilot studies in two government departments – Phase 2
- The design of an appropriate institutional framework for the implementation of RIA. Issues to be considered included the possible location of an RIA unit and whether the system should be centralised or decentralised – Phase 3.

This report provides a brief summary of the work undertaken over the three phases, and the resultant findings and recommendations.

Based on extensive consultation with departments and social partners, the project entailed a review of the legislative and regulatory system at the national level, identifying gaps and weaknesses in existing processes and exploring ways in which RIA could potentially address these. In addition, international practice was reviewed to derive possible lessons for South Africa. The project also involved the development of RIA instruments and processes specific to the South African context and reflective of national government policy priorities. These tools,

which were piloted in two departments, proved to be useful and illuminating in assessing the regulatory processes, as well as the content of actual legislative proposals.

Building on the research, the SBP-led consortium developed a set of institutional and procedural options for the implementation of RIA in South Africa, which are described below in the section on Phase 3.

The consortium recommended that, if introduced, the system should initially focus on new legislation and significant subordinate regulation, and should be phased in over time, with departments coming on board at different times according to their current capacity to undertake this type of analysis. The model recognises capacity issues associated with the introduction of such a requirement, and builds in mechanisms to address these, including provision of support and advice by a central RIA function.

RIA and international practice

The OECD has published guidelines on undertaking RIAs and the issues to cover, and a growing number of countries have published or are developing their own national guidelines. There are variations in the national guidelines, reflecting differences in legislative and administrative systems, but most follow a broadly similar approach. Table 1 summarises the OECD checklist of questions that should be addressed in a RIA.

Table 1: OECD RIA Checklist

| |
|---|
| <ol style="list-style-type: none">1. Is the problem correctly defined?2. Is government action justified?3. Is regulation the best form of government action?4. Is there a legal basis for regulation?5. What is the appropriate level (or levels) of government for this action?6. Do the benefits of regulation justify the costs?7. Is the distribution of effects across society transparent?8. Is the regulation clear, consistent, comprehensible, and accessible to users?9. Have all interested parties had the opportunity to present their views?10. How will compliance be achieved? <p><i>Source: OECD (1995)</i></p> |
|---|

International experience has confirmed that effective policy requires the promotion of appropriate evidence-based analytical methods to improve regulatory practice. RIA provides a tool for achieving improvements in the quality of regulation and encourages regulators to consider the potential of the alternative options in addressing the problem and to think through unintended consequences and wider

impacts. The scope of RIA is not limited to economic regulation. Both social and environmental regulations are amenable to RIA.

The call for RIA in South Africa should not be interpreted as an attempt to privilege particular interests. Rather, the call is one for South Africa to improve its regulatory system in keeping with modern trends. Applied effectively, RIA represents a useful tool with which to further the Government's economic growth, pro-poor and transformation objectives.

Phase 1

Summary of key findings

Phase 1 of the study consisted of two parts – a review of international experience of RIA, and an examination of the regulation-making process in South Africa and the relevance of RIA for the South African environment. A key conclusion emerging from this phase was that RIA, if appropriately tailored to South African conditions, has the potential to address some of the gaps identified in the current process and strengthen the effectiveness of consultation and consideration of options as corner stones of regulatory decision-making.

International Experience

The international review suggested that, while RIA may appear to offer a standardised approach, in practice, the scope and application of RIA varies considerably in individual countries and is often quite narrow in application. The application of RIA may be limited according to:

- Levels of administration – e.g. federal, regional and/or local levels of administration
- Levels of the regulatory measure – for example, primary and/or local levels of administration
- Types of measures – rules, financial instruments, policies
- Sectors to which the measures apply (economic, social, environmental) or which they affect (e.g. the business or small business sector).

Table 2 provides a summary of the various ways in which RIA is implemented.

Table 2: RIA adoption in selected OECD countries

| <i>Country</i> | <i>Year RIA was adopted</i> | <i>Scope of coverage</i> |
|------------------|-----------------------------|--|
| <i>Australia</i> | 1985, strengthened 1997 | Primary laws, subordinate regulations, international treaties and quasi-regulations that have business or competition impacts (150 regulations per year out of approximately 2,000 regulations) Business impacts arise in case of significant market impact Reviews of existing regulations should adopt the RIS (Regulatory Impact Statement) framework |
| <i>Canada</i> | 1978, strengthened 1986 | RIA is required only for subordinate regulations. Memorandum to Cabinet (MC) similar to RIA is required for primary laws and policies |
| <i>Czech</i> | Developed | All primary laws including their 'substantial intents' and government decrees. |

| | | |
|----------------------------|--|---|
| <i>Republic</i> | since 2000 | Partial impact analysis is done in case of some major subordinate regulations in particular areas, however, this is not systematic |
| <i>Germany</i> | 1984, strengthened 2000 | Primary laws and subordinate regulations The RIA process can be applied to the review of existing regulations |
| <i>Greece</i> | Developed since 2001 | Primary laws and subordinate regulations |
| <i>Hungary</i> | 1987, strengthened 1996 | Primary laws and subordinate regulations (all acts and decrees) The analysis process is applied to the existing regulations |
| <i>Italy</i> | 1999 | Primary laws and subordinate regulations |
| <i>Mexico</i> | 1996, expanded 2000 | Primary laws and subordinate regulations RIA does not apply to the review of existing regulations |
| <i>The Netherlands</i> | 1985, strengthened 1994-1995 | Primary laws in major regulations, subordinate regulations in major regulations, and review of existing regulations |
| <i>Poland</i> | 2002 | All legislative proposals (primary laws and subordinate regulations); but the Budget Act is excluded from that procedure RIA is not required to review existing regulations |
| <i>United Kingdom</i> | 1985, strengthened 1996 and 1998 | Any proposal for which regulation is an option – including both primary and secondary legislation – that would have a non-negligible impact on business, charities or the voluntary sector should have an RIA RIA is also applied to reviews of existing regulations Regulations affecting only the public sector are currently subject to a Policy Effects Framework (PEF) assessment, which was brought within RIA in 2004 |
| <i>United States</i> | 1974, strengthened 1981 | Primary laws in selected cases and all subordinate regulations |
| <i>European Commission</i> | 2002 | Major regulatory and/or non-regulatory proposals with significant economic, social and/or environmental impacts Proposals with a significant impact on major interested parties Proposals that constitute a new policy, policy reform and/or significant change to existing policy Proposals involving major regulatory issues (subsidiarity/ proportionality/choice of regulatory instrument) Does not apply to Community decisions that derive from the executive powers of the European Commission, e.g. adoption of EU-funded projects/decisions on application of EC competition law |

Source: OECD (2004) in Jacobs (2004).

A review of international checklists and the OECD guidelines shows that global standards and principles for RIAs are relatively easy to promulgate. What is much

harder is to successfully tailor and embed the systems to fit a particular country's set of requirements. Here there is a balance to be achieved. Centralised government structures and their supporting apparatus require investment to set-up and maintain. Although there is limited and mostly qualitative evidence, it is likely that RIAs have more than covered their costs in both economic and social terms. Overhead costs, however, can be reduced and legitimacy increased through active participation of private and non-government bodies in both conducting and contributing to RIAs.

From the critiques of RIA in the international literature, it is apparent that the most problematic aspect of RIA concerns the requirement that proposed regulation be subjected to cost-benefit analysis. Two major studies of regulation in the United States (Sunstein, 1990) and the United Kingdom (Baldwin & Cave, 1999) are sceptical about the extent to which RIA's have successfully provided an accurate assessment of the costs and benefits of regulation. The studies warn of the danger of 'spurious elaboration' of economic estimates of costs and benefits, where these are not amenable to quantification (Baldwin & Cave, 1999). Evaluations of the costing component of RIAs have pointed to difficulties accessing appropriate information, and narrowness of focus in terms of definition of costs and benefits. The lesson from international experience is that where quantifiable values are not feasible, there is nonetheless real value in presenting a qualitative assessment of the likely positive and negative impacts on particular groups and sectors. Where the benefits of proposed regulation can not be expressed in monetary units, Cost Effectiveness Analysis can provide a more useful approach (for example, in health and safety regulation or regulation aimed at promoting human rights).

Drawing on the international literature and the review of the current South African process, the consultants drew the following key lessons for South Africa:

1. RIA will need to be championed across government if it is to be used consistently and become a normal feature of regulatory policy making.
2. RIA will need the development of RIA skills within the government machinery, including skills in both quantitative and qualitative analysis.
3. RIA requires the extension of consultation procedures to ensure that appropriate information is collected and analysed in reaching a view on the regulatory impact.
4. The RIA framework should include a procedure for identifying when a detailed RIA is necessary. The need to consult and evaluate different options can be time consuming and resource heavy for departments.
5. RIA must also confront the possibility of "regulatory capture." In practice, there is a risk of the regulatory process being "captured" by special interest groups who have the time, resources and incentives to invest in exerting their influence.

Institutional issues that have to be considered include:

- The need to maintain some independence. Whilst RIA needs to be integrated into government policy processes, there should also be some independence to ensure that the process is not captured by internal government issues or politics. In several OECD countries this has been achieved through the appointment of independent bodies, such as the Better Regulation Task Force in the UK.
- Public accountability is essential. Reporting to the government and the broader public can aid transparency.
- RIAs can only perform their intended purpose within a broader regulatory environment, which is legal with a required normative basis. Appropriate levels of authority must be provided.
- Basic principles of coordination and division of work between ministries must be agreed
- Support in terms of guidance and training in conducting RIAs must be provided.

Analysis of the SA situation and relevance of RIA

The consultants undertook a review looking at how regulations are currently developed in South Africa, and examining the relevance of RIA within the current context. This involved a series of interviews with officials of various government departments, as well as labour and business representatives.

The review identified a broadly standardised set of procedures followed by all departments, with greater or lesser degrees of rigour, in developing primary legislation, and secondary legislation/regulations. Through the interviews, the consultants identified a number of areas of weakness within this process:

- Because there is no standardised approach to consultation, various government departments have adopted different approaches. Some consult early in the process of developing new regulations, while others consult much later.
- Consultation tends to be with a limited number of stakeholders, which may inhibit the issues being considered and the extent of comments provided
- Some government departments deliberately do not consult with the National Treasury until the recommendations contained in the regulations have gained enough political momentum.
- For some regulations the state law advisers see the regulations after cabinet to check for constitutionality and other legal issues. Once these changes have been made, the regulations are not returned to cabinet for further approval. This also applies to changes made in Parliament – often when

regulations are changed by parliament no further consultations are undertaken on the changes. This often causes problems in the implementation of legislation.

- Most government departments lack economic expertise, although many are in the process of increasing capacity in this area.

The paper found that the South African regulation-making process is already fairly sophisticated and includes many of the practices ordinarily associated with RIA. South Africa has far more than the rudiments of good regulatory practice: it has a strong culture of consultation, and a system for the costing of legislation that has seen significant improvement in the last four years. Some departments have proven capacity to conduct world-class research on regulatory issues and to make policy innovations that have been taken up by highly developed countries. Furthermore, the existing Cabinet memorandum process is already imposing some of the discipline of a formal regulatory system on departments. The current format of the Cabinet Memo is more or less in line with the OECD RIA checklist, although an RIA document would require more detailed information regarding costs and benefits, a more formal approach to reporting on consultation other minor adjustments. For this reason, the introduction of RIA will not come as a 'shock' to the existing regulatory system but as a logical development of the existing Cabinet memorandum process.

The consultants concluded that RIA could be adapted to South African conditions, not because the current South African regulatory system is in a state of crisis, but because it is sufficiently sophisticated to accommodate the requirements of RIA in a manner that will enhance existing regulatory practices. The consultants are of the view that the time is ripe for the implementation of RIA for the following reasons:

- The initial pre-occupation of South African regulators with regulations aimed at overhauling the apartheid legislative framework has now receded.
- The rate of production of primary national legislation appears to be slowing down in favour of the production of subordinate legislation.
- This change reflects the increased focus on the part of government with implementation, and the monitoring and evaluation of existing regulatory frameworks.
- There are a number of weaknesses in the current regulatory system that the introduction of RIA might be able to address.
- The introduction of the requirement that legislation be costed is already forcing departments to build the capacity to do RIA-like work.
- There is considerable support in the national departments for the formalisation of the current regulatory appraisal system through the introduction of RIA.

- Calculating the cost of implementation will help in establishing costs to business and communities early in the process and may help avoid later amendments to regulations due to cost.

Issues that have to be considered in the implementation of RIA include the following:

When should RIA be done?

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. The consultants recommend 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.

For which regulations should RIA be done?

Given the high volume of regulations being developed in South Africa, it will be impossible to conduct full RIA for all new regulations (an average of 252 new regulations were passed between 2002 and 2004). A threshold will need to be determined, under which the requirement for RIA does not apply. Factors to be considered in setting this threshold might include implementation cost to government and/or the number of people likely to be affected. Several countries use the term 'significant impact' to determine whether RIA is required. This issue was explored further during subsequent phases of the project.

Location of the RIA unit

The location of the RIA must be considered, and has cost implications. The consultants propose the adoption of a two-tier system, with a central office and RIA units within government departments. International experience indicates that the central unit is often located in the Presidency or equivalent. In South Africa, possible locations seemed to be the National Treasury and the Presidency. The findings of this phase however indicated negative perceptions of the National Treasury as a possible location from departments. For this reason the consultants recommended that the central unit be located within the Presidency. This area was explored further during phase three of the study.

Phase 2

Background

Phase 2 of the investigation, focused on two areas, namely the design of an RIA instrument and the testing of the instrument on two legislation proposals. Two national departments were selected to test the findings of Phase 1 and further develop thinking about the shape and scope of a possible RIA framework for South Africa.

After consultation with the National Treasury and the Presidency, the consortium approached the Department of Trade and Industry (DTI), the Department of Environmental Affairs and Tourism (DEAT), and a third department with a request to consider participating in the pilot process. Commitment to participate was secured from DTI and DEAT.

The deliverables for Phase 2 were:

- An RIA instruments adapted to South African circumstances – Basic draft guidelines for conducting RIA and an RIA template
- Two reports on the RIA pilot studies, and
- The Phase 2 final report

The development of the RIA tool

The first step in this phase was the development of an RIA template specific to South Africa. Working with international experts, including the head of the RIA Scrutiny Team in the Regulatory Impact Unit in the UK Cabinet Office, the consortium developed a draft RIA template and a broad framework of general guidelines for departments undertaking RIA. This was finalised in conjunction with the project reference group before the pilots commenced.

The template and guidelines built on the OECD guidelines, experience in the UK, EU accession countries, and other international sources of good practice, but were systematically adapted to the South African context. In particular, they were developed to reflect the need to address historical disadvantage in South Africa and therefore to accommodate additional economic costs where appropriate.

In analysing the regulatory options identified, the RIA template required the analysts to consider mechanisms and feasibility of enforcement, likely costs of implementation for government, and compliance costs likely to be incurred by business or private citizens in meeting the requirements of the regulatory proposal.

The key dimensions included for consideration in the template were:

- Economic Growth and Development, including impact on economic growth, competition implications, small business implications and broad based black economic empowerment impacts
- Employment Effects
- Distribution and equity impacts, including poverty reduction, income distribution and geographical distribution
- Racial equity
- Impacts on vulnerable groups

The pilot process

The pilots aimed to show how a well-constructed RIA could support rational choices and better regulation. The intention was that one of the pilots focus on economic regulation and the other social regulation, and that the pilots would assess the potential impact of the proposals in key areas of concern: the economy, employment, income distribution, and the environment.

At the methodological level, it is important to note a significant but unavoidable difference between the context in which the pilot exercises were to be carried out, and a system where RIA is institutionalised as a legislative requirement with real weight behind it. The pilot process did not have the support of established procedures and structures integral to a functioning RIA system. Nor could the RIA process influence the regulatory choices of the departments involved. The departments had agreed to participate on a voluntary basis and were under no obligation to take into account the issues raised by the RIA.

In order to secure senior level buy-in and ensure the feasibility of the pilots in the departments selected, the consortium project managers met with the DDGs of the relevant divisions for an initial discussion about the broad project and the process that the pilot would be expected to follow.

The first formal meetings with departments took place in April 2005. The consultants leading the pilots met with the coordinators in both departments. Expectations of the process from both sides were clarified, and a meeting of the full project team arranged. The consortium, together with a representative from Treasury held a series of meetings with the departments during the course of May. During these meetings, the details of respective legislation, benefits, risks and costs associated with various legislative choices were discussed. Based on the information received, the RIA template and cost benefit analysis were undertaken by the consultants, after which findings were shared with each department in two half-day workshops.

Summary of key findings

The DTI Pilot

The Consumer Protection Bill was in its fourth draft at the time of piloting. Stakeholder consultation had already taken place on the policy framework, and the policy had been discussed at NEDLAC. Given the relatively advanced state of the bill and the availability of supporting documentation from the consultation process, the consortium considered that the Bill would be an appropriate subject for a more comprehensive RIA. The consortium undertook a broad-brush RIA on the draft Bill as a whole. In addition, a more detailed RIA on a particular set of provisions (trade descriptions and environmental labelling) was also undertaken, in order to test and demonstrate the value of detailed economic modelling as part of the RIA process.

The draft Consumer Protection Bill is based on a draft Policy Framework that has been sanctioned by Cabinet. The draft Framework recommends a single regulatory option – the enactment of a comprehensive statute – as the best way of addressing the challenges currently being faced in the relevant sector. Other possible regulatory strategies (such as better enforcement of existing regulations, or self-regulation) had been rejected. Since it is integral to the method of RIA that there be more than one regulatory proposal on the table, it was decided that the pilot study in this case would work ‘backwards’ to some extent, analysing the process followed by the department in developing the draft Bill, but reconstructing this for the purposes of the pilot as if it had been subject to RIA methodology from the outset.

Toward this end, the following three options were assessed in relation to the Bill as a whole: 1) Continuation of the status quo 2) Self-regulation and 3) Comprehensive re-regulation.

The main findings of the broad-brush RIA were as follows:

The first general lesson relates to limited role of RIA with respect to framework legislation. Under framework legislation, the major impact is often contained in the subsequent regulations, the detail of which is not available at this stage. Furthermore, a comprehensive framework bill such as the Consumer Protection Bill contains too many different regulatory sub-proposals with too many different objectives to make intelligent assessment possible. The fact that many of the proposals are subject to ministerial exemption also means that it is virtually impossible to assess the Bill without knowing what those exemptions are going to be. To give just one example, the provision in clause 35(1)(c) of the Bill that a person who packages goods must disclose the ‘estimated energy requirements per hour of use’ of the good in question (in the event that it indeed requires the use of energy), is a complex regulatory intervention deserving of an RIA all of its own. Even so, this

particular regulatory proposal is just one proposal in the set of proposals on environmental labelling in clause 35 of the Bill.

The broad-brush pilot also demonstrated the lack of a supportive, information-rich environment in South Africa. Although extensive research is being done in universities, this expertise is not being utilised by Government departments. The absence of relevant statistical information made it difficult to conduct a detailed cost-benefit analysis. Had such information been actively sought in the consultation around the Bill, such an analysis would have been better facilitated.

The process for the Consumer Protection Bill is designed around one particular regulatory choice as a result of the approach adopted in the development of the Consumer Protection Framework. As noted earlier, the policy formulation process followed in respect of the Consumer Protection Bill differed from the process that would have been followed had RIA been required from the very beginning. In particular, the structure and content of the draft Consumer Policy Framework, as the main document used in the consultation process, would have been different. Instead of committing itself to comprehensive re-regulation of the consumer market, and then defending this regulatory choice against the alternative do-nothing and self-regulation options, the draft Framework would have set out the arguments for and against the three competing options in more or less neutral terms, i.e. without coming to an explicit conclusion on which option was favoured by government.

Had RIA already been in place, the framework would then have been developed with a view to ascertaining stakeholders' views on each option, and deepening government's understanding of the relative costs and benefits of the three options. Instead, the assessment found that the responses received from stakeholders do not seem to have affected the general trajectory followed by the policy formulation process in a significant way. The fact that only one of the responses received appeared explicitly to favour comprehensive re-regulation does not seem to have shaken government's commitment to this option. Similarly, the recommendation from the Nedlac Task Team that further research be conducted was met with the response that sufficient research had been conducted, suggesting that government was not prepared to revisit its fundamental regulatory choice in favour of comprehensive re-regulation.¹ Finally, the fact that the process of drafting the Consumer Protection Bill commenced before the revised draft of the Consumer Policy Framework was issued on 1 April 2005 also raised concerns about the extent to which the comprehensive re-regulation option was ever really subject to debate.

¹ Independently of this, the consultants questioned whether the level of research conducted for purposes of the draft Framework was adequate in relation to the level of detail contained in the draft Consumer Protection Bill, given the substantial potential impacts of each individual regulatory proposal contained in that Bill.

Another general finding emerging from the DTI pilot is that South African regulatory practice tends to discourage arms-length consideration of competing regulatory options, to the detriment of the consultation process and to government's capacity to choose the best regulatory option. If this is correct, one of the major contributions that RIA might make to improving current South African regulatory practice would be to delay the choice of regulatory option until completion of the initial consultation and research process.

In addition to the broad-brush RIA, a separate process was initiated to simulate the methodology of RIA in respect of a single regulatory proposal – trade descriptions and environmental labelling. Through interviews with key industry stakeholders, the consortium was able to establish economically sound analysis of the likely costs and benefits associated with implementation of the specific proposal.

One of the key lessons from the trade descriptions RIA is the need for a confidential and preferably statistically valid (survey-based) method of rapidly gathering information from industry in various sizes, sectors and locations. The availability of such information will enable departments assess compliance costs and other regulatory impacts for specific sectors. The trade descriptions RIA found that there was a significant difference in the compliance costs for small and large businesses.

A further lesson from the trade descriptions RIA was the need to begin the gathering of economic data alongside legal and policy research that typically occurs when developing new regulation. A simple economic guide to law making (like the UK Treasury Green Book) could be valuable in this regard.

The consultants emphasised that the RIA report should not be read to suggest any failing on the part of the officials involved, but simply to illustrate some of the problems of the current regulation-making model, with a view to assessing how the introduction of RIA might remedy these problems.

The DEAT Pilot

DEAT's Waste Management Bill was selected for the second pilot. However, the broad range of issues covered by the draft legislative proposals made it necessary to focus the pilot on a single aspect of the proposed bill. As with the Consumer Protection Bill, a number of the sections in the bill are enabling legislation, the substance of which will only be developed in subordinate regulation. The approach followed in the contaminated sites RIA could not be practically applied to such types of legislation, where the costs and benefits derive from the detail of the subordinate regulations and not from the powers granted in the framework legislation.

Soil contamination was identified as an appropriate subject. The impact of the proposals under scrutiny is primarily economic, but the provision is also likely to have important social consequences in terms of equity impacts, impact on informal settlements, health issues and environmental sustainability.

The draft National Waste Management Bill had identified two possible approaches to the revelation and management of land contamination during the land transfer process. For the purposes of the RIA, the consortium also inserted a third – ‘do-nothing’ - option, to allow for the possibility that current regulations are adequate to address the problem identified. The options assessed under the RIA were thus: 1) Continue to rely on the existing legislative framework with respect to addressing contaminated land; 2) Expand the liability of contaminated land to landowners via permission being required from the competent authority prior to land transfer (e.g. via a land quality certificate); and 3) Expand the liability of landowners via a prohibition on financing of land purchases without a third party contamination report being provided.

The first general lesson from the pilot process relates to the potential role that RIA could play in improving the structure of law making processes in South Africa. The draft Waste Management Bill has been preceded by a lengthy and wide-ranging policy and strategy development process. This process has included substantial consultation on future waste management priorities for South Africa. However, consultation had taken place on the proposal as a whole, with limited attention to the detail of proposals, and almost no attention to the proposed provision on contaminated land management. It became evident through the pilot that the structure of an RIA would have helped to ensure that the variety of regulatory options in the draft bill would have been subject to analysis and consultation from much earlier in the process, with targeted consultation on particular provisions contained within the overall proposal. The pilot therefore demonstrated a potential failing in the law-making process, which a formal RIA approach would help to address.

The information requirements for a thorough RIA are relatively daunting. However, the pilot process indicated that, had an RIA been applied at an early stage, it is likely that information gathering and consultation more appropriate to the particular problem identified would have been carried out. This would have provided greater information to assist in the choice of regulatory option. The consultation process undertaken in respect of the waste management process has been lengthy enough and sufficiently well-resourced to have accommodated a more targeted information gathering approach, had the process been better directed towards analysing regulatory choices from an earlier stage. In short, indications are that a formalised

RIA would better direct resources towards finding solutions to the policy problems identified.

This analysis does not indicate any failings on the part of the DEAT. The policy development processes around waste management have been thorough and have included a range of inputs from a wide range of stakeholders, including all spheres of government, NGOs and the private sector. However, the evidence suggests that an RIA approach would have helped in better structuring and directing the process.

The pilot also demonstrated ancillary benefits of the RIA approach. Through the process of consultation and discussion facilitated by the RIA structure new insights into both the problem and the potential solutions were gained. During internal DEAT discussions the RIA structure also helped to generate new ideas around the problem at hand and possible regulatory alternatives in addition to the three options proposed. It is possible that, in the absence of an RIA, the department may not have further explored the full range of regulatory options available.

DEAT noted that the department did not have internal capacity to undertake all elements of the RIA process. The department noted that a number of elements of the legislative process are currently out-sourced, such as legal drafting. The department felt that they could similarly out-source certain technical elements of some RIAs, such as detailed cost-benefit analysis components. The general view was that there was sufficient capacity in the department to manage the RIA process and to use the approach and structure of an RIA in regulatory decision-making. It was generally felt that, had an RIA process been followed from the beginning of the policy making process, it could have helped to reduce the overall cost of the law making process, by ensuring a more disciplined and targeted approach to the process.

The DEAT pilot illustrated there are useful economic approaches that can be used in instances where traditional cost benefit analysis is not possible. For example, by analysing the number of contaminated land 'incidents' likely to be prevented under a particular proposal, one could evaluate whether the associated costs of implementation and compliance are justified. While a full cost-benefit analysis was not possible in this case owing to limitations in data availability, the techniques employed during the analysis were still able to add a level of rigour to the selection among options that would otherwise be lacking.

A generic lesson from the pilots relates to the preconditions for a successful RIA system. The pilots revealed the dearth of high quality information that will be required for consistent cost benefit analyses across a wide range of regulatory actions. The collection and/or identification of such information by a central agency would play an important role in promoting the use of cost benefit approaches in the regulatory

process. It is not suggested that line departments should not be responsible for the collection of sound data to develop clear problem statements and regulatory solutions. However, there is some information that will be applicable across a range of regulatory decisions. A central institution could assist in the collection and/or facilitation of access to such information.

Typical information relevant to a range of cost benefit analyses include economic data or parameters such as: standard discount rates; the value of a statistical life (values for mortality and morbidity); environmental resource values (use, existence, amenity values for various resources); standard cost estimates for government employees and attendant overheads and so forth.

Summary of lessons from the pilots

The pilots demonstrated that:

- The early introduction of RIA to law making processes is likely to lead to more effective and efficient processes, without necessarily creating increased cost or time requirements. An RIA structure may improve the quality of consultation and will help to better target the generation and gathering of information pertinent to the decision to be made.
- Framework legislation is unlikely to be suitable for the purposes of detailed RIA, while major subordinate legislation is very likely to benefit from an RIA requirement.
- There are ancillary, 'soft' benefits of the RIA approach – primarily in the facilitation of more creative thinking on regulatory options and in the revelation of new insights into both the problem statement and possible solutions
- Although internal capacity may not exist to undertake all components of the RIA at present this was not seen as an over-riding constraint on the approach. Capacity could be both developed in-house and out-sourced on occasion as required.
- There is a role for a central agency to support RIA procedures, including through the collation of standardised economic information and parameters.
- There are useful economic approaches that can be used in instances where traditional cost benefit analysis is not possible

Recommendations

Based on the findings of the pilots, the Phase 2 report makes the following recommendations:

- RIA should be given serious consideration as a means of improving the quality of regulation and the rigour of the regulatory process
- RIA should be incorporated into existing processes for developing regulations – at central government and departmental level
- Efforts should be made to codify, deepen and extend existing regulatory processes as the basis for regulatory improvement
- RIA instruments should be developed that recognise specific South African conditions in line with overarching policy objectives
- RIA guidelines should be kept as simple as possible
- RIA should be inserted early in the process
- RIA will usually be needed at more than one stage
- Consultation process should be targeted toward gathering information, consulting widely and innovatively
- Interdepartmental consultation should be improved
- The RIA model should be developed on two-tiers, with central and departmental functions
- The focus should be on the national level in the first instance
- The central resource should be located in the Presidency
- RIA should be appropriately targeted to minimise unnecessary processes
- Capacity to implement RIA will need to be developed
- Time must be allowed for the systems to become embedded

Phase 3

Based on the potential for improvement in the current legislative system identified in Phase 1, together with the practical value of RIA as demonstrated by the pilots in Phase 2, the Presidency and Treasury were of the view that the introduction of RIA across national government deserved serious consideration. Phase 3 of the investigation thus focused on the practicalities of implementing RIA in South Africa. Drawing on the findings of Phases 1 and 2, together with further input from international experts, the consortium developed a range of options to inform a potential implementation model.

The consortium developed a questionnaire, presenting different possible mechanisms and structures for the operation of RIA. This questionnaire was used in a short, focused consultation with a selection of national government departments. Officials were asked to consider the implications of the different options and to indicate their preferences. In addition, the consortium held a half day workshop with senior officials in Presidency and National Treasury, in which participants focused specifically on the possible role, structure and location of an RIA central function. Based on these inputs, the consortium expanded and refined the implementation options.

The costs associated with these options were analysed according to a process of economic modelling, together with the possible economic benefits of institutionalising the system. A strategic implementation proposal was then developed for each of the two most favoured options.

Options for consideration

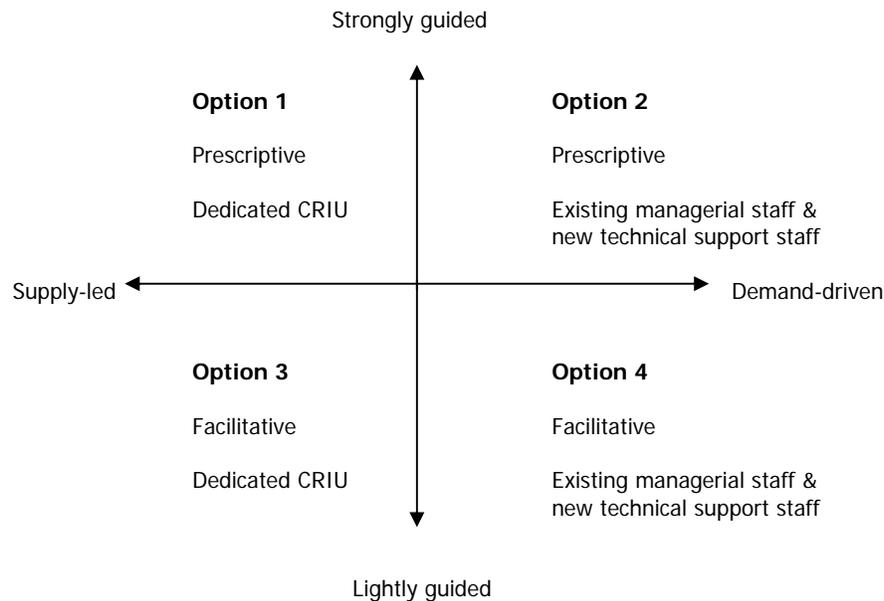
The consultants identified two main options in respect of the central unit's scope of authority. Under a **lightly guided option**, a central RIA unit (CRIU) would play a limited, enabling role in the RIA process, allowing departments considerable discretion in their application of the RIA model. Under a **strongly guided option**, the CRIU would play a more active, enforcing role.

In addition to the nature of the role to be played by the CRIU, a choice must be made about the extent to which the implementation of RIA should be supply-led or demand-driven. RIA could be implemented either by creating additional capacity at the centre to drive the process (the **supply-led model**), or by implementing a functional requirement that RIAs be conducted using existing personnel, and then allowing the capacity needed to meet this requirement to develop over time (the **demand-driven model**).

This effectively creates four broad options for the implementation of RIA:

- (1) a supply-led model in which a strongly capacitated CRIU plays an active, norm-enforcing (strongly guided) role;
- (2) a demand-driven model in which the functions associated with RIA are allocated to existing units within the Presidency and/or National Treasury. The central function plays a norm-enforcing role (strongly guided), and mechanisms to enforce RIA norms are developed and additional resources added over time;
- (3) a supply-led model in which a strongly capacitated CRIU assists national government departments in carrying out centrally prescribed, but broadly defined, RIA procedures, with considerable leeway for departmental norm-setting (lightly guided); and
- (4) a demand-driven model in which existing units within the Presidency and/or National Treasury assist national government departments in carrying out centrally prescribed, but broadly defined, RIA procedures, with considerable leeway for departmental norm-setting (lightly guided).

This is represented diagrammatically as follows:



Risks can be identified for each of the options. These would need to be addressed and mitigated in the development of an implementation strategy. A brief summary of the risks and benefits attendant on each option is presented in the table below:

| | | | | |
|--|-----------------|-----------------|-----------------|-----------------|
| | Option 1 | Option 2 | Option 3 | Option 4 |
|--|-----------------|-----------------|-----------------|-----------------|

| | Option 1 | Option 2 | Option 3 | Option 4 |
|-----------------|--|---|--|---|
| Benefits | Clarity and uniformity of RIA requirements | Clarity and uniformity of RIA requirements. Capacity built as required | Participating departments take ownership of process | Participating departments take ownership of process. Capacity built as required |
| Risks | Hostility to central control, and consequent non-compliance with prescriptive requirements | Hostility to central control, and consequent non-compliance with prescriptive requirements. Existing staff overloaded and RIA fails before additional capacity is built | Patchy compliance as under-performing departments slip through net | Existing staff overloaded and RIA fails before additional capacity is built. Patchy compliance as under-performing departments slip through net |

The central unit

The central unit needs to be a visible champion of RIA, providing oversight, quality control and support functions, facilitating shared learning across departments, providing input and technical expertise to supplement the sector specific knowledge available within departments, and developing relevant regulatory, consultation and assessment tools to be used in departments. The aim should be for the central unit to be seen to conduct its role in a spirit of partnership with the departments.

Experience in OECD countries has shown that central oversight units are most effective if they work under a clear regulatory framework endorsed at the political level, have a wide reach across government, and are staffed with experts. International experience also underlines the importance of locating the oversight body at the highest administrative level in the centre of the government secretariat, to maximise political leverage.

The precise location of the RIA function at the centre of government depends in part on the option eventually chosen, but most of the arguments about location are common to all four options. The main difference is that, if a supply-led approach is followed (i.e. options 1 or 3) a firm choice will have to be made on where to house the CRIU. The interviews suggested various possibilities. These include a number of options within the Presidency, namely the Policy Coordination and Advisory Service (PCAS), Cabinet Operations, and the Office of the Leader of Government Business. The Directorate: Legal and Executive Services was noted as a useful support

function for such a body. Possible options outside the Presidency include the National Treasury, Department of Public Service and Administration (DPSA) and the Office of the Chief State Law Adviser.

The consultants recommend that, if option 1 or 3 as identified above is pursued, the CRIU would probably be most usefully be located in Cabinet Operations or PCAS.

PCAS is currently tasked with checking regulatory proposals for conformity with government's policy framework. The official Cabinet Procedures memorandum says that PCAS' role is to 'support policy processes developed by the Clusters of Directors General' and to develop 'macro level monitoring and evaluation systems'. PCAS already provides substantive comment on legislative and policy proposals put to Cabinet, although this function is currently constrained by the short time period that PCAS is given to respond to proposals. PCAS therefore would appear to be a suitable location, if not for the CRIU itself, then at least for some of the technical capacity that needs to be built to support the work of RIA at the centre of government.

In the Cabinet Office, Cabinet Operations is concerned with the systems through which legal and policy proposals are considered before submission to Cabinet. It is well placed to coordinate the implementation of RIA, and to ensure that RIA both fits into, and helps give coherence to, the existing system through which legal and policy proposals are brought to Cabinet. Cabinet Operations does not at present have significant legislative and policy assessment capacity, however. If the CRIU were to be located in Cabinet Operations, therefore, such capacity would either have to be built or transferred from elsewhere within the Presidency.

Wherever the central function is located, the economic analysis component of RIA might be best located in the National Treasury. While the consultants found some reluctance among interview respondents to house the full RIA function in Treasury, owing to negative perceptions about potential overlaps between RIA and the budget process, it was generally felt that, if the main RIA function were located in the Presidency, the National Treasury could play a subsidiary role in providing economic analysis as required

It is also suggested that the assessment of constitutionality should be included as a requirement of the RIA process, with the Chief Directorate: Legal & Executive Services in the Presidency ensuring that adequate assessment of constitutionality takes place at the different stages of the law-making process. This office could also play a useful role in ensuring that new primary legislation does not repeal existing legislation before the necessary implementation mechanisms, including subordinate legislation, are put in place.

If a demand-driven approach is adopted (options 2 or 4), it would not be necessary to make a firm choice between different units in the Presidency or elsewhere, as this approach does not envisage the immediate creation of a CRIU. It however be important to decide on the appropriate allocation of RIA functions between PCAS, Cabinet Operations and the National Treasury, and to decide on the way in which their respective contributions to the work of RIA could be coordinated.

Location of the RIA function in departments

Whichever option is chosen, the consultants recommend that the location of the RIA function within national government departments be left to the discretion of the departments. It is clear from the interviews that any attempt by the centre to dictate to the departments how they should structure their response to the requirement that RIAs be conducted would be unwelcome and probably counterproductive. It should however be noted that, wherever it may be located in the department, the departmental RIA function needs to have direct access to the DG's office and the department's highest policy-making body. RIA requires a level of 'clout', together with appropriate skills. It will make demands on the time of a number of people in any given instance, and this needs to be recognised and facilitated.

All regulatory proposals need to pass through the departmental RIA office, even if only to decide that 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 do pass through it. 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 that this is properly coordinated. The consultants recommend that the people performing the RIA function need to be at some distance from policy makers, to ensure that RIA retains its integrity.

Although the RIA and monitoring and evaluation functions need to be kept analytically distinct, it is important that they be aligned with each other. Prospective RIA always depends to a certain extent on an assessment of the efficacy of the existing regulatory system.

Scope of RIA

The key decisions to be made in respect of the scope of RIA are:

- Should RIA be applied both to primary legislation to be enacted by the National Assembly and to subordinate legislation/regulations made under national primary legislation, and
- Should some sort of threshold test be applied to determine whether RIA is necessary in any particular case?

Based on their investigation, the consultants recommend that RIA should be applied both to primary legislation and subordinate legislation/regulations at the national level, for three main reasons:

- Subordinate legislation/regulation can, at times, have a much greater social and economic impact than primary legislation.
- Much primary legislation takes the form of framework legislation, which is generally not suitable for detailed RIA
- 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/regulation.

RIA is potentially time-consuming, requiring consultation and evaluation of several options. In order to minimise costs and maximise the value added by RIA, it is useful to employ a screening procedure to identify whether a regulation is likely to have major effects on the economy, society or the environment. All four of the options identified for consideration require some sort of central guidance on when RIA is required. The level of prescription, however, will vary according to whether a strongly guided or lightly guided approach is preferred. Under the strongly guided approach, the central body responsible for RIA would set detailed criteria determining when a RIA statement should be prepared, and would be empowered to enforce this required. Under the lightly guided approach, the centre would set a broad requirement, such as the need for RIA to be applied to significant regulation, and leave it to the departments to devise their own rules, procedures and other criteria regarding their application of this requirement.

Analytical content of RIA and level of analysis

The analytical categories and the depth of analysis used in RIA should be considered in relation to the purposes served by RIA. It is recommended that RIA should be required at three stages of the law-making process for national primary legislation:

- (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**). (In the case of subordinate legislation, the third stage would by definition fall away).

The level of rigour would clearly differ between stages. A scoping RIA would simply state the policy objective, formulate the problem, quantify scale where possible, specify a range of options for consideration and consultation, and indicate whether further RIA was required. A mid-level RIA 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 associated risks, 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 build on this, and provide greater detail on the recommended option on the basis of further consultation and analysis. It would also set out an implementation plan for the recommended option, enforcement methods and sanctions to be used, and the monitoring and evaluation system to be applied.

A decision will eventually have to be taken on the categories of analysis themselves. RIA attempts to integrate substantive and procedural analysis in order to improve the quality of regulation. The categories are thus not limited to matters of substance (such as social and economic costs and benefits), but also include analysis of procedures, and the formulation of the problem.

Phasing in RIA

Whichever option is selected, the implementation of RIA would need to be phased in over time. It is recommended that the requirement that RIAs be performed, should be phased in across departments, with some departments introducing RIA processes sooner than others. Capacity will need to be developed at both central and departmental level, and timeframes should reflect the need to modify staffing arrangements and organisational functions where necessary. Departments differ widely in their levels of readiness. At least two departments have already established RIA type units that could be well placed to respond to a requirement to implement RIA, while others require a considerable awareness raising programme before they are ready to commit to an RIA requirement. The consultants recommend that RIA should be phased in over two to three years, with some departments only participating in the process in year two or three.

Capacity

At the central level, there is a clear difference between the capacity requirements attendant on implementation of the supply-led and demand-driven approaches. The supply-led approach relies on quickly building capacity at the centre, to assist

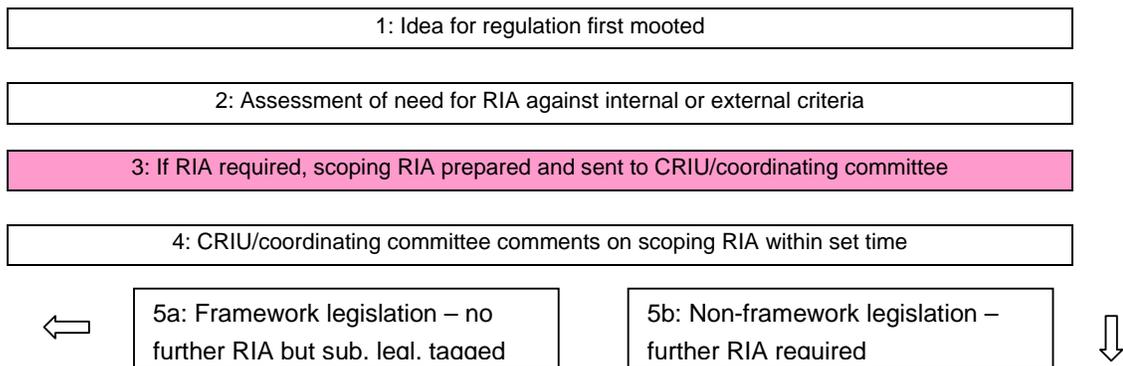
departments to implement RIA. However, in the medium to long term, it is possible that the demand-driven approach might result in similar capacity requirements at the central level.

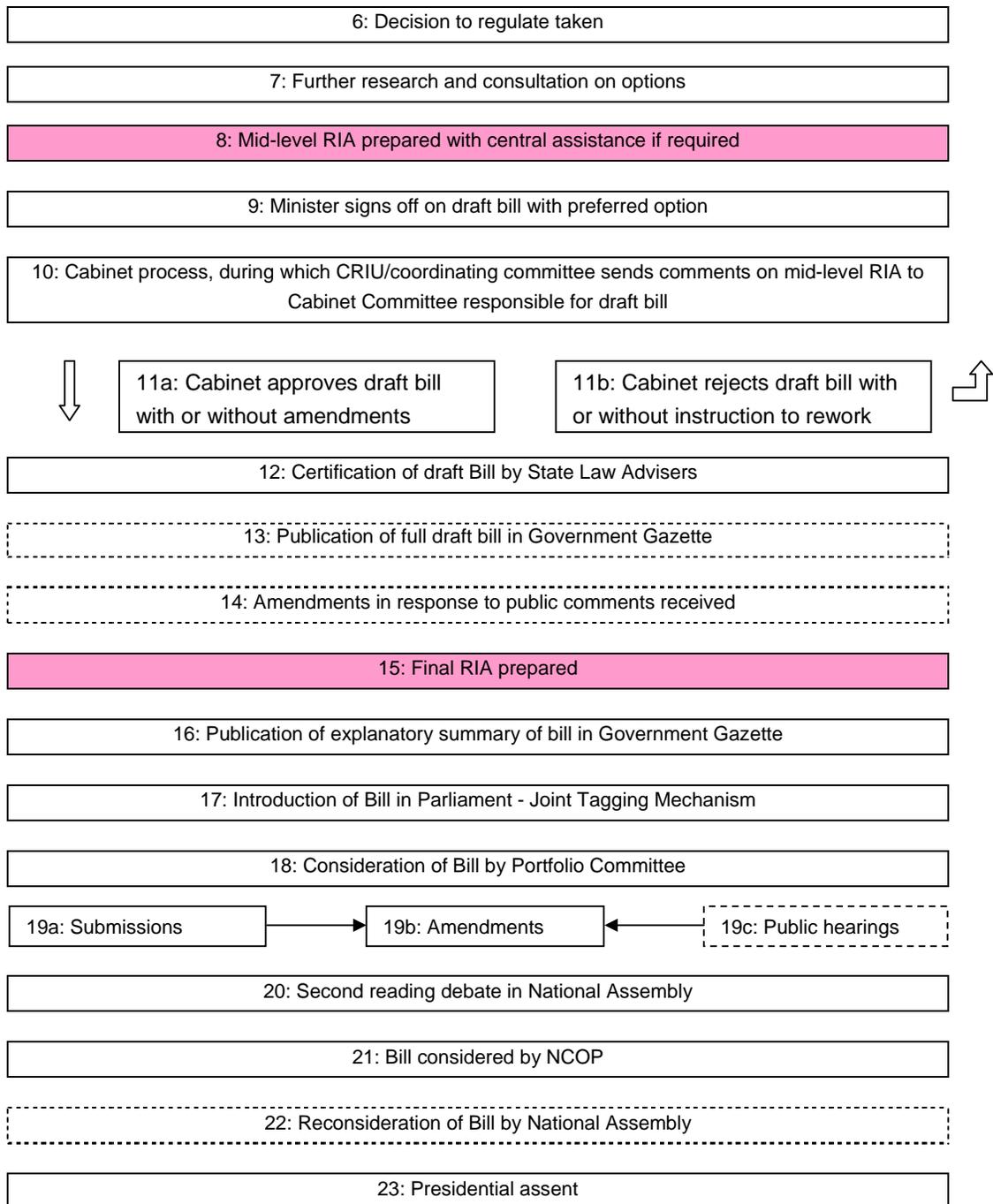
Specific capacity requirements identified through the interview process are as follows:

1. A 'high-powered' lawyer at the centre. Under the supply-led approach this would require the appointment of at least one new lawyer as part of the CRIU. Under the demand-driven model, existing personnel and offices would perform this function, at least initially.
2. Under options 2 and 4 it would not be necessary to make new *managerial* appointments at central level, apart from the need to designate an overall RIA coordinator.
3. Whichever option is chosen, additional technical capacity will be required. It is recommended that additional economic capacity should be built at National Treasury.
4. It may be useful to develop a pool of experts on from which national departments may draw. This could consist of external consultants and Treasury economists as well as 'shareable' in-house (departmental) capacity as this is developed. (The practice of using consultants should not distance departmental officials from knowing and engaging with the content of the RIA, especially at the scoping stage, and when a regulatory proposal is taken to Cabinet).
5. At departmental level, capacity requirements will, in addition to economic skills, extend to legal skills, financial services skills, and public administration skills. A balance will have to be struck between departmental ownership of the RIA process and external capacity supplementation.

Applying RIA in the context of the existing legislative process

The table below presents suggested stages of law-making process for primary legislation





The following observations may assist in understanding the above table.

1. Idea for regulation first mooted: Re-conceptualisation of the existing law-making process in terms of RIA would require an understanding that the law-making process begins not when a distinct regulatory proposal is made, but when the idea to respond to a particular social problem through regulation is first mooted.

2. Assessment of need for early RIA against internal or external criteria: The criteria for deciding when to apply RIA to a regulatory proposal would be set by the centre and applied by the departments. Under options 1 and 2 (strongly guided) these criteria would be prescriptive and mechanisms would be developed to enable the central unit to monitor their application. Under options 3 and 4 (lightly guided), departments would exercise considerable discretion in the application of the centrally defined criteria.
3. Scoping RIA prepared and sent to CRIU/coordinating committee: Because the level of analysis required by a scoping RIA is not very deep, it is likely that departments would be able to prepare scoping RIAs with minimal assistance from the CRIU/coordinating committee. The CRIU/coordinating committee would not at this stage seek to enforce the need to do a scoping RIA, since enforcement of these rules would occur later on in the process, when the regulatory proposal is submitted to Cabinet.
4. CRIU/coordinating committee comments on scoping RIA within set time: It is suggested that the CRIU/coordinating committee be given up to 30 days to comment on a scoping RIA sent to it, failing which the initiating department should be allowed to continue with its law-making process.
5. Decision on whether further RIA required: If the scoping RIA reveals that the regulatory proposal is a proposal for framework legislation, then no further RIA would be required. The draft bill would, however, be tagged as a bill requiring further RIA at the subordinate legislation stage. If the scoping RIA reveals that the proposal is not one for framework legislation, then further RIA might be required depending on whether the draft bill constitutes significant regulation.
6. Decision to regulate taken: The departmental decision on whether to regulate should be taken on the basis of the scoping RIA. Ideally, but not necessarily, this decision should be delayed until the central RIA body has commented on the scoping RIA.
7. Further research and consultation on options: The decision to regulate would be followed by further research and consultation on the options identified in the scoping RIA. Consultation should occur on the basis of *options*.
8. Mid-level RIA prepared with central assistance if required: The more detailed mid-level RIA would then be prepared, drawing on central assistance and external consultants if necessary.
9. Minister signs off on draft Bill with preferred option: It might be necessary to formalise this existing stage by including a section in the mid-level RIA in which the responsible Minister acknowledges that s/he has read the mid-level RIA and is satisfied that it justifies submission of the draft bill to Cabinet.
10. Cabinet process, during which CRIU/coordinating committee sends comments on mid-level to Cabinet Committee responsible for draft bill: As present, except that comments of central units like PCAS, Cabinet Operations

and the National Treasury on draft bills presented to Cabinet would be coordinated via the CRIU/coordinating committee, and would be directed at the mid-level RIA rather than the draft bill itself.

11. Cabinet approves or rejects bill: After discussion of the draft bill, Cabinet could either recommend that the proposal be adopted, with or without amendments, or that the proposal be rejected, either outright or without an instruction to rework it.
12. Certification of Cabinet-approved draft Bill by State Law Advisers: Unchanged, except State Law Advisers' consideration of the draft bill would be assisted by the mid-level RIA, and by any legal analysis (for example, of constitutional issues) that it might contain.
13. Publication of full draft bill in Government Gazette: Unchanged, except consideration should be given to simultaneous publication of mid-level RIA.
14. Amendments to draft bill in response to comments received: Unchanged, except that, if the mid-level RIA is simultaneously published, public comments might be directed both at the draft bill and the analysis in the mid-level RIA.
15. Final RIA prepared on the basis of public comments received. This RIA would recommend a single preferred option, and would include greater detail on the implementation, enforcement, and monitoring and evaluation of that option.
16. Publication of explanatory summary in Government Gazette: Unchanged.
17. Introduction of Bill in Parliament, accompanied by final RIA: Unchanged, except that the final RIA would accompany the draft bill on its tabling in Parliament, for information purposes.
18. Consideration of Bill by Portfolio Committee: Consideration of the draft bill would be assisted by the information and analysis contained in the final RIA.
19. Portfolio committee consultation on bill: Unchanged, save that public comments on the draft bill, and submissions to Parliament, could be directed both at the draft bill and the final RIA.
20. Second reading debate in National Assembly: If parliamentary discussion of the draft bill does not change the regulatory option chosen, there is likely to be no further need for RIA. If parliamentary amendment of the draft bill does change the regulatory option chosen, it is recommended that Parliament seek the advice of the CRIU/coordinating committee on whether the option chosen affects the judgments made in the final RIA. Parliament itself is the implementing institution for this function. Consideration should be given to Parliament developing its own RIA capacity in the medium to long term; while this capacity is being developed, interim RIA capacity may be developed within the Office of the Chief State Law Adviser.
21. – 23. Bill considered by NCOP, possible reconsideration of Bill by National Assembly, and Presidential Assent: Unchanged, save that the role of the Chief Directorate: Legal & Executive Services in advising the President on the

exercise of his/her powers under section 79(1) of the Constitution would be expanded to include participation in the CRIU/coordinating committee.

Suggested stages of law-making process for subordinate legislation

The suggested stages for the law-making process for subordinate legislation are outlined in the following table.

| |
|--|
| 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 |

As the above table indicates, 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.

Note: The detailed reports for each phase of the project are available from Fundi Tshazibana in the Macroeconomic Policy Unit, National Treasury.

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.

Annex 2: Implementation Proposals

Option 2: Strongly guided, Demand-driven RIA

| Activity | Recommended responsible institution |
|--|---|
| <i>Pre-Cabinet: Consultation with all departments</i> | |
| Communication and consultation on options for RIA | Presidency and Treasury project team |
| 1. Getting RIA policy approved at Cabinet Level | |
| Clearly state the policy objectives of RIA | Presidency and Treasury prepare Cabinet Memo, setting out broad options for implementation of RIA, for consideration by Cabinet |
| Clarify the role of RIA in achieving sustainable economic growth and poverty reduction goals | Presidency and Treasury (RIA project management team) |
| Clarify the underlying need or problem that the policy is seeking to address and the relationship of RIA to other programmes of regulatory best practice | Presidency and Treasury (RIA project management team) |
| Agree on responsibility of Ministers and accountability for compliance | Cabinet - led by Presidency and Treasury (RIA project management team + Cabinet Operations) |
| 2. Identification of project lead and staffing at central level | |
| Identify the unit in the Presidency with lead responsibility for RIA | Presidency with Cabinet approval |
| Secure commitment of RIA champions at Ministerial and DG/DDG level | Presidency (PCAS/Cabinet Operations), Treasury, other departments as appropriate |
| Establish a coordinating committee to support RIA at central level | Presidency (PCAS/Cabinet Operations, Legal and Executive Services), Treasury, other departments as appropriate |
| Translate RIA related functions into key performance indicators | Presidency and Treasury (RIA project management team + Cabinet Operations, Legal and Executive Services) |
| Review and amend job descriptions for existing managerial staff as appropriate, reflecting KPIs | PCAS / Cabinet Operations, Legal and Executive Services, Treasury, other departments as appropriate |
| Appoint Chief Director as RIA lead (new or existing post) | Presidency |
| Identify requirements for technical support and make appropriate new appointments | PCAS / Cabinet Operations, Treasury, other departments as appropriate |
| 3. Development of a Communication Strategy | |
| Design a clear communication strategy for all | Central RIA function (coordinating |

| | |
|--|---|
| departments and state agencies | committee), with assistance of GCIS |
| Publicise and disseminate a clear explanation of what RIA seeks to achieve | Central RIA function |
| Educate stakeholders about the benefits of RIA. Ensure that the message is clear and is not prone to misinterpretations | Central RIA function |
| Develop dedicated website for CRIU (note: will require ongoing maintenance – resource implications) | Central RIA function with appropriate IT support |
| 4. Definition of the scope of work | |
| Identify departments that will participate in the first phase and secure their agreement | Central RIA function in consultation with departments |
| Clarify roles and responsibilities of different core stakeholders - PCAS, Cabinet Operations, Legal and Executive Services in the Presidency, Treasury, Chief State Law Advisor's Office, Portfolio Committees and departments | Central RIA function through a process of consultation and negotiation with identified stakeholders |
| Determine and communicate key functions of centre and departments | Central RIA function |
| Analyse the RIA policy to determine the range of work to be undertaken and deliverables | Central RIA function in consultation with participating departments and other key stakeholders |
| Outline the phases of work to introduce RIA, including deliverables, timing and constraints which are likely to impact on each phase such as human resources, finances, interdepartmental and cluster collaboration, etc | Central RIA function at central level, in parallel with departments |
| Clarify qualitative and quantitative criteria for monitoring progress towards achievement of RIA objectives | Central RIA function at central level, in parallel with departments |
| Describe qualitative and quantitative benefits expected to flow from RIA implementation | Central RIA function, in parallel with departments |
| Outline evaluation methodology | Central RIA function, in parallel with departments |
| 5. Development of detailed breakdown of activities and responsibilities | |
| Central level – first six months Departmental level – within six months of RIAs introduction to department | |
| Describe what is to be delivered and when it is due by | Requirements determined at central level, departments translate into own processes |
| Give an indication of milestones or sign off points | Requirements determined at central level, departments translate into own processes |
| Detail the phases/activities/tasks to be performed | Requirements determined at central level, departments translate into own processes |

| | |
|--|--|
| Clarify accountability (who is responsible for ensuring that each phase/activity/task is completed) | Departmental teams with responsibility for coordination of RIA, reporting to central RIA lead office |
| 6. Identification of funding requirements at central and departmental levels | |
| Details of funding for establishing central level resources | Presidency and Treasury |
| Details of funding for establishing the participating departmental RIA units | Departments, with advice available from RIA coordinator at central level |
| 7. Development of Risk Management Strategy | |
| By understanding the potential risks which may affect the implementation of RIA, departments can reduce the likelihood or consequences of surprises that may jeopardize the achievement of RIA objectives. | |
| Ensure that the RIA policy context and environment are clearly articulated | Central coordinator and departments |
| Gather the views of key stakeholders when determining the risk environment | Departmental teams with responsibility for coordination of RIA |
| Provide a detailed identification of risks that should be taken into account | Departmental teams with responsibility for coordination of RIA |
| Analyse and evaluate the risks | Departmental teams with responsibility for coordination of RIA |
| Develop strategies to address the risks | Departmental teams with responsibility for coordination of RIA |
| Regularly review risk assessment | Departmental teams with responsibility for coordination of RIA |
| 8. Development of training programme | |
| Core skills include ² : - Familiarity with a few micro-economic concepts (e.g. opportunity cost); - Presentation of technical and analytical issues to policy officials so that the consequences and uncertainties of options are clear and relevant; - Processes of RIA, including the role of public consultation and quality control; - Familiarity with innovative alternative policy instruments, such as distributional impact, income distribution, and market-based approaches; - Design and implementation of cost-effectiveness, benefit-cost analysis and other methods; - Economic analysis in competitive global economies | |
| Introduce and design effective training programme in regulation theory and practice | Oversight by RIA coordinator at central level; departments to integrate RIA into own training programmes |
| 9. Development of effective data collection processes | |
| Clarify data needs and quality standards | Central RIA coordinator in consultation with departments |
| Determine strategies for collecting data at minimum cost and within the required time limits | Departments, with support and advice from central coordinator |

² Scott Jacobs "Asking the Right Questions: The Design of Training Courses for RIA in Developing Countries" Cape Town, 7-9 September 2004

| | |
|--|--|
| 10. Design of Monitoring and Evaluation system | |
| Design RIA in such a way that it is integrated within the policy-making process | Central RIA coordinator working in conjunction with departments |
| Encourage the adoption of RIA as an automatic part of the legislative process | Central RIA coordinator, RIA champions, and senior officials within departments |
| 11. Comprehensive regulatory review - improving the quality of new regulations | |
| Ensure that RIA is built into the process of regulatory evaluation, at the earliest stage in the design of new regulation and proposed regulatory changes ³ | Departments, accountable to central RIA coordinator |
| Establish a system for tracking and registering existing laws and regulation, and for planning future laws and regulation ⁴ | Responsibility to be assigned within central RIA coordinating committee |
| Develop a standardized checklist for regulatory decision-making in departments | Central RIA coordinating committee |
| Promote culture change within departments | Central RIA coordinating committee working with departments to encourage ownership of RIA |
| Improve on existing consultation procedures to ensure the widest possible input into regulatory decision making | Departmental teams with responsibility for coordinating RIA |
| Determine and develop methods for assessing regulatory options | Departmental teams with responsibility for coordinating RIA, reporting to central RIA coordinating committee |
| Introduce systems to ensure improved regulatory coordination within government | Central RIA coordinating committee in consultation with departments |
| Ensure that RIA is introduced as integral to policy decisions within government, rather than as an add-on | Departmental teams with responsibility for coordinating RIA, accountable to central RIA coordinating committee |
| 12. Comprehensive regulatory review - improving the quality of existing regulation | |
| Systematically review and upgrade existing regulation | Departments |
| Apply RIA to existing regulation | Departments |
| 13. Consideration of resource issues | |
| Critical resources would include staff with economics and legal skills, consultants, ICT, data, and information systems | |
| Identify the necessary non-financial resources – people, skills, materials, equipment and facilities | Departments |
| Reflect the activity or task of obtaining critical | Departments |

³ If there is no system of on-going evaluation and review of existing laws and regulations, this should be introduced together with RIA

⁴ Essentially, this would involve revamping existing system such as the annual letter written by the DG in the Presidency to departments

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| resources, including the costs, timeframes and responsible personnel associated with this activity, in the work breakdown section | |
| Address the risks relating to resourcing RIA in the risk management section | Departments |
| Review the scope and work breakdown structure and identify the resources that are critical to successful implementation of RIA | Departments |
| Determine whether the resource is available internally, and if not how it will be acquired | Departments |
| 14. Design Quality Assurance mechanisms | |
| To ensure the integrity and probity of all RIA processes | |
| Design mechanisms to measure success or progress | Departments report to central RIA coordinator |
| Design mechanisms to measure the quality of information | Central RIA coordinating committee in consultation with departments; Departments report to central RIA coordinator |
| Drawing on the success criteria provided in the scope section, develop key performance indicators for RIA | Central RIA coordinating committee in consultation with departments; Departments report to central RIA coordinator |
| Drawing on the benefits identified in the scope section, develop indicators that can be used to measure the achievement of the benefit | Central RIA coordinating committee in consultation with departments; Departments report to central RIA coordinator |
| Identify any additional resources/special skills necessary to develop an evaluation methodology, and reflect this in the resource section | Central RIA coordinating committee |
| Consider annual evaluations as a means of providing feedback on progress | Central RIA coordinating committee, possibly in conjunction with external stakeholders |
| Review the monitoring and evaluation strategy with regard to the balance of costs and benefits | Central RIA coordinating committee |

Option 3: Lightly guided, Supply-led RIA

| Activity | Recommended responsible institution |
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| <i>Pre-Cabinet:</i> Consultation with all departments | |
| Communication and consultation on options for RIA | |
| 1. Getting RIA policy approved at Cabinet Level | |
| Clearly state the policy objectives of RIA | Presidency and Treasury prepare Cabinet Memo, setting out broad options for implementation of RIA, for consideration by Cabinet |
| Clarify the role of RIA in achieving sustainable economic growth and poverty reduction goals | Presidency and Treasury (RIA project management team) |
| Clarify the underlying need or problem that the policy is seeking to address and the relationship of RIA to other programmes of regulatory best practice | Presidency and Treasury (RIA project management team) |
| Agree on responsibility of Ministers and accountability for compliance | Cabinet - led by Presidency and Treasury (RIA project management team) |
| 2. Identification of project lead and staffing at central level | |
| Identify the unit in the Presidency that will house the central RIA unit (CRIU) | Presidency with Cabinet approval |
| Secure commitment of RIA champions at Ministerial and DG/DDG level | Presidency (PCAS/Cabinet Operations) |
| Design job descriptions and person specifications for CRIU | Presidency and Treasury (RIA project management team + Cabinet Operations) |
| Appoint staff to CRIU | PCAS / Cabinet Operations |
| 3. Development of a Communication Strategy | |
| Design a clear communication strategy for all departments and state agencies | CRIU, with assistance of GCIS |
| Publicise and disseminate a clear explanation of what RIA seeks to achieve | CRIU |
| Educate stakeholders about the benefits of RIA. Ensure that the message is clear and is not prone to misinterpretations | CRIU |
| Develop dedicated website for CRIU (<i>note:</i> will require ongoing maintenance – resource implications) | CRIU with appropriate IT support |
| 4. Definition of the scope of work | |
| Identify departments that will participate in the first phase and secure their agreement | CRIU in consultation with departments |
| Clarify roles and responsibilities of different core stakeholders - PCAS, Cabinet Operations, Legal | CRIU, through a process of consultation and negotiation with |

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| and Executive Services in the Presidency, Treasury, Chief State Law Advisor's Office, Portfolio Committees and departments | identified stakeholders |
| Determine and communicate key functions of CRIU and departments | CRIU in consultation with departments |
| Analyse the RIA policy to determine the range of work to be undertaken and deliverables | CRIU in consultation with participating departments and other key stakeholders |
| Outline the phases of work to introduce RIA, including deliverables, constraints which are likely to impact on each phase such as human resources, finances, interdepartmental and cluster collaboration, etc | CRIU at central level, in parallel with departments |
| Clarify qualitative and quantitative criteria for monitoring progress towards achievement of RIA objectives | CRIU at central level, in parallel with departments |
| Describe qualitative and quantitative benefits expected to flow from RIA implementation | CRIU at central level, in parallel with departments |
| Outline evaluation methodology | CRIU at central level, in parallel with departments |
| 5. Development of detailed breakdown of activities and responsibilities | |
| Describe what is to be delivered and when it is due by | CRIU provides guidance, departments translate into own processes |
| Give an indication of milestones or sign off points | CRIU provides guidance, departments translate into own processes |
| Detail the phases/activities/tasks to be performed | CRIU provides guidance, departments translate into own processes |
| Clarify accountability (who is responsible for ensuring that each phase/activity/task is completed) | Departmental teams with responsibility for coordination of RIA |
| 6. Identification of funding requirements at central and departmental levels | |
| Details of funding for establishing the CRIU | CRIU in consultation with Presidency and Treasury |
| Details of funding for establishing the participating departmental RIA units | Departments, with advice available from CRIU |
| 7. Development of a Risk Management strategy | |
| By understanding the potential risks which may affect the implementation of RIA, departments can reduce the likelihood or consequences of surprises that may jeopardize the achievement of RIA objectives. | |
| Ensure that the RIA policy context and environment are clearly articulated | CRIU and departments |
| Gather the views of key stakeholders when determining the risk environment | Departmental teams with responsibility for coordination of RIA |
| Provide a detailed identification of risks that should be taken into account | Departmental teams with responsibility for coordination of RIA |

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| Analyse and evaluate the risks | Departmental teams with responsibility for coordination of RIA |
| Develop strategies to address the risks | Departmental teams with responsibility for coordination of RIA |
| Regularly review risk assessment | Departmental teams with responsibility for coordination of RIA |
| 8. Development of training programme (Core skills as above) | |
| Introduce and design effective training programme in regulation theory and practice | CRIU at central level; departments also to integrate RIA into own training programmes |
| 9. Development of effective data collection processes | |
| Clarify data needs and quality standards | CRIU in consultation with departments |
| Determine strategies for collecting data at minimum cost and within the required time limits | Departments, with support and advice from CRIU |
| 10. Design of Monitoring and Evaluation system | |
| Design RIA in such a way that it is integrated within the policy-making process | CRIU working in conjunction with departments |
| Encourage the adoption of RIA as an automatic part of the legislative process | CRIU and senior officials within departments |
| 11. Comprehensive regulatory review - improving the quality of new regulation | |
| Ensure that RIA is built into the process of regulatory evaluation, at the earliest stage in the design of new regulation and proposed regulatory changes | Departments, with encouragement and influence from CRIU |
| Establish a system for tracking and registering existing laws and regulations, and for planning future laws and regulation | CRIU, with cooperation of departments |
| Develop a standardized checklist for regulatory decision-making in departments | CRIU |
| Promote culture change within departments | CRIU working with departments to encourage ownership of RIA |
| Improve on existing consultation procedures to ensure the widest possible input into regulatory decision making | Departmental teams with responsibility for coordinating RIA |
| Determine and develop methods for assessing regulatory options | Departmental teams with responsibility for coordinating RIA, supported by advice and guidance from CRIU |
| Introduce systems to ensure improved regulatory coordination within government | CRIU in consultation with departments |
| Ensure that RIA is introduced as integral to policy decisions within government, rather than as an add-on | Departmental teams with responsibility for coordinating RIA, with support from CRIU |
| 12. Comprehensive regulatory review - improving the quality of existing regulation | |
| Systematically review and upgrade existing regulation | Departments |

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| Apply RIA to existing regulation | Departments |
| 13. Consideration of resource issues | |
| Critical resources would include staff with economics and legal skills, consultants, ICT, data, and information systems | |
| Identify the necessary non-financial resources – people, skills, materials, equipment and facilities | Departments |
| Reflect the activity or task of obtaining critical resources, including the costs, timeframes and responsible personnel associated with this activity, in the work breakdown section | Departments |
| Address the risks relating to resourcing RIA in the risk management section | Departments |
| Review the scope and work breakdown structure and identify the resources that are critical to successful implementation of RIA | Departments |
| Determine whether the resource is available internally, and if not how it will be acquired | Departments |
| 14. Design Quality Assurance mechanisms | |
| To ensure the integrity and probity of all RIA processes | |
| Design mechanisms to measure success or progress | CRIU in consultation with departments |
| Design mechanisms to measure the quality of information | CRIU in consultation with departments |
| Drawing on the success criteria provided in the scope section, develop key performance indicators for RIA | CRIU in consultation with departments |
| Drawing on the benefits identified in the scope section, develop indicators that can be used to measure the achievement of the benefit | CRIU in consultation with departments |
| Identify any additional resources/special skills necessary to develop an evaluation methodology, and reflect this in the resource section | CRIU |
| Consider annual evaluations as a means of providing feedback on progress | CRIU, possibly in conjunction with external stakeholders |
| Review the monitoring and evaluation strategy with regard to the balance of costs and benefits | CRIU |