

|  |
| --- |
| Subordinate Legislation (Legislative Instruments) Regulations 2021 |
| Regulatory Impact StatementApril 2021 |

# Subordinate Legislation (Legislative Instruments) Regulations 2021 - Regulatory Impact Statement

This Regulatory Impact Statement (RIS) has been prepared to fulfil the requirements of the ***Subordinate Legislation Act 1994*** and to facilitate public consultation on the proposed Subordinate Legislation (Legislative Instruments) Regulations 2021. A consultation copy of the Proposed Regulations accompanies this RIS and is at Attachment A.

Public comments and submissions are invited on the Proposed Regulations and in response to information provided in this RIS.

All submissions will be treated as public documents. Written comments and submissions should be forwarded no later than **5pm on Thursday 3 June 2021.**

The preferred method of submission is via email to GeneralOrdersLegislativeInstruments@dpc.vic.gov.au or via the Engage Victoria website <https://engage.vic.gov.au/>, but submissions can also be mailed to:

Office of the General Counsel

Department of Premier and Cabinet

Level 2,

1 Treasury Place,

EAST MELBOURNE VIC 3002

# Contents

[Subordinate Legislation (Legislative Instruments) Regulations 2021 - Regulatory Impact Statement 2](#_Toc70082335)

[Contents 3](#_Toc70082336)

[List of Acronyms 5](#_Toc70082337)

[Executive Summary 6](#_Toc70082338)

[Nature of the problem 7](#_Toc70082339)

[Objectives of the proposed regulatory measure 7](#_Toc70082340)

[Options 7](#_Toc70082341)

[Base case - no regulations 7](#_Toc70082342)

[Option 1 – make the Proposed Regulations 8](#_Toc70082343)

[Option 2 – make the Proposed Regulations but exclude categories of legislative instruments 9](#_Toc70082344)

[Multi-Criteria Analysis 9](#_Toc70082345)

[Table ES1: Multi-criteria analysis 10](#_Toc70082346)

[Proposed measure 10](#_Toc70082347)

[Costs and benefits of the proposed measure and groups in society who may be affected 11](#_Toc70082348)

[Why other means of achieving the objectives are not appropriate 12](#_Toc70082349)

[Implementation and Evaluation 12](#_Toc70082350)

[Consultation 13](#_Toc70082351)

[1. Introduction 14](#_Toc70082352)

[Subordinate legislation 15](#_Toc70082353)

[Legislative instruments 16](#_Toc70082354)

[2. Problem Analysis 22](#_Toc70082355)

[Impact on responsible agencies and Ministers under the base case 22](#_Toc70082356)

[Prescribed legislative instruments 24](#_Toc70082357)

[Desired Objectives 25](#_Toc70082358)

[Efficient allocation of resources 25](#_Toc70082359)

[Minimising unnecessary delays when making instruments 25](#_Toc70082360)

[Appropriate level of scrutiny of instruments 25](#_Toc70082361)

[3. Options 26](#_Toc70082362)

[Part 1 Base Case 26](#_Toc70082363)

[Costs of allowing the Current Regulations to expire 26](#_Toc70082364)

[Benefits of allowing the Current Regulations to expire 28](#_Toc70082365)

[Part 2 Options 29](#_Toc70082366)

[Option One – make the Proposed Regulations – which are effectively a remake of the Current Regulations with minor modifications – Preferred Option 29](#_Toc70082367)

[Exemptions for RIS-equivalence or national uniform legislation 32](#_Toc70082368)

[RIS-equivalent processes 32](#_Toc70082369)

[National uniform legislation schemes 34](#_Toc70082370)

[Public interest 35](#_Toc70082371)

[Option Two – make the Proposed Regulations as in Option 1 but with the exclusion of two categories of legislative instruments that face alternative scrutiny processes 37](#_Toc70082372)

[4. Impact Analysis 37](#_Toc70082373)

[Part 1 Multi-Criteria Analysis 37](#_Toc70082374)

[Criteria 38](#_Toc70082375)

[Weighting 39](#_Toc70082376)

[Scores 39](#_Toc70082377)

[Effective use of limited government resources 40](#_Toc70082378)

[Minimising unnecessary delay 44](#_Toc70082379)

[Appropriate level of parliamentary and public scrutiny 44](#_Toc70082380)

[Total score 45](#_Toc70082381)

[Part 2 Reasons for rejecting other options 46](#_Toc70082382)

[Base Case 46](#_Toc70082383)

[Option 1 46](#_Toc70082384)

[Option 2 47](#_Toc70082385)

[Part 3 Competition Assessment 49](#_Toc70082386)

[Will the preferred option restrict competition? 49](#_Toc70082387)

[5. Implementation plan 50](#_Toc70082388)

[6. Evaluation strategy 51](#_Toc70082389)

[Purpose 51](#_Toc70082390)

[Evaluation Scope 51](#_Toc70082391)

[Updates to the Proposed Regulations 51](#_Toc70082392)

[Requesting changes 52](#_Toc70082393)

[Requesting additions 52](#_Toc70082394)

[Administrative additions to Schedule 1 52](#_Toc70082395)

[Addition of an exempt legislative instrument in Schedule 3 52](#_Toc70082396)

[Addition of a legislative instrument that is exempt more broadly 52](#_Toc70082397)

[7. Consultation 52](#_Toc70082398)

[Attachment A –Consultation draft of Proposed Regulations 53](#_Toc70082399)

[Attachment B – Table summarising changes from Current Regulations to the Proposed Regulations 54](#_Toc70082400)

[Attachment C – Table of legislative instruments made under provisions that will be automatically exempt from certain requirements of the SLA 55](#_Toc70082401)

# List of Acronyms

BRV – Better Regulation Victoria

CBR – Commissioner for Better Regulation

Charter – **Charter of Human Rights and Responsibilities Act 2006**

Current Regulations – Subordinate Legislation (Legislative Instruments) Regulations 2011

DPC – Department of Premier and Cabinet

EPA – Environmental Protection Authority

ESC – Essential Services Commission

Proposed Regulations – Subordinate Legislation (Legislative Instruments) Regulations 2021

RIS – this Regulatory Impact Statement

SARC – Scrutiny of Acts and Regulations Committee

SLA – **Subordinate Legislation Act 1994**

SLA Guidelines – Guidelines made by the responsible Minister under section 26 of the SLA

# Executive Summary

The draft Subordinate Legislation (Legislative Instruments) Regulations 2021 (the Proposed Regulations) at Attachment A, are similar to the Current Regulations, the Subordinate Legislation (Legislative Instruments) Regulations 2011*,* which are due to sunset on 28 June 2021.

The Proposed Regulations to be made under section 4A of the SLA have three purposes:

* to prescribe a non-exhaustive list of instruments which are not to be legislative instruments for the purposes of the SLA (mostly instruments of purely administrative character) (Schedule 1);
* to clarify the characterisation of instruments as legislative instruments and prescribe them to be legislative instruments for the purposes of the SLA (Schedule 2); and
* to automatically exempt certain provisions under which legislative instruments are made from the operation of certain provisions of the SLA (including the preparation of a regulatory impact statement (RIS), associated consultation and other requirements) by listing those instruments in Schedule 3 or in the main body of the Proposed Regulations (exempt legislative instruments).

There are two types of exemption certificates that can exempt a legislative instrument from the requirement for a RIS on a case by case basis. These are:

* exemption certificates issued by the responsible Minister – section 12F; and
* exemption certificates issued by the Premier – section 12G.

Since the Current Regulations were enacted in 2011, there have been approximately 500 amendments to the Current Regulations. These changes reflect when instruments have been:

* inserted or amended to reflect new and amended Acts;
* repealed or replaced when Acts are repealed or amended; or
* moved between Schedules when the nature and effect of an instrument has been reconsidered by a Department during the annual reviews of the Current Regulations.

For example, in recent amendments to the Current Regulations in 2020, a management plan made under section 21(1) of the *Flora and Fauna Guarantee Act 1988* moved from Schedule 3 to Schedule 1. The Department of Environment, Land, Water and Planning requested this be moved, as it had become clear that despite some potential indications of legislative characteristics, on balance the instrument was administrative in nature and so should be included in Schedule 1 to ensure its status and requirements under the SLA are clear.

The Proposed Regulations differ from the Current Regulations as set out in the table at Attachment B.

The key differences include:

* changes resulting from ongoing feedback and analysis from departments during annual reviews of the Current Regulations, such as:
* moving from Schedule 1 to 3 and vice versa on the basis that the instrument had been incorrectly characterised; or
* removal of instruments from the Current Regulations because an instrument is clearly administrative in nature; and
* updates to reflect changes made to authorising Acts or provisions (including repeal of authorising Acts or provisions, renaming of authorising Acts or amendments to authorising provisions).

## Nature of the problem

The effective operation of a representative democracy depends on the community being able to scrutinise, discuss and contribute to government decision-making particularly where such decisions imposes a significant regulatory burden. The Victorian SLA facilitates such engagement.

Legislative instruments, like statutory rules, must undergo a detailed process of analysis under the SLA before they are made. Doing so improves government accountability and transparency and leads to better quality regulation. Key elements are the preparation of a RIS and public consultation on the RIS, which provides greater opportunities for public input on legislative instruments that significantly affect Victorians. Generally, legislative instruments must also be tabled in Parliament and will subsequently be reviewed by the Scrutiny of Acts and Regulations Committee (SARC).

A large number of legislative instruments qualify for an exemption from preparing a RIS under criteria provided in section 12F of the SLA. In these cases, there is considered to be a net benefit in automatically exempting legislative instruments from the RIS process, and associated consultation process, because the costs of additional consultation and scrutiny would be disproportionate and outweigh the benefits of that consultation and scrutiny. Without the Proposed Regulations, departmental resources would be required to seek an exemption each time an instrument was made, which imposes an administrative burden on Government and Parliament.

Without the Proposed Regulations, departments and agencies will spend more time in making or amending legislative instruments and resources would have to be allocated to these activities, which would represent a considerable opportunity cost for departments and agencies.

Some legislative instruments need to be made quickly to achieve their desired effect, for example when responding to an emergency. The additional time involved in preparing exemption certificates or RISs would undermine the intended effect of these legislative instruments. Departments, agencies and Parliament (including the SARC) would have to divert resources from other, more significant, issues which could otherwise be addressed.

## Objectives of the proposed regulatory measure

The objectives of the Proposed Regulations are to:

* assist departments and agencies to allocate their resources efficiently and ensure they are not subject to excessive burden;
* minimise unnecessary delays in making or amending legislative instruments; and
* ensure legislative instruments are identifiable, publicly available and an appropriate level of scrutiny (parliamentary and SARC) is applied to the legislative instruments.

## Options

### Base case - no regulations

Without the Proposed Regulations (the Base Case), each legislative instrument that is made would require a case-by-case exemption from preparing a RIS (under sections 12F or 12G of the SLA) or a RIS to be prepared. The benefit of this is that all legislative instruments, including those exempt under section 12F, would be required to undergo a human rights assessment, and be published in the Victoria Government Gazette, tabled in Parliament and reviewed by SARC. These additional steps provide additional scrutiny that would not be provided for legislative instruments prescribed to be exempt legislative instruments under Schedule 3 of the Proposed Regulations or in the main body of the Proposed Regulations.

However, there are a number of associated costs with the Base Case. Seeking an exemption certificate from the responsible Minister each time a legislative instrument is made (which is proposed to be included in the Proposed Regulations) will result in a cost to departments. There would be greater costs on departments for those legislative instruments that are not exempt under section 12F as some of those legislative instruments would require the preparation of a RIS and undergo the associated consultation[[1]](#footnote-2). Only a small number of additional RISs would need to be prepared without the Proposed Regulations (approximately 5-10 per year). There would also be a greater impact on SARC, as it would be required to assess every legislative instrument to ensure the requirements of the SLA have been met. With approximately up to 300-500 additional legislative instruments likely to be tabled with SARC each year (in the base case), SARC’s ability to effectively perform its scrutiny function may be compromised with this increased workload.

### Option 1 – make the Proposed Regulations

Option 1 proposes to prescribe five hundred and ninety three (593) provisions to make legislative instruments as automatically exempt from certain requirements of the SLA. These instruments would either be eligible for an exemption under section 12F of the SLA, or are being proposed to be exempt legislative instruments on overriding public interest grounds. The section 12F criteria includes where an instrument would not impose a significant burden, is of a fundamentally declaratory or machinery nature, or increases fees in a financial year by an amount less than the Treasurer’s annual rate. The public interest criterion recognises that a large number and diverse range of legislative instruments are now captured by the SLA. In these cases, the Department of Premier and Cabinet (DPC) believes that the benefits of exempting the provisions to make instruments outweigh the benefits of additional scrutiny before an instrument is made.

Option 1 will provide clarity and certainty to those responsible for making legislative instruments as to which instruments the requirements of the SLA apply to. There will be some opportunity cost savings, as the resources otherwise used in preparing exemptions certificates or undergoing a RIS and associated consultation process could be used more productively.

There is a key difference between the Base Case and Option 1. If exemptions are sought on a case-by-case basis, a legislative instrument must still undergo a human rights assessment, section 12C consultation and be published in the Victoria Government Gazette, tabled in Parliament and reviewed by SARC. This part of the process will be largely foregone for legislative instruments that are prescribed to be exempt legislative instruments in the Proposed Regulations. The only remaining requirement for those legislative instruments is that they are published in the Victoria Government Gazette before coming into force. In some instances, the Act under which the legislative instrument is made provides a contrary intention for this publication requirement. For example, an Order made under section 74E(1) or 74H(1) of the *Emergency Management Act 2013* whichdesignates critical infrastructure and responsible entity, is information included on the Victorian Critical Infrastructure Register. Section 74K limits access to the information on the Victorian Critical Infrastructure Register by certain persons or bodies. Given this legislative intention, these instruments do not need to comply with the SLA gazettal requirement and the whole of Part 2A of the SLA.

There is a risk that exempting a set of legislative instruments from the SLA requirements could lead to instruments being made that cause a significant economic or social burden on a sector of the public, or contravene the *Charter of Human Rights and Responsibilities Act 2006* (the Charter), without adequate analysis and consultation and without the additional scrutiny otherwise afforded by parliamentary processes and SARC review. However, each of the instruments proposed for exemption has been carefully assessed to ensure that, on balance, there is a benefit in excluding the instruments from the additional scrutiny the SLA provides. The table at Attachment C sets out DPC’s assessment.

### Option 2 – make the Proposed Regulations but exclude categories of legislative instruments

Option 2 proposes a similar but narrower set of Proposed Regulations to Option 1. The following categories of legislative instruments will be exempt under Option 1 but not exempt under Option 2:

* legislative instruments that face a RIS-equivalent process; and
* legislative instruments that are part of a national uniform legislation scheme where an assessment of costs and benefits has been undertaken.

These legislative instruments are provided closer scrutiny in this RIS, in recognition that they would often impose a significant economic or social burden on a sector of the public. However, such instruments face alternative scrutiny elsewhere, and would likely otherwise be granted an exemption on a case-by-case basis under section 12F of the SLA. Requiring that departments go through the exemption process for these particular instruments will impose a cost on them for no or limited benefits. As such, this option is not preferred. Option 1 is therefore the least costly to implement overall.

## Multi-Criteria Analysis

Due to the nature of the problem, it is difficult to fully quantify the costs and benefits of each option, and assign a dollar value to each. Where costs are available, these have been provided; and a multi-criteria analysis has been used to provide an overall assessment of the options.

Scores were assigned on three criteria:

* Efficiency and effective use of government resources.
* Minimise unnecessary delays in making or amending legislative instruments.
* Ensure an appropriate level of parliamentary and public scrutiny when making legislative instruments.

The third criterion is scored negatively, as placing provisions in Schedule 3 reduces the scrutiny of instruments made under those provisions. This analysis is discussed in greater detail in Chapter 4.

As can be seen in the table below, Option 1 is the preferred option. It receives the highest score.

## Table ES1: Multi-criteria analysis

(Scored between -10 and +10)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Criteria | Weighting | Base Case | Option 1 | Option 2 |
|  |  |  | Assigned score | Weighted score | Assigned score | Weighted score |
| *Benefit criteria* |
| * Effective use of government resources
 | ¼  | 0 | +10 | +2½  | +9 | +2¼ |
| * Minimise unnecessary delays in making or amending legislative instruments
 | ¼ | 0 | +10 | +2½  | +7 | +1¾  |
| ***Benefit criteria*** | **½**  | **0** |  | **+5**  |  | **+4**  |
| *Cost criteria* |
| * Ensure an appropriate level of parliamentary and public scrutiny when making legislative instruments.
 | ½ | 0 | -4 | -2 | -3 | -1½ |
| ***Cost criteria*** | **½** | **0** | **-4** | **-2** | **-2** | **-1**½ |
| **Total** | **1** | **0** |  | **+3** |  | **+2½**  |

## Proposed measure

Under section 4A of the SLA, the Governor in Council may make regulations that prescribe instruments to be legislative instruments (subject to the SLA); not to be legislative instruments for the purposes of the SLA; or to be exempt from SLA requirements.

The Proposed Regulations have therefore been drafted to clarify which instruments are not legislative instruments, and to provide a number of exemptions to legislative instruments which have met one or more exemption criteria that were developed as part of this proposal (see Attachment C for detail of the proposed exempt legislative instruments). The Proposed Regulations reflect Option 1, thus exempting all those instruments set out in Attachment C, including those being proposed for exemption based on RIS-equivalency, or that are part of a national uniform legislation scheme where an assessment of costs and benefits has been done, from certain requirements under the SLA.

Five hundred and eighty six (586) provisions to make legislative instruments are proposed to be exempt from Part 2A, Part 5A, section 16B, section 16C, section 16E and section 16F of the SLA.  Seven legislative instruments, included in the main body of the Proposed Regulations, are exempt from the operation of Parts 2A, 3A[[2]](#footnote-3), and 5A of the SLA:

* an Order made under section 74E(1) of the *Emergency Management Act 2013*;
* an Order made under section 74F of the *Emergency Management Act 2013;*
* an Order made under section 74H(1) of the *Emergency Management Act 2013;*
* a declaration under section 23(1) of the *Emergency Management Act 1986*;
* a revocation or variation of a declaration under section 23(2) of the *Emergency Management Act 1986;*
* a direction under section 24(2)(a) of the *Emergency Management Act 1986*;
* a declaration under section 24(2)(b) of the *Emergency Management Act 1986*;
* a declaration under section 24(4) of the *Emergency Management Act 1986*.

## Costs and benefits of the proposed measure and groups in society who may be affected

The Proposed Regulations affect the following groups in society, namely, the:

* Ministers and public sector bodies (e.g. departments);
* Parliament (especially SARC); and
* general public.

**Estimated costs**

DPC considers that the costs of the proposed measure are the foregone benefits of the Base Case, which are slightly limiting both the:

* accountability and transparency of the public sector; and
* public engagement in regulation processes and scrutiny of government policies and decisions.

**Benefits**

DPC considers that the benefits of the proposed measure are the avoided costs of the Base Case. These avoided costs are the costs borne by public sector bodies in complying with the SLA. These costs have the following two elements:

* + the preparation of RISs or exemption certificates; and
	+ the other processes involved in making legislative instruments (such as publication, tabling and provision of the instruments to SARC).

The benefits of the proposed measures are the avoided costs and delays of not complying with SLA requirements for scrutinising legislative instruments.

There is little precise available information on the cost involved in the preparation of RISs and the process to make legislative instruments. Therefore, the costs provided in this RIS are estimates only. To give an indication of these costs, DPC estimated that the Government will save about $797,000 each year in avoided administrative burden under Option 1. Due to the difficulty in estimating this figure, sensitivity analysis was conducted giving a range of about $522,000 to $2,463,000 per year. Similarly, Option 2 is expected to save the Government about $791,000 per year, with a lower bound estimate of $516,000 and an upper bound estimate of $2,433,000 per year.

The Proposed Regulations will help clarify to instrument-makers which instruments should be subject to the full requirements under the SLA, which instruments are not legislative instruments under the SLA (mostly because they are of purely administrative character), and which are exempt legislative instruments.

**Overall assessment**

Both Options are similar to the Current Regulations. The benefits for each Option are to decrease for departments, agencies, Parliament and SARC the administrative burden (ministerial exemption certificate or undertake a RIS) and delays to put in place measures. However, there are costs of both Options including a loss of scrutiny, transparency and consultation from exempting legislative instruments from certain requirements in the SLA.

Option 1 (preferred option) will maximise the efficient and effective use of government resources relative to the Base Case. There will be some opportunity cost savings, as the costs otherwise faced in preparing exemption certificates or undergoing a RIS and associated consultation process will not need to be funded from departmental budgets. However, there is a small risk that an exempt legislative instrument could, in future, be made in a way that imposes a significant cost or burden on a sector of the public and that the benefits of exempting the instrument do not outweigh the costs. The preparation and public release of RISs and proposed instruments helps to reduce the burden of proposals.

## Why other means of achieving the objectives are not appropriate

While many legislative instruments could be exempted on a case-by-case basis without the Proposed Regulations, there would be a cost in doing so.

Departments and agencies would have to allocate government resources to seek an exemption certificate from the responsible Minister each time an instrument is made. Other legislative instruments are proposed for exemption based on a broad ‘public interest’ criterion, which has been applied where the costs of undertaking a formal RIS and the associated consultation process are likely to exceed the benefits of doing so.

A non-regulatory option is not applicable. As discussed in the introduction the desired objectives of the Proposed Regulations relate to the increased efficiencies for agencies in making legislative instruments without unnecessary delay and an appropriate level of scrutiny, and it is impossible to achieve these objectives without making Regulations.

## Implementation and Evaluation

Compliance issues are expected to be minimal, given that the Proposed Regulations will exempt a large number of legislative instruments from certain requirements of the SLA. Where the requirements continue to apply, Ministers will have responsibility for instruments made within their portfolios and SARC will have responsibility for reviewing legislative instruments. As part of its responsibility, SARC will ensure that legislative instruments do not exceed the power conferred by an Act, do not unduly trespass on rights and freedoms, and that the requirements of the SLA have been met.

The Commissioner for Better Regulation (CBR) has advised DPC that it considers the Current Regulations to be essential and useful to Victoria’s regulatory system, as they support the 2011 amendments to the SLA which increased the scrutiny applied to legislative instruments. This increased scrutiny includes broader consultation, preparation of a RIS, gazettal, and submission to SARC for review. The CBR advises that, overall, departments and agencies (plus SARC) agree there are benefits to the current scheme.

Implementation is likely to be relatively straight forward given the Proposed Regulations are similar to the Current Regulations. DPC’s process for reviewing and updating the Proposed Regulations will continue.

The Proposed Regulations will sunset in 10 years, as per the requirements of the SLA. In addition, as a result of the ongoing monitoring and evaluation of the Current Regulations made by DPC, it may become apparent that the Proposed Regulations should be amended on ad-hoc basis, to ensure that new provisions in future Acts or amendments are captured appropriately and to remove any obsolete instruments or reassess instruments where their nature or use may have changed. DPC proposes that the Proposed Regulations be reviewed and evaluated annually.

## Consultation

DPC consulted with the other departments responsible for administering Acts under which legislative instruments are proposed to be included in the Proposed Regulations. This consultation has resulted in the list of provisions as exempt legislative instruments at Attachment C.

This RIS provides a further opportunity for consultation on the Proposed Regulations. Public comments and submissions are invited on the Proposed Regulations, in response to information provided in this RIS.

# Introduction

The Subordinate Legislation (Legislative Instruments) Regulations 2021 (Proposed Regulations) are proposed to be the principal regulations made under the **Subordinate Legislation Act 1994** (SLA). The Proposed Regulations are intended to replace the Subordinate Legislation (Legislative Instruments) Regulations 2011, which sunset on 28 June 2021.

Section 5 of the SLA requires that all statutory rules made in Victoria expire ten years after coming into force (with some limited exceptions) unless they are revoked at an earlier date. This is to ensure that regulations are regularly reviewed and that any unnecessary regulations are automatically revoked.

Under section 4A of the SLA, the Governor in Council, on recommendation from the Minister, may make regulations to prescribe:

* a non-exhaustive list of legislative instruments (which are legislative instruments for the purposes of the SLA);
* a non-exhaustive list of instruments that are not legislative instruments subject to the requirements of the SLA (mostly instruments of purely administrative character); and
* a list of legislative instruments that are exempt from certain requirements of the SLA.

Unless a legislative instrument is granted a case-by-case exemption under section 12F or 12G of the SLA, the responsible Minister must:

* prepare a RIS for any proposed legislative instruments (sections 12E and 12H of the SLA);
* ensure consultation in accordance with any SLA Guidelines (“Guidelines”) (section 12C);
* ensure that all comments and submissions are considered before the legislative instrument is made (section 12I);
* prepare a human rights certificate in respect of proposed legislative instruments (section 12D);
* publish any new legislative instruments in the Victoria Government Gazette (section 16A);
* lay all legislative instruments and related documents before Parliament (section 16B); and
* submit all legislative instruments and related documents to the Scrutiny of Acts and Regulations Committee (SARC) (section 16C).

A case-by-case exemption under the SLA involves the responsible Minister issuing exemption certificates (section 12F) or seeking a Premier’s exemption certificate (section 12G). When making these instruments the responsible Minister, supported by the relevant Department or agency, will certify that in their opinion the instrument meets one of the exemption criteria listed in section 12F. A Premier’s exemption certificate (under section 12G) is issued where, in the Premier’s opinion, there are special circumstances in the public interest that the instrument be made without preparing a RIS. Once the certificates are issued, a RIS does not need to be prepared for the proposed instrument. Other SLA requirements for making an instrument still apply, such as consultation and laying instruments and related documents before Parliament.

Making legislative instruments automatically exempt from certain requirements of the SLA by regulation allows for sets of instruments to be made without the full scrutiny process that the SLA requires, for example, the preparation of a RIS and public consultation on the RIS.

The instruments proposed for exemption are those where DPC considers that there is a net benefit of doing so. While the frequency an instrument may be made is a consideration, it is not, of itself, the key criterion for exempting under the regulations. Specifically, DPC will consider whether those instruments would likely meet one or more criteria for the case-by-case exemptions allowed for in section 12F of the SLA, or the benefits of undertaking more rigorous analysis and allowing for greater scrutiny are outweighed by the costs or other implications of doing so. However, there is a risk that instruments could be made in an unforeseen way that would impose a significant burden on business or community sectors, without having first undertaken adequate analysis or consultation.

Therefore, the main purpose of this RIS is to ensure there is analysis of which instruments should be automatically exempt legislative instruments before the Proposed Regulations are made. A full list of automatically exempt legislative instruments under Schedule 3 or the main body of the Proposed Regulations and the rationale for their exemption is attached to this RIS (Attachment C). A list of non-legislative, legislative and exempt legislative instruments are provided in Schedules 1, 2 and 3 of the Proposed Regulations.

This RIS focuses on exempt legislative instruments in Schedule 3 or the main body of the Proposed Regulations rather than instruments in Schedules 1 and 2 of the Proposed Regulations. Instruments in Schedules 1 and 2 merely provide clarity as to whether the instrument is legislative or administrative in nature, where there may be some uncertainty as to their status. Schedule 3 instruments (including the seven legislative instruments in the main body of the Proposed Regulations) are legislative in nature and while they may affect the public, they either do not or should not have the same level of public analysis and scrutiny, compared to the instruments listed in Schedule 2. Therefore, the RIS and public consultation being undertaken also ensures that the process of exempting those legislative instruments via regulation is transparent.

The following seven legislative instruments, included in the main body of the Proposed Regulations, will be automatically exempt from the operation of Parts 2A, 3A and 5A of the SLA:

* an Order made under section 74E(1) of the *Emergency Management Act 2013*;
* an Order made under section 74F of the *Emergency Management Act 2013;*
* an Order made under section 74H(1) of the *Emergency Management Act 2013;*
* a declaration under section 23(1) of the *Emergency Management Act 1986*;
* a revocation or variation of a declaration under section 23(2) of the *Emergency Management Act 1986;*
* a direction under section 24(2)(a) of the *Emergency Management Act 1986*;
* a declaration under section 24(2)(b) of the *Emergency Management Act 1986*;
* a declaration under section 24(4) of the *Emergency Management Act 1986*.

The above instruments are likely to meet at least one of the criteria for exemption listed under section 12F of the SLA in all cases of future use.

## Subordinate legislation

Subordinate legislation can be made when Parliament, through legislation, delegates a law-making power to another person (usually a Minister) or body (such as a government department or agency). It consists of instruments made under Acts or statutory rules that affect people’s rights or interests. Subordinate legislation is of general application, and does not generally include decisions made which relate only to a specific person or entity.

Subordinate legislation can impose restrictions, costs or requirements on people in the same way as primary legislation. Primary legislation undergoes scrutiny through the parliamentary process, including debate and passage through Parliament. This scrutiny can be bypassed where the power to make a subordinate instrument is delegated to a Minister or other person or body.

The SLA seeks to ensure that the power to make subordinate legislation is subject to an appropriate level of public and parliamentary scrutiny, particularly where that legislation could have a significant impact on business or community sectors. As stated in section 1 of the Act, the purpose of the SLA is therefore:

1. to ensure that the power to make subordinate legislation is exercised subject to Parliament's authority and control;
2. to regulate the preparation, making, publication and scrutiny of subordinate legislation;
3. to provide for public participation in the preparation and scrutiny of subordinate legislation; and
4. to amend the *Interpretation of Legislation Act 1984* in relation to incorporated documents, the incorporation of amendments and the admissibility of Acts and subordinate instruments.

The most prominent forms of subordinate legislation are statutory rules (most commonly regulations) and orders in council. Some other types of subordinate legislation include:

* **ministerial directions**, such as those made under section 5.10.4(2) of the *Education and Training Reform Act 2006*, which impose binding requirements on TAFEs and other educational institutions;
* **mandatory codes of practice**, such as a Code of Practice for food safety in the dairy industry made under section 31 of the *Dairy Act 2000*;
* **standards of professional practice**, such as the approval of qualifications appropriate for entry into teaching under section 2.6.8 of the *Education and Training Reform Act 2006*; and
* **declarations**, such as a declaration by the Governor in Council that an event is a “special event” for the purposes of Part 4A of the *Crown Land (Reserves) Act 1978*.

There are many other forms of subordinate legislation.

When deciding whether to make the Proposed Regulations DPC considered whether there was any other appropriate alternative to achieve the desired objectives and address the problem as described below. DPC found that a non-regulatory options is not applicable. The Proposed Regulations are the most appropriate way to address the problem.

The amendments made to the SLA in 2011 were intended to ensure that all subordinate legislation would face rigorous analysis, public consultation and parliamentary scrutiny where it could impose a significant burden on a sector of the public.

## Legislative instruments

For the purposes of the SLA, the term ‘legislative instruments’ is intended to cover the broad range of subordinate legislation that will be subject to the preparation requirements outlined in the SLA, other than statutory rules.

An instrument is legislative (section 3(1) SLA) if it is made under an Act or statutory rule and has a legislative character but does not include:

1. a statutory rule; or
2. a local law made under Division 3 of Part 3 of the *Local Government Act 2020* and any other instrument made by a council under that Act or any other Act; or
3. a proclamation of commencement of an Act or any provision of an Act; or
4. a planning scheme or an amendment to a planning scheme under the *Planning and Environment Act 1987*; or
5. the Victoria Planning Provisions within the meaning of the *Planning and Environment Act 1987*; or
6. a practice note or practice direction issued by or on behalf of a court or tribunal or an instrument which related only to a court or tribunal or the procedure, practice or costs of a court or tribunal; or
7. an instrument of purely administrative character; or
8. a prescribed instrument or a prescribed class of instrument.

An instrument will generally be considered to have ‘legislative character’ if it contains mandatory requirements with general application to undertake certain action(s), often accompanied by penalties or sanctions for non-compliance. See Part 1, Division 2 of the SLA Guidelines for further explanation and criteria that may apply. See Table 1 below for further assistance on establishing whether an instrument is a ‘legislative instrument’ for the purposes of the SLA.

The definition of ‘legislative instrument’ expressly excludes certain types of instruments, including instruments of a purely administrative character. See section 3(2) of the SLA for a non-exhaustive list of instruments that are of a purely administrative character.

The SLA Guidelines identify non-exhaustive factors to consider when assessing an instrument and encourages a holistic and global approach as to whether it is of a legislative character. Generally, the assessment involves considering if the instrument settles or determines rights, entitlements, and obligations. The non-exhaustive factors include whether the instrument is of general or limited application, if compliance with the instrument is mandatory, and if the instrument is disallowable by Parliament.

**Table 1 – Factors relevant to legislative instrument consideration**



*SLA requirements*

Legislative instruments, like statutory rules, must undergo a detailed process of analysis before they are made. Doing so improves government accountability and transparency and leads to better quality regulation.

Key elements are the preparation of a RIS and public consultation on the RIS, which provides greater opportunities for public input on legislative instruments that significantly affect Victorians. Legislative instruments must also be tabled in Parliament and will subsequently be reviewed by the SARC.

The flowchart below identifies the usual steps involved in the making of legislative instruments. 

Departments and agencies must also comply with the legislative instrument making process set out in the instrument’s authorising Act.

Prior to the amendments to the SLA in 2011, legislative instruments were not always readily accessible once made, even by those directly affected by them. The SLA now requires that they be published in the Victoria Government Gazette once they are made. This applies to all legislative instruments, including any instruments automatically exempted from the SLA requirements by regulations made under section 4A or any instruments exempted on a case-by-case basis under section 12F (Ministerial exemption) or 12G (Premier’s exemption). This requirement ensures that legislative instruments will be on public record and, as a result, will be more accessible. As discussed above, the main body of the Proposed Regulations include seven provisions to make legislative instruments that do not require publication of those instruments in the Government Gazette. This is because the Act under which the legislative instrument is made provides a contrary intention for this publication requirement. For example, an Order made under section 74E(1) or 74H(1) of the *Emergency Management Act 2013* which designates critical infrastructure and responsible entity, is information included on the Victorian Critical Infrastructure Register. Section 74K limits access to the information on the Victorian Critical Infrastructure Register by certain persons or bodies. Given this legislative intention, these instruments do not need to comply with the SLA gazettal requirement and the whole of Part 2A of the SLA.

*Provision for regulations to be made*

The SLA recognises that some legislative instruments could impose significant costs or a significant burden on people or organisations. However, other legislative instruments do not impose a significant burden; for example, some instruments are fundamentally declaratory or machinery in nature.

Because not all legislative instruments require a level of analysis and scrutiny on par with statutory rules, section 4A of the SLA allows for the Proposed Regulations to be made that prescribe an instrument to be: legislative (subject to all of the requirements of the SLA); not legislative (usually, where the instrument is of purely administrative character) and therefore not subject to the SLA; or legislative but exempt from certain requirements of the SLA.

Therefore, to further ensure that limited government resources are appropriately targeted at those legislative instruments that will impose a significant burden on a sector of the public, a number of automatic exemptions to the process are being proposed. All exempt legislative instruments would still be subject to the requirement to publish new instruments in the Victoria Government Gazette, to ensure they are accessible (unless the authorising Act provides otherwise).

One of the intentions of allowing for the Proposed Regulations to exempt legislative instruments from provisions in the SLA is to avoid the need for agencies to apply for an exemption (under section 12F or, in special circumstances, section 12G) each time an instrument is made that is expected to always meet one or more exemption criteria.

Secondly, the Proposed Regulations seek to automatically exempt legislative instruments where, on balance, it is in the public interest that an exemption is made. In some cases where a legislative instrument has been proposed for exemption, the instrument might not meet one section 12F criterion alone, but meets significant elements of two or more criteria and, when considered together, it is judged that there is a net benefit from exempting the instruments on overall public interest grounds having regard to the policy intent and balance reflected in the SLA and the amendments to it in 2011. In other cases, it is in the public interest to automatically exempt instruments for reasons other than those listed in section 12F of the SLA (discussed below at page 33).

While the requirements of the SLA promote accountability and transparency in the process of developing subordinate legislation, sometimes this comes at a greater cost in terms of flexibility, efficiency and/or timeliness.

Flexibility allows instrument-makers to make legislative instruments that best suit the purposes of both their authorising Act and the instrument itself. As a matter of good policy practice, a range of options should be analysed in the development of an instrument to ensure the best outcomes are found. However, instruments are proposed for exemption that should not require the formal RIS and associated consultation process, as further benefits would not be realised beyond the standard policy development process.

Efficiency considerations have also been made in determining those legislative instruments for exemption. It is important that resources used for the SLA processes are not allocated unnecessarily, and to the detriment of other, more significant, policy issues that could otherwise be addressed. In some cases, there is a need to make legislative instruments urgently, or within a timeframe that would not allow for preparation of a RIS and consultation on the RIS. The RIS process can add upwards of six months to the policy-making process. Examples of such instruments include where an immediate short term public health response is required to address an unfolding disease outbreak, or where a road closure needs to be made that could not be foreseen far enough in advance to undertake a RIS and consultation. In these cases, the need for urgent responses to public health and safety concerns outweigh the benefits that would be gained in undertaking a lengthy formal analysis and consultation. If a more permanent measure is required once the short term response is addressed it would be expected that the permanent instrument would be subject to the SLA requirements.

In summary, therefore, DPC finds there is a net benefit found in exempting the instrument from more rigorous analysis and consultation.[[3]](#footnote-4) This also ensures that government resources can be directed to analysis, consultation and scrutiny for those instruments which have a more significant impact on a sector of the public.

Finally, instrument-makers will be able to easily identify if a proposed instrument is administrative, and thus not subject to any of the requirements of the SLA.[[4]](#footnote-5) As stated during Parliamentary debate on the SLA amendments, the lists of instruments would “provide an easily accessible source for instrument-makers to refer to when considering whether or not their instrument must undergo the scrutiny processes under the Act”.[[5]](#footnote-6)

The scrutiny of proposed legislative instruments should be effectively targeted to ensure that:

* those proposals that will have a significant impact on any sector of the public are adequately scrutinised and well-justified;
* government agencies and departments are able to allocate their resources efficiently, and are not burdened unnecessarily;
* there is no significant cost impact on government programs and services; and
* any delay in making or amending legislative instruments is minimised.

*Definition of ‘significant burden’*

A significant burden may be imposed if the proposed legislative instrument is likely to, amongst other things, produce effects that:

* affect a significant number of businesses, community groups or individuals;
* have a significant concentrated effect on a particular group, region or industry;
* have a large aggregate impact on the Victorian economy;
* alter the ability or incentives for businesses to compete in an industry;
* impose resource costs (including time and funds) on business, community groups or individuals in order to undertake compliance activities, change current practices or seek external advice; and/or
* have a significant impact on individual rights and liberties.

# Problem Analysis

This chapter outlines the nature and extent of the problem.

A large number of provisions to make subordinate instruments (1,204) have been identified from the statute book in the Proposed Regulations. Of these, 555 provisions are purely administrative, and therefore are not a class of legislative instrument under the SLA (as per the definition of legislative instrument under section 3(1) of the SLA). Those instruments are listed in Schedule 1 of the Proposed Regulations. A further 586 provisions (listed in Schedule 3 of the Proposed Regulations) and 7 in the main body of the regulations were determined as likely to meet at least one of the criteria for exemption listed under section 12F of the SLA in all cases of future use or as meeting an additional criterion where, on balance, the instrument should be considered to be automatically exempt in the overall public interest.

The remaining provisions (56) can be made in a way that imposes a significant economic or social burden on a sector of the population and fails to meet any of the other exemption criteria in the SLA (instruments listed in Schedule 2).[[6]](#footnote-7) These legislative instruments should receive the same level of scrutiny as statutory rules under the SLA. The base case, of allowing the Current Regulations to sunset, would create uncertainty as to the status of certain legislative and non-legislative instruments and require them to undergo an assessment of whether a RIS should be prepared each time they are proposed to be made, which would place an overly disproportionate burden on departments and agencies, which have limited resources. The Proposed Regulations address this problem.

## Impact on responsible agencies and Ministers under the base case

Without the Proposed Regulations (that is, in the base case), each time a legislative instrument is made or proposed to be made, instrument-makers (usually departments or agencies) will have to determine on a case-by-case basis if the instrument is administrative; if the instrument should be exempt from certain requirements of the SLA because it meets one or more of the exemption criteria set out in section 12F of the SLA; or if the requirements apply because it is likely to impose a significant economic or social burden.

In summary, each individual instrument made under the provisions identified in regulations 9, 10 and Schedule 3 of the Proposed Regulations would have to be categorised on a case-by-case basis, as the need for an instrument arose. This places a burden on instrument-makers to accurately categorise the instrument being made. If an exemption should apply, then the SLA requires agencies to seek an exemption certificate from the responsible Minister.

Seeking an exemption (on a case by case basis) would entail:

preparing advice (typically including obtaining and outlining legal advice) and drafting an exemption certificate (by the responsible department or agency); and consideration and signing of the exemption certificate (by the responsible Minister).

While not necessarily resource intensive on an individual basis, overall instrument-makers will face unnecessary costs each year to seek exemptions for a number of legislative instruments.

The average cost of an exemption to the instrument-maker has been estimated to be about $600 (see discussion on the Base Case for more detail in Chapter 3)[[7]](#footnote-8), which covers the costs to review the legislative instrument against the exemption criteria and brief the Minister to make a decision. The costs to agencies in undertaking this activity would likely be absorbed within current departmental or agency budgets, such as general legal branch or legal advice budgets. There would not be an overt, additional cost to taxpayers in administering such a system of exemptions. However, an opportunity cost is created, as inefficient use of limited resources may mean departments and agencies have less capacity to address other issues.

This process can be inefficient if the exemption is sought on a regular basis for the same type of legislative instrument and exemption criteria, for example, for instruments made annually, or several times each year. The assessment for more regularly made instruments may become more straightforward for the agencies with a reduction in the average cost across multiple instruments, but is still expected to be higher overall. Alternatively, where an instrument is made infrequently, agencies may incur more significant one-off costs when assessing the instrument (such as obtaining legal advice and assessing such advice).

To give one example, section 2.3.2 of the *Education and Training Reform Act 2006* allows the Minister to make an order to constitute a school council to exercise and discharge powers, duties and functions in relation to a Government school or group of Government schools. These Orders are made on a regular basis and will likely never impose a significant burden, and to require that an exemption be considered each time an Order is made would be an inefficient use of government resources and Ministers’ time.

Having to seek a Ministerial exemption may also detrimentally impact situations where it is important that a timely regulatory response occur. A section 12F exemption may apply where the legislative instrument “is not of more than 12 months duration and forms a response to a public emergency, an urgent public health issue or likely or actual significant damage to the environment, resource sustainability or the economy” (section 12F(1)(h) of the SLA). For example, a declaration relating to infectious disease or a micro-organism, made under section 126 of the *Public Health and Wellbeing Act 2008*, which may be needed to respond urgently to an infectious disease outbreak. While a Ministerial exemption in such cases is likely to be straight forward, including the instrument in the Proposed Regulations removes the potential for some delay and an additional burden to the process of making a legislative instrument which in such circumstances may hinder a timely and effective response.

Where a Ministerial exemption would not apply under section 12F of SLA, but the instrument is proposed for inclusion in the Proposed Regulations due to overall public interest, the RIS and associated consultation process would likely need to be undertaken without the Proposed Regulations. The cost of doing this varies considerably depending on the size and scope of the proposal.

## Prescribed legislative instruments

Section 4A of the SLA allows the Governor in Council, on recommendation by the responsible Minister) to make regulations:

* “prescribing an instrument or class of instrument for the purposes of paragraph (h) of the definition of ***legislative instrument***;
* prescribing an instrument or a class of instrument to be, or not to be, a legislative instrument or a class of legislative instrument for the purposes of this Act or any specified provisions of this Act, whether or not subject to conditions;
* exempting an instrument or class of instrument that is a legislative instrument from the operation of this Act or any specified provision or specified provisions of this Act, whether or not subject to conditions”.

The Proposed Regulations attached to this RIS:

* prescribe a number of instruments to be legislative instruments for the purposes of the SLA;
* prescribe, and list, a number of instruments as not being legislative instruments for the purposes of the SLA (mostly instruments of purely administrative character); and
* automatically exempt a number of legislative instruments from certain SLA requirements, except for the requirement to publish any new legislative instruments in the Victoria Government Gazette, other than the instruments in proposed regulations 9 and 10.

As discussed in more detail below, prescribing instruments to be, or not to be, legislative instruments for the purposes of the SLA would not impose a significant economic or social burden on a sector of the public. It would simply confirm which instruments are not legislative (mostly because they are of purely administrative character) and are therefore not subject to the SLA requirements, and which legislative instruments will be subject to the requirements set out under the SLA. Those subject to the SLA requirements are those likely to impose a significant economic or social burden on a sector of the public, and therefore need to be closely examined each time they are made to ensure the proposed legislative instrument is justified.

Prescribing instruments in the Proposed Regulations as exempt from certain requirements of the SLA will reduce the burden on agencies. It will remove the need to prepare advice and seek an exemption certificate each time a legislative instrument is made that meets the exemption criteria in the SLA or to undertake a RIS and public consultation process where the benefits of doing so are expected to be outweighed by the costs.

DPC, in consultation with instrument-makers (generally other departments and agencies), seeks to ensure that, on balance, there is a benefit in excluding the instruments identified for exemption. However, a legislative instrument that is automatically exempted could impose, inadvertently or unintentionally, a significant economic or social burden on a sector of the public without the level of scrutiny required of other statutory rules and legislative instruments. It is these instruments that this RIS is largely focused on.

## Desired Objectives

The objectives[[8]](#footnote-9) of the Proposed Regulations are to:

* assist departments and agencies to allocate their resources efficiently and ensure they are not subject to excessive burden;
* minimise unnecessary delays in making or amending legislative instruments; and
* ensure legislative instruments are identifiable, publicly available and an appropriate level of scrutiny (parliamentary and SARC) is applied when making legislative instruments.

### Efficient allocation of resources

Instruments automatically exempted from certain requirements of the SLA by the Proposed Regulations are those that would likely be eligible for a case-by-case exemption under section 12F of the SLA or on overriding public interest grounds. Exempting those instruments from certain requirements of the SLA in the Proposed Regulations provides clarity and certainty to those responsible for making legislative instruments as to which instruments the requirements of the SLA apply to. This means there will be some opportunity cost savings, as the costs otherwise faced in assessing the character of the instrument, preparing exemptions certificates, or undergoing a RIS and associated consultation.

This also removes unnecessary duplication where the instrument has already been scrutinised and assessed through another similar process (that is, the instrument has been assessed through a RIS equivalent process). Such an approach also means there is a more proportionate burden on agencies and decision makers, so they can focus their resources on the analysis and assessment of those instruments that have a significant economic or social impact on a sector of the public.

### Minimising unnecessary delays when making instruments

The SLA recognises that there will be circumstances where it is impractical for departments and agencies to comply with all the requirements for making a legislative instrument under the SLA. This may be the case where instruments are necessary to respond to a public emergency, or urgent public health, public safety or environmental issues, as often the instruments will need to be made quickly to respond to unfolding situations. Unnecessary delays with considering the nature of the instrument, undertaking formal consultation and preparing the exemption certificates could therefore jeopardise or undermine the very purpose for making the instrument.

### Appropriate level of scrutiny of instruments

Legislative instruments, which are a form of subordinate legislation, do not receive the same level of scrutiny that accompanies primary legislation through the parliamentary process. The SLA seeks to ensure that the power to make legislative instruments is subject to an appropriate level of public and parliamentary scrutiny, particularly where that instrument could have a significant economic or social impact on a sector of the public. Legislative instruments subject to a RIS process are subject to a public consultation process and are laid before Parliament and a copy provided to SARC. By providing a mechanism to remove or reduce the consultation and scrutiny requirements for lower impact instruments, the public, Parliament and SARC are able to better focus on those instruments that are most likely to have a significant impact and are therefore more likely to be of interest to the public.

# Options

Section 10 of the SLArequires that a RIS consider other practicable means of achieving the desired objective besides the Proposed Regulations, including regulatory and non-regulatory options, together with an assessment of costs and benefits of those options and the reasons why means other than regulation are not appropriate.

This chapter outlines the set of options considered in this RIS, explains how feasible options were selected, and why other options were considered infeasible.

## Part 1 Base Case

According to the Victorian Guide to Regulation, the base case needs to be identified for comparison purposes (for example, what are the potential costs and benefits compared to the situation where the proposed approach is not adopted). For sunsetting regulations, the base case is the scenario of there being no regulation.[[9]](#footnote-10) Therefore, the base case is no regulation.

### Costs of allowing the Current Regulations to expire

There are a number of associated costs with the Base Case which allows the Current Regulations to expire. Although not all of the legislative instruments listed in Schedule 3 of the Proposed Regulations are made on a regular basis, seeking an exemption certificate each time a legislative instrument is made (which would otherwise be exempt in the Proposed Regulations) could result in a cost to departments (in addition to some delays with making the instrument while an exemption is being sought).

Departments and agencies would have to divert resources from other, more significant, issues which could otherwise be addressed. It would also place additional demand on Ministers’ time. Legal advice would likely be sought, an exemption certificate would be prepared for the Minister, and the Minister would be briefed in each instance. The Minister would then consider the advice received and, if satisfied, issue the exemption certificate. It would also impact scrutiny processes, particularly the review of legislative instruments by SARC.

Most of the instruments listed in Schedule 3 of the Proposed Regulations would be exempt from the RIS requirement under section 12F of the SLA (see Attachment C). Based on the assumption that each exemption certificate would take about 6 hours to prepare on average (including preparing associated briefing material and gaining approvals within the department) at a conservative estimated cost of $100 on average, per hour to the department (including salaries and on-costs), each exemption would pose a cost of about $600 to make[[10]](#footnote-11). For those instruments that are made on a regular basis, this cost may reduce over time once a process has been established. However, it is expected that any reduction would be minimal, as a significant portion of the costs are likely to be fixed.

Legislative instruments made under 89 provisions are proposed to be automatically exempt through inclusion in Schedule 3 of the Proposed Regulations on public interest grounds. The Base Case will mean that departments and agencies will most likely need to undertake a RIS process for those exempt legislative instruments. There would be greater costs on departments for those legislative instruments that are not eligible to be exempt under section 12F or 12G as those legislative instruments are likely to require the preparation of a RIS and undergo the associated consultation. Better Regulation Victoria (BRV) has advised DPC that the average RIS cost is about $200,000.[[11]](#footnote-12) Given the average cost for a RIS is $200,000, of which in the range of 25 per cent to 75 per cent is marginal additional work (i.e. $50,000 to $150,000), and an expected 5-10 additional RISs prepared per year, DPC estimates a potential cost of $0.3 million to $1.7 million per year.

There would also be a greater impact on SARC, as it would be required to assess every legislative instrument to ensure the requirements of the SLA have been met. With approximately 300-500[[12]](#footnote-13) additional legislative instruments likely to be tabled with SARC each year if the base case applies, SARC’s ability to effectively perform its scrutiny function may be compromised by the increased number of instruments that it would receive to review.

In its 2019 Annual Review (tabled in Parliament on 27 October 2020) SARC reported that it had examined 24 legislative instruments (that had been published in the Government Gazette) during the 2019 calendar year. Of those instruments, zero were accompanied by a RIS. SARC also reported that all 2019 legislative instruments were exempt from the requirement to provide a RIS. This was the first time since 2011, the first year of operation of the scrutiny of legislative instruments, that there had been zero legislative instruments accompanied by a RIS. The figure below shows how many legislative instruments SARC has reviewed over the last 5 years (an average of 39 legislative instruments per year, with an average 3 RISs). Therefore, an estimated increase of 300-500 legislative instruments per year for review would represent about an eight-fold to thirteen-fold increase in their workload related to legislative instruments[[13]](#footnote-14).

**Figure - Legislative Instruments scrutinised by SARC 2015 – 2019**

(Source – SARC Annual Review 2019, Regulations and Legislative Instruments, page 17)

There is also a burden on all instrument-makers to ensure that any legislative instruments for which they are responsible comply with the requirements in the SLA. This will involve ongoing monitoring to determine which instruments are legislative instruments and therefore subject to the SLA. Where an instrument-maker is unable to determine if a particular instrument is subject to the SLA requirements, legal advice may be required. In these circumstances, it may also be necessary to brief within the relevant department or agency and/or brief a Minister. The cost impact of this cannot be readily estimated due to the lack of data, as it would become one of the departments’ ‘business as usual’ activities and the demand on resources for that particular activity is not able to be accurately estimated.

An undesired outcome of the base case (no regulation) is the greater uncertainty for instrument makers about whether particular instruments are subject to the SLA especially those instruments that have factors that appear to be both administrative and legislative in nature. Instrument-makers may incur costs in complying with the SLA (e.g. costs to prepare a RIS and undertake consultation) where a RIS would not otherwise be required, or may fail to comply with the SLA requirements which may result in the public challenging the validity of those instruments. The two options work to clarify any confusion about the characterisation of instruments, ensuring that legislative instruments included in the Proposed Regulations comply with the applicable and relevant SLA requirements. Inclusion of those instruments will avoid legal ambiguity about the characterisation of those instruments.

### Benefits of allowing the Current Regulations to expire

Without the Proposed Regulations (the Base Case), each legislative instrument that is made would either face an exemption certificate process, if it is eligible to be exempt under section 12F of the SLA, or a RIS and associated consultation process. The benefits of this is that all legislative instruments, including those exempt under section 12F, would be required to undergo a human rights assessment, and be published in the Victoria Government Gazette, tabled in Parliament and reviewed by the SARC. These additional steps provide additional scrutiny that would not be provided for legislative instruments that will be prescribed as exempt legislative instruments under Schedule 3 of the Proposed Regulations.

Not making the Proposed Regulations provides benefits in that all legislative instruments will undergo checks to ensure that they are not in contravention of the *Charter of Human Rights and Responsibilities Act 2006* (Charter), and they will be reviewed by SARC, even if exempted from the RIS and associated consultation process. SARC has responsibility for scrutinising bills and statutory rules introduced into Parliament. SARC can make recommendations to Parliament in relation to legislative instruments on a very broad range of grounds. Under section 25A of the SLA, SARC can report a legislative instrument to Parliament if it:

* does not appear to be within the powers conferred to the instrument-maker under the authorising Act;
* is made without clear and express authority, has a retrospective effect; imposes any tax, fee, fine, imprisonment or other penalty; purports to shift the legal burden of proof to a person accused of an offence; or, provides for the sub-delegation of powers delegated by the authorising Act or statutory rule;
* is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities; or
* has been prepared in contravention of any of the provisions of the SLA or guidelines with respect to legislative instruments.

SARC can make any recommendations it sees as appropriate, including a recommendation that the legislative instrument be disallowed in whole or in part. However, only Parliament can actually disallow a legislative instrument, and it may choose not to do so, despite any SARC recommendation. SARC can also recommend a legislative instrument is suspended until a decision is reached by Parliament to disallow or amend the legislative instrument (either in whole or in part), or to leave it in place.

This option carries the lowest risk of unintended or unanticipated outcomes of Government policy, that is, of a legislative instrument being made that imposes a significant burden without being appropriately scrutinised. This is due to the exemption criteria being assessed against each legislative instrument on a case-by-case basis, where an exemption may apply, and any additional RISs that would otherwise not be prepared.

## Part 2 Options

## Option One – make the Proposed Regulations – which are effectively a remake of the Current Regulations with minor modifications – Preferred Option

Option One (the Proposed Regulations) is to retain the situation under the Current Regulations with minor modifications as set out in Attachment B. That is based on the exemption criteria outlined in section 12F of the SLA and an additional public interest criterion.

**Exempt legislative instruments**

The instruments that are proposed to be exempt from certain requirements of the SLA are those which would always or almost always meet at least one of the criteria set out in section 12F of the SLA. In summary, the making of any of these exempt instruments:

* is not likely to impose a significant economic or social burden on any sector of the public; or
* will still have adequate scrutiny through other processes; or
* should be made without the usual provisions of the SLA applying due to public interest; or
* would almost certainly be granted a case-by-case exemption by the responsible Minister under grounds in section 12F of the SLA.

As discussed in the Base Case above, there is a cost to departments in undertaking the section 12F exemption process.

Legislative instruments that are exempt through the Proposed Regulations will not be required to be tabled in Parliament or examined by SARC. The legislative instrument will be made (by the responsible instrument maker under the authorising Act) and published in the Victoria Government Gazette, and will then be in force (other than the instruments in proposed regulations 9 and 10).

Two key sets of provisions to make legislative instruments proposed for exemption, which have been assessed in more detail owing to their nature, are discussed below. The first contains those provisions that are more likely to impose a significant burden, but are proposed for exemption because they are part of a national uniform legislation scheme or an equivalent RIS process is required under the instrument’s authorising Act or statutory rule. The second set contains those provisions that are being proposed for exemption owing to a range of circumstances that come under the banner of “public interest”. All other provisions proposed for inclusion in Schedule 3 of the Proposed Regulations are included in Attachment C to this RIS, including a brief description for why each is proposed to be an exempt legislative instrument.

Table 2 below demonstrates how many provisions in the Proposed Regulations fit under each of the criteria. Given that many provisions fall under multiple criteria, the number of provisions listed in the table exceeds the total number of actual instruments.

**Table 2 - Basis for exempting provisions to make legislative instruments**

|  |  |
| --- | --- |
| **Basis of exemption** | **Number of provisions** |
| No significant burden (s12F(1)(a)) | 206 |
| Fundamentally declaratory/machinery (s12F(1)(b)) | 147 |
| Only increase fees by annual rate approved by the Treasurer (s12F(1)(c)) | 2 |
| Only imposes burden on a public sector body (s12F(1)(d)) | 23 |
| Instrument is made under the *Administrative Arrangements Act 1983* (s12F(1)(e)) | N/A |
| National uniform legislation scheme (s12F(1)(f)) | 3 |
| RIS equivalency (s12F(1)(g)) | 84 |
| Urgent public emergency, public safety or environmental issue – instrument not more than 12 months duration (s12F(1)(h)) | 79 |
| Administration or procedures within or as between departments (s12F(1)(i)) | N/A |
| Render the proposed legislative instrument ineffective or would unfairly advantage or disadvantage any person likely to be affected (s12F(1)(j)) | 21 |
| Made under statutory rule whose RIS has adequately considered impacts of the legislative instrument (s12F(1)(k)) | N/A |
| Overriding public interest  | 89 |

A small number of provisions to make legislative instruments are being prescribed to be automatically exempt if the legislative instrument has a duration of not more than 12 months.**[[14]](#footnote-15).** Table 3 below lists those exempt provisions.

**Table 3 Exempt provisions to make legislative instruments with a duration not more than 12 months (Schedule 3)**

|  |  |
| --- | --- |
| **Provision** | **Exempt legislative instrument** |
| *Catchment and Land Protection Act 1994* | An Order under section 58(1) of not more than 12 months duration.An order under section 69A(4) that amends an Order under section 58(1) that has a duration of not more than 12 months. |
| *Education and Training Reform Act 2006* | An Order under section 2.1.5 that is of not more than 12 months duration; and does not exempt a specific child. |
| *Electricity Industry Act 2000* | A proclamation under section 95(1) of not more than 12 months duration.A direction given under section 96(1) of not more than 12 months duration.A direction given under section 96(6) amending a direction given under section 96(1) of not more than 12 months duration. |
| *Electricity Safety Act 1998* | A notice under section 63(1) of not more than 12 months duration.A direction given under section 141A(1) of not more than 12 months duration. |
| *Fisheries Act 1995* | A direction given under section 61(1) of not more than 12 months’ duration.An amendment or revocation under section 61(3) of a direction of not more than 12 months’ duration.  |
| *Food Act 1984* | A direction given under section 39A(4) in respect of a class or classes of food premises and of not more than 12 months’ duration.  |
| *Gambling Regulation Act 2003* | An instrument under section 4.5AA.2 of not more than 12 months’ duration. |
| *Gas Safety Act 1997* | A prohibition under section 76(1) of not more than 12 months’ duration. |
| *Liquor Control Reform Act 1998* | An Order under section 147(1) of not more than 12 months’ duration. |
| *Pipelines Act 2005* | A declaration of not more than 12 months’ duration under section 11(1). |
| *Road Safety Act 1986* | A declaration under section 96A(1) of not more than 12 months’ duration. |
| *Safety on Public Land Act 2004* | A declaration of not more than 12 months’ duration made under Part 2. |

Each of the provisions in the Proposed Regulations have been carefully examined and has been proposed for automatic exemption as they either meet one or more criteria and would most likely be granted an exemption by the responsible Minister on a case-by-case basis anyway; or because the expected benefits of additional scrutiny are outweighed by the additional costs involved. Due to the nature of these instruments, it is also not necessary that these instruments go through as high a level of scrutiny as more significant subordinate legislation, with the exception of those under the public interest criterion or those being exempted due to equivalent assessments being made elsewhere. This latter category of instrument is discussed in more detail below and as part of Option 2.

### Exemptions for RIS-equivalence or national uniform legislation

As noted above, some of the criteria relate to proposals where a significant cost or burden may be imposed, but a RIS or equivalent document has been prepared and assessed elsewhere, and consultation has been undertaken, or the instrument is required under a national uniform legislation scheme and an assessment of the costs and benefits was undertaken. This is the case for the exemption criteria where a proposed instrument is:

* required under a national uniform legislation scheme; or
* required to undergo or has undergone a process deemed equivalent to a RIS.

A total of 87 provisions for legislative instruments have been assessed as meeting one of these criteria in the Proposed Regulations. Each category is discussed briefly below, including examples of instruments meeting the criterion.

### RIS-equivalent processes

This analysis considers that in order to be RIS-equivalent, the following criteria must be met:

* The preparation of a policy assessment that includes the nature and extent of the problem being addressed and an assessment of the options considered, including an assessment of the costs and benefits, to justify the introduction of the legislative instrument; and
* An independent assessment that advises the adequacy of the policy assessment; and
* A structured consultation process that includes public release of an exposure draft of the legislative instrument, with no less than 28 days of formal consultation.

A number of instruments currently undergo a process very similar to the RIS process. Some of these are legislative requirements that are set out in the authorising Acts for these instruments. DPC considers it inefficient to require instrument-makers to go through duplicate processes when making legislative instruments. It is also not considered appropriate to amend each of the authorising Acts to avoid such duplication, particularly given that the processes in authorising Acts may be tailored to the particular instruments and regimes to which they relate.

Further, in other cases where RIS equivalency applies, a RIS may not actually be suitable for the legislative instrument concerned. An equivalent, but more suitable process may be more appropriate, provided it meets the three criteria for RIS equivalency above. The equivalent processes in the relevant Acts for the instruments that this applies to are thought to be more suitable than the RIS process.

There are 84 provisions for making legislative instruments where a RIS-equivalent process is also required. These are summarised in the table below.

**Table 4 - Rationale for proposed RIS-equivalent exemptions**

|  |  |
| --- | --- |
| Instrument | Rationale for exemption |
| Instrument to determine charges for accident towing services (*Accident Towing Service Act 2007* s 211) | Instruments are required to undergo, or have undergone, an analytical and consultation process which is equivalent to the process for a RIS. The Essential Services Commission (ESC), which undertakes the process, will have its analysis independently assessed as part of the process for future instruments that are made. |
| Instruments made by the Essential Services Commission under various Acts (*Essential Services Commission Act* 2001 s 34(1);Grain *Handling and Storage Act 1995* ss 15, 18, 19 and 20) | The ESC conducts thorough analysis for these instruments that are released for public consultation. Participation in the public consultation is high by those affected by the instruments. The ESC will ordinarily seek independent advice as to the adequacy of its analysis for any instruments that are made. The exemption from certain SLA requirements will only apply to instruments made by the ESC; where an instrument is made by any other department or agency under the same provisions, those instruments will not be exempt from the SLA. |
| State Environment Protection Policy declaration (*Environment Protection Act 1970* s 16(1), (1B), (1C)) | The Act sets up specific requirements for analysis and consultation equivalent to or more stringent than for a RIS; for example, the consultation period is required to be for a minimum three months. The Environmental Protection Authority (EPA) also requires independent review of its draft Policy Impact Assessments before they are released for public comment along with the draft statutory policy. |
| Waste Management Policy declaration (*Environment Protection Act 1970* s 16A) | The Act sets up specific requirements for analysis and consultation equivalent to or more stringent than for a RIS; for example, the consultation period is required to be for a minimum three months. The EPA also requires independent review of its draft Policy Impact Assessments before they are released for public comment along with the draft statutory policy. |
| Price determinations (Essential Services Commission Act 2001 s33(5)) | The ESC conducts thorough analysis for these instruments that are released for public consultation. Participation in the public consultation is high by those affected by the instruments. The authorising Acts do not require independent analysis, however the ESC provides independent advice as to the adequacy of its analysis for any instruments that are made.  |
| Codes of Practice made by the ESC (*Essential Services Commission Act 2001* s 47(1)) | Instruments are required to undergo, or have undergone, an analytical and consultation process which is equivalent to the process for a RIS. The ESC, which undertakes the process, will have its analysis independently assessed as part of the process for future instruments that are made. |
| Standards and conditions of service and supply (*Port Management Act 1995* s 55(1)(a)) | Instruments are required to undergo, or have undergone, an analytical and consultation process which is equivalent to the process for a RIS. The ESC, which undertakes the process, will have its analysis independently assessed as part of the process for future instruments that are made. |
| Rural water customer codes, standards and conditions of service (*Water Industry Act 1994*, ss 4E and 4F) | These instruments are required to undergo, or have undergone, an analytical and consultation process which is equivalent to the process for a RIS. The ESC undertakes an extensive public consultation process before making such Codes and as part of that process carries out a full assessment of the economic and social impacts of the proposed Codes. In line with the requirements of the SLA, the ESC will have independent advice as to the adequacy of the analysis for future instruments that are made. |

There is a small risk that the RIS-equivalent process in those Acts may change in future. This is not considered likely; however, in the event that the process does change for a particular instrument, the provision for making that instrument could have its exemption removed in a future amendment to the Proposed Regulations.

### National uniform legislation schemes

For proposals under a national uniform legislation scheme, an assessment of costs and benefits must have been recently undertaken (i.e. in the past three to five years). The exemption ground reflects the unusual nature of national uniform legislation schemes and the cross-jurisdictional nature of the process leading to their establishment and agreement to them by the Victorian Government. There is an expectation that impacted Victorian stakeholders have had an opportunity to comment and that either impacts on Victoria have been considered or that any national impacts identified in that consultation will be equally applicable to Victoria.

Further to this are considerations such as the impact on State-Commonwealth relations. For example, if a commitment has been made to implement a particular policy (which has undergone a national assessment of costs and benefits) within a set timeframe, and Victoria were to delay this through its own requirements under the SLA, then this could affect the overall implementation of the policy to the detriment of those benefiting (both Victorians and all Australians) and to the relationship with other State and Territory governments and the Commonwealth.

There are 3 provisions in total for making legislative instruments where instruments are made under national uniform legislation.

The Proposed Regulations include provisions in relation to the making of instruments made under the *Road Safety Act 1986,* Road Safety (Vehicles) Interim Regulations 2020 and the Road Safety Road Rules 2017, falling under this criteria. In addition to the national uniform legislation criterion, many of these provisions satisfy a section 12F SLA criterion, and when the criteria are combined, those provisions should be exempted on balance. For example, a notice approving portable warning triangles are also fundamentally declaratory or machinery in nature (Road Safety Road Rules 2017, r407).

One provision under a national unform framework allows for the making of Orders to suspend or vary the operation of the *Dangerous Goods Act 1985*, which may be required urgently for possible emergencies or unforeseen consequences of the scheme that applies to the transport of dangerous goods (section 9C(1)). A RIS for the national legislative scheme was prepared by the Commonwealth, and found the costs to industry are likely to be offset by improved safety outcomes. This provision satisfies the national uniform legislation criteria and the public emergency exemption (if instrument is not more 12 months duration) under section 12F of the SLA.

Another provision allows for the making of National Electricity Rules and Regulations (under the *National Electricity (Victoria) Act 2005*), and constitutes a national uniform legislation scheme as part of a national energy market reform scheme (order under section 15). Cost-benefit analysis and consultation are required under the National Electricity system program.

### Public interest

The criterion referred to as ‘public interest’ has been used for legislative instruments where, on balance, DPC considers that the benefits of exempting an instrument outweigh the benefits of additional scrutiny before the instrument is made.

Some common themes for the public interest criterion are outlined in the table below.

**Table 5 - Common themes for the rationale for proposed “public interest” exemption**

|  |  |
| --- | --- |
| Rationale | Example |
| The instruments need to be made under restricted timeframes or there is a need to act quickly.[[15]](#footnote-16) | Further fisheries quota orders (*Fisheries Act 1995* ss64A(1) and 66D(1)).Declarations for prohibited period regarding fire protection area and prohibition of the use of fire where acute fire danger exists (*Forests Act 1958* ss3(2)).Written directions of the harbour master (*Marine Safety Act* s 232(1).Order certifying outbreak of, an exotic pest or disease (*Plant Biosecurity Act 1995* s 42(1)).Notice of closure, realignment or relocation of road (*Project Development and Construction Management Act 1994* s 24). |
| The instruments reflect the outcome of detailed, sensitive commercial negotiations that would be undermined by the RIS process. | Orders regarding architects’, builders’ and plumbers’ insurance cover (s17A(1) or (4) Architects Act 1991, *Building Act 1993* s135(1) or (4) and s 221ZQ(1) or (4)). |
| There is a need to maintain the autonomy of an independent entity. | Instruments that relate to University statutes and regulations.(Australian Catholic University (Victoria) Act 1991 ss5(1) and 5(3)); Deakin University Act 2009 s 28; La Trobe University Act 2009 s 28; Melbourne College of Divinity Act 1910 s 30; Monash University Act 2009 s 28; Royal Melbourne Institute of Technology Act 2010 s 28; Swinburne University of Technology Act 2010 s 28; University of Ballarat Act 2010 s 28; University of Melbourne Act 2009 s 28; Victoria University Act 2010 s 28). |
| Instruments where the RIS process and consultation may undermine the purposes of the authorising Act. | A range of instruments that can be made under *the Land Acquisition and Compensation Act 1986* (ss 5(3), and 7(1)(c)). These instruments are made in extreme circumstances where importance and urgency of a project and fairness to the property owner are relevant factors. These instruments may also fail satisfy the Ministerial exemption criteria in s12F(1)(j).Order that *Major Events Act 2009* (s 15) does not apply to the development or use of an event venue, where the aim of the provision is to streamline processes for particular occasions. |
| Instruments that implement agreements previously made between the Victoria Government and Commonwealth Government. | Order with respect to fees paid by overseas students applying to be enrolled or enrolled in Government schools (*Education and Training Reform Act 2006* s2.2.9).Notice of substituted public holidays (*Public Holidays Act 1993* s 8(1)).A number of instruments able to be made under the *Electricity Industry Act 2000* and *Gas Industry Act 2001*. |
| The instrument is part of a process of comprehensive consultation that would be undermined by a RIS process and RIS consultation. | Interim protection orders under the *Aboriginal Heritage Act 2006* s96, where requiring a RIS may undermine the role of registered Aboriginal parties and the Council in maintaining the relationship between Aboriginal people and a place or object.Orders applying to a commodity, under the *Agricultural Industry Development Act 1990* s 8(1), which are made after a request from the industry and following a public meeting of these producers. The final stage is an industry poll on the draft Order, requiring the producers affected to vote on the Order (majority required). The poll is conducted by the Victorian Electoral Commission.  |
| The instrument is developed following a process predetermined under the authorising Act. | WorkCover premiums, which are determined annually based on an independent actuarial assessment (*Workplace Injury Rehabilitation and Compensation Act 2013* s 448(1)) |

For an assessment of the costs and benefits relevant to Option 1 see Chapter 4 below.

## Option Two – make the Proposed Regulations as in Option 1 but with the exclusion of two categories of legislative instruments that face alternative scrutiny processes

Option 2 is the same as Option 1 except with the exclusion of legislative instruments that are subject to analytical and consultation processes (set out in their respective authorising Acts or required under a national uniform legislation scheme) which are considered as, or more, stringent than the RIS process. Under Option 2, fewer automatic exemptions from the SLA requirements would be allowed.

Under Option 1, 87 provisions are proposed to be exempt from certain requirements of the SLA because of these alternative processes. These instruments and the reasons for exemption were outlined above. They come under two criteria for exemption under Option 1, where the legislative instrument:

* is required to undergo, or has undergone an analytical and consultation process deemed equivalent to a RIS; or
* is required under a national uniform legislation scheme and an assessment of costs and benefits has been undertaken under that scheme.

Option 2 allows for the exemption criteria described above in Option 1, *excluding* the RIS equivalency and national uniform legislation criteria for provision exemption.

For an assessment of the costs and benefits relevant to Option 2 see Part 3 and Chapter 4 below

# Impact Analysis

The purpose of this section is to identify and analyse the impacts of the options identified in Chapter 3 of this RIS

As outlined above, the preferred option comprises the Proposed Regulations (Option 1). This will have the effect of prescribing legislative instruments made under 586 provisions as exempt from certain requirements of the SLA, except the requirement to publish new instruments in the Victoria Government Gazette. Only the seven (7) legislative instruments in proposed regulations 9 and 10 will not need to comply with the requirement to publish in the Government Gazette.

The process to identify these instruments has included extensive consultation with other departments and agencies. In each case, either the instruments are not expected to pose a significant burden, or the benefits of meeting the SLA requirements are outweighed by the cost of doing so (that is, there is a net benefit in exempting them), or there are mitigating factors, such a need for an urgent response for public health or safety concerns.

Future amendments will also provide an opportunity to include new provisions to make legislative instruments on the list of exempt legislative instruments, where this is appropriate.

## Part 1 Multi-Criteria Analysis

The nature of the problem is such that it is difficult to precisely estimate all costs and benefits in terms of a dollar value. Therefore, while some indication of costs and cost savings is given, a multi-criteria analysis has been prepared to analyse the impact of each of the options against a number of criteria.

In a multi-criteria analysis, a score is assigned, depending on the impact of the option on each of the criteria measured relative to the Base Case. The multi-criteria analysis technique requires judgments about how proposed options will contribute to a set of criteria that are chosen to reflect the benefits and costs associated with the proposals. It requires developing criteria based on the objectives of the Proposed Regulations, weighting the criteria, and assigning scores to the different options. Further, it is prudent to ensure that criteria that represent benefits are weighted equally against those that represent costs. The following section considers each element of the multi-criteria analysis approach.

### Criteria

The criteria developed for the multi-criteria analysis relate to the objectives outlined earlier in this RIS. The criteria are described in more detail below:

Benefit Criteria

1. *Effective use of government resources*

The preferred option should ensure Government resources are used effectively and efficiently.

Requiring every single legislative instrument to either have an exemption certificate prepared or to undergo rigorous analysis and consultation would be an inefficient use of limited government resources, as little benefit would be gained in most cases. Similarly, requiring Government agencies to consider whether a case-by-case RIS exemption applies where it would in practice always apply is also an unnecessary burden on Government resources. In addition, a lack of clarity of the legal status of an instrument creates additional work for Government agencies to ascertain the legal status of the instrument.

 Both of the options decrease the resources Government needs to dedicate to complying with SLA processes when making or amending legislative instruments relative to the base case and therefore score positively in the analysis below. A positive score indicates that legislative instruments will consume fewer Government resources, allowing resources to be used on other priorities.

1. *Minimise unnecessary delays in making or amending legislative instruments*

 The preferred option should minimise unnecessary delays in making or amending legislative instruments.

 In addition to the resource burden of the SLA processes noted above, the processes generally take significant time. Some legislative instruments need to be made quickly to achieve their desired effect, for example when responding to an emergency. The additional time involved in preparing exemption certificates or RISs would undermine the intended effect of these legislative instruments.

 Both of the options decrease the delays in making or amending legislative instruments relative to the base case and therefore score positively in the analysis below. A positive score indicates that legislative instruments can be made in situations where urgency or timeliness are important.

Cost criteria

1. *Ensure legislative instruments are identifiable, publicly available and an appropriate level of scrutiny (parliamentary and SARC) is applied when making legislative instruments*

 The preferred option should ensure legislative instruments are identifiable, publicly available and undergo an appropriate level of scrutiny before being made.

 The preferred option should mitigate the risk created by removing some of the parliamentary and public scrutiny that legislative instruments would otherwise be subject to as predominately only lower impact instruments will be automatically exempt.

 Both of the proposed options reduce the level of scrutiny from the base case, and, accordingly, have been scored negatively in the analysis below. A negative score indicates less scrutiny, which increases the risk that legislative instruments will have lower net benefits for society and/or adverse human rights outcomes.

### Weighting

It is considered appropriate to equally weight the costs and benefits of proposed policies, so the benefit criteria receive a combined weighting of 50 per cent and the cost criterion receives a weighting of 50 per cent. Each benefit criterion is considered to be of equal importance, so achieving effective use of government resources and minimising unnecessary delays are weighted 25 per cent each. The preferred option should balance effective use of government resources, minimisation of unnecessary delays, and an appropriate level of public scrutiny.

### Scores

The summary of the multi-criteria analysis in Table 6 below shows that Option 1 provides the greatest benefits overall. The analysis used to reach the scores given against each criterion is outlined in the following sections. The options are assessed against each criterion with a score of between -10 and +10.

**Table 6 - Analysis of options**

(Scored between -10 and +10)

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Criteria | Weighting | Base Case | Option 1 | Option 2 |
|  |  |  | Assigned score | Weighted score | Assigned score | Weighted score |
| *Benefit criteria* |
| * Effective use of government resources
 | ¼  | 0 | +10 | +2½  | +9 | +2¼ |
| * Minimise unnecessary delays in making or amending legislative instruments
 | ¼ | 0 | +10 | +2½  | +7 | +1¾  |
| ***Benefit criteria*** | **½**  | **0** |  | **+5**  |  | **+4**  |
| *Cost criteria* |
| * Ensure an appropriate level of parliamentary and public scrutiny when making legislative instruments.
 | ½ | 0 | -4 | -2 | -3 | -1½ |
| ***Cost criteria*** | **½** | **0** | **-4** | **-2** | **-2** | **-1**½ |
| **Total** | **1** | **0** |  | **+3** |  | **+2½**  |

### Effective use of limited government resources

In terms of improving clarity, Option 1 is the best to ensure that legislative instruments are clearly defined as administrative, legislative or exempt legislative. In terms of the 56 provisions proposed to be prescribed for clarity as legislative instruments for the purposes of the SLA (under Schedule 2 of the Proposed Regulations), instruments made under these provisions could be eligible for an exemption under section 12F or 12G of the SLA in particular instances, or if not, subject to the full requirements of the SLA including preparing a RIS. This is essentially the same as the base case, except avoids ambiguity for decision makers about whether the instrument is legislative.

Option 2 is improves clarity more than the base case, but less than Option 1. Many instruments made under the 87 provisions that would be automatically exempt under Option 1, but not under Option 2[[16]](#footnote-17) will most likely always be eligible for an exemption under section 12F of the SLA (or 12G). It is unlikely that any of the provisions to make legislative instruments identified for inclusion in Schedule 3 of the Proposed Regulations on the RIS equivalency (under the legislative instrument’s authorising Act) and national exemption criteria would need to undergo a RIS under the SLA. Therefore, Option 1 saves the administrative time involved in preparing the exemption certificates, arranging tabling and SARC scrutiny and avoids duplication of a similar consultation process for those provisions.

Option 1 will also result in the most efficient use of government resources. Option 2 is less efficient at utilising government resources. Focussing resources on such processes means other priority areas of work may be forgone.

Option 1 is expected to save the Government approximately $797,000 per year in costs of staff time, oncosts and overheads associated with the administrative burden of complying with the SLA requirements. Similarly, Option 2 is expected to save the Government approximately $791,000 per year in administrative burden. The nature of these expected savings is explained in tables 7A, 7B and 7C below. To estimate these savings, several assumptions and estimates have been made, which are detailed in Table 7D below. Note that most of these costs would be met through existing budgets and resources in the base case. These estimates indicate the value of the resources that would be saved under the options and able to be put to other, better uses.

Since there is significant uncertainty about the assumptions and estimates, resulting in a relatively wide range of potential values, DPC has performed sensitivity analysis illustrating the expected upper and lower bounds of the potential savings, detailed in Table 7E and 7F below. The range of estimated cost savings for Option 1 is about $522,000 to $2,463,000 per year, while the range of estimated cost savings for Option 2 is about $516,000 to $2,433,000 per year. Under all assumptions, Option 1 is expected to have higher savings that Option 2.

As Option 1 will achieve the most effective and efficient use of government resources, it has been scored +10 out of 10, while Option 2 has received a score of +9 out of 10 given that some efficiency loss is likely to occur regarding the 87 provisions to make legislative instruments that would be automatically exempted under Options 1 but not Option 2.

Table 7 below identifies the key cost impacts (and assumptions) on the use of resources by agencies, BRV and Parliament (including SARC) for the base case in comparison to the options. A number of the impacts have been quantified due to the difficulty of accurately estimating them or because the data is not available. DPC estimates that the unquantified costs would be small relative to the quantified costs.

**Table 7 – Impact on the use of limited government resources**

**Estimated annual use of the limited government resources[[17]](#footnote-18)**

The figures in each table below for each option is based on central estimates. The assumptions are listed in table 7D.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Table 7A** |  |  |  |  |  |
| **Annual use of limited government resources** |   |   |  |  |  |
|   | **Option 1** | **Option 2** |  |  |  |
| **Avoided costs** |   |   |  |  |  |
| Marginal avoided cost of RISs | $575,000 | $575,000 |  |  |  |
| Marginal avoided cost of exemption certificates (sections 12F, 12G) | $326,896 | $320,896 |  |  |  |
|   |   |   |  |  |  |
| **Additional costs** |   |   |  |  |  |
| Cost of preparing and updating the regulations | $105,080 | $105,080 |  |  |  |
|   |   |   |  |  |  |
| **Net avoided costs** | $796,816 | $790,816 |  |  |  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Table 7B** |  |  |  |  |  |
| **Annual use of Government resources - Option 1** |   |   |   |   |   |
|   | **Agencies** | **DPC** | **BRV** | **Parliament** | **Total** |
| **Avoided costs** |  |  |  |  |  |
| Marginal avoided cost of RISs | $500,000 | N/A | $75,000 | Unavailable | $575,000 |
| Marginal avoided cost of exemption certificates (sections 12F, 12G) | $177,000 | $149,896 | Unavailable | Unavailable | $326,896 |
|   |  |  |  |  |  |
| **Additional costs** |  |  |  |  |  |
| Cost of preparing and updating the regulations | $65,580 | $38,000 | $1,500 | Unavailable | $105,080 |
|   |  |  |  |  |  |
| **Net avoided costs** | $611,420 | $111,896 | $73,500 | Unavailable | $796,816 |
| **Table 7C** |  |  |  |  |  |
| **Annual use of Government resources - Option 2** |   |   |   |   |   |
|   | **Agencies** | **DPC** | **BRV** | **Parliament** | **Total** |
| **Avoided costs** |  |  |  |  |  |
| Marginal avoided cost of RISs | $500,000 | N/A | $75,000 | Unavailable | $575,000 |
| Marginal avoided cost of exemption certificates (sections 12F, 12G) | $171,000 | $149,896 | Unavailable | Unavailable | $320,896 |
|   |  |  |  |  |  |
| **Additional costs** |  |  |  |  |  |
| Cost of preparing and updating the regulations | $65,580 | $38,000 | $1,500 | Unavailable | $105,080 |
|   |  |  |  |  |  |
| **Net avoided costs** | $605,420 | $111,896 | $73,500 | Unavailable | $790,816 |

**Table 7D - Cost estimates and assumptions**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Cost estimates and assumptions** | **Agencies** | **DPC** | **BRV** | **Parliament** |
| Approximate average cost of a RIS[[18]](#footnote-19) | $200,000 | N/A | N/A | N/A |
| Average additional effort involved in undertaking RIS[[19]](#footnote-20) | 25%-75% | N/A | N/A | N/A |
| Approximate average cost of reviewing a RIS[[20]](#footnote-21) | N/A | N/A | $10,000 - $20,000 | Unavailable |
| Approximate average cost of preparing or reviewing s12F exemption certificates[[21]](#footnote-22) | $600-$1,500 | N/A | Unavailable[[22]](#footnote-23) | Unavailable |
| Approximate average cost of preparing or reviewing s12G exemption certificates[[23]](#footnote-24)  | $600-$1,500 | $3,747 | N/A | Unavailable |
| Approximate average cost of requesting placement of a provision on Schedule 3 or in the body of the regulations[[24]](#footnote-25) | $600-$1,500 | N/A | N/A | N/A |
| Cost of making the Regulations[[25]](#footnote-26) (once every 10 years) | N/A | $200,000 | N/A | N/A |
| Cost to amend the Regulations (typically annually)[[26]](#footnote-27) | N/A | $18,000 | N/A | N/A |

|  |  |
| --- | --- |
| **Other estimates** |  |
| Estimated number of avoided RISs per year (Options 1 & 2)[[27]](#footnote-28) | 5-10 |
| Estimated number of avoided s12F exemption certificates per year (Option 1)[[28]](#footnote-29) | 255-435 |
| Estimated number of avoided s12F exemption certificates per year (Option 2)[[29]](#footnote-30) | 245-415 |
| Estimated number of avoided s12G exemption certificates per year (Options 1 & 2)[[30]](#footnote-31) | 40-60 |
| Estimated number of instruments automatically exempted under Schedule 3 for National Scheme or RIS equivalence only per year (Option 1)[[31]](#footnote-32) | 10-20 |
| Estimated number of instruments automatically exempted under Schedule 3 and the body of the Regulations per year (Options 1 & 2)[[32]](#footnote-33) | 300-500 |
| Number of provisions listed in Schedule 3 and body of the regulations  | 593 |
| Estimated number of provisions added, removed or amended in the regulations per year[[33]](#footnote-34) | 50 |

|  |  |
| --- | --- |
| **Table 7E** |  |
| **Annual use of limited government resources – lower bound estimate** |   |   |
|   | **Option 1** | **Option 2** |
| **Avoided costs** |   |   |
| Marginal avoided cost of RISs | $300,000 | $300,000 |
| Marginal avoided cost of exemption certificates (sections 12F, 12G) | $326,896 | $320,896 |
|   |   |   |
| **Additional costs** |   |   |
| Cost of preparing and updating the regulations | $104,580 | $104,580 |
|   |   |   |
| **Net avoided costs** | $522,316 | $516,316 |

|  |  |
| --- | --- |
| **Table 7F** |  |
| **Annual use of limited government resources – upper bound estimate** |   |   |
|   | **Option 1** | **Option 2** |
| **Avoided costs** |   |   |
| Marginal avoided cost of RISs | $1,700,000 | $1,700,000 |
| Marginal avoided cost of exemption certificates (sections 12F, 12G) | $967,345 | $937,345 |
|   |   |   |
| **Additional costs** |   |   |
| Cost of preparing and updating the regulations | $203,950 | $203,950 |
|   |   |   |
| **Net avoided costs** | $2,463,395 | $2,433,395 |

### Minimising unnecessary delay

Option 1 ensures the most efficiency in terms of having legislative instruments made in a timely manner, without delays which are considered unnecessary given the size, nature or impact of those legislative instruments proposed for exemption. Avoiding some of the SLA process (such as the Ministerial case-by-case exemption or the preparation of a RIS) allows an instrument to be prepared more quickly. For instance, preparing a RIS can take on average 6-12 months. The length of time to prepare a Ministerial cases-by-case exemption varies greatly from instrument to instrument, depending on the complexity and level of assessment required. It can take anywhere from a few days through to a couple of months. As delays are minimised to the maximum extent under this option, it receives a score of +10 of 10.

Option 2 would lead to delays for the 87 provisions to make instruments discussed previously, which are proposed for exemption under the RIS-equivalency and national uniform legislation criteria under Option 1, but will not be exempt legislative instruments under Option 2. While there is arguably some benefit in subjecting instruments made under these provisions to the SLA, there would be a net cost overall. Delays also run the risk of, for example, impacting on State-Commonwealth relations if a particular legislative instrument was delayed by a RIS and associated consultation process, which impacted on overall implementation timeframes agreed to at a Commonwealth level. Given that the delay impacts of the 87 provisions to make instruments that are not made exempt legislative instruments under Option 2 could be quite costly, this option has been scored +7 out of 10.

### Appropriate level of parliamentary and public scrutiny

Option 1 poses a somewhat greater risk of legislative instruments being made that impose a significant cost or burden, without having undergone adequate analysis and consultation. Parliamentary scrutiny is forgone for exempt legislative instruments, due to forgoing the processes of tabling legislative instruments in Parliament and having SARC scrutinise each one. However, the loss of consultation and scrutiny is mitigated to some extent because, by providing a mechanism to remove or reduce the consultation and scrutiny requirements for lower impact instruments, the public, Parliament and SARC is able to better focus on those instruments that are most likely to have a significant impact and are therefore more likely to be of interest to the public. Moreover, if public consultation through the Engage Victoria online platform included all lower and higher impact instruments, the public may not be able to determine or focus on those instruments that are of most relevance to them.

Not all legislative instruments need to face such a rigorous scrutiny process. There is a risk that requiring SARC to scrutinise a much larger number of legislative instruments under the Base Case (compared to Options 1 and 2) would compromise SARC’s ability to effectively scrutinise each instrument including those with higher impacts on a sector of the public. A similar risk would exist for public scrutiny, if a much larger number of legislative instruments required feedback, which may compromise the public’s ability to focus its feedback on those instruments that have a higher impact.

Little or no scrutiny processes in relation to legislative instruments may pose a risk to the community in that impacts or burdens placed on them by a legislative instrument may not be justified and proportionate measures. Regulatory scrutiny can help identify and address issues with regulations. For example, the SLA requires consultation with significantly affected parties on proposed instruments, and these parties can identify issues, which can then be addressed to increase the benefits and/or reduce the costs of a proposal. However, this risk is low due to the fact that most exempt legislative instruments will only have minor impacts or are unsuitable for public consultation.

In summary, DPC, in consultation with departments:

* considered whether each exempt legislative instrument to be included in the Proposed Regulations requires a significant level of parliamentary and public scrutiny. The exempt legislative instruments in the Proposed Regulations are those which do not require such an intensive assessment as offered through the RIS, consultation, parliamentary and SARC processes; and
* determined that the cost to departments or agencies in preparing a RIS and undertaking consultation, and the impact on parliamentary processes and SARC resources, outweighs any benefits in having legislative instruments go through these process before they are made.

Nonetheless, due to the large number of instruments being proposed for exemption, both options have been scored negatively, in recognition that these instruments could be used in an unforeseen way that imposes a significant cost or burden without adequate scrutiny. The large number means that the cumulative burden of these instruments could be moderately high even if the individual burdens are low. This option has been scored -4 out of 10.

Option 2 focuses on those instruments which are likely to impose a significant cost or burden, but where an alternative and equally rigorous process is in place to ensure that burden is well justified. Removing those instruments from exemption ensures they face a more rigorous process, somewhat reducing the risk slightly that a significant cost or burden will be imposed without scrutiny. This option has been scored -3 out of 10.

### Total score

The multi-criteria analysis demonstrates that Option 1 has the greatest net benefit when scores are assigned to each of the criteria. In total, Option 1 receives a weighted score of +3 compared to Option 2 which receives a weighted score of +2.5. Both the scores are significantly in excess of the score of the Base Case of zero. The total scores for Option 1 and Option 2 are quite similar because the options are judged to have only small differences in their impact. Nonetheless, Option 1 receives the highest score and so has been judged to be the preferred option. The reasons that Option 1 is the preferred option are discussed in more detail below.

The total scores are not significantly sensitive to the assigned weightings. Option 1 receives the highest weighted score until the weighting to the third criterion (ensure an appropriate level of parliamentary and public scrutiny when making legislative instruments) exceeds 66.66 per cent. Either Option 1 or Option 2 is preferred over the Base Case unless the third criterion is assigned a weighting of over 72 per cent.

As disproportionately high weightings on one criterion are not considered appropriate when seeking an outcome that maximises the net benefit across several criteria, this simple sensitivity analysis shows that Option 1 receives the highest score across a range of appropriate weights.

## Part 2 Reasons for rejecting other options

The other means of meeting the objectives that were considered were:

* no regulation – the base case;
* making the Proposed Regulations as in Option 1 but with the exclusion of two categories of legislative instruments that face alternative scrutiny processes – Option 2.

These options were not selected as they do not sufficiently meet the desired objectives set out in Chapter 2 above.

The Base Case and Option 2 are not preferred for the following reasons.

### Base Case

The Base Case would lead to the imposition of exemption certificate costs or RIS and associated consultation process costs on instrument-makers. Therefore, for the Base Case, the problem is the additional resources and delays that these processes cause for departments, agencies, Parliament and SARC.

The estimated total cost of seeking exemption certificates in relation to the exempt legislative instruments over 10 years is difficult to estimate. Fully developed cost estimates are not able to be made for RIS and associated consultation processes that would occur without the Proposed Regulations; however, the average cost of preparing a RIS for a department of agency is estimated to be about $200,000 (including staff costs and consultant costs). Some of the staff costs would have been incurred if a RIS was not prepared, as some of the analysis in a RIS draws on analysis that would be undertaken as part of the normal policy process. The additional work required is estimated by BRV to be between 25 and 75 per cent of the cost of RISs, so the average additional work is in the range of $50,000 to $150,000 for the average RIS. It is estimated that the costs of BRV reviewing a RIS is between $10,000 and $20,000.

The Base Case would also result in SARC reviewing up to 300-500 additional instruments each year, an eight- to thirteen-fold increase on their legislative instrument workload. While this would be to ensure greater Parliamentary scrutiny of all legislative instruments being made by delegates authorised under the relevant Acts, it could also be detrimental. SARC’s ability to focus on those legislative instruments that have significant impacts may be compromised by the additional volume of legislative instruments that would be submitted (given its role also in relation to statutory rules).

### Option 1

Both options are similar to the Current Regulations (the status quo). The benefits for each option is to decrease for departments, agencies, Parliament and SARC the administrative burden (ministerial exemption certificate or undertake a RIS) and delays to put in place measures. However the cost that is incurred with both options is the loss of scrutiny, transparency and consultation from exempting legislative instruments from certain requirements in the SLA.

The Proposed Regulations (Option 1) will provide clarity and certainty to those responsible for the authorising Acts’ administration (Ministers and relevant departments or agencies) as to which requirements of the SLA apply to the legislative instruments. There will also be some opportunity cost savings to instrument-makers, as the exemption process outlined in the Base Case will not need to be followed each time any of the exempt legislative instruments are being made. The estimated avoided costs under this option are expected to be around $797,000 annually (see Table 7A).

The Proposed Regulations will also allow for legislative instruments to be introduced without unnecessary delays. As discussed above, the reasons to support inclusion of provisions in Schedule 3 are of a nature that means requiring a RIS and consultation would be wasteful of limited resources, or would in some way impede the effective application of a legislative instrument (for example, some regulations are required to be introduced quickly, as a response to an urgent situation). Making the Proposed Regulations will ensure that limited government resources are instead targeted towards those initiatives causing, or that may cause, a significant level of burden on some or all of the population and that, therefore, need to be properly scrutinised before their application.

Option 1 is the least costly in terms of application of the SLA. It is intended to reduce the cost to agencies in preparing advice in order to seek an exemption each time a legislative instrument that should be exempted is made. There are some small costs in preparing the Proposed Regulations. These costs are outweighed by the avoided costs and delays. The total cost to prepare the Proposed Regulations upfront will be much less than the costs that would be faced where assessment of legislative instruments are made on a case-by-case basis and more RISs would be prepared and consulted on (as described in the Base Case above).

### Option 2

Under Option 2, legislative instruments that face a RIS-equivalent process or are part of a national uniform legislation scheme would not be exempt legislative instruments and included in Schedule 3 of the Proposed Regulations. As these legislative instruments would always or almost always be granted a case-by-case exemption from the responsible Minister under section 12F, DPC considers that not including them as exempt legislative instruments under the Proposed Regulations will bring little additional benefit. These legislative instruments are more likely to impose a significant burden; however, they have alternative scrutiny processes that are likely to sufficiently analyse the impacts on Victorians.

The estimated avoided costs under this option are expected to be around $791,000 annually (see Table 7A).

In the case of RIS equivalency, three criteria were identified and applied - the alternative process must have required the preparation of a policy assessment, independent analysis on that policy assessment and formal public consultation for at least 28 days. For national uniform legislation, an assessment of the costs and benefits has been made.

There is a risk it could be more confusing for instrument-makers to have some legislative instruments not exempt under the Proposed Regulations, but where an exemption certificate could be sought each time (or almost every time) from the responsible Minister instead. It would also require the allocation of additional resources to preparing and seeking an exemption. Alternatively, in some rare cases, a RIS and associated consultation process will need to be prepared, which further increases the resources required. This would be unnecessarily duplicative, and could confuse stakeholders during consultation.

For any legislative instruments being prepared to implement national uniform legislation, any delays in implementing the instrument at a State level could have a detrimental impact on the agreed timeframes for implementation, which would delay the benefits of the proposed policy, and on State-Commonwealth relations generally.

There may be some additional benefit in Option 2 realised (over Option 1) through ensuring that these legislative instruments are subject to the SLA requirements. Instruments made under these provisions are likely to impose a more significant burden on sectors of the public. However, given that the instrument will face scrutiny through alternative consultation and impact assessment processes which are seen to be as stringent as the RIS process, and more appropriate for the legislative instrument concerned, the likelihood of any relevant additional information coming to light through the RIS process under the SLA that affects the final legislative instrument is low. In practice, a section 12F exemption certificate would likely be issued by the responsible Minister on a case-by-case basis or a RIS would be prepared. Nonetheless, being subject to this scrutiny on a case-by-case basis may provide greater confidence that only those instruments where comprehensive and independently assessed analysis and consultation takes place, or where there is an equivalent process that takes account of the impact on Victoria specifically will be exempted. If the impact to Victoria specifically has not been adequately taken into account in the alternative impact analysis, then an exemption should not be granted and a separate RIS that meets the SLA analysis requirements should be prepared.

If the two categories of provisions to make legislative instruments that face alternative scrutiny processes are not exempt legislative instruments under the Proposed Regulations (Option 2), the instrument-maker will need to either prepare and issue an exemption certificate under section 12F or prepare a RIS each time an instrument under that provision needs to be made.

If an exemption is made, this process may be straight forward in some cases, and, indeed, those proposed for exemption are those where the equivalent or national processes have been deemed as likely to adequately assess the cost and benefits for Victoria in future use. However, in order to adequately document this for each instrument, it is likely that more in-depth assessment (compared with other, more straightforward exemption criteria) of the instrument being proposed will be required each time to explain and justify this. This is due to the risk that instruments may impose significant costs on Victorian communities or businesses, even where that cost has been justified at a national level or as part of an equivalent process. An exemption certificate would have to be prepared to outline and explain this in each case. The explanation would need to be sufficient to satisfy SARC, which would be provided with the exemption certificate as part of its scrutiny process. This creates a burden for agencies, and takes away resources from other priorities, where the ultimate outcome is likely to be the same whether the exemption is made under regulations or sought on a case-by-case basis.

The cost of preparing a RIS could be particularly high if the issue is complex. It could also create confusion during consultation, for example, if two separate or one combined consultation process was adopted, or different consultation materials were made available during a combined consultation process. Even where the processes broadly align, and much of the information is transferable, there will still be an additional cost in presenting the information in the RIS format and the format under the authorising Act or part of a national scheme.

Given the wider demands on legal branches within departments and agencies in taking part in a challenging legislative program, any changes that can make the SLA process more efficient, without unjustifiably detracting from other important themes such as accountability and transparency, should be viewed positively.

## Part 3 Competition Assessment

The *Victorian Guide to Regulation* states that as a matter of good public policy, it is a fundamental principle that new regulations do not restrict competition, unless it can be demonstrated that:

* the benefits of the restriction, as a whole, outweigh the costs; and
* the objectives of the legislation can only be achieved by restricting competition.

The *National Competition Principles Agreement* requires an assessment of whether any new primary or subordinate legislation will have an effect on competition. The analysis must demonstrate that the objectives of the legislation can only be achieved by restricting competition and the benefits outweigh the costs of the preferred option.

### Will the preferred option restrict competition?

As the proposal relates to the assessment of legislative instruments before introduction/being made, which is largely undertaken by public sector entities, it is unlikely the proposal will have any impact on competition. Individual legislative instruments may impact competition as they are introduced/ made. The legislative instruments in the Proposed Regulations have been assessed as:

* unlikely to impact competition;
* may have an impact on competition, but this will be considered through a RIS-equivalent or national legislative process;
* may have an impact on competition, but are proposed for exemption on public interest grounds, due to other overriding factors.

Most of the instruments in the Proposed Regulations are unlikely to have a competition impact. For example, Orders constituting school councils have a low chance of impacting competition. In contrast, some exempt legislative instruments could restrict competition, but are subject to analysis through RIS-equivalent processes; a number of the instruments analysed by the Essential Services Commission fall into this category.

In addition, some instruments may have a competition impact, but are proposed for exemption because they meet criteria under section 12F or there is an overriding public interest. For example, some instruments regulating use and sale under the *Agricultural and Veterinary Chemicals (Control of Use) Act 1992* could impact on competition (e.g. an order under section 25(2)), but are proposed for exemption under the urgent public safety or environmental issue criteria under section 12F because the instruments are used to respond to urgent situations.

In another example, the Order regarding builder’s insurance cover (and similar instruments for other industries) is proposed for exemption on public interest grounds (*Building Act 1993* s135(1) or (4)). While there could be a competition impact from the order, DPC considers that there is a net benefit from having closed and flexible commercial negotiations that seek to guarantee the availability of insurance products that meet industry requirements, including affordability for the industry's members.

A RIS is a service provided by government. For those legislative instruments that are not exempt legislative instruments (including those in Schedule 2 of the Proposed Regulations), and may lead to an impact on competition, assessment of this impact will be made during the preparation of each RIS for those instruments. The public, including affected businesses, will then have an opportunity to comment through consultation.

The Proposed Regulations will not have any direct adverse impact on competition. Legislative instruments exempted from scrutiny under the Proposed Regulations may have impacts on competition, however adverse impacts are mitigated because the instruments either do not impose a significant burden on the public, are subject to a separate process of consultation and scrutiny or the benefits of exempting them from scrutiny are greater than the costs of exempting them from scrutiny.

The preferred option is shown in the multi-criteria analysis above to be the best option to meet the objectives set out in this RIS for the Proposed Regulations. Namely, the Proposed Regulations will:

* Assist instrument-makers in allocating limited government resources efficiently, and ensuring they are not faced with an excessive burden in the monitoring and making of legislative instruments;
* Minimise unnecessary delays in making or amending legislative instruments; and
* Ensure that each legislative instrument faces an appropriate level of scrutiny by Parliament and SARC, based on the expected impact it will have.

The Proposed Regulations will ensure that legislative instruments that have an impact are analysed by a RIS and face public consultation.

By automatically exempting legislative instruments in the Proposed Regulations from the RIS process and consultation, the opportunity for public comment or consultation on these instruments may be restricted. However, the exempt legislative instruments are largely limited to those not imposing a significant burden on the public or that have their own public consultation process. Further, the costs of undertaking analysis and consultation would likely outweigh the benefits of such exercises.

# Implementation plan

Compliance issues are expected to be minimal, given that the Proposed Regulations will exempt a large number of provisions to make legislative instruments from certain requirements of the SLA.

Where the requirements continue to apply, Ministers will have responsibility for instruments made within their portfolios and SARC will have responsibility for reviewing legislative instruments. As part of its responsibility, SARC will ensure that legislative instruments do not exceed the power conferred by an Act, do not unduly trespass on rights and freedoms, and that the requirements of the SLA have been met.

The arrangements for monitoring the Current Regulations will continue, with DPC undertaking annual and ongoing monitoring and evaluation of the Proposed Regulations. DPC will also review and update the SLA Guidelines during the operation of the Proposed Regulations.

Generally, DPC will start an annual review in the second quarter of the year and finish by the end of the year and assess requests received throughout the year as part of that annual cycle.

Departments and agencies may identify new provisions in future Principal Acts or amendments to existing Acts that need to be considered for inclusion in the Proposed Regulations and obsolete provisions that need to be removed from the Proposed Regulations. Provisions can also be reassessed where their nature or use may have changed, and the provision may need to move between the Schedules.

DPC will work with the office of the Chief Parliamentary Counsel to assess changes requested from departments and agencies.

As part of this ongoing monitoring, the Proposed Regulations may need to be amended on an ad-hoc basis, usually due to some specific urgency. Departments and agencies can provide the reasons for such urgency. DPC will consider the request and, if the required, the Proposed Regulations can be amended outside of the annual cycle.

DPC maintains a public facing website available at [www.vic.gov.au/requirements-updating-subordinate-legislation-legislative](http://www.vic.gov.au/requirements-updating-subordinate-legislation-legislative) instruments-regulations. This website contains the SLA Guidelines and training material on the SLA Guidelines and the operation of the SLA. The process for departments to seek to amend the Proposed Regulations, is also detailed with a dedicated DPC email address for departmental queries.

# 6. Evaluation strategy

## Purpose

This evaluation strategy has been developed to evaluate the effectiveness and efficiency of the preferred option (Option 1).

Evaluation is critical to measuring, and supporting, the success of regulations. As per the *Victorian Guide to Regulation*[[34]](#footnote-35) the key elements of the evaluation strategy are as follows:

* What will be evaluated?
* How it will be done?
* Who will do it?
* When it will be done?

## Evaluation Scope

The evaluation will measure whether the preferred option meets its objectives and achieves their desired outcomes.

The Proposed Regulations will sunset in 10 years, as per the requirements of the SLA. This provides an opportunity to reassess the stock of existing items in the Regulations, including those that are automatically exempt.

In addition, as a result of ongoing monitoring and evaluation and/or formal reviews, it may become apparent that the Regulations should be amended from time to time, to ensure new provisions in future Acts or amendments are captured appropriately and to remove any obsolete instruments or reassess instruments where their nature or use may have changed.

DPC will generally evaluate changes to the Proposed Regulations annually. DPC will also review and update the SLA Guidelines during the operation of the Proposed Regulations.

## Updates to the Proposed Regulations

DPC will work with the Office of the Chief Parliamentary Counsel to assess changes requested to the Proposed Regulations from departments and agencies. DPC will provide feedback on all requests. DPC will administer the following changes to the Proposed Regulations:

* adding a new instrument made under a provision to a schedule;
* moving an instrument from one schedule to another;
* removing an instrument provision from a schedule; or
* amending the description of an instrument in a schedule.

All change requests and supporting information should be emailed to GeneralOrdersLegislativeInstruments@dpc.vic.gov.au

### Requesting changes

Departments and agencies must provide the following information:

1. The title of the instrument (including the clause number);
2. Whether they want the instrument removed or amended;
3. The reason for the request.

### Requesting additions

Departments and agencies must provide the following information:

1. The title of the instrument (usually paraphrased from the text of the provision it is made under);
2. The principal Act and the provision under which it is made;
3. If relevant, in which schedule they want the instrument included;
4. A copy of an instrument made (if any have been made) under the provision and a summary about the effect of the instrument and provision;
5. Evidence (such as legal advice) to support:
a. the inclusion of the instrument in the Proposed Regulations and identifying, if relevant, which provisions of the SLA should not apply to the instrument
b. the characterisation of the instrument as either legislative or administrative in character.

### Administrative additions to Schedule 1

If the addition is on the basis that it is administrative in character but there is room for doubt, the requester should provide evidence (such as legal advice) to support this position of doubt and characterisation.

### Addition of an exempt legislative instrument in Schedule 3

Departments and agencies must first consider whether the instrument is in fact a legislative instrument captured by the SLA. For example, is it an instrument of purely administrative character, and so not captured in the definition of ‘legislative instrument’ in section 3 of the SLA?

### Addition of a legislative instrument that is exempt more broadly

Departments and agencies must first consider whether the instrument is in fact a legislative instrument captured by the SLA.

If the legislative instrument will be exempt from the Government Gazette publication provisions in the SLA, departments and agencies must provide evidence (such as legal advice) to support this.

# Consultation

In preparing the Proposed Regulations, DPC consulted with all departments.

This RIS will be available for 28 days for public consultation. The Proposed Regulations are intended to be made in June 2021.

The RIS will be advertised in the Government Gazette, on DPC’s website (www.vic.gov.au), Engage Victoria and a daily newspaper circulating generally throughout Victoria. Members of the public and bodies and offices affected by the Proposed Regulations will be able to make submissions to DPC on the Proposed Regulations.

Ministers and department General Counsels will be informed directly about the RIS.

## Attachment A –Consultation draft of Proposed Regulations

## Attachment B – Table summarising changes from Current Regulations to the Proposed Regulations

## Attachment C – Table of legislative instruments made under provisions that will be automatically exempt from certain requirements of the SLA

1. If no case by case exemption applies under s12F SLA department will need to undertake a RIS process or consider whether to seek an exemption under 12G (exempt from RIS requirement for 12 months). [↑](#footnote-ref-2)
2. Part 3A includes the requirement to publish in the Government Gazette (section 16A). [↑](#footnote-ref-3)
3. Attachment C to this RIS outlines the rationale for automatically exempting each of the legislative instruments that fall into this category. [↑](#footnote-ref-4)
4. Legislative instruments that are administrative are not required to meet any requirements of the SLA, including the publication of the making of an instrument in the Government Gazette. [↑](#footnote-ref-5)
5. *Parliamentary Debates,* Legislative Assembly, 2 September 2010, page 3616. [↑](#footnote-ref-6)
6. An instrument can still be exempted on a case-by-case basis by the responsible Minister if an instance of its use meets one or more of the exemption criteria in the SLA (section 12F). [↑](#footnote-ref-7)
7. This estimate is based on the 2010 RIS for Current Regulations which estimated $450 for 6 hours of staff time, which is equivalent to the midpoint of the VPS5 range in 2011 (plus oncosts and overheads of 75%). Using the 1 December 2020 VPS 5 level midpoint $111,734 ($101,120 - $122,348) plus 75% oncosts and overheads \* 6 hours gives an estimate of $592 which has been rounded to ‘approximately $600’ to avoid the implication of precision. [↑](#footnote-ref-8)
8. Not listed in any order of priority. [↑](#footnote-ref-9)
9. *Victorian Guide to Regulation*, 2016, page 19. [↑](#footnote-ref-10)
10. This estimate is based on the 2010 RIS for Current Regulations which estimated $450 for 6 hours of staff time, which is equivalent to the midpoint of the VPS5 range in 2011 (plus oncosts and overheads of 75%). Using the 1 December 2020 VPS 5 level midpoint $111,734 ($101,120 - $122,348) plus 75% oncosts and overheads \* 6 hours gives an estimate of $592 which has been rounded to ‘approximately $600’ to avoid the implication of precision. [↑](#footnote-ref-11)
11. This estimate is based on surveys completed by agency staff for the 23 RISs that received a letter of assessment from BRV in the 2019-20 financial year. This includes both agency staff costs and consultant costs, where relevant. This is an approximate figure, as costs fluctuate year to year and are influenced by outliers given the small sample size. Over the period, RISs varied in cost between about $30,000 and $800,000 and were prepared for regulations expected to have impacts ranging from small and unquantifiable to over $1 billion over 10 years. [↑](#footnote-ref-12)
12. Estimated based on the 593 provisions under which legislative instruments are proposed to be automatically exempt, and instruments being made on average about once every 14 to 24 months per provision. [↑](#footnote-ref-13)
13. If the base case applies the 7 legislative instruments in regulations 9 and 10 would need to be gazetted. Those legislative instruments are not currently reviewed by SARC. There is no data available to indicate how often those legislative instruments are made to then calculate the impact on SARC’s workload. [↑](#footnote-ref-14)
14. 17 provisions to make legislative instruments. [↑](#footnote-ref-15)
15. These cases are different to those exempt for public emergency reasons, where the legislative instruments are only 12 months in duration. [↑](#footnote-ref-16)
16. National uniform legislation schemes and RIS equivalent process. [↑](#footnote-ref-17)
17. These estimates relate to Schedule 3 provisions to make legislative instruments and those provisions in the main body of the Proposed Regulations. [↑](#footnote-ref-18)
18. This estimate is based on surveys completed by agency staff for the 23 RISs that received a letter of assessment from BRV in the 2019-20 financial year. This includes both agency staff costs and consultant costs, where relevant. This is an approximate figure, as costs fluctuate year to year and are influenced by outliers given the small sample size. Over the period, RISs varied in cost between about $30,000 and $800,000 and were prepared for regulations expected to have impacts ranging from small and unquantifiable to over $1 billion over 10 years. [↑](#footnote-ref-19)
19. Estimated range supplied by BRV, the central estimate of 50% has been used for the purposes of costings in Tables 7A and 7B. [↑](#footnote-ref-20)
20. Based on estimated BRV staff time spent on the 23 RISs which received a letter of assessment in financial year 2019-20. BRV notes that this figure is difficult to estimate precisely due to the uneven nature of the work, variation across RISs and the small sample size. Moreover, BRV undertakes a range of work beyond reviewing RISs which complicates estimating the effort spent on RISs. The estimate represents the expected marginal cost to BRV resources of reviewing one additional RIS. The central estimate of $15,000 has been used for Tables 7A and 7B. [↑](#footnote-ref-21)
21. $600 is the central estimate and is based on an expected cost to instrument makers of approximately the equivalent of 6 hours of VPS5 level staff time including oncosts and overheads. An upper bound estimate of $1,500 represents the equivalent of 15.5 hours of VPS5 level staff time including oncosts and overheads. [↑](#footnote-ref-22)
22. BRV costs of reviewing exemption certificates not estimated due to the difficulty in estimating them. They are difficult due to the voluntary, variable and ad hoc nature of these requests for advice. BRV spends a relatively small portion of its total effort on providing advice on exemptions, so excluding this cost should not materially affect the calculations. Agencies often prepare exemption certificates without seeking BRV advice, so this cost would only apply to a portion of the exemption certificates. [↑](#footnote-ref-23)
23. DPC expects that agencies spend approximately the same effort on a s12G certificate as on a s12F certificate. DPC processing of the request for exemption is expected to take approximately one week of VPS5 staff time on average, which at the average VPS5 salary is equivalent to $2,141 including oncosts and overheads. [↑](#footnote-ref-24)
24. DPC expects that agencies spend approximately the same effort on a request for placement of a provision on Schedule 3 or in the body of the Regulations as they would spend on an exemption certificate. [↑](#footnote-ref-25)
25. DPC does not keep data of all the costs (time and resources) used for the preparation of the Current or Proposed Regulations, once every 10 years, as this occurs within existing budgets. This is an illustrative estimate of staff costs and equates to about one year of VPS5 level staff time including oncosts or overheads and aligns with the average cost of preparing a RIS. [↑](#footnote-ref-26)
26. DPC does not keep data of all the costs (time and resources) used for the amending of the Current or Proposed Regulations, typically annually, as this occurs within existing budgets. This is an illustrative estimate where of staff costs are estimated to be about one tenth of the effort to make the Regulations. Note that this is multiplied by 0.9, as the Regulations are remade rather than amended in the 10th year. [↑](#footnote-ref-27)
27. Estimated based on those legislative instruments falling under the public interest exemption which would not otherwise be exempt through section 12F or 12G exemption certificates. Based on consultation with Departments, it is expected the Options would avoid 5 RISs per year, with 10 RISs per year representing the upper bound. There is no data available on the exact frequency that such legislative instruments are made. [↑](#footnote-ref-28)
28. Estimated as the average number of instruments automatically exempted under Schedule 3 or the body of the Regulations per year less the number that have a RIS prepared and less those that receive a 12G exemption. 255 is the central estimate and 435 is an upper bound. [↑](#footnote-ref-29)
29. Estimated as the average number of instruments automatically exempted under Schedule 3 or the body of the Regulations per year less the number that have a RIS prepared and less those that receive a 12G exemption and less those that would have received an exemption on National Scheme or RIS equivalence grounds. 245 is the central estimate and 415 is an upper bound. [↑](#footnote-ref-30)
30. This is estimated based on the 89 provisions exempt under the public interest grounds being used to make legislative instruments about once every 18 to 27 months on average, with 40 being the central estimate. [↑](#footnote-ref-31)
31. This is estimated based on the 87 provisions exempt under the National Scheme or RIS equivalence being used to make legislative instruments about once every 4 to 9 years on average, with 10 being the central estimate. [↑](#footnote-ref-32)
32. This is estimated based on the 593 provisions on Schedule 3 and in the body of the Regulations being used to make legislative instruments about once every 14 to 24 months on average, with 300 being the central estimate. [↑](#footnote-ref-33)
33. Annual figure estimate based on average amendments made to the Current Regulations over the last 10 years. [↑](#footnote-ref-34)
34. Office of the Commissioner for Better Regulation. (2016). *Victorian Guide to Regulation: A handbook for policy-makers in Victoria*. Melbourne, Australia. Accessed at: [http://www.betterregulation.vic.gov.au/files/98181269-905c-4893-bff3- a6bb009df93c/Victorian-Guide-to-Regulation-PDF-final.pdf](http://www.betterregulation.vic.gov.au/files/98181269-905c-4893-bff3-%20a6bb009df93c/Victorian-Guide-to-Regulation-PDF-final.pdf) [↑](#footnote-ref-35)