



<b>Report Title:</b>	<b>Ensuring public services are based on need</b>		
<b>Report No:</b>	2023-0308		
<b>Date:</b>	12 December 2023		
<b>To:</b>	<b>Hon Nicola Willis, Minister for the Public Service</b>		
<b>Action Sought:</b>	Discuss this briefing with officials	<b>Due Date:</b>	As soon as possible
<b>Contact Person:</b>	<b>Hannah Cameron - Deputy Commissioner Strategy and Policy</b>		
<b>Contact Number:</b>	9(2)(a) privacy		
<b>Encl:</b>	Yes – two appendices	<b>Priority:</b>	High: 100 Day commitment
<b>Security Level:</b>	<b>IN CONFIDENCE</b>		

### **Executive Summary**

1. You have been invited to report to Cabinet by the end of January on “*ensuring public services are available to all New Zealanders and are prioritised on the basis of need not race, e.g. ensuring government contracts are awarded based on value.*” At our meeting on 7 December, you stressed a desire for a practical and focused approach to this report back.
2. Government in New Zealand acts within a well-established legal and constitutional framework of non-discrimination. Within this framework, services targeted or designed for specific population groups are an established feature of good government and are supported by international convention and law.
3. This practice does not allocate services based on ethnicity per se, but aims to invest in specific population groups where there is evidence of persistent disparity in outcomes or opportunities between that group and the general population, or where evidence suggests different service designs will improve the efficacy of those services. In other words, ethnicity-based targeting is intended to coincide with a focus on need.
4. In a Treaty of Waitangi context, the Crown has repeatedly accepted that achieving equity for Māori may require different and targeted services, and any policy change that aims to eliminate culturally responsive approaches to service provision is likely to cause significant harm to the Crown-Māori relationship, strong objections from Māori entities and communities, 9(2)(h) legal privilege
5. In order to ensure agency proposals and decision-making about services are based on need, you could promote a new Cabinet Office circular setting out specific actions or considerations that Cabinet expects from agencies in this context.
6. We would need to engage more widely with service agencies on the content of such a circular, but at this stage we consider it could explore or emphasise:
  - the need for a strong evidential case for ethnically targeted or tailored services;
  - considerations relevant to when and how it is appropriate for the commissioning of such services to be devolved to external entities (such as with Whānau Ora); and/or

- a general expectation that, even where some targeting occurs, services should be universally accessible unless there is a good value-for-money reason.
7. Ensuring a focus on need also depends on agencies having the data needed to develop the evidential case above, and give Ministers confidence that culturally specific service models are likely to be effective. We suggest that we explore initiatives to support these ideas with Statistics NZ and the Social Wellbeing Agency and give you options for Cabinet to commission those initiatives in your January report back.
  8. Government Procurement Rules are still fundamentally grounded in the idea that all potential suppliers are assessed on merit. While the rules do require agencies to consider how to involve New Zealand businesses in contract opportunities (including Māori and Pasifika businesses), the emphasis is on providing opportunities to participate in procurement processes, and the contract award must still be based on the delivery of best public value.
  9. The Progressive Procurement Policy approved in 2020 includes a target that eight percent of mandated agencies' annual procurement contracts will be awarded to Māori businesses, and we outline several options in this paper, such as changing the policy to include additional groups and targets, removing the current target, or rescinding the policy.

### **Recommended Action**

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We recommend that you:

- a **discuss** this advice with officials  
*Agree/disagree*
- b **note** officials will commence drafting a Cabinet paper giving effect to these proposals, which we could provide you with before the end of the year, and will reflect your feedback as you are able to provide it  
*Agree/disagree*
- c **discuss** choices about the progressive procurement policy with the Ministers for Māori Development and Economic Development as soon as possible.  
*Agree/disagree*

Hon Nicola Willis  
**Minister for the Public Service**

## Purpose of Report

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10. You have been invited to report to Cabinet by the end of January on “*ensuring public services are available to all New Zealanders and are prioritised on the basis of need not race, e.g. ensuring government contracts are awarded based on value.*”
11. This report-back aligns with the commitment in both Coalition Agreements to “*issue a Cabinet Office circular to all central government organisations that it is the Government’s expectation that public services should be prioritised on the basis of need, not race, within the first six months of Government.*” It also aligns with the commitment in the Coalition Agreement between the New Zealand National and ACT New Zealand parties to “*ensure government contracts are awarded on value, without racial discrimination.*”
12. We understand this report-back to respond to a concern that some services may be arbitrarily targeted to ethnicity. At our meeting on Thursday 7 December you expressed a wish for a focused and practical approach to this report back.
13. This briefing provides separate options and analysis on ensuring services are aligned with need and how you can ensure contracts are awarded based on value, as the latter is driven by a specific set of existing rules and policies. If you wish, your choices on these options can inform a draft Cabinet paper that we could provide to you before the end of the year.

## Equity vs ‘equal’ treatment and population-specific services aligned to ‘need’

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14. Government in New Zealand acts within a well-established legal and constitutional framework of non-discrimination, including the right to freedom of discrimination on the grounds of race.<sup>1</sup>
15. At the same time, services targeted or designed in a way that responds to the needs of specific population groups is an established feature of good government, both domestically and internationally. This practice does not allocate services to people based on ethnicity per se, but it does propose specific investment in a population group where there is evidence of persistent disparity in outcomes or opportunities between that group and the general population, and therefore a particular **need** for support if that group is to enjoy a standard of living equal to others.<sup>2</sup>
16. This practice also recognises that services designed or delivered in a way that aligns with the distinct way of life of a particular group are often more effective, thereby improving the overall efficiency of public services.<sup>3</sup> Tailored service design can therefore be thought of as ensuring that all individuals have the same ‘ability to benefit’ from public services, such as in the tailored rollout of vaccination to Māori during the Covid-19 pandemic.
17. Targeting services is not limited to ethnically defined population groups, and routinely extends to groups such as disabled persons, senior citizens, people living in rural areas, or groups with diverse sexualities or gender identities. Where such approaches target the unique needs of defined population groups, they are recognised and endorsed in international

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<sup>1</sup> See s19 New Zealand Bill of Rights Act and the Human Rights Act 1993.

<sup>2</sup> For example, services targeting Māori are often based on evidence from deprivation indices that shows significant overlaps between areas with high deprivation and significant or majority Māori populations.

<sup>3</sup> Such as when services are delivered in culturally specific environments, or in formats that locate the individual within a family or tribal context, rather than separating them out for individualised treatment.

conventions and law as being non-discriminatory,<sup>4</sup> and we consider they are likely to be a key factor in international assessments of New Zealand’s performance against such conventions. They are also permitted (and may be required in order to **remove** discrimination) under the New Zealand Bill of Rights Act 1990.<sup>5</sup>

18. We also consider that this practice aligns well with a key feature of ‘social investment’ approaches, in that they target particular groups where more effective service provision or focused investment would have a significant impact on both outcomes for that group and the Crown’s long-term fiscal liability.
19. There is a wide range of such services already funded in an ongoing sense within baselines. Where these are focused on culturally specific approaches, they rarely exclude people from the general population from accessing them.<sup>6</sup>

### **Importance for the Crown-Māori relationship**

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20. In addition to the general analysis above, Māori have consistently asserted that such approaches are fundamental to the Crown meeting its ongoing obligations under the Treaty of Waitangi. Repeated inquiries in the Waitangi Tribunal have established expectations that:
  - a. Article Three is not only about equal treatment at law (in terms of fundamental rights and privileges), but also about seeking to achieve ‘equitable outcomes’, thereby requiring investment in Māori-specific services where disparities persist; and
  - b. the ‘tino rangatiratanga’ guaranteed in Article Two can be given practical effect alongside the Crown’s right to govern by delegating or sharing decision-making or commissioning functions in relation to service design and delivery with Māori.
21. The Crown retains responsibility for the balance of investment between general and Māori-specific services and for ensuring that overall outcomes are improved. Where commissioning roles have been devolved to entities such as the Whānau Ora Commissioning Agency, those roles are still subject to strong public scrutiny.
22. Nevertheless, the Crown has repeatedly accepted that achieving equity for Māori may require different and targeted services and may need to proceed at a pace and scale tailored to the needs of Māori.<sup>7</sup> This is an ongoing theme of Waitangi Tribunal Kaupapa Inquiries, which often examine contemporary service design and delivery in the context of whether the Crown has taken reasonable steps to address disparities and enable rangatiratanga, which the Crown has also acknowledged the need for.
23. For these reasons, any policy change that aims to eliminate culturally responsive approaches to service provision is likely to cause significant harm to the Crown-Māori relationship, entrench poor outcomes in Māori communities, and facilitate strong objections from the Iwi Chairs Forum, individual iwi and hapū, pan-Māori organisations and urban Māori authorities, Māori communities, and significant Māori service providers. Our experience is that damage to

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<sup>4</sup> Article Two of the International Convention on the Elimination of all Forms of Racial Discrimination notes that: “special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms **shall not be deemed racial discrimination**”

<sup>5</sup> New Zealand Bill of Rights Act 1990, s 19(2) and s 5.

<sup>6</sup> For example, the Māori health provider Ora Toa in Wellington does not limit access to their services based on ethnic identification.

<sup>7</sup> See Crown Closing Submissions to Tribunal, Housing Kaupapa Inquiry, 8 November 2021, Wai 2750, para 37.

these relationships in one area can translate into relationship challenges in other unrelated policy areas you may wish to progress.

## **Requirements and mechanisms that influence the targeting of public services<sup>8</sup>**

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24. There is a wide range of requirements, guidance, practices, and mechanisms that shape the targeting and design of public services (and, in particular, choices about the targeting of services to particular ethnic populations). At a high level, these include:
- a. *general legislative requirements for services to be culturally responsive or responsive to the needs of different population groups* (e.g. a key purpose of the Accident Compensation Act 2001 is ‘ensuring that the Corporation monitors access to the scheme by...identified population groups in order to deliver services under this Act in a manner that supports access by...those population groups’);
  - b. *specific legislative requirements on decision-makers to consider the Treaty of Waitangi and associated principles and/or do certain things in order to give effect to those* (e.g. section nine of the Education and Training Act 2020 includes a range of provisions that are intended to help the Crown give effect to the Treaty);
  - c. *existing Cabinet guidance or established practices of government, i.e.*
    - i. Cabinet paper requirements around assessing the needs and impact of proposals on specific population groups;
    - ii. existing Cabinet guidance on the Treaty of Waitangi – Cabinet Office Circular CO (19) 5 provides questions for Ministers, chief executives, and officials to consider when assessing whether policy appropriately recognises the Treaty in particular circumstances, and we expect this to apply to proposals for service provision;
    - iii. The Office for Māori-Crown Relations’ engagement framework provides guidance to agencies about how they should engage with Māori when developing policy in order to achieve better outcomes and meet Treaty obligations;
  - d. *budget and funding processes* – Ministers can influence the targeting of new or additional services within the parameters of budget initiatives or the appropriation structures, although sometimes funding will sit within more general appropriations. Similarly, budgeting processes within agencies have a significant influence on the mix and type of services tendered for/delivered;
  - e. *relationship instruments that influence the commissioning of public services for specific population groups, e.g.*
    - i. voluntary relationship agreements between agencies and ethnically aligned community or political entities (such as the Ministry of Justice’s Mana Orite agreement with the Ināia Tonu Nei group of iwi/Māori leaders);
    - ii. more formal agreements in Treaty settlements (such as Te Hiku Forum and the Tūhoe Service Management Plan, which facilitate a partnership between the Crown and iwi/Māori to improve outcomes for Māori in particular areas);
  - f. *other organisational structures, roles, or arrangements* within agencies designed to engage or incorporate ethnic-specific perspectives or involve representatives of such

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<sup>8</sup> This briefing focuses on mechanisms relating to the provision of social services, as mechanisms and obligations relating to wider public goods and services (such as conservation or natural resource management) are often influenced by different considerations and arrangements.

groups in decision-making processes around service design (such as Māori advisory committees or external Māori representatives in departmental decision-making);

- g. *commissioning models and approaches* – this includes the development and monitoring of outcome frameworks or needs analyses for specific population groups in service design, and strategic decisions about whether funding and design choices should in some cases be devolved to community-based commissioning agencies aligned to particular population groups or should adopt culturally specific approaches (e.g. Whānau Ora);
- h. *procurement and contracting processes* – rules, guidance, and templates in this area can influence approaches by agencies to tendering for services and selecting providers; and the populations eligible for particular services.

### **Options for ensuring the alignment of services with need**

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25. For the reasons given above, we consider that in many cases, targeting or designing services for particular ethnic population groups **represents** a focus on significant need.
26. Questions around the specificity or appropriateness of Treaty or general cultural responsiveness clauses in legislation require a much longer and context-specific work programme than could be completed by the end of January. We note that both Coalition Agreements specifically refer to the potential for work in relation to Treaty clauses, and you may wish to pass this advice onto relevant Ministers in that context. In addition, options for ensuring that service investment choices made in the central government budget process are consistent with need are largely within your control as Minister of Finance via budget policy and process.
27. However, we have considered two options which could fulfil the requirements of this report-back by helping to ensure decisions or advice generated about the targeting of services to ethnic population groups are made on the basis of a genuine, well evidenced assessment of need. These options are complementary, and we recommend they are explored together.

### **A new Cabinet circular on ensuring a needs-based approach to public service provision**

28. You could promote a new Cabinet Office circular setting out specific Cabinet expectations of agencies to ensure a focus on need in public service provision. **Appendix One** sets out a hypothetical outline of such a circular, although we would need to consult widely (particularly with social sector agencies) during the Cabinet paper process to ensure these expectations work in a range of different domains.
29. This option would work in conjunction with existing mechanisms, providing more specificity (and, to some extent, constraints) on how services can be targeted or designed with ethnic population groups in mind, while still fundamentally being driven by need. In response to your wish for a focused and practical approach, we have based the outline of the circular on:
  - the need for a high quality, evidence-based case for targeting and the efficacy of any culturally responsive service model proposed;
  - considerations relevant to the potential devolution of service commissioning, including how any such proposals relate to existing devolved models that we understand you support (such as Whānau Ora); and
  - a general expectation that, even where some targeting occurs, services should be universally accessible unless there is a good value-for-money reason for restricting access to the specific population group.

30. The directions in this circular would bind the public service, and act as non-binding guidance on the wider public sector. If you wish to ensure this direction binds Crown entities with a significant role in commissioning social services, other levers would be required i.e. formal direction under the Crown Entities Act 2004. Approaches are likely to vary depending on the specific sector, but we can provide further advice to you on this point if you wish.

*Potential to expand the content of this direction*

31. In theory, the content of this circular could be expanded to relate to the mechanisms discussed in paras 23(c) and 23(f), aiming to provide more specificity about how ethnic population groups are **engaged** in the targeting of public services, or **involved in decision-making processes** about such targeting.
32. However, this approach raises significantly greater risks than the approach set out in **Appendix One**, 9(2)(h) legal privilege [REDACTED].
33. In this context, we have not explored statements in the circular that would limit or constrain engagement with Māori, but can provide you with further advice on this issue if you wish.

**Strengthening the data and analysis that ensures a focus on need**

34. Ensuring a focus on need in social service provision depends on agencies having access to good quality, granular data – i.e. proposals for culturally specific investment or service design should be supported by clear evidence of outcome disparity and a long run benefit from investment. Similarly, Ministers need confidence that culturally specific service models are supported by comparable evaluations or will be comprehensively evaluated over time.
35. We expect that, in many cases, there will be gaps in the granularity of data about ethnic population groups that may prevent agencies from making a clear business case for investment in specific cohorts<sup>9</sup>. This would thereby increase the risk that such investment is perceived as being based on ethnicity per se, rather than need. We also consider there is scope for significant improvements in the quality and regularity of service evaluations.
36. We could explore these ideas with Stats NZ and the Social Wellbeing Agency and look to develop specific initiatives to address such challenges. You could then seek any Cabinet decisions required to commission such initiatives in your January report back.

**Ensuring government contracts are awarded based on value**

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37. Procurement is the responsibility of the Minister for Economic Development, and progressive procurement is the joint responsibility of the Ministers for Māori Development and Economic Development. The implementation and administration of the progressive procurement policy is co-led by TPK and the Ministry for Business, Innovation and Employment (MBIE).

**Procurement rules**

38. The Government Procurement Rules (the Rules)<sup>10</sup> apply to public service agencies' procurement practice and are supported by procurement principles and a procurement charter. Together, they provide an important framework for agencies in ensuring public value through procurement. The rules are grounded in the idea that all suppliers are assessed on

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<sup>9</sup> The Social Wellbeing Agency has already commenced work to understand agency capability in this area.

<sup>10</sup> [www.procurement.govt.nz/assets/procurement-property/documents/government-procurement-rules.pdf](http://www.procurement.govt.nz/assets/procurement-property/documents/government-procurement-rules.pdf)

merit and the delivery of value, with *Rule 3: 'Non-discrimination and offsets'* stating that “all suppliers must be given an equal opportunity to bid for contracts” and “suppliers must not be discriminated against.”

39. At the same time, the Rules steer agencies to be aware of their obligations under the Treaty of Waitangi and how these obligations relate to their procurement activities. A mechanism referred to as the Treaty exception (linked to *Rule 3*) allows the government flexibility in implementing domestic policies in relation to Māori. However, the exception may not be “used as a means of arbitrary or unjustified discrimination.”
40. *Rule 17: 'Increase access for New Zealand businesses'* requires agencies to consider how to involve such businesses in contract **opportunities** (including Māori and Pasifika businesses). This idea is also reflected in the second Principle of Government Procurement: ‘Be fair to all suppliers’ and in clause 5 of the Government Procurement Charter, which directs agencies to ‘promote inclusive economic development within New Zealand’ by engaging with, including, and supporting Māori businesses and enterprises through procurement processes. But again, these opportunities must not preclude other suppliers and **the contract award must still be based on the delivery of best public value** – the emphasis is on providing opportunities to participate in procurement processes, **not a preferential awarding of contracts**.
41. The rules themselves do not establish agency performance metrics for procurement.

### **Progressive Procurement Policy**

42. In 2020, Cabinet agreed to a Progressive Procurement Policy (the Policy) [CBC-20-Min-0072 refers]. The Policy is aimed at increasing supplier diversity in government procurement and promoting change in government procurement processes and behaviours to achieve more broader economic and social outcomes, starting with Māori businesses. It reflects the view that building supplier diversity and market access can support greater innovation, economic resilience and regional economic opportunities.
43. The Policy has a dual focus on both buyers (agencies) and suppliers (businesses). It sets a target that eight percent of mandated<sup>11</sup> agencies’ annual procurement contracts will be with Māori businesses. As such, it is essentially a way of driving the implementation of *Rule 17*, and does so by assessing agency performance against a readily identifiable and measurable sub-group. It also provides for supplier support, including the building of capability and technical expertise, supporting engagement in tender processes, and by connecting buyers and suppliers.
44. But as with the rules themselves, it does not discriminate against suppliers, nor does it guarantee suppliers of a contract. Suppliers need to be successful based on their own merits.

### *Current funding*

45. Budget 2022 provided funding of \$26 million over two years for progressive procurement. For 2023/24 this is \$4.194 million departmental and \$7.806 million non-departmental. Funding for the activities provided by Te Puni Kōkiri and MBIE expires in June 2024. The activities currently funded include a capability uplift programme which has seen \$47.5 million in contracts secured, of which \$27.6 million is with mandated government agencies. Te Puni Kōkiri is currently investigating options to secure ongoing funding with a focus on the provision of support pathways such as capability uplift.

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<sup>11</sup> The rules apply to core Crown agencies and a wide range of Crown agents and other public sector agencies.



## Options for change

46. Based on your direction about this work so far, we have considered three options for change, depending on which aspects of the status quo you wish to address.

### *Option A: Change the focus of the target in the Progressive Procurement Policy*

47. If you are concerned about the ethnicity focus of the current target, you could seek Cabinet's approval for a range of additional targets (such as targets for contracts awarded to environmentally sustainable businesses or businesses that utilise local labour), or a single broader target (such as a target focused on a proportion of New Zealand owned businesses<sup>12</sup>).

### *Option B: Remove targets*

48. If your concern is the impact targets have on agencies' ability to exercise a non-discriminatory approach to awarding contracts (or both this and the nature of the target), you could propose that Cabinet remove the target from the Policy. There is now baseline data that will allow officials to track supplier diversity, so retaining the policy (minus the target) could continue to provide some focus on supporting progressive procurement, without setting expectations for agencies to award a percentage of contracts to specific categories of supplier.

### *Option C: Rescind the Progressive Procurement Policy*

49. If you do not wish to place significant emphasis on these concepts at all, Cabinet could rescind the Progressive Procurement Policy entirely. As noted above, the substantive intention behind the policy is already reflected in the overarching procurement rules, charter and principles, so promoting diversity could still be a feature of agency procurement approaches.

## Analysis

50. Te Puni Kōkiri considers that work on the supplier side of the progressive procurement policy has seen real benefits in building economic stability, innovation, and regional employment opportunities, and that as such, Ministers should consider pursuing some version of **Option A** by broadening the scope of the policy beyond the initial starting point of Māori businesses.
51. The Public Service Commission considers that the work programmes associated with the policy could continue without a specific target, and we do not consider such targets are necessary to drive performance in the areas your Government has identified as a priority. As such, at a minimum, we recommend you pursue **Option B**.
52. Given this, we recommend you discuss the options with the Ministers for Māori Development and Economic Development as soon as possible. We note that you could also discuss with the Minister for Māori Development the scope, nature and resourcing of ongoing work programmes focused on progressive procurement under any of the options above.

## Next Steps

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53. We are available to discuss the ideas in this report as soon as is convenient for you. We will begin drafting a Cabinet paper, and will reflect your feedback as you are able to provide this. We will look to provide you with a draft of this before the end of the year (subject to your feedback and discussion with other Ministers on progressive procurement issues) along with a proposed timeline for achieving the report back at the end of January.

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<sup>12</sup> This option may require more detailed analysis against New Zealand's international commitments to see if such a target would be consistent with those commitments.

## **Appendix One: Outline of a possible Cabinet Circular on needs-based service provision** (subject to your feedback and Cabinet paper consultation)

### **Purpose**

This circular sets out the Government's expectations for how the targeting, commissioning, and design of public services should be based on the needs of all New Zealanders.

### **Context**

The Government seeks to ensure that all New Zealanders, regardless of ethnicity or personal identity, have access to public services that are appropriate and effective for them, and that services are not arbitrarily allocated on the basis of ethnic identity.

### **What is required?**

Consistent with this vision, Cabinet expects that:

- when considering proposals for services targeted to specific ethnic populations, agencies should:
  - engage responsible Ministers early about choices or options being considered;
  - provide a strong analytical case for targeted investment (based on empirical evidence about the nature and extent of the disparity in outcomes – i.e. the need – that such services are trying to address) and an assessment of any opportunity costs in terms of the service needs of all New Zealanders; and
- where it is proposed to devolve commissioning of such services to entities external to Government, agencies should make clear:
  - the rationale and evidence supporting such devolution;
  - whether and how such devolution fits with pre-existing vehicles for devolved commissioning (such as Whānau Ora), and how any separate devolution will maintain efficiency in this respect; and
  - how the contractual mechanisms that devolve commissioning powers will ensure such entities are held to account for the expenditure of public funds.

- when proposing that services are designed or delivered in a culturally specific or culturally responsive way, agencies should provide clear analysis of those model features, including:
  - why and how it is expected that such elements will improve the efficacy of the proposed service;
  - the extent to which such elements are likely to either increase or make savings in relation to the total cost of service provisions, and how they might affect competitive tendering for that service.
  
- where targeted investment occurs, service eligibility is not restricted to the particular population group unless there is a strong value-for-money rationale for doing so.

9(2)(h) legal privilege

