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| <b>Title:</b>                  | Revisions to draft Cabinet Office circular on ensuring public services are based on need |                        |                      |
| <b>Report No:</b>              | 2024-0154  |                        |                      |
| <b>Date:</b>                   | 16 May 2024  | <b>Security Level:</b> | <b>IN CONFIDENCE</b> |
| <b>Minister and Portfolio:</b> | Hon Nicola Willis, Minister for the Public Service                                       |                        |                      |

**Purpose**

This Aide Memoire provides options and analysis for revisions to the draft Cabinet Office Circular we have been discussing with you on ensuring public services are based on need.

We have previously briefed you on the invitation (originally as part of the Government’s 100-day plan commitments) for you to report back to Cabinet 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” - [2024-0025, 2024-0013, 2023-0318, and 2023-0308 refer]. We provided both a draft Cabinet paper on these issues and a draft Cabinet Office circular setting out expectations for how decisions or advice about the targeting, design, and commissioning of services should be based on need.

On Wednesday 15 May we met with you and coalition partners to discuss this circular. You requested further revisions to the circular providing:

**Context**

- for the inclusion of the text in Article One, Clause Four of the International Convention on the Elimination of All Forms of Racial Discrimination, that clarifies how special measures taken to ensure certain racial or ethnic groups equal enjoyment of human rights and fundamental freedoms shall not be deemed racial discrimination; and
- options for further clarifying how agencies consider ethnic identity<sup>1</sup> as part of an assessment of need.

Point one has been provided for in new (blue) paragraph five of the revised circular **attached** – we have no concerns about the inclusion of this statement.

We have provided three options in relation to your second request, shown in new (red) paragraphs six (Option A), eight (Option B) and nine (Option C).

**Analysis**

In assessing these options, we have considered two different approaches that the government might choose to pursue in targeting services and investment:

- **Scenario One: Additional investment to address historical disparity** – where there is a persistent disparity in outcomes between a specific population and the general population, and evidence that this is at least partly driven by historical reasons (such as dislocation or deprivation), the Government may consider there to be a fiscal, moral, or (in the case of Māori) a Treaty of Waitangi based case for investing more in that specific population. In this scenario, the ‘targeting’ is a specific increase or ring-fencing of investment for the population group, but the service design or delivery may not be any different from the status quo.

<sup>1</sup> We have continued to use the term ethnic identity throughout this briefing, as it provides for a more flexible, contemporary concept of identity than ‘race’, which is associated with a determinative judgment about people’s physical or biological characteristics, and which doesn’t allow for the idea that many people are of mixed racial heritage.

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- **Scenario Two: Specific service models where general services are less effective** – where there is a disparity in outcomes between a specific population group and the general population, and there is good evidence that this is at least partly driven by service models not being sufficiently tailored to the unique needs of the specific population group and therefore ineffective in closing the outcome disparity. In this case, the investment level may or may not change, but the service design model would (such as when service models for Māori utilise on-marae or group formats, or other culturally specific ways of delivering a service).

These approaches are not mutually exclusive, and both are possible whether you think about outcomes at a macro level (e.g. life expectancy), or an intermediate level in terms of the variables that drive the macro outcome (e.g. smoking, nutrition, housing).

The Waitangi Tribunal – and in some cases the Courts – will expect the Government to have an analysis and explanation for how it considers these approaches in respect of meeting its Treaty of Waitangi obligations, especially in those areas where it is not disputed that Māori outcomes are disparate from those of the general population.

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### Option A

Of the options, we consider Option A is sufficient to clarify the intention to ensure that ethnic identity or other forms of personal identity are not used as a proxy for need, and therefore a justification in itself for targeted services. While it may not be perceived as acting on the ‘operative’ parts of the circular (i.e. as influencing the specific requirements on agencies), it does make the context explicit and influences how the operative provisions of the circular are read.

### Option B

Option B is the specific option we were requested to consider. We do not recommend this option as we think it is conflating the assessment of the intermediate drivers (‘variables’) of an outcome – e.g. smoking, nutrition, or housing in the case of life expectancy - with an assessment of need in relation to each of those drivers - which would happen at the same time as agencies are considering the relevant drivers and which is a distinct consideration.

In doing so, and in suggesting ethnic identity is the last thing the Government should consider in assessing need, we think it is likely to imply that the Crown does not have an open mind about both the scenarios above – i.e. about how ethnic identity will often coincide with need (for historical reasons) or how ethnic groups may have particular service design needs in the present.

9(2)(h) legal privilege

As advised [2023-0308 refers], the Crown has previously acknowledged that Article Three of the Treaty is not only about equal treatment at law (in terms of fundamental rights and privileges), but also about seeking to achieve ‘equitable outcomes’, which means that, in some situations, it is required to take active steps such as investing in Māori-specific services where disparities persist. 9(2)(h) legal privilege

**Option C**

Option C is drafted in a very similar way to Option A, but is framed as a specific requirement. We have drafted Option C in a way that we consider would mitigate the risks of option B, while still emphasising that you do not wish agencies to use ethnic identify as a proxy for the need for targeted services.

**Summary**

We are comfortable with either Option A or C, subject to your view on whether having an additional statement in the requirements section is important.

While we cannot predict or quantify how often the Circular will change the behaviour of agencies (given that we do not know how often agencies are using ethnicity as a proxy at present), we consider that Options A or C along with the existing text will ensure much greater scrutiny in situations where this is occurring.

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**Next steps**

We are happy to discuss these options and the associated risks further if you wish. Following any further consultation and your decision on these options, we can provide you with a final draft of both the Cabinet paper and the Circular for progressing to Cabinet on Monday 27 May.

As previously discussed, we have not undertaken departmental consultation on the draft Cabinet paper. We will liaise with your office on the preferred approach.

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**Author**

Tim Saunders, Principal Analyst – Strategy and Policy

**Manager**

Callum Butler, Director – Strategy and Policy

## [Appendix One DRAFT] Circular

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| <b>Intended for</b> | All Ministers<br>All Chief Executives<br>Chief of Staff, Prime Minister's Office<br>Chiefs of Staff, ACT Party & New Zealand First<br>All Senior Private Secretaries<br>All Private Secretaries<br>All officials involved in service design, commissioning, and delivery;<br>and/or policy advice relating to these activities |
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### Needs-based service provision

#### Purpose

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

#### Application

2. The expectations set out in this circular apply to public sector agencies, as defined in paragraph 3.5 of the Cabinet Manual 2023.
3. All public service chief executives and those in their agencies who undertake activities related to this circular must follow the expectations. Where Crown entities, state-owned enterprises, or other public sector agencies have roles in service design, commissioning, and delivery, they should comply with the expectations as far as possible, taking into account their legal obligations, statutory functions and duties.

#### Context

4. 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 ethnicity or any other aspect of identity.
5. [The International Convention on the Elimination of All Forms of Racial Discrimination provides 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, provided, however that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”<sup>2</sup>*

6. The Government is concerned that in the absence of clear expectations, agencies may use ethnic identity or other forms of personal identity as a proxy for need, and therefore a justification in itself for targeted services. The requirements in this Circular aim to address this concern. **[Option A]**

### **What is required?**

7. Consistent with this context, Cabinet expects that:
- 7.1. when considering proposals for services targeted to specific population groups, agencies should engage responsible Ministers early about choices or options being considered and:
    - 7.1.1. provide a strong analytical case for targeted investment (based on empirical evidence about why such interventions are necessary, i.e. the disparity in outcomes between the target and the general population and why general services are not sufficient to address this) and an assessment of any opportunity costs in terms of the service needs of all New Zealanders; and
    - 7.1.2. provide clear advice on how service design, funding, prioritisation, eligibility criteria and frontline resources can be aligned with this assessment of need;
  - 7.2. when proposing services should be designed or delivered in a culturally specific or responsive way, agencies should provide clear analysis of that model, including:
    - why and how it is expected that such a model will improve the efficacy of the proposed service and how it will be evaluated over time;
    - how such a model will impact on competitive tendering for the service or its total cost.
  - 7.3. where culturally specific models are used, eligibility should not be restricted to the specific population group unless there is a strong value-for-money rationale;
  - 7.4. agencies should regularly review services targeted to specific population groups to ensure they remain necessary to achieve their original objectives.

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<sup>2</sup> <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial>

8. In making the assessment above, Cabinet expects agencies will recognise that there are many variables that can be used to identify and assess need, and that all other variables should be exhausted before ethnic identity is used to determine that need. **[Option B]**
9. In making the assessment above, Cabinet expects that agencies will consider all the drivers of an outcome and all the dimensions of need, rather than simply using ethnic identity or other forms of personal identity as a proxy for need. **[Option C]**

### **Distribution of circular and further guidance**

10. Public Service chief executives should forward copies of this circular to the heads of relevant public sector agencies within their Ministers' portfolios.
11. The Social Wellbeing Agency provides a range of [guidance](#) on the use of data and analytics in the social sector to help service agencies and providers make decisions grounded in evidence and strengthen evaluation practices. The Treasury's [Living Standards Framework](#) and [He Ara Waiora](#) provide frameworks for thinking holistically about the dimensions of need beyond (but inclusive of) financial capital.
12. Stats NZ's [Ngā Tikanga Paihere](#) support ethical data practice and research by providing guidance about informing or involving communities of focus, transparency of data use, and thinking about the consequences of data use for communities.

Rachel Hayward

Secretary of the Cabinet and Clerk of the Executive Council

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#### **Enquiries:**

Te Kawa Mataaho | Public Service Commission

9(2)(a) privacy

[commission@publicservice.govt.nz](mailto:commission@publicservice.govt.nz)