

Regulatory Impact Statement

Assessment of options to further improve timely access to a greater variety of copyright works for New Zealanders with a print disability under the Marrakesh Treaty

Agency Disclosure Statement

1. This Regulatory Impact Statement (**RIS**) has been prepared by the Ministry of Business Innovation and Employment (**MBIE**).
2. It provides an analysis of options to further improve timely access to a greater variety of copyright works for New Zealanders with a print disability under the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (the **Marrakesh Treaty**).
3. The analysis assumes that:
 - New Zealand will agree to take the minimum necessary legislative steps to accede to the Marrakesh Treaty; and
 - the international legal framework provided by the Marrakesh Treaty will be utilised. The Marrakesh Treaty only entered into force on 30 September 2016 so the extent to which cross-border exchange of accessible format copies of works will occur, between overseas organisations and New Zealand organisations authorised to provide for individuals with a print disability, is unknown.
4. New Zealand has yet to accede to the Marrakesh Treaty, and evidence of the problem is drawn from qualitative submissions during public consultation and relevant international experience. As a result, the size of the problem, and costs and benefits of the options are difficult to quantify.
5. In the public consultation process, submitters strongly supported making the necessary amendments to accede to the Marrakesh Treaty and considering further options to improve access.
6. Options related to expanding the group of organisations and individuals that can produce and provide accessible format copies of works were not tested as part of the public consultation process. High level consultation was held with two key stakeholders once the specific options were developed.
7. This RIS should be read together with the National Interest Analysis on the proposed accession to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, which can be found [here](#) on MBIE's website.

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Status Quo

- 1 For the purposes of this RIS we assume that New Zealand will accede to the Marrakesh Treaty and has made the minimum necessary amendments to the Copyright Act 1994 (the **Act**).

Role of copyright and copyright exceptions

- 2 The New Zealand copyright framework aims to give people an incentive to create and disseminate creative works. It provides copyright owners with the right to authorise or prevent certain uses of their work (e.g. to authorise the copying or reproduction of the work in a different format).
- 3 However, copyright must strike a balance. Over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and 'follow-on' creation — that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services. It can also inhibit important cultural activities, such as those of educational, library and archival organisations.
- 4 The exclusive rights provided to the owners of copyright (the **rights holder**) in a work under section 16 of the Act include:
 - a. to copy the work;
 - b. to communicate the work;
 - c. to make an adaptation of the work; and
 - d. to authorise another person to do any of the above acts.
- 5 The Act also provides certain exceptions and limitations to these rights that enable a person to perform certain restricted acts without needing the authority of the copyright owner. The copyright owner may or may not receive compensation in these circumstances.

Current exception for individuals with a print disability

- 6 New Zealand has an exception to copyright infringement for the benefit of individuals with a print disability in section 69 of the Copyright Act 1994 (the **section 69 exception**). It allows bodies prescribed in Regulations (**prescribed bodies**) to produce¹ and provide² accessible format copies of copyright works for individuals with a print disability.
- 7 An individual with a print disability is defined as a person who is blind, severely visually impaired, unable to hold or manipulate a book, unable to move or focus their eyes, or experiences a disability with respect to visual perception. Prescribed bodies can provide individuals with a print disability copyright material that is in an accessible format that meets their specific needs. For example, braille, large print, or audio versions (**accessible format copies**).

¹ The term 'produce' is used to describe the process of taking a legally obtained copyright work (electronic or hardcopy) and making it into an accessible format copy for the personal use of individuals with a print disability.

² The term 'provide' refers to the distribution or communication of an accessible format copy for the personal use of individuals with a print disability.

- 8 The only requirements to become a prescribed body under the section 69 exception are that the organisation is not-for-profit and copies are produced only for individuals with a print disability. The Minister of Commerce and Consumer Affairs also takes into account the views of affected stakeholders, and ability of an organisation to fulfil the conditions in the section 69 exception, related to the production of accessible format copies, which are:
- a. the organisation must make reasonable efforts to obtain a copy of the work in the required format, within a reasonable time at an ordinary commercial price, but has been unable to do so (the **commercial availability test**);
 - b. the copy made in the required format is provided only to people with a print disability;
 - c. reasonable steps are taken to notify the copyright owner that the copy has been made, as soon as practical; and
 - d. the reproduction of the work is not-for-profit.
- 9 How these conditions must be fulfilled is not prescribed. New Zealand's actively producing prescribed bodies, the University of Auckland and the Blind Foundation, have established voluntary processes to satisfy these conditions (e.g. providing only to members and having membership requirements that determine whether an individual has a print disability).
- 10 Upon request rights holders will usually provide prescribed bodies with access to an electronic copy of the requested work. This saves prescribed bodies time and cost when producing accessible format copies.³
- 11 The success of the system is based on the mutual trust between rights holders and prescribed bodies.

Proposed accession to the Marrakesh Treaty

- 12 An estimated 90 per cent of all written materials published worldwide, are unable to be accessed in a format that meets the particular needs of individuals with a print disability. Limited access to works in accessible formats is a barrier to participation in public life, and restricts employment, educational and recreational opportunities for the estimated 168,000 New Zealanders with a print disability.
- 13 The Marrakesh Treaty aims to facilitate greater access to works in accessible formats by allowing for and encouraging cross-border exchange of such works between countries party to the treaty (**member countries**).
- 14 New Zealand already largely complies with the Marrakesh Treaty obligations through the section 69 exception. However, amendments are required to the exception to align with Marrakesh Treaty obligations. The only feasible option to ensure compliance with these obligations is to:
- provide for the import and export of accessible format copies between member countries;

³ Recording a single book is estimated to cost around \$3000 and producing a Braille book can cost up to \$5000 per book depending on factors such as the length, complexity and the inclusion of diagrammatic content.

- extend the definition of 'works' (to which the section 69 exception applies) to include artistic works;
 - expand the conditions applied to prescribed bodies in the section 69 exception to include the maintenance of due care in, and records of, its handling of copies of works; and
 - clarify that the definition of print disability includes individuals who have a visual impairment or perceptual or reading disability, which cannot be improved to give substantially similar function as a person without such an impairment.
- 15 These amendments are expected to go some way towards facilitating more timely access to works in accessible formats for individuals with a print disability. In particular prescribed bodies would be able to easily and inexpensively import and distribute works in accessible formats that have been produced in other jurisdictions. This will allow better use of the resources available, particularly given resource strains due to rising production costs and increasing demand (with an aging population).
- 16 The Marrakesh Treaty is likely to provide a range of benefits to individuals with a print disability, including improved access to education, enhanced participation in public life, greater autonomy and independence, and improved health outcomes.
- 17 An analysis on New Zealand's proposed accession to the Marrakesh Treaty is provided in the National Interest Analysis on the proposed accession to the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (**NIA**), which can be found [here](#) on MBIE's website. The NIA and this RIS should be read together.

Problem definition

- 18 The problem is that limited access to works in accessible formats for individuals with a print disability will likely only be partially addressed if New Zealand takes the minimum steps necessary to accede to the Marrakesh Treaty. There are two specific issues contributing to this problem:
- **Issue 1:** only a small number of organisations (with limited resources) are providing accessible copies of works to a small subset of individuals with a print disability (e.g. individuals who are blind or students with impaired vision); and
 - **Issue 2:** there is a lack of clarity around the extent to which individuals with a print disability (or someone acting on their behalf) can convert lawfully obtained copyright works into accessible format copies for personal use.

Issue 1: Only a small number of organisations (with limited resources) are providing services for a small subset of individuals with a print disability

- 19 Only a small number of organisations (with limited resources) are providing services for a small subset of individuals with a print disability. We understand this:
- is contributing to limited access to accessible format works for individuals with a print disability; and

- may be resulting in some organisations without prescribed body status providing or producing accessible format copies without authority to do so.

Only two organisations are using the section 69 exception

20 Although there are currently six prescribed bodies⁴, only the Blind Foundation and the University of Auckland are active producers under the section 69 exception. Both have limited capacity to meet the needs of individuals with a print disability.

- The **Blind Foundation** is the primary producer and supplier of accessible format copies in Braille, talking book, electronic and large print formats and the only prescribed body with the expertise to create braille. The Blind Foundation has approximately 12,000 members. Membership is currently restricted to severely visually impaired adults, and to children and young adults with a referral from an ophthalmologist or optometrist.⁵ Material produced or sourced by the Foundation is available only to its members.
- Since 2003 the Ministry of Education has funded the Blind Foundation \$1.05 million for the services it provides to students with a print disability. The Blind Foundation largely relies on charitable donations to translate most other works.
- The **University of Auckland** scans text using Optical Character Recognition (OCR) technology to make accessible copies for its students with a print disability, including students with learning disabilities such as dyslexia and dysgraphia. Braille copies are sourced from the Blind Foundation.

21 An application from the **Blind and Low Vision Education Network New Zealand** to become a prescribed body is currently under consideration. Its sole function is to provide educational services to 1557 blind, deafblind and low vision learners throughout New Zealand up to the age of 21.

Limited access to accessible format copies may be resulting in some organisations without prescribed body status providing or producing accessible format copies

22 Anecdotal evidence suggests limited access to accessible format copies may be resulting in some organisations without prescribed body status providing or producing accessible format copies without authority to do so. It is unknown how many organisations may be acting in this manner or whether they are following any of the conditions required under the section 69 exception.

23 This problem is unlikely to be resolved by taking the minimum necessary steps to accede to the Marrakesh Treaty.

⁴ The prescribed bodies are the Blind Foundation, the University of Auckland, Christian Ministries with Disabled Trust (now known as Elevate Christian Disability Trust), the Correspondence School Te Kura ā-Tuhi, New Zealand Radio for the Print Disabled Incorporated, and the Wellington Braille Club Incorporated.

⁵ All children and young adults (21 years of age and under) who are currently registered with Visual Resource Centres regardless of their degree of vision loss may apply to become a Blind Foundation member.

Issue 2: A lack of clarity relating to the extent to which individuals with a print disability (or someone acting on their behalf) can convert lawfully obtained copyright works into accessible format copies for personal use.

24 There is a lack of clarity on the extent to which individuals with a print disability (or someone acting on their behalf) can convert lawfully obtained works into accessible formats for personal use. This is likely to be contributing to the limited access to accessible format works for individuals with a print disability whether or not Issue 1 is addressed.

Individuals may want to produce accessible format copies for personal use

25 It is likely that some individuals with a print disability (or someone acting on their behalf) may want to produce their own accessible format copies, or import directly from overseas organisations authorised to provide and produce accessible format copies, for personal use. This may occur in a range of circumstances, including:

- a. *Some works may not be appropriate for conversion into the required accessible format by prescribed bodies.* Examples include copyright works that become out of date rapidly such as current events reports, or works that are specific to the individual such as instruction manuals or legal information.
- b. *Some works may not be prioritised for conversion into the required accessible format by prescribed bodies.* As discussed in paragraph 51 of the NIA, there is increasing demand for accessible formats and costs of production are rising. Organisations who provide for individuals with a print disability (both in New Zealand and internationally) will have to continue to prioritise the production of certain works in accessible formats and it will not always be possible to meet all requests. This means that individuals with a print disability can only read what third party intermediaries deem a priority or otherwise worth converting.
- c. *Individuals may not meet specific criteria.* Accessing works through a prescribed body may be problematic for some individuals because of specific criteria that need to be satisfied to access the services of that entity. For example, the Blind Foundation only provides accessible format copies to members, and primary and secondary school students with a print disability. Auckland University only provides accessible format copies to its students. However, the definition of print disability is clearly much wider than individuals who are severely visually impaired or are students with a print disability.
- d. *Individuals may seek greater autonomy.* Some individuals may prefer to have a direct relationship with an overseas organisation that produces accessible format copies, rather than going through a prescribed body.

Individuals producing copies for personal use tends to be a last resort

26 Producing accessible copies of works for personal use tends to be a last resort if an accessible format copy (produced by a publisher or a prescribed body) is unavailable. It is very time consuming for individuals with a print disability (or someone acting on their behalf) to make accessible versions for personal use. While improvements in scanning/OCR technology have made it possible to produce copies that can be manipulated conveniently, the technology is not always accurate. Complex information (such as tables, columns, and graphical data) does not yet convert well using these technologies.

Individuals producing their own accessible format copies are likely to be infringing copyright

27 An individual with a print disability (or someone acting on their behalf) generally cannot produce an accessible format copy without infringing copyright. The Act does not provide a broad exception to copyright for individuals with a print disability copying for personal use. Examples of the ways in which individuals with a print disability produce works are:

- Scanning and converting text into a format compatible with screen reading software, or text-magnification programme, or displayed on an electronic braille device such as a brailleNOte or BrailleSense. Pages are usually scanned one at a time and the process would usually require making a copy of the original work in its entirety.
- Transcribing a hard copy book by typing the content into an electronic file, or arranging for others to read content onto tape or other audio format both involve making entire copies of the original protected work.
- Photocopies to enlarge the print size also involve making copies of the relevant pages.

Although some current exceptions may apply, the extent to which they might apply is unclear

28 The Act has a number of fair dealing exceptions, such as for the purpose of research or private study, and criticism review and news reporting, that may be potentially relevant for individuals wanting to produce an accessible format copy for personal use. Determining whether making a copy of a work satisfies fair dealing involves considering the following factors:

- the purpose of the copying
- the nature of the work copied
- whether the work could have been obtained within a reasonable time at an ordinary commercial price
- the effect of the copying on the potential market, or value, of the work
- the amount and substantiality of the part copied in relation to the whole work.

29 However, the extent to which an individual could rely on the fair dealing exceptions is untested and unclear. Furthermore producing a copy of a work for recreational reading may be out of scope of the fair dealing exceptions.⁶

Objectives

30 To increase the variety and number of copyright works available in accessible formats for print disabled individuals by providing a copyright regime that:

- a. **facilitates individuals and their support organisations reproducing and distributing works in accessible formats** by:
 - i. clearly defining when they may reproduce and distribute works in accessible formats;
 - ii. better allocating resources and minimising their regulatory and business compliance costs; and

⁶ Fair dealing provisions apply only to research or private study, or criticism and review.

- iii. providing sufficient flexibility to adapt to technological developments (recognising the Marrakesh international framework is new and likely to take some time to bed in).
- b. **protects the rights and commercial interests of rights holders;** and
- c. **complies with New Zealand's international obligations,** including in respect of copyright and as a member of:
 - i. the *United Nations Convention on the Rights of Persons with Disabilities*; and
 - ii. the *United Nations Convention on the Rights of the Child*.

31 Each criterion is weighted evenly.

Options and impact analysis for Issue 1

32 This RIS examines five regulatory options that address Issue 1. Options 2 to 3a provide for an expanded group of organisations that may use the exception. They are:

- **Option 1: Status Quo**

Under the Status Quo, New Zealand would:

- retain the section 69 exception that requires bodies who wish to produce or provide accessible format copies of copyright works for individuals with a print disability to be prescribed in Regulations; and
- make minor amendments required to align with Marrakesh Treaty obligations (see paragraph 14). This would include expanding the conditions applied to prescribed bodies in the section 69 exception to include the maintenance of due care in, and records of, its handling of copies of works.
- **Option 2:** Allow any organisation that meets the definition of an “authorised entity”⁷ under Article 2(c) of the Marrakesh Treaty to **provide** accessible format copies but require organisations wanting to **produce** accessible format copies to:
 - meet the Marrakesh Treaty requirements; and
 - be prescribed under the Copyright Act.

This option is open to New Zealand under the Marrakesh Treaty, which gives member countries the flexibility to determine who is eligible to become an authorised entity. Member countries are not required to impose any specific procedures to obtain authorised entity status but are entitled to impose conditions if they wish to do so.

- **Option 2a:** Adopt the approach in Option 2 for what organisations must do to qualify to **provide or produce** accessible format works but also, in legislation, clarify **how** authorised entities should observe each condition when providing or producing accessible format copies of works.⁸

⁷ Authorised entities are defined as a non-profit or government agency that is recognised or authorised by government to provide education, training, adaptive reading or information access to individuals with a print disability on a non-profit basis either as its sole function or as one of its primary activities or institutional obligations. Authorised entities also cover for-profit entities that provide such services using public funds and on a not-for-profit basis.

⁸ Examples of this could include clarifying whether an individual has a print disability and whether an accessible format work meets the needs of an individual with a print disability.

Option 2a reflects the concerns that:

- some organisations without prescribed body status are providing or producing accessible format copies (see paragraph 22); and
 - an expanded group of organisations will be able to use the section 69 exception (as discussed in the consultation section below).
- **Option 3:** Allow all organisations that meet the definition of “authorised entity” under Article 2(c) of the Marrakesh Treaty to *both provide **and** produce* accessible format copies for individuals with a print disability.

Under this option, there would be no restrictions on the entities that could provide or produce accessible format copies on top of what the Marrakesh Treaty already provides. The rules in the Marrakesh Treaty would essentially be incorporated into domestic law.

This option would enable a wide range of institutions such as educational institutions and other not-for-profit organisations to provide and produce accessible format copies.

- **Option 3a (preferred option):** Adopt the approach in Option 3 for what organisations must do to qualify to provide or produce accessible format works but also, in legislation, clarify **how** authorised entities should observe each condition when providing or producing accessible format copies of works.

Option 3a reflects the concerns that:

- some organisations without prescribed body status are providing or producing accessible format copies (see paragraph 22); and
- an expanded group of organisations will be able to use the section 69 exception (as discussed under in the consultation section below).

Issue 1: Summary of options

	Description
Option 1: Status Quo	Organisations that want to provide and produce accessible format copies for individuals with a print disability must be prescribed in regulations .
Option 2	Organisations that want to provide accessible format copies for individuals with a print disability must meet the definition of authorised entity under Article 2(c) of the Marrakesh Treaty Organisations that want to produce accessible format copies for individuals with a print disability must: <ul style="list-style-type: none"> • meet the Marrakesh Treaty requirements; and • be prescribed under the Copyright Act
Option 2a	Adopt the approach in Option 2 for what organisations must do to qualify to provide or produce accessible format works but also clarify how authorised entities must observe each condition when providing or producing accessible format copies of works in legislation.
Option 3	Organisations that want to provide and produce accessible format copies for individuals with a print disability must meet the definition of authorised entity under Article 2(c) of the Marrakesh Treaty .
Option 3a <i>(preferred option)</i>	Adopt the approach in Option 3 for what organisations must do to qualify to provide or produce accessible format works but also clarify how authorised entities must observe each condition when providing or producing accessible format copies of works in legislation

Key applied to table 1 and 2

- ✓✓ Significant improvement on the status quo
- ✓ Improvement on the status quo
- ✗ Deterioration relative to the status quo
- ✗✗ Significant deterioration relative to the status quo
- ~ No impact relative to the status quo
- Shaded row = preferred option

Table 1: Expanding the group of organisations that can provide and produce accessible format copies for individuals with a print disability - summary assessment of options against objectives

	Facilitates individuals and their support organisations reproducing and distributing works in accessible formats	Protects the rights and commercial interests of rights holders	Complies with New Zealand’s international obligations
Option 1: Status Quo	<p>~</p> <p><i>Limited access</i></p> <p><i>Expanded group of organisations provided for by the Marrakesh Treaty are unable to use the exception leading to inefficient resource allocation.</i></p>	<p>~</p> <p><i>Good protection as a small group of organisations that provide for individuals with a print disability operate on a not-for-profit basis and must observe conditions e.g. the commercial availability test.</i></p> <p><i>However, some organisations without prescribed body status may be providing or producing accessible format copies. Could better protect legitimate rights and commercial interests if these organisations are acknowledged as users of the section 69 exception and required to observe the same conditions.</i></p>	<p>~</p> <p><i>No improvement against the UN Conventions’ goals and obligations.</i></p>

<p>Option 2: Allow all organisation that meets the definition of an “authorised entity” under Article 2(c) of the Marrakesh Treaty to provide accessible format copies but require organisations wanting to produce accessible format copies to:</p> <ul style="list-style-type: none"> • meet the Marrakesh Treaty requirements; and • be prescribed under the Copyright Act. 	<p style="text-align: center;">✓</p> <p style="text-align: center;"><i>Improved access</i></p> <p style="text-align: center;"><i>Educational institutions and non-profit organisations could be distributing accessible format works freeing up existing Government resources.</i></p> <p><i>However compliance costs involved with being prescribed in regulations could act as a disincentive for additional organisations producing accessible format copies.</i></p> <p><i>May be some uncertainty around when organisations can use the exception (i.e. to what extent they must maintain due care and records).</i></p>	<p style="text-align: center;">~</p> <p><i>More organisations may use the exception however, despite concerns from rights holders; international experience from the UK suggests that this does not mean legitimate rights and commercial interests are at risk. The UK does however provide greater certainty around what is permitted under the exception which may be an important factor.</i></p> <p><i>Organisations that may be providing or producing accessible format copies without prescribed body status are required to observe conditions under the section 69 exception.</i></p>	<p style="text-align: center;">✓</p> <p><i>Good - access improved, providing individuals with a larger pool of organisations available to provide reading material in a timely manner.</i></p>
<p>Option 2a: Adopt the approach in Option 2 for what organisations must do to qualify to provide or produce accessible format works but also, in legislation, clarify how authorised entities should observe each condition when providing or producing accessible format copies of works</p>	<p style="text-align: center;">✓</p> <p><i>Same as for Option 2 – Improved access</i></p> <p><i>If conditions are too prescribed, compliance costs may increase (reducing resources for providing/producing a work). However conditions may also increase access by providing greater certainty about what organisations can do. Therefore no change on Option 2.</i></p>	<p style="text-align: center;">✓</p> <p><i>Same as for Option 2 plus prescribing conditions in legislation is likely to improve certainty around what is permitted under the exception and help organisations that may be providing and producing works to better observe each condition. Protection improved further if developed with input from stakeholders.</i></p>	<p style="text-align: center;">✓</p> <p><i>Same as for Option 2</i></p>

<p>Option 3: Allow all organisations that meet the definition of “authorised entity” under Article 2(c) of the Marrakesh Treaty to both provide and produce accessible format copies for individuals with a print disability.</p>	<p style="text-align: center;">✓✓</p> <p style="text-align: center;"><i>Best – access most improved</i></p> <p style="text-align: center;"><i>Educational institutions and non-profit organisations could be distributing accessible format works, freeing up existing Government resources and providing access to many more individuals. May be some uncertainty around when organisations can use the exception (i.e. to what extent they must maintain due care and records).</i></p>	<p style="text-align: center;">~</p> <p style="text-align: center;"><i>More organisations may use the exception; however, despite concerns from rights holders around this, international experience from the UK suggests that this does not mean legitimate rights and commercial interests are at risk. The UK does however provide greater certainty around what is permitted under the exception which may be an important factor.</i></p> <p style="text-align: center;"><i>Organisations that may be providing or producing accessible format copies without prescribed body status are required to observe conditions under the section 69 exception.</i></p>	<p style="text-align: center;">✓✓</p> <p style="text-align: center;"><i>Best – access greatly improved, providing individuals with a much larger pool of organisations available to provide reading material in a timely manner.</i></p>
<p>Option 3a: Adopt the approach in Option 3 for what organisations must do to qualify to provide or produce accessible format works but also, in legislation, clarify how authorised entities should observe each condition when providing or producing accessible format copies of works.</p>	<p style="text-align: center;">✓✓</p> <p style="text-align: center;"><i>Best – access most improved</i></p> <p style="text-align: center;"><i>If conditions are too prescribed, may increase compliance costs (reducing resources for providing/producing a work). However conditions may also increase access by providing greater certainty about what organisations can do. Therefore no change on Option 3.</i></p>	<p style="text-align: center;">✓</p> <p style="text-align: center;"><i>Same as for option 3 plus prescribing conditions in legislation likely to improve certainty around what is permitted under the exception and help organisations that may be providing and producing works to better observe conditions. Protection improved further if developed with input from stakeholders.</i></p>	<p style="text-align: center;">✓✓</p> <p style="text-align: center;"><i>Same as for Option 3.</i></p>

Impact of Option 3a (preferred option) for Issue 1

- 33 Option 3a is the best option vis-à-vis the status quo. The three main benefits are:
- *Significantly improved access to accessible format copies of works* — Educational institutions and non-profit organisations that meet the definition of “authorised entity” under Article 2(c) of the Marrakesh Treaty can provide and produce accessible format copies without being prescribed in regulations. This is likely to free up existing government resources in the production of material for individuals with a print disability to produce more complex materials or those with broader appeal.
 - *Improved protection of the rights and commercial interests of rights holders* — This option uses legislation to clarify how authorised entities observe each condition when providing or producing accessible format copies of works. For example clarifying the specific procedure to determine whether an individual has a print disability and whether an accessible format work meets the needs of an individual with a print disability.
 - *Significantly improved compliance with international obligations* — Individuals with a print disability have better access to works in accessible formats, which provides them with greater autonomy and independence. For example, improved access to education, participation in public life (i.e. employment) and access to written content, including recreational and foreign texts.
- 34 These benefits are judged to outweigh any negative impact on the commercial interests of rights holders, particularly given the section 69 exception is only used on a not-for-profit basis and organisations cannot use it if there is a commercially available copy in the required format.

Options and impact analysis for Issue 2

- 35 This RIS examines three regulatory options that address Issue 2. Options 2 and 3 provide clarity around the extent to which individuals with a print disability (or someone acting on their behalf) should be allowed to convert lawfully obtained copyright works into accessible format copies for personal use. They are:
- **Option 1: Status Quo**

Under the Status Quo, individuals producing their own accessible format copies are likely to be infringing copyright. The Act does not provide a broad exception to copyright for individuals with a print disability copying for personal use. Fair dealing exceptions, such as those for the purpose of research or private study may be useful in some circumstances.
 - **Option 2: A flexible fair dealing styled exception.**

This option would provide that individuals (or someone acting on their behalf) may import an accessible format copy of a copyright work directly from an overseas authorised entity or produce an accessible format copy of a copyright work, to enable an individual with a print disability to enjoy equitable access to copyright works in the same way as an individual without a print disability. To do so, it applies **flexible fair dealing factors** based on those proposed in the Australian Copyright Amendments (Disability Access and Other Measures) Bill 2017, which can be summarised as follows:

- Four factors to be considered as part of a fairness assessment are:
 - *The purpose and character of the dealing.* If the use of the copyright work is for the purpose of assisting an individual with a disability access, this is likely to be satisfied.
 - *The nature of the copyright material.* Whether the material is in print, available or published are all relevant issues for consideration.
 - *The effect on the potential market.* This factor requires an analysis on whether the use of the copyright work is reasonably fair with regard to the interests of rights holders. Only substantial market harm should be considered unfair.
 - *The amount and substantiality of the part copied in relation to the whole work.* Requires consideration of the portion of the material to be used or quantity of copies to be made. A copy of a whole copyright work may be required for individuals with a print disability.
- Each factor is not required to be met and may have a different degree of significance according to each individual.
- The factors accommodate the types of uses that occur in practice when working with copyright material for disability access purposes to ensure that copyright law works in a flexible way to encourage equitable access to copyright material by persons with a disability.
- The exception could extend to the importation or exportation of accessible format works or a communication to the public that occurs across borders.
- An individual with a disability or anyone assisting a person with a disability, proposing to use copyright work is responsible for determining if the use is a fair dealing and that any accessible format copy produced is for personal use only and is not transferable.
- **Option 3 (preferred option):** An exception for individuals with a print disability (or someone acting on their behalf) with specific criteria.

This option would provide that individuals with a print disability (or someone acting on their behalf) may:

- **produce** accessible format copies of copyright works provided the following criteria were met:
 - i. the individual has lawful possession of or lawful access to the material in question (for example, has bought a copy of a book or loaned a book from a library); and
 - ii. the copy is produced only for personal use of an individual with a print disability.
- **import** copies from an authorised entity in a country party to the Marrakesh Treaty under the same conditions in (i and ii) above.

In practice, this option provides individuals with a print disability (or someone acting on their behalf) with a number of options to access a copyright work in the required accessible format. They could:

- *Ask an authorised entity to source the accessible format copy.* Under this option the individual with a print disability (or someone acting on their behalf) would rely on a domestic authorised entity applying the commercial availability test. As a result, the authorised entity may:
 - advise them that copy in the required format is commercially available; or if there is no commercially available copy
 - contact an overseas authorised entities in countries party to the Marrakesh Treaty for a copy; or
 - produce a copy in the required format for them.
- *Produce the accessible format copy themselves.* Under this option the individual with a print disability (or someone acting on their behalf) would require lawful possession or access to the work (for example, has bought a copy of a book or loaned a book from a library). They would then be able to use that copy (whether it be a hard copy or electronic file) to produce an accessible format that meets their needs.
- *Source a copy through an overseas authorised entity themselves.* Under this option the individual with a print disability (or someone acting on their behalf) would require lawful possession or access to the work (for example, has bought a copy of a book or loaned a book from a library). They would then be able to approach an overseas authorised entity themselves to request a copy of the work in the required accessible format.

An overseas authorised entity may require information to satisfy their domestic reporting requirements and conditions of use. The individual with a print disability may also be required to pay for the cost of production of the copy.

This option is based on a modified version of the United Kingdom approach to permitted acts relating to disability set out in the Copyright, Designs and Patents Act 1988.

Article 6 of the Marrakesh Treaty requires that any conditions applied when an individual with a print disability imports an accessible format copy of a work, must be the same as any conditions imposed when they produce a copy of a work.

Issue 2: Summary of options

	Description
Option 1: Status Quo	Individuals producing their own accessible format copies are likely to be infringing copyright . The Act does not provide a broad exception to copyright for individuals with a print disability copying for personal use.
Option 2: A flexible fair dealing styled exception	Individuals (or someone acting on their behalf) may produce or import an accessible format copy of a work provided they apply the flexible fair dealing factors that take account of: <ul style="list-style-type: none"> • the purpose and character of the dealing; • the nature of the work copied; • the effect on the potential market; and • the amount and substantiality of the part copied in relation to the whole work. Each factor under the proposed exception would be considered as part of a fairness assessment, noting that each factor is not required to be met and may have a different degree of significance according to each individual.
Option 3 (preferred option): An exception for individuals with a print disability (or someone acting on their behalf) with specific criteria	Individuals (or someone acting on their behalf) may produce an accessible format copy of a work provided the following criteria are met: <ol style="list-style-type: none"> i. the individual has lawful possession of or lawful access to the material in question (for example, has bought a copy of a book); and ii. the copy is produced only for personal use by an individual with a print disability. They may also import copies from an authorised entity in a country party to the Marrakesh Treaty under the same conditions in (i and ii) above.

Table 2: Clarifying the extent to which individuals with a print disability (or someone on their behalf) can convert lawfully obtained works into accessible formats for personal use - summary assessment of options against objective

	Facilitates individuals and their support organisations reproducing and distributing works in accessible formats	Protects the legitimate rights and commercial interests of rights holders	Complies with New Zealand's international obligations
Option 1: Status Quo	~ <i>The Act is unclear and risk adverse. Individuals are unlikely to rely on fair dealing provisions. Inefficient resource allocation – authorised entities may be producing accessible format copies that very few people want.</i>	~ <i>Currently a grey area. No reporting required.</i>	~ <i>No improvement against the UN Conventions' goals and obligations.</i>
Option 2: A flexible fair dealing styled exception	✓ <i>Individuals with a print disability and someone acting on their behalf may produce an accessible format copy of a copyright work provided they meet fairness assessment. Better resource allocation – Organisations freed up to produce more complex materials or those with broader appeal. Flexible to technological advances within the disability sector, however the commercial availability test may impose compliance costs.</i>	✓ <i>Safeguards are in place against misuse but some individuals may not understand fair dealing and how to apply each factor as part of the fairness assessment. Producing accessible format works is time consuming and likely to be of lower quality and last resort for most individuals with a print disability. Individuals with a print disability (or someone acting on their behalf) are not permitted to transfer that work or file.</i>	✓✓ <i>Significant improvement – the exception allows for a high level of autonomy and independence.</i>
Option 3: An exception for individuals with a print disability (or someone acting on their behalf) with specific criteria	✓✓ <i>Individuals with a print disability (or someone acting on their behalf) are able to create and import with certainty. Better resource allocation – Organisations freed up to produce more complex materials and/or those with broader appeal. Easy to understand and not particularly onerous given there is no criterion to apply the commercial availability test. This may promote better use of the exception.</i>	✓✓ <i>Safeguards are in place against misuse and it is clear what conditions must be observed. Risk higher if no guidance. Producing accessible format works is time consuming and likely to be of lower quality and last resort for most individuals with a print disability. Individuals with a print disability (or someone acting on their behalf) are not permitted to transfer that work or file.</i>	✓✓ <i>Significant improvement – the exception allows for a high level of autonomy and independence.</i>

Impact of Option 3 (preferred option) for Issue 2

- 36 Option 3 is the best option vis-à-vis the status quo. The three main impacts are:
- *Significantly improved access to accessible format copies of works* — Individuals with a print disability (or someone acting on their behalf) are able to produce accessible format copies. The criteria they must follow are easy to understand and not onerous, given there is no requirement to apply the commercial availability test.
 - *Significantly improved protection of the rights and commercial interests of rights holders* — Clear that individuals with a print disability (or someone acting on their behalf) can produce accessible format copies and that they must observe specific criteria should they wish to do so.
 - *Significantly improved compliance with international obligations* — Individuals with a print disability are able to produce accessible format copies, which provides them greater autonomy and independence. For example, improved access to education, participation in public life (i.e. employment or professional development) and access to written content, including recreational and foreign texts.
- 37 These benefits are judged to outweigh any negative impact on the commercial interests of rights holders, particularly given the section 69 exception is only used on a not-for-profit basis and the production of accessible format copies by organisations and individuals is usually a last resort as it is expensive and time consuming.

Consultation

- 38 As discussed in paragraph 57 of the NIA, MBIE tested a number of options in the public consultation process. A total of 29 submissions were received on the discussion document from a range of stakeholders. These included individuals, organisations providing for individuals with a print disability, rights holders⁹, universities and libraries.
- 39 Submitters strongly supported joining the Marrakesh Treaty and making the necessary amendments to the section 69 exception to align with the obligations of the Marrakesh Treaty. They also supported considering further options to improve access. Submitters agreed that joining the Marrakesh Treaty would improve access to works and the quality of life of New Zealanders with a print disability.
- 40 The objective and criteria are based on the objectives tested in the consultation document and received unanimous support from submitters.
- 41 Options related to expanding the group of organisations and individuals that can produce and provide accessible format copies of works were not tested as part of the public consultation process. High level consultation was held with two key stakeholders once the specific options were developed.

⁹ Rights holders included Copyright Licencing New Zealand (CLNZ), the New Zealand Society of Authors (NZSA) and the Publishers Association of New Zealand (PANZ).

Perceived concerns with expanding group of organisations and individuals being able to use the section 69 exception

- 42 During the consultation process rights holder organisations raised concerns about the perceived risks presented by an expanded group of organisations being able to use the section 69 exception. Rights holders were concerned about whether these organisations would have the processes and systems in place to fully observe the conditions to the level expected of them. This included:
- a. *How the commercial availability test should be applied* — There is no legislative guidance on what constitutes a reasonable effort to locate a commercially available copy in the required format, or what a reasonable time period is.
 - b. *How to fulfil reporting requirements* — The Marrakesh Treaty does not prescribe any mechanism for how organisations maintain due care and record any accessible format copies they produce and provide.
 - c. *How to ensure copies produced are only supplied to individuals who have a print disability* — Rights holders are particularly interested in how organisations will determine who has a print disability. Electronic files (particularly audio) are easily utilised outside the exception by individuals who do not have a print disability, which can undermine the commercial market for the work in question. For example, there is a possibility that an authorised entity may unintentionally provide access to the electronic files to sighted individuals on their network. This could occur without the rights holders' knowledge.
 - d. *How to decide whether the work is in the required format* — There is no guidance around how to determine whether an accessible format work meets the needs of an individual with a print disability and who should make this judgement. For example, would an audio version meet the needs of an individual with a print disability if it is easy to understand or does it need to be well narrated, and should this decision be made by the organisation providing the accessible format copy or the individual with a print disability.
- 43 Some concerns were also expressed about expanding the group of individuals being able to use the section 69 exception. One submitter noted that if the print disability category is expanded and a broad definition is given to someone acting on the behalf of an individual with a print disability, there is a large potential population able to legally break digital rights management. The submitter was concerned that there was an increased risk that accessible format copies produced under this exception would be made available to the wider public.
- 44 Another submitter had similar concerns stating that permitting individuals to make accessible format copies would significantly reduce certainty for rights holders as to who was making accessible format copies and how they may be distributed.
- 45 Our view is that:
- Experience from the broader framework in the UK suggests these concerns are unlikely to materialise;

- some concerns may be overstated, e.g. the term “reasonable” is a well understood and commonly used legal test¹⁰;
- some of these concerns are likely to be mitigated by the preferred options:
 - i. providing greater clarity about what is permitted under the section 69 exception via guidance and legislative changes; and
 - ii. developing the conditions in tandem with initiatives led by stakeholders¹¹; and
- the preferred options provide the greatest social benefits for individuals with a print disability (e.g. greater access to education, participation in public life, and autonomy and independence) and this outweighs any potential negative impact to the commercial interests of rights holders.

Conclusion and recommendations

46 MBIE recommends making further changes to the section 69 exception that are provided within the Marrakesh Treaty framework (but not required), and allow New Zealand to further improve access to a greater variety of copyright works for individuals with a print disability.

47 Based on our analysis of options against the objective and criteria, our recommended options are to:

- **Issue 1 – Option 3a:** Allow all organisations that meet the definition of “authorised entity” under Article 2(c) of the Marrakesh Treaty to both provide and produce accessible format copies for individuals with a print disability and also, in legislation, clarify how authorised entities should observe each condition when providing or producing accessible format copies of works.
- **Issue 2 – Option 3:** Adopt an exception for individuals with a print disability (or someone acting on their behalf) to:
 - i. produce an accessible format copy of a work provided the individual has lawful possession of, or lawful access to, the material in question and the copy is produced only for the personal use of an individual with a print disability; or
 - ii. import copies from an authorised entity in a country party to the Marrakesh Treaty under the same conditions in (i) above.

¹⁰ Providing detailed rules about what constitutes a detailed timeframe for the commercial availability test could lead to additional compliance costs and reduce the efficiency of the system.

¹¹ We understand that Copyright Licensing New Zealand is planning to develop a reporting tool that organisations providing for individuals with a print disability could use to help meet record keeping requirements. Officials will take account of such developments when developing the conditions.

Implementation plan

- 48 As outlined in the NIA, domestic changes required to comply with Marrakesh Treaty obligations and give effect to the preferred options in the regulatory impact analysis, would be made via a bill to amend the Act and the Copyright (General Matters) Regulations 1995. A bill to this effect has accepted as part of the Government's 2017 legislative programme.
- 49 The preferred options will require the Government to provide guidance on the rights and responsibilities of organisations and individuals under the new section 69 exception. Guidance would be released at least three months before the Marrakesh Treaty enters into force in New Zealand.
- 50 Affected parties would be notified of that guidance is available through existing communications channels. This includes emailing organisations and individuals that submitted in the consultation process (who can then inform their membership), updating MBIE's website and issuing a press release (see paragraph 45 of the NIA).

Monitoring, evaluation and review

- 51 Officials will proactively meet with domestic stakeholders who support individuals with a print disability. They will also monitor any issues that may emerge as the international legal framework provided by the Marrakesh Treaty is adopted by more countries.
- 52 Officials will evaluate the impact of minimum necessary steps to accede to the Marrakesh Treaty and preferred options under the RIS two years after the Marrakesh Treaty enters into force in New Zealand. The evaluation will draw on data collected by authorised entities as part of their record keeping requirements (mandated by the minor amendments required to the section 69 exception to align with Marrakesh Treaty obligations).
- 53 A review of the legislative amendments to the section 69 exception would be held as part of any future review of the Copyright Act.