

13. Delegating law-making powers to the executive

Parliament makes laws by enacting primary legislation (Acts); however, it is not always appropriate or possible for Parliament to deal with all of the detailed underlying systems and structures that give effect to an Act. In these cases Parliament often includes in an Act a provision that authorises another body, usually part of the executive, to exercise some of its law-making functions to deal with those detailed underlying systems. The Act that delegates this law-making power is known as the “empowering Act”. The specific provision containing the power is usually known as the “empowering provision”. The product of the exercise of this power is known as “delegated legislation”.

Delegated legislation can be made by different bodies or officers within or outside the executive. These include the Governor-General in the Executive Council (the most common), a Minister, or a statutory body or officer. Delegated legislation is referred to by a range of terms, including secondary legislation, tertiary legislation, regulation, Proclamation, Order in Council, bylaw, rule, code, notice, or warrant.

A powerful check on delegated legislation is the requirement for all regulations (defined in wide terms by s 29 of the Interpretation Act⁹⁴), but not including most bylaws and empowering provisions, to face Regulations Review Committee (“RRC”)⁹⁵ scrutiny. The RRC is established and governed by the Standing Orders of the House of Representatives⁹⁶. The RRC might effect significant change to empowering provisions or regulations. The RRC may bring a regulation or empowering provision to the attention of the House for a variety of reasons, including that the empowering provision is drafted in such a way that regulations drafted under it may breach one of the grounds in Standing Order 319(2). Officials must be prepared to justify to the RRC why a power has been delegated to the executive or another body outside Parliament.

The Cabinet Manual establishes a number of rules and procedures for developing delegated legislation (see [7.77] of the Cabinet Manual).⁹⁷

This chapter will help identify those matters that are appropriate for Parliament to delegate, to whom the power should be delegated, what form the delegated legislation might take, and what matters the empowering provision should address.

Further guidance on codes will be provided in future updates to these Guidelines.

⁹⁴ <http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html>

⁹⁵ <http://www.parliament.nz/en-nz/features/00NZPHomeNews201204161/the-role-of-the-regulations-review-committee>

⁹⁶ <http://www.parliament.nz/en-nz/pb/rules/standing-orders>

⁹⁷ <http://cabinetmanual.cabinetoffice.govt.nz/7.77>

Guidelines

13.1. Is the matter appropriate for delegated legislation?

Legislation should not authorise delegated legislation to be made in respect of matters which are appropriate for primary legislation.

As a general rule, matters of policy and principle should be included in primary legislation. Delegated legislation should deal with technical matters of implementation and the operation of the Act.

While valid reasons do exist for delegating a power to the executive, each decision to authorise the making of delegated legislation should be justified on its own merits.

Some matters, such as limiting fundamental human rights, are clearly appropriate only for primary legislation; but the decision will not always be clear-cut, and some matters may be appropriate for both primary and delegated legislation.

The following matters should ideally (or in some cases can only) be addressed in primary legislation:

- matters of significant policy;
- matters affecting fundamental human rights;
- the creation of significant new public powers such as search and seizure or confiscation of property;
- granting or changing appeal rights;
- variations to the common law;
- the creation of serious criminal offences and significant penalties;
- authorising the levying of a tax, borrowing of money, or spending of public money;
- the creation of a new public agency;
- amendments to another Act;
- retrospective changes to the law;
- procedural matters that go to the essence of the legislative scheme.

Delegated legislation should only be authorised when it is necessary to give effect to primary legislation. It is particularly useful in situations where the environment in which the legislation must operate is subject to frequent change or where flexibility is desired for some other reason.

The following may be appropriate for delegated legislation:

- the mechanics of implementing an Act, fees, format and content of documents, certain lower-level procedures;
- large lists, schedules of minor details, and matters suitable for inflation indexation within identified parameters;
- technically complex matters;
- allowing for potential, but as yet unknown, contingencies;
- a need for flexibility, or regular technical updating;
- a need to respond to emergencies or other matters that require speedy responses;
- matters that need to be consulted

on before they are finalised or changed.

In limited cases, the setting of the commencement date may be delegated to the executive. Such provisions are likely to face additional RRC scrutiny and, as such, cogent reasons for the delegation must exist. The legislation should also incorporate a provision that the legislation is brought into effect automatically after a set period of no more than one year after its enactment, if not brought into force earlier by Order in Council.

It **will not** be appropriate to authorise delegated legislation:

- to fill any gaps in primary legislation that may have occurred as a result of a rushed or unfinished policy development process;
- to avoid full debate and scrutiny of politically contentious matters;
- solely to speed up its passage through Parliament;
- that simply follows a past practice of using delegated legislation.

13.2. For what purposes may the power to make delegated legislation be exercised?

The empowering Act should define clearly the purposes for creating delegated legislation.

Before settling the purposes for creating the delegated legislation, it is advisable to consult those who will implement the Act. This will help to identify the extent of the powers they require and in what circumstances they anticipate exercising those powers.

A power to create delegated legislation should be wide enough for implementation of the Act, but it should not be unfettered. The RRC may criticise a general empowering provision on the basis that it is an unexpected use of the delegated power.

13.3. Who will hold the power to make delegated legislation?

The person authorised to make delegated legislation must have an appropriate level of expertise, and hold an appropriate office having regard to the importance of the issues and the nature of any safeguards that are in place.

There are no absolute rules as to who should be authorised to make delegated legislation. Traditionally, delegated legislation is made by the Governor-General on the advice of Government Ministers, or is made by the relevant portfolio Minister(s). Key factors to take into account are the expertise required of the person making the delegated legislation, the importance of the issues in question, and what safeguards are in place (for example, publication, disallowance, Cabinet scrutiny or drafting by the PCO). The following is an indication of when a certain office holder might be the appropriate person to exercise a particular power.

- **Governor-General in Council:** Will be appropriate when the potential exists to significantly affect the population, a large number of people, or human rights. The Governor-General will also be appropriate when delegated legislation creates criminal sanctions (rarely done), amends Acts (very rarely), brings primary legislation

into force, or deals with non-technical matters. By convention, the Governor-General will act on the advice of the Executive Council (ordinarily given after Cabinet decisions that confirm or alter decisions of Cabinet committee), and sometimes is expressed to be on the recommendation of one or more Ministers or after compliance with a statutory consultation requirement.

- **Government Ministers:** Will be appropriate where some law making is appropriately entrusted to the relevant portfolio Minister(s) acting (in exercising the power) independently from Cabinet colleagues. There is considerable overlap between those powers that a Minister and the Governor-General might appropriately hold.
- **Public service chief executives:** Will be appropriate where the matter is of minor technical detail, with little impact on the rights of individuals (such as setting the format of prescribed forms).
- **Independent statutory body or officers:** Will be appropriate where the subject matter is highly specialised or technical, where there will be less impact generally on individual rights, and where adequate safeguards are in place. This delegation choice is to empower, as a delegate, a law-maker legally independent of Ministers. Specialist or technical participation can also be achieved by preconditions (such as recommendations or consultation) before making delegated legislation.
- **Local government/local authorities:** Will be appropriate where the subject matter will have a localised impact that requires in-depth knowledge of the particular region, or local government accountability is needed or desirable.
- **Occupational and professional groups:** Will be appropriate if the subject matter will only affect a particular profession or occupation, and if adequate safeguards are in place.

In some of those cases it may be preferable to use primary legislation to directly empower a party to do something (“The Registrar may prescribe the forms ...”), rather than attempt to say that regulations may say who may prescribe the forms (if it is obvious that the person will be the Registrar).

13.4. Is the delegated legislation subject to appropriate safeguards?

All delegated legislation should be subject to an appropriate level of scrutiny, publication and review.

What is considered an appropriate level of safeguards will increase with the significance of the delegated power. Each safeguard imposed will increase the complexity of the process, increasing the time and cost required to produce delegated legislation.

All delegated legislation should generally be subject to RRC scrutiny and judicial review.

- **Regulations Review Committee scrutiny:** The RRC will scrutinise all regulations regardless of their form.

- **Judicial review:** In contrast to primary legislation, delegated legislation may on many grounds be challenged in the courts and declared invalid on judicial review. Legislation should not restrict a right of access to the courts to challenge delegated legislation (see Chapter 25).

The form and substance of delegated legislation may trigger some further safeguards.

- **Publication:** Instruments that fall within the definition of “legislative instruments” in s 4 of the Legislation Act 2012⁹⁸ will trigger the publication requirements in the Legislation Act 2012.
 - If the delegated legislation does not fall within this definition, the legislation must make it clear how the instrument will be made public. This can be achieved by stating in the legislation that the instrument is a “legislative instrument” (a “deemed legislative instrument”), or by stating alternative publication requirements such as placing it on a departmental website or publishing it in the Gazette.
- **Disallowance:** Instruments that fall within the definition of “disallowable instruments” (which includes all “legislative instruments”) in s 38 of the Legislation Act 2012 must be presented to the House of Representatives. The House may revoke or amend an instrument in accordance with Part 3 of the Legislation Act 2012.
 - If the delegated legislation does not fall within this definition, the legislation must make it clear whether or not the instrument is a “disallowable instrument” and be tabled under the Legislation Act 2012.

An Order in Council will usually trigger the publication and disallowance procedures in the Legislation Act 2012, and will be subject to Cabinet requirements for consultation and certification by the PCO.⁹⁹ Sometimes it will be necessary to consider modifying those procedures if there is a cogent reason for the Order in Council not to be published in the Legislative Instrument series or **not** to be a disallowable instrument).

It may be appropriate to make the exercise of the delegated power subject to preconditions, such as a consultation requirement or a requirement that the power is exercised only once the recommendation, approval, confirmation, concurrence or consent of another person has been sought or obtained. Other potential preconditions involve requiring that certain things are shown, or certain circumstances exist, before regulations are made.

It may be appropriate to provide that the delegated legislation lapses after a certain period if not confirmed by Parliament.

⁹⁸ <http://www.legislation.govt.nz/act/public/2012/0119/latest/DLM2997666.html>

⁹⁹ <http://cabinetmanual.cabinetoffice.govt.nz/7.77>

13.5. Does the delegated power have any special features?

Legislation should address any special features of the power to make delegated legislation.

A delegated power may have certain features that should be explicitly addressed in the empowering Act.

- **Inconsistency with primary legislation:** Delegated legislation should rarely, if ever, override, suspend or amend primary legislation (empowering provisions that authorise delegated legislation of this nature are sometimes called Henry VIII clauses). Delegated legislation that attempts to do so without express authorisation is at risk of the courts declaring it unlawful and invalid, and it risks facing RRC criticism. In the rare cases where power of this kind is needed, it must be drafted in the most limited terms possible, must be consistent with and support the provisions of the empowering Act, and must be subject to adequate safeguards. The empowering provision should usually also be limited in time (that is to say, a temporary law), as should any regulations made under the power.
- **Retrospective effect:** Where delegated legislation is intended to have retrospective effect, the empowering provision must authorise that effect in clear and unequivocal terms.
- **Sub-delegation:** The identity or office of the person to whom the power to make delegated legislation is given is a key factor in the particular legislative scheme. Careful consideration should therefore be given as to whether that person should be able to sub-delegate a power given to them. Where the power to make delegated legislation is able to be sub-delegated, the empowering provision must clearly identify that intent.
- **Inconsistency with NZBORA:** In the rare cases where delegated legislation is required or permitted to be inconsistent with NZBORA¹⁰⁰, an express statutory provision authorising this outcome must exist. Despite s 4 of NZBORA stating that inconsistency with NZBORA is not a ground for invalidating an enactment, the courts have held that delegated legislation is invalid if it is inconsistent with NZBORA and the empowering provision does not expressly state that it may be inconsistent.

13.6. Does the legislation authorise “incorporation by reference”?

Incorporation by reference should only be used where it is impractical to do otherwise.

Incorporation by reference refers to creating or defining rights, powers and obligations by a reference in primary or delegated legislation to another document (possibly prepared by someone outside government), or part of a document, the provisions of which are not set out in legislation.

¹⁰⁰ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

Incorporation by reference might be appropriate where:

- the document is long or complex, covers technical matters only, and few people are likely to be affected;
- the document has been agreed with one or more foreign governments, cannot easily be recast into an Act of Parliament or delegated legislation, and deals only with technical or operational details of a policy already approved by Parliament;
- it is appropriate for the document to be formulated by a specialist government or inter-governmental agency or private sector organisation, rather than by Parliament or Ministers;
- the document has been developed by an organisation for use in respect of products (such as motor vehicles) manufactured by it or its members.

If not approached carefully, incorporation by reference can be inconsistent with some fundamental law-making principles, including the requirement for Parliament to have control over the law and the requirement for obligations imposed by law to be clear, understandable and accessible. It is therefore necessary to work closely with legal advisers to ensure adequate safeguards are in place and the requirements of the Legislation Act 2012 (where delegated legislation is incorporating the document) are complied with.

Consider whether any amendments to the incorporated material will automatically become part of the law. For instance, if a failure to comply with a requirement found in the incorporated material is an offence, those who subsequently amend the incorporated material are creating/amending the criminal law. The Legislation Act has default provisions addressing these issues (see Part 3, Subpart 2) that should be considered.