

16. Creating a new statutory power

The executive, legislative, and judicial branches of the Government require some form of authority before they can act. In many cases the exercise of a power will be central to achieving the policy objective.

The power to do something may be granted by express provision in legislation (statutory powers), the common law, or it may stem from the fact that the chief executive or other agency head is a legal person and is capable of contracting with other parties.

Where a public body acts without power, or acts in a way that is inconsistent with the powers given to it, that body will be deemed to have acted unlawfully, or *ultra vires* (beyond powers). This may result in costly and time-consuming litigation, and the body may be required to re-take the decision. In some cases it may result in the public body not having the powers that were intended. The legislation must therefore clearly articulate the scope of the power, who will exercise it, and how it will be exercised.

Guidelines

16.1. Is a new statutory power required?

A new statutory power should only be created if no suitable existing power or alternative exists that can achieve the policy objective.

If there is already clear authority in existing legislation, it will be inappropriate to grant the same power in new legislation. This will lead to duplication and a lack of certainty in the law, particularly where only one Act is amended (this may create an unintended distinction between the two provisions (see Chapter 2)).

If there is an existing common law power, careful consideration must be given to whether or not it is sufficient. If it is not sufficient, consideration should be given to replacing it with a statutory power. If the intention is to limit or extinguish the common law power, the new legislation must clearly state that (see Chapter 2).

If an existing power is relied on to perform a new function created by legislation, that power must be clearly identified in the documentation that supports the legislation along with the reasons why it is considered that the new function can be exercised under it.

16.2. Who should hold the new power?

Legislation should identify who holds the new power. The power should be held by the person or body that holds the appropriate level of authority, expertise and accountability.

There are two aspects to this issue. The first aspect is which branch of government will hold the power? Powers are usually granted to the executive. In cases where a power of a judicial nature is involved, it should be granted to the judiciary (which includes tribunals). The second aspect is which level within that branch will exercise the power? A power may be vested in the executive, but a decision must still be made about whether the power is to be exercised by officials, the chief executive, Minister or another statutory office holder.

The following factors should be considered when deciding where to place the power:

The character of the issues involved and the nature of the power includes:

- whether the power is appropriate for delegation;
- the importance of the individual rights and interests involved;
- the importance of the government interests involved;
- whether the power contains a broad policy element;
- whether the power should be exercised independently of government control or the control of the governance body of the organisation.

The characteristics of the person who holds the power includes:

- the expertise required of the decision maker;
- whether the new role will conflict with an existing role;
- the level of accountability desired of the decision maker.

The process by which the power will be exercised includes:

- the context in which the issues are to be resolved (such as by administrative decision);
- the procedure commonly used by the decision maker;
- whether the power involves the finding of facts and the application of precise rules to those facts;
- whether the power requires the making of broad judgements or the exercise of wide discretion.

Practical matters include:

- the ability of the decision maker to access relevant information;
- the existence of safeguards (such as the Ombudsmen and the Official Information Act).

In general, decisions relating to more significant issues should be taken by a person with an appropriate level of seniority and accountability. For reasons of simplicity, it will usually be preferable to place a power with the person who has ultimate accountability for the decision (such as a chief executive or Minister). The person exercising the power must have sufficient expertise in the area in which they are exercising the power. If a tension arises between the need to place a power with a suitably senior or accountable person, one option is to require the decision maker to have regard to or act on the recommendation of a subject matter expert.

16.3. Will the new power be delegable?

Legislation should state the extent to which a new power can be delegated.

To avoid uncertainty and litigation, legislation must be clear as to when (if at all) a power may be exercised by a person other than that to whom it was granted. Legislation must also be clear who that person is. Some powers are of such importance that they should only ever be exercised by the person granted them and no delegation should be permitted. Examples include powers to make subsidiary legislation, borrow money, and grant warrants of appointment. However, the reality of public administration often means that it is impractical (or impossible) for the person to whom a power is granted to exercise that power. If a statutory power is to be delegated to another person, an express provision allowing this will be required in primary legislation.

Section 14 of the Interpretation Act¹⁰⁶ provides that a power conferred on the holder of an office (other than a Minister) may be exercised by that person's deputy. The provisions of the Interpretation Act will apply unless legislation indicates otherwise. The Crown Entities Act 2004¹⁰⁷ contains default provisions providing for delegation by Crown entities. The State Sector Act 1988¹⁰⁸ contains standard delegation provisions for the public service, and the Local Government Act (Schedule 7)¹⁰⁹ specifies what a local authority may and may not delegate. These default provisions should be relied on unless there are good reasons not to do so.

Generally, legislation should not authorise a person to delegate the power of delegation.

16.4. Is the power no wider than is required to achieve the policy objective and purpose of the legislation?

Legislation should not create a power that is wider than is necessary to achieve the policy objective.

The extent of a statutory power should have a direct connection to the policy objective that the power was intended to help achieve. The power should be confined to that which is necessary to perform those actions necessary to achieve the purpose of the legislation.

16.5. What is the power and how will it be exercised?

Legislation should identify what the power is, for what purposes, and in which circumstances it may be exercised.

A clear statement of the power and how it will be exercised will assist those exercising the power, those people subject to it, and those who may be tasked with settling any dispute over the exercise of it. It should also reduce the risk of litigation regarding the particular exercise of a power.

¹⁰⁶ <http://www.legislation.govt.nz/act/public/1999/0085/latest/DLM31459.html>

¹⁰⁷ <http://www.legislation.govt.nz/act/public/2004/0115/latest/DLM329631.html>

¹⁰⁸ <http://www.legislation.govt.nz/act/public/1988/0020/latest/DLM129110.html>

¹⁰⁹ <http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM170873.html>

The following matters should be specified in the legislation:

- any pre-requisite circumstances or procedural steps (such as consultation) that must be taken before exercising the power;
- the appropriate process for exercising the power (will depend on the purpose and characteristics of the power, the issues to be resolved, the interests affected, and the qualities and responsibilities of the decision maker);
- if the power is to be exercised independently, that should be made clear either from the context, or by explicit provision (for example, the Crown Entities Act has a “statutorily independent function” regime that should be referenced in appropriate cases);
- whether the exercise of the power requires the taking into account or exclusion of certain matters (those matters should be identified, and it should be explicit whether or not those matters make up an exhaustive list).

See, for example, s 7 of the Major Events Management Act 2007.¹¹⁰

16.6. What safeguards are provided in the legislation?

Legislation should include safeguards that will provide adequate protection for the rights of individuals affected by the decision.

Prescribed limits as to the extent and exercise of the power (see above) are key safeguards; however, it may be necessary to include additional safeguards to ensure the rights and interests of individuals are protected. An additional consideration is ensuring that the safeguards that apply are appropriate, having regard to the full range of people who are affected. The safeguards and procedures that are appropriate may differ where the people affected are mostly people with little access to legal representation (as opposed to corporate entities).

What is considered to be an adequate level of protection will increase as the interference with the rights of individuals increases. The rules of natural justice (see Chapter 3) will apply; however, the flexible nature of the doctrine means that it is good practice to explicitly identify the specific protections that apply so as to avoid any uncertainty. The following protections should usually apply to the exercise of a statutory power:

- the rules and criteria by which the power will be exercised should be specified in the legislation;
- a fair procedure should apply (this may include the right to make submissions, the right to be heard, and the right to produce evidence in support);
- decisions that affect a person’s rights or interests should be reviewable in some way (see Chapter 25).

¹¹⁰ <http://www.legislation.govt.nz/act/public/2007/0035/latest/DLM411987.html>

Where the power involves the making of a decision, the decision maker should be independent of the parties whose interests are affected. If this is not practicable (such as in administrative decision making), an independent means of review or appeal should be available.

16.7. Will a new power be given to a specialist tribunal?

New powers that are given to a specialist tribunal must be consistent with the particular field of expertise of that tribunal, must be appropriate in light of the procedure adopted by the tribunal, and must not impair the tribunal's independence and impartiality.

Specialist tribunals perform adjudicative functions in a defined specialist jurisdiction. They are independent of the executive, and their decisions will generally be appealable to the courts of general jurisdiction (see Chapter 25).

If a new power will be given to an existing tribunal, the power must relate to matters that are within the specialist jurisdiction of the tribunal. The new power must not conflict with the existing functions of the tribunal, nor should it compromise the tribunal's independence or the appearance of independence. The tribunal must either possess or be capable of amending its processes to ensure that appropriate procedures and safeguards are in place concerning the exercise of the new power.

The Ministry of Justice must be consulted if new powers are being given to an existing tribunal or if a new tribunal is being created (see Chapter 17).