

17. Creating a new public body

The day-to-day business of government is conducted through a number of different public bodies. It may be necessary to establish a new body where new functions are created and there is no appropriate existing body that can perform those functions. Different organisational forms will have distinct governance and reporting requirements. They will also have different relationships with the executive and different relationships and obligations in respect of government policy.

The State Services Commissioner (“SSC”) advises the Government on the design and capability of the State services. The SSC should be consulted at an early stage when considering whether or not to create a new public body or alter the functions of an existing one. The SSC’s website¹¹¹ provides detailed information relating to the public sector organisations, and officials should contact the SSC for further advice.

17.1. Is a new public body required?

A new public body should only be created if no existing body possesses the appropriate governance arrangements or is capable of properly performing the necessary functions.

Creating a new public body involves considerable expense and should only occur where no pre-existing bodies are capable of performing the particular function. As part of the internal government consultation exercise, those public bodies that may have an interest in a particular subject and might be capable, with or without amendment to their structure or powers, of carrying out the new functions, should have been identified. In most cases it will be more efficient to give new powers to an existing public body, even if it requires further structural change, than it will be to create a new body. For more information on creating a new public power, see Chapter 16.

17.2. Is legislation required to create a new public body?

Legislation should only be used to create a new public body when it is required by law or is necessary to ensure that the body possesses the necessary powers, authority, and appropriate governance arrangements.

Legislation is required to establish a new tribunal, Crown Agent, Autonomous Crown Entity, or Independent Crown Entity (see below for a discussion of these forms). However, it is not always necessary to establish a public service department, a departmental agency, or any of the other organisational forms mentioned below. Whether or not legislation is required must be assessed on a case-by-case basis, having regard to the need to:

- confer a particular function (whether statutory or otherwise);
- grant the entity powers it would not otherwise have by virtue of being a legal person;
- establish appropriate governance and accountability arrangements;

¹¹¹ <http://www.ssc.govt.nz/>

- give effect to international obligations;
- give statutory recognition to the body;
- establish a statutory officer within a public sector agency, who will have the task of exercising specific statutory functions or powers.

17.3. What form should the new public body take?

A new body should be in the form that provides appropriate accountability arrangements and is best suited to performing the relevant functions.

It will be more efficient, and result in a more effective organisation, to rely on one of the existing organisational forms discussed below. Good reasons must exist for creating a new organisational form from the ground up rather than relying on an existing form.

The organisational forms below have comprehensive governance rules already in place that can be found in legislation. Where a new organisational form is created, legislation will still need to replicate these essential features of the existing forms. Many forms also have existing bodies of case law surrounding their operations that may need to be factored into any new form.

Sometimes it may be appropriate to adopt an existing proven regime such as the Crown Entities Act, but to exclude the application of any particular provisions that are not appropriate (see, for example, the provisions of the Heritage New Zealand Pouhere Taonga Act 2014¹¹²).

Choosing a particular organisational form purely for reasons of administrative convenience or presentation may result in the body not possessing all the qualities (such as independence or governance arrangements) it requires to operate properly or to fulfil its functions.

Public service departments: Public service departments are also known simply as departments or ministries. Some, such as the Crown Law Office and the Treasury, are named differently. Departments are directly accountable to a Minister and are part of government. All public service departments are listed in the first Schedule to the State Sector Act 1988.¹¹³

- Departments should be the preferred form where the body is required to exercise functions inherent to government (foreign policy, immigration, and citizenship), substantive coercive powers (tax collection, prisons), provide policy advice to the Government, or perform multiple functions. Where there is a constitutional requirement for ministerial oversight or direct responsibility, or where the subject matter is of importance to the Government, carries high public and political expectations, and has significant accompanying risk, a public service department should be the preferred form. This may involve granting an existing department a new power or creating a new department.

¹¹² <http://www.legislation.govt.nz/act/public/2014/0026/latest/DLM4005414.html>

¹¹³ <http://www.legislation.govt.nz/act/public/1988/0020/latest/DLM129110.html>

Departmental agency: A departmental agency is a new organisational form in the New Zealand context, provided for by amendments in 2013 to the State Sector Act 1988. Legally, a departmental agency is part of the host department, but it is headed by its own chief executive who acts under deemed delegation as the employer of those employees who carry out the departmental agency's activities.

- Departmental agencies are designed to carry out a clearly defined set of services, operational or regulatory activities under autonomous management, but within the policy and resource settings of a host public service department. The choice of a departmental agency can offer a preferable alternative to establishing a wholly separate department or Crown entity, and offers the benefits of maintaining system coherence and avoiding the fragmentation and costs of separate agencies.

Crown entities: Crown entities perform much of the operational business of government. They are governed by the Crown Entities Act 2004.¹¹⁴ Crown entities will usually be appropriate when there is a compelling need to have the function performed at arm's length from Ministers or under the authority of a governance board. Crown entities can take a variety of forms, each of which vary slightly from each other in respect of their legal form, function, source of funding and their relationship with Ministers.

- **Crown agent ("CA"):** This form is appropriate when the body is required to give effect to government policy. A CA has a large degree of ministerial oversight.
- **Autonomous Crown entity ("ACE"):** This form is appropriate when the body is required to have regard to government policy as one of a number of relevant factors. An ACE can still have a large degree of ministerial oversight.
- **Independent Crown entity ("ICE"):** This form is appropriate where it is important that the body has greater independence from Ministers to preserve public confidence in the body. The Minister is prevented from directing the body how to perform its functions, although the Minister can exert indirect influence through budget monitoring and the Statement of Intent process.
- **Crown entity company ("CEC"):** This form is appropriate where the functions are both commercial and non-commercial in nature although not as clearly defined as may be needed for a State Owned Enterprise.
- **School board of trustees:** This form is appropriate where a new State school or State-integrated school is created.
- **Tertiary Education Institution:** This form is appropriate where a new university, polytechnic, wānanga or institute of technology is created.

Examples of CAs, ACEs, ICEs and CECs are in Schedules 1 and 2 of the Crown Entities Act 2004.

¹¹⁴ <http://www.legislation.govt.nz/act/public/2004/0115/latest/DLM329631.html>

State Owned Enterprise (“SOE”): An SOE is designed to be run as a commercial enterprise and be independent of government influence over the SOE’s day-to-day operations. The Government is the sole shareholder and is therefore able to ensure that the business is run having regard to the values and interests of the community in which it operates. SOEs are governed by the State-Owned Enterprises Act 1986.¹¹⁵

- An SOE may be the appropriate form when there is an identifiable commercial objective and the body can operate as an efficient and profitable business.

Mixed ownership model company: A mixed ownership model company can be created when the Government sells minority shares (up to 49%) in an SOE. The Government retains control as the majority shareholder and the company ceases to be an SOE. It is also possible to create new companies with the Crown as majority or minority shareholder from the outset.

Officer of Parliament: An officer of Parliament is accountable to the House, not to Ministers. This form is used for roles that act as a check on the executive’s use of power and resources. For that purpose, an officer of Parliament must only discharge functions that the House of Representatives, if it so wished, might carry out. Offices of Parliament are rarely created; at present only three exist.¹¹⁶

Public Finance Act 1989 body (Schedule 4 and 4A): Where, due to its particular distinctive features, a body does not comply with all of the requirements of the Crown Entities Act 2004, that body may be listed in Schedule 4 or Schedule 4A of the Public Finance Act 1989¹¹⁷.

The State Services Commission maintains an up-to-date list of all the organisations in the State Sector, categorised by their organisational form.¹¹⁸ It has also produced guidance on how to identify the organisational form that is most appropriate to the particular functions concerned.¹¹⁹

17.4. Will the new public body be a tribunal?

Legislation should only create a new tribunal where it is inappropriate to give new powers to an existing tribunal and no other court, tribunal, or other specialist body is better placed to exercise the power.

Creating new tribunals is complex and involves considerable start-up costs, and ongoing costs. Creating a new tribunal should be a last resort and only considered if no other viable option exists.

A tribunal may be the appropriate body to determine questions or disputes that affect people’s rights, particularly where an independent assessment of facts and the application

¹¹⁵ <http://www.legislation.govt.nz/act/public/1986/0124/latest/DLM97377.html>

¹¹⁶ <http://www.parliament.nz/en-nz/parl-support/agencies/offices-of-parl/00CLOOAdminAgenciesOffices1/offices-of-parliament>

¹¹⁷ <http://www.legislation.govt.nz/act/public/1989/0044/latest/DLM160809.html>

¹¹⁸ http://www.ssc.govt.nz/state_sector_organisations

¹¹⁹ <http://www.ssc.govt.nz/reviewing-mog>

of specialist judgement or legal principles are required. Proceedings before a tribunal are generally more accessible, cost effective and allow a greater scope for individual and public participation. The procedures adopted are generally flexible enough to enable non-legally qualified people to represent themselves.

Any new tribunal should have, as a minimum:

- actual and perceived independence from the executive, in particular any department or agency that is likely to appear before the tribunal or that conducts an investigatory function relevant to the matter before the tribunal;
- members appointed in accordance with set criteria (such as minimum qualifications) to include at least one legally qualified member;
- a clearly defined jurisdiction, usually in a specialist field;
- a procedure appropriate to the subject matter of the dispute and flexible enough to accommodate the range of parties likely to come before it;
- powers necessary to perform its function and ensure a fair hearing, such as powers to adjourn, summons witnesses, require the production of documents, administer oaths and affirmations, take sworn evidence, and in appropriate cases close proceedings and suppress evidence or identities (the powers given to inquiries under the Inquiries Act 2013¹²⁰ may provide a suitable precedent in this regard);
- a right of appeal to a court of general jurisdiction (see Chapter 25).

The Ministry of Justice should be consulted before any substantive policy work is undertaken to create a new tribunal or alter an existing tribunal's powers or functions. The Ministry of Justice is currently producing detailed guidance on creating new tribunals. Once published, this guidance will provide the starting point for any department that is considering creating a new tribunal.

17.5. Will the public body be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987)?

All public bodies should be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987).

The Acts discussed in this section are key mechanisms by which government bodies are able to be held accountable for their activities. They should apply to all new bodies and existing bodies unless there are compelling reasons not to do so. The Ministry of Justice, the State Services Commission, the department that administers the particular Act, and any agency with operational responsibilities under the particular Act (departments and agencies

¹²⁰ <http://www.legislation.govt.nz/act/public/2013/0060/latest/DLM1566106.html>

identified below) should be consulted when considering whether to apply the following Acts to a Government body:

- **The Ombudsmen Act 1975¹²¹, the Official Information Act 1982¹²², and the Local Government Official Information and Meetings Act 1987¹²³**: The Department of Internal Affairs¹²⁴ and the Office of the Ombudsman¹²⁵.
- **The Public Audit Act 2001¹²⁶**: The Treasury¹²⁷ and the Office of the Controller and Auditor-General¹²⁸.
- **The Public Records Act 2005¹²⁹**: The Department of Internal Affairs and Archives New Zealand¹³⁰.

¹²¹ <http://www.legislation.govt.nz/act/public/1975/0009/latest/DLM430984.html>

¹²² <http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html>

¹²³ <http://www.legislation.govt.nz/act/public/1987/0174/latest/DLM122242.html>

¹²⁴ <http://www.dia.govt.nz>

¹²⁵ <http://www.ombudsman.parliament.nz/>

¹²⁶ <http://www.legislation.govt.nz/act/public/2001/0010/latest/DLM88541.html>

¹²⁷ <http://www.treasury.govt.nz>

¹²⁸ <http://www.oag.govt.nz/>

¹²⁹ <http://www.legislation.govt.nz/act/public/2005/0040/latest/DLM345529.html>

¹³⁰ <http://www.archives.govt.nz> and also <http://www.dia.govt.nz/About-Internal-Affairs---Department-structure---Archives-New-Zealand>