

# ISSUES PARTICULARLY RELEVANT TO EMPOWERING SECONDARY LEGISLATION

## Chapter 14 Delegating law-making powers

Parliament makes laws by enacting primary legislation (Acts of Parliament). However, it is often not appropriate or possible for an Act to include all the details necessary for it to have its intended effect. For this reason, Parliament will often include in an Act a provision that delegates to another person or body, often part of the Executive, the power to prescribe these necessary details.

The Act that delegates this law-making power is known as the “empowering Act”. The specific provision containing the power is the “empowering provision”. The product of the exercise of this power is known, generically, as “delegated legislation” or “secondary legislation”.<sup>34</sup> This chapter refers to it all as “secondary legislation” as this is the label adopted by the [Legislation Bill](#). Although many other names are used (for example, regulations, proclamations, Orders in Council, bylaws, rules, codes), these names do not, by and large, provide a principled way of distinguishing between different types of secondary legislation. The key questions with secondary legislation are *what* can be delegated, *who* exercises the delegated power, and what *safeguards* apply.

The following competing considerations need to be balanced in determining what is appropriate for Parliament to delegate under an Act:

- **The legitimacy of the law**—Important policy content should be a matter for Parliament to determine in the Act through an open democratic process. Too much delegation, or having delegated powers that are too broad or uncontrolled, undermines the transparency and legitimacy of the law. However, it is not necessary for Parliament to do everything—as Parliamentary time is scarce, this time is best spent on the policy issues, not details.
- **The durability and flexibility of the law**—Delegation can be important to how a law (and the regulatory system it is part of) performs over time in terms of responding to changing or unforeseen circumstances or allowing minor flaws to be addressed. Delegation can give an opportunity for experimentation. Delegation can also allow emergencies to be dealt with quickly, which can be important at least for short-term solutions.
- **The certainty or predictability of the law**—If too much policy content is delegated or delegations are given to different decision makers without clearly scoped mandates, clarity about what is required by the law can be undermined.
- **The transparency of the law**—Layers of secondary legislation can create complexity and fragmentation in a regime, making it difficult for readers to find and understand

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<sup>34</sup> Note that the Legislation Bill will remove a distinction sometimes made between secondary and tertiary legislation on the basis that it is unhelpful as often so-called “tertiary” legislation is empowered directly by an Act.

the law. However, too much technical detail in an Act might make it difficult to navigate.

Particular attention should be paid to empowering provisions that empower a delegate to augment or override or authorise exemptions from, primary legislation. Such empowering provisions should be assessed in the context of the general principles governing secondary legislation. However, they can increase the risk of undermining the separation of powers and so always require careful consideration to ensure that they are both needed and appropriately circumscribed. This is dealt with further in [Chapter 15](#).

One important check on secondary legislation within Parliament itself is the Regulations Review Committee (RRC). When a Bill is before another committee, the RRC may consider any empowering provision in that Bill and report on it to that committee. Officials preparing legislation must therefore be prepared to justify why a power is proposed to be delegated and the scope of that power.

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

## Guidelines

### 14.1 Is the matter appropriate for secondary legislation?

*Legislation should not authorise secondary legislation to be made in respect of matters that are appropriate for an Act.*

As a general rule, matters of significant policy and principle should be included in an Act. Secondary legislation should generally deal with minor or technical matters of implementation and the operation of the Act. However, there are difficult choices on the continuum between significant policy and technical detail.

Some matters, such as those that affect fundamental human rights in a significant way, are clearly appropriate only for an Act. However, the decision will not always be clear-cut, and some matters may be appropriate for both primary and secondary legislation. Secondary legislation often involves some policy, but this should be at a lower level than the policy in the Act.

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

- matters of significant policy;
- matters significantly affecting fundamental human rights;
- the creation of significant public powers such as search and seizure or confiscation of property;
- the granting or changing of appeal rights;

- variations to the common law (especially when a common law right is to be entirely taken away, or replaced, by legislation);
- the creation of serious criminal offences and significant penalties;
- the authorization of the levying of a tax, borrowing money, or spending of public money;
- the creation of a new public agency; and
- procedural matters if they, in effect, set the fundamental policy of a legislative scheme.

Most of the items above are subsets of the basic idea that significant policy should be in an Act. Although “significance” will vary from case to case, some indicators are that the policy answers the key questions in the problem addressed by the legislation, that the policy has the potential to give rise to controversy (whether political or otherwise), or that (without this policy decision being made) it would be otherwise unclear what the overall implications of the Bill are.

The following matters should also generally be addressed in an Act but in limited circumstances (as discussed further below) may also be appropriate for secondary legislation:

- amendments to another Act; and
- retrospective changes to the law.

The following are examples of subject areas that may be appropriate for secondary legislation:

- the mechanics of implementing an Act, such as prescribing fees, the format and content of documents, or certain lower-level procedures;
- large lists and schedules of minor details;
- technically complex matters;
- commencement dates;
- subject matter that requires flexibility or updating in light of technological developments in an area;
- material required to respond to emergencies or other matters requiring speedy responses; and
- material that requires input from experts or key stakeholders.

It is *not* appropriate to empower secondary legislation:

- to fill any gaps in an Act 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 in Parliament;
- solely to speed up a Bill's passage through Parliament; or
- simply to follow a past practice of using secondary legislation on that subject.

#### **14.2 For what purposes may the power to make secondary legislation be exercised?**

*The empowering Act should clearly and precisely define the permitted subject matter of secondary legislation and the purposes for which it may be made.*

It is normal to specify in an empowering provision that the named delegate is empowered to make regulations (or rules, bylaws, etc) on a defined range of subject matters and for defined purposes. This ensures that the resulting secondary legislation is within the limits intended by Parliament. Before settling an empowering provision, it is advisable to consult those who will implement the Act and make the secondary legislation. This will help to identify the extent of the powers that are needed and in what circumstances those people anticipate exercising the powers. Generally, officials should have a clear idea of the scope and content of secondary legislation when the empowering provision is being developed.

A power to create secondary legislation should be wide enough to enable an Act to be effectively implemented. Some flexibility in an empowering provision is often justified as it can be difficult to be sure exactly how the Act's requirements will be legally operationalised. However, flexibility needs to be balanced against the need to have clear boundaries about the scope of the power so that it is not unfettered. RRC may criticise an empowering provision if it is drafted so broadly that its boundaries are uncertain.

A rushed or unfinished policy development process does not justify a broad or relatively unfettered empowering provision.

#### **14.3 Who will hold the power to make secondary legislation?**

*The person authorised to make secondary legislation must be appropriate 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 secondary legislation. Traditionally, secondary legislation is often made by the Governor-General on the advice of Ministers, or is made by the relevant portfolio Minister(s). Key factors to take into account are the extent of policy or value judgements required, the expertise required of the person making the secondary legislation, the degree of political accountability required (reflected in the importance of the issues in question), and what safeguards would apply as a consequence (for example, publication, disallowance, Cabinet scrutiny, or drafting and certification by the [Parliamentary Counsel Office](#) (PCO)).

The more significant the power, the more likely it is that it should be exercised by the Governor-General in Council. That will ensure that a full range of safeguards will apply (including Cabinet scrutiny and drafting and certification by the PCO). The more technical the exercise of the power, or the more limited the group it applies to, the more likely it is to be appropriate for delegation to another agency (see [Chapter 18.2](#), which also deals with this

issue).

#### 14.4 Is the secondary legislation subject to appropriate safeguards?

*All secondary legislation should be subject to an appropriate level of scrutiny, a good process, publication requirements, and review.*

Safeguards provide a vital check on the exercise of the delegated power. The level of safeguards considered appropriate will increase with the significance of the delegated power. The proper purposes of safeguards are to promote:

- a good law-making process (through, for example, requirements to have regard to certain matters or being satisfied that a test is met);
- transparency (through transparent processes and decisions);
- participation (through consultation or requiring confirmation, concurrence, or consent); and
- accountability (through, for example, disallowance via the RRC).

Safeguards can take a variety of forms. They can be substantive preconditions or procedural requirements. They can apply before a power is exercised or provide a remedy after it is exercised.

Safeguards are not, however, a substitute for clearly and precisely defining the permitted subject matter of the secondary legislation and the purposes for which it may be made (see [14.2](#)). Safeguards are not a sufficient remedy for a vague and sweeping empowering provision that gives the decision maker too much discretion.

Standard safeguards that generally apply to secondary legislation are:

- review by the RRC and potential disallowance by Parliament (this applies to secondary legislation that is a “disallowable instrument”); and
- publication (if the legislation is a “legislative instrument”, publication is automatically done on the [New Zealand legislation website](#), but otherwise needs to be stated in the legislation).

Additional safeguards apply automatically to secondary legislation that is made by the Governor-General by Order in Council. It must be drafted and certified by the PCO, will receive Cabinet scrutiny, and will be subject to the 28-day rule (meaning that the legislation must not come into force earlier than 28 days after its notification in the *Gazette*).

For secondary legislation other than an Order in Council, the empowering Act should usually expressly provide for whether or not it is a disallowable instrument or a legislative instrument, or both.

Other bespoke safeguards may also be appropriate. However, these can increase the complexity of the process (particularly the time and cost) and so need to be carefully designed

to ensure that the benefits are captured without too much cost. Examples of these safeguards include:

- The instrument may be made only on the recommendation of a Minister (or on the recommendation, approval, confirmation, concurrence, or consent of some other person) and safeguards may also be attached to that recommendation (for example, the Minister or other person may be required to consult with certain people before making the recommendation, to have regard to certain principles or other matters, or to be satisfied that certain criteria are satisfied).
- The decision maker itself may be required to have regard to certain matters or be satisfied that a certain test is met.
- Preconditions may be included that require that certain things are shown, or certain circumstances exist, before the instrument is made.
- Consultation requirements may be included (see [Chapter 19](#)).
- A “sunset” clause may be included (that is, the legislation only remains in force for a limited period of time).
- Provision may be made for the legislation to lapse after a certain period if not confirmed by Parliament through a confirmation Bill (although protection offered by this safeguard may be somewhat limited).
- The reasons for the exercise of the power may be required to be given.

#### **14.5 Will the secondary legislation have retrospective effect?**

*If secondary legislation may have retrospective effect, the empowering provision must clearly authorize that in clear and unequivocal terms.*

If secondary legislation is intended to have retrospective effect, the reasons for that must be capable of clear articulation and the empowering provision must authorise that effect in clear and unequivocal terms.<sup>35</sup>

#### **14.6 Will the maker of the secondary legislation be able to subdelegate some of the legislation?**

*If secondary legislation may be made by a subdelegate, that must be clearly authorised in the empowering provision.*

The identity or office of the person to whom the power to make secondary 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 subdelegate a legislative power. If the power to make secondary legislation is able to be subdelegated, the empowering provision must clearly identify that intent.

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<sup>35</sup> See [Chapter 12.1](#) for guidance on legislation having retrospective effect.

**14.7 Will the secondary legislation be inconsistent with rights in the New Zealand Bill of Rights Act 1990?**

*Legislation should not empower secondary legislation that is inconsistent with the New Zealand Bill of Rights Act 1990.*

Secondary legislation that is inconsistent with the [New Zealand Bill of Rights Act 1990](#) (NZBORA) will generally be invalid because it falls outside the empowering provision. This is because an empowering provision will generally be interpreted, in accordance with section 6 of NZBORA, to empower only such secondary legislation as is consistent with NZBORA. The only circumstance in which secondary legislation might be valid despite inconsistency with NZBORA is if the empowering provision unequivocally, or by necessary implication, permits rights-infringing secondary legislation. In such a case, the empowering provision (and the secondary legislation it empowers) will prevail over NZBORA because of section 4 (which says that provisions inconsistent with NZBORA are not for that reason invalid or ineffective).

## Chapter 15 Some specific types of empowering provisions

This chapter provides guidance on three specific types of empowering provisions—those that delegate a power to amend or override an Act; those that delegate the commencement of legislation; and those that enable material to be incorporated by reference. These types of empowering provisions must always be considered in light of the principles for all secondary legislation described in [Chapter 14](#), but give rise to specific issues that need to be dealt with in the empowering Act.

### Guidelines

#### 15.1 The interaction of secondary legislation with primary legislation

*Legislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so, the empowering provision is as limited as possible to achieve the objective, and the safeguards reflect the significance of the power.*

The nature of secondary legislation is that it generally takes effect *subject to* all primary legislation. It is possible, however, for secondary legislation to amend or override an Act. This requires that Parliament enact an empowering provision expressly authorising secondary legislation with that effect. Empowering provisions of this nature are sometimes called “Henry VIII clauses”.

By virtue of the fact that this type of empowering provision enables the Executive to override Acts of Parliament, these provisions create a risk of undermining the separation of powers. However, such clauses come in various types and, although each must be carefully considered, they do not all raise the same level of constitutional concern.

Towards one end of the spectrum are powers to adjust legislation in such a narrowly circumscribed way that the policy for the adjustment is fully or largely set by Parliament and the subject matter would in any case be appropriate for secondary legislation. Examples include adjusting an amount to reflect changes in the New Zealand Consumer Price Index, adding to a list of types of people under a test set by an Act or, one step further, defining terms that do not set the scope of the Act (so are not central to the policy or principle of the Act). That type of empowering provision amends an Act by augmenting it. If the power is appropriately limited and the matter is otherwise appropriate for secondary legislation, it augments the Act in a manner that is consistent with Parliament’s intention and that does not pose significant constitutional risk.

At the other end of the spectrum is an empowering provision that permits secondary legislation to override an Act in ways that affect its policy or, more significantly still, that amends *other* Acts. Examples include emergency powers created for post-earthquake responses or epidemics. These types of powers pose more risk, require strong justification, and need very careful designing of appropriate safeguards.

In each case, the questions to be asked are:

- Why delegate this power? What is the need or benefit that justifies delegating the power to amend the Act? Examples of a justification include that there is:



- an emergency that requires a quick response;
  - a complicated transition between two statutory regimes; or
  - a benefit to the public in having an amount (or list) stated (and so easily accessible) in the Act but also able to be easily adjusted over time.
- If there is a need, what is the extent of delegation that is being permitted? What is the significance of the policy being delegated? How does that compare to what would generally be appropriate for delegation under [14.1](#)? As noted above, there is a spectrum. The larger the delegation, the greater the constitutional risk or significance, and so the greater must be the justification or need for the power. If it is judged that the power is needed, the empowering provision must be drafted in the most limited terms possible to address the need, and it must be consistent with and support the provisions of the empowering Act.
  - If the power is justified, what additional safeguards are needed? Safeguards should be designed to address the risks posed by the actual provision. Safeguards may include:
    - requiring consultation with people or bodies likely to be affected;
    - providing that the power to make the secondary legislation is exercised by the Governor-General in Council (so at the highest level of delegation);
    - for broader powers:
      - limiting the time period within which secondary legislation that amends primary legislation is possible (for example, including a “sunset clause”, so the power exists only for the reasonable period of a transition from one regime to another);
      - establishing a review panel to consider and report to Parliament or the Minister on the use of the power; or
    - making the use of the power subject to parliamentary approval (rather than only disallowance).

## 15.2 Commencement

*If the commencement of legislation is to be delegated, the need for that delegation must be justified and there should generally be a backstop commencement date.*

Commencement dates may be set by Orders in Council but only if flexibility is needed for good reason. Otherwise, delegation of commencement risks the will of Parliament being thwarted by an executive that no longer supports the policies of the Act or (on a more practical level) large amounts of latent legislation creating, over time, increased uncertainty and complexity. For this reason, if commencement is delegated, the Government should have a realistic

timetable for bringing legislation into force.

### 15.3 Does the legislation authorise “incorporation by reference”?

*Incorporation by reference should be used only if there are clear benefits to doing so or it is impractical to do otherwise.*

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

The issue of incorporation by reference can be considered in relation to principles of good law making. There are four main issues with incorporation by reference:

- **Quality**—There is a risk that the material incorporated is not sufficiently certain or understandable to be appropriate for legislation. This is particularly important if the material is the basis for offences and is a common problem if the material incorporated was developed for another purpose (for example, guidance).
- **Accessibility**—Legislation should be easy to find, use, and understand. The incorporated material needs to be accessible to the same extent as the legislation that incorporates it.
- **Legitimacy**—If it is possible to change the incorporated material and for those changes to automatically flow through into the legislation, Parliament or the other law maker does not have control over the content of the secondary legislation. Subdelegation of this kind needs to be carefully considered and specifically authorised.
- **Good process**—An appropriate process should be followed in making the law and if incorporation by reference enables the usual process to be bypassed, this can be problematic.

Incorporation by reference is, to a certain extent, inconsistent with these fundamental principles of good law making (particularly if it allows for amendments to the document incorporated to be automatically part of the law). Accordingly, incorporation by reference should be used only if there is a strong need or benefit from doing so or it is impracticable to do otherwise.

The possible benefits from incorporation by reference are:

- It can enable the law to be shorter, simpler, and more consistent. It can remove significant technical detail that undermines the ease of finding and using the core requirements. It can simplify compliance by allowing users to rely on material they are already complying with in another context.
- It can allow rules to be developed by people who have specialist knowledge or expertise, which improves the quality of the law. Those who work in the affected

area may then better understand the rules.

- It can facilitate convergence and consistency of standards being used and enable rules to remain up to date with international and national standards.

Practical examples of the cases where incorporation by reference may be appropriate, after considering the risks above, are:

- 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 or secondary 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 a product (such as motor vehicles) manufactured by it or its members.

Part 3 of the [Legislation Act 2012](#) provides general authority for secondary legislation to incorporate by reference certain types of material and prescribes rules that apply when this general authority is relied on. The rules include a range of standard safeguards that address some of the above risks and issues. For example, amendments to the incorporated material do not become part of the law unless the amendments are specifically incorporated by a later instrument. Further, consultation is required on the proposal to incorporate material and there are rules about how the material must be held and made available.

Section 30 of the [Standards and Accreditation Act 2015](#) provides general authority for New Zealand Standards (which include joint AS/NZS standards) to be incorporated by reference into secondary legislation, including bylaws. Section 29 deems a reference to a New Zealand standard in legislation to be a reference to the latest New Zealand Standard with that citation, together with any modifications to it, promulgated before the enactment in which it is cited was passed or made. This means that, consistent with the Legislation Act 2012, amendments to a standard do not take effect until specifically incorporated by a later instrument.

Legislation should not repeat the provisions of the Legislation Act 2012 or the Standards and Accreditation Act 2015 and those provisions should not be overridden in other legislation unless a different policy approach is necessary.<sup>36</sup> Any different policy approach may need to be justified to the Regulations Review Committee.

In addition, each decision to incorporate material under the general authority in Part 3 of the Legislation Act 2012 or section 30 of the Standards and Accreditation Act 2015, needs to be

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<sup>36</sup> For example, if the standard maker is an expert body and it is critical to the policy that there be consistency with those standards, it is more likely to be appropriate for an Act to permit amendments to apply automatically as part of the secondary legislation or with a simpler updating process.

justified on its own merits—ie, that there are sufficient benefits in the particular case as described above to justify the costs in terms of the risks described above.

## Chapter 16 Granting powers of exemption

In some cases, requiring a particular person to comply with legislation might be impractical or result in hardship to that person. In such cases, it may be necessary to empower a government body (including Crown entities and other State sector bodies) or office holders to exclude or exempt a particular person or class of people, transactions, or things from the application of an Act or regulations (*see*, for example, section 220 of the [Health and Safety at Work Act 2015](#)).

For convenience, the term “exemption” is used in this chapter to refer to all exemption powers regardless of whether they are called exemptions, waivers, dispensations, exclusions, concessions or otherwise. An exemption is distinct from a statutory exception. An exemption is a discretionary power granted to a particular body or office holder by an Act that, when exercised, will exclude or exempt certain things from the application of an Act. An exception is a provision in an Act that states that the law does not apply to a certain person, group, thing, or transaction.

Exemptions occupy a sliding scale and vary in terms of their significance and scope. At the one end of the scale are exemptions that vary the scope or application of an Act. At the other end are concessions that are “one-off”, or minor allowances usually made to individuals only. The more significant the exemption, the more significant the procedural safeguards required in respect of its exercise. In the case of minor concessions, additional procedural safeguards may be unnecessary.

A power of exemption is a form of delegated power (*see* [Chapter 14](#)), although at times the distinction between a power of exemption and a discretion is hard to identify.

### Guidelines

#### 16.1 Should legislation grant a power of exemption?

*There must be good reasons to grant a power of exemption.*

Powers of exemption should not be the norm. They should not be granted to allow arbitrary exemption from the provisions of an Act, nor should they be granted to patch up incomplete policy development.

If a power of exemption would delegate to the Executive the power to change the scope or operation of an Act, or it reduces the accessibility of the law (because the law regarding who or what the legislation applies to is spread across specific exemptions and the Act), consideration should be given to whether that is a power better left to Parliament.

The Regulations Review Committee has expressed concern that in some cases exemptions have been so numerous and applied so broadly that the exemptions have supplanted the framework of rules to which they relate.

Factors that may favour the granting of a power of exemption are:

- an Act relates to a complex and rapidly developing field such that the boundaries may be difficult to foresee;
- fields in which an urgent decision on an exemption may be required;

- the circumstances requiring an exemption may be so exceptional or “one-off” as not to justify amending an Act;
- an area requires frequent adaptation to changing factual or policy circumstances;
- minor unforeseen developments in, or technical issues with, the law may arise that do not justify amending an Act; or
- compliance is impractical, inefficient, or unduly expensive but the policy objective can be achieved by imposing conditions on the exemption.

## 16.2 What safeguards apply to the exercise of the power of exemption?

*Legislation must specify appropriate safeguards to apply to powers of exemption.*

An exemption that varies the scope of legislation or applies to a class of people or things will require a greater level of safeguards than a minor concession to an individual that does not materially affect the scope or operation of the legislation. If exemptions to individual parties may give an unfair advantage, consideration should be given to allowing class exemptions.

A power of exemption should generally be subject to the following safeguards:

- **Consistency with purpose of the Act**—The power must be exercised consistently with the purpose of the Act. The circumstances in which the exemption may be granted or the criteria for the exercise of the power should also be consistent with the purpose of the Act. This is often incorporated into the criteria (*see next point*).
- **Criteria for exercise of power**—Legislation should set out the criteria for granting the exemption. Clear criteria will reduce the likelihood of a successful judicial review of the decision to grant or refuse an exemption.
- **Reasons**—Legislation should include a requirement to give reasons for the exemption, although this requirement may not be necessary for minor or trivial exemptions.
- **Judicial review**—The ability to seek judicial review of the exercise of an exemption power is an important safeguard. This right should not be unreasonably restricted (*see [Chapter 28](#)*).
- **Process review**—Usually there should be a process (which need not be in the legislation, but may be expected by Ministers or select committees) to review exemptions at regular intervals to identify a need to amend the Act.

Two additional safeguards may also be appropriate: sunsets or reviews, and annual reporting requirements:

- **Sunsets or reviews**—The empowering Act may provide that an exemption may continue in force for not more than a certain period (for example, five years) (and

is treated as revoked at the end of that period) or may require that exemptions be reviewed. This may be appropriate if exemptions under the Act are expected to be mainly of a short-term or temporary nature. It may also be appropriate if there is a special reason for requiring a regular review of exemptions (rather than leaving a review as matter of administrative discretion). A review may include assessing whether the Act itself should be amended. Providing for revocation is unnecessary if the legislative design of the Act contemplates exemptions that are relatively long-term or permanent in nature or if it is best left to administrative discretion as to when and how to prioritise reviews.

- **Annual reporting requirements**—The person or body that exercises the power may be required to submit a report to Parliament detailing the number of times and circumstances in which a power of exemption was exercised.

### **16.3 Will the power be subject to the publication or disallowance procedures in the Legislation Act 2012?**

*Legislation should clearly identify whether the power of exemption will be subject to the disallowance and/or publication procedures in the Legislation Act 2012.*

For the avoidance of doubt, an Act should confirm whether or not the exemption instrument is a disallowable instrument or a legislative instrument, or both. Often a class exemption that is of general application will be a disallowable instrument and a legislative instrument. An “individual” exemption will often be a disallowable instrument yet not a legislative instrument (but in this case the legislation should provide for alternative publication requirements). Some individual exemptions will probably be neither, and publication may not be appropriate; for example, exemptions from wearing a seatbelts or helmets on health grounds in section 166 of the [Land Transport Act 1998](#).

### **16.4. Will the exemption be subject to conditions?**

*Legislation must contain express authority to impose conditions on an exemption.*

An exemption may either be granted on a blanket basis or may be subject to specific conditions. The ability to impose conditions on an exemption is a useful tool to ensure that the exemption granted is no broader than is strictly necessary, but the power to impose conditions must be explicitly authorised by the empowering Act. Conditions must also be consistent with the purpose of the Act.

## Chapter 17 Authorising the charging of fees and levies

The ability to recover some or all of the cost of providing or performing a public function will often be vital to the ability of an agency to provide or perform that function. Granting a public body the power to charge fees or levies is a common method of cost recovery.

Legislative authority for imposing fees or levies is usually granted by empowering provisions that authorise the Executive to make regulations providing for fees or levies. This chapter will help to ensure that those empowering provisions are included in appropriate circumstances, and that the authority to make regulations is exercised in an appropriate manner.

There is an important distinction between a fee or levy and a tax.

Parliament may delegate to the Executive the power to set and charge a fee or levy, but a tax may only be imposed by or under an Act. In rare circumstances Parliament may delegate the setting of certain features of a tax to the Executive, but only in very certain and confined terms. Failure to provide adequate authority for a tax in the empowering Act may result in the courts declaring the subsequent regulations invalid. This may result in disruption to the provision of the service or exercise of a function and considerable financial consequences to the agency concerned.

There is a further distinction between a fee and a levy. A levy is more akin to a tax in that it is usually compulsory to pay it, and is usually charged to a specific group. Also, a levy charged to members of a certain group or industry is usually used for a particular purpose (such as market development), rather than relating to specific services provided to an individual. In the Regulation Review Committee's (RRC) view, imposing a levy using a fee-setting power is contrary to [Standing Order 319\(2\)\(c\)](#) in that the regulation "appears to make some unusual or unexpected use of the powers conferred by the enactment under which it is made".

Fee-setting and levy-setting regulations made under the empowering provision are secondary legislation. As such, the considerations in [Chapter 14](#) will apply and the regulations will be reviewable by RRC. A discretion to waive a fee is, in effect, an exemption power (see [Chapter 16](#)).

Two essential pieces of guidance to review at an early stage are the Treasury's [Guidelines for Setting Charges in the Public Sector \(2017\)](#), and the Office of the Auditor-General's guidance [Charging fees for public sector goods and services \(2008\)](#).

### Guidelines

#### 17.1 Should the service or function be subject to a fee?

*Fees should be charged only if the nature of the service or function is appropriate and the fee can be quantified and efficiently recovered.*

Whether a service or function should be subject to a fee is not always clear and will involve a number of considerations. The table below sets out some of the key issues to consider when determining whether it is appropriate to charge a fee:



<b>Fees may be appropriate</b>	<b>Fees may be inappropriate</b>
Service or function is rendered to an individual and confers a benefit	Service or function is provided to the community as a whole
Service or function is rendered by request	Service or function is non-voluntary
Fee is easily quantifiable	Impractical to quantify the fee
Fee is easy to recover	Impractical to recover the fee
Service or function is transactional or regulatory in nature	Service or function is contractual in nature (and the level of charge can be negotiated contractually)
Examples: driver licensing and passports, and Overseas Investment Office consents	Examples: police, public hospitals, and Department of Conservation concessions

Legislation should not provide for regulations to prescribe a fee for a service if the service is something that the user is not bound to use or the provider is not bound to provide, and the level of the fee could be negotiated contractually when the service is requested (such as granting a licence to run a business in a national park).

Whether the courts find that a particular charge is a fee or a tax will involve considering:

- the terms of the empowering provision;
- the level of the charge;
- the costs of providing the service or performing the function, relative to the income from charges;
- the purpose for the charge;
- who the charge applies to; and
- in what circumstances the charge is imposed.

A fee may be considered a tax if it does not bear a proper relation to the cost of providing the function or service to which it relates.

## **17.2 Should the objective or function be subject to a levy?**

*Levies should be imposed only if it is appropriate for a certain group to contribute money for a particular purpose.*

A levy does not relate to a specific good or service. It is usually charged to a particular group to help fund a particular government objective or function. Accident Compensation Corporation levies, for example, are factored into the costs of petrol and vehicle licensing to

help cover the cost involved in treating people who are injured in motor vehicle accidents. The person paying might never benefit personally from the government service, but it is desirable that they contribute to the cost.

Another example is where the members of a particular industry pay a levy to cover the costs of a regulator or promoter of that industry. A particular member may have little direct contact with the regulator or may not directly benefit from the promotion, but it is appropriate that the member contribute towards the costs. If the [Commodity Levies Act 1990](#) applies, it is usually not acceptable to enact (by Act) a parallel scheme for a particular industry.

The key distinction between a levy and a general tax (such as income tax or GST) is that revenue gathered by a tax is not usually earmarked for any particular purpose. Rather, it is appropriated and spent by the Government according to the particular policy objectives or requirements of the day.

In some cases, it will be appropriate to use a levy to pay for the costs of a particular government objective or function. In other cases, it will be appropriate to use a tax-funded appropriation; for example, if the benefits accrue primarily to the public as a whole and there is only a remote connection to the group that would pay the levy.

### **17.3 Does the legislation provide authority to prescribe a fee or a levy?**

*Legislation must include an empowering provision that specifically authorises the Executive to prescribe a fee or levy.*

With the exception of payments received under contractual agreements (public bodies generally do not need statutory authority to enter into contracts for commercial transactions), it will usually be unlawful for a public body to charge a fee or levy without express authority from Parliament.

### **17.4 How is the fee amount determined?**

*Legislation must set out the manner by which the fee should be determined.*

The empowering provision should state the basis by which to prescribe the fee. Fees for a service or function should normally be determinable in advance by the payer before the service is provided or the function is performed, unless the Act contemplates otherwise. Often a fee or levy will be a fixed amount. However, if a fee is to be determined by a particular method or calculation (such as a fee calculated by reference to an hourly rate), this should be authorised in the empowering provision.

The fee amount recovered should bear a proper relation to the cost of providing the service or performing the function and should not exceed that cost. If the fee amount exceeds the cost, the fee will be at risk of being declared unlawful on the basis that it is an unauthorised tax.

Any authority given to charge a fee is, therefore, implicitly capped at the level of cost recovery. Specific authority in the Act would be required to charge a fee that would recover more than the cost of providing the service because of an intention to impose a penalty, to limit access

to, or demand for, a service or to meet a social objective. It is good practice that the relevant Cabinet papers provide a clear justification for the level of the fee.

A fee that cross-subsidises other services or other groups of users should generally be avoided. However, in the rare cases in which it may be appropriate for a fee to cross-subsidise other services, or other users, the cross-subsidisation should be transparent and the empowering provision must be drafted widely enough to authorise the cross-subsidisation.

#### **17.5 How is the levy amount determined?**

*Legislation must set out the manner by which the levy is determined.*

There must be a proper relation between the levy amount charged and the particular objective or function concerned. The amount of a levy imposed on a particular group should be commensurate with the degree of connection between the group and the objective or function concerned. For example, if a levy covers the costs of a regulator, it may be inappropriate to impose a large levy on a group that has little to do with the functions of the regulator.

In some cases, an objective or a function is funded from a mixture of levies and an appropriation (for example, levies may pay for a portion of the costs of a regulator while an appropriation may pay the balance). In this case, the benefits that accrue to the regulated industry should be considered, as should the broader public benefit.

#### **17.6 Who will pay the fee or levy and in what circumstances can it be waived or refunded?**

*Legislation must clearly identify who may be charged the fee or levy and the circumstances in which it may be waived or refunded.*

Fees should only be charged to those people who benefit from the service or function. The fee should not be used to offset the cost of future users of the service or to attempt to recover any deficit that may have occurred as a result of previous under-recovery. A fee that does either of those things will risk being declared unlawful.

Levies may be charged to a class or group of people (often defined by the fact that they are undertaking a certain activity) to fund certain costs that may arise in connection with that activity. It is not necessary that the person paying obtain a direct benefit from paying the levy.

Payment of a fee or levy cannot be waived or refunded without authorisation from an Act. The Act may either explicitly authorise the refund or waiver, or it may empower the making of regulations to authorise a refund or waiver. In either event, the Act or regulations should identify the circumstances under which the fee or levy may be waived or refunded.

#### **17.7 Should there be a special process in connection with prescribing the fee or levy?**

*Legislation should identify any procedural requirements that must be satisfied in connection with the fee or levy.*

In some cases, it will be appropriate for the Act to set out specific procedural requirements

that must be satisfied before a fee or levy is prescribed.

It may be desirable for the Minister responsible for the empowering Act to consult with existing and potential users of the service, industry groups, or the public more generally before recommending regulations to prescribe a new fee or levy.

In some cases, it may be appropriate for a significant levy to be subject to a confirmation process (under which regulations lapse at an identified time unless confirmed earlier by an Act).