NEW POWERS AND ENTITIES

Chapter 18 Creating a new statutory power

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

The power to do something may be granted by legislation (statutory powers) or the common law. It may also stem from the fact that the chief executive or another agency head is a legal person and so has the natural powers of a legal person and is capable of contracting with other parties, subject to those powers being used within the limits of their functions.

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 remake the decision. The legislation must therefore clearly articulate the scope of the power, who will exercise it, and how it will be exercised.

Guidelines

18.1 Is a new statutory power required?

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

If there is already clear authority in existing legislation, it is inappropriate to grant the same power in new legislation because it would lead to duplication and a lack of certainty in the law. This is particularly true where only one Act is amended because it may result in an unintended distinction between two provisions (*see* Chapter 3.3).

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 3.6).

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.

18.2 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 appropriate court or tribunal. 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, including:
    - 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; and
    - 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, including:
    - the expertise required of the decision maker;
    - whether the new role will conflict with an existing role; and
    - the level of accountability desired of the decision maker;
- the process by which the power will be exercised, including:
    - 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; and
    - whether the power requires the making of broad judgements or the exercise of wide discretion;
- practical matters, including:
    - the ability of the decision maker to access relevant information; and
    - the existence of safeguards (such as the Ombudsmen Act 1975 and the Official Information Act 1982).

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 is usually 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.

18.3 Will the new power be delegable?

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

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. In these cases, a power to delegate the power may be advantageous. If a statutory power is to be delegated to another person, an express provision allowing this is required in the Act. To avoid uncertainty and litigation, legislation must be clear about who may exercise the delegated power and when it may be exercised by that person.

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.

Section 14 of the Interpretation Act 1999 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 1999 will apply unless legislation indicates otherwise. The Crown Entities Act 2004 contains default provisions providing for delegation by Crown entities. The State Sector Act 1988 contains standard delegation provisions for the Public Service, and Schedule 7 of the Local Government Act 2002 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.

18.4 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 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.

18.5 What is the power and how will it be exercised?

Legislation should identify what the power is and 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 responsible for settling any dispute over the exercise of it. That statement should also reduce the risk of litigation regarding the particular exercise of a power.

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 (which 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);
- whether the power is to be exercised independently (which should be made clear either from the context or by explicit provision—for example, the Crown Entities Act 2004 has a "statutorily independent function" regime that should be referenced in appropriate cases); and
- 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, section 7 of the Major Events Management Act 2007.

18.6 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* 18.5) are key safeguards; however, it may be necessary to include additional safeguards to ensure that 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).

The level of protection that is considered adequate increases as the interference with the rights of individuals increases. The rules of natural justice (*see* Chapter 4) 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 normally 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 28).

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.

18.7 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 28).

If a new power is 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 20).

The Ministry of Justice has produced detailed guidance for departments that are considering whether to create a new tribunal or improve an existing tribunal. The guidance includes information about the powers and procedures that may be appropriate for a tribunal.[37]

[37] Ministry of Justice *Tribunal Guidelines—Choosing the Right Decision-making Body; Equipping Tribunals to Operate Effectively* (2015).

Chapter 19 Requiring decision-makers to consult

Although several decades ago government policy tended to be developed behind closed doors, now, transparency and accountability are accepted norms and consultation is a standard part of most significant policy decisions. In fact, in some contexts, the expectation may extend beyond consultation to include stakeholder involvement or collaboration in the decision-making process (for example, in the Treaty of Waitangi context).

Consulting the public or affected stakeholders on significant decisions has the following benefits:

- It increases the transparent and inclusive nature of decisions, which improves their legitimacy.
- It improves the quality of decisions by ensuring that decision makers take into account the perspectives of those affected by them.
- It helps promote public understanding and acceptance of the decision (and so is likely to improve compliance).
- It enables those to whom the legislation or policy decision will apply to plan and adjust systems or processes appropriately.

Consultation often occurs simply because it is good practice or because there is an administrative requirement to consult (for example, the Cabinet Manual requires consultation prior to many Cabinet decisions).[38] Imposing a legislative obligation to consult is often not necessary. However, there may be good reasons to include obligations to consult in the legislation, particularly if the decision is delegated below the level of Cabinet or has a significant impact on others (and others' perspectives need to be transparently included), or if additional certainty is required about the scope of the obligation.

In this chapter, we discuss the question of whether legislation conferring decision-making powers should impose an express requirement to consult on those decisions. Those decision-making powers cover two main cases:

- administrative-type decisions that set or implement some government policy (for example, a decision, under section 236(1) of the Land Transfer Act 2017, of the Registrar-General of Land to set standards and issue directives in relation to the administration and operation of the register of land); and
- decisions to make secondary legislation (for example, a Minister's decision, under section 201 of the Health and Safety at Work Act 2015, to recommend the making of regulations for a funding levy).

This chapter does not cover circumstances where a person has a right to be heard in accordance with natural justice because the decision affects his or her rights or obligations (for example, a licensing

[38] Cabinet Office *Cabinet Manual 2017* at [5.14]. More detailed guidance on consultation requirements is found in the CabGuide and Treasury Guidance Note: Effective Consultation for Impact Analysis (June 2017).

decision or the power to remove a person from office). Those types of decisions are discussed further in Chapter 18.

If there is a duty to consult, the common law provides the details of how consultation should be conducted when the legislation itself is silent on that detail. The 1993 Court of Appeal decision in *Wellington International Airport Ltd v Air New Zealand* describes the nature of the consultation obligation, which applies except to the extent that legislation specifically provides otherwise:[39]

- Consultation includes listening to what others have to say and considering the responses.
- The consultative process must be genuine and not a sham.
- Sufficient time for consultation must be allowed.
- The party obliged to consult must provide enough information to enable the person consulted to be adequately informed so as to be able to make intelligent and useful responses.
- The party obliged to consult must keep an open mind and be ready to change and even start afresh, although it is entitled to have a work plan already in mind.

It is important to bear the nature and scope of this duty in mind in deciding whether to include a legislative obligation to consult.

Guidelines

19.1 When should legislation include requirements to consult?

Legislation should include a requirement to consult when that is necessary to clearly ensure good decision-making practice.

There is a wide spectrum of decisions made under legislation where consultation may be expected but is not required by the legislation. In general, decisions made by Cabinet can be expected to be made in accordance with the Cabinet Manual requirements for consultation. However, in some circumstances, it may be useful to include a legislative requirement to consult.

Officials should identify the stakeholders affected by the particular decision and consider the significance of the decision, the nature of (and controls otherwise applying to) the decision-maker, and the need for transparency and accountability in the particular context. A legislative requirement to consult may be necessary to:

- provide additional assurance and certainty to people affected by a decision that their views can be presented. This may be important in securing support for the legislation or in addressing concerns about the delegation of decision-making

[39] *Wellington International Airport Ltd v Air New Zealand Ltd* [1993] 1 NZLR 671, as described by Asher J in *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832.

powers. If there are conflicting perspectives, it may be important to ensure that they are given a clear opportunity to be included;

- set clear processes around what is required for consultation (to give certainty to decision makers and clarity to stakeholders);
- ensure consistency of consultation practice for similar decisions (particularly where there are multiple decision-makers and consistency of expectations and practice is important); or
- address concerns that consultation obligations from other sources (such as the common law or Cabinet Manual) are inaccessible to many people or do not apply.

However, there are some risks with solidifying the requirement to consult in legislation rather than leaving it up to good administrative practice. Including procedural requirements in legislation always risks reducing flexibility to tailor requirements to circumstances and potentially creates more complex legislation.

In assessing the risks, the following factors may limit the kind of consultation required by the legislation or may justify not including an obligation to consult:

- if, given the minor nature of the decision, consultation would add too much cost to the process;
- if, where the decision is required to be made urgently, consultation would create inappropriate delay; or
- if meaningful consultation could expose information that should remain confidential.

Officials should note that, in some cases, the common law provides a duty to consult (but usually only if the effect of a decision on an individual is significantly different to its effect on the general public). The common law duty to consult may occur where there is a legitimate expectation of consultation arising from a promise, past practice, or a combination of both on the general ground of fairness or because a duty can be implied into the statute.[40] However, in general, this is sufficiently rare or uncertain that it would not weigh against including a legislative obligation to consult if one would otherwise be advisable for the reasons given above.[41]

19.2 Who should be required to be consulted?

An obligation to consult should clearly identify who must be consulted.

The particular circumstances of the policy will determine how the legislation should describe

[40] *See Nicholls & Anor v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 369-370; *Talleys Fisheries Ltd v Cullen & Ors* (HC Wellington, CP 287/00, 31 January 2002 (Ronald Young J).

[41] This situation should be distinguished from the situation where natural justice applies. In that case, statute law commonly relies with confidence on this duty applying to decisions affecting individual rights at common law.

who must be consulted. The two main concerns here are that the description:

- captures the key people or organisations likely to be interested in or affected by the decision; and
- is sufficiently certain, without unnecessarily restricting the requirements or being too inflexible to cater for change (for example, changing organisations).

Naming or describing the people or organisations to be consulted provides the greatest level of certainty about who must be consulted (for example, the Privacy Commissioner). Officials should, however, consider whether the description of the person or organisation is likely to change over time or be superseded, making the legislation obsolete.

The people or organisations to be consulted can also be described by category (for example, registered architects or "entities to which this decision applies") or by their representative nature (for example, "organisations representing the interests of journalists"). In those cases, officials should consider whether the class of people included within a description is sufficiently confined so that the decision maker can be certain of satisfying the obligation.

Often, it will not be possible to name or describe in advance all the people who should be consulted. In that case, a "catch-all" description may also be added (for example, "any other person likely to be substantially affected by the decision" or "any other person that the [decision-maker] considers is likely to be affected by the decision"). Catch-all descriptions can result in more risk around decision-making processes (because they require a judgement about who must be consulted and that decision may be challenged). However, that risk should be balanced against the countervailing risk of being under-inclusive or allowing too much discretion. Those risks may be reduced by allowing consultation with the representatives of the people who are substantially affected.

19.3 What aspects of the consultation process should be prescribed?

The specific requirements for consultation should be set by legislation if certainty is needed on the scope or timing of the obligations.

As mentioned earlier, if legislation does not specify the process to be followed in consultation, the common law will fill in the detail. Specifically, the principles outlined in the *Wellington International Airport* case apply. Generally, it is better to rely on the common law as it is sufficient to ensure meaningful consultation and minimises the risks that come from excessive legislation of detailed processes.

However, in some contexts, there may be advantages in imposing more specific (and possibly circumscribed) obligations in place of the standard common law duty. Those advantages may exist when express consultation provisions could:

- ensure consistent consultation practice across multiple decisions or decision-makers;
- provide certainty to decision-makers and affected people about the process that should be followed; or

- provide assurance to decision makers about the limits of their obligations to consult.

Aspects of the consultation process that could be specified in legislation include:

- the timing of the consultation obligation as part of the decision-making process;
- the way in which notice of the consultation opportunity should be given; and
- the information that must be provided to inform interested parties.

However, any prescribed consultation process should be crafted in a way that takes account of the degree of flexibility decision makers are likely to need in the particular context.

Officials should note that if the legislation confers an obligation to "consult", it is not necessary to go on to impose specific obligations, such as to "have regard to the views of", "consider the views of" or "request people to comment" (which are inherently part of the obligation to consult).

19.4 What should be the consequences of failing to consult?

Judicial review should generally remain available as a means of challenging the adequacy of a consultation process.

Generally, any failure to comply with the legislative process for making a decision (including a failure to consult) can be challenged by judicial review. If the failure involves a decision to make legislation, a failure to comply with a consultation obligation can also be queried by the Regulations Review Committee.[42]

Sometimes, consultation provisions in legislation contain a provision stating that a failure to comply with the requirement to consult before making a decision does not affect the validity of that decision. The purpose of this protection is to save a decision from an attack on its validity due to a minor or technical error in the course of a genuine consultation process (perhaps because a particular person missed out on being consulted or some minor information was not communicated). It does not generally protect against a deliberate decision not to consult in the face of a statutory obligation. Also, it does not save the decision if the lack of consultation means that relevant considerations were not taken into account or irrelevant considerations were taken into account.

However, this type of concern can often be addressed in other ways, for example, by clearly specifying the consultation process or by giving the decision maker some discretion as to how far to go in determining which members of a group need to be consulted. A validating provision may still be appropriate to ensure that minor or technical failures do not affect the validity of the decision. However, the scope of the validating provision should be clear.

[42] Standing Orders 2017 319(2)(h).

Chapter 20 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 if 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 Commission (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 website provides detailed information relating to the public sector organisations, and officials should contact the SSC for further advice.

If a new public body will be a regulator, this chapter should read together with the guidance in 22.3 on linking the role, functions, and powers of the body to the purpose of the regime in which it operates.

Guidelines

20.1 Is a new public body required?

A new public body should be created only 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 occur only if no pre-existing bodies are capable of performing the new 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 is more efficient to give new powers to an existing public body, even if it requires further structural change, than it is to create a new body. (For more information on creating a new public power, *see* Chapter 18).

20.2 Is legislation required to create a new public body?

Legislation should be used to create a new public body only when it is necessary in order 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* 20.3 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;
- give effect to international obligations;
- give statutory recognition to the body; and
- establish a statutory officer within a public sector agency who will have the task of exercising specific statutory functions or powers.

20.3 What form should a new public body take?

Legislation should ensure appropriate accountability arrangements best suited to the relevant functions.

It is usually more efficient and effective 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. If a new organisational form is created, legislation still needs to replicate the essential features of the existing forms. Many forms also have existing bodies of case law surrounding their operations that may need to be considered when creating any new form.

Sometimes it may be appropriate to adopt an existing proven regime, such as the Crown Entities Act 2004, 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 2014).

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 Schedule 1 of the State Sector Act 1988.

Departments are the preferred form if 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. If there is a constitutional requirement for ministerial oversight or direct responsibility, or if the subject matter is important to the Government, carries high public and political expectations, and has significant accompanying risk, a public service department is the preferred form. This may involve granting an existing department a new power or creating a new department.

Departmental agency—A departmental agency is a new organisational form in the New Zealand context that was provided for by amendments to the State Sector Act 1988 in 2013. 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 or 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 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 and are governed by the Crown Entities Act 2004. They are usually the appropriate form 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 if 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 if 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 if 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 as to 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 if the functions are both commercial and non-commercial in nature but not as clearly defined as may be needed for a State-owned Enterprise.
- **School board of trustees**—This form is appropriate if a new State school or State-integrated school is created.
- **Tertiary Education Institution**—This form is appropriate if a new university, polytechnic, wānanga, or institute of technology is created.

  Schedules 1 and 2 of the Crown Entitles Act 2004 contain examples of CAs, ACEs, ICEs, and CECs.

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 according to the values and interests of the community in which it operates. SOEs are governed by the State-Owned Enterprises Act 1986.

An SOE may be the appropriate form if 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 if 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 organizational form is used for roles that act as a check on the Executive's use of power and resources. However, in performing that function, 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.[43]

Public Finance Act 1989 body (Schedule 4 and 4A)—If, 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 4A of the Public Finance Act 1989.

The State Services Commission maintains an up-to-date list of all the organisations in the State Sector, categorised by their organisational form.[44] It has also produced guidance on how to identify the organisational form that is most appropriate to the particular functions concerned.[45]

20.4 Will the new public body be a tribunal?

Legislation should create a new tribunal only if 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 and ongoing costs. Creating a new tribunal should be a last resort and only be 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 if an independent assessment of facts and the application of specialist judgement or legal principles are required. Proceedings before a tribunal are generally more accessible and cost effective and allow greater scope for individual and public participation than proceedings before a court. The procedures adopted are generally flexible

[43] The Offices of Parliament are the Office of the Auditor-General, the Office of the Ombudsmen, and the Office of the Parliamentary Commissioner for the Environment. See New Zealand Parliament Offices of Parliament.
[44] State Services Commission New Zealand's State sector – the organisations.
[45] State Services Commission Approach to choosing organizational form (2007).

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) including a requirement to appoint 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 2013 may provide a suitable precedent); and
- a right of appeal to a court of general jurisdiction (*see* Chapter 28).

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 has produced detailed guidance for departments that are considering whether to create a new tribunal or improve an existing tribunal. The guidance provides the starting point for any department that is considering creating a new tribunal.[46]

20.5 Will the public body be subject to certain key Acts that hold government bodies accountable?

All public bodies should be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, and 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 held accountable for their activities. They should apply to all new bodies and existing bodies unless there are compelling reasons for them not to. The Ministry of Justice, the SSC, the department that administers the particular Act, and any agency with operational responsibilities under the particular Act (departments and agencies identified below) should be consulted when considering whether to apply the following Acts to a government body:

- **The** Ombudsmen Act 1975**, the** Official Information Act 1982**, and the** Local

[46] Ministry of Justice *Tribunal Guidance—Choosing the right decision-making body; Equipping tribunals to operate effectively* (2015).

Government Official Information and Meetings Act 1987—The Department of Internal Affairs and the Office of the Ombudsman;

- **The** Public Audit Act 2001—The Treasury and the Office of the Controller and Auditor-General; and

- **The** Public Records Act 2005—The Department of Internal Affairs and Archives New Zealand (Te Rua Mahara o te Kāwanatanga).

Chapter 21 Creating powers of search, surveillance and seizure

Powers of entry, search, surveillance, and seizure (referred to in this chapter as "search powers") must be authorised by an enactment or the common law (provided that the Government's actions do not breach section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA)), or be carried out by consent.

Search powers balance important sets of values. On one hand is respect for liberty, dignity, bodily integrity, privacy, and the right to peaceful enjoyment by people of their property. These values are affirmed by the right in section 21 of NZBORA to be secure against unreasonable search and seizure. However, what constitutes a "search" within that right can be difficult to define. The Court of Appeal has expressed the view that a "search" involves state intrusion into reasonable expectations of privacy.[47] Although the exact ambit of that concept has yet to be determined, it may capture a range of activities that might not automatically come to mind—for example, undertaking routine inspections; using a dog to detect concealed forbidden items; using thermal imaging equipment to detect heat inside a building; requiring a person to answer questions; requiring a company to disclose information about its customers; using under-cover officers to obtain information; and accessing the contents of a computer from a distant location by hacking.

On the other hand, and balanced against that right are regulatory and law enforcement objectives underlying particular powers. Searches for regulatory purposes aim to promote compliance with the law through inspections, monitoring, and enforcing compliance with legislative regimes that regulate particular industries or activities (particularly where serious harm can occur from non-compliance, such as physical harm to people, the environment, or the economy). In contrast, searches for law enforcement purposes aim to gather evidence for the prosecution of offences. Search powers for these two purposes occur on a spectrum and there is no clear demarcation between them.

A well-designed set of search powers will strike a balance between respecting individual rights and providing an agency with the vital tools it needs to give effect to a policy or Act. Generally, the more intrusive the search power is, or the more significant the consequences for the individual of the use of the power, the greater the need is for both a strong policy justification and safeguards on the exercise of the power. Safeguards can include prerequisites for the exercise of the power (such as a warrant), conditions on how the power is exercised, or limits on who may exercise the power. More intrusive powers should be restricted to classes of people with higher levels of accountability (*see* Chapter 18 for more guidance on who should hold a legislative power). Poorly designed search powers may be unjustifiably intrusive or insufficient. They may be difficult to use, be inconsistently exercised, and be subject to challenge in the courts. In such cases, it may be necessary to urgently amend the legislation to rectify defective search powers.

The Search and Surveillance Act 2012 reformed the law of search and seizure. It consolidates the existing Police powers that were previously contained in multiple enactments. It also provides a detailed set of procedural rules and safeguards that apply to the exercise of Police powers in Parts 2 and 3, and the majority of the powers held by non-Police regulatory agencies (which remain in agency-specific legislation, but are listed in the Schedule of the Act).

The Search and Surveillance Act 2012 strikes a balance between the competing rights discussed above.

[47] *Lorigan v R* [2012] NZCA 264 at [22].

Therefore, the procedural rules contained in Part 4 of that Act should generally be the starting point for those intending to create new search powers. Part 4 is discussed in more detail at 21.4. Legal advisers and the Ministry of Justice (who play an important "gate keeping" role in respect of search powers) should be consulted to ensure that any proposed departures from the Act are justified.

Guidelines

21.1 Should new search powers be granted?

New search powers should be granted only if the policy objective cannot be achieved by other means.

If the information or evidence concerned can be obtained by means other than by granting new search powers (for example, by recourse to the common law, consent, or existing powers), those alternatives should be used. If new search powers are required, the approach that results in the least limitation on privacy rights should be adopted.

Search powers should not be granted for the convenience of the agency or ease of prosecution. Each search power must have a separate justification for why it is necessary. A general justification that search powers are required is not sufficient. The more invasive a particular search power is, the greater the justification required to create it is. Searches of a person's body are more invasive than searches of a business premises and generally require a greater justification.

In the regulatory context, search powers may have a legitimate monitoring or deterrent effect, but in the law enforcement context it is inappropriate for search powers to be used for coercive or deterrent reasons.

Search powers must be proportionate to their objective. Consequently, search powers connected to lower-level offending give rise to concerns. Advice should be sought from the Ministry of Justice if there is a proposal to provide search powers in respect of lower-level offences. These types of powers require clear justification and careful scoping.

Statutory law enforcement search powers must be triggered by suspicion that a specific matter or class of matters has taken place. Generally-worded law enforcement search powers (which allow "fishing expeditions") are likely to be interpreted narrowly by the courts, and should not be authorised by legislation.

In some cases, the effective exercise of search powers might necessitate the inclusion of a power to require information to be produced (such as codes to access computers) or questions to be answered. However, these powers are likely to be used in situations where prosecutions are likely to follow, and the privilege at general law (and in the Evidence Act 2006) against self-incrimination should be respected. If grounds exist to override that privilege, then the overriding of the privilege should be explicitly stated. If not, then the privilege should be affirmed.

Search powers should also respect other privileges such as legal professional privilege.

21.2 Is a warrant required for the exercise of new search powers?

All searches for law enforcement purposes should be carried out under a warrant unless there are good reasons why a warrant should not be required.

The starting point is that all law enforcement searches should be carried out under a warrant issued by an independent judicial officer.

Warrantless search powers can be exercised without independent judicial oversight; therefore, a compelling reason must exist to create them. Generally, a real risk must exist that some serious harm or damage will occur or evidence will be lost if officers are required to obtain a search warrant.

However, consideration must still be given to whether or not any risk can be satisfactorily addressed by obtaining a warrant but delaying notice to the person or the occupants of a property that is the subject of the search. In the law enforcement context, compelling reasons must exist for granting warrantless search powers in respect of non-imprisonable offences.

In the regulatory context, it may be appropriate to allow warrantless inspections to take place without notice if it is the only effective way to ensure that certain regulatory standards are being adhered to (for example, the inspections of restaurants). Regardless of the context, all search powers must be proportionate to their objectives and all searches must be carried out by properly authorised and trained officers.

Warrantless search powers should rarely extend to dwelling houses or marae and only in circumstances where there is a compelling justification for such a high level of intrusion. Such powers should rarely be granted in the regulatory context.

21.3 How should the search powers be framed?

New search powers for law enforcement purposes should be exercisable only if there are "reasonable grounds to suspect" the relevant factual situation has occurred, and "reasonable grounds to believe" that evidence will be found or that a particular thing may be achieved during the course of that search.

In the law enforcement context, legislation should set out the thresholds that must be satisfied before a search power is exercised. The default thresholds below are based on the search powers of the Police in section 6 of the Search and Surveillance Act 2012 and should apply to any new search powers:

- there are "reasonable grounds to suspect" the relevant factual situation has occurred (such as a criminal offence); and
- there are "reasonable grounds to believe" that evidence will be found, or a particular thing might be achieved, during the course of the search (a common example is that evidence relating to a criminal offence may be found).

Compelling reasons must exist for relying on different thresholds in a law enforcement context (such as a suspicion that the person is carrying a dangerous item or may otherwise pose a

serious and imminent threat to themselves or other people).

In the regulatory context, suspicion of a breach is not always necessary for search or inspection powers to be exercised. However, the power must still be justified (for example, a search or inspection power is required to monitor compliance with legislation). Even so, those powers must be capable of being exercised only for the purpose of monitoring compliance or detecting breaches of the legislation.

21.4 What procedure should apply to the exercise of the search power?

New search powers should apply the rules and procedures set out in Part 4 of the Search and Surveillance Act 2012.

The starting point is that legislation that creates new search powers should contain a specific statutory provision that applies Part 4 of the Search and Surveillance Act 2012.

Part 4 sets out a comprehensive set of rules concerning the conduct of searches by consent; the application for, and issuing and execution of, search warrants; the conduct of warrantless searches; how to treat legally privileged and confidential material; and the application of other legal privileges. Part 4 also addresses what happens to seized material following the end of proceedings or an investigation, and what immunities apply to those people who issue and execute orders and search warrants under the Act.

The rules and procedures in Part 4 should be specifically assessed for their relevance and applicability to the new search powers. Legal advice should be sought for this assessment. In many cases, Part 4 will need to be applied with modifications to suit the particular circumstances of the new powers. However, applying the rules in Part 4, with or without modifications, should be preferred over creating new bespoke provisions. Good reasons are required for not applying or for modifying the procedures in Part 4. Those reasons might include the need for a more specialised or technically complex set of rules and procedures (*see*, for example, the Animal Welfare Act 1999).

21.5 Who should exercise search and surveillance powers?

Search and surveillance powers should be held by a person with the appropriate level of expertise and accountability.

In general, the more invasive the search or surveillance power is, the more expertise and accountability the person holding the power should have. At a practical level, the person exercising the power must have access to the information and means to exercise the power (such as sufficient facts to determine whether the prerequisite conditions for exercising the power have been met) and sufficient expertise (perhaps demonstrated by training, qualifications, and experience) to exercise any discretion.

In relation to accountability, officials must consider whether the person exercising the power will be subject to sufficient safeguards, appropriate to the nature of the decision and proportionate to the invasiveness of the power. Safeguards could include 1 or more of the following:

- oversight or supervision of the exercise of the power by a person with higher levels of accountability:
- requirements to publicly report on the exercise of the powers:
- being potentially subject to investigation by the Ombudsmen or subject to the Official Information Act 1982.