

## 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 Entities 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.<sup>43</sup>

**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.<sup>44</sup> It has also produced [guidance](#) on how to identify the organisational form that is most appropriate to the particular functions concerned.<sup>45</sup>

## 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

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<sup>43</sup> 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](#).

<sup>44</sup> State Services Commission [New Zealand’s State sector – the organisations](#).

<sup>45</sup> 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.<sup>46</sup>

## **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](#)**

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<sup>46</sup> 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).