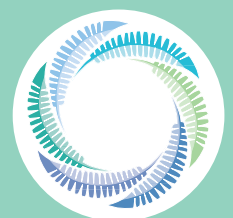




Reviewing the Machinery of Government



State Services Commission

PO Box 329

Wellington

New Zealand

Ph: (04) 495 6600

Fax: (04) 495 6686

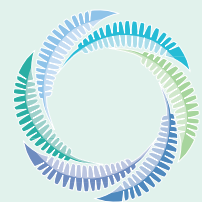
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DEVELOPMENT GOALS



For further information on the
Development Goals for the State Services, see
<http://www.ssc.govt.nz>

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Introduction

- 1 This paper is written for public servants and other employees in the State Services who deal with machinery of government issues. It sets out the main lines of thought adopted by the State Services Commission (SSC) for machinery of government analysis, especially for determining which organisational form is best suited to carry out government functions.
- 2 This paper is by no means a compendium covering all possible machinery of government questions or situations. It does not deal comprehensively with all aspects of analysis. Its aim is to set out the main lines of thinking that inform high quality policy advice on machinery of government issues. More detailed analysis will be required on most machinery of government issues, including consultation with the SSC and other agencies, especially the Treasury.

Meaning of “Machinery of Government”

- 3 Machinery is an apt metaphor for the structures and systems of government. A machine is an instrument that exists in order to fulfil a purpose beyond itself. The parts in a machine move and change, and can be replaced or improved. In this paper, the term “machinery of government” refers to:
 - the allocation of functions to and between departments and other government agencies
 - the creation of a new department or other government agency, and the amalgamation or abolition of existing departments and other government agencies
 - the co-ordination of the activities of departments and other government agencies.
- 4 Reviewing the machinery of government across all areas of government is one of the State Services Commissioner’s principal functions [State Sector Act 1988, s.6(a)]. Departments dealing with policy issues that have potential implications for the machinery of government are required to consult the SSC [Cabinet Office, Step by Step Guide 11.6].

Importance of context

- 5 In practice, machinery of government decision making rarely follows a scientific path that leads inexorably to a clear conclusion. As former State Services Commissioner D K Hunn expressed it in 1997:

“Machinery of government changes do not tend to happen merely because of the existence of an abstract set of design criteria. Context is crucial. They tend to occur in response to perceived problems or inadequacies. Criteria may have a significant affect on the ultimate design, but other considerations will also be relevant such as political judgements about the suitability of different organisational forms, or practical considerations about the relative ease with which changes can be made”.

- 6 For example, a political party’s pre-election campaign may include a commitment to establish a new agency to carry out a particular role. The government may have decided it wants more control over an agency, or that an agency’s objectives or functions should expand or be restricted, or that better coordination is needed between agencies without changing their form or functions; and so on. The advice must fit the context and nature of the issue.

Importance of problem definition

- 7 It is sometimes tempting to use machinery of government changes (most notably, structural change) as a solution to all sorts of problems pertaining to government agencies. Doing so runs grave risks of not addressing the real problem and incurring the costs and negative consequences of ill-advised change. Structural change should not be seen as an automatic panacea for problems or issues concerning:
- agency leadership
 - inter-agency relationships
 - employment relations
 - agency culture
 - agency capability
 - systems problems.
- 8 Though structural change can affect some problems in such areas, structural change should not be seen as the automatic or full solution. It is important that the real problem or issue is well analysed and articulated, so that the appropriate package of potential remedies can be devised.

Terms of Reference

- 9 Terms of reference (ToR) should be prepared for any significant review or exercise with implications for the machinery of government. There is no prescribed format for the ToR. Key elements should include:
- context: description of the situation and the issues or problems to be addressed
 - objective: the purpose of the review
 - scope/assumptions: range of issues and/or agencies covered; elements explicitly included; elements explicitly excluded, if any; constraints, if any; how the review will be conducted
 - deliverables
 - consultation
 - timeframe.

Criteria

- 10 Criteria should be developed as part of the review process. Sometimes, it is appropriate to include the criteria in the ToR. The criteria should:
- take account of the sectoral context
 - address the particular issues or problems
 - encapsulate the desired state or level of performance (NB this does not mean pre-empting the outcome of the review).

- 11 For example, relevant factors may include:
- with regard to context, whether the government has modified its objectives for an activity; whether other players have emerged with substantially similar roles; whether international agreements or other developments call for a change in the way a certain activity is carried out
 - with regard to the desired state or level of performance, whether structural change or a reallocation of functions would better achieve the government's desired outcomes through, for example, improved capability, efficiency, coordination; improved clarity of roles and responsibilities and better governance; improved responsiveness to government policy; better information flows; improved risk management; reduced compliance costs; and so on.
- 12 A strategic review of a government agency should be undertaken at regular intervals, for example, when preparing the position description for a new departmental chief executive or new chairperson of a Crown entity board. The review should consider, among other things, whether all of the existing agency's functions should continue to be provided by the agency (e.g. whether there is a statutory or government policy imperative that they continue). This includes assessing:
- what functions are 'must do', 'should do', 'could do', 'could cease doing'?
 - what would happen if a particular function were to cease?
 - what other agencies might be more suitable for taking on a particular function?
 - is there something different that the agency should take on?

Approach to choosing organisational form

- 13 Within the contextual reality, high quality analysis is important for the provision of free and frank, comprehensive advice to Ministers on the machinery of government. If the issue or problem involves reassessing or determining what agency in the State sector should be charged with certain functions, two main questions need to be answered:

- Question 1: What type of agency?

As shown on the contents page of this paper, a series of sub-questions underpins the analysis required to answer this question. The questions aim to build a picture of an agency's overall 'profile' in terms of the desirable governance and accountability regime, so that the most appropriate organisational form can then be identified.

- Question 2: Existing agency, or new agency?

Question 1: What type of agency?

- 14 The analysis required to answer this question - what type of agency? – aims at clarifying two main issues:
- What are the desirable governance and accountability arrangements?
 - What organisational form corresponds best with the desired governance and accountability regime?

What governance and accountability requirements?

- 15 Once the desirable governance and accountability arrangements are clear, the main organisational options follow suit.

Hence, while at a high level the axiom “**form follows function**” is correct:

- “**form follows function and governance**” is more accurate; and
- “**form is based on governance of functions and powers**” is even more accurate.

- 16 “Form follows function” locates the right ‘ball park’ at a high level, but it is not always sufficient. For example:

- purely judicial functions belong in the judicial branch of government
- quasi-parliamentary functions belong in the legislative branch of government. But, does the function belong in an Office of Parliament or other agency that supports the House?
- commercial functions of executive government belong in an agency with commercial objectives. But, should the agency (a company) be a State-owned enterprise, or Crown entity company, or other form of company?
- non-commercial functions of executive government belong in one of the many other types of agencies in the executive branch of government. But, should the agency be a department or one of the types of Crown entities or other form of agency?

- 17 Well-informed judgements about organisational choice cannot jump from a general idea about an organisational role to a clear-cut decision on the most appropriate organisational form. “*We know what we want this organisation to do*” should not lead directly to addressing “*so, what are the organisational choices?*”

- 18 High quality policy advice relies on additional information. There are certain questions that should **always** be asked, within the contextual reality.

| Machinery of Government: The Big Questions | |
|---|---|
| Qu. 1 | <p>What role?</p> <ul style="list-style-type: none"> • for central government? • for the agency in the context of who else it needs to work with? • for the agency as a stand alone entity? |
| Qu. 2 | <p>What functions?</p> <ul style="list-style-type: none"> • to carry out role? |
| Qu. 3 | <p>What powers?</p> <ul style="list-style-type: none"> • to carry out functions? |
| Qu. 4 | <p>What funding?</p> <ul style="list-style-type: none"> • what source(s)? • how ‘materially significant’? |
| Qu. 5 | <p>What risks?</p> <ul style="list-style-type: none"> • from functions and powers? • strategic, political, fiscal or contractual risk? |
| Qu. 6 | <p>What governance?</p> <ul style="list-style-type: none"> • what Ministerial involvement? |

Qu. 1:

What role?

- 19 *For central government* - Generally, machinery of government analysis proceeds on the basis that government is already involved in an area of activity, or has decided as a matter of policy to become involved in that activity, and that government's involvement requires it to discharge functions through ownership or control of one or more organisations.
- 20 There are times when it is legitimate to step back and first consider whether the involvement of central government is necessary or desirable, especially if local authorities, non-government agencies or individuals already carry out the same role or a very similar role. In such cases, what is the need or justification for central government involvement?
- 21 *For the agency in the context of who it needs to work with* - The majority of agencies in the State sector must, by virtue of their role and objectives, collaborate with other agencies or co-ordinate their activities in some way or other. The nature of the collaboration required influences the appropriate governance arrangements, which in turn are critical to the choice of organisational form. For example, basic sharing of information from time to time is not the same as a formal, on-going commitment of agency resources to work on a joint strategy or programme alongside partner agencies, and where the level and type of collaboration is critical to combined and individual success.
- 22 *For the agency as a stand alone entity* - The first step towards determining the most appropriate organisational form of a stand alone government-owned or controlled agency is to identify its role. At the highest level this can sometimes indicate which branch of government should carry out the role, although more detailed criteria are often necessary also.
- 23 Within the executive branch of government, the role of government agencies can be considered generally under broad headings such as advisory, service delivery, regulatory, quasi-judicial, purchase or funding, trading, or financial institution. Certain agencies carry out a mix of roles. This high level categorisation of an agency's primary role or roles is clearly insufficient on its own to lead to a decision about the most suitable organisational form for carrying out the agency's activities. For example, a regulatory role may be discharged by a department or different types of Crown entities. More detailed information is needed to discern between the organisational design options.

Qu. 2:

What functions?

- 24 In addition to knowing what an agency's overall role will be, a more detailed understanding is required of what the agency will actually *do*, i.e. its actual functions or day-to-day activities. For example, if a regulatory body is under consideration, will its functions include issuing licences to operate? This understanding starts to build a picture of an agency's profile in terms of the nature and scope of its activities, the impact of its

functions, the variety of stakeholders, the sensitivities around ensuring that the activities are carried out appropriately, and the nature of risks if things go wrong.

Qu. 3:

What powers?

25 Many agencies in the State sector are endowed with specific powers to enable them to discharge their functions. For example, a regulatory body that has the power to issue a licence to operate often has the power to suspend or revoke the licence if the operator fails in some way to observe the licence conditions. A clear understanding of the nature and scope of an agency's powers is a vital component of an agency's 'profile'. State sector governance and organisational form have a great deal to do with the public powers entrusted to an agency.

Qu. 4:

What funding?

26 An agency's profile includes its funding arrangements, from at least three perspectives:

- *source(s)* – Crown, levy, trading, or mix?
- *quantity* – significant, especially from a Crown perspective, or not substantial?
- *sustainability* – what are the longer term intentions for on-going funding? Are there risks to sustainability?

27 Another relevant funding question is what should happen to an agency's funds and liabilities if the agency is wound up e.g. should they revert to the Crown? The Treasury should be included in the deliberations.

Qu. 5:

What risks?

28 An understanding of the risks associated with the agency's functions and powers is also necessary. The key types of risk that are pertinent are:

- *strategic risk* – the strategic relevance to the government and society of the activity, and the associated risks if something adverse happens
- *political risk* – the level of expectation that the Minister and the Government will be held responsible if things go wrong; in the end, this is always a matter for Ministers to decide
- *fiscal risk* – the potential for monetary loss
- *contractual risk* - whether or not the agency's activities are readily 'contractible' i.e. some activities are not readily contractible because the objectives or outputs are complex, inherently difficult to specify or measure, or may need to be changed frequently.

29 Legal risks are also important. For example, are the proposed functions consistent with relevant legislation or common law? What checks and balances might be needed when determining the most appropriate organisational form to perform the functions?

30 Risks are generally viewed in terms of likelihood and potential impact. For machinery of government purposes, it is necessary to assess whether an activity poses a high level of risk from the Minister's and the Government's perspective.

31 This question is directly relevant to the governance and accountability arrangements that should exist between the Minister and the agency.

Qu. 6:

What governance?

On the basis of the 'profile' that emerges in response to the previous questions, what type of governance arrangements should apply? This question is posed first **from the perspective of the Government and the responsible Minister.**

32 With regard to the myriad of non-commercial agencies that operate as part of the executive branch of government, the essential question is whether the Minister should:

- have a high degree of control or oversight?
- have a degree of control or oversight in-between high level and being clearly separated from decision making?
- be clearly separated from decision making, where the decision maker is independent from Ministerial influence?

33 For each level of Ministerial involvement, there is an associated 'package' of governance arrangements that determine the feasible organisational design options.

Additional lens: Development Goals for the State Services

34 In March 2005, the Government agreed an ambitious set of Development Goals for the State Services. The Development Goals are "aspirations for how the State Services will be arranged and perform"¹. As such, the goals provide an additional lens for machinery of government analysis and advice.

Overall Goal

A system of world class professional State Services serving the government of the day and meeting the needs of New Zealanders

Development Goals

Employer of Choice – Ensure the State Services is an employer of choice attractive to high achievers with a commitment to service

Excellent State Servants – Develop a strong culture of constant learning in the pursuit of excellence

Networked State Services – Use technology to transform the provision of services for New Zealanders

Coordinated State Agencies – Ensure the total contribution of government agencies is greater than the sum of its parts

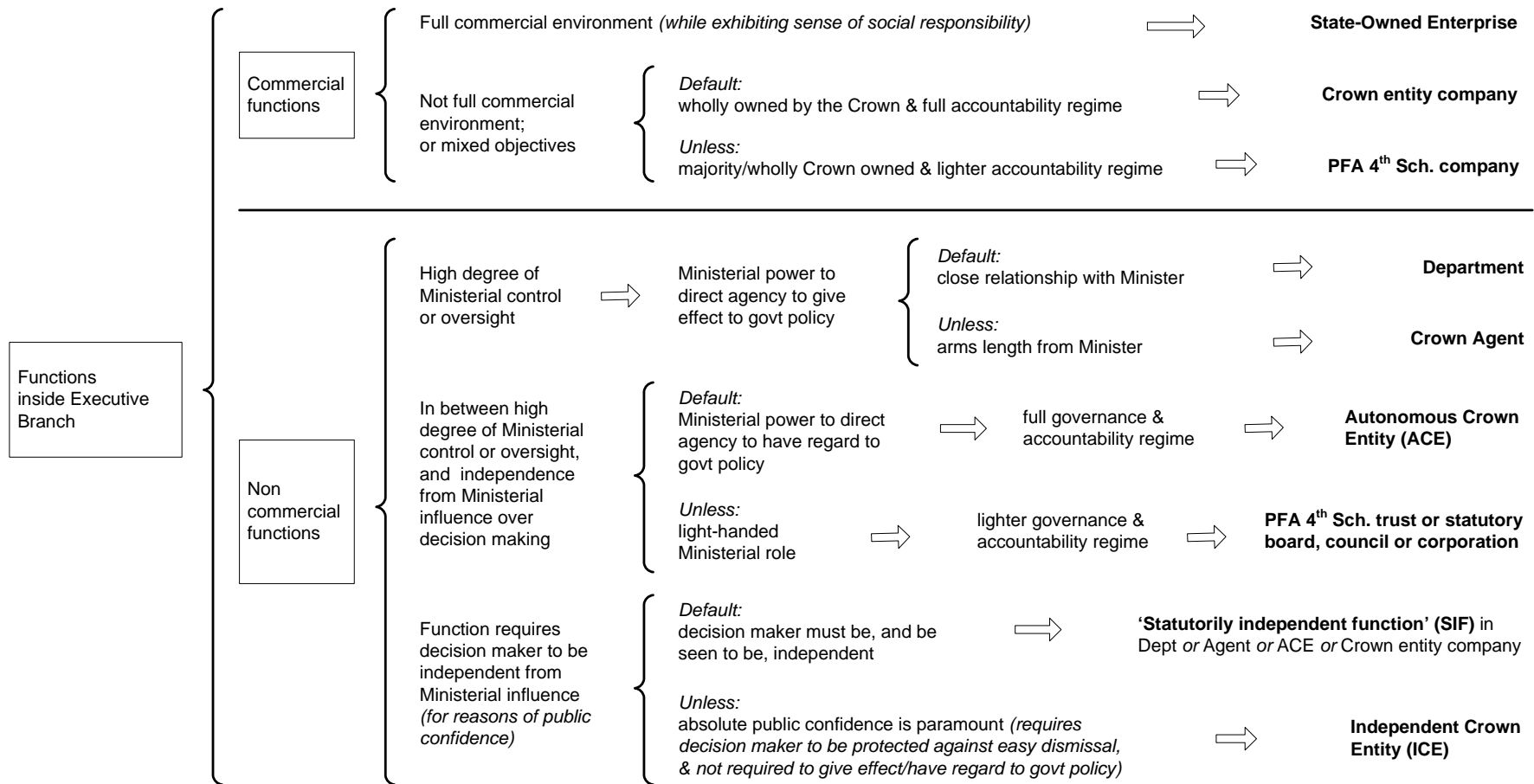
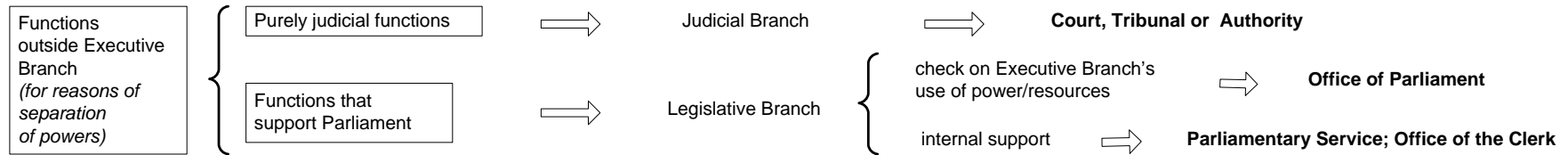
Accessible State Services – Enhance access, responsiveness and effectiveness, and improve New Zealanders' experience of State Services

Trusted State Services – Strengthen trust in the State Services, and reinforce the spirit of service

35 On their own the goals do not provide answers to many machinery of government questions, but the goals should always be referred to when preparing machinery of government advice. Advisors should be able to explain in what ways their policy proposals would help to achieve one or more of the goals.

¹ *Development Goals for the State Services*, SSC brochure, March 2005

Figure 1: Main Organisational Design Options



What organisational form has the desired governance and accountability arrangements?

Scope

- 36 The diagram on the previous page [Figure 1: Main Organisational Design Options] provides a quick overview of the main organisational forms across the three branches of government: judicial branch, legislative branch and executive branch.
- 37 This paper does not discuss further:
- the judicial branch of government
 - the legislative branch of government
 - specific agencies or types of agencies in the executive branch of government:
 - the Reserve Bank of New Zealand (the only agency of its kind in the State Services)
 - School Boards of Trustees and Tertiary Education Institutions (distinct types of educational bodies with comprehensive sets of provisions respectively in the Education Act 1989)
 - Crown entity subsidiary companies (which are formed or acquired by one or more parent Crown entities in accordance with provisions in the Crown Entities Act 2004)
 - less commonly used organisational forms that tend to carry out specific or relatively small roles, such as Ministerial advisory committees, statutory commissions or councils, foundations and similar bodies.
- 38 This paper focuses on the remaining bulk of agencies in the State Services, plus State-owned enterprises.

Commercial functions

- 39 The basic principle is that commercial activities of the government should be carried out by agencies with commercial objectives.

Fully commercial environment

- 40 A function should be deemed a ‘commercial function’ and undertaken by a State-owned enterprise (SOE) if:
- performance is measured primarily in financial terms; and
 - revenue is generated through the sale of goods and services.
- 41 SOEs have unambiguous commercial objectives, and the Crown’s objectives are relatively straightforward – being to maximise the return to the shareholding Ministers over time. SOEs are designed to operate as an efficient and profitable business. They tend to sell into contestable markets (although monopoly enterprises exist).
- 42 Nevertheless, an SOE is required to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

- 43 The SOE Act recognises that an SOE may have non-commercial roles, but requires Ministers to enter into an agreement with the agency to pay for any goods or services that they wish an SOE to provide to any person.

Not fully commercial environment

- 44 A quasi-commercial form of statutory governance should be used (i.e. a Crown entity company or a company listed on the 4th Schedule of the Public Finance Act) if:
- the context or environment in which a function is to be undertaken is not fully commercial; or
 - the agency undertaking a function has mixed objectives.
- 45 Non-SOE companies are generally established by the Crown to further certain policy objectives (e.g. Crown Research Institutes, Television New Zealand Ltd) and a profit objective may be secondary.

Crown entity company

- 46 Crown entity companies are incorporated under the Companies Act 1993 and are one of the five categories of Crown entity defined in s.7 of the Crown Entities Act 2004. This Act applies in addition to the Companies Act, and contains comprehensive provisions about their establishment and governance, operation, reporting and financial obligations.
- 47 Crown entity companies are wholly owned by the Crown (i.e. shares may be held only by two or more Ministers).
- 48 Apart from a reconstruction or merger in which the Crown's shareholding is not diminished, legislation is required to enable any transfer of ownership (legislation may also be required in the case of a merger, where the Crown entity company has been established by an Act). Incremental transfer of ownership is not possible, as the shares in a Crown entity company may be held only by Ministers (i.e. the Ministers cannot progressively reduce their shareholding to less than 100%).

Company listed on the 4th Schedule of the Public Finance Act

- 49 There are circumstances where the Crown may wish to establish a non-SOE company, but it is not appropriate to establish it as a Crown entity company:
- joint ownership is necessary or desirable i.e. the Crown intends to reduce its shareholding at some stage to somewhere between over 50% and under 100%; or
 - 'materiality' or 'distinctiveness' reasons indicate that a Crown entity company is not feasible or appropriate. The Crown may wish to establish an agency to fulfil a specific policy objective for which the legal form of a company is the most suitable organisational choice, but for which the full governance and accountability regime applying to a 'standard' Crown entity company would not be appropriate. Incorporating a company under the Companies Act 1993 and adding it to the 4th Schedule of the PFA by Order in Council is a way to meet both objectives.

Non-commercial functions

- 50 The *Guidelines on Process and Content of Legislation* published by the Legislation Advisory Committee explains that: "There is a continuum of bodies exercising public power at the level of central government. At one end is the standard Minister-department relationship and along it various forms of independent or partly independent power. The legal structures should reflect that continuum and the reasons for greater or lesser autonomy".

- 51 Non-commercial functions of central government agencies can be placed under three broad headings along the continuum of bodies exercising public power:
- high degree of ministerial control or oversight
 - in between high degree of Ministerial control or oversight, and independence from Ministerial influence over decision making
 - function requires decision maker to be independent from Ministerial influence.

High degree of Ministerial control or oversight

At the 'high end' of the continuum are those functions and powers for which it is desirable or necessary to have a high degree of Ministerial oversight or control.

This level of Ministerial involvement is characterised by a governance relationship where the responsible Minister has the power to direct the agency to give effect to the policy of the government of the day.

- 52 The organisational design options that meet this fundamental governance criterion are:
- departments; and
 - the type of statutory Crown entity known as Crown agents (such as the Accident Compensation Corporation, District Health Boards and Land Transport New Zealand).

Department

- 53 Departments are legally part of the Crown (i.e. they do not have separate corporate status; they exercise powers and legally contract in the name of the Crown).
- 54 There is a close and hierarchical relationship between Ministers and departments, with the governance arrangements centred on a direct Minister-chief executive relationship. Ministers have extensive powers to direct departments, as long as such directions are consistent with the law (e.g. there are relatively numerous statutory requirements for officials to act independently in some matters – which can be quite significant).
- 55 The types of functions and powers that require a high degree of Ministerial control or oversight, and for which departments are the default choice of organisational form include:
- the activities in some sense are an inherent function of the State (e.g. the conduct of foreign policy; national defence)
 - the agency will exercise significant coercive powers of the State (e.g. policing; prisons; tax collection)
 - other special powers will reside in the agency or its officials (e.g. the substantial powers of the Director-General of the Ministry of Agriculture and Forestry under the Animal Products Act 1999)
 - the agency will provide policy advice to government
 - the agency will carry out multiple functions, particularly where the functions potentially conflict

- the complexity of the activities makes it difficult to “contract” for their provision by a Crown entity (if, for example, the objectives or outputs are complex, inherently difficult to specify or measure, or may need to be changed frequently)
- constitutional conventions indicate a need for close Ministerial oversight or direct Ministerial responsibility (e.g. citizenship); or
- there is a Ministerial desire to control the process and outcome of an activity, including frequently reviewing its objectives. This may be indicated by:
 - the significance and importance of the activity to the government
 - the high public and political expectations associated with the activity; or
 - the nature of the risks posed to the Crown (e.g. strategic or fiscal risks).

Crown Agent

- 56 Crown agents are one of the three types of statutory Crown entities, as defined in s.7 of the Crown Entities Act 2004. Every Crown agent:
- is a stand alone body corporate: it is a legal entity separate from the Crown, its board members, office holders and employees
 - has the power – subject to law - to do anything that a natural person of full age and capacity may do e.g. own property and enter into contracts in its own name
 - is subject to its enabling legislation and the Crown Entities Act 2004.
- 57 The legal separation from the Crown establishes an ‘arms length’ distance between the Minister and the entity. The channels of Ministerial direction or instruction are considerably more formalised than the interactions between a Minister and department. The governance arrangements are centred on the Minister-board relationship.
- 58 Placing a function in a Crown agent rather than in a department is justifiable in three circumstances:
- it is essential to access certain skills and experience that can only be provided by members of a governance board; OR
 - positioning outside the legal Crown is critical to success (e.g. because the government itself may be bound by the decisions); OR
 - a degree of separation from Ministers in the allocation of Crown resources and delegation of a significant degree of decision making authority to the entity is needed to:
 - credibly distance Ministers from politically hard/sensitive decisions, including those involving individuals; and/or
 - limit the scope for Ministers to become involved in decision making.
- 59 Certain regulatory bodies and devolved purchaser/funding agencies are likely to satisfy one or other of these criteria, as do certain significant service delivery agencies that require the skills and experience of a governance board.

In between high degree of Ministerial control or oversight, and independence from Ministerial influence over decision making

Towards the middle of the continuum are those functions and powers that do not require a high degree of Ministerial control or oversight.

This level of Ministerial involvement is characterised:

- normally, by a governance relationship where the responsible Minister has the power to direct the agency to have regard to the policy of the government of the day; or
- in some circumstances, by a relationship where the responsible Minister has a light-handed role.

60 The organisational design options that fit these governance criteria are:

- the autonomous Crown entity (ACE) type of statutory Crown entity; and
- an agency listed on the 4th Schedule of the Public Finance Act.

Autonomous Crown entity (ACE)

61 Just like Crown agents, every ACE is a stand alone legal entity separate from the Crown. They are established as bodies corporate. They are also subject to their own enabling statute as well as comprehensive provisions for governance, operations and accountability in the Crown Entities Act 2004.

62 ACEs are suitable for carrying out non-commercial executive government functions that:

- are substantial in their own right and are designed to meet identified policy objectives (e.g. significant service delivery agencies); and
- will be sustainable in financial and policy terms to warrant the establishment of a body corporate that is legally separate from the Crown (as opposed to meeting a specific or short term need that could be met by a temporary body or an existing agency);
- should come under the management skills and experience of a governance board;
- do not:
 - constitute inherent functions of the State, such as national security; or
 - involve the exercise of significant coercive powers, such as policing; or
 - pose significant strategic or fiscal risks for the Crown, or political risks that should come under closer Ministerial control.

Agency listed on the 4th Schedule of the Public Finance Act

63 There can be 'materiality' or 'distinctiveness' circumstances where it would not be appropriate to apply all the governance, accountability and reporting provisions in the Crown Entities Act 2004 to an agency whose functions and powers do not require a high degree of Ministerial control or oversight. For example:

- an agency's operations are small (including in financial terms) or local in nature (e.g. Reserves Boards; Fish and Game Councils), or

- an agency operates within a different legal framework (e.g. those agencies that are trusts, such as the Road Safety Trust), or
 - an agency has certain features that do not mesh with the requirements in the Crown Entities Act 2004. For example, whereas statutory Crown entities are bodies corporate (including corporations sole), the New Zealand Lottery Grants Board is not a body corporate and it has a board of which half of the members are required to be Members of Parliament (two Ministers of the Crown and the Leader of the Opposition).
- 64 Listing an agency on the 4th Schedule of the Public Finance Act:
- ensures, by virtue of s.45M(1) of the PFA, that minimum provisions in the Crown Entities Act 2004 apply (notably the Ministerial power to request information and the obligation to prepare annual financial statements, a statement of responsibility and audit report); and
 - provides discretion, by virtue of s.45N(1) of the PFA, to apply a specific range of additional requirements in the Crown Entities Act (such as the requirement for an annual statement of intent, annual report, and certain financial restrictions).
- 65 It is important when preparing advice about a prospective PFA 4th Schedule agency to be satisfied that the test of ‘materiality’ or ‘distinctiveness’ is real i.e. there are clearly identifiable reasons why a Crown entity would not be suitable.

Decision making independence from Ministerial influence

At the other end of the continuum are decision making functions that, for reasons of public confidence, should be made independently from Ministerial influence.

The governance relationship and organisational form depend on both:

- the **degree of separation** required for reasons of public confidence; and
- the agency’s **role, functions and powers considered collectively**.

- 66 The governance and organisational design options that protect the independence of decision making from Ministerial influence, where necessary for reasons of public confidence, are:
- a ‘statutorily independent function’ located in a department or Crown agent or autonomous Crown entity or Crown entity company; or
 - the type of statutory Crown entity known as an independent Crown entity (ICE).

Statutorily independent function

- 67 If public confidence requires decision making to be, and to be seen to be, free from Ministerial influence, the default solution is to:
- place the function in the appropriate type of agency (department or Crown agent or autonomous Crown entity or Crown entity company) having regard to:
 - the agency’s role, functions and powers considered collectively; and
 - the criteria discussed earlier in this paper with regard to each of these organisational design options; and

- specify in legislation that the particular function or functions must be carried out free from Ministerial influence: this will establish a function as a ‘statutorily independent function’ (SIF).

68 Establishing agencies with some statutorily independent functions is relatively common across the State Services. The following table illustrates the point.

| | Ministerial influence ... | ... but also independent decision making |
|---|--|---|
| Department (e.g. Statistics New Zealand) | Close relationship, and extensive powers of direction: Statistics NZ’s role is of very high strategic importance for all areas of central government policy | Decisions relating to statistical methods and publication of statistics |
| Crown Agent (e.g. Sport and Recreation New Zealand) | Arms length relationship, but power to direct to give effect to government policy: e.g. in relation to national policies and strategies for physical recreation and sport | Decisions to allocate funds to, or for the benefit of, any persons |
| Autonomous Crown entity (e.g. Te Papa) | Arms length relationship, but power to direct to have regard to government policy: e.g. in relation to maintaining and controlling the Museum | Decisions relating to individual exhibitions |
| Crown entity company (e.g. TVNZ) | Power to direct on content of statement of intent: e.g. in relation to performance measures against TVNZ’s charter | Decisions relating to particular programmes or news items |

69 The examples in the table illustrate that it is possible to meet the twin objectives of:

- safeguarding the need for independence from Ministerial influence with regard to particular decision making functions; and
- placing those functions in an agency that is required otherwise (because of its overall role and other functions and powers), to be subject to some degree of Ministerial influence or control.

Independent Crown entity

70 An independent Crown entity (ICE) is appropriate in cases where public confidence in decision making is paramount, such that it demands a level of independence from Ministers for decision making purposes that can be provided only where the decision maker is:

- NEITHER subject to influence or easy removal by Ministers
- NOR required to give effect or have regard to the policies of the government of the day.

71 Absolute public confidence is likely to be needed where significant coercive powers are exercised by the entity, its decisions are binding, and the Crown is subject to its jurisdiction.

72 Typically, quasi-judicial and adjudicative functions (e.g. those of the Police Complaints Authority and the Commerce Commission), as well as certain investigative roles (e.g. those of the Transport Accident Investigation Commission and the New Zealand Sports Drug Agency) and regulatory activities (such as of the Accounting Standards Review Board) meet these criteria. It is appropriate that they are constituted as ICEs.

Question 2: New agency or existing agency?

- 73 After identifying what type of agency should carry out a particular role, the next question is whether, in order to achieve the Government's objectives, it is sufficient and suitable to allocate the functions and powers to an existing agency in the State sector, or whether it is necessary to establish a stand alone agency.
- 74 An assessment of the New Zealand public management system carried out in 2001 identified a need to address fragmentation as one of the three main areas for attention, including re-examining the large number of agencies². Against this backdrop, a convincing case must be established in order for a new agency to be justified.

New agency?

- 75 A new agency should be considered only if:
- a proposed role or function is incompatible with any existing agency e.g. there are strategic or operational reasons why no existing agency should carry out the proposed role and associated functions; AND
 - it would not be feasible or appropriate to expand the role or functions of an existing agency; AND
 - all the necessary capability and financial viability could be guaranteed for the present and long term; AND
 - the establishment of a new agency could be justified in cost-benefit terms.

If existing agency, which one?

- 76 If it is determined that an existing agency should be charged with a particular role, either because the government wants a new role to be performed or as the result of a merger, the criteria for choosing which agency should include, at a minimum:
- 'fit for purpose': compatibility with the existing agency's present role and functions; and
 - capability: whether the agency has, or could acquire, what it would need now and in the future to deliver the interventions and outputs which best contribute to the outcomes government is seeking; and
 - whether the merger or expansion would be cost effective without jeopardising the efficient, effective and economical management of the activities of the host agency or the activities that are to transfer.

Check list: working on machinery of government

- 77 Advisors working on machinery of government matters, especially proposals that could lead to change in any of the areas mentioned in paragraph 3, as well as managers responsible for implementing change, should check to ensure the following steps.

² Report of the Advisory Group on the *Review of the Centre*, presented to the Ministers of State Services and Finance, November 2001.

Policy development phase

Commissioning the work

- Who requested/directed the work to be done e.g. the Minister, chief executive, board chairperson? Clarify that person's expectations regarding the ToR, including sign-off
- Ensure there is agreement on the situation/issue/problem to be addressed. Depending on the review, the 'problem statement' may be explicit in the ToR, or clarified as part of the review process
- Who will carry out the analysis and write the report(s) e.g. will the work be done in-house, or does an inter-agency working group need to be convened, or will a third party be contracted to carry out the review (with in-house support)? For any contracted work, ensure the process complies with applicable procurement rules and guidelines
- Departments must consult SSC and should involve SSC and Treasury early in the development phase. Consider who else will need to be consulted during the review
- Clarify with the project sponsor the reporting milestones and timeframe
- Finalise ToR. Ensure it covers at least all the elements in paragraph 9

Analysis phase

- Adhere to what is in scope, and be conscious of what is out of scope, as per ToR
- In line with the project objective and problem definition, consider the full range of potential solutions i.e. do not leap straight to structural change as a universal or sole remedy
- Ensure genuine consultation i.e. listen seriously and objectively to the views expressed, with an open mind to changing one's initial position as a result. But this does not create an obligation to satisfy all views expressed by modifying the report and recommendations in an attempt to please all submitters

Reporting phase

- Be aware of realistic timeframes, especially if papers are to go through the Cabinet process and legislative change would be required to implement the recommendations

Implementation phase

Change management plan

- The change leader should prepare a change management plan for every machinery of government change. The plan should include: context for the change process; key organisational issues; workstreams, phases and milestones; governance for the change process; risk analysis; monitoring of progress; evaluation

Statutory requirements

- The State Sector Act provides for the transfer of functions between departments and for the merger of departments. Sections 30A to 30L provide for such things as the transfer of staff, the disestablishment of existing departments, consequential amendments to other legislation, and the continuity of legal proceedings
- Specific legislation is likely to be required when a Crown entity is disestablished and when the transfer of functions is from a department to a Crown entity
- Records must not be disposed of without the Chief Archivist's authorisation. Records relating to a function which has been transferred to another government agency may be transferred: the Chief Archivist must be notified within 3 months of the transfer
- Check all applicable employment agreements, both individual and collective, and be aware of their implications. The Employment Relations Act now requires all agreements to have clauses relating to transfer of employees
- Legislation is required to preserve Crown appointments and statutory officers where these are affected by machinery of government change
- Be aware of any statutory functions to be affected by machinery of government change – especially if proposed legislation has not been enacted. This means having a transitional plan to ensure the appropriate discharge of functions continues
- If a new agency should be subject to the Ombudsmen Act 1975 and the Official Information Act 1982, it needs to be listed in the respective schedules in these Acts
- Ensure that responsibilities and accountabilities are maintained with the appropriate person/agency as requirements fall due, and that there is a formal point or points for the handover of responsibility e.g. for the Annual Report, Statement of Intent, etc

