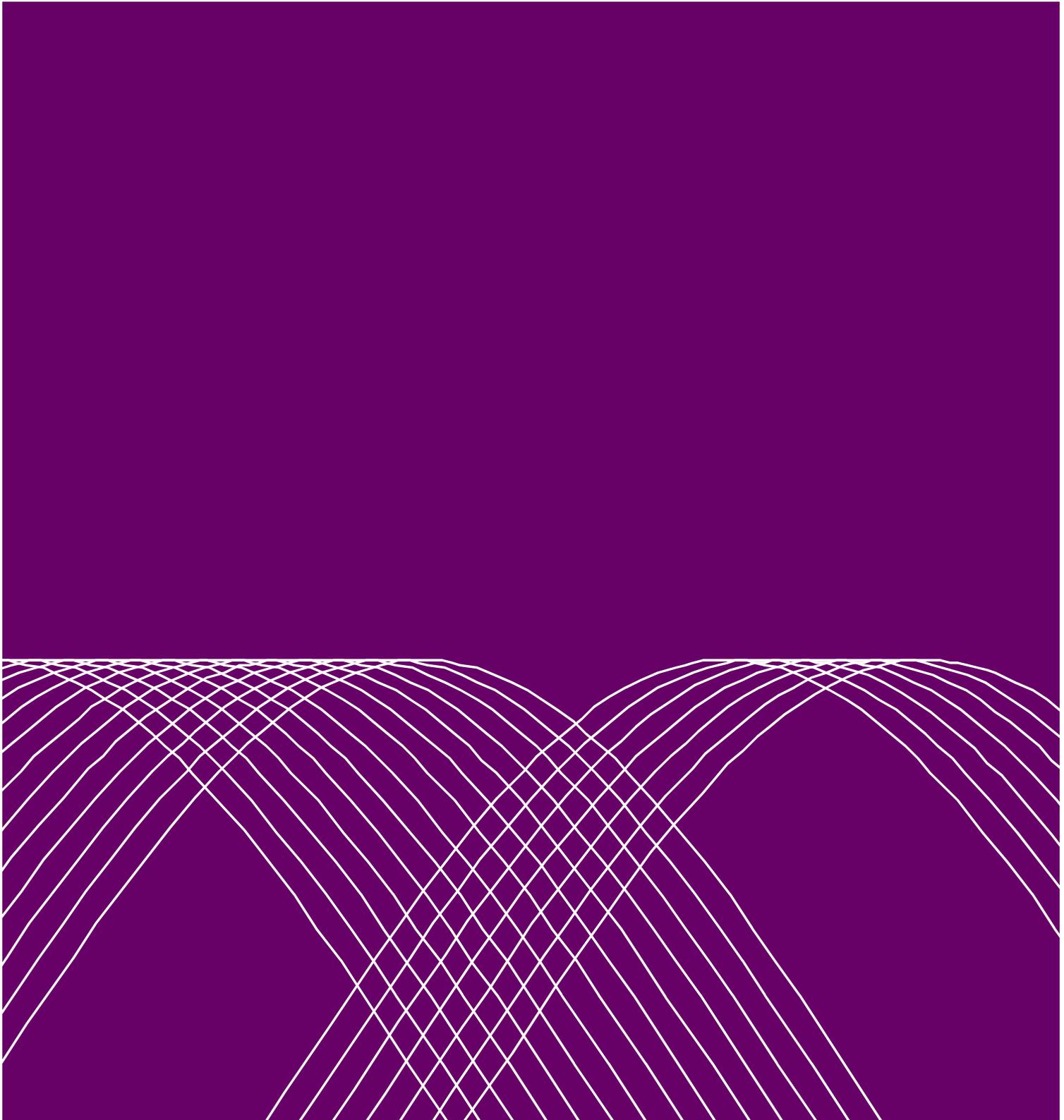




Public Bodies: A Guide for Departments

Chapter 2: Policy and characteristics of a Public Body



POLICY AND CHARACTERISTICS OF A PUBLIC BODY

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1. Definition of a Central Government Public Body

1.1 There are occasions where bodies carrying out public functions should be further removed from Ministers, operating more at 'arm's length'. The greater degree of independence may be appropriate for a variety of reasons. This can be to provide independent advice and expertise on technical, scientific or other complex issues and take this outside the party political arena e.g. on ethical issues, or funding decisions. Tribunals and other quasi-judicial bodies are set up to meet specific requirements for separation of decision-making and appeals. Public bodies carry out a wide range of functions such as independent regulation, advice, investigation, adjudication, ombudsman services, appeal, funding, partnership, commercial and health services.

1.2 Such "arms length bodies" focus in depth on clear and specific functions and purposes. As separate legal entities, they can operate more flexibly than executive agencies, entering into partnerships and taking commercial and entrepreneurial decisions. These bodies have grown up over time and in response to particular needs and situations. This flexibility and responsiveness means that the landscape of public bodies is necessarily both complex and diverse.

1.3 Firstly, in order to be classified in its own right a body must be a separate institutional unit. A body fulfilling *executive* functions needs to be able to lead a separate existence. So, for example, it needs to be able to:

- Make decisions in an autonomous way
- Enter into contracts
- Own assets and dispose of them
- Employ staff
- Make payments from its own bank account
- Draw up accounts.¹

1.4 Secondly, our remit is for public bodies sponsored by central government. Bodies whose immediate reporting line is to another public body will not be regarded as central government public bodies and will be deemed second order public bodies for Cabinet Office purposes but remain central government for both National Accounting and Government Accounting purposes.

1.5 Bodies are set up for specific purposes and there is no set template of what a public body should look like. However, over the past thirty years, a workable taxonomy of public bodies has emerged. This is used by Government to classify public bodies. This classification has important implications for accountability, funding and reporting arrangements.

¹ Taken from HM Treasury's 'Classification of Expenditure Public and Private Sectors: New Bodies, Partnerships, Joint Ventures, Privatisation and Nationalisation' November 2000.
<http://www.wga.gov.uk/pages/classification.html>

2. What is a Non-Departmental Public Body (NDPB)?

2.1 The term 'NDPB' has been in existence since 1980 when it was coined by Sir Leo Pliatsky in his 'Report on Non Departmental Public Bodies'. An NDPB is described as:

“ A body which has a role in the processes of national government, but is not a government department, or part of one, and which accordingly operates to a greater or lesser extent at arm’s length from ministers.”²

2.2 NDPBs have a national or regional remit and carry out a wide range of important functions. Their distance from government means that the day-to-day decisions they make are independent as they are removed from ministers and Civil Servants. Ministers are however ultimately responsible to Parliament for a NDPB's independence, its effectiveness and efficiency.

3. Government policy on NDPBs

3.1 The main principles are that:

3.1.1 a new NDPB should only be set up where it can be demonstrated that this is the most appropriate and cost-effective means of carrying out the given function;

3.1.2 NDPBs should be accountable to Parliament and to the public for the way in which they carry out their functions;

3.1.3 the relationship between each NDPB and its sponsor department must be clearly defined in a way which supports the appropriate degree of delegation and independence of the NDPB, while assuring the accountable minister and department that financial management arrangements ensure propriety, regularity and value for money, and that risks will be managed;

3.1.4 all NDPBs should be reviewed regularly to ensure that the functions of the body are still required; and if so, if they are still best undertaken by the NDPB;

3.1.5 bodies which have completed their tasks or are no longer needed should be wound up.

² In the past NDPBs have also been referred to as 'Quangos' – Quasi-Autonomous Non Government Organisations. There is no commonly agreed definition of what the term 'quango' means and the term is often used to include local bodies such as universities, research bodies or housing associations to which the government gives grants. In addition the term is misleading as NDPBs for example are governmental rather than non-governmental organisations.

4. When is a NDPB the appropriate model?

4.1 A NDPB will be the appropriate model:

4.1.1 if the function needs to be carried out at arm's length from ministers eg. regulatory functions, decisions on funding.

4.1.2 when expert advice is required by ministers on technical/specialised issues.

4.1.3 if a body needs to be set up to deal with appeals. Tribunal NDPBs are often a suitable structure for the resolution of conflicts in certain areas between the citizen and the state, or between individuals. They are generally simpler in structure, less formal and less expensive to run than the more formal parts of the court system. The tribunal body will need to comply with the Human Rights Act 1998 and, on most occasions, with Article 6 of the European Convention on Human Rights. Where Article 6 (right to a fair trial) does apply, the tribunal must be and seen to be, independent of the state. Article 6 has a broad application and applies to any determination of civil rights and obligations. Please refer to Paragraph 7.3 of this Chapter for further information on the wider government policy concerning tribunals.

4.1.4 when a partnership needs to be formed between government and other interests. This is done, in some instances, by enabling other bodies to nominate members.

4.1.5 when a body is required to carry out a range of commercial activities where board members need a degree of independence from government to make decisions.

5. Counting the cost

5.1 Before choosing or setting up a NDPB, you will need to consider the cost implications:

5.1.1 compare, against other models, items such as the total costs including board members' fees and expenses; staff costs; superannuation; accommodation; depreciation or amortisation of fixed assets and other overheads.

5.1.2 think about offsetting savings in central government or other public bodies, e.g. by having reduced demand on common services.

5.1.3 look at the extra costs in central government or other public bodies arising from setting up the NDPB e.g. new requirements for policy or financial advice to ministers and new appeals machinery to safeguard the rights of those affected by the NDPB's decisions.

5.1.4 examine transitional costs, e.g. the cost of legislation and the one-off extra overheads, redundancy payments and so on.

6. Questions of accountability

6.1 Whilst NDPBs are distanced from government, the responsible minister is accountable to Parliament for the degree of independence which a NDPB enjoys; for its usefulness as an instrument of government policy; and so ultimately for the overall effectiveness and efficiency with which it carries out its functions. Ministers also remain accountable to Parliament for public money spent by a NDPB, even though bodies operate at arm's length with their own designated accounting officers. NDPBs are also accountable to the public for the services which they provide.

6.2 Departments will need to identify whether, in the circumstances of a particular NDPB, Ministers will need to retain control over and so be accountable to Parliament for certain aspects of the NDPB's activities. For example:

6.2.1 whether questions of policy can be left to the NDPB acting in accordance with the functions and responsibilities conferred by the instrument establishing it, or whether Ministers will need to be able to direct or modify policy;

6.2.2 whether decisions in individual cases can be left to the NDPB subject only to appeal to the courts or a tribunal, or whether appeal to Ministers is needed on some matters;

6.2.3 whether income will derive substantially from levies, fees or charges, whether their level needs to be specifically approved by Ministers or Parliament, or whether this can be left to the NDPB (subject to the restrictions set out in the NDPB's management statement or financial memorandum).

6.3 It is unlikely that all of the risks related to delivering a service will be transferred to the NDPB. The Minister's accountability means that some kind of assurance that risks are being well managed within the NDPB will be necessary.

7. The different types of Public Bodies – key characteristics

7.1 Executive NDPBs

7.1.1 Main features:

7.1.1.1 are set up by Ministers to carry out administrative, commercial, executive or regulatory functions on behalf of the Government;

7.1.1.2 are legally incorporated and have their own legal identity. This means that they are established by Act of Parliament, by Royal Charter, under the Royal Prerogative, or incorporated under Companies Acts legislation and charity law;

7.1.1.3 employ their own staff;

7.1.1.4 are allocated their own budgets;

7.1.1.5 are not Crown bodies and do not have Crown status (apart from the few exceptions mentioned in the 'Staff' section of this guidance);

7.1.1.6 appointments to the boards of the bodies are made by Ministers, by officials on behalf of Ministers, by the Prime Minister or the Queen on the advice of ministers. Some may be made by the bodies themselves.

7.1.1.7 Ministers are ultimately answerable for the performance of the bodies and for their continued existence, e.g. ministers have the power (subject to Parliamentary approval if necessary) to wind the bodies up.

7.1.2 Legislation is normally required to establish any new Executive NDPB that will require continuing government funding. It may also be needed to provide for particular powers or obligations. You will need to consider the availability and timing of possible legislative opportunities before deciding to set up an Executive NDPB.

7.1.3 Where there is existing legislation and parliamentary authority already exists for the funding of a particular programme and it is subsequently decided to change the delivery mechanism by setting up a company limited by guarantee, which is then classified as an Executive NDPB, such legislation may not be required.

7.1.4 A body established under the Companies Acts, that is not classified as a 'market body' by the Office of National Statistics (and therefore is not a Public Corporation), may be classified as central government public body and accordingly fulfil the criteria of an Executive NDPB for governance and accountability purposes. Please see Chapter 3 (Setting up a new Public Body – The Legislative Requirements) for further guidance about incorporation as a company.

7.2 Advisory NDPBs

7.2.1 Main features:

7.2.1.1 are established by Ministers, or by officials working on behalf of Ministers, to provide independent expert advice or to provide input into the policy-making process;

7.2.1.2 do not usually have staff but are supported by staff from their sponsoring department;

7.2.1.3 do not usually have their own budget, as costs incurred come within the department's expenditure;

7.2.1.4 are formal bodies with defined membership and clear terms of reference;

7.2.1.5 meet on a regular basis (at least once a year);

7.2.1.6 are standing bodies (ie. in existence for more than twelve months);

7.2.1.7 appointments to the bodies are made by Ministers, by officials on behalf of Ministers, the Prime Minister, or by the Queen on the advice of Ministers. Some may be made by the bodies themselves.

7.2.1.8 those appointed to the body are independent of government and drawn from outside the public sector. (A body made up of more than two-thirds public servants is unlikely to be classified as a NDPB.);

7.2.1.9 Ministers are ultimately answerable for the performance of the bodies and for their continued existence.

7.2.2 It is likely that if the body has the above characteristics, it may be deemed to be part of the Crown. Exceptionally, advisory NDPBs can be established through primary legislation or through Companies Acts if the department intends to give the body its own legal personality. Please refer to Chapter 3 of the Guide for further detailed advice. In terms of governance and accountability, Advisory NDPBs with their own legal identity are in most respects akin to Executive NDPBs.

7.2.3 Before setting up an Advisory NDPB, check whether an ad hoc consultation with appropriate experts or stakeholder organisations is more suited to your needs, or whether the remit of an existing body could be expanded. Task forces, ad hoc advisory groups and reviews may display the same characteristics as those above, however the key difference is that such a group is set up at short notice (to investigate a particular issue of concern) and should be in existence for not longer than two years

7.2.4 If an Advisory NDPB is the most appropriate type of body, ensure that there is a clear understanding with the chair and other members about their remit and the broad time-scale for their work. This should be set out in formal terms of reference. Public bodies should be subject to regular review and disbanded when their function is no longer required.

7.3 Tribunal NDPBs

7.3.1 Main features:

- 7.3.1.1 have jurisdiction in a specialised field of law;
- 7.3.1.2 generally operate under statutory provisions and decide the rights and obligations of private citizens towards a government department or public authority;
- 7.3.1.3 are separate from the formal court system;
- 7.3.1.4 are usually supported by staff from their sponsoring department and do not have their own budgets.

7.3.2 The growth of tribunals has reflected the development of legislation affecting individuals' rights and obligations, and the view that administrative tribunals are often the best means of resolving matters requiring expert knowledge of particular administrative schemes.

7.3.3 Most modern tribunals exist to provide an appeal system against administrative acts or decisions. In complex areas they often have two layers, with the upper tier dealing with appeals on a point of law alone enabling the systematic development of a coherent body of law. Departments should bear in mind that if there is no, or an inadequate, system of appeal, dissatisfied customers may well have to use the cumbersome and expensive system of judicial review, creating unnecessary burdens for the higher courts.

7.3.4 Wider government policy on tribunals was set out in the White Paper *Transforming Public Services: Complaints, Redress and Tribunals*, published on 15th July 2004. This White Paper clearly establishes the principle that tribunals are part of the administrative justice system. It also sets out how the government intends to respond to Sir Andrew Leggatt's 2001 report *Tribunals for Users: One System, One Service*. In April 2006 a new executive agency, the Tribunals Service was established in the Department for Constitutional Affairs (DCA) to administer the largest central government tribunals with the transfer of the five largest tribunals administered outside the DCA happening between 2006-08. Smaller central government tribunals will also transfer over time and in future all new, non-devolved, central government tribunals will be created within this new organisation unless there are exceptional reasons to the contrary.

7.3.5 Under the Constitutional Reform Act 2005 any tribunal appointments that were previously the responsibility of the Lord Chancellor will in future fall under the aegis of the Judicial Appointments Commission (JAC). Responsibility for appointing tribunal members for those tribunals joining the new organisation will transfer with the tribunal and also fall under the JAC. Responsibility for appointing members to any new tribunals will also fall under this process rather than the Commissioner for Public Appointments.

7.3.6 Once the new system and associated public reporting procedures are operational, the annual Cabinet Office *Public Bodies Directory* will cease to include appointment data for those tribunal NDPB appointments transferred to JAC. Departments should consult the DCA at the earliest opportunity if they are considering establishing a tribunal body. Please contact Christine Lappin in Tribunals Policy on 0202 340 6570 or e-mail Christine.lappin@dca.gsi.gov.uk.

7.4 Independent Monitoring Boards of Penal Establishments and Immigration Removal Centres (the fourth type of NDPB)

7.4.1 Independent Monitoring Boards of Penal Establishments (currently legally known as Boards of Visitors) derive their responsibilities from the Prison Rules 1999 (as amended) and Young Offenders Rules 2000 (as amended). They are appointed by the Home Secretary under Section 6 of the Prison Act 1952.

7.4.2 Independent Monitoring Boards in Immigration Removal Centres (currently legally known as Visiting Committees) derive their statutory basis from the Immigration and Asylum Act 1999 and the Detention Centre Rules 2001.

7.4.3 Independent Monitoring Boards perform a 'watchdog' role on behalf of Ministers and the general public in providing a lay and independent oversight of prisons (including the state of the prison premises, their administration and the treatment of prisoners) and Immigration Removal Centres.

7.4.4 The Boards are financed by the sponsoring department.

7.5 Public Corporations

7.5.1 Main features:

7.5.1.1 Public corporations are market bodies that derive more than 50% of their income from the sale of goods and services³.

7.5.1.2 Some charge for regulatory activities where these provide a significant benefit to the person paying the fee;

7.5.1.3 They are owned or controlled by central government⁴.

³ ONS classify Executive Agencies that have trading fund status as public corporations. Executive Agencies are excluded from this Guidance as in administrative terms they are a constituent part of their sponsor department and are not public bodies for Cabinet Office purposes. They are subject to separate governance arrangements.

⁴ Public Corporations in national accounts includes local authority public corporations. The Agencies and Public Bodies Team is specifically concerned with central government public bodies and therefore local authority bodies are excluded.

7.5.1.4 They have substantial day to day operating independence so that they should be seen as institutional units separate from their sponsor departments

7.5.1.5 Otherwise may have similar features to Executive NDPBs as detailed above.

7.5.2 The independent Office for National Statistics determines whether a body is classified as a Public Corporation or not. Public Corporations are defined as government controlled market bodies and can be controlled by either Central or Local Government.

7.5.3 A government controlled (over 50% government ownership or control by government) market body is one which produces goods and services for sale and at least 50% of its income is derived from sales rather than from grants or voted supply. The 50% criterion should be applied by looking over a range of years to avoid frequent reclassifications through minor fluctuations in one year which are not repeated or expected to be repeated in the future. Sales are defined as payments for goods and services at economically significant prices. Please refer to the following Treasury Guidance for detailed information: Classification of Expenditure Public and Private sectors: New Bodies, Partnership, Joint Ventures, Privatisation & Nationalisation.

<http://www.wga.gov.uk/pages/classification.html>

7.5.4 In terms of governance, Public Corporations are in most respects akin to an Executive NDPB. Generally Public Corporations are governed in accordance with their constitutional documents. However, HM Treasury require that a certain degree of information is provided to maintain an audit trail for public spending and to input data into the Whole of Government Accounts. Public Corporations will prepare their accounts in accordance with Generally Accepted Accounting Practice in the UK (UK GAAP). There is no requirement for Public Corporations to follow the Government Financial Reporting Manual ("FReM") although, as information will be required for the purposes of the Whole of Government Accounts, departments should encourage their Public Corporations to have regard to the requirements of the FReM in, for example, the use of modified historical cost accounting.

7.6 Public Broadcasting Authority

7.6.1 The term Public Broadcasting Authority is a unique public body category currently encompassing the British Broadcasting Corporation and S4C (Sianel Pedwar Cymru, the Welsh Fourth Channel Authority).

7.6.2 The BBC is governed by Royal Charter and an associated Agreement with Government. These arrangements reflect the Corporation's independent status and its unique accountability directly to the licence fee payer. The Charter and Agreement set out the BBC's accountability to

Parliament for use of the public money it receives whilst at the same time preserving the BBC's independence on editorial policy and programming.

7.6.3 S4C is a statutory corporation. Its governance arrangements and functions are set out in the Broadcasting Acts of 1990 and 1996 and the Communications Act 2003. S4C's Chair and members are appointed by the Secretary of State and the Authority is responsible for S4C's strategic policy and for ensuring the fulfilment of its statutory functions. S4C is funded primarily by a Government grant, the level of which is prescribed by statute.

7.7 Central Bank

The European System of Accounts (ESA 95) which harmonises the system of economic accounts applicable to all members of the European Union created a central bank sector. As a result the Office for National Statistics classify the Bank of England in the central bank sector. A central bank is the public financial corporation which is a monetary authority, i.e. which issues banknotes and sometimes coins and may hold all or part of the international reserves of the country.

7.8 Nationalised Industry

The term 'Nationalised Industry' is no longer used as a recognised public body classification. British Nuclear Fuels plc (the sole active such body) is now recorded under the Public Corporation classification by both the Office of National Statistics and the Cabinet Office.

7.9 National Health Service Bodies

7.9.1 Main Features:

- 7.9.1.1 Established under over-arching legislation;
- 7.9.1.2 Monitored by Department of Health;
- 7.9.1.3 Chief executive accountable to a management board;
- 7.9.1.4 The NHS Appointments Commission makes non-executive appointments to boards of NHS bodies on behalf of the Secretary of State;
- 7.9.1.5 All appointments to boards are made in line with the Commissioner for Public Appointments' Code of Practice;
- 7.9.1.6 Special Health Authorities (SHAs) are health authorities set up to assume a delegated responsibility for providing a national service to the NHS or direct to the public. They are established by powers under section 11 of the NHS Act 1977;

7.9.1.7 Ministers retain a formal power of direction to ensure ultimate control over a SHA's activities.

7.9.2 In terms of governance, they are in most respects akin to an Executive NDPB.

8. Summary

8.1 As described above, the current system of classifying public bodies has grown over time in response to an existing and complex delivery landscape. As it has become more widely accepted, new public bodies have mostly been structured to comply with the definitions and common features of different types of body set out above. This is essentially a pragmatic approach and the current method of classification by features remains the most workable option.