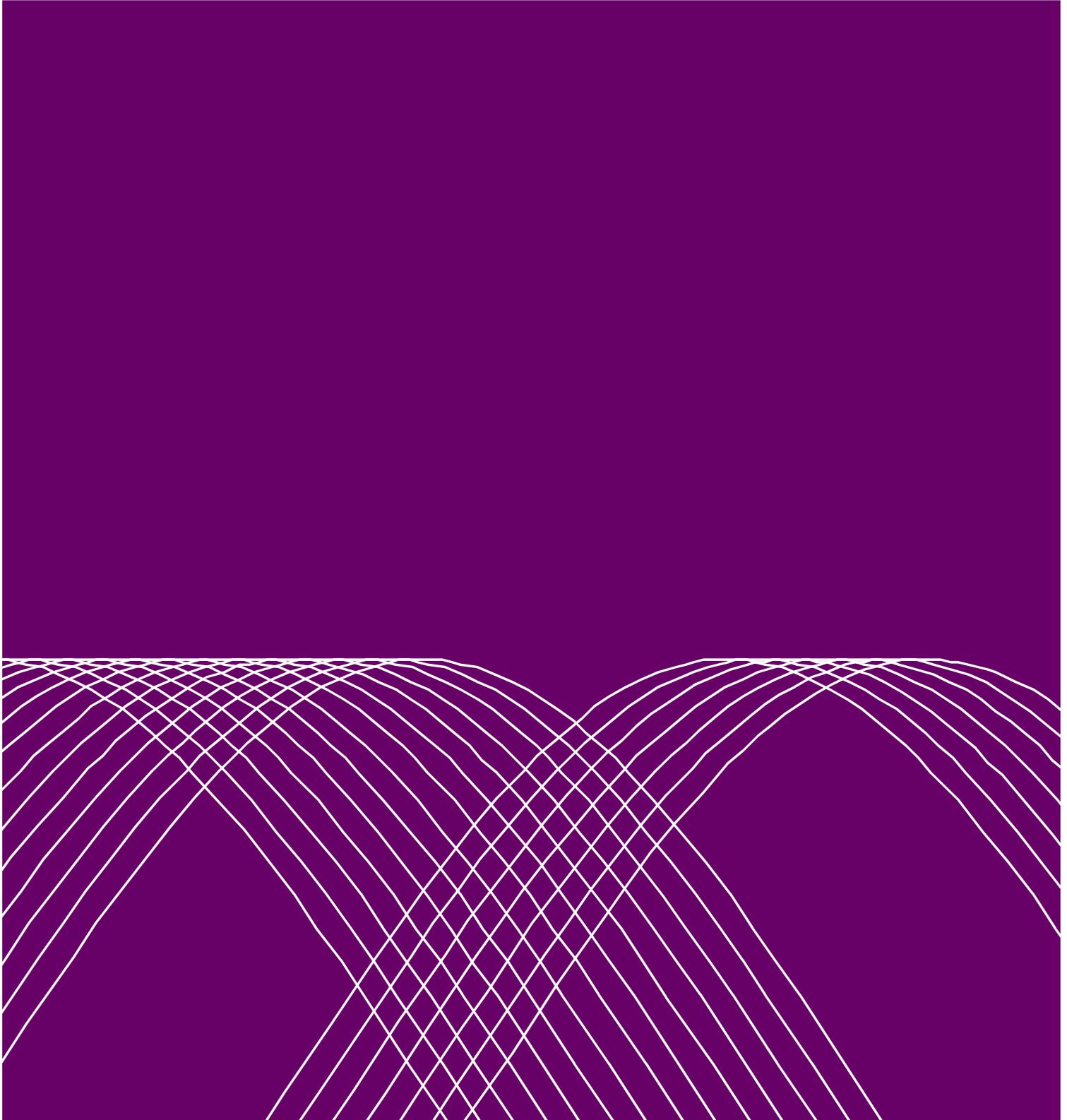




# Public Bodies: A Guide for Departments

## Chapter 3: Setting up a new Public Body – The Legislative Requirements



# **SETTING UP A NEW PUBLIC BODY - THE LEGISLATIVE REQUIREMENTS**

## ***Contents***

- 1. Introduction**
- 2. Is legislation necessary for all new Public Bodies?**
  - 2.1 Statutory Authority**
  - 2.2 Executive NDPBs and Public Corporations**
    - 2.2.1 Primary Legislation**
    - 2.2.2 Incorporation under the Companies Act**
  - 2.3 Advisory NDPBs**
  - 2.4 Tribunal NDPBs**
  - 2.5 Royal Commissions**
  - 2.6 Royal Charter**
  - 2.7 Crown Status**
  - 2.8 Charitable Status**
- 3. General principles- powers of the body and ministerial powers**
- 4. Powers and obligations of the body**
- 5. Ministerial powers**
- 6. Paving legislation**
- 7. Main legislation**
- 8. Provision for winding up**
- 9. Execution of documents by affixation of seal**
- 10. Devolution Issues**

## 1. Introduction

1.1 Having drawn up the basic proposals for a new Public Body and having consulted with others and established that a Public Body should be set up, you will need to explore the need for legislation to establish the body.

1.2 As a sponsor department you must first establish that you have the legal power to set up a new Public Body or you must legislate to acquire that power. In some cases the power may already exist but if, as is usually the case for Executive NDPBs, primary legislation is needed parliamentary time must be secured. There may be a considerable period of time between deciding to proceed and enactment of the necessary legislation. If you plan to set up a Public Body as a company or for it to have charitable status, advice should be sought from the legal and accountancy units in your department.

1.3 The constitutional arrangements appropriate for a new Public Body will depend on its functions and the intended degree of independence from ministerial and parliamentary control.

## 2. Is legislation necessary for all new NDPBs?

### 2.1 Statutory Authority

2.1.1 Where the Public Body is to be funded by the sponsoring department it is likely that statutory authority will be required. Specific statutory authority is generally required for new and continuing (i.e. lasting for more than two years) expenditure by government departments which is not *de minimis*. The current *de minimis* threshold for these purposes below which statutory authority is not required is expenditure under £1.5 million a year. Further relevant advice is provided in *Government Accounting* Section 2.3, but departments must make sure that they obtain Treasury approval that the *de minimis* exemption applies to any new body being set up. Any proposals for new Public Bodies of whatever type should be considered against these requirements. The Treasury should be consulted in any cases of doubt.

2.1.2 In addition, statutory authority may be needed to confer the relevant functions on the Public Body. In particular, where a department is hiving off one of its own statutory functions, legislation will usually be needed to amend the underlying legislation. The underlying principle - that departments should not generally hive off their functions to Public Bodies without specific statutory authority – applies generally to all types of hiving off and irrespective of whether the body is a new or an existing Public Body. Departments should discuss all such proposals with their legal advisers.

2.1.3 There are a number of other features of a Public Body which will require legislation. For example, if the body is to have powers to impose charges or fees (otherwise than charges for services provided) legislation will be needed. Similarly, if the body is to have any powers over and above those of a normal company e.g. powers of entry, power to require the provision of

information, legislation will generally be needed. If the body is to have powers to make binding judgements in a dispute, legislation will also be needed in the vast majority of cases.

## **2.2 Executive NDPBs and Public Corporations**

### **2.2.1 Primary legislation**

Most Executive NDPBs require legislation, in order to confer functions on the body, and also for reasons of government accounting. Where the body is created by legislation it will usually be incorporated as a body corporate by the founding legislation, although sometimes functions are conferred onto a body that is incorporated in a different way. It should be noted that it is the Office of National Statistics who are responsible for determining whether a public body (irrespective of its legal status) fulfils the criteria of a Public Corporation. Please see Paragraph 7.5 of Chapter 2: Policy and Characteristics of a Public Body for further information.

### **2.2.2 Incorporation under the Companies Act**

2.2.2.1 In general terms the advantages of incorporation are that a body corporate is an independent legal entity, separate from its shareholders or members, and the liability of the members to repay debts of the company is limited. Basic guidance on the registration requirements for forming a new company can be found in the *Guidance Booklet on Company Formation (GBF1)* available from Companies House and on their website at <http://www.companies-house.gov.uk/>.

2.2.2.2 Public Bodies incorporated as companies limited by shares are rare and are set up expressly for trading purposes. Companies limited by guarantee are normally formed for charitable or for other non-trading purposes, although they may carry out some trading activities. Many Public Bodies constituted in this way are financially self-sufficient and do not receive grants-in-aid. Setting up a Public Body as either a limited company or a charity may have tax implications. Departments should therefore consult HM Revenue and Customs on the tax implications before establishing Public Bodies as limited companies or charities.

2.2.2.3 Where specific legislation is not required, incorporating a body as a company can be relatively easy and straightforward. It is likely to be appropriate where:

- a Public Body requires corporate status to give it legal personality but departmental expenditure is insufficient to justify new legislation;
- a corporate body is needed temporarily (eg for a short-term task such as a collaborative promotional venture which would not warrant legislation) or provisionally pending a decision whether it should continue on a statutory basis; or

- a body is set up as a limited company prior to privatisation, with assets transferred to it by enabling legislation.

2.2.2.4 Incorporation imposes certain statutory obligations: i.e. the Companies Acts require registration of a Memorandum and Articles of Association with the Registrar of Companies, and the making of an annual return. Failure to comply with many of the statutory obligations constitutes an offence on the part of the company and each of its officers who was knowingly party to the default. The relevant statutes also emphasise the personal liability and responsibility of the directors and those who are regarded as managing the company, to manage it in a responsible fashion so as to protect creditors and investors

2.2.2.5 Until the Company Law Reform Bill comes into force – expected in April 2007 – Public Bodies established under the Companies Acts will continue to appoint their own external auditors in accordance with the requirements of the Companies Acts. This legislation was foreshadowed in the Government’s response to Lord Sharman’s Report<sup>1</sup>. In the current circumstances, the Management Statement and Financial Memorandum should provide for the audit reports to be supplied to the sponsor department.

2.2.2.6 However, once the Bill comes into force, the Comptroller & Auditor General (C&AG) will become eligible to audit all Public Bodies established under the Companies Acts, together with subsidiary bodies that are companies. The Treasury will be in touch with sponsor departments and Public Bodies in due course explaining the procedures and processes in detail. But there will be different arrangements for NDPB companies that make a profit and those that are non-profit making.

2.2.2.7 Departments will need to devise suitable formal arrangements to ensure that ministers have sufficient information about, and as necessary control over, the company’s activities. Suitable methods are: agreement on the terms of the Memorandum and Articles, ministerial appointments to the board of directors, departmental representation in company membership and conditions attaching to a grant-in-aid. In addition it may be helpful to draw up a formal agreement setting out the respective responsibilities, rights and obligations of the minister and the company.

2.2.2.8 Departments considering incorporation should seek legal advice at an early stage on such matters as the recovery of the value of publicly funded assets and the implications under companies’ insolvency legislation of departmental control over the companies’ activities.

2.2.2.9 Where a public body is set up under the Companies Act, its accounts must comply with UK GAAP and have regard to the guidance issued by the Treasury such as the Government Financial Reporting Manual, Government Accounting and Dear Accounting Officer letters. The accounts

---

<sup>1</sup> Audit and Accountability in Central Government: The Government’s response to Lord Sharman’s Report ‘Holding to Account’ – CM 5456 March 2002.

should be signed by both a director and the Accounting Officer of the body - unless the latter is also a director in which case he or she may act as a sole signatory. Please refer to Government Accounting Rules for detailed guidance. Sponsor Departments may wish to refer to the Government Financial Reporting Manual 2005/06 for further Treasury guidance in respect of interpretation of the Companies Acts' requirements.

## **2.3 Advisory NDPBs**

2.3.1 Advisory bodies are normally set up by administrative action, although legislation will be required if its activity will involve continuing Government funding for which parliamentary authority is needed. Secretariat support and accommodation are normally provided by the department whose Minister they advise and their expenses and other support costs are carried on the Vote for the relevant departmental functions. The minister concerned should inform Parliament of his or her action in establishing an advisory body; a ministerial statement is usually sufficient.

2.3.2 Departments are advised to seek legal advice at an early stage on the legal status of their advisory bodies. Departments will need to determine if they wish to establish the body as part of the Crown or as an unincorporated/incorporated body with a separate legal personality. In terms of governance and accountability arrangements, Advisory NDPBs with a separate legal identity should comply with the guidance relating to Executive NDPBs.

### Crown status and implications

2.3.3 If the body is established as a Crown body and it also forms part of the Home Civil Service (as clarified by legal advice in each particular case), the requirements of the Civil Service Order in Council must be complied with. Therefore if any new employees (rather than seconded employees from the sponsor department) are taken on, they should be recruited in accordance with the requirement of fair and open competition and the appointments should be on merit. The Board members would be office-holders (statutory or non-statutory) and it should expressly be made clear that they are not employees of the NDPB or sponsor department. Departments should take legal advice on the status of the Board members.

2.3.4 It should be noted that if the Advisory NDPB is to be part of the Crown, reports, documents and other works produced by the NDPB will be subject to Crown copyright. Responsibility for the management of Crown copyright rests with the Controller of Her Majesty's Stationery Office, who operates within the Office of Public Sector Information (OPSI). Further information of the management of how Crown copyright is managed can be found on OPSI's website at <http://www.opsi.gov.uk/click-use/index.htm><sup>2</sup>

---

<sup>2</sup> The National Archives and the Office of Public Sector Information, which is currently attached to the Cabinet Office, are to merge. This merger will take effect in October 2006.

## **2.4 Tribunal NDPBs**

2.4.1 Tribunals are generally statutory bodies usually set up in the context of a wider legal framework establishing citizens' rights and obligations.

2.4.2 Although tribunals exercise their functions entirely independently, a government department will normally be responsible for providing administrative support. Current Government policy on Tribunals is detailed in Chapter 2 of this Guide.

## **2.5 Royal Commissions**

2.5.1 New Public Bodies should not in general be established as Royal Commissions. Royal Commissions are set up under the Royal Prerogative and are more formal and prestigious than advisory bodies set up by ministerial administrative action.

2.5.2 They are set up by issuing to the Commissioners a Royal Warrant by the Sovereign, through the relevant Secretary of State. Whilst the Crown Office in the Department for Constitutional Affairs (Grant Bavister on 020 7219 2632) undertakes work on the Royal Warrants for setting up and amending Royal Commissions, it does not offer guidance on the practicalities of setting up Royal Commissions.

2.5.3 Although there are instances of standing Royal Commissions with executive functions, the Royal Commission approach to establishing a permanent, executive body can give rise to difficulty in establishing, for instance, clear financial relationships between the Commission and its 'sponsor' department.

## **2.6 Royal Charter**

2.6.1 A Royal Charter is a charter of incorporation which confers independent legal personality on a body and defines its objectives, constitution and powers to govern its own affairs. Incorporation by Royal Charter is a prestigious way of acquiring legal personality and reflects the high status of a body. It is usually confined to universities and colleges, professional and regulatory bodies, and bodies like the BBC, the British Council and the Research and Sports Councils. The terms of the individual Charter determine how far a chartered body is independent from government. Disbanding a body established by Royal Charter will probably require an application from its members. The Privy Council Office should be consulted on procedure. (See <http://www.privycouncil.gov.uk/output/Page26.asp> or telephone 020 7210 1030).

2.6.2 A Royal Charter does not entitle the body concerned to a grant-in-aid from public funds and many receive none. Insofar as a body with a Royal Charter does receive such finance, the department giving the grant-in-aid should impose exactly the same conditions as apply to any other outside body which is similarly financed.

## 2.7 Crown Status

2.7.1 With three notable exceptions (the Health and Safety Commission, the Health and Safety Executive and the Advisory, Conciliation and Arbitration Service which are Crown bodies), Public Bodies with their own legal personality do not enjoy Crown status and legislation to establish a new executive NDPB should make clear that the body is not part of the Crown. Staff of Public Bodies that have a separate legal personality are not civil servants (see Chapter 5 - Public Body Staff). Please see above Paragraph 2.3.2 for advice on bodies that do not have a separate legal identity.

### 2.7.2 Copyright and re-use issues

In paragraph 2.3.4 it is explained that the copyright of Crown NDPBs is subject to Crown copyright protection and that it is managed by the Office of Public Sector Information (OPSI). Copyright material produced by other NDPBs, however, will be owned by the NDPB concerned. Under the Regulations on the re-use of public sector information, NDPBs, like most other parts of the public sector, have responsibilities for facilitating the re-use of the material they produce: <http://www.opsi.gov.uk/si/si2005/20051515.htm> NDPBs can find further information on OPSI's website at: <http://www.opsi.gov.uk/advice/index.htm>

2.7.3 Whilst Government Departments have a general discretion to use the Royal Arms (or the Royal Crown which can be regarded as an equivalent, but simpler device) for official badges, on stationery, vehicles and official publications, this may not be extended to associated bodies which, although having a role in the processes of national government, are not government departments, or part of them. Any enquiries related to this matter should be addressed to the Royal and Hereditary Branch, the Department for Constitutional Affairs (Tel: 020 7210 8644/8564).

## 2.8 Charitable Status

2.8.1 The Charity Commission's publication *The Review of the Register of Charities* (RR1) contains a section entitled *The Essential Characteristics of a Charity* which sets out the defining characteristics which distinguish a charitable and non-charitable body. This publication can be seen on the Commission's website at <http://www.charity-commission.gov.uk/>. Departments should consult the Charity Commission at an early stage if they are considering charitable status for a new Public Body (tel: Charity Commission Contact Centre – 0845 300 0218).

2.8.2 Whether or not an entity is legally a charity will broadly depend on its express purposes and powers, and the arrangements for its governance and management, as set out in its governing instrument (i.e. its Memorandum and Articles of Association; constitution; Royal Charter; statute etc). Charitable status is inherent and does not depend on registration with the Charity Commission or anyone else. It is therefore possible to set up an entity as a charity without intending it to be, or realising that it is, a charity, or where its

exact status is in doubt. Being a charity would mean that it and its Board (as charity trustees) were subject to some or all of the requirements and restrictions of charity law – which might in turn mean that it was prevented from functioning in precisely the way it was intended to.

2.8.3 A key element of what the law regards as a charitable purpose is public benefit. It is not surprising given this public benefit requirement that some charitable purposes correspond with what are also nowadays purposes of government, both central or (more commonly) local. However, this does not mean that every purpose for which a Public Body could be set up is certain, or even likely, to be a charitable purpose. A body established in order to implement the policies and directions of ministers or departments, for example, is unlikely to be a charity. If charitable status is sought for a Public Body it will be necessary to make substantial compromises in terms of the control which the department or minister can exercise over its activities. However, it should be noted that charitable status and classified central government public body status are not automatically mutually exclusive.

2.8.4 The Charity Commission's publication RR7 'The Independence of Charities from the State' (version Feb 01) states that just because a body has been set up by the State does not prevent it from being a charity. Nor is it a bar to charitable status that the body has been created with a view to taking on a government function. What is important is that the **purposes** for which the new body exists should be exclusively charitable. In practical terms, this means that a charity can be set up to carry out a function of government where there is a charitable purpose that **coincides** with the governmental function.

2.8.5 Although organisations that are established to pursue political purposes cannot be charities, campaigning and political activity may be carried out by recognised charities as a means of furthering their charitable purposes. Further detailed information is available on the Charity Commission website: <http://www.charity-commission.gov.uk/publications/>

### **3. General principles – powers of the body and ministerial powers**

3.1 In setting up a Public Body, Departments should ensure that they strike the balance between a) enabling the minister to fulfil his or her responsibilities to Parliament and b) giving the Public Body the desired degree of independence. The balance will depend largely on the nature of each Public Body's functions and on the reasons for distancing these from government.

3.2 Conferring functions on a Public Body involves recognition that a degree of independence from ministers (in carrying out those functions) is appropriate. Nevertheless, ministers may be answerable to Parliament for the failure to take controls that are necessary or advisable, especially in the case of a Public Body which is to receive public funds. Ministers may also be answerable if, having taken responsibility by establishing such controls, they fail to use the controls properly.

3.3 It may be appropriate to provide for certain controls other than through legislation: for example, through conditions attached to the issue of grant-in-aid, or in a formal document of agreement between the department and the body. This is the normal course for detailed control arrangements likely to change over time. Such changes can be made more easily if detailed arrangements are not embodied in legislation. A general provision in a Bill to the effect that the Secretary of State may, with the consent of the Treasury, fund the body from monies voted by Parliament subject to terms and conditions determined by the Secretary of State, would be an effective way of achieving this.

3.4 Ministerial powers over a Public Body (statutory or otherwise) should ideally rest with one sponsoring minister. If two or more ministers are involved there is a risk of uncertainty about the precise division of responsibilities in serving two or more 'masters'. In certain cases, however, shared ministerial responsibility may be unavoidable.

3.5 Except where the minister is not a Secretary of State, statutory powers are normally vested in the Secretary of State at large. It will generally not be appropriate to name individual Secretaries of State in statute unless there is a particular reason for limiting performance to a named Secretary of State. The precise allocation of responsibilities should, however, be decided at an early stage and made clear during the passage of the legislation if there is any room for doubt.

#### **4. Powers and Obligations of the Body**

4.1 The legislation or instrument creating the Public Body, or conferring the relevant functions on it, should define clearly the Public Body's functions, the method of funding, and other specific powers and obligations. Provisions for the following are frequently included:

4.1.1 power to appoint staff;

4.1.2 power to pay salaries and allowances;

4.1.3 power to make pension provision: admission to the Principal Civil Service Pension Scheme (PCSPS) via Schedule 1 of Superannuation Act 1972 may be an option but this is constrained by the scope of the 1972 Act and would need to be cleared by the Cabinet Office, so cannot be relied on and the body must have other options if PCSPS membership is not available;

4.1.4 power to raise money by levies or charges, and/or to borrow and lend;

4.1.5 enforcement powers where appropriate;

4.1.6 power to acquire property to accommodate the body's staff and activities;

4.1.7 a general power for the Secretary of State to fund the body from monies voted by Parliament (i.e. it is silent in whether by grant-in-aid or not).

4.1.8 power to create subsidiary organisations;

4.1.9 obligations to make suitable external audit arrangements (i.e. in line with the arrangements announced by the Government in the light of Lord Sharman's review of audit and accountability in central government – see Chapter 6: Financial Management - Accountability), to submit accounts by a certain date and to lay audited accounts before Parliament and to publish them;

4.1.10 the obligation to inform Parliament of its activities through an annual report;

4.1.11 a declaration of whether the body should be subject to investigation by the Parliamentary Commissioner for Administration (also known as the Parliamentary Ombudsman). The Parliamentary Ombudsman operates under the provisions of the Parliamentary Commissioner Act 1967 as amended. NDPBs that meet the relevant criteria set out in section 4 of the Act and do not fall within the jurisdiction of another Ombudsman, should be brought within the Parliamentary Ombudsman's jurisdiction unless there are exceptional reasons for not doing so (i.e. it does not meet the relevant criteria set out in the 1967 Act). Please see Paragraph 4.3 of Chapter 8: Policy-Openness and Accountability for further information. When drafting legislation to establish new NDPBs, provision should be made to add the new body to the list of bodies in Schedule 2 to the Act;

4.1.12 a declaration of whether members of the body are disqualified from membership of the House of Commons under the House of Commons Disqualification Act 1975. An amendment to the House of Commons (Disqualification) Act 1975 will often be necessary.

4.1.13 an obligation to comply with the provisions of the Public Records Acts 1958 and 1967. Public Bodies may be covered by these Acts but they may need to be added to Schedule 1 to the 1958 Act.

4.1.14 an obligation to set fees and charges for any facilities or services in accordance with the Treasury's Fees and Charges Guide: 'Selling into Wider Markets: A Policy Note for Public Bodies and Charges for Information: When and How'. In setting fees for information requested under either the Freedom of Information Act, the Environmental Information Regulations or the Re-Use of Public Sector Information Regulations, bodies must follow the respective regulations and guidance notes issued for public bodies.

4.1.15 and whether the body should be designated under the Official Secrets Act 1989. The Act makes unlawful disclosure of certain limited categories of information (for example security and intelligence, defence, international relations, and information which may lead to the commission of crime) a criminal offence. The Act applies explicitly to the staff of a small number of NDPBs that are listed in the Act.

## 5. Ministerial powers

5.1 The statute or instrument creating the NDPB or conferring the relevant functions on it, should normally provide suitable powers of appointment and dismissal over the Chairman and board members. Grounds for dismissal normally include criminal behaviour, poor performance and other grounds which make members unable or unfit to discharge the functions of the body. The latter may include repeated non-attendance at Board meetings without reasonable excuse, undischarged bankruptcy or sequestration of estate, a deed of arrangement with creditors, or being guilty of misbehaviour or conflict of interest. (The legislation should not include a reference to incapacity by reason of physical or mental illness since this formulation has been criticised in the House of Lords as being offensive to people with disabilities.) Please see Paragraph 4.2.2 of Chapter 1: Case assessment and classification of a Public Body for further information about making and managing ministerial appointments.

5.2 The following are some examples of additional provisions that may be needed:

5.2.1 a requirement that the body exercise particular functions subject to guidance from the Secretary of State, and/or in accordance with plans approved by the Secretary of State;

5.2.2 general or specific ministerial powers of direction;

5.2.3 exercise of certain financial powers – e.g. borrowing or capital expenditure – to be subject to ministerial approval or consent;

5.2.4 careful consideration should be given to the size and composition of the board – e.g. the department may wish to give a statutory right to a particular organisation (known as a nominating body) to have its rights represented on a particular public body board<sup>3</sup>;

5.2.5 staff numbers, terms and conditions, and pension arrangements to be subject to departmental approval where PCSPS applies; and

5.2.6 powers to require the production of information which ministers need in order to answer satisfactorily for the body's affairs.

5.3 The nature of the controls will depend both on the NDPB's functions, and on the closeness of supervision which ministers wish to exercise. In particular, the controls relating to staff numbers, terms and conditions and superannuation arrangements will not generally be appropriate for bodies which receive less than 50% of their funds from government. For all bodies in receipt of government funds, more detailed provisions for financial control and the

---

<sup>3</sup> Please see the OCPA guidance on Procedures for Making Formal Nominations to Public Bodies for further details: [http://www.ocpa.gov.uk/publications/pdf/nomination\\_procedures.pdf](http://www.ocpa.gov.uk/publications/pdf/nomination_procedures.pdf)

provision of information are likely to be included in the conditions attached to the grant-in-aid.

5.4 Particular care must be taken when setting the terms of appointment and dismissal of members of a Tribunal NDPB which is subject to Article 6 of the European Convention of Human Rights so as to ensure that the independence of the body is not called into question. Legal advice should be sought on this point.

5.5 Any proposal to mention in legislation the Office of the Commissioner for Public Appointments (OCPA), the Commissioner for Public Appointments or the Commissioner's Code should be cleared in advance with OCPA.

## **6. Paving legislation**

6.1 In some circumstances the main legislation setting up a new NDPB may be preceded by "paving" legislation. This legislation would be designed to allow or ensure that the necessary preparatory work is carried out in advance of Royal Assent to the main legislation. It would normally need to include powers for expenditure to be incurred by the department or other existing organisations (e.g. NDPBs, local authorities) for which statutory authority would not otherwise be available; and it might require organisations, which would not otherwise do so, to take certain preparatory steps to supply information and to safeguard assets. The paving legislation might also make provision for setting up a "shadow body" in the form of a statutory advisory or preparatory Committee to assist and advise on the preparations for setting up the NDPB. Please see Paragraph 7.2 below.

6.2 Paving legislation would, therefore, be worth considering where the proposals involve the transfer of functions, assets, liabilities or staff from existing organisations to the new NDPB; where there is the possibility that such organisations may not co-operate; and where early expenditure beyond current powers is required. Where paving legislation is not possible, the scope for incurring 'new services' expenditure on preparing for the establishment of the new body prior to Royal Assent to the main legislation will be limited. The finance unit of the sponsor department should consult the Treasury at an early stage in such cases.

## **7. Main legislation**

7.1 The main legislation setting up a Public Body will normally come into force at Royal Assent or following a Commencement Order. Depending on the legislation, the Public Body will formally come into existence as soon as a quorum of Board members has been appointed and in some cases the body will then possess its full powers. In others it will take on its main functions and take over staff, assets, and liabilities at a later "vesting" date (or dates) either stated in the main primary legislation or determined by secondary legislation (statutory instrument). This vesting process will normally be used where a new Public Body is taking over functions from one or more existing bodies (the department,

another public body etc). A Public Body which has come into being but not yet reached vesting date, is referred to as a “skeleton body”.

7.2 Whatever the exact legislative framework, prior to the Public Body having a legal existence it may be appropriate to establish, in the absence of paving legislation, a non-statutory “shadow” body to advise on the setting up of the body. Please refer to Paragraph 3 of Chapter 4 (Setting up a new Executive NDPB: The Practical Tasks) for further information.

## **8. Provision for winding-up**

8.1 Departments may wish to consider if the legislation setting up a new Public Body should contain powers to permit winding up at a later date and for finalising and auditing the closing accounts, if a fixed lifetime is not established at the outset. Departmental legal advisers would need to be involved in this process. Difficulties have occurred in past cases where sponsor Departments have not been able to wind up statutory bodies when their work has been completed due to problems in securing a Parliamentary slot to amend the primary founding legislation. The bodies therefore continue to exist as legal entities even though there is no longer a requirement for them.

## **9. Execution of documents by affixation of seal**

9.1 Those drafting founding legislation for a Public Body should consider whether to include specific provision for the proposed body to have an official corporate seal. Seals can be said to be necessary because there are legal distinctions between documents entered into under seal such as deeds, and other documents not entered into under seal but entered into ‘under hand’. With certain exceptions, all conveyances, transfers, mortgages, leases and surrenders of legal estates or interests in land must be by deed. The grant of a power of attorney must also be by deed. A deed is also necessary at common law in certain other cases, for example, a release or a discharge of a debt or liability.

9.2 Where a Public Body is incorporated by statute or royal charter, there remains a common law requirement to execute relevant documents under seal. There is, therefore, no necessity to provide for the Public Body to have a seal by express provision but such a provision may be considered desirable particularly so as to set out a procedure pursuant to which the seal is to be used. For example, that the seal should be authenticated by the Chief Executive or by a member of the Board or some other person who has been authorised for that purpose. Public Bodies registered under the Companies Act may, however, execute a document as a deed either by affixing its common seal or by signature of two officers (either two directors or a director and the company secretary). If desired, an express statutory provision to this effect could allow a Public Body that was not registered under the Companies Act to execute a document as a deed in a similar way.

## **10. Devolution Issues**

The Department for Constitutional Affairs is responsible for the overall management of relations between the UK Government and the devolved administrations in Scotland, Wales and Northern Ireland. Please refer to the following website for detailed information:

<http://www.dca.gov.uk/constitution/devolution/>