



**Government
of South Australia**

Department of the Premier and Cabinet Circular

PC022
**Establishment and governance requirements for government boards
and committees**

October 2014

**PC022 – Establishment and Governance requirements
for government boards and committees**

For the information of:

Ministers' offices, chief executives and staff involved in the establishment and review of Government boards and committees.

Contact information for this Circular:

Phone: 8429 5218

Email: boardsandcommittees@dpc.sa.gov.au

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**PC022 – Establishment and governance requirements
for government boards and committees**

Summary

The objectives of this Circular are to:

- Prevent the proliferation of government boards and committees by promoting community engagement strategies and departmental structures as the first consideration for service delivery models.
- Enhance performance and governance by establishing tests and approvals for when to establish a new board, providing general guidance on the structural options, and ensuring that all existing boards and committees undergo regular review.

Background

The establishment of government boards and committees has historically been one of the most popular mechanisms used by governments to receive community input into government decision making and to direct and oversee organisations. These entities have taken many forms ranging from non-statutory advisory committees appointed by Ministers to more formal structures with boards established by legislation and appointed by the Governor.

While boards and committees can play an important role in providing leadership, independent decision-making or specialist advice to government, they are not always the most effective or efficient tools available to government for the delivery of services. There are other ways of engaging with the community or receiving specialist advice that should first be considered.

Part 1 – Establishment of government boards and committees

Boards and committees should not be established by default. Community engagement strategies should be explored and proper consideration and testing of whether a department can undertake government functions should occur prior to establishing an alternative structure, such as a board or committee.

1. Community engagement

Engaging with people who are affected by government decisions results in better decisions, which drives better outcomes. To do this, a range of community engagement tools are available to activate the community's voice, such as (but not limited to) social media, community meetings, workshops or surveys.

While in the past advisory boards or consultative committees have been established to inform government decisions, modern engagement strategies now provide a greater ability to directly connect with stakeholders and interest groups on a much larger scale. This allows the government to tap into diverse perspectives and potential solutions to improve the quality of its decisions which traditional and more focussed models, such as government board structures, may not provide. In other words, effective engagement strategies provide flexibility and open up conversation and debate beyond those at the board table.

2. Departmental provision of government functions must be considered

A departmental model of delivering government functions must be considered before other structural options are explored. There are a number of advantages to the departmental model, particularly with regard to accountability and flexibility. Ministers are accountable to Parliament and to the electorate for the operation of the bodies within their portfolio, and the government department provides the Minister with a structure over which he or she has direct control; there is a direct line of accountability from the chief executive to the Minister.

Departmental structures are also more flexible than entities created by legislation. Their scope of work can be altered to fit need, including specialised business units with distinct branding, and they can be created and abolished at the discretion of the Governor acting on the advice of the Premier. Departments undertaking well-planned community engagement strategies to inform policy development or to resolve community issues can provide an effective alternative to a traditional advisory board or committee. A department can be organised so as to include an attached office or alternatively a business unit may be established within a department and headed by a statutory office holder who may be a public servant. This gives the functions of that business unit/office a limited form of independence. Its functions might be to support the statutory officer in the performance of his or her functions.

There are circumstances, however, where a department may not be the most appropriate structure for the delivery of a function. This is considered in more detail below.

3. Delivering functions in government: The Threshold Test

Before establishing a new function – or reforming an existing one – a threshold test must be met. The test is weighted in favour of the departmental structure by requiring agencies to demonstrate the need for the function and to show why an existing department cannot undertake the function.

1. Does the function need to be undertaken? (Yes / No)

Reasons for deciding **no** include (but are not limited to):

- the business case is insufficient

- there is insufficient public interest or demand, and
- the body is not, or is not likely to be, financially sustainable.

If **yes**:

2. Should the SA Government undertake the function? (Yes / No)

Reasons for deciding **no** include (but are not limited to):

- it may be delivered more efficiently by contracting it to the private or community sectors
- it is properly a role for the private sector, a community-based service or another jurisdiction, and
- another jurisdiction already has responsibility for the proposed function.

If **yes**:

Is there a compelling reason that a department or existing body cannot, or should not, undertake the proposed function? (Yes / No)

If it is determined that the government ought to undertake the function, the preference is that it be conducted by an existing department. In some circumstances, however, there may be compelling reasons that a new body be created. Some of these reasons include:

- the function is regulatory in nature, and its decisions would be binding on government
- the function needs to be at arm's length from the Minister (although consideration should be given in this instance to vesting the function in an independent statutory office holder supported by an existing department)
- the function is commercial in nature and requires a corporate structure (more detail on this can be found in the following section).
- the function requires a high level of public confidence that the advice, recommendations, facts or statistics provided by the body are independent and politically impartial
- there is an existing agreement – such as an interjurisdictional agreement, a public-private partnership, a multiple ownership arrangement, or national competition policy requirements – that a function be provided through a non-departmental body
- the function requires expert input not available in the public service (and which cannot be engaged at a reasonable cost), and
- the function is funded by external sources and/or requires stakeholder determination in the distribution of funds.

If there is a compelling reason that a department cannot perform a function, this must be demonstrated through the development of a business case submitted to Cabinet for approval. The business case must also set out what structure is considered appropriate for provision of the function. Further information is provided on this process in section 6.

4. Structural options for a new entity

If it is established that there is a need to undertake the function and that it cannot be delivered by an existing department or another body, the next step is to consider alternative structures. Some of these are set out below.

Information on structural options is of a general nature only. As such, agencies are encouraged to seek specialist advice from the Crown Solicitor as necessary.

4.1. Statutory Authority

A statutory authority is a body corporate established by its own specific legislation, either independently from government or as a public sector body. A statutory authority typically has the power to sue and be sued, hold land and property, and enter into contracts and expend moneys from its own accounts without the need for further appropriation authority.

There are a number of variations of the characteristics of statutory authorities, which depend on its functions. The entity's function will generally influence the level of independence, the level of ministerial direction or control and the legal form of the entity. Its staff are generally public sector employees under the *Public Sector Act 2009* unless expressly excluded.

Statutory authorities can normally be classified according to their functions as follows:

- non-commercial service delivery
- commercial service delivery, and
- regulatory.

Non-commercial service delivery statutory authorities often pursue social objectives or provide certain services in the public interest. They are generally subject to a high level of ministerial control, although it is normally limited in relation to organisational decisions or the contents of advice. The majority of funding for operations is usually derived from a government grant, although they may in some cases levy charges to clients. Examples of statutory authorities in this category include the Art Gallery Board, Green Industries SA Board or the SACE Board of South Australia.

Commercial service delivery statutory authorities pursue commercial objectives, although this is often balanced against public service considerations. They are generally subject to ministerial direction and control, but the power will generally be tempered to reflect their commercial objectives. Staff may be employed in the public service or directly by the authority. Commercial statutory authorities will normally generate most, or a significant portion, of their own income. Examples of statutory authorities in this category include HomeStart Finance and the Urban Renewal Authority (Renewal SA).

Regulatory statutory authorities are independent decision-making bodies, often involved in issuing standards or guidelines. They may also exercise disciplinary or enforcement functions such as determining breaches of compliance. Their independence from government is crucial for satisfying the expectation of impartiality. Regulators may raise revenue through the imposition of fees and charges, but may also receive grant funding from government. Examples of statutory authorities in this category are the Environment Protection Authority, the Education and Early Childhood Services Registration and Standards Board of SA and the Dairy Authority of SA.

Statutory authorities are typically governed by a board, the members of which are often appointed by the Governor. However, this is not always the case; they may be managed by a public servant within an administrative unit. In the latter case, the legislation can stipulate that an act of the public servant in the management or administration of the authority is an act of the authority.

Another option is for the establishing Act to simply establish an Office or Authority. In such cases the statutory office-holder may for administrative purposes be part of an administrative unit. Alternatively, the establishing legislation may provide for the office-holder to employ staff or to make use of the staff of an administrative unit. In either case, this structure tends to be utilised for office-holders whose functions are non-commercial.

Advantages

- This structure has the ability to reduce ministerial involvement when active involvement in day to day management of the relevant organisation is difficult, and/or to create greater efficiencies that may result from a more corporate structure.
- A degree of independence, to the extent provided in the particular authority's establishing legislation.
- Usually required by the legislation to report to their own Minister and/or the Treasurer.

Disadvantages

- Establishment of a statutory authority involves some loss of power and control by the Parliament and the executive, with the extent of such loss again depending on the statutory regime and the degree of ministerial direction and control it imposes.
- Often have all of its powers and functions specified in legislation, resulting in a lack of flexibility, as any changes need to be made by Parliament. However, this can be overcome to some extent by building in a degree of flexibility, such as by permitting the authority to undertake other functions or to exercise other powers with approval from the Minister, the Treasurer or the Governor.

4.2. Public Corporation

A public corporation is a statutory entity with predominantly commercial or trading interests. A body corporate can be established as a subsidiary of a public corporation (including as a subsidiary of the relevant Minister) by the enactment of regulations under the *Public Corporations Act 1993* (PC Act).

A statutory body established under a specific piece of legislation can have the provisions of the PC Act applied to it by its establishing legislation or by regulation under the PC Act. Not all of the provisions of the PC Act need be applied.

A public corporation to which the PC Act applies may have the following relevant features, subject to the terms of its establishing legislation:

- it is an instrumentality of the Crown
- it holds its property on behalf of the Crown
- it has powers to enter into contracts, borrow money and hold land
- it is accountable to its Minister and is subject to the control and direction of its Minister
- the Treasurer indemnifies its liabilities, and
- it has the benefit of significant management oversight tools, such as a charter prepared by the Minister and the Treasurer and a performance statement.

A public corporation must perform its commercial operations in accordance with prudent commercial principles and use its best endeavours to achieve a level of profit consistent with its functions. Any non-commercial operations must be performed in an efficient and effective manner consistent with the requirements of its charter. It should be noted that, while the public corporation structure is most commonly used for entities undertaking largely commercial functions, it can also be used for predominantly non-commercial entities.

Examples include the South Australian Water Corporation, TAFE SA Board or StudyAdelaide Board.

Advantages

- Sufficient flexibility is built in to the PC Act to enable it to adapt to corporations that have different functions. The PC Act has thorough governance and financial administration provisions. At the same time, the option of applying only some of its provisions to a corporation established by its own legislation is open to the Parliament.
- This structure has the ability to reduce ministerial involvement when active involvement in day to day management of the relevant organisation is difficult, and/or to create greater efficiencies that may result from a more corporate structure.
- A degree of independence, to the extent provided in the legislation.
- Usually required by the legislation to report to their own Minister and/or the Treasurer.

- The relevant Minister has particularly broad powers to investigate the affairs of a public corporation.

Disadvantages

- There are few disadvantages of the public corporation structure. One may be that a public corporation that is established as a subsidiary of another corporate entity cannot have powers that are greater than those of the principal entity. It will, of course, depend on the functions it is expected to have as to whether that is a significant limitation.

4.3. Advisory bodies

There may be occasions where a stand-alone advisory body, usually a board or committee, will be required. Advisory bodies are specifically created for the provision of advice to the responsible Minister or to the government more broadly, which could be in the form of recommendations or reports. An advisory body may provide perspectives from key stakeholders, eminent persons and/or business and broader community interests, as relevant to the functions of the body. They may also add a degree of prestige to a government objective or work program.

Advisory bodies are normally established in one of two ways: by a Minister of the Crown (non-statutory) or by legislation (statutory).

Non-statutory advisory bodies must have a terms of reference to clearly guide and focus the work of the body (see Part 2 for further information). They are normally time-limited and flexible, able to be established and dissolved with relative ease. Further, their role and functions can be amended quickly at the direction of the Minister.

Statutory advisory bodies are normally only required where there is an ongoing need for specialist advice in the area of focus. The relevant legislation will normally specify that power is limited to the provision of advice, but occasionally additional functions will be included. The enabling legislation will normally cover membership and reporting requirements.

In either form, advisory boards will normally receive administrative support from within an existing department, which may also include a distinct business unit.

Examples of statutory advisory bodies include the Premier's Climate Change Council or Controlled Substances Advisory Council. Examples of non-statutory advisory bodies include the Defence SA Advisory Board and South Australian Aboriginal Advisory Council.

5. Does the new structure need a board?

If it is decided that either a statutory authority or public corporation structure may be appropriate, it may be the case that a body may derive benefit from the skills and experience offered by a board-like governance structure.

However, the establishment of a board is not automatic and should be probed and tested to ensure that it is appropriate.

The fundamental question is: **Can the board add value?** The following factors may assist agencies to determine whether or not there is justification:

- value of public assets over which the body has control, or its capacity to expend funds or incur liabilities
- the extent to which power and responsibilities are granted to the body
- risk of the body not fulfilling its objectives/performing its functions (e.g. essential services)
- need for autonomy and independence in the exercise of functions or decisions made by the body (a board's influence is as protector and advocate for that autonomy and independence)
- contentious nature of the body's functions or the extent of conflict amongst stakeholders
- appropriateness for a responsible Minister or associated portfolio department to receive reports directly from executive management
- need for quality specialist or expert judgment, or a diverse range of perspectives and experience, which cannot be adequately provided by a community engagement strategy, and
- the extent to which networking by board members can legitimately promote achievement of organisational goals.

6. Approval process for the establishment of a board

If a Minister or agency determines that a new board or committee will be required to deliver a function, whether statutory or non-statutory, the approval of Cabinet is required. Securing approval requires the completion of a business case, as per the template in appendix 1. This must be attached to the relevant Cabinet submission.

PART 2 – GOOD GOVERNANCE: ENSURING THE EFFECTIVENESS OF GOVERNMENT BOARDS AND COMMITTEES

Once established, government boards and committees must be effective. As such, it is required that each board or committee have:

- a terms of reference approved by the Minister
- annual (or other) reporting requirements
- a sunset date or review date, and
- appropriate gender balance.

7. Terms of reference

A terms of reference sets out the scope of the board or committee. It defines the functions and responsibilities of the board and provides a framework for reporting on the board's operations. Effective terms of reference must be approved by the responsible Minister and should include:

- a statement of the functions and responsibilities of the body, ensuring that these do not duplicate an existing government function
- reporting arrangements, including timeframes for reporting and a list of agreed objectives against which performance can be measured
- a sunset or review date
- a statement of membership composition complying with the SA Strategic Plan targets on gender balance and setting out the expertise required of members
- stakeholders and key relationships
- meeting procedures, minutes, quorum requirements and record-keeping, and
- resources and support structure.

Any amendments to an existing terms of reference must also be approved by the responsible Minister.

Statutory boards and committees will generally have their functions and responsibilities detailed in their establishing legislation, which satisfies the policy requirement for a terms of reference. However, in cases where the legislation does not contain sufficient detail regarding the functions and responsibilities of the board or committee, separate terms of reference consistent with the legislation must be approved by the responsible Minister.

8. Reporting requirements of boards and committees

This section of the circular applies primarily to those bodies that do not have reporting requirements set out in legislation. Guidance for boards covered by statutory reporting requirements is available in DPC Circular 13.

All boards and committees not subject to existing statutory reporting obligations are required to report to their responsible Minister at regular intervals determined in agreement with the Minister. A period of 12 months will generally be sufficient, although there may be instances where a different time frame would be more appropriate.

Reporting should provide a summary of activities undertaken and outcomes achieved over the reporting period, with supporting data where relevant. The quality of reporting should be sufficiently robust to give the Minister confidence in its reliability and relevance.

9. Establishing time frames: Sunset and review dates

Non-statutory boards and committees must have a sunset date identified in their terms of reference. The intention of this measure is that the body will be wound up at this date. However, the sunset date may be extended by the responsible Minister if a review of the body indicates that there is value in continuing the body for a further period.

When determining the sunset date for a board or committee, consideration should be given to the time likely to be needed by the board to fulfil its

purpose. As a general guide, between one and three years is suggested as being appropriate.

Most statutory boards have more complex roles and responsibilities than non-statutory advisory bodies. On this basis, review dates, which prompt a review of the board without requiring its dissolution, will generally be more appropriate than sunset clauses. Review dates will generally be set at longer intervals than sunset dates, such as five years or more.

Reviews of boards and committees should be undertaken prior to the actual sunset or review date. Ministerial or departmental staff not directly involved in the operation or administration of the body should undertake the review. However, all reviews should take into account the views and information of stakeholders and administrators of the body.

Questions to be considered in a review may include some or all of the following:

- Has the body fulfilled its intended role?
- How effective has the body been in terms of achieving the objectives set out in its terms of reference?
- Is there an ongoing need for the functions of the body, and is the body the most cost-effective way of providing those functions?
- Do members have skills and experience suited to the purpose for which the body was established?
- Do the functions or operations of the body duplicate or overlap the functions or operations of another body?
- Can the function be delivered through an alternative community engagement strategy?

10. Gender composition of boards and committees

All Cabinet submissions to Cabinet relating to board appointments must:

- set out the existing gender balance of the board, and
- set out the new gender balance of the board resulting from the proposed appointments.

Non-compliant submissions or notes may be returned to the originating agency for amendment prior to being processed by Cabinet Office.

The Office for Women maintains the Premier's Women's Directory, a database of women that may be qualified for government board positions. Agencies should contact the Office for Women to arrange searches of the directory or to seek further advice on recruiting women to boards.

Where a non-government organisation is required by law to nominate a person to a government board, that organisation must, under the *Acts Interpretation Act 1915*, supply a panel of three nominees, one of whom must be a man and one a woman, for each position.

Where a non-government organisation is invited to nominate a person to a government board, but is not required by law to do so, government policy is that the organisation supply a panel of three nominees, one of whom must be a man and one a woman, for each position.

Further information

Advice on specific areas of board governance, such as honesty and accountability obligations, membership composition, board structure and remuneration, can be obtained from:

Boards and Committees Unit
Department of the Premier and Cabinet
GPO Box 2343
ADELAIDE SA 5001
Phone: 8429 5218
E-mail: boardsandcommittees@dpc.sa.gov.au
Website: <https://dpc.sa.gov.au/what-we-do/services-for-government/boards-and-committees-administration>

Topic	Contact information
Cabinet submissions	Cabinet Office Department of the Premier and Cabinet Phone: 8226 3661 Website: https://dpc.sa.gov.au/what-we-do/services-for-government/cabinet-office
Crown Solicitor	Advising section Office of the Crown Solicitor Website: http://www.agd.sa.gov.au/government/about-us/department/crown-solicitors-office

APPENDIX 1: BUSINESS CASE TO ESTABLISH A NEW BOARD

THIS FORM MUST BE ATTACHED TO THE CABINET SUBMISSION

Proposed name of new entity	
Brief description of role	
Minister	
Department (if applicable)	

		please tick (✓)			
THRESHOLD TEST	Q1	Does the function need to be undertaken?	YES	NO	
	insert explanation				
	Q2	Should the SA Government undertake the function?	YES	NO	
	insert explanation				
	Q3	Is there any compelling reason why a department or existing body cannot, or should not, undertake the proposed function?	YES	NO	
Insert explanation					
STRUCTURAL FRAMEWORK	insert explanation of choice of structural framework				
BOARD TEST	Insert explanation of why a board is required				
APPROVALS	(signature) CHIEF EXECUTIVE Date:	(signature) MINISTER Date:			