



Cabinet Office Circular

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Whole of Government Directions under the Crown Entities Act 2004

Introduction

- 1 This circular sets out requirements that must be complied with before a whole of government direction is issued under s 107 of the Crown Entities Act 2004 (the Act). In particular, given the importance of such directions, Cabinet's approval must be sought for:
- the use of a whole of government direction as an appropriate mechanism for achieving the intended policy purpose;
 - initiating the legislative process for issuing a direction by undertaking the consultation required by the Act; and
 - issuing a direction.

Background

- 2 Under s 107(1) of the Crown Entities Act 2004 the Ministers of Finance and State Services can jointly direct Crown entities to "*comply with specified requirements for the purpose of both*
- (a) *supporting a whole of government approach; and*
 - (b) *either directly or indirectly, improving public services.*"

- 3 Such a direction can only be given to one or more specified “categories” of Crown entity, or to one or more “types” of statutory entity, as defined in the Act. That is:
- all statutory entities, or all Crown agents, or all autonomous Crown entities, or all independent Crown entities; or
 - all Crown entity companies; or
 - all school boards of trustees; or
 - a combination of these groups or all of them.
- 4 A whole of government direction cannot be given to:
- individual entities only (other than as part of a group); or
 - tertiary education institutions; or
 - Crown entity subsidiaries as a crown entity category (although the parent Crown entity must ensure to the extent of its ability that its subsidiaries comply with a direction given to the parent, to the extent that it relates to the subsidiary); or
 - non-Crown entities (for example, a direction cannot be issued to SOEs or to organisations listed in Schedule 4 of the Public Finance Act 1989).
- 5 Entities subject to a direction must give effect to it as soon as it comes into force. The only exceptions are Crown research institutes which must have regard to a whole of government direction. Entities must disclose that they have been subject to a direction in their annual report. Were an entity to breach a direction, it would be reasonable for Ministers to expect the report to disclose this, but there is no statutory requirement to do so.
- 6 The Ministers of Finance and State Services must, before giving a whole of government direction, consult with those entities to which the direction is proposed to apply, and with persons that the Ministers consider are representative of the interests of persons likely to be substantially affected by the proposed direction, “*to the extent that the Ministers consider necessary in the circumstances*”. Once a direction has been issued the Ministers must:
- notify the entities subject to the direction; and
 - present the direction to the House of Representatives.
- 7 Under Standing Order 384 any whole of government direction presented to the House of Representatives stands referred to the Finance and Expenditure Committee (FEC). The FEC will consider the subject area of the direction and either retain it for examination itself (if it falls within the Committee’s terms of reference) or refer it to another select committee. The FEC, or any other select committee, must report back to the House no later than 12 sitting days after a direction has been referred to it.
- 8 A whole of government direction comes into force 15 sitting days after it is presented to the House of Representatives, unless the House resolves to disapply the direction under s 109 of the Act. The Ministers must ensure that a direction is published in the *Gazette* and on the Internet [s 111 of the Act].

Potential uses of a whole of government direction

9 The following matters are not required in the legislation, but they may assist in determining whether a whole of government direction is appropriate in a given situation. A direction is appropriate for government policy requirements that lend themselves to administrative direction, as distinct from legislative requirements in regulations or an Act. This means that the direction should:

- relate to matters of general policy applicable to the entities within the selected category or type;
- relate to specific matters provided the direction does not interfere with decisions on particular cases or quasi-judicial decision-making (for example investigating or determining a particular complaint);
- be clear and consistent in the obligations it imposes (i.e. capable of application);
- take account of any rights of review or appeal to a court that may be in a Crown entity's Act. A whole of government direction should not impinge on rights of review or appeal; and
- take account of the role of boards as governing bodies of Crown entities.

10 Without limiting the uses to which whole of government directions can be put, provided the statutory requirements are met, directions in the following areas could potentially apply:

- to implement administrative systems or minimum standards or technical computer requirements in order to prevent errors, widespread inconvenience, viruses, or security breaches;
- to implement e-government requirements, such as standards for interoperability or website accessibility (compliance with e-government requirements to improve public services is given as an example in the Act);
- to implement early warning systems, and contingency plans to deal with direct or indirect threats to public services, such as electricity shortages or security breaches;
- to implement policies on consultation or networking with a sector or other agencies, such as the community and voluntary sector;
- to issue generic standards and qualifications (e.g. in relation to human resource management issues).

Alternative mechanisms should be considered

11 Ministers and departments should consider whether the objective can be better achieved in some way other than a whole of government direction, such as:

- letters conveying Ministers' expectations;
- statements of intent and output agreements;
- direction by an individual Responsible Minister under the Crown Entities Act or other Acts, where permitted;

- Cabinet Office circular; or
- regulations or instructions under the Crown Entities Act 2004, the Public Finance Act 1989 or other legislation.

12 The State Services Commissioner has a mandate under the State Sector Act to issue minimum standards of integrity and conduct in a code (or codes) of conduct. The Commissioner also has a role in issuing guidance on integrity and conduct, management systems, structures, and organisations.

Limits on scope

- 13 The Crown Entities Act safeguards the statutory independence of Crown entities potentially subject to whole of government directions. Section 113 provides that whole of government directions:
- cannot be given to entities in relation to their statutorily independent functions;
 - cannot require the performance or non-performance of a particular act, or the bringing about of a particular result, in respect of a particular person or persons; and
 - do not change the way in which entities' statutorily independent functions are carried out; or the way that functions are carried out by a person acting judicially in relation to a particular matter in accordance with an entity's Act.
- 14 Ministers and departments should also consider whether the proposed requirements are suited to an administrative direction rather than legislation. The latter might apply where the proposed requirements involve controversial matters or impose new legal obligations which should be the subject of considered consultation, select committee scrutiny, and proceeding through all the stages of the House.

Process requirements

- 15 A collective approach to managing whole of government directions is necessary for a number of reasons:
- the collective interest dimensions of the direction, given that the responsibilities of multiple Ministers are likely to be affected;
 - the need to avoid directions encroaching on entity independence (where applicable) as discussed above (paragraph 13);
 - the need for careful management within the government and with Crown entities given the potentially high profile nature of any whole of government direction and the ability of the House of Representatives to disapply a direction;
 - the new and important nature of the direction; and
 - the risk of judicial review if the process requirements of the Act (notably consultation) are not complied with.

- 16 Where use of a whole of government direction is proposed, the Ministers of Finance and State Services will seek approval from Cabinet, through the Cabinet Committee on Government Expenditure and Administration (or other appropriate subject committee), to develop a whole of government direction (and associated explanatory material), and to consult with affected Crown entities and representatives of other affected parties. A proposal to initiate a whole of government direction should include, as a minimum, explanatory material covering:
- the intended effect and nature of the proposed direction;
 - how the proposal meets legislative and other requirements;
 - alternative mechanisms that have been considered and why a whole of government direction is recommended;
 - whether any time limit on the direction is appropriate.
- A more detailed checklist is provided in Annex 1.
- 17 The proposal should also include an indication of any preliminary discussions that have taken place with other interested parties, and set out a plan for consultation with affected parties.
- 18 Consultation would then take place with affected Crown entities and representatives of other affected parties as required by the Act.
- 19 Following consultation, the Ministers of Finance and State Services will submit a paper to Cabinet, via the appropriate subject committee –
- reporting on the outcome of the consultation process;
 - seeking Cabinet’s agreement to issue the direction, notify affected entities, and present the whole of government direction and associated explanatory material (based on the points set out in paragraph 16) to the House of Representatives;
 - asking Cabinet to approve the text of the whole of government direction, and to note the explanatory material, which should be annexed to the Cabinet submission;
- 20 After consideration by Cabinet, the Ministers of Finance and State Services will issue the direction, notify affected entities and present the direction and explanatory material to the House of Representatives.
- 21 The direction comes into force after 15 sitting days unless the House has resolved to disapply it under s 109 (such a direction stands referred to the FEC which either examines it itself, or refers it to another select committee (Standing Order 384)). The Ministers of Finance and State Services will cause the direction to be published in the Gazette and on the Internet.
- 22 In following the process set out in paragraphs 16-19 above, Ministers should consider at various stages the need for consultation with the Government caucus and other political parties in accordance with standard Cabinet requirements.

Diane Morcom
Secretary of the Cabinet

Checklist for whole of government direction proposals

A submission proposing a new whole of government direction should cover the following points:

- 1 What is the issue (problem/opportunity) to be addressed by the whole of government direction?
- 2 To which Crown entity categories or types will the direction apply? (see point 4a below)
- 3 How does the proposal meet the requirements in s 107 of the Crown Entities Act that a whole of government direction be "for the purpose of both
 - supporting a whole of government approach; and
 - either directly or indirectly improving public services"?
- 4 Does the proposal meet other legislative requirements, in terms of:
 - the category/type of entities it is to be applied to? (see paragraphs 3 and 4 of this circular)
 - falling within the scope of an administrative direction? (see paragraph 9)
 - meeting the requirements in section 113 which safeguard Crown entities' statutorily independent functions? (paragraph 13)
- 5 What alternative mechanisms have been considered? (paragraph 11)
- 6 What are the costs/benefits (or advantages/disadvantages) of the whole of government direction relative to alternative mechanisms?
- 7 Provide an indicative assessment of the potential costs to affected Crown entities and other parties of the proposed direction. (Note that Ministers may expect Crown entities to absorb additional costs, and that any additional funding sought should go through the normal Budget process.)
- 8 Is a time limit on the direction (e.g. five years) or a review after a period of time appropriate?
- 9 Indicate whether any legal advice has been received on the proposal and the nature of that advice.
- 10 Indicate any preliminary consultation/discussions that have already occurred with interested parties (e.g. Crown entities, departments, Treasury/SSC, representatives of other affected parties).
- 11 Provide details of how the consultation requirements in s 108 will be met (see paragraph 6 of this circular), in terms of:
 - who will be consulted;
 - timeframe and process for consultation.