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Signposting the Zoo – From Agencification to a More Principled Choice of Government Organisational Forms

by

Derek Gill*

1. Introduction

This paper originated with the discussions at the experts meetings at the OECD for PUMA's Distributed Public Governance (Agencies and Authorities) Project.¹ These suggested that the quite structured systems of classification of government organisations in continental countries like Germany could equally be applied to the range of similar bodies in English-speaking countries like New Zealand. Cross-country dialogue has been hampered by the lack of a common language and classification to compare agencies and authorities across jurisdictions. In particular the term “agency” has quite different, but quite precise, legally defined meanings in different jurisdictions.

All the countries, however, had very similar types of bodies. Once common understandings emerged on terminology, the ensuing dialogue indicated that countries had very similar problems and experiences with the governance of this diverse group of organisations. As one of the delegates put it “We are all game keepers in zoos in our respective countries. We lack shared words for ‘lions’ and ‘tigers’ and ‘bears’ to be able to compare the feeding habits of each species or differentiate them from the other wildlife outside the zoo walls”.

The aim of this paper is quite practical – it is to start a dialogue across jurisdictions about practitioners’ experience and advice on the choice of organisational form to undertake public policy functions. To do this, the paper first proposes a six-way classification of the different “species” of central government bodies: Directly-controlled bodies (ministries and departmental agencies) and indirectly-controlled bodies (public law administrations, government enterprises, other public law bodies) and a residual “others” (not otherwise classified). The

* Derek Gill is Branch Manager, New Zealand State Services Commission.

paper then uses the classification schema to address a general question: “*When are different organisational forms best used?*” The paper offers some principles about their “feeding habits”, strengths and weaknesses of each form.

The paper is structured as follows. It summarises alternative bases for classification in Section 2 (the Annex contains more details), discusses some key factors in choice of form in Section 3, and provides a more detailed discussion of each of six organisational types including key strengths, key risks and alternatives in Section 4. Section 5 discusses the principles in more detail, while Section 6 concludes with a more detailed discussion of the classification, and the principles that emerged for choice of forms. In conclusion the paper briefly discusses the policy implications for “agencification”.

2. Alternative bases for classification

Developing an international classification is no small task. “Agencies” and “authorities” are striking for the diversity of:

- their funding – from taxes (including social security taxes), levies, trading revenue and subsidies;
- their size – number of employees, value of turnover or assets;
- their functions – predominantly policy, service delivery or administration of law and regulations;
- their legal form – legally separate bodies or not, public or private law bodies, created by the legislature or by the executive, and the legal status of employees (whether under civil service or general labour law);
- their powers – including the ability to create subsidiaries, to borrow and to invest; and lastly
- the rationale for their creation – economy (freeing from civil service controls and from administrative procedures), efficiency (focus and single tasking) and effectiveness (flexible and customer friendly), or increased legitimacy (depoliticisation, introducing specialist expertise).

This is not the first time the task of developing a classification has been attempted (see Talbot, 2000). Unfortunately there remains no agreed common usage. While the term “agency” and the neologism “agencification” have currency at present, other terms such as “autonomous bodies or organisms”, “quangos”, “non-majoritarian institutions”, “non-departmental public bodies”, “extra-governmental organisations”, and “subsidiary organisations” are also in usage in the literature.²

A classification can have a number of possible bases other than common usage and academic convention. The other potential bases include accounting standards, legal form, and economic substance (*i.e.* what an organisation does). These were investigated but none was found to provide a useful language or clas-

sification system. However, as discussed in the Annex, each has some useful concepts to offer:

- Accounting standards provide the useful notion of the consolidated central government financial reporting entity.
- Legal form provides a good basis to start but it is not determinative, because even within similar jurisdictions there are important legal differences³ and it is too static to capture changes in organisations over time.
- The System of National Accounts (SNA) provides some useful definitions and case law by going beyond legal form and including the underlying economic substance.

The approach adopted in this paper is to use the classification based on *legal form* used in some jurisdictions (Germany in particular) but to elaborate on that using judgements about the *economic substance* based on the country case studies.

A sharp distinction is drawn between directly-controlled bodies (*i.e.* ministries and bodies that are subsidiary to ministries) and indirectly-controlled bodies (*i.e.* entities that are separate from ministries). The OECD has now adopted the terms “delegated” and “devolved”⁴ to distinguish these two broad groupings.

Analysis of the eight country reports (summarised in Table 1) shows that while there are significant country differences, six distinct forms are found in most of the sample countries:

- **ministries** (including departments) and bodies that are subsidiary to ministries (**departmental agencies**);
- three types of non-ministry government organisations – **public law administrations, government enterprises**, and others such as advisory boards that are **not elsewhere classified (NECs)**;
- non-commercial **private law bodies**.

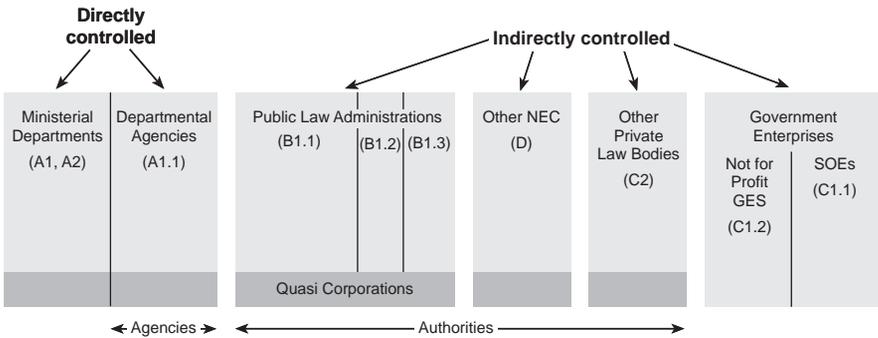
These six forms are the basis of the classification summarised in Table 1. Table 1 shows the use of these six forms in the eight sample countries.

This classification, like any other, raises the issue of the terminology to be used to describe the elements of the classification schema. The dilemma on terminology is nicely summarised (Talbot *et al.* 2000; p. 4) as “either redefine an existing term (and be accused of nit-picking and terminological authoritarianism) or invent a new specific term (and be accused of obfuscation)”. This paper opts for nit-picking.

It suggests that for the purposes of international comparisons:

- the label “departmental agency” is only used for directly-controlled bodies that are subsidiary to ministries;

Figure 1. Classification of different central government organisational forms



- the label “government enterprise” is used only for government-owned bodied that are performing commercial activities (as defined by the System of National Accounts);
- the label “authority” is used as a working term to cover all indirectly-controlled bodies other than government enterprises.

For the purposes of cross-country work therefore this paper has classified all bodies within the executive central government financial reporting entity as follows:

- “ministries” (A1 and A2, Table 1) and “departmental agencies” (A1.1, Table 1);
- “government enterprises” (for commercial activities – C1.1, C1.2, Table 1); and
- “authorities” (all indirectly-controlled non-departmental government bodies that are not government enterprises B, C2 and D, Table 1).

3. Use of forms

The country reports to be published by PUMA (*op. cit.*) suggest a wide-range of reasons why agencies and authorities were established. These can be grouped under three dimensions of performance and legitimacy as follows:

- economy (freeing from civil service controls and from administrative procedures);
- efficiency (focus and single tasking);
- effectiveness (flexible and customer friendly, value of a governance board); or
- legitimacy (separation of powers, promoting the involvement of experts and wider civil society, distancing politicians from certain decisions).

Table 1. Country use of different forms of agencies, authorities and government enterprises¹

	Ministries Subsidiaries	Public Law Administrations				Private Law Bodies			Others NEC
	Departmental Agencies	PLA (General)	Implement PLAs	Independent PLAs	Guided PLAs	SOEs	Not for Profit Govt Enterprises	Other	
	A1.1	B1	B1.1	B1.3	B1.2	C1.1	C1.2	C.2	
France	✓	✓	✓	✓	✓	✓	✓	✓	✓
Germany	✓	✓	✓	✓	?	?	✓	✓	✓
Netherlands	✓	✓	✓	?	?	✓	✓	✓	✓
New Zealand	✓	✓	✓	✓	✓	✓	✓	✓	✓
Spain	✓	✓	✓	?	✓	✓	✓	✓	✓
Sweden	✓	✓	?	?	?	✓	✓	✓	✓
United Kingdom	✓	✓	?	?	?	?	✓	✓	✓
United States	✓	✓	✓	✓	✓	✓	✓	✓	?
Total with	8	8	6	4	4	6	8	4	7
Total without	0	0	?	?	?	?		4	?

1. Based on the discussion at the Experts Meetings and an analysis of eight of the case studies published by PUMA. In the case of the United Kingdom and Sweden it was not possible to assign public law administrations to the different subcategories because each individual body has a unique governance regime.

This paper uses these two standards, performance and legitimacy, to assess different government organisational forms.

In both the public and private sectors, organisational *performance* varies markedly within industries at any one time and across time within one organisation. Organisations matter in the sense that where organisational boundaries are drawn determines how tasks are defined and how well they are executed (James Q. Wilson, 1989). Measuring the performance of government organisations is notoriously difficult because of the absence of independent measures of both service value (cost = price) and organisational value (the equivalent of the share price).

Legitimacy refers to the public acceptance of and support for the actions of government. Such acceptance and support must be voluntary, *i.e.* rest on the consent of the governed because force alone is not enough. Therefore, legitimacy must be based on democratic elections (*legitimacy of origin*) reinforced by *legitimacy of process* (*e.g.* rule of law, accountability to the legislature, compliance with administrative procedures and due process, wider participation in the policy process), as well as the *legitimacy of results* (*e.g.* effectiveness of the final results). Legitimacy is particularly important because, while there are significant differences in how government is perceived, in all major OECD Member countries trust in government (along with other institutions) has shown a long-run secular decline (Nye, 1996).

Saying something useful about organisational performance or legitimacy across jurisdictions is even more fraught with difficulties because of constitutional, other legal, historical and other contextual differences. In recognition of this, the following are important qualifiers to all the propositions in this paper:

- All statements are in general and on average propositions. Every principle will admit an exception in at least one country and some principles might apply to relatively few countries. All statements are meant to be valid for most of the countries most of the time, not true in each and every case.
- There is no one, or right, model. What is best for any function in any one country is crucially dependent on the formal institutional environment and the informal rules of the game (see Laking, 2002) – so detailed design will need to be tailored to each country's situation. Understanding this context is crucial for drawing out the lessons from one country that can be applied to another.
- Change is a two-edged sword. Creation of government bodies has a dark side as well as a light side. Statements about why agencies and authorities were created actually include evading government rules, avoiding merit in appointments and increasing scope for political interference in decision-making, etc.

The paper also proceeds from a number of assumptions:

- Form follows function. Like all clichés, this has a significant element of truth. Before considering issues of organisational form, consideration must be

given to the nature of the underlying problem, the policy intent, and alternative interventions to best achieve that intent.

- **Horses for Courses.** There are no valid top-down, general, cross-country rules for organising government. Good organisational design is based on a bottom-up analysis including the critical mission, constraints, culture and incentives.
- **Balance is all.** Getting high performance from government organisations requires the right balance (for both ministers and bureaucrats) between discretion and rules, autonomy and control, co-ordination and subordination, empowerment and restraint, looseness and tightness.
- **Reform is not a one-shot game.** Most of the effect of organisational design on performance will depend on how well the design is implemented, including building in incentives for learning and continuous improvement.

The aim of this paper is quite practical – to start a dialogue across jurisdictions about practitioners' experience and advice on the choice of organisational form to undertake public policy functions. To do this, this paper asks a "thought experiment": "in a sterile environment what are the strengths and weaknesses of different forms?" The paper assesses the potential contribution of each organisational form to performance and legitimacy. This is a big ask. To make the problem tractable, the paper does not focus on any particular function of government or any one country's context⁵ (history, informal system, legal system, etc.).

The analysis identifies a range of factors that are key to the choice of organisational form. These key factors are based on what has been reported by countries and identified in the literature. Some of these factors reflect qualities inherent in activities (measurability, cohesiveness), others reflect contextual features of the environment (salience, policy durability and stability), and some reflect a mix of both (interconnectedness). Factors that are sometimes stressed in the literature – independence and autonomy – do not emerge as key factors for organisational choice. Box 1 outlines these key factors in more detail.

4. Analysis of each organisational form

For each of the six forms (ministries, departmental agencies, public law administrations, government enterprises, other private law bodies, and advisory bodies as an example of NECs) this section sets out a brief description, a generic type and a finer classification. It then applies the key factors discussed in Section 3 to identify the strengths of and risks associated with for each form, and offers a conclusion about when they are best used.

Box 1. Key factors: Salience, interconnectedness, cohesiveness and measurability

Salience refers to the external environment and is particularly concerned with political risk. A simple test for salience can be put in the form of a question – in the normal course of the entity's business, how often would the chief executive be required to formally meet with the minister? Less frequently than once a quarter implies low salience.

Interconnectedness problems arise where the greater focus on a particular task leads to decreased appreciation of wider concerns so that overall co-ordination suffers. These co-ordination problems can occur at the policy development, operational or citizen service delivery level. (Talbot, 2002, p. 21).

A **cohesive** functional grouping is one where there is a related set of focused activities to be performed on a scale sufficient to exploit economies of scale and scope and with objectives that do not conflict. To test for whether a reorganisation could yield a performance gain, a bottom-up analysis of what an organisation does and how it does it should show how the core competency valued by the organisation, and the extrinsic or intrinsic incentives on staff, would change.

Measurability refers to the qualities inherent in the nature of the activity – the more complex and uncertain transactions are, and the greater the difficulty in specifying performance requirements in advance and measuring actual performance after the event, then the more they lend themselves to ministry form. James Q. Wilson developed a tentative typology based on the measurability of outputs (what is delivered) and outcomes (desired results). Production organisations (where the key outputs and outcomes are readily measurable), craft organisations (where only outcomes are measurable) and procedural organisations (where only the key outputs are measurable) lend themselves to non-departmental form more than coping organisations (where neither is measurable).

Durability refers to the extent of policy durability and uncertainty in the broader environment over time. There is an increased risk of irreversibility once a function is placed into a separate legal body.

4.1. Directly-controlled bodies

4.1.1. Form A: Ministries⁶

The base case with which all other alternatives are compared is the ministry form because, certain sovereignty functions excepted, any departmental function could be delivered through another form, and second, the ministry form has strengths of durability and integrity.

Ministries (or “departments” in some English-speaking jurisdictions) range in importance from a handful of small policy organisations in Sweden to other countries where they are large multifunction bodies that employ almost all civil servants. But for most OECD Member countries for most of the 20th century, functionally-integrated ministries were the dominant organisational form in central government. Allen Schick (PUMA, 2001, p. 28) notes that ministries often grew in response to the fragmentation of the state sector into separate bodies in the 19th century, and draws the parallel with the growth of the “M Form” corporation in the private sector over the same period.

The ministry form has been durable for a wide-range of functions throughout the 20th century. Thus, ministries undertake the classic “sovereignty” functions of Government of Foreign Affairs, Defence, Justice and Finance (excluding revenue collection) in all the countries reviewed. Ministries have a number of common characteristics. Typically they are:

- part of the state or central government and do not have separate legal body status;
- solely or predominantly funded from tax revenue;
- headed by or report directly to a minister in Cabinet; and
- part of the public or civil service.

Ministries are direct administration bodies “hierarchically connected to and under the direct control of the government” (unpublished SIGMA (OECD) paper, 2001, p. 6). Despite this direct ministerial control, ministries may be required by statute to act independently when carrying out certain functions. In the United Kingdom, network utility regulators are in departmental form. Similarly central government police forces, which are often in ministry form, commonly have statutory independence when pursuing cases or classes of cases.

Moreover, since the introduction in most countries of the civil service in the late 19th century, ministries have had considerable administrative autonomy from politicians. The statutory powers given to them regarding the hiring, review, and removal of staff provide considerable formal management independence from politicians. Coupled with the qualities inherent in many of the activities commonly undertaken by ministries (low measurability and certainty), this means that in practice *some* ministries have a lot of formal autonomy about what they do and how they do it. In practice, of course, how much autonomy is exercised will depend on the informal as much as on the formal system (see Rob Laking, 2001), but the informal system will influence non-ministry forms just like ministries. The key point for this paper is that ministries may exercise statutory independence and have considerable management autonomy from ministers as well.

Box 2. The generic ministry

Legal status

Public law; no separate legal identity from the state.

Control

Minister has formal, direct hierarchical control while the Director-General has operational control.

Governance

No board; part of the civil service. Minister resolves disputes not dealt with under civil service rules or the rule of law.

Key functions

Multifunctional including policy advice and implementation; design and implementation of laws, rules and regulations; administration of taxes and transfers; non-commercial services; monitoring of non-departmental government bodies.

Examples

Finance, diplomacy, defence.

Typical features

Finance

Tax financed annually; no ability to borrow or lend; typically has limited ability to carry forward surpluses.

Staff

Process controls on the appointment, promotion and removal of staff; input controls on the price and quantity of labour.

Other

Subject to administrative procedures and process controls *e.g.* for purchasing non-labour inputs.

Capital spending

Controlled separately with proceeds from assets sales not retained.

Ministries can be classified as:

- A1. **ordinary ministries**, *i.e.* ministries where standard civil service protections apply;
- A2. **special ministries**, *i.e.* ministries where special rules are introduced tailoring standard civil service protections, *e.g.* by making easier but more transparent the appointment and removal of the ministry's head. Common examples are the security agencies such as police, intelligence, and the armed services. In

Box 3. **Assessment of ministries¹**

Strengths

- Multifunctional – can undertake all government functions.
- Insulation – legal controls on staff insulate the ministry from political interference protecting the rule of law, due process, and a foil against excessive policy change (*e.g.* “free and frank advice”).
- Responsiveness – focused on tailored products for a unique customer – the minister – so alignment to the political context is high. Ideally suited to policy advice and implementation.
- Democratic visibility with a direct line of accountability from the ministry to the minister to the legislature.
- Integrity – ethos derived from broader civil service.
- Durability – flexible general form more able to adapt than those with specific statutes.

But the first three of these strengths have an inherent blind spot.

Risks

- Multifunctional but does nothing particularly well – like the poorly performing private conglomerates that have increasingly been broken up since the 1970s. At its worst a conglomerate ministry becomes a loose confederation of warring (bureau) tribes, each with its own outlook and values, stakeholders and resources, and with no distinctive corporate culture or core competency.
- The insulation results in excessive risk aversion, limited innovation and limited individual performance management.
- A culture of responsiveness up to ministers means managing down, *e.g.* service delivery to citizens is not undertaken well.

1. Loosely based on James Q. Wilson. See for example page 264 for a discussion on reorganisation.

the United Kingdom, this sub-group includes non-ministerial departments such as the utility regulators. In some jurisdictions this sub-group also includes executive bodies reporting directly to the President.

The ministry form can also be used flexibly to cater for the complexities of particular functions. This paper focuses on standard form ministries, but for certain specialised functions, special form ministries need to be considered as an alternative to creating a public law administration.

4.1.1.1. *When are ministries best?*

There are a number of sovereignty functions (*e.g.* policing, defence) where the need for direct ministerial responsibility and close oversight mean that, for legitimacy reasons, the ministry form is used. Outside of these functions, the ministry form would be expected where the qualities inherent in certain activities (lack of measurability) or the contextual environment (high salience) mean that performance will be best in this form. This performance consideration will apply for a wide-range of functions where, for example, policy objectives are ambiguous and subject to rapid and unpredictable changes, or if the activities are difficult to specify and observe. Considerations of robustness over time, uncertainty about the full life cycle of the organisation, and a risk of irreversibility once a function is placed into a separate body all argue for a preference for using the ministry form unless there are compelling reasons otherwise.

Governments can be characterised as doing five basic things – raising taxes, paying transfers (*e.g.* social assistance), producing physical services for citizens (*e.g.* border protection), regulating and law-making, and owning non-market and market producers.⁷ To undertake these different interventions, governments need policy support.

The fundamental role of a ministry is policy development, advice and oversight of implementation. The absolute advantage of ministries in policy work arises because:

- ministries are focused on supplying tailored products for a unique customer (the minister);
- policy is highly interconnected;
- ministries are in “the information loop” for government-wide policy processes;
- direct control by the minister reinforces the role.

This is not to say other organisations can’t or shouldn’t provide policy services – just that this function is best suited to the ministry form. The discussion above suggests the following principle:

Box 4. Ministries – The residual principle

The ministry is the best organisational form for all multifunctional activities, for policy development and preferred for all executive functions except focused cohesive groupings of activities and commercial activities.

It is to “focused cohesive” and “commercial” activities that this paper now turns under the discussion of departmental agencies, PLAs and government enterprises respectively.

4.1.2. *Form A1.1: Departmental agencies*

In each of the sample countries, separate single purpose bodies have been established that are subsidiary⁸ to a ministry. Schick (in PUMA *op. cit.*) notes that whereas functionally integrated ministries undertake an array of tasks (akin to a

Box 5. The generic departmental agency (A1.1)

Legal status

Public saw; subsidiary of a ministry so no separate legal status.

Governance

No governance board; part of civil service. Minister resolves disputes not dealt with under civil service rules or the rule of law.

Control

Minister has formal (but less direct) control, while Director-General has operational control.

Typical Features

Function

Delivery of non-commercial services to citizens or support services to other state sector bodies.

Box 5. **The generic departmental agency (A1.1) (cont.)**

Finance

Fully tax or partly tax, partly user fee financed; annual budget; carry forward of surplus often allowed.

Staff

Generally civil servants but often with some relaxation of civil service staff processes.

Other inputs

May be subject to general process controls.

Capital spending

Usually no power to borrow or lend; proceeds from asset sales may be retained.

Examples

Regulatory compliance services (*e.g.* issuing drivers licences), support services to ministries.

Country examples:

- France – Centres of responsibility;
- Germany – Direct federal administration;
- Netherlands – Agencies;
- NZ – Semi-autonomous bodies;
- Spain – *Organismos autonomos*;
- Sweden – Delegations
- UK – Executive agencies;
- US – PBOs, some government corporations.

department store), agencies are generally single purpose bodies set up for a bespoke task (akin to a specialist boutique in retailing). This paper uses the term departmental agency to describe this latter form.

It has been suggested that since 1980 a process of “agencification”, *i.e.* moving functions to bodies that are subsidiary to or separate from ministries, has been widespread in both developed and developing countries. The term “agency” is used in

Box 6. **Assessment of departmental agencies¹**

Strengths

- Focus on one or a few related services to citizens or government clients.
- Insulation from politics allows the development of a culture focused on serving citizens and clients rather than the minister.
- Measurability enables performance contracting with management autonomy and accountability.
- Resourced and focused to deliver a mission.
- Management expertise in service delivery.

But each of those strengths has inherent in it a blind spot or weakness.

Weaknesses

- Loss of co-ordination where interconnectedness is high.
- Loss of political control even where salience is high.
- Only some government activities are measurable and poor specification has perverse consequences.
- Focused agencies resist resource reallocation, a particular problem where policy settings not stable or durable.
- Management has less expertise in working in the political and government context.

Alternatives

- In addition to contracting out, alternatives include stand-alone bureau in a ministry, use of PLA with governance board and, in some jurisdictions, a focused stand-alone ministry.

1. Based on emails with Oliver James (see James, 2002, forthcoming).

various jurisdictions to mean very different things. “Agencification” in the sense of moving functions to subsidiary bodies is a feature of two of the eight OECD Member countries studied: the United Kingdom (where over 80% of civil servants are in executive agencies) and the Netherlands where an ambitious programme is underway.

A key consideration in setting up departmental agencies is whether a country's legal system allows the creation of separate ministries without increasing the number of ministers. In some jurisdictions, one ministry can serve a number of ministers, and the holder of one ministerial portfolio can have a number of ministries. In

contrast, in both the jurisdictions that have been most active in creating departmental agencies (the Netherlands and the United Kingdom), there is a one for one constitutional relationship between ministers and ministries. Where this is not the case, creating a stand-alone focused ministry may be better than establishing a departmental agency especially where salience or interconnectedness are higher.

4.1.2.1. *When are departmental agencies best?*

Departmental agencies offer performance gains from the increased focus on the delivery of cohesive groups of services without diminishing legitimacy. Performance can also be improved by increasing management autonomy. The latter is likely where measurability allows increased delegation and accountability for results. The United Kingdom anticipates operating cost savings of 3% p.a. in the initial years as well as quality-of-services gains from the setting up of agencies (Scott and Taylor, 2000).

The above analysis of strengths and risks suggests that spinning off a cohesive functional group of administrative activities into a departmental agency could improve performance if the activity grouping is distant from the host ministry core competencies, and where:

- interconnectedness and salience are low;
- measurability and stability of policy are high; and
- there is a cohesive functional grouping of administrative tasks on a scale sufficient to exploit economies of scale and scope.

These conditions are most likely to apply to the delivery of tangible administrative services (*e.g.* issuing driver's licences), where key information is not tacit but can be transformed into data (*e.g.* revenue collection), and supply of support services where, for some reason, contracting out or privatisation are not an option.

The discussion above suggests the following principle:

Box 7. Departmental agencies – Cohesiveness and focus principle

The departmental agency form can improve performance through better focus and more performance contracting when there is a cohesive functional grouping of administrative tasks, predominantly delivering tangible services.

4.2. Indirectly-controlled bodies

Indirectly-controlled bodies are separate from ministries and often are separate legal entities. The SIGMA paper (*op. cit.*) describes these as “indirect administration”, that is as “... public administration carried out with a certain degree of autonomy by (partially or) fully separate legal entities”.

All the sample of countries reported a significant number of non-departmental public bodies and all distinguished different types within this general heading. These in turn can be classified into public law administrations (often undertaking administrative functions), and private law bodies (often undertaking commercial, industrial or financial activities).

The distinction between public law and private law bodies is not meant to imply that each body will be completely in one of these legal jurisdictions. For example, private law bodies can be incorporated under private law but still may be created by statute and subject to the budget law or administrative law with respect to the exercise of certain administrative powers. Similarly, public law bodies may be subject to private law (and treated as separate legal entities for those purposes) when conducting certain transactions with third parties (entering leases, etc).

In some jurisdictions (predominantly continental law countries) there is a clear distinction about whether a body has private and public law status. For the English law aligned countries, the distinction is less clear-cut. In general, bodies established by statute and included within the consolidated financial reporting entity will be public law bodies unless the statute provides for them to be incorporated in a private law form (such as a company or trust) and operate under private law. In practice an examination of the individual statute should enable this judgement to be made.⁹

4.2.1. Form B: Public law administrations (PLAs)

All the sample of countries reported a large number of different types of non-departmental bodies. Some use the term “public establishments” by which is meant “... an administrative institution in public law with a full or partial legal personality ... instrumental for the government ... but clearly separated from the government” (SIGMA, 2001, p. 12).¹⁰ These bodies are separate from ministries and operate at arm’s-length from ministers so that control is exercised indirectly rather than directly. There are a number of different generic PLAs depending upon the prime rationale for use of the form. Thus there is no generic PLA type. Box 8 draws out the key variations between the generic types.

PLAs are characterised by their diversity and complexity. Within any one country, a bewildering array of governance regimes and legal forms may be used to undertake a wide variety of functions. Across countries the legal status, control

Box 8. **PLAs – Differences in generic types**¹

Legal status

- Public Law; *varies* between separate legal body, partially separate with respect to third parties, or not separate.

Governance

- *Varies* between governance board, advisory board or corporation sole (one-person rule). Conflict resolution varies depending on whether civil service rules apply and whether a separate legal entity.

Control

- Devolved to governing body, which generally delegates to Director-General (DG); minister has indirect control.

Finance

- *Varies* – some solely tax financed, some part tax/part user fee financed; annual budget carry forward of surplus often allowed).

Staff

- *Varies* between full civil service controls, partial controls and being outside the civil service but subject to a general framework for state servants (standards of conduct, merit, Equal Employment Opportunities, etc.).
- *Varying* controls on appointment and ease of removal of DG.

Capital spending

- *Varying* controls on borrowing, lending and retention of proceeds from assets sales.

Examples

- Funding *e.g.* arts and culture, sport, sciences; regulatory compliance *e.g.* health, safety, and environmental issues; membership bodies, *e.g.* museums.

Country examples include:

- France – EPAs- Administrative public establishments;
- Germany – Indirect public administrations;
- Netherlands – Public law ZBOs;
- NZ – Crown Entities which are statutory corporations and corporations sole;
- Spain – OA administrations;
- Sweden – Agencies;
- UK – Executive non-departmental public bodies;
- US – Most independent agencies.

1. This analysis is largely based on New Zealand's analysis of its Crown Entities; see the papers by the State Services Commission and by Hyndman.

regimes, powers, size, functions, internal governance and administrative cultures *vary* even more. The differences across countries, and the very diversity of PLAs, means that a number of generic types will be used.

However as Allen Schick points out, "... every agency [and authority] has its own story but all the stories are the same" (PUMA, 2001, p.26). There are striking *similarities* in PLAs across the sample countries:

- all the sample countries have a long history of using public law bodies for a wide-range of government functions;
- generally they undertake new functions not previously undertaken by ministries;
- these bodies are legally or institutionally separate from ministries and at arm's-length from ministers so control has to be exercised indirectly rather than directly.

PLAs can be significant government employers. In Germany, ministries employ only 6% of civilian federal employees compared to 51% in PLAs and 40% in Defence. By contrast, in France 70% of central government staff are employed by ministries (66% excluding defence).¹¹

With some exceptions, PLAs are a reasonably stable well-established group, which in some cases have histories dating back to medieval times. The notable exceptions are New Zealand, which created a large number of Crown Entities in the 1980s and 1990s, and the creation of specialised separate utility regulators in most countries.¹²

4.2.1.1. *When are PLAs best?*

PLAs can improve performance where a governance board or a differentiated control environment can add value, and can improve the legitimacy of decision-making. This paper illustrates each of these rationales in turn. It uses various PLA sub-types, starting with PLAs that implement government policy (B1.1), to illustrate the different reasons for using PLAs. However, with the exception of independent PLAs (B1.3) there is no one-for-one relationship between reason and type of PLA.

4.2.2. *Form B1.1: PLAs that implement government policy*

There is a distinction in a number of jurisdictions between:

- bodies that are close to the centre of government because they exist to implement or give effect to government policy within a statutory framework; and

Box 9. PLAs (B 1.1) that implement government policy

Typical functions

Regulatory compliance, service delivery.

Country examples include:

- France – EPAs- Administrative public establishments;
- Germany – Indirect public administrations;
- The Netherlands – Public law ZBOs;
- NZ – Crown Agents and schools;
- Spain – OA administrations.

- bodies that are more distant from the centre of government because they exist to serve some defined group of members or to exercise statutory powers at arm's-length from the government.

4.2.2.1. *Governance board*

PLAs can improve performance (relative to the one-person rule of ministries) because the governance board¹³ adds value. With an appropriate governance regime, there need be no loss of legitimacy. A good board adds expertise in management, provides leadership, sets an ethical tone, and acts when performance

**Box 10. PLAs (B1.1) that implement government policy –
Variant 1 – Governance board**

Legal status

- Public law; separate legal entity, distinct from ministry.

Governance

- Governance board.

Control

- Devolved to board which delegates to DG; minister has indirect control.

Examples

- Funding, *e.g.* of roading; regulatory enforcement, *e.g.* some safety issues; intangible service delivery, *e.g.* schools and hospitals.

Box 10. **PLAs (B1.1) that implement government policy – Variant 1 – Governance board** (*cont.*)

Typical features

Finance

- Some solely tax financed, some part tax/part user fee financed; annual budget; carry forward of surplus allowed.

Staff

- Exempt civil service (input or process) controls but within the state sector framework (*e.g.* regarding standards of conduct, merit, and EEO).

Other

- Subject to administrative procedures and general process controls.

Capital spending

- Some restrictions on borrowing and lending; retention of proceeds from assets sales allowed.

Strengths

- Focus on only one or a few related services to citizens or government clients.
- Insulation from politics allows the development of a culture focused on serving citizens/members interests.
- Governance board provides expertise in management, leadership, and “tone”, and oversees performance.
- The control environment can be better tailored to the body’s status and functions.
- Attracts staff from outside the civil service.

But each of those strengths has inherent in it a potential blind spot.

Weakness

- Loss of co-ordination where interconnectedness is high.
- Insulation from politics is a weakness where salience or interconnectedness is high because the political risk for weak performance still rests with the minister.
- Risk of patronage in board appointments undermining the quality of the board.
- Differentiation of the control environment may reflect special pleading rather than genuine diversity and some important protections may be lost.
- Isolation from the wider state sector undermines the ethos of public service and staff mobility, and increases pay differentials.

Alternatives

Contracting out, stand-alone ministry, departmental agency, even in some cases government enterprise.

monitoring shows a problem. A governance board is likely to have a particularly important role for commercial activity where, for regulatory or other policy reasons, the company form has not been used. Similarly, a PLA with a governance board could be used to undertake a group of cohesive administrative activities suitable for a departmental agency.

In English-speaking jurisdictions at least, the value of a governance board has been demonstrated in a range of profit and not-for-profit settings. The experience of boards in the public sector has been mixed, particularly depending upon the quality of the board appointment process to protect against cronyism and patronage.

4.2.2.2. *Differentiation of the control environment*

“Differentiation of the control environment” refers to designing some key controls and operating rules for a particular form of organisation. In a number of countries, executive government bodies are subject to generic laws or constitutional provisions (such as financial management, accounting, civil service and procurement rules) which make it difficult to differentiate the control environment and increase management autonomy. For these countries, the creation of a class of indirectly-controlled bodies may allow the use of a control environment that is better tailored to each body’s status and functions. This is most likely to be useful for organisations where measurability is high and salience is low.¹⁴

Box 11. **PLAs (B1.1) that implement government policy – Variant 2 – Differentiation of control**

Legal status

- Public law; partly or fully separate legal body.

Governance

- Director-General assisted by an advisory board.

Control

- Devolved to Director General, minister has indirect control.

Typical features

Finance

- Some solely tax financed, some part tax/part user fee financed; annual budget; carry forward of surplus allowed.

**Box 11. PLAs (B1.1) that implement government policy –
Variant 2 – Differentiation of control (cont.)**

Staff

- Part of civil service and subject to all input and process controls.

Other

- Exempt from a number of administrative procedures and general process controls.

Capital spending

- No borrowing, lending, or retention of proceeds from assets sales.

Strengths

- Insulation from politics allows the development of a culture focussed on serving citizens interests.
 - Control environment better tailored to the body's status and functions.
 - Focus on one or a few related services to citizens or government clients.
- But each of those strengths has inherent in it a potential blind spot.

Weaknesses

- Insulation from politics is a weakness where salience or interconnectedness is high because the political risk for weak performance still rests with minister.
- Differentiation of the control environment may reflect special pleading rather than genuine diversity and some important protections may be lost.
- Loss of co-ordination (“mission madness”) resists resource re-allocation because the freedom is used to pursue objectives inconsistent with those of the government.

Alternatives

- Stand-alone ministry, departmental agency, even in some cases government enterprise.

Differentiation of the control environment is not risk-free, however, because it may be hard to distinguish a genuine need for exemptions from special pleading. As Moe observes (for the United States context but the point applies equally well to other countries) “opposition ... tends to be pluralistic in its approach, narrow in its

interests and generally seeks an exception to a general rule instead of promoting its own general rule" (Seidman *et al.*, 1986, p. 252). A disciplined approach is required to create an integrated governance regime with differentiated controls applying to classes of bodies. The alternative, designing a unique governance regime for each organisation, tends to result in special pleading prevailing over discipline.

4.2.3. Form B1.2: PLAs that are guided by government policy

The relationship between the centre of government and PLAs can be conceived as a spectrum. At one end are PLAs that implement government policy (B1.1), while at the other are PLAs that exist to independently exercise statutory powers (B1.3). In between is an intermediate case (B1.2), namely bodies that are required to be influenced or guided by ("have regard to") government policy as opposed to comply with it. Examples are bodies set up to increase the legitimacy of decision-making in some area by involving experts, *e.g.* funding bodies, or by including interest groups or social partners on the board so they are part of the decision-making process.

Several countries distinguished at least three types of public law body. For example, New Zealand found that legal form was not enough to determine the required governance regime for the diversity of functions undertaken by PLAs. As a result of the different requirements and the different relationships for this diverse group, public law administrations were divided along three points on a continuum.

Box 12. PLA s (B 1.2) that are guided by government policy

Examples from the sample countries include:

- France – Other public interest authorities GIPs and professional EPs;
- NZ – Some Crown Entities including fish and game councils, universities, and the National Museum;
- Germany – Corporations such as universities;
- US – some government corporations.

4.2.3.1. Decision-making

The legitimacy of decision-making can be increased by involving persons with specialist knowledge and expertise, key stakeholders, or ordinary citizens directly in decision-making as opposed to giving them only an advisory role in a generic advisory bodies (Type D1 below). Encouraging such participation may

Box 13. **PLA s that are guided by government policy (B1.2)**

Legal status

- Public law; completely or partially separate legal body (with respect to third parties).

Governance

- Board.

Control

- Devolved to the board which delegates to the Director-General; minister has indirect control.

Typical functions

- Funding *e.g.* arts and culture, sport, sciences; legitimacy bodies that involve social partners, regulatory compliance, *e.g.* occupational regulation; serving for some defined group of members *e.g.* museums.

Finance

- Annual tax revenue financed; carry forward of surplus allowed.

Staff

- Part civil service exempt some controls but within state sector framework (*e.g.* standards of conduct, merit, Equal Employment Opportunities (EEO)).

Other

- Subject to some administrative procedures and general process controls.

Capital spending

- No borrowing or lending, but retention of proceeds from assets sales allowed.

Strengths

- Increased legitimacy for decision-making by involving stakeholders and those with specialist knowledge and expertise.
- Control environment tailored to the body's status and functions.
- Attracts staff from outside the civil service.

But each of those strengths has inherent in it a potential blind spot.

Box 13. PLAs that are guided by government policy (B1.2) (cont.)

Weaknesses

- Minister has only indirect control, but political risk for weak performance still rests with the minister.
- Differentiation of the control environment may reflect special pleading rather than genuine need.
- Isolation from the wider state sector undermines the ethos of public service and staff mobility, and increases pay differentials.

Alternatives

- Advisory bodies, or a PLA that implements government policy.

be easier if the activity is undertaken in a form only indirectly-controlled by the government because of the common perception that this means more independence for the activity. If an activity has low salience and does not need to be close to the centre of government, the following PLA generic type would be appropriate.

4.2.4. *Form B1.3: PLAs that independently exercise statutory powers (but which have regard to government policies in the exercise of the powers of a natural person)*

For legitimacy reasons it is sometimes suggested that organisational form be used to signal independence. This approach may be appropriate, but is often based on the confusion of independence of a function with independence of a form. In fact there are a number of specific statutory devices,¹⁵ regardless of

Box 14. PLAs (B 1.3) that independently exercise statutory powers

Legal status

- Public law; separate legal body.

Governance

- Board or PLA Director-General (one-person rule).

Control

- Devolved to the governing body; minister has very indirect control because dismissal of the governing body is very difficult.

Box 14. **PLAs (B 1.3) that independently exercise statutory powers** (*cont.*)

Country examples include:

- France – Autonomous administrative authorities;
- NZ – Independent Crown Entities;
- Spain – selected regulatory bodies operating outside the public law framework;
- US – Independent regulatory commissions.

Examples

- Regulatory functions applying to state bodies – Police complaints, human rights adjudication, and independent utility regulators.

Typical features

Finance

- Levy or tax funded; annual budget; no carry forward of surplus allowed.

Staff

- Within the civil service but exempt some civil service controls.

Other

- Subject to administrative procedures and general process controls.

Capital spending

- No borrowing, lending or retention of proceeds from asset sales.

Strengths

- Independence in both form and substance arising from process controls, *e.g.* the difficulty of dismissal.
- Control environment tailored to the body's status and functions.
- Increased legitimacy of decision-making by involving those with specialist knowledge and expertise.

But most of these strengths have inherent in them a potential blind spot.

Weaknesses

- Loss of control and democratic accountability but political risk for performance still rests with minister.
- Control environment means that only limited functions are best undertaken in this form.

Alternatives

- Statutory independent function in a ministry; special ministry or another PLA (B1.1 or B1.2).

organisational *form*, that can be used to protect an independent decision-making *function* from political inference. In those (restricted) circumstances where considerations of public confidence in the independence of the decisions are paramount, organisational form can be used as an additional device to increase the credibility of the other statutory protections. This is particularly important, for example, when the government's own actions are subject to the jurisdiction of the body.

The discussions above suggest the following principles:

Box 15. PLAs principles

PLAs can improve **performance** for a cohesive grouping of functions where a *governance* board provides strong leadership and effective monitoring and/or a differentiated *control environment* is better tailored to the entity's status and functions.

The **legitimacy** of decision-making can be improved for a cohesive grouping of functions by involving experts or members of broader civil society directly in decision-making, or by using organisational form to signal *independence*.

The **governance environment** will need to be tailored within an overall control framework for the different imperatives for establishing PLAs and the functions that they undertake.

4.2.5. Form C: Private law bodies

The previous subsection discussed public law administrations that predominantly undertake administrative functions and generally operate under public law. This subsection discusses private law bodies. All the sample countries have government enterprises, generally established under private law and undertaking commercial, industrial or financial activities. In addition, governments in half the sample countries have some non-commercial private law bodies.

4.2.5.1. Form C1: Government enterprises

There are two bases on which to define government enterprises – *economic substance* or *legal form* and jurisdiction, *e.g.* incorporated in a commercial form under private law.¹⁶ If *legal form* were the sole criteria, this grouping would be limited to government-owned companies. However, a significant amount of commercial activity is undertaken in non-company private law forms in what the System of

Box 16. The generic government enterprise

Legal status

- Functions under private law; separate legal entity; courts could (in theory) resolve disputes with owners.

Control

- Devolved to board which delegates to the CE; minister has indirect control.

Governance

- Governance board; not part of wider civil service.

Finance

- Sales revenue (and limited subsidy) financed; may carry forward surpluses, borrow and lend.

Controls

- No staff or other input controls.

Capital spending

- Proceeds from asset sales and depreciation retained.

Examples

- Postal services, electricity generation and distribution, broadcasting.

National Accounts (SNA) calls “quasi-corporations” *i.e.* bodies that are not separate legal entities but which act as if they were a government corporation.

SNA provides some useful definitions for the boundaries of government enterprises based both on *legal form and economic substance*. The Annex discusses how SNA “market” tests [as augmented by European System of Accounts (ESA)] can be used to define “commercial”. Government market producers include three legal forms: government companies; quasi-corporations; and other private law organisations undertaking commercial activities.

For the last 100 years government enterprises have played a significant role in a wide-range of countries. Although countries differ significantly in the level of activity undertaken in government enterprises, there is a remarkable similarity in the industries in which historically they have been concentrated (postal services, railways, telecommunications, electricity generation and distribution, and gas reticulation). The

widespread privatisations undertaken in a number of countries in recent years have changed this pattern. Nevertheless, across OECD Member countries an average of 7% of GDP is still produced by government enterprises. A number of countries are corporatising quasi-corporations and unbundling regulatory and commercial activities and placing the latter in government companies. Inevitably there is also a historical dimension unique to each country. Thus the Swedish Government still owns a liquor manufacturer, the French Government currently owns the majority of the national airline, and the Spanish Government owns hotels.

Government enterprises as a group are a rather diverse clump ranging from:

- quasi-corporations that emerged from other non-commercial government bodies;
- public organisations *en route* to privatisation;
- privately incorporated companies that happen to be government-owned (but which otherwise behave to maximise profits within the political context just as does any for-profit private enterprise);
- organisations more akin to private not-for-profits that maximise another objective function (service, output, etc.) subject to a cost constraint.

Government enterprises usefully can be subdivided using the distinction (per SNA) between for-profit and not-for-profit. Accordingly two sub-types are proposed: state-owned enterprises and not-for-profit government enterprises.

4.2.5.2. Form C1.1: State-owned enterprises

The term state-owned enterprise (SOE) is currently in widespread usage. For example, the World Bank use the term for any government-owned or controlled entity that generates the bulk of its revenue from selling goods and services (World Bank, 1995, Box 1, originally from Jones, 1957). This paper uses the term for a more limited subset of organisations – government enterprises

Examples include:

- France – EPICs on the way to privatisation, Air France, EDF;
- Netherlands – ZBOs on the way to privatisation;
- New Zealand – SOEs, Air New Zealand;
- Spain – Telefonica;
- Sweden – State-owned companies;
- US – Some government corporations.

(whether a company, non-company private law body or a quasi-corporation) that have, or act as if they have, a for-profit objective function. (An alternative term would be “for-profit government enterprises”.) In some countries these companies are being privatised but the government retains a significant number of shares or special shares enabling it to influence the future of the firm (*e.g.* the so-called golden shares).

4.2.5.3. Form C1.2: Not-for-profit government enterprises

This group includes government companies, other private law bodies and quasi-corporations engaged in market activities that are central government-owned but which are not SOEs. They are akin to private not-for-profit companies in that they aim to maximise a service objective function (output, services delivered, etc.) subject to a cost constraint rather than aiming to maximise profits.

All countries have these bodies.

Examples include:

- France – Other industrial and commercial public establishments, La Poste, SCNF;
- Germany – Private law administrations;
- Netherlands – ZBOs not on the way to privatisation;
- New Zealand – Crown Owned companies;
- Spain – RENFE, TVE, EPEs;
- Sweden – Government enterprises.
- UK – Nationalised industries and other public corporations, the BBC, etc.;
- US – Some government corporations.

4.2.5.4. Use of Government Enterprises

This paper distinguishes between for-profit SOEs and not-for-profit government enterprises. SOEs are superior to not-for-profit government enterprises for undertaking commercial activities where the measurability of the public policy interest is high because this allows a government to pursue its public policy objectives through other policy instruments (such as explicit subsidies and regulation), and assign a relatively unambiguous strategic objective to the governance board of the organisation.

Box 17. Assessment of government enterprises

Strengths

- Focus on one or a few related services to customers.
- Board insulates the organisation from politics, which allows the development of a commercial culture.
- Prices are related to but independent of costs so performance can be measured in financial terms.

Weaknesses

- Board can be undermined where public policy objectives dominate/ political interference is high.
- Only indirect political control but political risk of weak performance resides with the minister.
- No analogue for the share price, no residual claimant.

Weaknesses

- Board can be undermined where public policy objectives dominate/ political interference is high.
- Only indirect political control but political risk of weak performance resides with the minister.
- No analogue for the share price, no residual claimant.

Alternatives

- PLA, contracting-out or privatisation.

4.2.5.5. When are government enterprises best?

A wide-range of OECD Member countries, after experimenting with various half-way houses (net funding, trading funds, etc.) is using the company form for commercial activities. The company form developed in the private sector to undertake commercial activities and almost all the features (role of governance board, etc.) are equally applicable in the state sector. This form is, however, unsuited to policy advice or regulatory functions. Use of government companies often requires separating out the government's overall interests – as owner, regulator, or service user – and designing governance arrangements that work best for each interest. Particularly in cases where the government is able to clarify its pub-

lic policy objectives and use other policy instruments (such as explicit subsidies and regulation), significant gains have been realised by moving commercial functions into SOEs established as companies. The World Bank, however, emphasises that changes in legal form alone are not sufficient. In “Bureaucrats in Business” it reports that what distinguished successful from unsuccessful reforms of government enterprises¹⁷ was that the successful countries introduced a package of reforms that included:

- wide-ranging divestment (where state ownership was higher);
- introducing competition (including unbundling large enterprises, and easing entry restrictions);
- applying a hard budget constraint (eliminating direct and indirect subsidies);
- introducing financial sector reforms (making access to finance on a commercial basis);
- institutional reform (oversight bodies, management autonomy, performance agreements).

Interestingly, institutional reform was not sufficient on its own to achieve performance gains. The World Bank argues that this reflects problems of information asymmetry, rewards and penalties and commitment.

The discussions above suggest the following principle.

Box 18. Government enterprises – Match commercial to commercial principle

Placing commercial activities in government companies can improve performance, particularly when accompanied by budgetary and regulatory reform.

4.2.5.6. Form C2: Non-commercial other private law bodies (PLBs)

Half the sample countries reported government bodies incorporated under private law but which are not commercial as defined by SNA. Accordingly the generic characteristics are shown in Box 19.

4.2.5.7. Use of non-commercial private law bodies

While government enterprises undertake significant commercial activities, other private law bodies are found in only half of the sample countries and even there operate on a much smaller scale. They undertake a wide-range of functions

Box 19. The generic other private law body (C2)

Legal status

- Private law; separate legal body.

Governance

- Governance board; not part of wider civil service; courts could (in theory) resolve disputes with owners.

Control

- Devolved to board which delegates to DG; minister has indirect control.

Finance

- Private revenue financed.

Staff

- No input controls, but may be subject to a general framework for state servants (regarding merit, EEO, standards of conduct).

Capital spending

- No controls on borrowing or lending; proceeds from assets sales may be retained.

Examples

- Regulatory enforcement (*e.g.* vehicle inspection); support service delivery, membership services.

Examples include:

- Germany – Charged administrations;
- Netherlands – Civil law ZBOs;
- New Zealand – Crown trusts;
- UK – Company form NDPBs;
- Others – Various foundations.

Alternatives

- Contracting out, stand-alone ministry, departmental agency.

including providing membership services to defined groups, regulatory enforcement and providing support services. These are included here for completeness but they are not a numerous or pervasive form. When establishing new public organisations, it is not clear when, if ever, this organisational form is preferred.

4.2.5.8. *Form D: Others not elsewhere classified (NEC)*

Form D1: Advisory bodies

All countries have a range of usually small advisory bodies. *Ad hoc* ministerial or departmental advisory bodies are standing bodies with a national remit, formal meetings and membership from outside government (see PUMA, United Kingdom, p. 168). In some cases, such as Sweden, they are extremely influential government players.

Advisory boards are a good means of bringing in outside advice without creating the overhead of an organisation and thereby increasing the quality and legitimacy of government decision-making. They are an alternative to the PLA legitimacy bodies (B1.2) discussed above.

Box 20. The generic advisory body

Legal status

- Public law; no separate legal status.

Governance

- Advisory board serviced by ministry.

Control

- Minister retains decision rights.

Finance

- Serviced by ministry.

Staff, other inputs

- Nil.

Examples

- Scientific advice on genetically modified foods, AIDS, etc.

Form D2: Residual (NEC)

The residual is not otherwise classified (NEC).¹⁸ Almost all the sample countries have created organisations that are specifically exempt from the classification inherent in the jurisdiction's administrative law framework. Generally, but not always, this group includes the central bank (because of international treaty considerations for European Monetary Union members) In some countries it also includes some pension and social assistance funds in some countries. This residual group also sweeps up some rarely used organisation forms like public law foundations, trusts, etc. if they are not classified elsewhere but still are part of the consolidated central government financial reporting entity.

4.2.5.9. From E: Quasi-governmental instrumentalities

This paper focuses on executive bodies that are part of the central government consolidated financial reporting entity. It is acknowledged that in all jurisdictions

Box 21. The generic quasi-government instrumentality

Legal status

- Private law; separate statutory entity with private owners.

Governance

- Governance board with some government appointees. Potential for litigation to resolve disputes.

Control

- Delegated to board; government has very indirect influence through some appointments.

Finance

- Part unconditional government grant, mainly private.

Staff, other

- No controls.

Example

- US quasi-governmental entities.

there is a range of bodies outside the reporting entity that undertake public policy functions (deliver services, regulate, etc.). There are significant governance risks for government with these privately-owned bodies, particularly when government appointed members sit on the board. Even though they are outside the consolidated central government, the line between public and private sector is blurred rather than sharp. In some countries, the courts have sometimes found the government responsible for the actions of bodies that the government did not own (which is why they are outside the financial reporting entity) but were deemed to control. This deemed control could arise in the absence of a clear residual claimant, most obviously through a power to appoint or dismiss members of the governing body.

Thus, there are a range of legal bodies established by statute but not owned or fully controlled by government and which are charged, in part, with performing some public policy functions (see Moe and Stanton, 1989 on quasi-governmental entities in the United States). The government has an interest in how the body performs some of its functions and a contingent liability if it is deemed to have control.

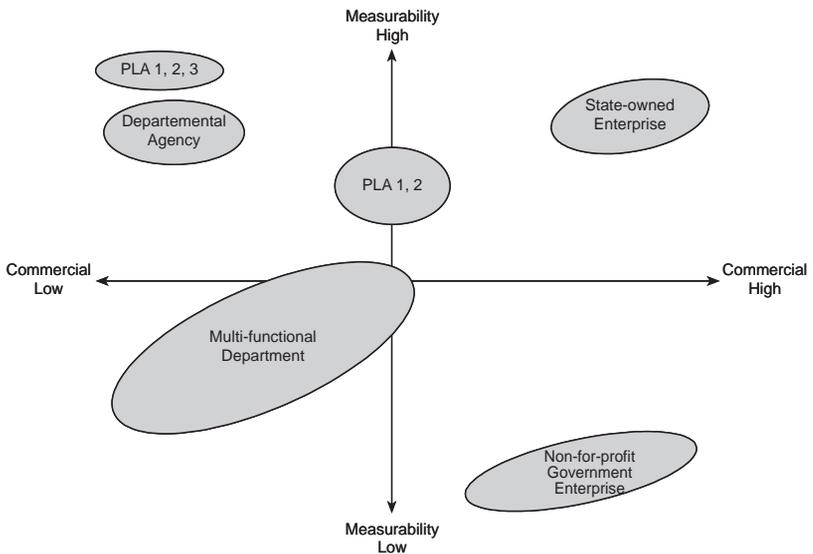
This risk suggests the need to create a generic governance framework for quasi-government instrumentalities. The extent of the governance framework put in place in any one case should be commensurate with the risk to the public interest associated with the performance of the policy and the financial risk to the government's balance sheet from the contingent liability.

5. Discussion of principles

This paper abstracts from any one government function and from any one country's context (history, informal system, legal system, etc.) and asks a "thought experiment" – "in a sterile environment what would be the strengths and weaknesses of different forms?" The paper uses two standards, performance and legitimacy, to assess different government organisational forms. The paper identifies a range of factors that are key to choice of form; some reflect qualities inherent in government activities (measurability, coherence), others reflect contextual features of the environment (salience, policy durability and stability) and some reflect a mix of both (interconnectedness).

The interaction of these factors for any one type of organisational form is complicated. So too, therefore, is the discussion, and for that reason it is useful to review the analysis schematically. Figure 2 has four quadrants on two axes – whether the commercial focus of an activity is high or low and whether the measurability of the government's policy interest is high or low. Of course, the world is more complicated than a 2 X 2 schematic allows, so some factors have to be suppressed.

Figure 2. Measurability and commercial focus



The location of the “bubble” for each organisational form depicts the best use of that form. For example, state-owned enterprises are best used when both measurability and commercial focus are “High”. The size of the bubble for each organisational form reflects the range of circumstances for which that particular form is best suited (not the amount of activity in any one form).

The ministry form covers the widest range and dominates not only the low measurability/low commercial quadrant but also the intermediate cases in the middle. The two forms of government enterprises dominate the commercial focus axis depending on whether the measurability of the government policy interest is high or low. Departmental agencies have a niche for tangible service delivery where measurability is moderate and commercial focus is low to moderate. PLAs do not occupy one unique space; instead they are clustered at two points – where measurability is high and commercial focus low, and where both commercial focus and measurability are moderate.

One theme running through the discussion is the extent of policy durability and uncertainty in the broader environment. This is a particular consideration when comparing departmental agencies and PLAs on the one hand with ministries and government-owned companies on the other. Agencies and PLAs are single purpose organisations that in the case of PLAs are established

under their own unique statute. By contrast, ministries and companies are more general and flexible forms. Considerations of robustness over time, uncertainty about the full life-cycle of the organisation, and a risk of irreversibility once a function is placed into a separate body, all argue for the use of general and flexible forms. This is why the company is the preferred form for commercial activities, and the ministry is the preferred form for non-commercial executive functions.

It is sometimes suggested that choice of organisational form should be driven by a principle of separating policy formulation from policy implementation. This paper does not take that approach for three reasons:

- The evidence – to quote the World Bank: “There is no hard evidence available that “single-roof’ agencies (multi-purpose bodies retaining both policy and service delivery responsibilities) perform less well or are less readily held to account than their single-purpose counterparts.”¹⁹
- This decision should be made case-by-case depending on whether a split is likely to be beneficial. The case for structural separation is clearest where information can be readily turned into data (*e.g.* tax policy), and weakest where information is tacit (*e.g.* defence, foreign affairs).
- While there are strong arguments, based on focus, for separating policy development from implementation within organisations, the benefits of separating these functions between separate organisations are not decisive. Organisational splits pose particular problems where, as discussed above, measurability and policy uncertainty are high.

The need for independence is often cited as a decisive factor in organisational choice. The view taken here is that it is important to distinguish policy independence (*i.e.* the execution of legislative power without regard to high authority) from management autonomy (*i.e.* exercising management discretion about how activities are undertaken).

The key point for this paper is that policy independence *per se* is not a determinative factor in the choice of organisational form (except as noted below). The key issue for policy independence is to provide a credible assurance that there will be no political inference in the decision-making on individual cases. This is an issue that arises with a range of government functions (tax assessment, law enforcement, economic statistics, regulatory functions) that are undertaken in different organisational forms in different countries. Formally this assurance can be achieved through statutory provisions that provide officers with a duty to make certain decisions free of political interference. The credibility of this assurance rests on formal civil service or other rules and laws, and on the informal systems of values and standards that exist in many countries. The credibility of these rules, and the importance of informal systems, varies across countries. But, generally it is

not necessary to establish a separate legal entity to ensure policy independence so a need for independence generally is not a determinative factor in the choice of organisational form.

The exception (discussed under PLAs)²⁰ is where organisational form can be used as a signal of independence. The presence of a board with representatives from civil society increases the credibility of the signal of independence. This particularly arises when the government's own actions are subject to the jurisdiction of the body. An example is when the government is both the owner and the regulator of the dominant supplier in a commercial market.

This argument can also be shown schematically. The figures below depict a mapping between policy independence and managerial autonomy and the continuum of direct to indirect control developed in this paper. Both figures depict the suggested range within which each generic form operates as well as the central tendency for each form. The striking suggestion is that, while there is a loose positive relationship between managerial autonomy and whether control is exercised directly or indirectly, there is no such relationship for the exercise of policy discretion. Two things stand out in Figure 3:

- the wide-range of discretion in the exercise of policy independence within the ministry form; and
- the unevenness of policy independence across organisational forms (if anything being more consistent with an S curve).

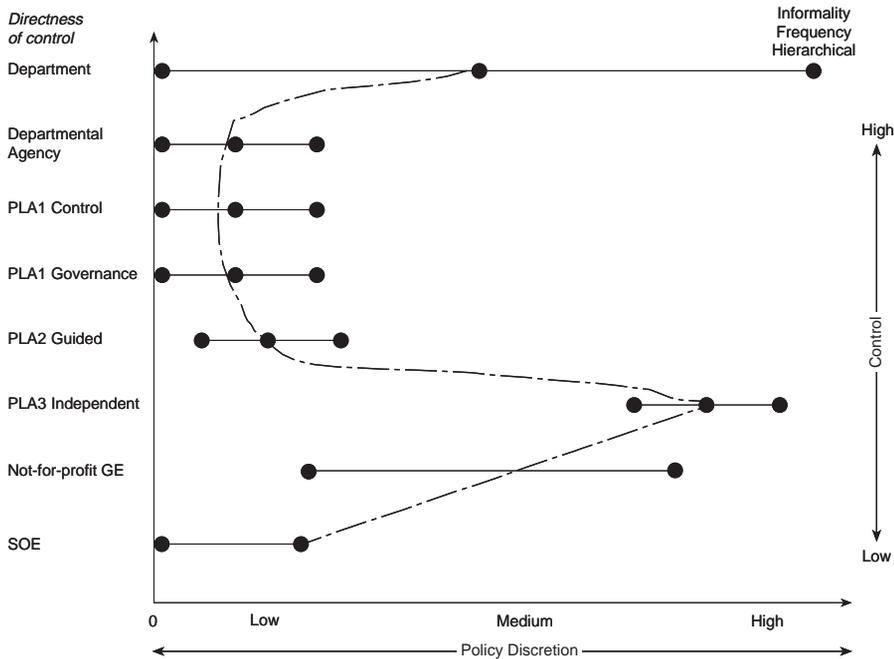
By contrast Figure 4 shows a tendency for a more linear relationship – when control is more direct management autonomy is lower.

6. Conclusion

This paper develops a positive classification²¹ of agencies, authorities and government enterprises. There was no one authoritative source for a classification based on common usage, academic convention, accounting standards, legal form, or economic substance. Therefore, use was made of the classification based on legal form in some jurisdictions augmented with judgements based on economic substance. The classification relies crucially on the distinction between direct and indirect control.

The classification schema is summarised in Figure 5 below. Consideration of economic substance over legal form results in commercial quasi-corporations being classified as government enterprises even though they are not established in company form. The red hatched area in Figure 5 shows this schematically. Figure 5 shows the range of central government organisational forms along one axis and the different coverage of legal form and commercial on the other. Underneath the boxes various horizontal arrays depict key characteristics of the

Figure 3. Policy independence and directness of control

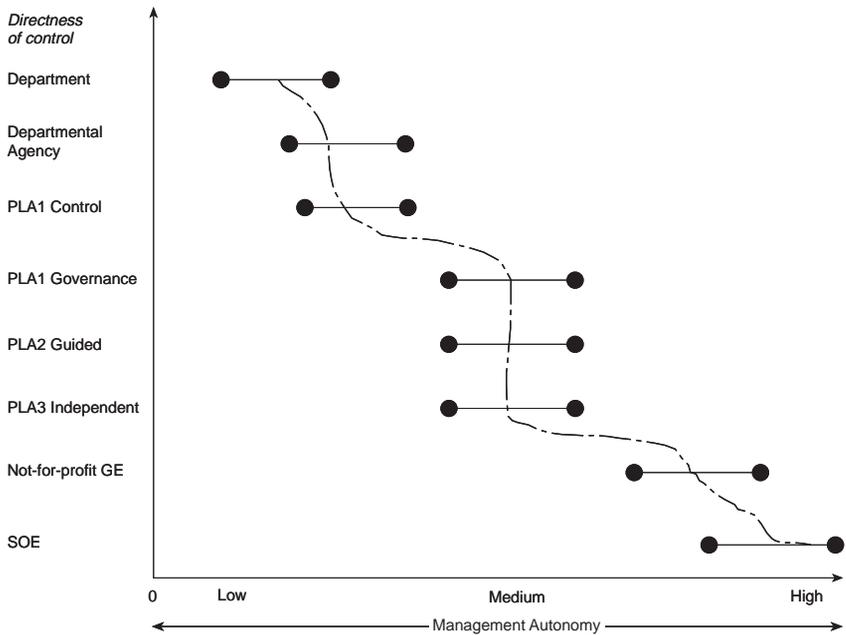


various sorts of bodies, *e.g.* staffing, revenue sources, and legal jurisdiction.²² Some other key characteristics, including powers to borrow, lend and create subsidiaries, do not vary systematically with organisational form and hence are not shown.

The diagram can be conceptualised as a spectrum. It runs from direct hierarchical ministerial control of ministries at one end, through more indirect but still active control, through to an arm’s-length but engaged relationship and finally to indirectly influencing by setting the strategic context for relatively autonomous bodies at the other.

While the classification is a positive description, the discussion of choice of organisational form is necessarily normative. This paper is concerned with one key question for distributed public governance: *When are different organisational forms best used?* What is “best” is obviously specific to each function in each country. Moreover, organisational form is just one aspect of governance, so choice between forms cannot be made in isolation from the context and the rest of the governance regime. A number of mechanisms are particularly important here;

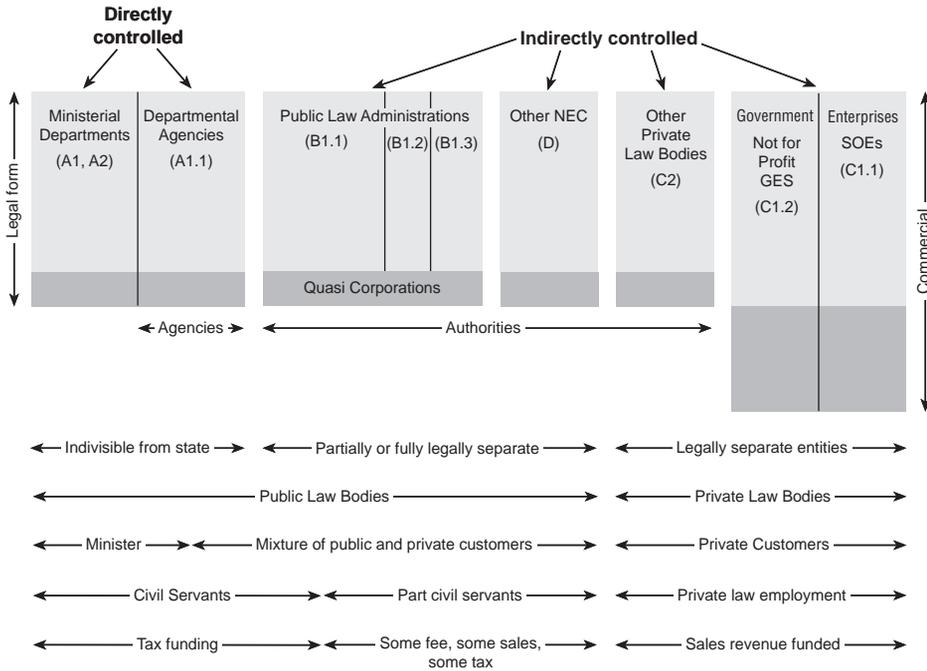
Figure 4. Management autonomy and directness of control



predictable budgeting, a professional civil service, an effective independent audit function, an effective ethics management regime and effective freedom of information regime.

There is no natural law or general theory of organisations that can be applied to any one country or specific function.²³ There are a number of caveats set out earlier in the paper – all statements are in general and on average propositions, there is no one or right model, reform is not a one-shot game, balance is all, which need to be borne in mind. Advice on choice of organisational form inevitably involves judgements, and those judgements will vary depending upon the context. Even for a given function in a given country, the best advice on choice of form may differ at different times because of a change in either the external environment or in the internal capabilities of the organisation. But these judgements need to be informed by some view about what works when. Bearing the caveats in mind, the analysis in this paper aims to start the dialogue by suggesting the following Principles of Choice of Organisational Form.

Figure 5. Executive central government



7. Implications for agencification

The normative discussion above raises an important public management issue – that of “agencification”, *i.e.* creating or moving functions to bodies that are *subsidiary* to or *separate* from a ministry. The paper concludes that “agencification” is not well understood nor a widespread phenomenon for the eight countries in the study.

There are a number of countries including four OECD Members (Japan, Korea, Netherlands and United Kingdom) where there are wide-ranging programmes to use departmental agencies, which are *subsidiary* bodies. These need to be distinguished from public law administrations, which are *separate* bodies.

In all eight OECD Member countries studied, PLAs currently are used extensively. But this is not new. Creating specialised bodies to undertake new functions not previously undertaken by the state has a long history dating back to the Middle Ages in some countries. With the exception of one function (economic utility

Box 22. Principles of choice of organisational form

1. Ministries – The residual principle

The ministry is the best organisational form for policy development and all multifunctional activities. It is the preferred option for all executive functions unless 2-4 below apply. Even if these apply, when interconnectedness and salience are high, or the task is not durable and measurability is low, then the ministry is preferred.

2. Departmental agency – Cohesive, delegation and focus principle

Departmental agency form can improve performance through better focus and more performance contracting when there is a cohesive functional groupings of administrative tasks, predominantly delivering tangible services.

3. Government enterprise – Match commercial to commercial principle

Placing commercial activities in government companies outside of the civil service can improve performance, particularly when accompanied by budgetary and regulatory reform.

4. PLAs – Governance, legitimacy and independence principles

PLAs can improve **performance** for a cohesive group of functions when a *governance* board provides strong leadership and effective monitoring and/or a *differentiated control* environment is better tailored to the entity's status and functions.

The **legitimacy** of decision-making can be improved for a cohesive group of functions by involving experts of members of broader civil society directly in decision-making, or by using organisational form to signal *independence*.

The **governance** environment within an overall framework will need to be tailored for the different imperatives for establishing PLAs and the functions that they undertake.

regulators) and one country (New Zealand), there has been no trend to use this organisational form more widely in the past two decades. For the one country in the study which has created a large number of new PLAs in the 1980s and 1990s, the tide seems to have turned; in New Zealand the policy thrust now is to strengthen the governance regime for PLAs and reduce their number.

What does this mean for transitional and developing economies? Applying this analysis to a different context is beyond this paper (see Miro Beblav on transition economies). However, two important lessons that do transfer are the importance for the success of new subsidiary and separate bodies of developing a

generic governance regime and the capability of “host ministries” to support them. In fact, there is a more general point about the supporting processes and conditions needed to make these bodies effective. These include predictable budgeting, a professional civil service, an effective independent audit function, an effective ethics management regime and effective freedom of information regime.

The process of creating departmental agencies and separate authorities in selected OECD and other countries since the 1980s has been compared with the break-up of private sector conglomerates into focused companies, and, within those companies, the creation of strategic business units. This reflects the development of specialised intermediaries that have grown up in advanced OECD Member countries such as venture capital funds, certification and credit agencies, the market for business talent, etc. Note, however, that in the developing world, private conglomerates are still widespread. While this may reflect capital market inefficiencies, it also reflects the lack of specialised intermediaries and underdeveloped legal systems. In their absence, conglomerates in the developing countries use trust and business relations to supply these services to related companies. If the public sector lacks the analogues to these specialised intermediaries (including robust budget process, ethics management regimes) and the accompanying governance regimes and capabilities, then the role for separate single purpose agencies and authorities is likely to be very limited indeed.

Notes

1. OECD/PUMA, (2002, forthcoming) *Distributed Public Governance – Agencies Authorities and Other Autonomous Public Bodies* has eight OECD Member country reports; Table 2 shows the diverse countries involved.
2. This paper discusses executive central government national organisations within the consolidated central government financial reporting entity – it does not consider supranational, state or local government organisations, the judiciary, constitutional or legislative offices, NGOs or non-governmental statutory bodies. The conclusion offers a brief discussion of quasi-government instrumentalities. For simplicity, the discussion does not address the complexities of joint ventures, partly- or fully-owned subsidiaries and associated entities, regional offices, and partnership organisations.
3. Legal form alone is bedevilled by cross-jurisdictional problem of comparison – *e.g.* common law and Roman law, federal and unitary, written and unwritten constitutions, etc. For example, non-departmental bodies, while they are separate legal entities in most countries, are not in Sweden.
4. The terms “delegated” and “devolved” while useful are not determinative in distinguishing direct from indirect control for two reasons. First, many individual ministries have devolved authority when they independently exercise statutory power. Second, the creation of the civil service involved the devolution of extensive management authority to ministries as a group.
5. The judgements are most immediately influenced by New Zealand's experience and by the English language literature on this topic but informed by the discussions at the OECD experts meetings.
6. Ministry here is used as a generic label for both ministries and departments. The distinction made in some jurisdictions between ministries (steering organisations – *administrations de mission*) and departments (rowing organisations – *administrations de gestion*) is not material for the purposes of this paper.
7. Osborne and Gaebler, 1993 Appendix A provide a list of 36 government policy instruments, based mainly a “mix and match” of these basic interventions.
8. A departmental agency is subsidiary to the host ministry if the ministry has the power to appoint and dismiss the governing body and, most importantly, set or modify the policies that guide the body's operations.
9. Regardless of the legal form, a judgement is required about whether in substance a body is a quasi- corporation involved in commercial activities (see the discussion below under government enterprises). Note that being a quasi-corporation would not affect the government's legal responsibility for a public law administration due to its public law status.

10. Note that separateness can occur on a number of dimensions. Not all have separate legal personality (Sweden), and managerial autonomy is not necessary for separateness either. Sweden for hundreds of years until the 1980s had separate authorities subject to the full panoply of civil service controls, while more recently New Zealand has given similar managerial autonomy to ministries and non-departmental bodies alike.
11. See Table 12 PUMA/HRM(2001)11.
12. See PUMA/REG(2001)12 for a discussion of the growth in separate specialised economic utility regulators since 1990.
13. Governance board means the governing body of the organisation with external members and full powers including those of appointing and removing the DG (senior executive). As such it should be distinguished from internal management boards, advisory boards, and external boards with limited powers (such as those in Sweden).
14. This is not an argument that applies to all jurisdictions, the obvious exception being counties with unwritten constitutions. It does not explain Swedish agencies, which have been established for hundreds of years at arm's-length from ministers and ministries, but which until very recently remained part of the civil service and subject to the same panoply of input controls. In other jurisdictions (such as New Zealand) significant management autonomy has been devolved both to ministries and PLAs.
15. The tenure protection given to civil servants reinforces the credibility of their exercise of independent statutory powers. The protections from summary dismissal given to the governing body of an independent PLA mimics the protections afforded civil servants generally.
16. While relations with customers are regulated by private law, aspects of public law can still apply to these bodies.
17. P22 based on a sample of 12 countries, including four OECD Member countries – Czech Republic, Korea, Mexico and Turkey.
18. In order to focus on national bodies of executive central government, this classification excludes supranational, state and local government, the judiciary, offices of the legislature, NGOs and non-governmental statutory bodies. To simplify the discussion it has not covered joint ventures, regional offices, partnership organisations, subsidiaries and associated entities.
19. From www1.worldbank.org/publicsector/civilservice. This is an excellent 2-page summary of this issue.
20. This independence issues is discussed as a commitment problem because the current legislature can't bind future houses so even if policy is written into law democratic politicians cannot credibly commit future governments to a long-term policy. This problem is inherent in democratic politics. Indeed it has been suggested as the political economy explanation for the replacement of the patronage system with the professional career civil service across many countries. Under this framework, the choice of organisational form between courts, ministries and PLA regulatory commissions, for example, will depend upon the arrangement that minimises the costs of uncertainly, agency, commitment and legislative decision-making (Horn, 1992). The more general point is that there are ranges of devices to handle the commitment problem such as the professional career civil service without creating separate organisations.

21. This classification is a positive description of “what is” not a normative prescription of “what should be”. Not every country has examples of every organisational type. Some countries (*e.g.* New Zealand and France) have created finer classifications to create governance regimes for groups of bodies, while others have created a unique governance regime for each individual body within a general framework (*e.g.* United Kingdom, Sweden.)
22. These arrays are in general statements. The Civil Servant and Tax funding break points are not aligned with the breakpoints for organisational forms because they overlap – some PLAs for example are 100% general tax revenue funded.
23. This paper is concerned with the basis for giving advice on the choice of organisational form. In practice, of course, decisions on structure of government reflect *realpolitik* factors not just considerations of optimal organisation choice. Davis, *et al* (1999) report that machinery of government reforms in the United Kingdom, Canada and Australia reflect political concerns of the Prime Minister of the day.

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Annex

The search for the holy grail of a common terminology

In order to encourage the cross-jurisdictional dialogue, there is a need for a shared language based on some sort of systematic classification. The reports from the sample countries make it clear that, while there are important differences, there are significant similarities across jurisdictions. Virtually all countries have at least four non-ministry bodies in common: departmental agencies (bodies subsidiary to departments), public law administrations (bodies separate from departments), government enterprises, and other bodies not elsewhere classified. In addition, half the sample countries have other non-commercial private law bodies.

Consideration of cross-country trends and issues is hard enough without being hampered by a lack of a common language. The term “agency” means quite different things in, say, the United States and the United Kingdom. Indeed in some countries the word “agency” has little or no legal meaning. This note attempts to move the debate forward by exploring potential sources of a common terminology for use by practitioners in cross-country work. This is not an attempt to redefine terms, which already have quite precise legal meanings in individual jurisdictions, but instead to come up with something which helps cross-jurisdictional dialogue.

This Annex reviews four potential sources – the academic literature, accounting standards, legal form, and SNA- economic substance.

Academic literature

Two recent academic articles focus on this problem but neither entirely satisfactorily resolves the issue. One ends up with an extremely broad definition of quangos, which includes NGOs (Greve, Flinders and Van Thiel, 1999). The other ends up with a definition which is more focused than that offered by Greve *et al.*, but is not comprehensive because it excludes government commercial enterprises and potentially excludes organisations created for legitimacy reasons (Talbot *et al.*, 1999). Therefore, it is too narrow for this study.

Accounting standards

The International Federation of Accountants (IFAC) defines public organisations as all bodies within the public sector financial reporting entity. To define this they use the concept of control defined as “the power to govern the financial and operating policies of another entity so as to benefit from its activities”. Thus, private not-for-profits are distinguished from public sector agencies by control. IFAC then goes on to describe public organisations with no separate legal identity from the central executive as ministries, while controlled bodies, which are separately constituted, are subsidiary public organisations.

While it provides a useful discussion of governance issues (albeit from a particular perspective), accounting standards do not provide a sufficiently fine-grained language to break down non-departmental bodies. Moreover, focusing largely on financial control introduces the loaded notion of “subsidiary”. This is as difficult a term as “independent” – the challenge with designing governance arrangements for these bodies is the right balance between control and independence, freedom and accountability.

Legal form

Legal form provides a good basis to start but it is not determinative, because even within similar jurisdictions there are important legal differences. Also, using legal form *per se* risks being too static – the functions a government body performs may change over time (*e.g.* as it moves from PLA to a commercial quasi- corporation) but statutory recognition may lag economic substance.

Use of legal form is further bedevilled by cross-jurisdictional problem of comparison – *e.g.* common law and Roman law, federal and unitary, written and unwritten constitutions, etc. For example, a simple test for separating PLAs from ministries is whether they are separate legal entities. While PLAs are separate legal entities in most countries, they are not in Sweden. Swedish agencies can be clearly distinguished from ministries and are not subsidiary to them. But the use of a strict legal test for separateness, based on separate legal form, does not fit the Swedish case.

SNA and economic substance

SNA provides another potential framework and place to start based on economic substance as well as legal form. SNA organises all activity into four areas: market, financial services, output for own use, and non-market. Most importantly SNA includes a number of other cuts – by institution/organisational form (*e.g.* corporations including quasi-corporations), and by ownership. Unfortunately to date SNA has not been used to more finely segment below the level of market or non-market central or local government (and social security funds).

SNA provides a map of the state in OECD Member countries. Across the OECD as a whole, one could hypothesise that it would show government-owned producers in virtually all market production groups and government owned institutions of all forms (except households).

SNA provides a potential set of neutral terms. For example, central government is defined to consist of two types of non-market units, “departments” and “agencies” while all government market units are defined as “corporations”. The term “corporation” is ambiguous as it has a precise narrow legal meaning in a number of jurisdictions while agency is a term that has precisely defined but different meanings in different jurisdictions. Thus while SNA does not provide a complete new neutral language or finely segmented slice of government, it does provide a useful framework of definition for measurement. For example to provides a definition of:

- control – the ability to determine policy or programmes generally through the appointment of the officers that manage the organisation;
- market and non-market – non-market is defined as where output is free or at prices that are not economically meaningful, ESA further defines non market as where 50% or less of cost recovered is in prices;

- institutional separateness – legal identity, autonomy with respect to spending and revenue and the ability (actual or potential) to produce meaningful accounts;
- ownership – in the absence of shares, tests include appointment to the governing board and government financing;
- quasi-corporation – bodies which, while not an independent legal entity, keep a complete set of accounts, undertake market activities, and their economic behaviour is similar to a corporation;
- not-for-profit – generally legally separate bodies with, *inter alia*, no shareholder or residual claimant on surplus or equity, and any surplus incidentally earned are retained.

One area where SNA is less helpful in providing a more fine grained breakdown of central government or clarifying the muddy boundary between civil society and the government, *e.g.* non-market, non-profit producers predominantly funded from tax revenue. Under SNA these are all assigned to general government (unless the non-for-profit produces output for own use). Note also the central bank and government owned financial institutions are defined as part of the financial sector not general government.

Overall the SNA framework could be helpful in providing a framework and a structured approach for addressing most boundary problems. In particular the “case law” from the application of SNA, *e.g.* distinguishing market and non-market government activities, may provide a useful jurisprudence for countries in making judgements. The problem of a lack of a shared language for non-market producers remains.

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