



Instructor Guidance Note— Delegations

What is a delegation?

1 This guidance is about provisions in legislation that authorise a person to delegate the performance of a function or duty, or the exercise of a power, that the person has been given under the legislation. The function, duty or power might be:

- administrative in nature (such as a power to make a decision about an application or to appoint a person to an office); or
- legislative in nature (such as a power to make a legislative instrument in the form of rules).

2 The material below sets out some key considerations in determining policy, and providing instructions, in relation to delegations. For convenience, the material refers only to performing functions or exercising powers, but it applies equally to performing statutory duties.

Subject matter of the delegation

3 Suppose a person (the **authorised person**) such as the Minister or the Secretary is given specific functions and powers under legislation. The first key consideration in the context of delegation is *which* (if any) of the authorised person's functions and powers should be delegated.

4 The Senate Standing Committees that review legislation will examine whether or not there are limits set on either the scope of the functions or powers that might be delegated or on the categories of persons to whom the functions or powers may be delegated. For this reason, a delegation of *all* the authorised person's functions or powers would be considered unusual, and would need to be justified.

5 There might also be good policy reasons for not delegating an authorised person's functions or powers in particular circumstances, such as the following:

- the function or power is an important one and is intended to be exercised personally by the authorised person;
- the nature of the function or power is such that it involves high policy considerations of government;
- the power is a general power to make legislative instruments (e.g. a general rule-making power).

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6 It is typical for legislation to permit delegation of only a specified subset of an authorised person's functions or powers. If the authorised person is to have power under an Act to make one or more legislative instruments, the drafting instructions for the Bill should specifically address whether that power may be delegated by the authorised person and, if so, to whom.

Range of permissible delegates

7 The Senate Standing Committees prefer that the range of permissible delegates be as limited as practicable—for example, confined to the holders of nominated offices or to members of the Senior Executive Service (or equivalent). For this reason, a delegation to “all employees in the Department” is unusual and would need to be justified. If the proposed delegation does include a broad range of permissible delegates, an explanation of why such a broad range is considered necessary should be included in the explanatory materials.

8 If the power is to allow delegation to persons who are not SES employees or acting SES employees, consider including a provision that requires the authorised person to be satisfied that the delegate has appropriate training, qualifications, skills or experience.

9 Note that the Secretary of the Department is not an SES employee for this purpose, so it is necessary to specifically consider whether a delegation from a Minister, for example, should extend to the Secretary of the Department.

Functions and powers under instruments

10 A key consideration in the instruments context is whether an authorised person's functions or powers under an instrument are intended to be delegable by the authorised person. You should get legal advice on whether the delegation power in the enabling legislation is wide enough to permit delegation of functions or powers under the instrument.

11 If it is intended that the instrument itself confer the power of delegation, you should get legal advice as to whether the scope of the power under which the instrument is made extends to permitting such conferral. Because the making of a legislative instrument is itself an exercise of delegated legislative power, legal issues may arise if an instrument purports to further delegate legislative power to a person or body (see below).

Power to give directions

12 It is common for a delegation provision to allow an authorised person to give general directions to a delegate in relation to the exercise of powers by the delegate under the delegation. In the case of a statutory discretion, the power of direction does not usually extend to directing the delegate to exercise the discretion in a particular way in a particular case (for example, a specific direction to refuse a particular application

for a licence would likely infringe the rules against a decision maker acting at the direction or behest of another person).

Subdelegation

13 The general principle is that a delegate to whom functions or powers have been delegated cannot further delegate—i.e. subdelegate—those functions or powers (see paragraph 34AB(1)(b) of the *Acts Interpretation Act 1901*). However, if the policy is that that delegate should be able to subdelegate such functions or powers, then an express provision to that effect can be included in the provision of the legislation that empowers delegation. Note that it is not enough that the *delegation* itself purports to authorise subdelegation; the authorisation needs to come from the source of the delegation.

14 Additionally, note that the term ‘subdelegation’ is used in subtly different ways. For example, both of the following involve a ‘subdelegation issue’:

- An authorised person has functions under an Act (e.g. to assess licence applications) and powers (e.g. to grant a licence, to impose a condition on such a licence or both), and the authorised person wishes to consciously authorise another person holding a specified office or position to exercise those functions and powers. Can the authorised person do so?
- An authorised person is themselves a delegate, holding a power delegated by the Parliament to make a legislative instrument specifying considerations that must be taken into account in assessing licence applications. If the legislative instrument then purports to specify a condition that, for example, an applicant hold a qualification specified by the Registrar, there may be an issue of unlawful subdelegation. In this case, the subdelegation issue is not so much a case of the authorised person consciously authorising another to exercise a power, but rather a case of the authorised person perhaps being found, after the fact, to have engaged in an unlawful subdelegation of the power.

15 The above is not to be taken to suggest that a delegated power to make a legislative instrument is not delegable (it may well be delegable). The point is that the expression ‘subdelegation issue’ can refer to different things, and instructors should pay particular attention to the context in which it is being used.

16 For the purposes of providing instructions the question is a simple one—of all the functions and powers given to the authorised person, which ones are to be delegable?

Acts Interpretation Act

17 Sections 34AA, 34AB and 34A of the *Acts Interpretation Act 1901* contain rules about delegations. It is important to understand these provisions when instructing on delegation provisions in legislation or when drafting delegations under such provisions.

18 The rules include the following:

- a delegation may be made to a specified office or position (as opposed to a named individual or body), even if the office or position does not come into existence until after the delegation is given (section 34AA)
- a delegation may be general or limited in scope (paragraph 34AB(1)(a))
- the functions or powers that may be delegated do not include the power to delegate (paragraph 34AB(1)(b))
- an authorised person may themselves continue to exercise a power or perform a function even though the authorised person has delegated the power or function to a delegate (paragraph 34AB(1)(d))
- generally speaking, amendments to legislation to add to, or alter, the scope of authorised person's powers and functions will flow through to a delegation (subsections 34AB(2) and (3))

Administrative review

19 If a decision has been made by a delegate, the decision is generally taken to have been made by the authorised person on whom the function or power was conferred by an Act or instrument. This is reflected in both paragraph 34AB(1)(c) of the *Acts Interpretation Act 1901*, and subsection 14(7) of the *Administrative Review Tribunal Act 2024*.

20 This reflects well-established Commonwealth policy that an appropriately senior authorised person (usually the Minister or the Secretary) who originally delegated the function or power is the person required to defend the actions of a delegate in a court or tribunal.

Delegation to computers

21 A delegation power is not sufficient to authorise automated decision making. Any delegation must be to a human decision-maker. If you anticipate a need to authorise the use of computers or artificial intelligence in decision-making processes, you will need to provide instructions on the arrangements to enable OPC to prepare provisions providing appropriate legislative authority.

Character of delegations

22 Table items 1 and 2, respectively, in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulations 2015*, provide that neither of the following are legislative instruments for the purposes of the *Legislation Act 2003*:

- an instrument of delegation, including any directions to the delegate;
- an instrument that is a direction to a delegate.

23 As a result, delegations and directions to delegates are not subject to disallowance or sunseting. Nor do they need to be registered on the Federal Register of Legislation to have legal effect.

24 Note, however, that a legislative instrument made by a delegate under a delegated power:

- may well be subject to disallowance and sunseting or both; and
- must be registered to be enforceable (subsection 15K(1) of the *Legislation Act 2003*).

More information

- Delegation template on OPC's website
- *Instructor Guidance Note—Automated decision-making*

The purpose of Instructor Guidance Notes is to assist agencies with general legislative drafting issues and preparing drafting instructions for Bills and instruments. The series is intended to be a starting point for instructors' own engagement with the matters covered. Instructor Guidance Notes are not statements of official policy and are not intended to be a comprehensive statement of the law. This Instructor Guidance Note should not be relied on as a substitute for legal advice.