

# You got the power!



The use of legal powers for good decision-making in government departments and arm's-length bodies in Northern Ireland

Claire Archbold,  
Deputy Departmental Solicitor  
Chief Executives' Forum

# What legal powers do real people have?

- Buy, sell and gift property
- Enter into contracts
- Employ staff
- Set up trusts
- Sue and be sued in court
- Make a will
- Enter into a marriage or civil partnership
- Statutory and common law powers
- Powers and duties



# What makes a public body different from any other legal person?

- Exercises the power of the State
- Can require people to do things they may not want to
- Can prevent people from doing things they want to
- Can allocate scarce resources between citizens



*L'État, c'est moi*

# The Nolan (Sisters) Principles



- Dancing
- Romancing
- Chancing

*Copyright Caitlin Moran*

# The (Stephen) Nolan Principle



# The Nolan Principles (the Seven Principles of Public Life)

- Selflessness
- Integrity
- Objectivity
- Accountability
- Openness
- Honesty
- Leadership

Apply to everyone in public life, including Ministers, public appointees and civil servants

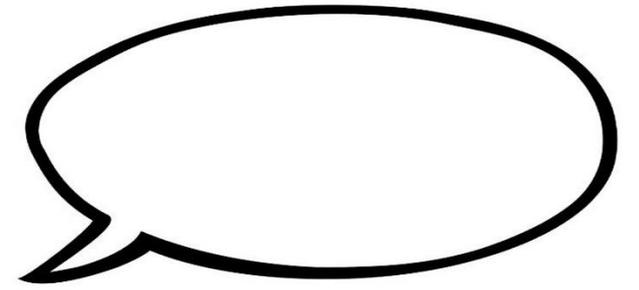
# NI Executive Ministerial Pledge of Office

- (a) to discharge in good faith all the duties of office;
- (b) commitment to non-violence and exclusively peaceful and democratic means;
- (c) to serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination;
- (ca) to promote the interests of the whole community represented in the the Northern Ireland Assembly towards the goal of a shared future;
- (cb) to participate fully in the Executive Committee, the North-South Ministerial Council and the British-Irish Council;
- (cc) to observe the joint nature of the offices of First Minister and deputy First Minister;
- (cd) to uphold the rule of law based as it is on the fundamental principles of fairness, impartiality and democratic accountability, including support for policing and the courts as set out in paragraph 6 of the St Andrews Agreement;
- (ce) to support the rule of law unequivocally in word and deed and to support all efforts to uphold it;
- (cf) to work collectively with the other members of the Executive Committee to achieve a society free of paramilitarism;
- ...

# The Civil Service Code of Ethics

- ‘Integrity’ is putting the obligations of public service above your own personal interests;[includes obeying the law]
- ‘Honesty’ is being truthful and open;
- ‘Objectivity’ is basing your advice and decisions on rigorous analysis of the evidence; and
- ‘Impartiality’ is acting solely according to the merits of the case and serving equally well Ministers of different political persuasions.

# What is a culture of lawfulness?



- Mrs Doyle is at her wits' end. The people in the flat upstairs are selling drugs and running a “party house”, with noise all night every night.
- Ted has lost his job and his landlord is hounding him for rent.
- Dougal runs a milk delivery business and the café at the end of the street has not paid him for three months.
- What might these citizens do next in a community that respects the rule of law and in one which does not?

# What does the rule of law mean?



# 1. The powers of public bodies



...you can only make the moves that the rules of the game allow

Where does the power of public bodies come from?

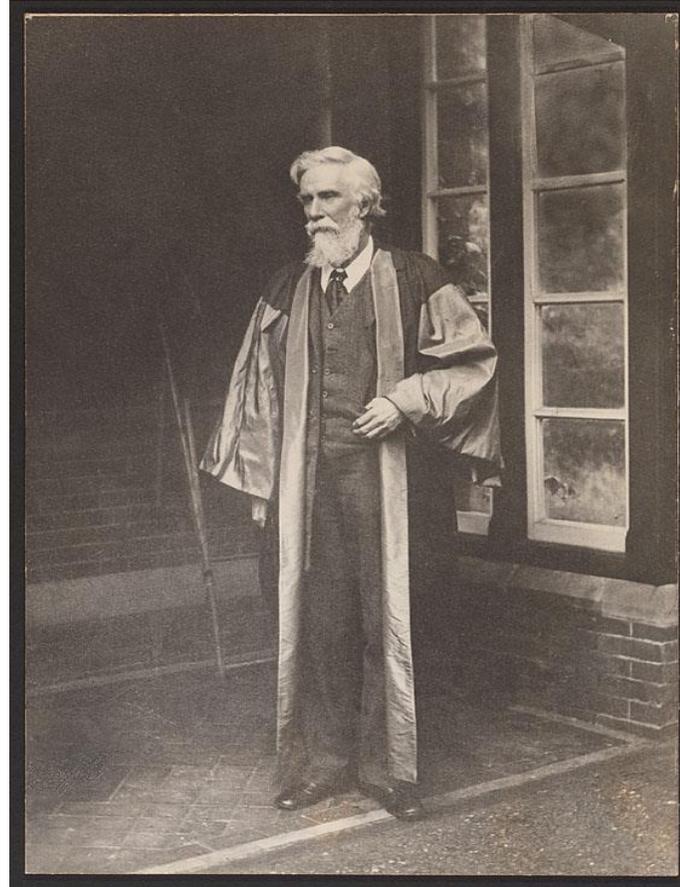


...legislative sovereignty rests with the Queen-in-Parliament

# What is Parliamentary sovereignty?

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the [UK] constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of [the UK] as having a right to override or set aside the legislation of Parliament.

AV Dicey (1885)



The legislature...makes laws which implement government policy and scrutinises the work of the executive



The executive – sets policy direction and implements laws and policies using powers granted by the legislature



# Agencies and arm's length bodies – a spotter's guide

- Part of the executive branch of the State
- Agency – part of a Department
- Trading fund – usually part of a Department
- Non-departmental public body – special purpose body – separate from Department – established by statute or prerogative power
- Public corporation – special purpose body – established as a company, subject to Companies Acts
- For more, see *Managing Public Money (NI) Ch 7*



Judiciary – independent of executive and legislature, adjudicates in disputes including those between citizen and the executive



# Types of powers

- Statutory powers – in an act of Parliament or the NI Assembly
- Powers in secondary legislation – the delegated body is given power to legislate to delegate its powers
- Implied statutory powers
- Prerogative
- Common law powers of the Crown
- General statutory powers of the type of body in question (eg Interpretation Act or company law)

## 2. The powers of Departments



# Who can use a legal power in Departments?

## **UKGov**

- UK Government Departments
- Secretaries of State exercise the whole power of the Crown
- Ministers of State assist them
- Civil Servants assist them
- Agencies and arm's length bodies report to them
- Statutes give powers to “the Secretary of State”
- They are accountable for their own and their ALBs' work to Parliament

## **NI Gov**

- Executive power (including prerogative) is exercised by NI Departments and Ministers
- Statutes give powers to Departments
- Departments have separate legal personality
- Departmental power is exercised “subject to the direction and control of the Minister”
- Departmental decisions can be taken by a senior official or Minister
- Agencies and ALBs report to the sponsor Dept
- Accountable through Minister to the NI Assembly

# The Carltona doctrine – UK Departments only!

- *Carltona v Commissioners of Works (1943)*
- In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them... The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of ministers by responsible officials of the department. ***Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament.*** The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.

**WARNING!**  
Carltona does not apply to NI Departments



# Statutory powers in NI are usually given to Departments

- Northern Ireland Departments each have their own legal personality



Sustainability at the heart of a living, working,  
active landscape valued by everyone

# So who can use legal powers in Northern Ireland Departments?

## **Departments (NI) Order 1999**

**4.**—(1) The functions of a department shall at all times be exercised subject to the direction and control of the Minister.

(3) Subject to the provisions of this Order, any functions of a department may be exercised by—

(a) the Minister; or

(b) a senior officer of the department.

## **Northern Ireland Act 1998**

**23** (1) The executive power in Northern Ireland shall continue to be vested in Her Majesty.

(2) As respects transferred matters, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall...be exercisable on Her Majesty's behalf by any Minister or Northern Ireland department

# Limits on the power of NI departments (1)

## Northern Ireland Act 1998 s. 24

(1) A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act—

(a) is incompatible with any of the Convention rights;

(b) is incompatible with [retained EU] law;

(c) discriminates against a person or class of person on the ground of religious belief or political opinion;

(d) in the case of an act, aids or incites another person to discriminate against a person or class of person on that ground; or

(e) in the case of legislation, modifies a [protected] enactment

# Limits on the power of NI Ministers (2)

## Northern Ireland Act 1998 s. 28A

- **Duty to refer to the Executive matters which are crosscutting or “significant or controversial [and outside the Programme for Government when we have one]”**
- S., 28A (1) Without prejudice to the operation of section 24, a Minister or junior Minister shall act in accordance with the provisions of the Ministerial Code.
- (5) The Ministerial Code must include provision for requiring Ministers or junior Ministers to bring to the attention of the Executive Committee any matter that ought, by virtue of section 20(3) or (4), to be considered by the Committee.
- (10) Without prejudice to the operation of section 24, a Minister or junior Minister has no Ministerial authority to take any decision in contravention of a provision of the Ministerial Code made under subsection (5).

# Some good questions about the powers of your Departmental business area

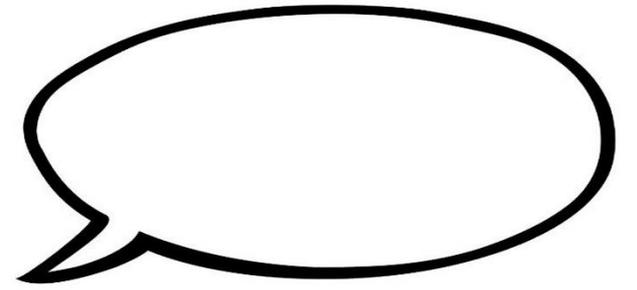
- What statutes contain our powers?
- What powers do we have to make regulations?
- What powers do we have to give grants or loans?
- What powers do we have to make appointments?
- What powers do we have to make quasi-judicial decisions?
- Is a sufficiently senior officer taking the decision?
- Do any of our powers belong to the Minister?
- Are any of our powers in other documents?
- Do we ever use prerogative or common law powers of the Crown?
- When we act jointly with other bodies, do we need to use powers? Whose are they?

# Appeals under the Firearms (NI) Order 2004

- **Appeal from decision of Chief Constable**
- **74.**—(1) A person aggrieved by a decision of the Chief Constable under this Order may appeal to the relevant authority if it is a decision to which this Article applies.
- (2) On an appeal under this Article the relevant authority may make such order as the relevant authority thinks fit having regard to the circumstances.
- (3) This Article applies to the following decisions of the Chief Constable under this Order—
- (a) a refusal to grant or vary any certificate;
- (b) a revocation of a certificate;
- (c) a condition attached to any certificate or the variation of such a condition;
- (d) a requirement to surrender a certificate of approval under Article 17(3) or 18(2);
- (4) In this Article—
- (5) In this Article “the relevant authority” means—
- (a) the Secretary of State, in any case where the Chief Constable's decision was taken wholly or partly on the basis of information the disclosure of which may, in the view of the Secretary of State or of the Chief Constable, be against the interests of national security;
- (b) the Department of Justice, in any other case.

# Fictional example

## Two firearms appeals – advise the NI Minister for Justice



- Tom Good appeals refusal of his firearms certificate.
- He has received two informal warnings from police for discharging a shotgun in a built-up area; he says he was destroying magpies' nests, which are disrupting the ecosystem around his home as magpies eat smaller birds.
- In his appeal, he says that he will undertake not to use his shotgun in a built-up area but the police say he gave the same undertaking after the first warning and a letter from his GP says he has early-stage dementia which makes him forgetful.
- Margot Leadbetter appeals refusal of her firearms certificate.
- She is Secretary of her local clay pigeon shooting club.
- The club was recently burgled and the gun cabinet, which had been left unlocked, was emptied.
- MI5 have intelligence that this was the work of a paramilitary organisation who sold the guns on to international terrorists. Police believe that the cabinet was left unlocked on purpose.
- Margot is one of only two keyholders.

# Department for the Economy higher education grant-making powers

It shall be the duty of the Department –

- (a) To promote the education of the people of NI;
- (b) To secure the effective execution by boards and other bodies on which...powers are conferred or duties imposed under the Education Orders of the Dept's policy in relation to the provision of the education service.

Art 3, Education Reform (NI ) Order 1989

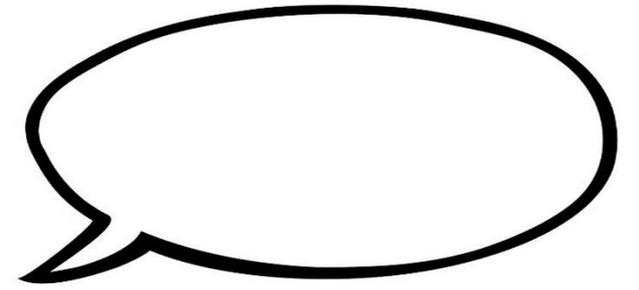
The Department may on such terms and conditions as it may determine, make grants –

- (a) to the governing body of any higher education institution in Northern Ireland in respect of expenditure incurred or to be incurred by it for the purposes of, or in connection with,
  - (i) the provision of education and the undertaking of research by that institution; or
  - (ii) the provision of any facilities, and the carrying on of any other activities, by that institution which the governing body of that institution considers it necessary or desirable to provide or carry on for the purposes of education or research;
- (c) to any body or person in respect of expenditure incurred or to be incurred by that body or person for the purposes of the provision of services for the purposes of, or in connection with, the provision of education and the undertaking of research by higher education institutions in Northern Ireland.

Art 30(1) Education and Libraries (NI) Order 1993

# Fictional example

## A Ministerial dilemma



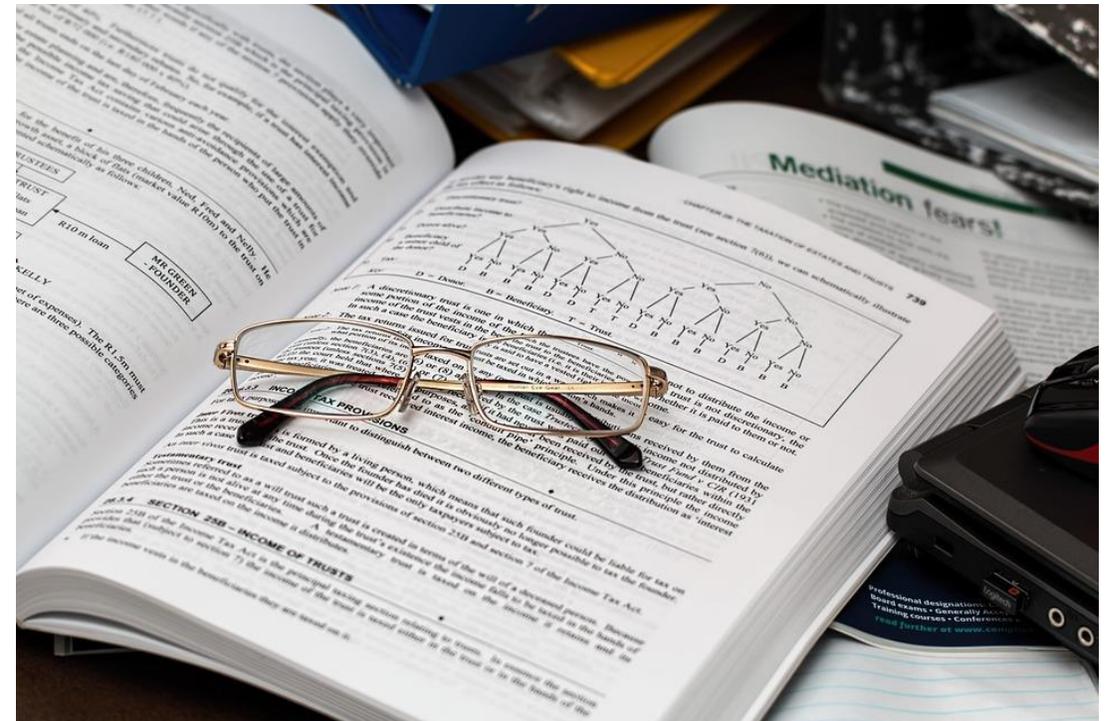
- You are advising the interim Minister for the Economy, Jill Hacker (Independent, South Belfast). Can she provide funding for:
  - A new Sub-Molecular Mass Spectrometer and a sterile laboratory in which to locate it, for University of Ulster Biosciences Dept;
  - A state of the art laptop computer as the prize in a “Covid vaccine raffle” for students at Queen’s University, to encourage vaccine uptake;
  - An English-speaking student-community local council liaison officer for one year at the Universidad de Alcalá de Henares in Spain, a popular location for NI Erasmus students, where there has been some friction between the locals and hard-drinking NI students.

### 3. The powers of Non-Departmental Public Bodies



# Where can I find the legal powers of non-Departmental public bodies?

- Know where they are!
- In the parent statute
- In the general law only if (eg) a limited company
- In the Interpretation Act (NI) 1954
- Be alert for the limitations on powers
  - Power to act only for the body's purposes
  - Power to spend money for specific purposes
  - Power to give grants to particular classes of person



# An example...NI Human Rights Commission (NI Act 1998)

## **In the statute (ss. 68-71)**

- Establishment
- Number of Commissioners
- Disqualification
- Functions
- Duties (shall)
- Powers (may)
- Investigative powers
- Assisting individuals

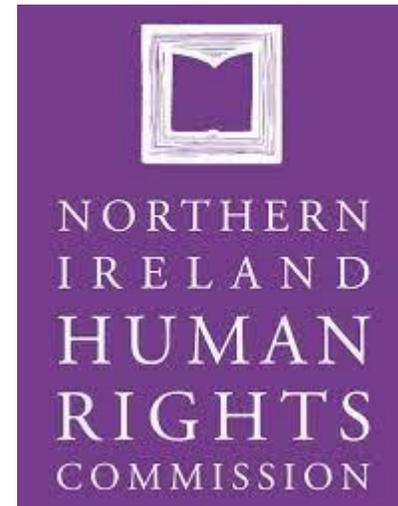
## **In Schedule 7**

- Commissioners' tenure
- Commissioners' salary
- Staff
- Annual Report
- Money
- Procedure
- Disqualification

# Focus on functions

69(6)The Commission **shall** promote understanding and awareness of the importance of human rights in Northern Ireland; and for this purpose it **may** undertake, commission or provide financial or other assistance for—

- (a) research; and
- (b) educational activities.



# Focus on establishment – staffing (Sched 7(4))

The Commission may employ staff subject to the approval of the Secretary of State as to numbers and as to remuneration and other terms and conditions of employment.

# Section 19, Interpretation Act (NI) 1954

(1) Where an Act passed after the commencement of this Act contains words establishing, or providing for the establishment of, a body corporate and applying this section to that body those words shall operate—

(a) to vest in that body when established—

(i) the power to sue in its corporate name;

(ii) the power to enter into contracts in its corporate name, and to do so that, as regards third parties, the body shall be deemed to have the same power to make contracts as an individual has;

(iv) the right to acquire and hold any real or personal property for purposes for which the corporation is constituted and to dispose of or charge such property at pleasure;

(v) the right to regulate its own procedure and business; and

(vi) the right to employ such staff as may be found necessary for the performance of its functions;

(b) to make that body liable to be sued in its corporate name;

(d) to vest in a majority of the members of that body the power, subject to any quorum fixed by the enactment under which it is established or by any relevant standing orders, to bind other members thereof; and

(e) to exempt from personal liability for the debts, obligations or acts of that body, such members thereof as do not contravene the provision of the Act under which the body is established.

# Behind the statute - The Management Statement and Financial Memorandum /Partnership Agreement

- The legal basis - Functions, duties and powers of the body
- The aims of the relationship, objectives and key outcomes
- The governance of the partnership: the terms of engagement of the partners
- Accountabilities - to Assembly, Minister, Department, governing body, role of executive team, role of third parties
- How strategic decisions about the future of the partnership will be made, with timetable, terms for intervention, break points, dispute resolution procedures, termination process, and so on.
- Planning, budgeting and controls within the chain of accountability e.g. stewardship reporting, keeping track of efficiency, risk assessment, project appraisal, management of interdependencies
- Risk management
- Staffing issues and professional input (where relevant)
- Arrangements for taking stock of performance and learning lessons from it. financial management
- The financial relationship of the partners
- Monitoring, reporting, regular liaison and any other tracking arrangements.
- Audit arrangements

See Managing Public Money NI Ch 7, Box 7.2

# Who can use your public body's legal powers?

- **Delegatus non potest delegare**
- **The person to whom power is delegated cannot subdelegate it.**
- The rule everywhere except in UK Government Departments
- Parliament gives power to Ministers or public authorities – it must be exercised by the person to whom it was given.
- Unlawful subdelegation renders a decision unlawful, void and of no effect



# What is delegation by a public body?

- A public body or office-holder must carry out the functions given to it
- A public body acts by its Board
- Ancillary activities may be delegated to staff, contractors or partners (eg applying a signature stamp to a document)
- If there is a statutory power to delegate, whole function can be delegated
- Eg - a NI Department may enter into an agency agreement with a UK Department or a public body to carry out its functions (NI Act s. 28)
- Unless delegation is granted by express power or necessary implication, a public body may only enter into an agency agreement for ancillary activities
- Necessary implication is very limited. The core of a function may not be delegated unless delegation is “inevitable”.

# Compare and contrast – subdelegation of the whole of a function

- A local authority has power to certify cinema films for public viewing in its area
- It sets a policy that it will show films which have been given a
  - BBFC Certificate
  - It has unlawfully delegated its decision-making

- A local authority has power to certify cinema films for public viewing in its area
- It sets a general policy that it will show films which have been given a British Board of Film Censors certificate
- It retains a power to override this general policy
- The whole power has not been delegated, the policy is lawful.



# Can a power to delegate be implied?

## Yes if...

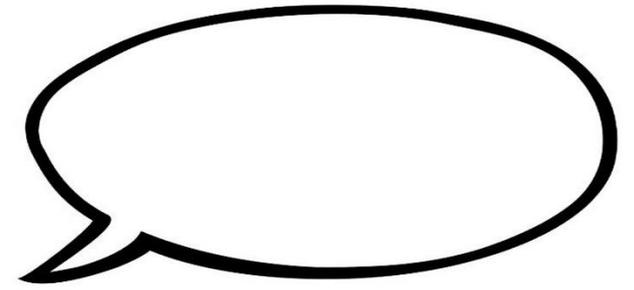
- Power given to the head of the office
- Hierarchical organisation
- Power in question not final or decisive
- Heavy pressure of business makes delegation “inevitable”
- Local government – courts give more leeway because of underpinning statutory scheme

## No if...

- Power given because of officeholder’s expected experience or qualification
- Power in question final or decisive
- Power in question quasi-judicial
- Workload not so heavy as to make delegation “inevitable”
- Interpretation of individual statute

# Fictional example

## Education project in the NIHRC



- Norman Fletcher has been appointed as education officer in NIHRC
- He has a great idea for some schools education projects on prison reform, an issue about which he is passionate
- He provides small grants to Lennie Godber, a talented local animator, and his daughter Ingrid, a drama student, to create content for a schools webinar he has decided to develop on human rights and sentencing.
- He suggests to Henry Barrowclough, the Chief Human Rights Commissioner, that the Commission fund a PhD student at a local university to carry out some research on human rights and prison reform. Mr Barrowclough readily agrees.
- Are these a valid exercise of the Commission's power in s. 69(6) of the NI Act 1998?

# Some good questions about the powers of your Non-Departmental Public Body

- What statutes contain our powers?
- What powers do we have to give grants or loans?
- What powers do we have to make appointments?
- What powers do we have to make quasi-judicial decisions?
- Who can exercise the powers?
- Which powers can be delegated?
- Do we have a schedule of delegation?
- Are we a corporation? Does company law apply to us?

# KNOW LIMITS

4. Are there limits on how a power can be exercised?

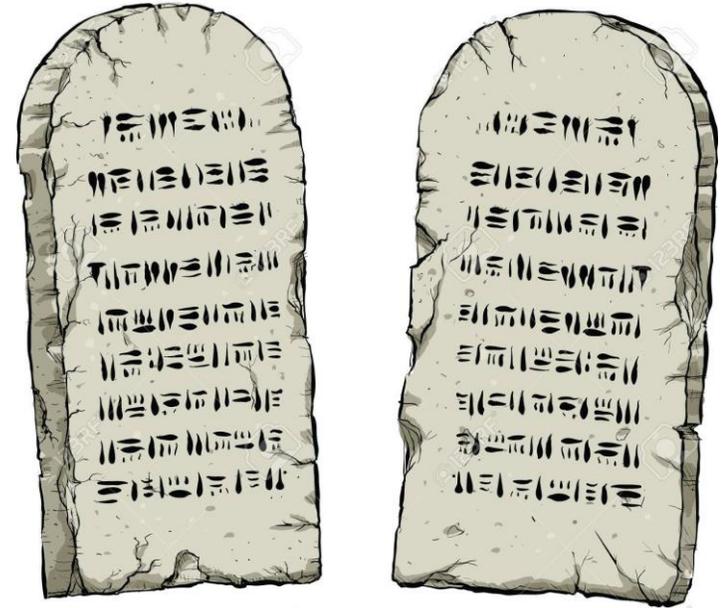
# The public law limitations

- Parent statute may contain limitations
- Duty to act lawfully
- Duty to act reasonably/rationally
- Duty to act properly (common law fairness)
- Duty of public authority to act in compliance with human rights
- Duty to comply with general statutory regimes eg data protection, equality impact assessment, anti-discrimination law.

# The ten commandments

## A good decision by a public authority is...

- Lawful
  - Free from factual error and misunderstanding
  - Made by the appropriate person
  - Made with an open mind
  - Considers all relevant and no irrelevant factors
  - Free from improper motive, bad faith and bias
  - Fair and reasonable (in procedure and substance)
  - Meets legitimate expectations
  - Human-rights compliant
  - Reasoned
- 
- For more, see *Judge Over Your Shoulder* , CAL judicial review course



# Giving reasons – a checklist



- What is the applicant applying for?
- What are the relevant facts?
- Have you taken into account all and only relevant factors?
- Is there any relevant policy or guidance?
- Has the applicant made any representations/been consulted? How have you taken their views into account?
- How did you weigh the factors in reaching your decision?

# What if we get it wrong? Judicial review

- Judicial review
- Do they have standing? Locus standi
- The pre-action protocol letter
- Think about mediation
- A two stage hearing – leave and full hearing
- Three month time limit
- The important question – not who's right, but what's right



# Good governance and ethical standards

- The Nolan Standards (the seven standards of public life)
- The Northern Ireland Audit Office Board standards
- The NI Public Service Ombudsman
- The Civil Service Code
- The Ministerial Code and the Pledge of Office

Any questions?

