CABINET MANUAL

2017

Cabinet Office
Department of the Prime Minister and Cabinet
Wellington, New Zealand

New Zealand Government

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Summary of Contents

Foreword xv

Preface xvii

On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government 1

1 Sovereign, Governor-General, and Executive Council 7

2 Ministers of the Crown: Appointment, Role, and Conduct 19

3 Ministers of the Crown and the State Sector 41

4 Ministers, the Law, and Inquiries 57

5 Cabinet Decision-making 73

6 Elections, Transitions, and Government Formation 87

7 The Executive, Legislation, and the House 99

8 Official Information and Public Records 123

Appendix: Letters Patent Constituting the Office of Governor-General of New Zealand 1983 147

Index 159

Contents

Foreword xv

Preface xvii

On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government 1

1 Sovereign, Governor-General, and Executive Council 7

Introduction 7
Sovereign of New Zealand 7
- References to "the Crown" 7

Governor-General 7
- Office of Governor-General 7
- Formal powers and functions of office 8
- Royal prerogative 8
- International role 8
- Exercising the powers and functions of office 9
- Administrator of the Government 9

Executive Council 9
- Powers 9
- Membership of Executive Council 10
- Resignations and dismissals of members of the Executive Council 10

Clerk of the Executive Council 11
Meetings of Executive Council 12
- Items for consideration by Executive Council 12
- Preparing items for Executive Council 12
- Meetings, quorum, and attendance 12
- Confidentiality 13

Gazetting and entry into force 13
Announcement 14
New Zealand Royal Honours System 14
- General 14
- Administration 15
- Nominations 15
- New Zealand Royal Honours for non-New Zealand citizens 15
- "The Right Honourable" and "The Honourable" 15
- Acceptance of foreign honours by New Zealand citizens 16

Heraldry 16
Order of Precedence 16

2 Ministers of the Crown: Appointment, Role, and Conduct 19
Introduction 19
Prime Minister 19
Appointment 19
Role 19
Deputy Prime Minister 20
Ministers 21
Appointment 21
Resignation and dismissal 21
Legal power for Ministers to act for other Ministers 21
Role and powers of Ministers 22
Financial responsibility of Ministers 23
Cabinet Ministers, Ministers outside Cabinet, and Ministers of State 23
Ministerial portfolios 24
Associate Ministers 24
Acting Ministers 25
Duty Ministers 26
Parliamentary Under-Secretaries 26
Parliamentary Private Secretaries 27
Conduct, public duty, and personal interests 27
General 27
Conduct of Ministers 27
Register of Pecuniary and Other Specified Interests of Members of Parliament 28
Ministers' interests 28
Identifying conflicts of interest 29
Types of conflicts of interest 29
Pecuniary interests 29
Interests of family, whānau, and close associates 29
Association 30
Managing conflicts of interest 30
Conflicts of interest in the House 31
Constituency interests 32
Interactions with representatives from non-government or commercial organisations 32
Gifts 32
General 32
Gifts from foreign governments 33
Gifts from non-government or commercial organisations 33
Cultural gifts 33
Political party donations 34

Speaking engagements, endorsements, and non-ministerial activities 34
Speaking engagements 34
Endorsement of products, services, or organisations 35
Charitable fundraising 35
Business and professional activities 35
Provision of references 35
Use of information after leaving office 35
Government advertising and publicity guidelines 36
Ministerial travel 36
Overseas travel 36
Purpose of travel 36
Approval of travel 37
Travel costs 37
Accompanying family members, staff, and officials 37
Reporting on overseas travel 38
Personal travel overseas 38
Visits by Leaders and Ministers from other countries 38
Travel within New Zealand 38

3 Ministers of the Crown and the State Sector 41
Introduction 41
The public service, the state services, and the state sector 41
Public service 41
State services 41
State sector 42
Ministers and the public service 42
Roles and responsibilities 42
Ministers' relationships with chief executives 43
Accountability documents 44
Briefing for incoming Ministers 44
Ministers and officials 45
Individual ministerial responsibility for departmental actions 46
Appointment and review of chief executives 47
Chief executives as employers 47
Ministers and Crown entities 48
General 48
Role of Ministers 48
Directions to support a whole of government approach 49
Role of Crown entity boards 49
Role of monitoring departments 50
Ministers and companies in the state sector 50
General principles 50
State-owned enterprises 50
Integrity and conduct throughout the state sector 51
Principles of public service 51

Processes for upholding the principles of public service 52
Public comment on government policy 52
Public servants' contact with the House of Representatives and political parties 53
Select committees 53
Caucus and caucus committees 53
Supporting consultation and negotiation between political parties 53
Private communications with Ministers and members of Parliament 54

4 Ministers, the Law, and Inquiries 57
Introduction 57
Attorney-General 57
General 57
Role of Attorney-General 57
Law officer role 57
Legal proceedings involving the Crown 58
Link between the judiciary and the government 58
Responsibility for agencies 58
Attorney-General's functions and section 7 of the Constitution Act 1986 58
Comment by Ministers on judicial decisions 58
Crown legal business 59
Litigation involving Ministers 59
Judicial review 59
Production or discovery of documents and appearance in court by Ministers to give evidence 60
Service of court documents 61
Indemnity of Minister as a defendant 62
Proceedings brought against Ministers 62
Proceedings concerning the exercise of ministerial powers 62
Proceedings against a Minister personally 62
Indemnity in other cases 62
Preliminary steps 63
Cabinet consideration 63
Procedure where the Crown undertakes the defence 63
Procedure where private counsel is retained 63
Payment of costs or damages awarded 64
Receipt of costs or damages awarded 64
Indemnity of Minister as plaintiff 64
Legal advice and legal professional privilege 65
General 65
Legal professional privilege 65
Guidelines for the presentation of legal advice 66
Waiver of legal privilege 66
Release of legal advice 67

Inquiries 67
General 67
Statutory inquiries 68
Royal commissions 68
Public inquiries 68
Government inquiries 68
Duties, powers, immunities, and privileges of statutory inquiries 69
Administrative support for inquiries 69
Establishing an inquiry 69
Subject of inquiry 70
Purpose of inquiry 70
Terms of reference 70
Appointment of inquirer or commissioner 70
Budget and timeframe 71
Other inquiries 71
Non-statutory ministerial inquiries 71
Statutory bodies with inquiry powers 71
Select committee inquiries 72

5 Cabinet Decision-making 73
Introduction 73
Cabinet 73
Cabinet committees 73
Principles of Cabinet decision-making 74
Items for consideration by Cabinet 74
Consultation 75
Portfolio consultation 75
Political consultation 76
Departmental consultation 76
Statutory consultation processes 76
Public consultation 76
Confidentiality 77
Collective responsibility 77
Principle of collective responsibility 77
Collective responsibility and coalition Ministers 77
Collective responsibility and support party Ministers 77
Collective responsibility and Parliamentary Under-Secretaries 78
Law officer function 78
Collective decision making and government agencies 78
Exercise of Ministers' statutory powers and functions in the collective Cabinet context 78
Statutory decisions 78
Statutory decisions and Executive Council 79
Cabinet and Cabinet committee procedures 79
Preparing and submitting Cabinet papers 79
Deadlines and late papers 80

Amendments to papers 80
Withdrawal of papers 80
Agendas 80
Oral items 81
Minutes 81
Meetings 81
Chairs of meetings 81
Attendance of Ministers 81
Quorum 82
Attendance of officials and visiting dignitaries at Cabinet 82
Attendance of officials at Cabinet committee meetings 82
Financial matters and Cabinet 83
Government spending 83
The Budget cycle 83
The Crown's financial veto 84
Impact analysis for regulatory proposals 84
Constitutional issues and Cabinet 84
International treaties and Cabinet 84
Referral to Cabinet of decisions taken outside the Cabinet process 85
Secretary of the Cabinet and the Cabinet Office 85

6 Elections, Transitions, and Government Formation 87
Introduction 87
The electoral cycle 87
General 87
Cabinet and Ministers' decision-making before and after an election 88
Pre-election period 88
Transitions following an election 89
General 89
Outcome of elections 90
Caretaker convention 90
General 90
Principles of the caretaker convention 90
Two arms of the convention 90
Unclear outcome 91
Clear outcome 92
Decision-making process under the caretaker convention 92
Departments and other state sector agencies 92
Day-to-day administration 92
Departments 92
Crown entities, state-owned enterprises, and other state sector agencies 93
Ministerial decisions 93
Coordination and the Prime Minister's role 93
Guidance on decisions about expenditure and the Official Information Act 1982 93

Government formation 94
General 94
Principles and processes of government formation 94
Outgoing Ministers 94
Appointment of a new government 95
Mid-term transitions 95
General 95
Mid-term change of Prime Minister with no change of government 95
Mid-term change of government 96
Early election 96
Provision of information by the state sector during transitions 96

7 The Executive, Legislation, and the House 99
Introduction 99
Speech from the Throne 100
Prime Minister's statement 100
Government legislation programme 100
Purpose of the legislation programme 100
Confidentiality 101
Development of the legislation programme 101
Monitoring the legislation programme 101
Legislation Coordinator 101
Revision Bills 102
Law Commission work programme 102
Development and approval of bills 102
From policy to enactment 102
Process for developing bills 103
Assessing the need for legislation 103
Consultation 104
Effective and appropriate consultation 104
Ministerial colleagues 104
Caucus(es) 104
Political consultation 104
Inter-agency consultation 105
Ministry of Justice 105
Regulatory Quality Team, the Treasury 105
Portfolios and the administration of legislation 105
Legislation Design and Advisory Committee 105
Officers of Parliament 106
Clerk of the House of Representatives 106
Organisations outside the state services 106
Consultation timeframes and processes 107
Drafting legislation 107
Role of the drafter 107
Drafting instructions 107

Consideration by Cabinet Legislation Committee and Cabinet 108
Reference to caucus(es) 108
Consultation with non-government parliamentary parties 109
Compliance with legal principles and obligations 109
Omnibus bills 110
Policy changes to a bill after introduction 110
Non-government legislative proposals 111
Regulations 112
Authority to make regulations 112
Scrutiny of regulations 112
Planning for the development of regulations 113
Process for developing regulations to be made by Order in Council 113
The 28-day rule 114
Publicising new regulations 115
Ministers and the House 115
Questions for oral or written answer 116
Ministers and select committees 116
General 116
Consideration of bills 117
Submissions on bills by departments 117
Government responses to reports of select committees 118
Parliamentary treaty examination 118
General 118
National interest analysis 118
Select committee consideration 119
Related legislation 119
Further information 119
Crown's financial veto 120
Citizens initiated referenda 120

8 Official Information and Public Records 123
Introduction 123
Information held by government 123
Security classification of government documents 124
Improper release or use of information held by the government 124
Unauthorised release of information 124
Exploitation of information for private gain 124
Information about commercial entities 125
Proactive release of information, including Cabinet material 125
Official Information Act 1982 126
Purpose of the Act 126
What is official information? 126
Complying with the Official Information Act 127
Informal advice and training 128
Requests for Cabinet material under the Official Information Act 128

Security classifications and endorsements and the Official Information Act 129
Consultation on Official Information Act requests 129
Undertaking consultation 129
Consultation by Ministers 129
Consultation between departments 129
Departments' consultation with Ministers 130
Coordinating Official Information Act requests 130
Charging for official information 131
Review of decisions to withhold official information 131
Conduct of the review 131
Ombudsman's recommendation 131
Privacy Act 1993 132
Purpose of the Act 132
Compliance 132
Ministerial access to and use of personal information 132
Role of the Privacy Commissioner 133
Ombudsmen Act 1975 134
Providing information to select committees 134
Production or discovery of official documents in legal proceedings 135
Requests for parliamentary information 135
Ministers and Public Records 135
Creating and maintaining records 136
Management of records 136
Cabinet and Cabinet committee records 137
Departmental papers and files 137
Remainder of Ministers' papers 137
Deposit of Ministers' papers with Archives New Zealand 137
Assessing requests for public access to Ministers' papers 138
Records deposited by current Ministers 138
Ministers' papers deposited by former Ministers 138
Deposit of personal records 139
Disclosure and use of official information by former Ministers 139
Convention on access to Cabinet records of a previous administration 140
General 140
Documents covered by the convention 140
Incumbent Ministers 140
Former Ministers 141
Releasing Cabinet documents of a previous opposition administration 141

Appendix

Letters Patent Constituting the Office of Governor-General of New Zealand 1983 147

Index **157**

Foreword

The system of Cabinet government is an essential element of New Zealand's democracy. Cabinet provides the forum in which Ministers collectively consider, debate, and decide on the key issues facing the nation. The operations of Cabinet are not set out in legislation, but have evolved over time into the system we have today.

The *Cabinet Manual* is the primary authority on the conduct of Cabinet government in New Zealand. It documents Cabinet's procedure and provides authoritative guidance for Ministers, their offices, and those working within government. Successive governments have endorsed the *Cabinet Manual* as a principled and effective basis on which to operate.

Each iteration of the *Cabinet Manual* records incremental changes in the constitutional and administrative arrangements of executive government. For example, in this edition the guidance on Ministers and the House of Representatives has been updated, the text reflects amendments to legislation governing the operation of the State sector, and changes to Cabinet decision-making procedures and processes have been incorporated.

Cabinet has approved the content of the *Cabinet Manual*. I commend the new edition to all those working in government and encourage them to use it and follow the guidance it contains.

Rt Hon Bill English
Prime Minister

Preface

The *Cabinet Manual* has for many years been the authoritative guide to New Zealand's system of central government decision making. It is also a primary source of information on constitutional matters. Successive governments have recognised the need for guidance to provide the basis on which they will conduct themselves while in office. The *Cabinet Manual* fulfils this need. The endorsement of the *Cabinet Manual* is an item on the agenda of the first Cabinet meeting of a new government, to provide for the orderly recommencement of the business of government.

As has been acknowledged in earlier editions, while the *Cabinet Manual* has a venerable lineage it is not set in stone. One of its key strengths is that it is updated from time to time, and responds to and reflects changes and developments in political, administrative, and constitutional arrangements and language. Thus the content of this edition of the *Cabinet Manual* represents an orderly and continuous development of the conventions and procedures of Cabinet government.

The content of the 2008 *Cabinet Manual* has been thoroughly reviewed and updated in this edition. Some guidance, such as that concerning the relationship between Ministers and public servants, and the characteristics of coalition and support party government arrangements, has been clarified and expanded. Other guidance has been updated to reflect important contextual changes such as changes to the *Standing Orders of the House of Representatives*, the enactment of the Inquiries Act 2013, and the introduction of the CabNet system. The *Cabinet Manual* also encompasses guidance on matters not previously included, but on which the Cabinet Office regularly provides advice. For example, there are new sections on ministerial interactions with representatives from non-government or commercial organisations, the role of officials in the pre-election period, and Ministers and public records.

The *Cabinet Manual* focuses on principles. It provides guidance, rather than prescribing rules. Detailed guidance and information on Executive Council, Cabinet, and Cabinet committee processes is contained in the *CabGuide*, an online resource at www.dpmc.govt.nz/cabguide.

The review of the *Cabinet Manual* has been a significant task for the Cabinet Office over the past year. I would like to acknowledge and thank all those working in government, and in other agencies, who have contributed to the review, whether by revising existing text, or drafting new material. Particular thanks are due to the Cabinet Office team who coordinated the review project.

The *Cabinet Manual* is a valuable guide, not just for those working in or with executive government, but for anyone who has an interest in New Zealand's constitutional arrangements, and the systems and processes of executive government. I know that this latest edition will continue to be a key work of reference for all those with an interest in the good government of New Zealand.

Michael Webster
Secretary of the Cabinet and Clerk of the Executive Council

Updates and further guidance

The *Cabinet Manual 2017* is produced in book form and published online at www.dpmc.govt.nz/cabinet-manual.

The *Cabinet Manual* is reviewed periodically. Any updates required before the next review will be incorporated into the website version. Users of the *Cabinet Manual 2017* in book form are encouraged to check the website for updates regularly.

From time to time the Cabinet Office may issue Cabinet Office circulars to supplement or update guidance in the *Cabinet Manual*. The *Cabinet Manual 2017* refers to some current Cabinet Office circulars. These and other current circulars are available on the Department of the Prime Minister and Cabinet's website www.dpmc.govt.nz/cabinet-office-circulars.

Departments are encouraged to consult the *CabGuide*, available at www.dpmc.govt.nz/cabguide, for current guidance on Cabinet and Executive Council processes.

On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government

The Rt Hon Sir Kenneth Keith, 1990, updated 2008 and 2017

A constitution: What is it?

A constitution is about public power, the power of the state. It describes and establishes the major institutions of government, states their principal powers, and regulates the exercise of those powers in a broad way. While all constitutions have these general characteristics, each constitution is affected by the national character of the state it services.

The New Zealand constitution: Its main features

The New Zealand constitution is to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a constitutional monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand. The constitution must also be seen in its international context, because New Zealand governmental institutions must increasingly have regard to international obligations and standards.

The Constitution Act 1986

The Constitution Act 1986 is the principal formal statement of New Zealand's constitutional arrangements. The Act first recognises that the Queen – the Sovereign in right of New Zealand – is the Head of State of New Zealand, and that the Governor-General appointed by her is her representative in New Zealand. Each can, in general, exercise all the powers of the other.

The Act then deals with the Executive, the legislature, and the judiciary.

The provisions about the Executive emphasise its parliamentary character. Only Members of Parliament may be Ministers of the Crown, members of the Executive Council, and Parliamentary Under-Secretaries. One Minister may also act for another.

Parliament – the legislature – consists of the Sovereign and the House of Representatives. The members of the House are elected in accordance with the Electoral Act 1993. Each Parliament has a term of three years, unless it is earlier dissolved. The Governor-General has the power to summon, prorogue and dissolve Parliament. After each general election, Parliament is to meet within six weeks of the date fixed for the return of the writs.

The Constitution Act recognises that Parliament continues to have full power to make laws; a Bill passed by the House becomes law when the Sovereign or Governor-General assents to it.

The Constitution Act reaffirms the constitutional principles about parliamentary control of public finance: the Crown may not levy taxes, raise loans, or spend public money, except by or under an Act of Parliament.

The provisions about the judiciary also relate back to long-established constitutional principle. To enhance their independence, the Judges of the Supreme Court, the Court of Appeal and the High Court are protected against removal from office and reduction of salary.

Other major sources of the constitution

The other major sources of the constitution include:

- **The prerogative powers of the Queen** under which, for instance, the Queen issued the Letters Patent Constituting the Office of the Governor-General of New Zealand in 1983 and conferred her powers in respect of New Zealand on the Governor-General. The Queen appoints the Governor-General who, in general, exercises her prerogative powers. The Queen or Governor-General appoints and dismisses members of the Executive Council and Ministers of the Crown. Those powers are part of the common law. They exist independently of statutes, although statutes can, of course, limit or even supersede them.

- Other relevant **New Zealand statutes**, such as the State Sector Act 1988, the Electoral Act 1993, the Senior Courts Act 2016, and the District Court Act 2016, relating in turn to the three branches of government, as well as the Ombudsmen Act 1975, the Official Information Act 1982, the Public Finance Act 1989 and the New Zealand Bill of Rights Act 1990.

- Relevant **English and United Kingdom statutes**, such as Magna Carta 1297, the Bill of Rights 1688, and the Act of Settlement 1700 (regulating succession to the throne among other matters), all confirmed as part of the law of New Zealand by the Imperial Laws Application Act 1988. These statutes also regulate the relations between the state and the individual.

- Relevant **decisions of the courts**, for instance decisions upholding rights of the individual against the powers of the state, and determining the extent of those powers.

- **The Treaty of Waitangi**, which may indicate limits in our polity on majority decision-making. The law may sometimes accord a special recognition to Māori rights and interests such as those covered by Article 2 of the Treaty. And in many other cases the law and its processes should be determined by the general recognition in Article 3 of the Treaty that Māori belong, as citizens, to the whole community. In some situations, autonomous Māori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi of two parties negotiating and agreeing with one another is appropriate. Policy and procedure in this area continues to evolve.

- **The conventions of the constitution**, which in practice regulate, control and in some cases transform the use of the legal powers arising from the prerogative or conferred by statute. The most important conventions arise from the democratic character of our constitution. Constitutional conventions are of critical importance to the working of the constitution, even though they are not enforceable by the courts. In 1982, the Supreme Court of Canada summarised the constitutional position in that country in an equation: constitutional conventions plus constitutional law equal the total constitution of the country.

The underlying principle: Democracy

The Queen reigns . . .

This basic equation and the democratic character of the main conventions appear clearly in relation to the powers of the Queen and Governor-General under the law. Thus they may appoint Ministers and other holders of important offices (such as the Judges, the Defence Chiefs, the Ombudsmen, and the Controller and Auditor-General), they may dismiss them (following certain procedures), they may summon and dissolve Parliaments, they may assent – or not – to Bills passed through the House, and they may agree – or not – to proposed regulations and other decisions submitted to them by the Executive Council and Ministers.

. . . but the government rules . . .

The Queen and the Governor-General are free to take those steps as a matter of law. But, as a matter of convention, they do so only on the advice of the Prime Minister or Ministers who have the support of the House of Representatives – that is, on the advice of those who are elected by the New Zealand voters, and who belong to a party which has a majority in the House; or who are part of a coalition which has a majority; or who, as a minority, are accepted by the House as able to sit on the Treasury benches. There must always be a ministry (the government of the day) to advise the Queen or Governor-General.

. . . so long as it has the support of the House of Representatives

This convention of course incorporates its own limit – one that conforms with democratic principle. If the government loses the support of the House, or if the Prime Minister loses his or her support as the leader of that government, then the ministry or the Prime Minister is likely to change: another party or combination of parties may now have the support of the House, or a new leader may be identified as Prime Minister. Or the Governor-General may face a more difficult situation because the position in the House or the governing party is unclear.

Situations where the position is unclear were rare in New Zealand under the first past the post electoral system, but have been less rare since the introduction of the proportional representation electoral system. The essential principle in such situations continues to be that the Queen, as a constitutional monarch, or the Governor-General, as her representative, acts in accordance with the advice of the Prime Minister or Ministers who have the necessary support of the House of Representatives for confidence and supply (the money to fund the state's functions). Where that support is unclear, the Governor-General relies on the elected representatives in the House, and especially the party leaders, to clarify by way of public statement whether a party or grouping of parties has the support of the House to govern, or whether fresh elections will be required. In the meantime, the incumbent government continues in office, where necessary acting in accordance with the convention on caretaker government.

This is not to deny the important role of the Governor-General in the business of government. Practice and the Letters Patent indicate that the role includes being informed and consulted, and advising and warning Ministers. The office has central symbolic, unifying, and representative roles, as well as the important legal powers mentioned.

In a broad sense, it is the ministry or government of the day which governs. The members of the ministry as a whole have the support of the House and must take collective and individual responsibility for their decisions, the decisions that are taken in their name, and the measures they propose. That is the position in law and in convention. That responsibility and power to take decisions results from the electoral process and the political contest.

Real power and legal form

The decisions often take a legal form that departs from the practical and conventional reality; the decision taken in fact by Cabinet has then to be taken, as a matter of law, by the Governor-General in Council, the Governor-General or a Minister, as the law requires; or the Bill passed by the House through all its readings has to be assented to by the Governor-General to become law. The Cabinet, essentially a body established by convention, has no legal power; and the House acting alone has very limited powers to take decisions with full legal effect.

The role of political parties

Political parties provide a vital link between the people, Parliament, and the government. The competition for the power of the state, exercised by and through the House of Representatives, is a competition organised by and through political parties. It is party strength in the House after elections that decides who is to govern. It is the parliamentary party (or parties) with the support of the House (and the ability to maintain confidence and ensure supply) that provides the government.

The importance of political parties in our constitutional system is recognised in the Electoral Act 1993 and in the *Standing Orders of the House of Representatives*. It follows that parties' internal procedures, for instance in respect of the means of selecting their leaders and members of Cabinet, have an important practical effect on our governmental arrangements. The relationships between parties, including any agreements they may reach, have become more important under coalition and minority governments.

The role of the Prime Minister and Ministers

The Prime Minister is the head of government, chairs Cabinet and has a general coordinating responsibility across all areas of government. By constitutional convention, the Prime Minister alone can advise the Governor-General to dissolve Parliament and call an election, and to appoint, dismiss, or accept the resignation of Ministers.

Ministers constitute the ministry, or executive arm of government. Their powers rise from legislation and the common law (including the prerogative). Ministers are supported in their portfolios by the public service.

The role of the public service

The role of the public service is stated in some detail in legislation, particularly in the provisions of the State Sector Act 1988, the Public Finance Act 1989, and the Official Information Act 1982, as well as a great number of particular statutes. Constitutional principles and that legislation support four broad propositions (among others). Members of the public service:

- are to act in accordance with the law;
- are to be imbued with the spirit of service to the community;
- are (as appropriate) to give free and frank advice to Ministers and others in authority, and, when decisions have been taken, to give effect to those decisions in accordance with their responsibility to the Ministers or others;
- when legislation so provides, are to act independently in accordance with the terms of that legislation.

Public servants meet these obligations in accordance with important principles and values such as political neutrality, fairness, and integrity.

Independent powers of decision: statutory bodies

Members of the public service sometimes have independent statutory powers of decision, over which Ministers do not have control and for the exercise of which they are not responsible. Other parts of the broad state sector are not subject to ministerial control and responsibility in the same way that departments and their members usually are.

The bodies set up separately from government include regulatory agencies, providers of a wide range of services, state trading bodies, and supervisory, control, and advice agencies.

In establishing such bodies, over a very long period, Parliament has recognised and reaffirmed that much public power should not be concentrated. It should be allocated to distinct bodies with varying degrees of independence from the Executive. This separation and independence may help ensure, for instance, a judicial independence of decision, equitable distribution of funds, the pursuit of commercial profit and business efficiency, or effective and credible processes of independent scrutiny, supervision and advice.

Towards more open government

Over recent decades the processes of government have become more open. Notably, in 1982 the Official Information Act reversed the basic principle of the Official Secrets Act 1951: the principle now is that official information is to be made available to those seeking it unless there is good reason for withholding it. Such reasons relate to public interests such as the national security and law enforcement, and to private interests such as confidences and privacy. Underlying the principle are a number of purposes, including enabling the more effective participation of the people of New Zealand in the making and administration of laws and policies, and promoting the accountability of Ministers of the Crown and officials, with the consequence of enhancing respect for the law and promoting the good government of New Zealand.

The emphasis on greater transparency in decision making and policy development is also to be seen in the legislation governing the government's spending and fiscal policies (especially the Public Finance Act 1989), and in the operation of the parliamentary select committee processes.

Individuals, autonomy and majority rule

In a range of ways, individuals and communities participate directly in political and governmental processes important to them. There is for instance much emphasis in law and in practice on those exercising public power giving fair hearings to and consulting those affected by the exercise of that power. Also relevant is the enactment of the Citizens Initiated Referenda Act 1993.

A balance has to be struck between majority power and minority right, between the sovereignty of the people exercised through Parliament and the rule of the law, and between the right of elected governments to have their policies enacted into law and the protection of fundamental social and constitutional values. The answer cannot always lie with simple majority decision-making. Indeed, those with the authority to make majority decisions often themselves recognise that their authority is limited by understandings of what is basic in our society, by convention, by the Treaty of Waitangi, by international obligations and by ideas of fairness and justice.

The international context

Major changes in science, technology, communications, trade patterns, financial systems, population movement, the environment and many other matters of international concern mean that more and more law is made through international processes. The powers of national governmental institutions are correspondingly reduced. This has important consequences for national and international constitutional processes. Parliament has an opportunity to scrutinise and comment on the more significant international treaties before they are ratified by the Executive.

Changing the constitution

In theory, many parts of the constitution can be amended by legislation passed by a simple majority of the Members of Parliament. That power is, however, restrained by law, convention, practice, and public acceptance.

Some limits on constitutional change arise from the international obligations just mentioned.

Certain key elements of the electoral system can be amended only if the people approve it in a referendum, or if three-quarters of the Members of Parliament agree. The provisions thus protected concern the three-year term of Parliament, the membership of the Representation Commission, the division of New Zealand into general electoral districts, the voting age, and the method of voting. Accordingly, the amendments made in the last 50 years to these provisions have been made only following agreement between the major political parties in the House or, in the notable instance of the change to proportional representation, following a binding referendum (which had itself been preceded by an indicative referendum).

It is also accepted, at the level of convention, that those voting requirements also apply to any proposal to amend the protective provision. Similarly, *Standing Orders* provide that an entrenched provision should be adopted by the House only by the vote which would be required for the amendment or repeal of the provision being entrenched. The 1986 Constitution Act itself was enacted with general bipartisan support in the House. And recommendations to the House for new *Standing Orders*, in accordance with convention, are adopted by consensus in the Standing Orders Committee.

Other constitutional changes arise from legislation enacted in the regular way, such as the New Zealand Bill of Rights Act 1990, from decisions of the courts, from new prerogative instruments, and from changing practices (which may contribute to new conventions). Some matters are better left to evolving practice rather than being made the subject of formal statement. But such development, like other changes to the constitution, should always be based on relevant principle.

1
Sovereign, Governor-General, and Executive Council

Introduction

1.1 This chapter covers:

(a) the formal and constitutional aspects of the role of the Sovereign and the office of the Governor-General;

(b) the powers, membership, and meeting procedures of the Executive Council;

(c) the role of the Clerk of the Executive Council;

(d) the key elements of the New Zealand Royal Honours system and heraldry.

Sovereign of New Zealand

1.2 New Zealand is a constitutional monarchy. The Sovereign in right of New Zealand is the head of state of New Zealand, and is known by the royal style and titles defined in statute from time to time. Upon the demise of a Sovereign, the transition to the Sovereign's successor is immediate and automatic.

1.3 The Sovereign exercises certain powers and functions as the head of state, acting on the advice of New Zealand Ministers—the Prime Minister being the principal adviser. The appointment of the Governor-General and the conferral of Royal Honours are the principal examples of the matters in relation to which the Sovereign exercises powers. The Sovereign is able to carry out any of the functions delegated to or conferred by statute on the Governor-General.

References to "the Crown"

1.4 The expression 'the Crown' is used frequently in descriptions of New Zealand's current constitutional arrangements. The meaning of "the Crown" varies according to the context in which it is used. Generally, it describes executive government conducted by Ministers and their departments. It does not normally include organisations having their own corporate identities, such as state-owned enterprises.

Governor-General

Office of Governor-General

1.5 The Governor-General is the representative of the Sovereign in the Realm of New Zealand. The office of Governor-General is constituted by the Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (the Letters Patent). The Governor-General is appointed by the Sovereign of New Zealand, on the advice of the Prime Minister of New Zealand.

1.6 The Realm of New Zealand means the metropolitan state of New Zealand, together with its territories and associated states (the self-governing states of the Cook Islands and Niue; Tokelau; and the Ross Dependency—see clause I of the Letters Patent in the appendix).

Formal powers and functions of office

1.7 Through the Letters Patent, the Sovereign authorises the Governor-General to exercise, on the Sovereign's behalf, the executive authority of the Realm of New Zealand, except as may be otherwise provided by law. The Governor-General therefore plays an important role in many of the formal procedures associated with government.

1.8 In particular, the Letters Patent empower the Governor-General to:

(a) constitute and appoint various officers, such as members of Executive Council, the Prime Minister and other Ministers of the Crown, and diplomatic or consular representatives of New Zealand; and

(b) exercise the prerogative of mercy.

These prerogative powers may be governed or supplemented by statute.

1.9 The Letters Patent also constitute the Executive Council over which the Governor-General presides. See paragraphs 1.21 – 1.28 for information about the Executive Council.

1.10 The Constitution Act 1986 empowers the Governor-General to:

(a) summon, prorogue (that is, discontinue without dissolving), and dissolve Parliament; and

(b) assent to bills passed by the House of Representatives.

1.11 The Governor-General also exercises a range of statutory powers, including making statutory appointments. The Sovereign can exercise every power conferred on the Governor-General.

Royal prerogative

1.12 The royal prerogative is the discretionary power held by the Sovereign under common law. Most of the Sovereign's prerogative powers have been delegated to the Governor-General. The Sovereign has retained a number of prerogative powers, including the conferment of certain honours. See paragraphs 1.55 – 1.64 for details of the New Zealand Royal Honours system.

International role

1.13 At the invitation of the Prime Minister, the Governor-General undertakes a programme of international travel, representing New Zealand in the head of state role. In New Zealand, the Governor-General welcomes visiting heads of state and receives the credentials of foreign diplomats.

Exercising the powers and functions of office

1.14 The office of Governor-General is apolitical. By convention, the Governor-General avoids becoming involved in the party politics of government, despite having an integral role in the formal processes of government.

1.15 As members of the Executive Council, Ministers of the Crown are the Governor-General's responsible advisers. In exercising the powers and functions of office, the Governor-General, like the Sovereign, acts on the advice of those Ministers. This advice is tendered either in the forum of the Executive Council, or directly to the Governor-General by the Prime Minister or by another Minister of the Crown. By convention, the Governor-General acts on the advice of Ministers as long as the government of the day retains the confidence of the House of Representatives.

1.16 Similarly, the Governor-General acts on the advice of the Prime Minister as long as the government commands the confidence of the House, and the Prime Minister maintains support as the leader of that government.

1.17 The Governor-General is required by the Letters Patent to execute the powers and authorities of the office in accordance with the laws of the Realm or any part of the Realm.

1.18 In only a very few cases may the Governor-General exercise a degree of personal discretion, under what are known as the "reserve powers". Even then, convention usually dictates what decision should be made.

1.19 The Letters Patent require Ministers to keep the Governor-General fully informed about the general conduct of the government, and to furnish the Governor-General with all information the Governor-General may request on any matter relating to the government of New Zealand.

Administrator of the Government

1.20 If the Governor-General is temporarily absent from New Zealand, or is unable for any other reason to perform the functions of office, the Letters Patent provide for the Chief Justice to act as Administrator of the Government and to perform the functions of the Governor-General (see clause XII of the Letters Patent in the appendix). The Administrator also acts whenever the office of Governor-General is vacant. If the Chief Justice is not able to act, this function is performed by the next most senior judge of the New Zealand judiciary. Provisions concerning the powers of the Administrator are also contained in the Constitution Act 1986.

Executive Council

Powers

1.21 The Executive Council, which is constituted by the Letters Patent, is the highest formal instrument of government. It is the institution through which the government collectively and formally advises the Governor-General.

1.22 Action by the Governor-General in Council requires two elements:

(a) a recommendation by a Minister or Ministers (that is, a member or members of the Executive Council); and

(b) the advice and consent of the Executive Council that the Governor-General in Council act in accordance with the Minister's recommendation.

1.23 Orders in Council are the main method, apart from Acts of Parliament, by which the government implements decisions that require the force of law. Meetings of the Executive Council are called for the purpose of making such orders and carrying out other formal acts of state.

1.24 The submission of almost all items for consideration by the Executive Council must be authorised by Cabinet (see paragraphs 1.39 – 1.41).

Membership of Executive Council

1.25 The Governor-General presides over, but is not a member of, the Executive Council.

1.26 Following the formation of a government, the Governor-General appoints the Prime Minister-designate as a member of the Executive Council, and then signs his or her warrant of appointment as Prime Minister. For further information about government formation and the appointment of the Prime Minister, see paragraph 2.2 and paragraphs 6.42 – 6.53.

1.27 Once appointed, the Prime Minister advises the Governor-General on the appointment of the other members of the Executive Council. After the Executive Council has been appointed, a meeting of the Council is convened and the Council members take the oaths or affirmations prescribed in the Oaths and Declarations Act 1957.

1.28 Members of the Executive Council must be members of Parliament, as set out in the Constitution Act 1986 (with an exception in some transitional situations—see paragraph 1.31 and section 6 of the Constitution Act). Ministers derive their power to advise the Sovereign and the Sovereign's representative from their membership of the Executive Council. All Ministers of the Crown are therefore members of the Executive Council, whether or not they are members of the Cabinet. Parliamentary Under-Secretaries are not members of the Executive Council.

Resignations and dismissals of members of the Executive Council

1.29 Resignations and dismissals of members of the Executive Council and Ministers are effected by the Governor-General, acting on the advice of the Prime Minister. See paragraphs 2.18 – 2.20 for further information on resignation and dismissal.

1.30 Following a dissolution of Parliament, Ministers continue in office (subject to the legal requirement set out in paragraph 1.31) until the result of the general election and government formation negotiations are known and the next administration is ready to be sworn in. Members of the Executive Council and Ministers act in a caretaker capacity until the negotiations are complete. The convention on caretaker government is set out in paragraphs 6.21 – 6.40.

1.31 Members of the Executive Council and Ministers must vacate office within 28 days of ceasing to be members of Parliament. If a caretaker administration continues in office beyond this 28-day period, Ministers who are no longer members of Parliament must leave office at the end of the 28-day period. Their portfolio responsibilities will be either carried out by other Ministers under section 7 of the Constitution Act (see paragraph 2.21) or formally reassigned to other Ministers in the caretaker administration.

1.32 The transition between administrations, including the principles and processes concerning a change of Prime Minister, is covered further in chapter 6.

Clerk of the Executive Council

1.33 The Clerk of the Executive Council is formally appointed by the Governor-General by warrant under the Letters Patent, on the advice of the Prime Minister. The primary role of the Clerk is to provide impartial secretariat support for the Executive Council and associated support to the Governor-General and the Prime Minister.

1.34 The main functions of the Clerk of the Executive Council are to:

(a) advise on matters affecting the role of the Governor-General;

(b) provide, coordinate, and monitor official support and advice to, and consultation with, the Governor-General;

(c) provide a channel of communication and liaison between the government and the Governor-General and, if necessary, between party leaders and the Governor-General;

(d) facilitate, on behalf of the Governor-General, the constitutional processes of government that involve the Governor-General (particularly those associated with the transition between administrations—see chapter 6);

(e) attend meetings of the Executive Council in order to witness its proceedings and keep its records;

(f) countersign any proclamation, Order in Council, or other instrument made or issued by the Governor-General in Council;

(g) be responsible for the New Zealand Royal Honours system; and

(h) liaise with the Palace and the Sovereign as necessary.

The Clerk of the Executive Council may delegate any of the functions of the office.

1.35 The Clerk of the Executive Council is responsible directly to the Prime Minister and the Governor-General for servicing the Executive Council and providing such advice as may be required from time to time on constitutional matters.

1.36 The offices of the Secretary of the Cabinet and the Clerk of the Executive Council are usually held by the same person. The role of the Secretary of the Cabinet, and the appointment process for the Secretary/Clerk, are outlined in paragraphs 5.83 – 5.87.

1.37 Official communication with the Governor-General is conducted through Ministers' offices and the Clerk of the Executive Council. Departments should not usually deal directly with Government House.

Meetings of Executive Council

Items for consideration by Executive Council

1.38 Matters requiring Executive Council action include:

(a) regulations (which are made by Order in Council);

(b) other Orders in Council; for example, commencement orders (see paragraph 1.52) and certain local government orders;

(c) some proclamations;

(d) establishing a public inquiry under the Inquiries Act 2013; and

(e) various appointments, including chief executives of government departments.

The need for Executive Council action on a particular matter will be indicated in the relevant statutory provision by the words "in Council" (that is, "the Governor-General in Council" or "by Order in Council").

Preparing items for Executive Council

1.39 The Parliamentary Counsel Office is responsible for drafting most of the documents for the Executive Council.

1.40 The submission of almost all matters for consideration by the Executive Council must first be approved by Cabinet. Once Cabinet authorises the submission of a proposed item, the item will be submitted to the Governor-General in Executive Council (in most cases on the same day).

1.41 A few items, however, are drafted by the department concerned and are submitted directly to the Executive Council by the relevant Minister. In general, these are items that are not published in the legislative instruments series, items affecting only a particular local district, or items required to give effect to the determinations of statutory bodies. Technical requirements for Orders in Council that are submitted directly to the Executive Council are included in the information on the Executive Council in the *CabGuide*.

Meetings, quorum, and attendance

1.42 The Executive Council usually meets with the Governor-General after Cabinet on Monday afternoons in the parliamentary complex. The Clerk sends a notice of meeting to the members of the Executive Council. The agenda is distributed at the meeting.

1.43 For urgent matters, the Cabinet Office, with the relevant Minister's office, may arrange special meetings of the Executive Council at other times and at other venues.

1.44 The Letters Patent provide that in a situation of emergency or urgency, the Executive Council can meet in any way that allows all members to participate effectively during the whole of the meeting. This provision allows the Executive Council to meet by teleconference or videoconference, if necessary.

1.45 The Letters Patent provide that two members of the Executive Council, plus the presiding officer, constitute a quorum. When available to attend, the Governor-General presides over the Executive Council. When the Governor-General is not available, the most senior member of the Executive Council present at the meeting is the presiding officer.

1.46 Section 3A of the Constitution Act provides that the Governor-General may perform a function or a duty, or exercise a power, on the advice and with the consent of the Executive Council, if that advice and consent are given at a meeting that the Governor-General is unable to attend. The performance of the function or duty, or the exercise of the power, takes effect from the date of the meeting, once the Governor-General has signed the documents.

1.47 If the Governor-General is outside New Zealand, the Administrator of the Government presides, if available (see paragraph 1.20). Section 3A of the Constitution Act also applies if the Administrator is unable to attend an Executive Council meeting.

1.48 The Governor-General may wish to ask questions at the Executive Council meeting. For this reason, Ministers with items on the agenda should make a special effort to attend. If they are unable to do so, they must brief another Minister to represent them.

Confidentiality

1.49 Executive Council proceedings are confidential. When members of the Executive Council are appointed, they swear or affirm an oath under the Oaths and Declarations Act 1957 that they "will not directly nor indirectly reveal such matters as shall be debated in Council and committed to [their] secrecy".

Gazetting and entry into force

1.50 Laws should enter into force only after their publication. The exceptions to this important constitutional convention are matters of national security or great commercial or legal significance where time is an overriding factor. Accordingly, Orders in Council must be published as soon (and as widely) as possible. To satisfy this requirement, Orders in Council and other instruments made in Executive Council are notified in the *New Zealand Gazette*, which is the official journal of the government.

1.51 Orders in Council made at a Monday meeting will appear in the *New Zealand Gazette* the following Thursday. In a case where an Order in Council must enter into force before the next regular issue of the *New Zealand Gazette*, a special *Gazette* may be arranged (see the *CabGuide* for further information).

1.52 Orders in Council enter into force on the date stated on the order. For an order making regulations, this date should be no earlier than 28 days after the date of its notification in the *New Zealand Gazette* ("the 28-day rule"—see paragraphs 7.96 – 7.99). Even if the 28-day rule is waived, it is most unusual for regulations to enter into force any earlier than the day immediately following the Executive Council meeting. An Order appointing a day for an enactment to enter into force, known as a "commencement order", may, however, enter into force on the same day as that on which the order is made (see section 10(3) of the Interpretation Act 1999).

Announcement

1.53 The Governor-General or the Governor-General in Council may need to formally execute a decision to give effect to it (for example, an appointment decision). In such cases, Ministers should not pre-empt the outcome of this process by announcing that the decision has taken effect before the Governor-General has signed the necessary documents.

1.54 If it is necessary to announce a decision or an appointment before the Governor-General has signed the relevant documents, staff in the appropriate Minister's office should:

(a) advise staff at Government House in advance, as a matter of courtesy; and

(b) ensure that the wording of the announcement reflects the fact that the decision or appointment has not yet been formally effected (for example, "The Minister will today advise the Governor-General to appoint…").

New Zealand Royal Honours System

General

1.55 The New Zealand Royal Honours system provides a way for New Zealand to thank and congratulate people who have served their communities and to recognise people's achievements. Further information on all aspects of the honours system is available on the website of the Department of the Prime Minister and Cabinet's Honours Unit.

1.56 The New Zealand Royal Honours system comprises:

(a) the Order of New Zealand (ONZ);

(b) the New Zealand Order of Merit (NZOM);

(c) the Queen's Service Order (QSO) and its associated Queen's Service Medal (QSM);

(d) New Zealand Gallantry Awards;

(e) New Zealand Bravery Awards;

(f) the New Zealand Antarctic Medal (NZAM); and

(g) the New Zealand Distinguished Service Decoration (DSD).

1.57 Besides these core elements, the armed forces and uniformed services also have medals for their personnel, which those agencies administer. For a complete list of all the orders, decorations, and medals that are officially part of the New Zealand Royal Honours system, see the honours listed in the *New Zealand Order of Wear*, available on the Department of the Prime Minister and Cabinet's website.

1.58 New Zealand Royal Honours are conferred by the Sovereign on the advice of the Prime Minister. They are usually announced in regular honours lists on the New Zealand observance of the Sovereign's Birthday (the first Monday in June) and at the New Year (30–31 December). Gallantry and Bravery Awards are usually announced in special honours lists.

Administration

1.59 The New Zealand Royal Honours system is administered by the Honours Unit, which is part of the Cabinet Office. The Unit is also responsible for all matters relating to:

(a) use of the titles "The Right Honourable" and "The Honourable";

(b) acceptance of foreign honours by New Zealand citizens; and

(c) general honours policy, including establishment of new honours and awards.

Nominations

1.60 Any person may make a nomination for an honour by completing the appropriate nomination form and submitting it to either the Prime Minister or the Honours Unit. A Cabinet committee chaired by the Prime Minister considers all nominations for the regular honours lists, on the basis of a consolidated list of nominations prepared by the Honours Unit.

1.61 Honours nominations are accepted throughout the year, but the processing and consideration of nominations is likely to take at least six months preceding the announcement of an honours list (see paragraph 1.58).

1.62 Further information about the process for nominating someone for an award can be found on the Honours Unit's website.

New Zealand Royal Honours for non-New Zealand citizens

1.63 New Zealand citizens and citizens of nations of which the Queen is head of state are eligible to receive appointments to the Order of New Zealand, New Zealand Order of Merit, and the Queen's Service Order.

1.64 People who are not New Zealand citizens or citizens of nations of which the Queen is head of state are eligible to receive honorary appointments to the Order of New Zealand, New Zealand Order of Merit, and the Queen's Service Order. They may be nominated for these honours in the usual way.

"The Right Honourable" and "The Honourable"

1.65 The Queen approved rules regarding the use of the titles "The Right Honourable" and "The Honourable" in August 2010.

1.66 Before August 2010, the title "The Right Honourable" was associated with appointment to the United Kingdom's Privy Council. People entitled to use the title "The Right Honourable" who are also members of the Privy Council may use the letters "PC" after their name to denote this membership. New Zealand appointments to the Privy Council ceased informally from 2000, and formally from August 2010.

1.67 The 2010 rules provide that the title "The Right Honourable" (abbreviated to "The Rt Hon") is granted to, and may be used by, the Governor-General, the Prime Minister, the Speaker of the House of Representatives, and the Chief Justice. This entitlement is retained for life.

1.68 Members of the Executive Council and Judges of the High Court (including Judges of the Supreme Court and the Court of Appeal) are entitled to use the title "The Honourable" (abbreviated to "The Hon") while they hold office, if they do not already have the title "The Right Honourable".

1.69 On relinquishing office, or on retirement from office, the holders of the offices in paragraph 1.68 are eligible to be recommended for retention of the title for life. The Governor-General may approve the retention of the title under authority delegated by the Sovereign and on the advice of the Prime Minister.

1.70 Further information about the titles "The Right Honourable" and "The Honourable" is available from the Honours Unit.

Acceptance of foreign honours by New Zealand citizens

1.71 Commonwealth and other foreign governments or international organisations may on occasion wish to confer an honour on a New Zealand citizen. The Queen has approved rules relating to the acceptance and wearing of foreign honours by New Zealand citizens. These rules are available on the Honours Unit's website.

1.72 Enquiries should be directed to the Honours Unit or the Protocol Division of the Ministry of Foreign Affairs and Trade.

Heraldry

1.73 The granting, confirmation, and control of armorial bearings (coats of arms) and other heraldic devices fall within the Sovereign's prerogative as the "Fount of all Honour". Her Majesty's Lieutenants, in exercising this prerogative in New Zealand, are the Earl Marshal and the Kings of Arms (College of Arms).

1.74 Their representative in New Zealand is the New Zealand Herald of Arms Extraordinary to Her Majesty the Queen, who acts as the formal channel of communication with the College of Arms. All matters relating to heraldry, associated genealogical research, and registrations should be directed to the New Zealand Herald of Arms. As the New Zealand Herald of Arms is an independent officer, fees may be charged for services and advice.

1.75 The use of state, royal, and vice-regal emblems is protected by the Flags, Emblems, and Names Protection Act 1981. The Ministry for Culture and Heritage is responsible for the administration of this Act. The New Zealand Herald of Arms advises on matters relating to the use of such emblems where the proposed use requires consideration of heraldic matters.

1.76 For more information on heraldry and the role of the New Zealand Herald of Arms Extraordinary, see the Honours Unit's website.

Order of Precedence

1.77 The Order of Precedence is approved by the Sovereign. It indicates the relative precedence of constitutional office holders, public officials, and certain others, on state, official, and other important occasions. Hosts and organisers of official functions and events should consult the Order of Precedence for guidance on the placement of official guests for the purposes of presentation lines and seating.

1.78 The Order of Precedence is a guide to be followed as appropriate to the circumstances of the occasion. With the exception of the Sovereign and the Governor-General, the precedence of those listed varies from time to time and from national to local level, and depending on the nature of the occasion. Individuals not specifically included in the Order of Precedence may also be accorded precedence ahead of some office holders who are listed, where it is appropriate to the occasion. The relationship between the host and the guests and the requirements of courtesy, hospitality, and tikanga may override strict precedence.

1.79 The Order of Precedence is published on the Governor-General's website.

Related information

- The Letters Patent Constituting the Office of Governor-General of New Zealand 1983, incorporating the 1986 and 2006 amendments, are in the appendix.
- Information about the office of Governor-General, including background information, biographies, and speeches, can be found on the Governor-General's website, www.gg.govt.nz.
- Guidance about Executive Council procedures is set out in the *CabGuide*, at www.dpmc.govt.nz/cabguide.
- The *New Zealand Gazette* is available at www.gazette.govt.nz.
- Information about the New Zealand Royal Honours system is available from the Honours Unit or on the Unit's website, www.dpmc.govt.nz/new-zealand-royal-honours.
- Information about the New Zealand Herald of Arms Extraordinary is available on the Honours Unit's website, www.dpmc.govt.nz/new-zealand-royal-honours.
- Information about the Order of Precedence is available on the Governor-General's website, www.gg.govt.nz.

The guidance listed here was current at time of going to press. For updates, see the online version of this manual at http://www.dpmc.govt.nz/cabinet-manual.

2
Ministers of the Crown: Appointment, Role, and Conduct

Introduction

2.1 This chapter covers:

(a) the appointment and roles of the Prime Minister, Deputy Prime Minister, Ministers (including Associate Ministers, acting Ministers, and duty Ministers), Parliamentary Under-Secretaries, and Parliamentary Private Secretaries;

(b) standards of personal conduct and management of conflicts of interest for Ministers and Parliamentary Under-Secretaries;

(c) guidance for the handling of gifts received by Ministers and Parliamentary Under-Secretaries;

(d) key principles concerning travel by Ministers and Parliamentary Under-Secretaries.

Prime Minister

Appointment

2.2 The Prime Minister is appointed by warrant by the Governor-General. In making this appointment, constitutional convention requires the Governor-General to:

(a) act on the outcome of the electoral process and subsequent discussions between political parties. These discussions ascertain which party or group of parties appears able to command the confidence of the House of Representatives (expressed through public statements) and therefore has a mandate to govern the country; and

(b) act on the outcome of the political process by which the person who will lead the government as Prime Minister is identified.

Chapter 6 contains further information on government formation.

Role

2.3 The Prime Minister is the head of the government. The functions and powers of the Prime Minister have evolved over time. There is no statutory provision that constitutes the office of Prime Minister or defines its role.

2.4 The Prime Minister has several key constitutional roles. The Prime Minister is the principal adviser to the Sovereign and to the Sovereign's representative, the Governor-General, as long as the government commands the confidence of the House and the Prime Minister maintains support as the leader of that government.

2.5 By constitutional convention, formal communication with the Sovereign is a matter for the Prime Minister. The Prime Minister advises the Sovereign on substantive matters: for example, the appointment of a new Governor-General, amendments to the Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (the Letters Patent), and the conferment of royal honours.

2.6 The Prime Minister alone has the right to advise the Governor-General to:

(a) appoint, revoke, dismiss, or accept the resignation of Ministers;

(b) dissolve Parliament and call a general election.

2.7 The Prime Minister is also the head of executive government. This role includes the task of forming and maintaining a government, which, in a proportional representation system, will often involve working with other parties. The Prime Minister determines portfolio allocations and ministerial rankings, taking into account practical and political considerations.

2.8 The Prime Minister determines the title and scope of each portfolio—that is, the portfolio's area of operation; the legislation administered within the portfolio; the department(s), Crown entities, and other organisations reporting within the portfolio; and (where necessary) the relevant Vote(s) or appropriations within Votes.

2.9 As the chair of Cabinet, the Prime Minister approves the agenda, leads the meetings, and is the final arbiter of Cabinet procedure. The Prime Minister determines the terms of reference and membership of Cabinet committees.

2.10 The Prime Minister has an important role in maintaining and coordinating the government by overseeing the government's general policy direction.

2.11 The Prime Minister customarily has overall ministerial responsibility for national security and intelligence matters, and may also hold other portfolios.

2.12 The Prime Minister's ministerial and executive duties are separate from the leadership role in the Prime Minister's own political party and caucus.

Deputy Prime Minister

2.13 The Deputy Prime Minister is appointed by warrant. If the Prime Minister is unavailable or unable to exercise the statutory or constitutional functions and powers of the office, the Deputy Prime Minister can, if necessary, exercise those powers and functions.

2.14 As Acting Prime Minister, the Deputy Prime Minister may exercise other prime ministerial functions and powers, in consultation (where appropriate and practicable) with the Prime Minister.

Ministers

Appointment

2.15 The Letters Patent (see the appendix), issued under the Sovereign's prerogative power, empower the Governor-General:

> …to constitute and appoint under the Seal of New Zealand, to hold office during pleasure, all such Members of the Executive Council [and] Ministers of the Crown … as may be lawfully constituted or appointed by [the Sovereign].

2.16 In appointing Ministers, the Governor-General acts on the advice of the Prime Minister. Practical and political considerations, such as internal party rules or the terms of a coalition agreement, may affect the process by which the Prime Minister reaches decisions on the advice to be given to the Governor-General. The primary legal restriction, as set out in the Constitution Act 1986, is that all Ministers of the Crown must be members of Parliament (except in some transitional circumstances—see paragraphs 1.31, 6.49, and 6.52).

2.17 All Ministers must be appointed as members of the Executive Council before they are appointed as Ministers. The Governor-General signs a warrant of appointment for each member of the Executive Council, and separate warrants for each ministerial portfolio. Each member of the Executive Council must take the relevant oaths or affirmations set out in legislation.

Resignation and dismissal

2.18 The Governor-General formally effects a Minister's departure from office by accepting the Prime Minister's advice on the Minister's resignation or dismissal from, or the revocation of appointment to, both individual portfolios and the Executive Council. As in the appointment of Ministers, it is a constitutional convention that the Governor-General acts on the advice of the Prime Minister in dismissing Ministers, accepting their resignations, or revoking their appointments.

2.19 Prime Ministers have advised the dismissal of Ministers for various reasons. Procedurally, all that is required is for the Governor-General to execute an advice sheet that has been signed by the Prime Minister. The Prime Minister is not legally required to give grounds for dismissing a Minister.

2.20 Following a general election, irrespective of the outcome and even when the composition of the government has not changed greatly, it has been the practice for all Ministers from the outgoing administration to resign as Ministers and from the Executive Council. This formal process, which marks the end of the administration, takes effect at the time of the appointment of the new administration (see paragraph 6.48).

Legal power for Ministers to act for other Ministers

2.21 Section 7 of the Constitution Act provides that any function, duty, or power of any Minister of the Crown may be performed by any member of the Executive Council. (The exception is where the context requires otherwise; for example, see paragraphs 4.10 – 4.11 on the Attorney-General's law officer functions.) Section 7 of the Act provides flexibility in the way that ministerial functions are carried out. For example:

(a) if Ministers are overseas, unwell, or temporarily unavailable, other Ministers can act for them (including signing Cabinet papers and other official documents) (see paragraphs 2.41 – 2.45);

(b) if there is a temporary vacancy in a portfolio, the Prime Minister may ask a Minister to carry out the responsibilities of the portfolio until a formal appointment is made; and

(c) if a ministerial title (as specified in legislation) is discontinued, the Prime Minister may authorise a Minister with a different title to carry out all the ministerial functions and powers relating to the discontinued title as provided in that legislation (subject to any statutory provision preventing such a change) (see paragraph 2.34(d)).

Role and powers of Ministers

2.22 Collectively, Ministers direct the executive branch of government. Ministers:

(a) are members of the Executive Council (see chapter 1);

(b) formally advise the Governor-General—either individually, or collectively in the context of the Executive Council (see chapter 1);

(c) take significant decisions and determine government policy collectively, through the Cabinet decision-making process (see chapter 5);

(d) exercise statutory functions and powers under legislation within their portfolios, in the collective Cabinet decision-making context (see chapter 5);

(e) determine both the policy direction and the priorities for their departments (see chapter 3);

(f) in most cases have financial responsibilities (see paragraphs 2.24 – 2.27);

(g) are supported by and (to varying degrees, depending on the nature of the entities concerned) direct officials in the state services and the wider state sector (see chapter 3);

(h) are members of Parliament (see section 6(1) of the Constitution Act) and are accountable to the House for their policies, their own performance, public spending, and the performance of entities within their portfolios; and

(i) have a political role in maintaining government stability, which requires maintaining close working relationships with all other parties as issues arise.

2.23 Ministers' powers are derived both from the common law powers of the Crown (including the prerogative) and from statute. Legislation may confer a power on a specified Minister or on the Minister authorised by the Prime Minister as responsible for administering the Act. See paragraph 2.34(d) for further information about ministerial responsibility for legislation.

Financial responsibility of Ministers

2.24 Portfolio Ministers in most cases have responsibility for appropriations in one or more Votes, which are administered on their behalf by their departments. Ministers seek authority from Parliament for their appropriations, each of which is limited by type, amount, scope, and period. Ministers are responsible for decisions on the spending from within these appropriations on:

(a) outputs provided by their departments, Crown entities, and other bodies;

(b) other operating expenses, such as social welfare benefits or official development assistance; and

(c) capital expenditure.

2.25 After the end of each financial year, Ministers are required to ensure information is presented to the House on what has been achieved with each appropriation for which they are responsible.

2.26 Under the Public Finance Act 1989, "responsible Ministers" are responsible to Parliament for the financial performance of the departments in their portfolios and for protecting the Crown's interest in those departments. Similarly, under the Crown Entities Act 2004, "responsible Ministers" are responsible for the Crown's interests in, and relationship with, Crown entities in their portfolios (see paragraphs 3.35 – 3.38).

2.27 Some departments administer only one Vote and report to only one Minister. For these departments, the Minister responsible for the appropriations administered by the department and the responsible Minister for the department are likely to be the same Minister. For more information on the public finance system, see *A Guide to Appropriations* and *The Responsibilities of an Appropriation Administrator* on the Treasury's website.

Cabinet Ministers, Ministers outside Cabinet, and Ministers of State

2.28 The Prime Minister determines the size and membership of Cabinet. Although all Ministers are members of the Executive Council (see chapter 1), they are not usually all members of Cabinet. Ministers who are members of Cabinet attend Cabinet meetings. They are members of one or more Cabinet committees, and may attend others when relevant.

2.29 Ministers outside Cabinet have full legal powers as Ministers, and may be appointed to full portfolios. They have the same role, duties, and responsibilities as Ministers inside Cabinet, and are also bound by the principle of collective responsibility (see paragraphs 5.24 – 5.31). They do not attend Cabinet, but, with the agreement of the Prime Minister, may attend for particular items relating to their portfolio interests. They are usually members of one or more Cabinet committees, attending other committees where relevant.

2.30 Ministers inside or outside Cabinet may be appointed to full portfolio positions or they may be appointed as Ministers of State without portfolio responsibilities. The Prime Minister may assign Ministers of State a range of roles and responsibilities, which they may carry out as Ministers or Associate Ministers.

2.31 For more information about the operation of Cabinet and Cabinet committees, see chapter 5. For information about Associate Ministers, see paragraphs 2.35 – 2.40.

Ministerial portfolios

2.32 The Prime Minister determines the allocation of portfolios to Ministers, taking into account various matters (including political considerations, particularly in a coalition or support party context). The Prime Minister also decides on portfolio titles. There are no precise rules governing the application of portfolio titles; their use varies between administrations.

2.33 Each Minister generally holds more than one position and may, for example, be the Minister in one portfolio and an Associate Minister in another. Full portfolio appointments are made by warrant signed by the Governor-General. The Prime Minister may allocate other ministerial responsibilities (including those given to Associate Ministers) by letter.

2.34 The Cabinet Office maintains four directories containing information about ministerial portfolios. All four directories are available on the website of the Department of the Prime Minister and Cabinet.

(a) The *Ministerial List* issued under the authority of the Prime Minister lists Ministers in order of their rankings and sets out their portfolio and other ministerial responsibilities.

(b) The *Directory of Ministerial Portfolios* sets out, for each portfolio, the Minister's title, the relevant departments, Crown entities, and other organisations, the Votes or appropriations within Votes, and the legislation administered within the portfolio.

(c) The *Schedule of Responsibilities Delegated to Associate Ministers* is presented to the House from time to time. This schedule sets out defined responsibilities formally delegated to Associate Ministers, and may include responsibilities allocated to Parliamentary Under-Secretaries (see paragraphs 2.37 and 2.50).

(d) The *Register of Assigned Legislation* lists various Acts of Parliament and the Ministers (and/or departments) to whom they have been assigned. Modern statutes do not usually specify which Minister may exercise the functions and powers conferred by the Act; instead they define "the Minister" (and/or department) for the purposes of the Act as the Minister (and/or department) authorised by the Prime Minister to be responsible for administering the Act. The *Register of Assigned Legislation* is not a complete list of the Acts administered in each portfolio or by each department; this is found in the *Directory of Ministerial Portfolios.*

Associate Ministers

2.35 The Prime Minister may, by letter, assign responsibilities to Associate Ministers. Associate Ministers assist portfolio Ministers in carrying out tasks relating to their portfolios. Any statutory powers or functions that they exercise on behalf of the portfolio Minister are exercised under the authority of section 7 of the Constitution Act. Associate Ministers are members of the Executive Council and, in most cases, have other ministerial portfolios in their own right. Associate Ministers, whether inside or outside Cabinet, are bound by the principle of collective responsibility (see paragraphs 5.24 – 5.31).

2.36 The control of a portfolio always rests with the "portfolio" or "principal" Minister. When an Associate Minister is appointed to support a portfolio Minister, the principal Minister must provide a formal letter clearly setting out the role of the Associate Minister in the portfolio, any delegated responsibilities, and the relevant working arrangements. The Prime Minister, through the Secretary of the Cabinet, must be consulted on each letter before it is finalised. Once the proposed delegation has been approved by the Prime Minister and the letter has been finalised, the portfolio Minister provides copies to the Secretary of the Cabinet and to the chief executive of the department or departments concerned.

2.37 Delegations to Associate Ministers are set out in a schedule of delegations compiled by the Cabinet Office. The schedule is available on the website of the Department of the Prime Minister and Cabinet. The schedule is also presented to the House of Representatives (so that, for example, parliamentary questions can be directed to the appropriate Associate Ministers for answer).

2.38 Associate Ministers should take particular care to avoid making public statements or taking initiatives of any sort without the knowledge and approval of their portfolio Minister. The delegation letter generally sets the parameters of the Associate Minister's communication with departments. Associate Ministers should ensure that the parameters are respected.

2.39 Associate Ministers may submit papers to Cabinet committees or Cabinet within their designated area of responsibility, provided that the paper clearly indicates that the portfolio Minister agrees with the submission of the paper.

2.40 Associate Ministers who are not already members of a Cabinet committee in their own right may attend the committee to take through a paper submitted by the appropriate portfolio Minister, with the approval of that Minister and the committee chair. If a committee is considering an item that is relevant to an Associate Minister's own responsibilities, the Associate Minister will receive the relevant papers and may attend the meeting.

Acting Ministers

2.41 Sometimes a Minister will be absent overseas, or otherwise temporarily unavailable to perform official duties. In such a case, the Minister will ask another Minister or Ministers to act in his or her place under the authority of section 7 of the Constitution Act (see paragraph 2.21). The acting Minister will control the portfolio until the portfolio Minister returns to official duties. Special considerations apply in the case of an Acting Prime Minister (see paragraph 2.14).

2.42 Similarly, if an unforeseen temporary vacancy occurs in a portfolio or the Minister is unexpectedly incapacitated, the Prime Minister may appoint a Minister to act in the portfolio until a formal appointment is made, or until the Minister is able to return to ministerial duties.

2.43 In the case of a major portfolio, if an absence of more than a day or so is envisaged, the acting Minister should be a Minister inside Cabinet. There are no other particular requirements to take into account when choosing an acting Minister for a portfolio. Care is needed, however, when temporarily assigning a portfolio from one Minister to another, to ensure that potential conflicts between portfolio responsibilities are avoided.

2.44 If an Associate Minister is absent overseas, or otherwise temporarily unavailable to perform official duties, the portfolio Minister usually takes up any delegated responsibilities during the period of the Associate Minister's absence, unless arrangements have been made for another Minister to act as the Associate Minister during the period of absence.

2.45 Absent Ministers (particularly those travelling overseas) should in general leave the day-to-day management of their portfolios to the Ministers acting for them in their absence. Public statements, in particular, are usually best made by the acting Minister in New Zealand so that due account can be taken of the domestic context. If a significant matter arises during the portfolio Minister's absence, however, the acting Minister should consult the portfolio Minister if possible before taking ministerial action or making any public comment.

Duty Ministers

2.46 A "duty Minister" is assigned to deal with urgent issues requiring ministerial involvement during extended holiday periods, most notably Christmas and New Year, when many Ministers may be out of contact. The Prime Minister's Office prepares a roster of duty Ministers for such periods to ensure that a Minister is always available.

2.47 The duty Minister's role is to carry out urgent ministerial functions on behalf of absent colleagues under the authority of section 7 of the Constitution Act (see paragraph 2.21) and to act as the first point of contact for officials. The duty Minister should, where possible, contact the relevant portfolio Minister(s) before making a public statement, making a decision, or issuing instructions to officials. The duty Minister should contact the Prime Minister or Acting Prime Minister if:

(a) the portfolio Minister cannot be contacted; or

(b) the portfolio Minister considers that the matter needs consideration by a wider group of Ministers or at the Cabinet level.

Parliamentary Under-Secretaries

2.48 The Governor-General, under section 8 of the Constitution Act, may appoint any member of Parliament to be a Parliamentary Under-Secretary in relation to the ministerial office or offices specified in the warrant of appointment. The Governor-General appoints Parliamentary Under-Secretaries on the advice of the Prime Minister. Although they form part of executive government, Parliamentary Under-Secretaries are not members of the Executive Council, so they are not empowered to act for Ministers under section 7 of the Constitution Act.

2.49 Parliamentary Under-Secretaries are appointed to assist Ministers, and their authority derives solely from the Minister they are assisting (see section 9 of the Constitution Act).

2.50 The relevant Minister must give the Parliamentary Under-Secretary a formal letter clearly setting out the role of the Parliamentary Under-Secretary in the portfolio, any assigned responsibilities, and the relevant working arrangements. The draft letter must be approved by the Prime Minister through the Secretary of the Cabinet, and the Minister should provide copies of the final letter to the Secretary of the Cabinet and the chief executive of the department concerned. As for Associate Ministers, the letter should set out clearly the Parliamentary Under-Secretary's area of responsibility, including any limits on authority, on the ability to make public statements, and on the relationship with the department. Details of assignments to Parliamentary Under-Secretaries may be included in the *Schedule of Responsibilities Delegated to Associate Ministers* (see paragraphs 2.34(c) and 2.37).

2.51 As members of the Executive, Parliamentary Under-Secretaries are bound by the principle of collective responsibility (see paragraphs 5.24 – 5.31).

Parliamentary Private Secretaries

2.52 Parliamentary Private Secretaries are members of Parliament who may be appointed by the Prime Minister by letter to assist Ministers. Parliamentary Private Secretaries support the Minister by building relationships with relevant communities, representing the Minister at public events, delivering speeches on occasions when the Minister is not available, and assisting with administrative matters. They are not part of the Executive. They have no executive responsibilities and no policy, financial, statutory, or operational authority. They are not bound by the principle of collective responsibility.

Conduct, public duty, and personal interests

General

2.53 To protect the integrity of the decision-making process of executive government and to maintain public trust in the Executive, Ministers and Parliamentary Under-Secretaries must conduct themselves in a manner appropriate to their office. Accordingly, the guidance in paragraphs 2.55 – 2.106:

(a) explains the standards of personal conduct expected of Ministers;

(b) helps Ministers to identify personal interests that might be seen to influence their decision-making; and

(c) sets out options for managing conflicts of interest where necessary.

2.54 The guidance on conduct, public duty, and personal interests applies to all Ministers (inside and outside Cabinet) and Parliamentary Under-Secretaries. References to Ministers in this guidance include Parliamentary Under-Secretaries.

Conduct of Ministers

2.55 A Minister of the Crown, while holding a ministerial warrant, acts in a number of different capacities:

(a) **in a ministerial capacity**, making decisions and determining and promoting policy within particular portfolios;

(b) **in a political capacity** as a member of Parliament, representing a constituency or particular community of interest; and

(c) **in a personal capacity**.

2.56 In all these roles and at all times, Ministers are expected to act lawfully and to behave in a way that upholds, and is seen to uphold, the highest ethical standards. This includes exercising a professional approach and good judgement in their interactions with the public and officials, and in all their communications, personal and professional. Ultimately, Ministers are accountable to the Prime Minister for their behaviour.

2.57 Holding ministerial office is regarded as a full-time occupation and is remunerated as such. Accordingly:

(a) accepting additional payment for doing anything that could be regarded as a ministerial function is not permissible; and

(b) accepting payment for any other activities requires the prior approval of the Prime Minister.

Register of Pecuniary and Other Specified Interests of Members of Parliament

2.58 All members of Parliament are required to disclose certain assets and interests in an annual *Register of Pecuniary and Other Specified Interests of Members of Parliament*. The purpose of this register, administered by the Registrar of Pecuniary and Other Specified Interests of Members of Parliament, is to facilitate the transaction of business by the House by promoting the highest standards of behaviour and conduct by members, and thereby strengthening public trust and confidence in parliamentary processes and decision-making. The detailed requirements are set out in appendix B of the *Standing Orders of the House of Representatives* (the *Standing Orders*) and in the explanatory notes on members' financial interests provided to members by the Registrar (see also paragraphs 2.84 – 2.92 on gifts).

Ministers' interests

2.59 Additional requirements apply to Ministers' interests. Conflicts of interest may arise between Ministers' personal interests and their public duty because of the influence and power that Ministers exercise, and the information to which they have access, both in the individual performance of their portfolio responsibilities and as members of the Executive.

2.60 Ministers are responsible for ensuring that no conflict exists or appears to exist between their personal interests and their public duty. Ministers must conduct themselves at all times in the knowledge that their role is a public one; appearances and propriety can be as important as actual conflicts of interest. Ministers should avoid situations in which they or those close to them gain remuneration or other advantage from information acquired only by reason of their office.

2.61 The Cabinet Office, on behalf of the Prime Minister, supports Ministers in identifying and managing conflicts of interest that may arise in relation to their portfolios or other ministerial responsibilities. Accordingly:

(a) the Cabinet Office contacts all Ministers on appointment and provides them with a worksheet containing questions and guidance designed to prompt Ministers' thinking about a broad range of interests and possible areas of conflict, financial and non-financial;

(b) the Cabinet Office then meets each Minister for a confidential discussion about their worksheet and any issues that may arise;

(c) each year, following the publication of the *Register of Pecuniary and Other Specified Interests of Members of Parliament*, the Cabinet Office reminds all Ministers to review their interests in the light of their portfolio or other ministerial responsibilities, to consider any possible conflict issues, and to seek advice where necessary;

(d) the Cabinet Office is available during the year to provide guidance on any conflict issues that may arise, and on the acceptance of payments or gifts; and

(e) the management of any conflicts that are identified is agreed between the Prime Minister and the Minister concerned, with advice as required from the Cabinet Office.

2.62 Ministers themselves are responsible for proactively identifying and reviewing possible conflicts of interest, and ensuring that any conflicts of interest are addressed promptly by taking one or more of the measures set out in paragraphs 2.73 – 2.74.

Identifying conflicts of interest

Types of conflicts of interest

2.63 A conflict of interest may be pecuniary (that is, arising from the Minister's direct financial interests) or non-pecuniary (concerning, for example, a member of the Minister's family). A conflict of interest may be direct or indirect. Ministers must consider all types of interest when assessing whether any of their personal interests may conflict with, or be perceived to conflict with, their ministerial responsibilities.

Pecuniary interests

2.64 Pecuniary interests are financial interests such as assets, debts, and gifts. A pecuniary conflict of interest may arise if a Minister could reasonably be perceived as standing to gain or lose financially from decisions or acts for which he or she is responsible, or from information to which he or she has access. A pecuniary conflict of interest could, for example, relate to the value of land or shares that a Minister owns, or the turnover of a business in which a Minister has an ownership interest.

Interests of family, whānau, and close associates

2.65 A conflict may arise if people close to a Minister, such as a Minister's family, whānau, or close associates, might derive, or be perceived as deriving, some personal, financial, or other benefit from a decision or action by the Minister or the government. Ministers must therefore be careful not to use information they access in the course of their official activities in a way that might provide some special benefit to their family members, whānau, or close associates. Passing on commercially sensitive information, or encouraging others to trade on the basis of such information, may also breach the insider trading regime (see paragraphs 8.11 – 8.13). Such a breach may result in a significant fine or term of imprisonment.

2.66 Similarly, it may not be appropriate for Ministers to participate in decision-making on matters affecting family members, whānau, or close associates, for example, by:

(a) attempting to intercede on their behalf on some official matter;

(b) proposing family members for appointments; or

(c) participating in decisions that will affect the financial position of a family member.

2.67 Public perception is a very important factor. If a conflict arises in relation to the interests of family, whānau, or close associates, Ministers should take appropriate action (see paragraphs 2.73 – 2.74).

Association

2.68 Ministers do not act in isolation from their political, constituency, and community networks. Indeed, some Ministers are elected to Parliament because of their close association with and advocacy for particular interest groups. Participation in decision-making by such Ministers allows Cabinet to consider diverse viewpoints in reaching a collective decision.

2.69 Ministers should take care, however, to ensure that they do not become associated with non-governmental organisations or community groups where:

(a) the group's objectives may conflict with government policy;

(b) the organisation is a lobby group; or

(c) the organisation receives or applies for government funding.

2.70 Any possible conflict arising from association with a non-public body should be dealt with using the measures set out in paragraphs 2.73 – 2.74.

2.71 A conflict will not generally arise from a generic interest held as one of a class of persons or held in common with the public: for example, an interest in education issues where the Minister has school-age children, or an interest in issues affecting Māori where the Minister is Māori.

Managing conflicts of interest

2.72 Ministers must ensure that any conflicts of interest are addressed promptly. The Secretary of the Cabinet (and, where appropriate, the chief executive of the department concerned) should be kept informed of conflicts of interest as they arise. In addition, the Prime Minister should be advised in writing of conflicts that are of particular concern or that will require ongoing management. If in doubt about the appropriate course of action, Ministers should consult the Prime Minister or the Secretary of the Cabinet.

2.73 If a conflict between a Minister's portfolio responsibilities and a personal interest is substantial and enduring, it may be necessary to consider a permanent change to some or all of the Minister's portfolio responsibilities.

2.74 Most conflicts can be managed by taking one or more of the following measures, in consultation with, and on the advice of, the Cabinet Office.

(a) **Declaration of interest**: Where a Minister has a conflict of interest that arises during general decision-making (for example, at a meeting of Cabinet or a Cabinet committee), but the Minister does not have ministerial responsibility for the issue, a declaration of interest will generally be sufficient. Having declared the interest, the Minister should either withdraw from the discussion or seek the agreement of colleagues to continue to take part. The declaration of interest will be recorded. (Withdrawal from a Cabinet or Cabinet committee discussion on the grounds of conflict of interest does not absolve a Minister from collective responsibility for any decision resulting from the discussion.)

(b) **Not receiving papers**: A Minister's personal interest in an issue may mean that it is inappropriate for the Minister to receive official information on the issue. In this case, the Minister should instruct the Cabinet Office (and/or other officials, as appropriate) to ensure that the Minister does not receive official papers or reports about the issue.

(c) **Transferring responsibility to another Minister**: A Minister with a conflict of interest concerning a particular issue within his or her portfolio may, with the agreement of the Prime Minister, transfer responsibility for that issue to another Minister. In this case, the Minister with the conflict of interest should instruct officials to ensure that departmental briefings and papers on the issue are directed to the other Minister. The Minister with the conflict will also need to declare the interest if the matter is discussed at Cabinet or a Cabinet committee, and should consider whether it is appropriate to receive Cabinet or Cabinet committee papers on the issue, or to remain at the meeting.

(d) **Transferring responsibility to the department**: If a conflict arises in the Minister's portfolio concerning a minor issue, the Minister may be able to handle the matter without further difficulty by passing the issue on to the department. The Minister should take care to ensure, however, that there is no attempt to influence the department inappropriately. The Minister should declare the interest if the matter is discussed at Cabinet or a Cabinet committee. The Minister should also consider whether it is appropriate to receive Cabinet or Cabinet committee papers on the issue, or to remain at the meeting.

(e) **Divestment**: Where a conflict of interest is significant and pervasive, the Minister may need to divest himself or herself of the interest.

(f) **Blind trusts**: Ministers with complicated or extensive shareholdings may wish to consider placing their investments in a blind trust, as a precaution against inadvertent conflicts of interest.

(g) **Resignation from an organisation**: Where a conflict of interest arises from association with a non-governmental organisation, the Minister may need to resign from that organisation.

Conflicts of interest in the House

2.75 The *Standing Orders* require a member of Parliament who has a financial interest in an item of business in the House to declare that interest before consideration of the item. The member need not declare an interest that has already been disclosed in the *Register of Pecuniary and Other Specified Interests of Members of Parliament*. The *Standing Orders* define a financial interest as including an interest held by a member's spouse, partner, or dependent child. The Speaker can decide any dispute about whether a conflict exists. The rules are set out in the section entitled "Declaration of financial interests" in the chapter on general procedures in the *Standing Orders*.

2.76 Occasionally, a Minister may find that he or she has a conflict concerning a bill, or part of a bill, for which he or she has portfolio responsibility. The *Standing Orders* do not preclude a Minister who declares a financial interest (as defined in the *Standing Orders*) from moving motions relating to a bill of which he or she is in charge. Nonetheless, a Minister with any conflict concerning a bill for which he or she has portfolio responsibility may choose to arrange for another Minister to move formal motions relating to that bill. Any issue of this sort must be discussed in advance with the Prime Minister, the Leader of the House, and the relevant whip. The portfolio Minister must be absent from the House for another Minister to move the motions on the portfolio Minister's behalf, but may declare the conflict in a subsequent speech.

Constituency interests

2.77 A member of Parliament is always entitled to make representations to a Minister on an issue of concern in the member's electorate or an issue of general constituency concern.

2.78 Where a member of Parliament is also a Minister, but has no portfolio responsibility in the areas relating to the issue of interest to him or her as a member of Parliament, the Minister may make representations to the Minister with the portfolio responsibility. Ministers representing the concerns of constituents (or the concerns of other sectors of the community, for example in the case of list members) should be clear at all times, however, that they are acting in their capacity as members of Parliament (for example, by signing correspondence as a member of Parliament and not using ministerial letterhead).

2.79 Where the member also holds the relevant portfolio or is the Associate Minister, further measures, as set out in paragraphs 2.73 – 2.74, are likely to be needed to manage any possible conflict. If the matter is minor, the Minister may be able to pass it to the department. If the matter is more significant, the Minister may instead pass ministerial responsibility for it to another Minister.

2.80 Alternatively, the Minister may retain ministerial responsibility for the matter and ask another member of Parliament (for example, a local list member, the member from a neighbouring electorate, or a member with a particular interest in the issue) to represent the constituency on the matter.

2.81 As with all conflicts of interest, Ministers should exercise careful judgement about possible conflicts between their constituency interests and their ministerial roles. They need to be alert at all times to the possibility that a conflict might exist or be perceived to exist. The Secretary of the Cabinet is available to advise in cases of doubt.

Interactions with representatives from non-government or commercial organisations

2.82 In a democracy, everyone has the right to make representations to Ministers on matters that concern them. Ministers will receive a large number of requests for meetings with people and organisations seeking either to influence government policy, or to position themselves for providing services.

2.83 It is a valid and appropriate aspect of a Minister's role to engage with representatives of non-government and commercial organisations. Care should be taken, however, to avoid creating a perception that representatives or lobbyists from any one organisation or group enjoy an unfair advantage with the government.

Gifts

General

2.84 The *Standing Orders* require members of Parliament to disclose to the Registrar of Pecuniary and Other Specified Interests of Members of Parliament any gift received with an estimated market value of more than a prescribed amount (or more than one gift from the same donor in the period with a total value of more than the prescribed amount), and the name of the donor. This declaration includes hospitality and donations in cash or kind.

2.85 Ministers who receive gifts worth more than the prescribed value must not only disclose them in their annual (or initial) return to the Registrar, but must also relinquish them, unless they obtain the express permission of the Prime Minister to retain them. Any gift received by Ministers may be relinquished to the Parliamentary Service to arrange appropriate display or storage. Gifts that Ministers receive from close family members need not be relinquished.

2.86 If a Minister is sent an unsolicited gift that is returned to the donor before the Minister takes possession of it, the gift does not need to be declared. However, once the Minister takes possession of the gift, it must be declared in a return. If the gift is subsequently returned to the donor or donated to another person or organisation, this information can be noted in the Minister's return to the Registrar.

Gifts from foreign governments

2.87 In their capacity as representatives of the government, Ministers often exchange gifts during official government visits either in New Zealand or overseas. This is an accepted practice; a refusal to accept is likely to cause offence. Such gifts are more in the nature of gifts to the office than to the incumbent. If they are worth more than the prescribed value (see paragraph 2.84), they should be relinquished before or at the time of leaving office, unless the express permission of the Prime Minister is obtained to retain them (see paragraph 2.85). Overseas posts discourage foreign governments or organisations from offering expensive gifts to Ministers, because of the rules that apply to the acceptance of such gifts.

Gifts from non-government or commercial organisations

2.88 To avoid creating or appearing to create an obligation, gifts in cash or kind are not to be solicited or accepted from a commercial enterprise or any other organisation, either in New Zealand or overseas. An exception to this principle would be the acceptance of some small unsolicited token, such as a presentation made during a visit to a marae or a factory. If a Minister wishes to keep a gift worth more than the prescribed value, the Minister should seek the express permission of the Prime Minister to retain it, or pay full value for it. The gift still needs to be disclosed to the Registrar, although an explanatory note might be added.

2.89 Payment for air travel or accommodation may constitute a gift, and must be declared in the member's annual return. Where payment for air travel or accommodation is offered to a Minister, consideration should be given to whether it is appropriate instead for the government to pay for the air travel and accommodation, to avoid any potential or perceived conflict of interest.

Cultural gifts

2.90 Ministers are sometimes offered cultural gifts such as koha, mealofa, lafo, or quanxi. Cultural gifts are traditionally offered to honour and show respect for relationships, and reflect concepts such as service to others, reciprocity, hospitality, and responsibility.

2.91 Although cultural gifts may be offered to a Minister with the best of intentions, accepting such gifts may create a perception of a conflict of interest or attract accusations of "double dipping". Ministers should return gifts of cash immediately, with a respectful statement explaining that they honour the intent behind the gift, but that it is their job to serve, and that they are already well remunerated for their work.

2.92 Acceptance of other cultural gifts such as fine mats or food is unlikely to create the same perception problems. The guidance in paragraphs 2.84 – 2.85 should be followed in such cases.

Political party donations

2.93 Ministers, as members of Parliament, may accept political party donations. The fact that the Minister is accepting the money on behalf of the party must be made clear, however, and the Minister must pass the money on as soon as possible.

Speaking engagements, endorsements, and non-ministerial activities

Speaking engagements

2.94 Ministers receive many invitations to events and offers of speaking engagements. Ministers should consider carefully which invitations they will accept, and try to honour invitations from a variety of organisations.

2.95 Ministers often appear at conferences or other gatherings to explain and discuss government policies and plans. This is an integral function of government, for which the state would expect to meet expenses, and no appearance fee would be expected or accepted.

2.96 If an appearance fee or other personal payment for any non-ministerial activity is offered to a Minister, the Minister may accept it only with the agreement of the Prime Minister. Such a payment must be declared in the Minister's annual disclosure of pecuniary interests (see paragraph 2.58). Unsolicited payments should be returned. With the agreement of the Prime Minister, fees may be accepted and donated directly to a recognised charity, but must still be declared (with an explanatory note).

2.97 Where travel and accommodation expenses are incurred by a Minister undertaking non-ministerial activities, they may be met by:

(a) the organisers, in which case the travel and accommodation must be declared to the Registrar of Pecuniary and Other Specified Interests of Members of Parliament (subject to the exemptions in appendix B of the *Standing Orders*);

(b) the Minister personally; or

(c) the Crown, initially, in which case reimbursement must be made to a Crown bank account by the person or organisers concerned.

2.98 As senior members of political parties, Ministers are often asked to participate in fundraising activities for their parties, their own electorate organisations, or those of other members of Parliament. Any speaking or appearance fee the Minister receives must be donated to the political party and declared to the Registrar of Pecuniary and Other Specified Interests of Members of Parliament.

Endorsement of products, services, or organisations

2.99 No Minister should endorse in any media any product or service. Ministers may, however, appear in party political advertisements, or in non-political advertisements or announcements in the public interest (promoting, for example, water safety), where no fee would be expected or accepted.

2.100 When accepting an invitation to speak or appear at an event, a Minister should inform the organisation that it may not publicise the event, or use any photos taken of the Minister at the event, in any way that could be perceived as an endorsement of the organisation, its products, or its services.

2.101 In speeches, it is appropriate for a Minister to speak positively about the objectives and achievements of an organisation or business. It is not appropriate for a Minister to explicitly promote the organisation, or its products or services.

Charitable fundraising

2.102 Ministers may be approached to participate in events designed to raise funds for charitable purposes. In considering any request to assist with charitable activities, Ministers should consider the guidance in paragraphs 2.69 and 2.99 – 2.101, noting that charities often operate in a competitive environment. In particular, Ministers participating in any charitable fund-raising activities should be careful not to place, or appear to place, themselves under an obligation as a Minister to those from whom funds are sought.

Business and professional activities

2.103 Because they are expected to devote their time and talent to their official business, Ministers, while holding office, must not take any active part in the day-to-day management or operation of any business.

2.104 Provided no conflict of interest arises, Ministers are not required to dissolve any professional partnerships, allow practising certificates to lapse, or dispose of businesses. They may also continue to advise in relation to family trusts, or similar matters of personal interest.

Provision of references

2.105 Providing references is not a government or ministerial role: any reference will be a personal view provided by someone who happens to hold office as a Minister. Ministers should not, therefore, use ministerial letterhead for references. If asked to write a reference for a constituent, Ministers should do so in their capacity as a member of Parliament. Where the subject of the reference is known to the Minister in a personal capacity, for example as a family friend or acquaintance, the reference should be written on plain paper, using the Minister's home address.

Use of information after leaving office

2.106 Ministers must ensure that, after leaving office, they do not use any confidential or commercially sensitive information to which they have had access as a Minister in any way that affects their personal interests or the personal interests of their family, whānau, or close associates, while that information is not generally available to the public (see also paragraphs 8.11 – 8.13).

Government advertising and publicity guidelines

2.107 Governments have a responsibility to keep the public informed about important issues of the day. They may legitimately use public funds and resources for advertising and other publicity that explains their policies, informs the public of the government services available to them, or sets out the public's rights and responsibilities. Government advertising and publicity must be accurate, factual, and objective, and comply with all relevant legislation and government policies.

2.108 The *Guidelines for Government Advertising* (available on the website of the Department of the Prime Minister and Cabinet) assist Ministers and the state services in preparing advertising and publicity, and in the expenditure of public funds for this purpose. The State Services Commission is available to provide advice to the state services on the guidelines, particularly if conduct or integrity issues arise. The Office of the Controller and Auditor-General is also available to provide advice, particularly as to probity and financial management.

2.109 Members of Parliament (including Ministers) and all parliamentary political parties can access funding from Vote Parliamentary Service for communications related to parliamentary business. For parliamentary political parties, this funding is based on the number of seats they hold in the House. Guidance on the use of these funds is available on Parliament's website. Public funds may not be used to finance publicity for party political purposes except for election advertising provided for under the Broadcasting Act 1989.

2.110 Special considerations apply to government advertising during an election year (see paragraphs 6.9 – 6.11). The State Services Commission releases guidance to the state services in an election year, which includes guidance relating to advertising and other communication activities (see the State Services Commission's website).

Ministerial travel

Overseas travel

2.111 Overseas travel by Ministers or Parliamentary Under-Secretaries can provide important benefits to their portfolios and to New Zealand generally.

2.112 To ensure that their travel is approved properly and undertaken in an appropriate manner, Ministers must follow the principles set out in paragraphs 2.114 – 2.127, and the more detailed procedural guidance on the ministerial intranet and in the *CabGuide.*

2.113 This guidance applies to all Ministers (inside and outside Cabinet) and Parliamentary Under-Secretaries. References to Ministers include Parliamentary Under-Secretaries.

Purpose of travel

2.114 Ministers' travel should usually be for one or more of the following purposes relating to their portfolios:

(a) to attend specific conferences, meetings, or events;

(b) to familiarise themselves with specific issues; or

(c) to meet international obligations.

Approval of travel

2.115 Travel proposals require the preliminary approval of the Prime Minister. Ministers wishing to travel during a House sitting period will also need the agreement of the party whips. A Cabinet paper proposing the travel must subsequently be submitted to and approved by Cabinet (except for travel to Australia and the Ross Dependency in Antarctica, for which the Prime Minister's approval is sufficient). Ministers must seek the agreement of another Minister or Ministers to act for them during their proposed absence (see paragraphs 2.41 – 2.45). No commitments or understandings regarding overseas travel are to be entered into before the Prime Minister's preliminary approval is given.

2.116 Where there is any doubt about travel to a particular destination (for example, for international relations reasons), the request for the Prime Minister's approval must be supported by a recommendation from the Minister of Foreign Affairs.

2.117 When considering proposals for overseas travel by Ministers, the Prime Minister will take into account the number of Ministers overseas at any one time. Usual practice is for no more than four Ministers in Cabinet to be absent from New Zealand on official business at the same time, although the Prime Minister may approve exceptions to this limit in special circumstances.

2.118 The Ministry of Foreign Affairs and Trade coordinates arrangements for Ministers' official visits overseas, and circulates guidance from time to time concerning the support provided by New Zealand's overseas posts. Early contact with the Ministry of Foreign Affairs and Trade should be made through the office of the Minister of Foreign Affairs to ensure focused and coordinated programmes overseas. Ministers' offices should not contact overseas posts directly.

Travel costs

2.119 Any proposal that a Minister accept the payment of international airfares or other travel-related costs by another country or international organisation must be approved by the Minister of Foreign Affairs and the Prime Minister, and included in any related Cabinet paper.

2.120 Any proposals for bodies other than government organisations to fund any of the travel, accommodation, or other expenses incurred by Ministers should be assessed in the light of the guidance on the public duty and personal interests of Ministers. See in particular paragraphs 2.59, 2.63, and 2.64, and the guidance on gifts (paragraphs 2.84 – 2.89 and 2.96). The Secretary of the Cabinet is available for advice. The *Standing Orders* require members of Parliament to disclose to the Registrar of Pecuniary and Other Specified Interests of Members of Parliament the name of any person who contributed in whole or in part to the costs of travel or accommodation for each country other than New Zealand to which the member travelled.

Accompanying family members, staff, and officials

2.121 It may be appropriate for a Minister to be accompanied by a spouse, partner, or family member as a member of the official party. Approval is not given automatically; the Prime Minister will consider requests case by case. Requests should make it clear how the accompanying person's travel is proposed to be funded.

2.122 Ministers may be accompanied on overseas visits by staff from their own offices or officials from their departments. The number of accompanying staff must be kept to an absolute minimum, and should be determined in the light of the nature of the visit.

Reporting on overseas travel

2.123 Within a month of their return, Ministers must report to Cabinet on the achievements and outcomes of their overseas travel.

Personal travel overseas

2.124 Subject to parliamentary or portfolio requirements, and with the prior approval of the Prime Minister, Ministers may occasionally extend overseas visits outside the formal itinerary for personal reasons, provided no additional costs are incurred by the government as a result.

2.125 Ministers may make personal visits overseas if they obtain the Prime Minister's prior approval, which will be subject to obtaining leave to be absent from the House. Ministers must also obtain the agreement of another Minister or Ministers to act during such periods of absence (see paragraphs 2.41 – 2.45). The Cabinet Office should be advised of any such arrangements.

Visits by Leaders and Ministers from other countries

2.126 The Prime Minister and the Minister of Foreign Affairs should be consulted if a visit by a leader or a Minister from another country is proposed. Guidance about the arrangements for a visit by an overseas leader or Minister is available from the Visits and Ceremonial Office at the Department of Internal Affairs.

2.127 The New Zealand government does not usually offer payment of international airfares for leaders or Ministers from other countries who are visiting New Zealand, although it may provide some assistance with internal costs.

Travel within New Zealand

2.128 Details of the procedures and entitlements governing ministerial travel within New Zealand are set out on the ministerial intranet.

Related information

- Information on the composition of the current ministry and the scope of ministerial portfolios can be found on the Cabinet Office section of the Department of the Prime Minister and Cabinet's website, www.dpmc.govt.nz/cabinet-office. Documents include:
  - *Ministerial List*;
  - *Directory of Ministerial Portfolios*;
  - *Schedule of Responsibilities Delegated to Associate Ministers*; and
  - *Register of Assigned Legislation.*
- Information on appropriations and Votes is available on the Treasury website, www.treasury.govt.nz.
- Information about the *Register of Pecuniary and Other Specified Interests of Members of Parliament* is available on the Parliament website, www.parliament.nz.
- The *Standing Orders of the House of Representatives* are available on the Parliament website, www.parliament.nz.
- The *Guidelines for Government Advertising* are available on the website of the Department of the Prime Minister and Cabinet, www.dpmc.govt.nz.
- Access to the ministerial intranet is provided to Ministers and their staff by Ministerial and Secretariat Services in the Department of Internal Affairs.
- Guidance about overseas travel is set out in the *CabGuide*, www.dpmc.govt.nz/cabguide.

The guidance listed here was current at time of going to press. For updates, see the online version of this manual at www.dpmc.govt.nz/cabinet-manual.

3
Ministers of the Crown and the State Sector

Introduction

3.1 This chapter covers:

(a) the relationship between Ministers and the various organisations making up the public service, the state services, and the state sector;

(b) the standards of integrity and conduct expected throughout the state sector.

3.2 In this chapter, the term "officials" covers both employees within the public service and those of the wider state sector, except where the context signals that it covers employees in the public service only.

The public service, the state services, and the state sector

Public service

3.3 "Public service" is the term used to describe all public service departments listed in Schedule 1 of the State Sector Act 1988, and any departmental agencies listed in Schedule 1A of that Act. The public service is part of the executive branch of government.

State services

3.4 "State services" is the term used to refer to the broad range of organisations that serve as instruments of the Crown in respect of the Government of New Zealand. The state services consist of:

(a) the public service;

(b) other departments in the executive branch of government that are not part of the public service (such as the New Zealand Police, the New Zealand Defence Force, and the Parliamentary Counsel Office);

(c) four of the five categories of Crown entities:

- statutory entities, which comprise Crown agents, autonomous Crown entities, and independent Crown entities;
- Crown entity companies;
- school boards of trustees;
- Crown entity subsidiaries;

(d) various organisations listed in Schedule 4 of the Public Finance Act 1989 that do not warrant Crown entity status because of their nature or that of their operations, such as reserves boards, fish and game councils, and a number of trusts and other bodies;

(e) companies named in Schedule 4A of the Public Finance Act; and

(f) the Reserve Bank of New Zealand.

State sector

3.5 "State sector" is the common term for the organisations included in the annual financial statements of the government. The state sector is broader than the state services. The state sector includes:

(a) all the state services;

(b) organisations that are part of the legislative branch of government, such as the Office of the Clerk of the House of Representatives and the Parliamentary Service;

(c) the fifth category of Crown entities—tertiary education institutions and their Crown entity subsidiaries;

(d) offices of Parliament;

(e) state-owned enterprises, which are listed in Schedule 1 of the State-Owned Enterprises Act 1986; and

(f) mixed ownership model companies listed in Schedule 5 of the Public Finance Act.

Ministers and the public service

3.6 The formal relationship between Ministers and the public service is governed primarily by the State Sector Act and the Public Finance Act. The relationship is also governed by convention, key aspects of which are set out in this chapter.

Roles and responsibilities

3.7 Ministers decide both the direction of and the priorities for their departments. They are generally not involved in their departments' day-to-day operations. In general terms, Ministers are responsible for determining and promoting policy, defending policy decisions, and answering in the House on both policy and operational matters.

3.8 Ministers have a duty to give fair consideration and due weight to free and frank advice provided by the public service.

3.9 Officials are responsible for:

(a) supporting Ministers in carrying out their ministerial functions;

(b) serving the aims and objectives of Ministers by developing and implementing policy and strategy;

(c) actively monitoring the performance or condition of state sector organisations, government assets, and regulatory regimes within their Ministers' portfolios;

(d) informing Ministers of significant developments within their portfolios, and tendering free and frank advice; and

(e) implementing the decisions of the government of the day.

3.10 Officials must be politically neutral in their work, serving the current Minister in such a way that they will equally be able to serve any future holder of the office. This principle of political neutrality is central to the public service's ability to support the government of the day and any future government.

Ministers' relationships with chief executives

3.11 The main point of contact between the Minister and a department in the public service is the chief executive. Chief executives are responsible to their portfolio Ministers, under section 32 of the State Sector Act, for the:

(a) department's or departmental agency's carrying out the purpose of the Act;

(b) department's or departmental agency's responsiveness on matters relating to the collective interests of government;

(c) stewardship of the department or departmental agency, including of its medium- and long-term sustainability, organisational health, capability, and capacity to offer free and frank advice to successive governments;

(d) stewardship of assets and liabilities on behalf of the Crown that are used by or relate to the department or departmental agency, and of the legislation administered by the department or departmental agency;

(e) performance of the functions and duties and the exercise of the powers of the chief executive or of the department or departmental agency (whether imposed by any enactment or by the policies of the government);

(f) tendering of free and frank advice to Ministers;

(g) integrity and conduct of the employees for whom the chief executive is responsible; and

(h) efficient and economical delivery of the goods or services provided by the department or departmental agency and how effectively those goods or services contribute to the intended outcomes.

3.12 Chief executives are also responsible to their responsible Ministers for the financial management, performance, and sustainability of their departments under section 34 of the Public Finance Act. They advise appropriation Ministers on the efficiency and effectiveness of expenditure under both departmental and non-departmental appropriations administered by their departments.

3.13 Chief executives are responsible for matters relating to the employment of individuals within their department (see paragraphs 3.33 – 3.34). Chief executives, or other staff within the department, may also have independent statutory functions. While they are required to exercise these independently, chief executives should still keep Ministers informed as appropriate under the "no surprises" principle (see paragraph 3.22).

Accountability documents

3.14 Ministers are concerned not only with the short-term performance of their departments, but also with the capability of their departments to continue to deliver government objectives in the longer term. Ministers' priorities for departments and the standard of performance expected of their departments are specified in key accountability documents.

3.15 Accountability documents may include:

(a) one-year performance information, to be found for example in supporting information to the *Estimates of Appropriations;*

(b) medium-term performance information, found for example in information on strategic intentions and documents containing the information required by section 40 of the Public Finance Act;

(c) plans providing a medium-term perspective on departments in the context of their longer-term vision, such as four-year plans; and

(d) output plans agreed between the chief executive and the relevant portfolio Minister for each Vote the department administers when more detail is needed than that included in the supporting information to the *Estimates*.

Briefing for incoming Ministers

3.16 When a new Minister is appointed or a Minister assumes a new portfolio (whether after a change of government or during the term of a government), the chief executive of the department prepares a written briefing for the Minister. The briefing generally:

(a) describes the organisation and responsibilities of the department or agency, and any Crown entities or other state sector agencies within the portfolio, and specifies any decision-making that has been delegated to the chief executive;

(b) sets out the terms of reference, membership, and terms of office for all boards, commissions, tribunals, and so on, for which the Minister has responsibility;

(c) includes an account of major outstanding policy issues and the implementation of current programmes; and

(d) sets out details of pending decisions or action that will be required of the Minister, including recommendations for draft legislation (taking into account any coalition or support agreements, or pre-election undertakings).

3.17 The chief executive may give this briefing to the Minister after the announcement of the Minister's appointment, with the approval of the incumbent Prime Minister and with the knowledge of the incumbent Minister and the State Services Commissioner.

3.18 The written briefing should be tailored to the needs of the new Minister, and prepared in similar presentation and style to other departmental advice to the Minister. The level of detail included in this initial briefing will vary depending on whether the Minister concerned has had any prior involvement with the portfolio, and whether there has been a change of government.

3.19 While the briefing will be subject to the Official Information Act 1982, there is no presumption of public release. Whether a briefing is proactively released publicly is a matter for the Minister, not the department or agency, to decide.

3.20 The written briefing is the first part of an ongoing process of briefing the new Minister. Its purpose is to give the Minister sufficient information to meet his or her initial requirements. This initial briefing will need to be supplemented, over a number of weeks, with further written or oral briefings as required.

3.21 The State Services Commission has issued further guidance on the content of briefings for incoming Ministers (see the State Services Commission website).

Ministers and officials

3.22 The style of the relationship and frequency of contact between Minister and department will develop according to the Minister's personal preference. The following guidance may be helpful.

(a) In their relationship with Ministers, officials should be guided by the "no surprises" principle. As a general rule, they should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate.

(b) A chief executive should exercise judgement as to whether, when, and how to inform a Minister of any matter for which the chief executive has statutory responsibility. Generally a briefing of this kind is provided for the Minister's information only, although occasionally the Minister's views may be a relevant factor for the chief executive to take into account. In all cases, the chief executive should ensure that the Minister knows why the matter is being raised, and both the Minister and the chief executive should act to maintain the independence of the chief executive's decision-making process. The timing of any briefing may be critical in this regard. As a matter of best practice, briefings should be in writing or at least documented in writing.

(c) It would clearly be improper for Ministers to instruct their departments to act in an unlawful way. Ministers should also take care to ensure that any direction they give their chief executive could not be construed as improper intervention in administrative, financial, operational, or contractual decisions that are the responsibility of the chief executive.

(d) Ministers are ultimately responsible for setting the government's policy priorities and objectives and are accountable for them in the House. Chief executives must provide their Ministers with all the relevant information and advice to enable the Ministers to set these priorities and objectives. In providing this information and advice, chief executives must take into account the resources available to their departments and the need for stewardship of their departments' future capability.

(e) On a day-to-day basis a Minister will have contact with the senior officials best able to provide the necessary information or advice. Departmental staff and the Minister's office should keep the chief executive informed, at least in general terms, of any contact between the department and the Minister. This information helps to keep lines of communication and accountability between the Minister and the department clear.

(f) Ministers should exercise a professional approach and good judgement in their interactions with officials. Ministers must respect the political neutrality of the public service and not request that officials act in a way that would conflict with the state services' *Standards of Integrity and Conduct* (see paragraph 3.60).

(g) Ministers and departments need a clear shared understanding as to which of them is responsible for media or other public comment on particular issues.

(h) Ministers and senior officials are likely to benefit from ongoing discussion about strategy for the department, and the department's capability and performance.

(i) Ministers should bear in mind that they have the capacity to exercise considerable influence over the public service. Ministers should take care to ensure that their intentions are not misunderstood, and that they do not influence officials inappropriately, or involve themselves in matters that are not their responsibility. Particular care should be taken with officials who are unlikely to have frequent or direct contact with Ministers, who may be less familiar with the principles, conventions, and working guidelines that govern the interaction between the public service and Ministers.

3.23 Ministers should ensure that staff and advisers in their offices understand the principles governing the Minister's role and the Minister's relationship with public service officials and entities in the state sector. Like Ministers, staff and advisers in Ministers' offices must take care to ensure that they do not improperly influence matters that are the responsibility of others.

3.24 Ministers who wish to obtain information from, or the assistance of, a department other than one for which they are responsible should do so through the relevant portfolio Minister.

3.25 In addition to taking advice from the public service and other parts of the state sector, Ministers may take advice from other sources, including political advisers in their offices. Political advisers have an important role in supporting Ministers in their management of relationships with other political parties and of risk, and in negotiating support for policy and legislative initiatives.

3.26 A Minister may involve political advisers in policy development and other areas of work that might otherwise be performed within the Minister's department. The Minister and the chief executive must establish a clear understanding to ensure that:

(a) departmental officials know the extent of the advisers' authority; and

(b) proper accountability exists for results and financial requirements under the Public Finance Act.

Individual ministerial responsibility for departmental actions

3.27 Ministers are accountable to the House for ensuring that the departments for which they are responsible carry out their functions properly and efficiently. On occasion, a Minister may be required to account for the actions of a department when errors are made, even when the Minister had no knowledge of, or involvement in, the actions concerned. The question of subsequent action in relation to individual public servants may be a matter for the State Services Commissioner (in the case of chief executives), or for chief executives in the case of members of their staff.

Appointment and review of chief executives

3.28 The State Services Commissioner's role in appointing chief executives and the independence of chief executives in matters concerning their employees underpin the neutrality of the public service.

3.29 The process of selecting most public service chief executives is managed by the State Services Commissioner, in accordance with Part 3 of the State Sector Act. The Commissioner's recommendation is subject to confirmation by the Governor-General in Council, following consideration by Cabinet. Conditions of employment for chief executives are determined by agreement between the State Services Commissioner and the chief executive, but the Commissioner must consult the Prime Minister and the Minister of State Services before finalising the conditions.

3.30 The State Services Commissioner also has a role in managing the appointment process for a range of other chief executives and senior officers in the executive branch of the state services, beyond those for which the Commissioner has responsibility under the State Sector Act. These appointments include:

(a) Solicitor-General;

(b) Chief Parliamentary Counsel;

(c) Secretary of the Cabinet/Clerk of the Executive Council (see paragraph 5.87);

(d) Chief of Defence Force and senior defence appointments; and

(e) Commissioner of Police and senior police appointments.

3.31 The State Services Commissioner may assist in the appointment process for certain chief executives and senior officers in the legislative branch of the state sector (for example, the Clerk of the House of Representatives) if requested to do so by the Speaker.

3.32 The State Services Commissioner is also responsible under the State Sector Act for reviewing the performance of public service chief executives and their departments. Various statutory and other mechanisms also enable the Commissioner to carry out performance reviews in relation to the heads of other agencies including the New Zealand Police, the New Zealand Defence Force, the Parliamentary Counsel Office, the Parliamentary Service, and the Office of the Clerk of the House of Representatives.

Chief executives as employers

3.33 The public service is established on the principle of merit-based appointments. Chief executives act as the employing authority for the departments to which they have been appointed. Under section 33 of the State Sector Act, chief executives must act independently in matters such as the appointment, promotion, or disciplining of individual employees. They are not responsible to their Minister in such matters. Generally, the duty of independence and the obligation to act as a good employer will make it inappropriate for a chief executive to involve the Minister in any staffing matter.

3.34 In certain circumstances, chief executives may need to provide their Minister with a briefing on a staffing matter. In such situations, the chief executive should take into account the guidance set out in paragraph 3.22(a)-(c).

Ministers and Crown entities

General

3.35 Crown entities are legal entities in their own right. A decision to assign a government activity or function to a Crown entity indicates that the function should be carried out at "arm's length" from the government. As reflected in the definition of the state services in section 2 of the State Sector Act, Crown entities (except tertiary education institutions and their Crown entity subsidiaries) are, however, instruments of the Crown. Ministers, Crown entity boards, and monitoring departments participate in the governance of Crown entities in different ways.

3.36 Ministers play a key role in the governance of Crown entities and are responsible to the House for overseeing and managing the Crown's interests in, and relationships with, the Crown entities in their portfolios. Section 3 of the Crown Entities Act 2004 recognises that an accountability relationship exists between Crown entities, their board members, and their responsible Ministers on behalf of the Crown and the House of Representatives.

3.37 The Crown entity's board governs the entity's operations. A monitoring department is responsible to a portfolio Minister for monitoring Crown entities within that portfolio on the Minister's behalf. Memoranda of understanding can help clarify the respective roles of Ministers, Crown entities, and monitoring departments.

3.38 Detailed guidance on Ministers' roles and responsibilities in relation to Crown entities is set out in *Statutory Crown Entities: A Guide for Ministers*, published by the State Services Commission.

Role of Ministers

3.39 Ministers oversee and manage the Crown's interests in, and relationships with, the Crown entities in their portfolios, and carry out any statutory responsibilities conferred on them as Ministers.

3.40 The Minister's role and responsibilities are to:

(a) ensure (through the appointment of board members) that an effective board is in place to govern the Crown entity;

(b) participate in setting the direction of Crown entities, which may include setting the direction for multiple agencies in a sector;

(c) monitor and review Crown entity operations and performance; and

(d) manage risks on behalf of the Crown.

3.41 The Crown Entities Act (and other legislation that relates to particular Crown entities) sets out the extent of the control the Minister has over a Crown entity. The extent of this control depends on the entity's category and type, and whether it has any statutorily independent functions. For example, Crown agents and autonomous Crown entities must give effect to, or have regard to, any policy direction given by the relevant responsible Minister. Similarly, the remuneration of members of some Crown entities is set by Ministers in accordance with the fees framework applying from time to time to statutory and other bodies in which the Crown has an interest (see Cabinet Office circular CO (12) 6 *Fees framework for members appointed to bodies in which the Crown has an interest*).

3.42 A Minister with a Crown entity in his or her portfolio can require the Crown entity to enter into an output agreement whereby the Crown funds the entity or the Crown entity's services are paid for by fees and levies.

3.43 In some cases, a Minister may direct a Crown entity to follow a certain course of action. These powers of direction are likely to be used infrequently because other tools such as letters of expectation work well to convey Ministers' expectations.

3.44 The Minister of State Services' portfolio responsibility for the state services includes responsibility for Crown entities. Ministers should consult the Minister of State Services before Cabinet considers any proposal that could establish a new Crown entity. The Minister of Finance also has statutory responsibilities under the Crown Entities Act and should be consulted when appropriate.

Directions to support a whole of government approach

3.45 The Ministers of Finance and State Services may issue directions to support a whole of government approach under section 107 of the Crown Entities Act to specified categories or types of Crown entities as defined in the Act, or to a group of such entities. The purpose of such a direction is both to support a whole of government approach and (directly or indirectly) to improve public services. Any Crown entity to which a direction to support a whole of government approach is issued must give effect to the direction. Companies named in Schedule 4A of the Public Finance Act may be treated as a category of Crown entity for the purposes of such directions.

3.46 Where a direction to support a whole of government approach to achieve any of the purposes specified in section 107 is proposed, Cabinet's approval must be sought for:

(a) developing the direction and undertaking the consultation required by the Crown Entities Act; and

(b) issuing the direction, following consultation.

3.47 Further guidance on directions to support a whole of government approach is set out in Cabinet Office circular CO (13) 4 *Crown Entities Act 2004: Section 107 directions to support a whole of government approach*. This circular includes a checklist for proposals for directions to support a whole of government approach.

Role of Crown entity boards

3.48 A Crown entity's board governs the Crown entity, exercises its statutory powers and functions, and may delegate these powers and functions in accordance with section 73 of the Crown Entities Act. The board makes decisions about the entity's operations and appoints its chief executive (where applicable). For boards of statutory entities and Crown entity companies, a board's actions must be consistent with the Crown entity's objectives, functions, statement of intent, and any output agreement.

3.49 The board should maintain open communication with the Minister. The Minister, together with the board, has a strong interest in:

(a) clearly setting the direction of the Crown entity;

(b) ensuring that the entity achieves its objectives, as expressed in legislation and/or the entity's statement of intent;

(c) managing any risks to the Crown.

Role of monitoring departments

3.50 The Crown Entities Act provides for Ministers to participate in the process of monitoring Crown entities' performance against their strategic direction, as agreed with the Ministers and set out in their statements of intent. Each Crown entity has a monitor (usually the department in the relevant portfolio), which assists the Minister with appointing and maintaining an effective board, setting direction and performance expectations, and monitoring performance. In addition, monitors undertake other statutory functions on their own behalf, administering appropriations and legislation, tendering advice to Ministers, and undertaking any other activities required under statute. The monitor's role for statutory entities is set out in section 27A of the Crown Entities Act, and in section 88A for Crown entity companies.

Ministers and companies in the state sector

General principles

3.51 The relationship between Ministers and companies in the state sector differs from the relationship between Ministers and agencies in the state services. Although the nature of the relationship with a particular company will vary, some general principles are common to all.

(a) **Focus on policy not operations**: As in all areas of their portfolio responsibilities, Ministers should focus on government policy rather than day-to-day operations.

(b) **No product endorsement**: Ministers should not endorse any product or service offered by a company in the state sector (see paragraphs 2.99 – 2.101).

(c) **Avoidance of conflict between public duty and personal interests**: As in all areas of their portfolio responsibilities, Ministers should take care to ensure that no conflict exists or appears to exist between their public duty and their personal interests (see paragraphs 2.59 – 2.74).

(d) **Careful use of information**: Information relating to companies that are listed on the stock exchange must be treated with particular care to avoid breaches of the insider trading regime (see paragraphs 8.11 – 8.13).

State-owned enterprises

3.52 State-owned enterprises are owned by the government, through two shareholding Ministers—the Minister of Finance and one other, usually the Minister for State Owned Enterprises. Most state-owned enterprises are registered as companies and are bound by the provisions of the Companies Act 1993. All state-owned enterprises are required by the Act to operate as commercial businesses.

3.53 Every state-owned enterprise has a board of directors, appointed by shareholding Ministers, which takes full responsibility for running the business. The board of directors is accountable to the shareholding Ministers for the performance of the state-owned enterprise. The shareholding Ministers are responsible to the House of Representatives for the functions given to them by the Act or the rules of the state-owned enterprise.

3.54 The role of the shareholding Ministers is prescribed in the State-Owned Enterprises Act 1986. Their functions include:

(a) appointing directors;

(b) determining the amount of dividend payable;

(c) monitoring performance; and

(d) agreeing to, and presenting to the House, the state-owned enterprise's statement of corporate intent and annual report.

3.55 Most state-owned enterprises are subject to ministerial direction as to the content of the company's statement of corporate intent and the amount of dividend payable, in accordance with section 13 of the State-Owned Enterprises Act.

3.56 The Treasury provides the government with advice to enable the shareholding Ministers to hold boards of state-owned enterprises and other Crown companies accountable for their performance.

Integrity and conduct throughout the state sector

Principles of public service

3.57 Employees in the state sector must act with a spirit of service to the community and meet high standards of integrity and conduct in everything they do. In particular, officials must be fair, impartial, responsible, and trustworthy.

3.58 New Zealand's state sector is founded on the principle of political neutrality. Officials must perform their jobs professionally, without bias towards one political party or another. Officials are expected to act in such a way that their agency maintains the confidence of its current Minister and of future Ministers. This principle is a key element of impartial conduct. It provides the basis on which officials support the continuing process of government by successive administrations.

3.59 Advice given to Ministers must be honest and impartial, and include all relevant information. It must also be responsive to the priorities determined by the government of the day. Advice must be free and frank, and acknowledge any key information gaps, assumptions, risks, or connections to other matters. This will allow Ministers to take decisions based on the best available evidence and an appreciation of all the options and issues. Once policy decisions have been taken, departments are responsible for their effective implementation.

3.60 Ministers must uphold the political neutrality of the public service and not ask officials to act in any way which would conflict with their obligation of neutrality. Ministers may ask officials to provide them with factual or analytical material, but should not require them to offer comment or opinion on clearly political topics, such as policies mooted by other parties in Parliament. The State Services Commission issues advice about costing political parties' policies in its pre-election guidance.

3.61 Political advisers have a specific exemption from the political neutrality requirements. Otherwise, they are subject to the same standards of integrity and conduct as other state servants.

3.62 Employees in the state sector, including staff in Ministers' offices, should ensure that their personal interests or activities do not interfere with, or appear to interfere with, their obligation to serve the aims and objectives of their employer. They must seek to avoid situations where there could be a conflict, or the appearance of a conflict, between their personal interests and the interests of their employers.

3.63 Where a conflict or appearance of a conflict cannot be avoided, employees should advise their manager and actively work with their employer to establish processes and practices to deal with the issue appropriately.

3.64 For further information on conflicts of interest, see guidance from the State Services Commission and the Office of the Controller and Auditor-General.

Processes for upholding the principles of public service

3.65 The State Services Commissioner has a mandate to set minimum standards for integrity and conduct for much of the state services, including public service departments and most Crown entities.

3.66 The State Services Commissioner has issued a code of conduct for the state services, *Standards of Integrity and Conduct*, which is available on the State Services Commission website. Agencies within the state services must maintain policies and procedures that are consistent with the code of conduct. The Commissioner can vary the code to reflect the circumstances of particular agencies, or of any people undertaking particular functions in an agency.

3.67 Public service departments and agencies in the state services can seek advice and guidance from the State Services Commission on matters relating to the integrity and conduct of employees within the state services. The State Services Commission can advise on:

(a) compliance with the principles of public service; and

(b) the interpretation and application of the code of conduct for the state services, including advice on any particular cases of actual or potential conflict of interest.

3.68 Section 11 of the State Sector Act sets out the circumstances under which the State Services Commissioner may carry out statutory functions and powers in relation to any part of the state services that does not form part of the public service (subject to any legislative provision to the contrary). The Commissioner may act on the direction of the Prime Minister or another Minister, or at the request of the head of that part of the state services.

3.69 In relation to integrity and conduct beyond the state services, the State Services Commissioner has only the functions and powers that are specifically authorised by legislation. A Minister with portfolio responsibility for an agency in the wider state sector may therefore wish to clarify his or her expectations with the chair of the board of the agency at the beginning of their relationship. These expectations may include an understanding that the agency will observe appropriate standards of ethics and conduct equivalent to those set out in the code of conduct issued by the State Services Commissioner (see paragraph 3.66).

Public comment on government policy

3.70 Authorised spokespeople for departments may publicly explain government policy. Defending or justifying it is the Minister's role. If an official is approached to discuss advice given to a Minister, the "no surprises" principle applies, and ministerial agreement may be needed. Having provided advice that becomes public (such as impact statements or summaries), it is usually appropriate for a department rather than the Minister to take responsibility for responding to questions about the advice tendered. However, if the Minister chooses to comment publicly on the advice, officials should not generally respond to those comments in public.

3.71 Generally, public servants acting in a private capacity have the same rights of free speech and conduct of their private affairs as other members of the public. They should, however, ensure that their personal contribution to public discussion, including any on social media, maintains a level of discretion appropriate to the position they hold. Senior public servants, or those working closely with Ministers, need to exercise particular care.

Public servants' contact with the House of Representatives and political parties

Select committees

3.72 The select committee is the main parliamentary institution with which public servants have contact. Senior public servants regularly represent the Executive and support the government in terms of the government's accountability to the House of Representatives through select committees. The primary responsibility of officials is to their Ministers when they provide information or advice to select committees. Officials are subject to ministerial direction on answers to be given and information to be supplied to select committees.

3.73 The State Services Commission and the Office of the Clerk of the House of Representatives have issued detailed guidance on the relationship between officials and select committees (Officials and Select Committees – Guidelines, available on the State Services Commission's website, and Working with Select Committees, on the Parliament website). Officials should consult these guidelines before attending a select committee (either as an adviser or as a witness) or providing information to a select committee.

3.74 The House of Representatives must receive free and frank answers and evidence from those who appear before its committees. Parliamentary proceedings are protected by parliamentary privilege to ensure that those participating in them, including witnesses before select committees, do so without fear of external consequences. Officials from state sector agencies appear before select committees to support ministerial accountability, and their conduct must be consistent with this principle. Therefore, at a minimum, they have an obligation to manage risks and apply a "no surprises" approach in briefing their Ministers.

3.75 See paragraphs 7.108 – 7.122 for information on the role of Ministers in relation to select committees.

Caucus and caucus committees

3.76 Ministers may from time to time ask officials to attend a meeting of a caucus committee or caucus, particularly to support Ministers in briefing their colleagues about a current issue or proposed legislation. Requests from other sources for officials to attend caucus or caucus committee meetings must be relayed through the relevant Minister and should be accepted only with the Minister's agreement. The role of officials at these meetings is to provide factual information only. Officials should not comment on the merits of government or party proposals. See paragraphs 7.29 and 7.57 – 7.60 for information on the role of Ministers in relation to caucus(es) and caucus committees.

Supporting consultation and negotiation between political parties

3.77 Ministers are responsible for consultation and negotiation involving political parties represented in the House. On occasion, Ministers may call on officials to support them in this process. Ministers should instruct their officials clearly on the nature of the contact,

and on whether their role is to support a factual briefing or to support a process of consultation and negotiation. Any contact between an official and a representative of a political party should take place only with the prior approval of the official's Minister.

3.78 Special rules apply in the period leading up to and following an election, and particular care should be taken at these times (see chapter 6 and guidance on the State Services Commission website).

3.79 Information on the coalition and/or support agreements entered into by the parties forming a government is issued from time to time in a Cabinet Office circular. The circular sets out the practical arrangements for implementing any agreement, and provides guidance for Ministers, their staff, and officials on their respective roles and responsibilities in relation to the arrangements.

Private communications with Ministers and members of Parliament

3.80 Officials may communicate with Ministers and members of Parliament about matters affecting them as private citizens. Senior officials or those working closely with Ministers, however, should exercise particular care in doing so. An official is entitled to the same information and level of detail in response to an official information request as any member of the public.

3.81 If an employee wishes to communicate privately with a Minister about a matter concerning the agency by which he or she is employed, the Minister should ensure that the employee has first raised the matter with the agency's chief executive.

3.82 An employee may wish to disclose a serious wrongdoing in or by an agency under the Protected Disclosures Act 2000. A Minister may receive such a disclosure under the Act only if the employee has first followed the agency's internal procedures for such disclosures, or has disclosed the matter to the agency's chief executive or to an appropriate authority (as defined in the Act).

3.83 If, an employee having disclosed a serious wrongdoing, the matter has not been resolved to the employee's satisfaction, the Minister may:

(a) refer the matter to an appropriate authority or to the Ombudsman for consideration, if the Ombudsman has not already considered the matter; or

(b) where appropriate, commission an independent investigator to investigate the disclosure on the Minister's behalf.

Related information

- Information on Cabinet and Cabinet committee processes is set out in the *CabGuide,* www.dpmc.govt.nz/cabguide.
- Information on standards of integrity and conduct, political neutrality, briefings for incoming Ministers, contact between public servants and political parties, working with select committees, pre-election guidance, and board appointment and induction guidelines can be found on the State Services Commission website, www.ssc.govt.nz.
- The fees framework for members of statutory and other bodies appointed by the Crown is contained in Cabinet Office circular CO (12) 6 *Fees framework for members appointed to bodies in which the Crown has an interest*, and can be found on the Department of the Prime Minister and Cabinet's website, at www.dpmc.govt.nz/cabinet-office-circulars.
- Information on Ministers' relationships with Crown entities can be found in:
  - *Statutory Crown Entities: A Guide for Ministers*, State Services Commission, available at www.ssc.govt.nz;
  - Cabinet Office circular CO (13) 4 *Crown Entities Act 2004: Section 107 directions to support a whole of government approach,* www.dpmc.govt.nz/cabinet-office-circulars.
- The Office of the Auditor-General's publication *Managing Conflicts of Interest: Guidance for Public Entities* (June 2007) can be found on the website of the Controller and Auditor-General, www.oag.govt.nz.
- A guide for officials advising select committees, *Working with Select Committees,* is available on the Parliament website, www.parliament.nz.

The guidance listed here was current at time of going to press. For updates, see the online version of this manual at www.dpmc.govt.nz/cabinet-manual.

4
Ministers, the Law, and Inquiries

Introduction

4.1 This chapter covers:

(a) the role of the Attorney-General, including the law officer role;

(b) the relationship between Ministers and the judiciary;

(c) litigation involving Ministers, including judicial review and proceedings taken by or against a Minister personally;

(d) legal advice and professional privilege;

(e) inquiries.

Attorney-General

General

4.2 The Attorney-General is the principal legal adviser (the "senior law officer") to the government. The Attorney-General is a Minister and almost always a member of Cabinet. In Cabinet and Cabinet committee meetings, the Attorney-General gives legal advice and encourages ministerial colleagues to seek appropriate legal advice in the course of government decision-making. The Attorney-General should be consulted on policy papers that raise significant legal issues.

Role of Attorney-General

Law officer role

4.3 The Attorney-General has particular responsibility for maintaining the rule of law. The Attorney-General has a responsibility to notify Cabinet of any proposals or government actions that do not comply with existing law and to propose action to remedy such matters. The New Zealand Bill of Rights Act 1990 requires the Attorney-General to report to Parliament if a bill appears to be inconsistent with this Act.

4.4 The Attorney-General may take into account public policy considerations when exercising the law officer functions. By convention, however, the Attorney-General is not influenced by party political considerations, and should avoid appearing to be so influenced. Consequently, when acting in the law officer capacity, the Attorney-General is not subject to collective responsibility. The Attorney-General may seek the views of other Ministers, and they may volunteer their views.

4.5 The Attorney-General, as a Minister, whether inside or outside Cabinet, shares collective responsibility for the decisions of Cabinet that do not relate to the law officer role.

Legal proceedings involving the Crown

4.6 The conduct of legal proceedings involving the Crown is the responsibility of the Attorney-General. In practice, the Solicitor-General, the Crown Law Office, or departmental legal teams, acting on the Attorney-General's behalf, generally provide legal services to the portfolio Minister or the department involved in proceedings. The Attorney-General monitors litigation or prosecutions in which the Crown is involved, and informs Cabinet of progress.

4.7 The Attorney-General also has a role in advising Cabinet on the indemnity of individual Ministers involved in legal proceedings (see paragraphs 4.45 – 4.49).

Link between the judiciary and the government

4.8 The Attorney-General is the link between the judiciary and executive government. The Attorney-General recommends the appointment of judges and has an important role in defending the judiciary by answering improper or unfair public criticism, and discouraging ministerial colleagues from criticising judges and their decisions (see paragraphs 4.12 – 4.16).

Responsibility for agencies

4.9 The Attorney-General is answerable to the House of Representatives in relation to the agencies under the Attorney-General's control, such as the Crown Law Office and the Parliamentary Counsel Office.

Attorney-General's functions and section 7 of the Constitution Act 1986

4.10 When the Attorney-General is overseas, unwell, or otherwise temporarily unavailable:

(a) another Minister may exercise the Attorney-General's ministerial functions under section 7 of the Constitution Act 1986; and

(b) the Solicitor-General may exercise the Attorney-General's law officer functions under section 9A of the Constitution Act.

4.11 If necessary, an Acting Attorney-General may be appointed by warrant to exercise either the ministerial or the law officer functions of the Attorney-General, or both.

Comment by Ministers on judicial decisions

4.12 The separation of the Executive and the judiciary under New Zealand's system of government means that Ministers must exercise judgement before commenting on judicial decisions, whether generally, or in relation to the specifics of an individual case (for example, the sentence).

4.13 Ministers should not express any views that are likely to be publicised if they could be regarded as reflecting adversely on the impartiality, personal views, or ability of any judge. If a Minister has grounds for concern over a sentencing decision, the Attorney-General should be informed.

4.14 Following a long-established principle, Ministers do not comment on or involve themselves in the investigation of offences or the decision as to whether a person should be prosecuted, or on what charge. Similarly, they should not comment on the results of particular cases, on matters that are subject to suppression orders, or on any sentence handed down by a court. Ministers must avoid commenting on any sentences within the appeal period, and should avoid at all times any comment that could be construed as being intended to influence the courts in subsequent cases.

4.15 The *Standing Orders of the House of Representatives* (the *Standing Orders*) prohibit discussion in the House of matters that are awaiting judicial decision or that are the subject of a suppression order, subject to the discretion of the Speaker. The *Standing Orders* provide useful guidance on when to refrain from comment. The requirement for restraint applies to both civil and criminal cases.

4.16 Ministers may comment on the effectiveness of the law, or about policies on punishment (that is, on matters where the Executive has a proper involvement), but not where the performance of the courts is brought into question.

Crown legal business

4.17 CO (16) 2 *Cabinet Directions for the Conduct of Crown Legal Business* is available on the Department of the Prime Minister and Cabinet's website. These directions set out the processes to be followed when:

(a) Ministers seek legal advice or representation in matters concerning their portfolios; or

(b) a department requires legal services from outside its departmental legal staff.

4.18 All enquiries regarding the directions should be directed to the Crown Law Office.

Litigation involving Ministers

Judicial review

4.19 "Judicial review" is the review by a judge of the High Court of any exercise of, or non-exercise of, a decision-making power in order to determine whether or not the decision was lawful or valid. Most formal decisions taken by the executive arm of government (including Ministers), and the process by which they are reached, can be reviewed by a court. Ordinarily, a power that is the subject of review proceedings will be one that has been conferred on the decision-maker by statute.

4.20 On occasion, the courts will review the exercise of other public powers. In principle, all exercises of public power are reviewable, whether the relevant power is derived from statute, the royal prerogative, or any other source. However, the courts acknowledge that some exercises of public power are not suitable for judicial review because of their subject matter. The courts would be most unlikely to intervene in decisions about policy formation by the government of the day or involving political or fiscal considerations.

4.21 This does not mean that any decision having a policy context will be inappropriate for review if the Court considers some principle of public law decision-making has been breached. In addition, even if not appropriate for judicial review, a policy decision may be open to challenge in another forum, such as the Waitangi Tribunal.

4.22 The basic questions for judicial review are:

(a) has the decision-maker acted within the scope of the power or discretion conferred?

(b) has the decision-maker acted reasonably and fairly?

The courts are primarily concerned with the process of decision-making rather than the outcome or merits of the decision.

4.23 The most likely grounds for review of a ministerial decision are that, in making the decision in question, the Minister:

(a) acted outside the scope of the power or discretion;

(b) misinterpreted the applicable law;

(c) did not make up his or her own mind on the matter that he or she was called on by law to determine (acted "under dictation");

(d) took into account irrelevant considerations;

(e) failed to take account of relevant considerations; or

(f) did not act "fairly" in that he or she failed to hear from or consult with persons or groups who would be affected by, or otherwise had an interest in, the particular decision.

4.24 Generally, a decision will have been made following advice from officials, which is likely to touch on many of the above matters, and often those officials will be the key witnesses in judicial review proceedings. Where the Minister is required to make the final decision, however, the court will regard the Minister as the person who is ultimately responsible for ensuring that the decision is made reasonably, fairly, and according to law.

4.25 Referring any matter to Cabinet or a Cabinet committee when the Minister is acting under statutory authority must be handled carefully so that it is clear that the Minister is not asking Cabinet to make the decision. Paragraphs 5.34 – 5.38 contain detailed guidance about statutory decision-making in the collective context.

4.26 In almost all cases, litigants are given court-authorised access to the departmental papers on which decisions are taken (through the process of discovery). Officials should therefore prepare all submissions to Cabinet and Cabinet committees and any other policy advice assuming that the papers could be made public. The policy elements of a decision should be made clear. Inappropriate editorial comment, unnecessary subjective views, and other irrelevancies should be avoided in case they may be taken out of context in a way that would detract from an otherwise proper decision-making process. Similarly, Ministers should themselves ensure that any written comments they make—either on advice prepared for them by officials (including marginal notes) or on their own account—would be regarded as appropriate if later made public through court proceedings.

Production or discovery of documents and appearance in court by Ministers to give evidence

4.27 Requests to produce Cabinet or departmental papers to a court or other quasi-judicial body, or to give evidence in court or to another quasi-judicial body on official matters, usually take the form of a formal notice or order in existing proceedings. These documents are unlikely to be received by Ministers directly, as the Crown Law Office is generally authorised to accept service on a Minister's behalf.

4.28 Any Minister who receives such a request should refer it to the Attorney-General, who may consult the Solicitor-General on the question of whether public-interest immunity should be claimed. Public interest immunity is a term that applies to the protection of official information from disclosure where its disclosure would be injurious to the public interest (see paragraph 8.87).

4.29 Cabinet or departmental documents that are relevant to a legal proceeding are potentially subject to production or discovery. See paragraphs 8.86 – 8.89 for guidance.

4.30 If a Minister or government department considers that it is necessary to release any documents containing legal advice provided to the government, approval must first be obtained from the Attorney-General, through the Crown Law Office. This principle applies to documents containing legal advice from the Crown Law Office, internal legal advisers, or lawyers in private practice. See the guidance on legal and professional privilege in paragraphs 4.62 – 4.73.

4.31 In judicial review proceedings, the Court of Appeal has indicated that an affidavit from the relevant Minister may be desirable to ensure that the court has reliable evidence of the reasons why the Minister acted in a particular way. Cross-examination on an affidavit made by a Minister is unlikely to be permitted unless the court concludes that cross-examination is necessary to allow the case to be disposed of fairly. Cross-examination is unlikely to be ordered if:

(a) the chain of documents culminating in a decision is sufficiently complete; and

(b) the Minister's affidavit addresses the matters raised in the case.

4.32 The practice of limiting cross-examination reflects a balance between two competing objectives. The first is to ensure that the courts are able to discharge their functions properly. The second is to preserve the relationship of mutual respect and deference between the branches of government, acknowledging that the first call on a Minister's time must be the House and the duties of executive office. Similar considerations arise when considering requests for Ministers to appear before other quasi-judicial forums.

4.33 A subpoena or any less formal attempt to require a Minister to give evidence in person should always be referred to the Crown Law Office for advice.

4.34 In certain circumstances, the Speaker may issue a certificate exempting any member of Parliament from attendance at court in answer to a summons to attend as a party or witness in a civil proceeding, or as a witness in a criminal proceeding. The Speaker's power to issue such a certificate arises under the Parliamentary Privilege Act 2014. Additionally, where a Minister is unable to give any relevant and admissible evidence in the proceedings for which the witness summons has been issued, an application can be made to the court to have the summons set aside. In either event, the Crown Law Office will help the Minister make the necessary applications.

Service of court documents

4.35 The Crown Law Office is authorised to accept service of all court documents relating to proceedings where Ministers are parties in their ministerial capacity. This authority does not extend to documents such as witness summonses, which require personal service.

Indemnity of Minister as a defendant

Proceedings brought against Ministers

4.36 The guidance in paragraphs 4.37 – 4.57 sets out the process for indemnifying Ministers for legal costs incurred in the course of legal proceedings brought against them in their capacity as Ministers. References to Ministers in this guidance also apply to former Ministers, including those of previous governments.

Proceedings concerning the exercise of ministerial powers

4.37 Ministers may be named as defendants in court proceedings, almost always in relation to the exercise of their ministerial powers. Most proceedings will be by way of judicial review, which generally involves a legal challenge to the way in which a particular (usually statutory) power has been exercised (see paragraphs 4.19 – 4.26).

4.38 Ministers would not be at risk of judicial review proceedings at all if it were not for their official position. It is a convention of government, therefore, that Ministers should be indemnified by the Crown for any actions taken against them for things done or decisions made in the course of their ministerial duties. The indemnity will cover the cost of defending the proceedings, and any costs or damages awarded against the Minister (in all but exceptional cases—see paragraph 4.55).

Proceedings against a Minister personally

4.39 On occasion, Ministers may be sued for acts done while a Minister, but having a more "personal" aspect. For example, a Minister may be sued in defamation arising from the contents of a particular speech or other public statement. Or proceedings may be instituted alleging that a Minister has acted dishonestly or in bad faith. The extent to which a Minister will be personally liable will depend on the law relating to the particular matter.

4.40 By their very nature, cases against a Minister personally raise issues about whether the Minister has acted so far beyond the scope of his or her authority that the Minister should not be indemnified by the Crown in relation to the proceedings. No absolute legal right to indemnity by the Crown exists just because a Minister was acting as a Minister in doing, or refraining from doing, the act that is the subject of the claim.

4.41 Where a Minister is sued or threatened with legal action personally and it is uncertain whether he or she should be indemnified, the normal arrangement is to seek Cabinet's agreement in advance to meet the expenses of legal representation. The question of indemnity on costs and damages will be held over until judgment has been given (see paragraphs 4.53 – 4.56).

4.42 If an indemnity is given to a Minister, the government may be called on to answer for it in the House.

Indemnity in other cases

4.43 Ministers may be indemnified by the Crown for actions other than legal proceedings taken against them for things done or decisions made in the course of their ministerial duties, for example where the Minister is the subject of a formal inquiry and requires legal advice and representation. There is no absolute right to indemnity in such circumstances. The steps set out in paragraphs 4.44 – 4.57 should also be followed in these circumstances.

Preliminary steps

4.44 Where a Minister is sued personally about a matter that he or she regards as government business, the Minister must, on service of the proceedings, discuss them promptly with the Prime Minister and the Attorney-General (who will usually consult the Solicitor-General). The Attorney-General will form a view on whether or not the matter arose from the Minister's duties.

Cabinet consideration

4.45 If the Attorney-General forms the view that the matter arose from the Minister's duties, the Attorney-General should consult the Prime Minister and the Minister of Finance and submit a paper to Cabinet seeking a decision on whether or not to indemnify the Minister's expenses. The Attorney-General should also advise the Secretary of the Cabinet of his or her intention to seek a Cabinet decision.

4.46 The Cabinet paper should note that the Attorney-General is satisfied that the matter has arisen as a consequence of the Minister carrying out his or her ministerial duties. It should seek a decision from Cabinet on whether the Crown will:

(a) undertake the defence of the proceedings, that is, treat it as an ordinary action against the Crown (this will usually be the case for judicial review proceedings); or

(b) if the proceedings are against the Minister personally, such as defamation proceedings, meet the Minister's costs in retaining private counsel (for example, to obtain preliminary advice on the situation or to undertake the defence of the proceedings); or

(c) leave the Minister to handle the case privately as a personal expense.

4.47 The Cabinet paper should seek Cabinet's agreement to the Vote and appropriation from which the expenses would be met. It may, if necessary, seek a Cabinet decision on whether or not it would be appropriate, given the circumstances, to indemnify the Minister against an award of costs or damages, or whether to defer this decision pending the outcome of the proceedings (see paragraphs 4.41 and 4.53 – 4.56). The Minister concerned usually withdraws from the Cabinet meeting.

4.48 The Cabinet paper should recognise that the statutory decision whether to give an indemnity in such a situation must be taken by the Minister of Finance under section 65ZD of the Public Finance Act 1989.

4.49 If any doubt exists about the capacity in which the Minister is defending legal proceedings (that is, whether the proceedings are against the Minister personally or not), the case should be dealt with according to the guidance in paragraph 4.46(b) or 4.46(c).

Procedure where the Crown undertakes the defence

4.50 Where Cabinet decides that the Crown will undertake the defence (see paragraph 4.46(a)), the papers must be referred to the Crown Law Office. The Crown Law Office's costs in defending the proceedings will usually be charged to the relevant Vote.

Procedure where private counsel is retained

4.51 If Cabinet has agreed that the Crown will meet the Minister's costs in retaining private counsel (see paragraph 4.46(b)), the choice of counsel is made by the Minister only after consultation with the Attorney-General (who will usually consult the Solicitor-General). Once that choice has been made, the practice is for the Solicitor-General to retain counsel and to settle the basis on which the fees will be charged.

4.52 Once the Solicitor-General has retained private counsel to act for the Minister, the Minister should refer bills for legal expenses to the Crown Law Office for certification before the bills are paid. If private counsel was engaged by a Minister before the matter had been referred to Cabinet, the bill should be promptly referred to the Attorney-General who will, if necessary, refer it to Cabinet for a decision on payment. Counsel's bills for legal expenses will be charged against the relevant Vote and appropriation (as determined by Cabinet—see paragraph 4.47).

Payment of costs or damages awarded

4.53 Where a Minister defends proceedings concerning the exercise of ministerial powers (such as judicial review proceedings), the Minister will usually be indemnified against any award of costs or damages (except in exceptional cases—see paragraph 4.55).

4.54 Where proceedings have been taken personally against a Minister, Cabinet will usually defer the issue of an indemnity on costs or damages until after the trial, at which point Cabinet will decide the issue on the advice of the Attorney-General or the Solicitor-General.

4.55 The decision as to whether a Minister should be indemnified against costs or damages will usually depend on the extent to which the costs or damages awarded against the Minister might be said to arise from the Minister's personal wrongdoing or impropriety. The Attorney-General may defer such a decision until judgment has been given. For example, in a defamation case, if a court finds that a particular Minister had made the statement complained of dishonestly or maliciously, Cabinet may consider that the Minister's words went beyond the bounds of duty, for it is no part of a Minister's duty to act for malicious reasons. Malice in a legal sense, and in broad terms, means for a dishonest or improper motive. Other exceptional cases may also lead Cabinet to decline to authorise the indemnification of the Minister.

4.56 If Cabinet agrees that the Minister should be indemnified against an award of costs and/or damages made against the Minister, those costs may be charged to the relevant Vote and appropriation, as determined by Cabinet.

Receipt of costs or damages awarded

4.57 If a Minister has been represented at the expense of the Crown and costs or damages are awarded in the Minister's favour, then they should be regarded as public funds and paid into a Crown or departmental bank account, unless Cabinet directs otherwise.

Indemnity of Minister as plaintiff

4.58 A Minister may contemplate taking a suit as a plaintiff in a personal capacity to uphold his or her integrity as a Minister, for example, in a defamation suit. In such a case, the Minister may wish to be indemnified against the costs of the proceedings. Paragraphs 4.36 – 4.57 do not apply in these circumstances.

4.59 Any intention to take proceedings as a plaintiff must first be discussed with the Prime Minister and the Attorney-General (who will usually consult the Solicitor-General). The Attorney-General will then ask Cabinet to agree that the matter be investigated by the Solicitor-General or by private counsel to determine whether it would be in the public interest for the Minister to take a personal action in the courts at the Crown's expense to resolve the matter. An opinion on the merits of the claim, prepared either by the Solicitor-General or private counsel, will be provided to the Attorney-General, together with the Solicitor-General's views on the public interest aspect. On the basis of this advice, the Attorney-General may seek Cabinet's authorisation for the Minister to pursue the claim at the Crown's expense.

4.60 Counsel will be retained in the way set out in paragraphs 4.51 – 4.52.

4.61 If a Minister is successful as a plaintiff in proceedings that have been funded by the Crown, any costs or damages awarded should be paid into a Crown or departmental bank account unless Cabinet directs otherwise (for example, where the Crown has contributed only part of the Minister's costs).

Legal advice and legal professional privilege

General

4.62 Legal advice in departmental documents and Cabinet papers should be protected from disclosure in a manner consistent with the law. The guidance in paragraphs 4.63 – 4.72 sets out the required approach to the release of legal advice. Guidance on the release of draft government legislation outside the Crown can be found in Cabinet Office circulars.

Legal professional privilege

4.63 Legal professional privilege is a term applied to the protection of confidential communications between a lawyer and a client. If legal advice is protected by legal professional privilege, it may be protected from disclosure under the Official Information Act 1982 and the Privacy Act 1993, and will not be required to be produced for inspection during discovery in legal proceedings (see section 9(2)(h) of the Official Information Act and section 29(f) of the Privacy Act). It is therefore important that legal professional privilege in legal advice provided to the government is maintained, and not inadvertently waived.

4.64 There are two categories of legal professional privilege:

(a) **Solicitor/client privilege** applies to communications between a lawyer and a client, where the lawyer is acting in his or her professional capacity, the communication is intended to be confidential, and the communication is for the purpose of obtaining legal advice.

(b) **Litigation privilege** applies to communications or information compiled for the dominant purpose of preparing for a proceeding or an apprehended proceeding. It applies to communication between a party to the proceeding and any other person and communication between the party's legal adviser and any person. It also applies to information compiled or prepared by, or at the request of, the party or the party's legal adviser.

4.65 All legal advice that is provided to Ministers or government agencies (whether it is internal advice from departmental legal advisers, advice from the Crown Law Office, or advice from outside legal firms to either Ministers or government agencies) will attract solicitor/client privilege. A document does not automatically attract solicitor/client privilege merely because a lawyer prepared it or it is labelled "legally privileged". Only those parts of a document that record legal advice (as distinct from other types of advice, such as policy advice) will attract solicitor/client privilege.

Guidelines for the presentation of legal advice

4.66 Some government documents necessarily include legal advice, so that Ministers and government agencies have all the relevant information and advice before them when they make a decision. For example, a Cabinet paper may contain legal advice on a proposed transaction, or the government's proposed strategy for settling or conducting legal proceedings.

4.67 To ensure that legal advice provided to the government is properly protected by solicitor/client privilege, all those involved in preparing documents containing legal advice should follow these guidelines:

(a) Legal advice should be clearly separated from policy advice, even if the two kinds of advice are provided in one document. Departmental lawyers are encouraged to consider carefully the role they are performing (that is, whether they are providing legal or policy advice, or both), and the way in which their advice is given and will be used.

(b) Depending on its nature and extent, the legal advice should be either:

- contained in a separate section, and described in a way that makes it plain that it is legal advice from the Crown's lawyers (for example, "The Crown Law Office advises that ..." or "Counsel from the Ministry advises that…"); or

- attached as an appendix in the form of an opinion from a legal adviser (for example, Crown Law Office, Solicitor-General, or in-house counsel from the department).

(c) It is also useful if the document clearly shows that the legal advice is "legally privileged". If the entire paper is legally privileged, a security classification and endorsement such as "Legally Privileged: In Confidence" may be appropriate.

Waiver of legal privilege

4.68 The protection of legal professional privilege may be lost in two sets of circumstances:

(a) **Express waiver** occurs when a client chooses to waive privilege in the legal advice and release it.

(b) **Implied waiver** occurs when a client voluntarily discloses a significant part of the legal advice in a way that is inconsistent with a claim to its confidentiality. In these circumstances the privilege would likely be treated as implied to have been waived even if the client did not intend this. A simple statement by a client that legal advice has been received is unlikely to amount to an implied waiver of privilege. Partial disclosure of the actual legal advice received, or reference to the content of the legal advice, however, may result in waiver of privilege. For example, a statement such as "I have received legal advice and acted on it" may constitute a waiver. If upholding privilege following partial disclosure would result in injustice, a court would be likely to find there had been implied waiver.

Release of legal advice

4.69 As part of the Attorney-General's constitutional role, the Attorney-General represents the Crown in the courts and provides legal advice to the government. Day-to-day instructions to legal advisers are usually provided by departments, agencies, or other Ministers under the authority of the Attorney-General. Nevertheless, the constitutional responsibility of the Attorney-General remains. The Attorney-General has the right to:

(a) obtain copies of all legal advice provided to the Crown (from whatever source);

(b) determine whether to release that advice; and

(c) instruct all lawyers acting for the Crown.

4.70 When determining whether to release legal advice that has been provided to the government, or to refer to the content of such advice, and waive (or potentially waive) legal privilege, there is a need to:

(a) ensure a coordinated government approach to release;

(b) avoid any adverse impact from a release on current or potential legal proceedings; and

(c) ensure that no single release will create an undesirable precedent.

4.71 Where a Minister or a government department considers that it is necessary to release legal advice or refer to the content of such advice, the matter must first be referred to the Crown Law Office. The Crown Law Office will in turn refer the matter to the Attorney-General's office for approval.

4.72 Where a request is made under the Official Information Act 1982 or the Privacy Act 1993, the decision on release must be made by the Minister or chief executive who received it. The Attorney-General (through the Crown Law Office) should be consulted about the request.

4.73 A separate protocol for the release of draft government legislation outside the Crown is set out in Cabinet Office circulars.

Inquiries

General

4.74 This guidance provides information on the different types of inquiry, and the principles that apply to their establishment.

4.75 Statutory inquiries, non-statutory ministerial inquiries, and standing statutory bodies with powers of inquiry have different powers and privileges, which should be considered when deciding on the most appropriate form of inquiry. Ministers and departments may seek advice from the Attorney-General or Solicitor-General, and from the Cabinet Office and the Department of Internal Affairs, on matters relating to the establishment of an inquiry. Further guidance on statutory inquiries can be found in the Inquiries Act 2013 and the Commissions of Inquiry Act 1908, and on the Department of Internal Affairs' website.

4.76 All inquiries act independently of the government. Those conducting an inquiry may nonetheless consult with officials on technical matters and on the practical implications of any draft proposals.

4.77 All inquiries must follow the principles of natural justice.

Statutory inquiries

4.78 The Inquiries Act provides for three types of inquiry:

(a) Royal commissions;

(b) public inquiries; and

(c) government inquiries.

4.79 These three types of inquiry have identical powers, and differ only in status, method of appointment, and the way they report back. The options allow a flexibility of approach in establishing an inquiry and provide for less formal procedural options for inquirers where appropriate.

4.80 The Commissions of Inquiry Act remains in force for the time being for the purposes of those statutory bodies deriving specific powers from that Act.

Royal commissions

4.81 Royal commissions are typically reserved for the most serious matters of public importance. They are appointed by the Governor-General, in the name of the Sovereign and on the advice of the Executive Council, under clause X of the Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (see the appendix).

4.82 The Inquiries Act applies to Royal commissions as if they were public inquiries.

Public inquiries

4.83 Public inquiries may be established under the Inquiries Act for the purpose of inquiring into, and reporting on, any matter of public importance. A matter may require a public inquiry when it pertains to a particularly significant or wide-reaching issue that causes a high level of concern to the public and to Ministers.

4.84 A public inquiry is established by the Governor-General by Order in Council. The final report of a public inquiry is presented to the Governor-General, and must be presented by the appropriate Minister to the House of Representatives as soon as practicable thereafter.

Government inquiries

4.85 Government inquiries may be established under the Inquiries Act for the purpose of inquiring into, and reporting on, any matter of public importance. In practice, government inquiries typically deal with smaller and more immediate issues where a quick and authoritative answer is required from an independent inquirer.

4.86 A government inquiry is established by one or more Ministers by notice in the *New Zealand Gazette* and reports directly to the appointing Minister/s. There is no requirement that the report of a government inquiry be tabled in Parliament.

Duties, powers, immunities, and privileges of statutory inquiries

4.87 All inquiries must act independently, impartially, and fairly.

4.88 An inquiry may regulate its own procedures as it considers appropriate, unless otherwise specified by the Inquiries Act or by the inquiry's terms of reference. This broad discretion allows a degree of flexibility in the level of formality required.

4.89 However, all public inquiries and government inquiries have statutory powers to require the production of evidence, to compel witnesses, and to take evidence on oath. Where powers of search and seizure are considered necessary, investigation by a specialist agency with these powers is more appropriate.

4.90 Where an inquiry is established under the Inquiries Act, the exercise of statutory powers in relation to members of Parliament and parliamentary agencies will require the recognition of parliamentary privilege.

4.91 Witnesses and counsel are protected by the same immunities and privileges that they would have before the courts. Commissioners are also protected.

4.92 Inquiries may refer questions of law for determination by a court.

4.93 Inquiries usually hold open hearings with public and media access, but may restrict access as the need arises. The inquiry's terms of reference may also limit public access. An inquiry may make orders to forbid the publication of certain information, including evidence and submissions, or to restrict public access to any part or aspect of the inquiry. Before doing so the inquiry must take into account certain specified criteria, such as privacy and the benefits of open justice.

4.94 An inquiry is subject to the Official Information Act 1982 once it has presented a final report. However, information that is the subject of an order imposing restrictions on access and certain documents that relate to the internal deliberations of the inquiry are not official information for the purposes of the Official Information Act.

Administrative support for inquiries

4.95 The Inquiries Act is administered by the Department of Internal Affairs.

4.96 The Department of Internal Affairs is the default department for providing administrative support to inquiries (known under the Inquiries Act as the responsible department). However, another department may be appointed the responsible department if it is better placed to provide technical or subject matter expertise, or if it is determined that it would be inappropriate for the Department of Internal Affairs to be appointed the responsible department (for example, because of an actual or perceived conflict of interest).

Establishing an inquiry

4.97 A Minister must consult the Prime Minister and the Attorney-General when assessing whether to establish an inquiry, prior to submitting any proposal to Cabinet. Cabinet papers proposing the establishment of an inquiry are often joint papers from the portfolio Minister and the Minister responsible for the Inquiries Act. More than one Cabinet paper may be required during the establishment of an inquiry. The Cabinet paper(s) should address the matters covered in paragraphs 4.99 – 4.110.

4.98 Further guidance on the process for obtaining Cabinet approval for the establishment of an inquiry is contained in publications issued by the Department of Internal Affairs.

Subject of inquiry

4.99 An inquiry may be established to inquire into any matter of public importance. An inquiry should not usually be appointed, however, where an existing body has jurisdiction to carry out the investigation.

4.100 Although inquiries are not prevented from making findings of fault or making recommendations that further steps be taken to determine liability, an inquiry has no power to determine the civil, criminal, or disciplinary liability of any person.

Purpose of inquiry

4.101 The purpose of an inquiry may include:

(a) establishing facts or developing policy;

(b) learning from events;

(c) providing an opportunity for reconciliation and resolution; or

(d) holding people and organisations to account.

Terms of reference

4.102 Terms of reference can be used to give direction to or place restrictions on the inquiry, and to give specific procedural directions not set out in the Inquiries Act. The terms of reference should be precise and yet sufficiently flexible to allow the inquiry to respond to issues that come to light in the course of the inquiry.

4.103 The relevant agencies should be consulted on the terms of reference, along with, ideally, the proposed commissioner or inquirer, and directly interested or involved persons.

4.104 The commission appointing a Royal commission and the Order in Council establishing a public inquiry are drafted by the Parliamentary Counsel Office.

4.105 A *New Zealand Gazette* notice establishing a government inquiry is drafted by the responsible department, in consultation with the Crown Law Office and any other relevant agencies.

Appointment of inquirer or commissioner

4.106 The Inquiries Act does not specify any requirements about the number or expertise of inquirers. Nonetheless, decisions about the appointment of commissioners or inquirers are fundamental to an inquiry's success. The commissioners or inquirers should be people whose expertise best suits the subject matter and purpose of the inquiry. Where an inquiry will involve hearings and lawyers, legal experience may be essential. If it is proposed that a sitting or retired judge be appointed, the Attorney-General must consult the Chief Justice. If the nominated appointee is a sitting judge, the relevant Head of Bench should also be consulted.

4.107 Depending on the size, complexity, and likely length of an inquiry, more than one inquirer may be appointed. Where more than one inquiry member is appointed, members should have complementary skills and experience. If one inquirer is unable to continue, the remaining inquiry members should still have the broad skills required to complete the task. Fees for commissioners are set under the fees framework set out in Cabinet Office circular CO (12) 6 *Fees framework for members appointed to bodies in which the Crown has an interest*.

Budget and timeframe

4.108 The budget for an inquiry should allow for the inquiry to have access to discrete resources and, in most cases, a secretariat established for the purpose of the inquiry. Inquiries are usually funded by an increase in appropriation in Vote Internal Affairs, typically by a charge against the Budget contingency. If a different responsible department is appointed, the inquiry will be funded from the relevant Vote. The Treasury and the Department of Internal Affairs should be consulted on the budget.

4.109 Realistic timeframes should be set, acknowledging that the scope of the issues may not be clear until considerably further along in the process.

4.110 Inquiries must be fiscally accountable. The Department of Internal Affairs or the responsible department, as appropriate, will establish the process for monitoring the budget and the reporting timeframe.

Other inquiries

Non-statutory ministerial inquiries

4.111 In some cases, it may be considered appropriate or desirable for a Minister to establish a non-statutory inquiry into an area for which they have portfolio responsibility. However, the ability to establish a government inquiry under the Inquiries Act means there are likely to be fewer circumstances than previously in which a non-statutory inquiry would be established.

4.112 Non-statutory inquiries have no coercive powers, and therefore rely solely on witnesses' cooperation. They offer no immunities for those taking part, including inquirers, lawyers, and witnesses. Information relating to a non-statutory ministerial inquiry will be subject to the Official Information Act in the normal way.

4.113 In order to establish a non-statutory inquiry, the Minister should seek the Prime Minister's agreement to the matters referred to in paragraphs 4.99 – 4.110 and advise Cabinet as soon as possible of these details.

Statutory bodies with inquiry powers

4.114 A wide variety of statutory bodies have powers to inquire into events or issues. Examples include the State Services Commissioner, the Ombudsmen, the Auditor-General, the Law Commission, the Health and Disability Commissioner, and the Independent Police Conduct Authority. Some inquiries may be initiated by a statutory body; in other cases, a Minister may ask a statutory body to investigate certain issues.

4.115 Before an inquiry is established, consideration should be given to whether any of these existing bodies can more appropriately conduct the inquiry. Factors to consider will be the size and complexity of the matter at hand, and the capacity of the body to conduct the inquiry within its existing resources.

4.116 In some circumstances, consideration should be given to whether it may be more appropriate to refer information to the police or to another investigative agency.

Select committee inquiries

4.117 A select committee may hold an inquiry within its subject area. After considering evidence and advice, a committee may report to the House with its conclusions and recommendations, which may be addressed to the government. The government must respond to such recommendations within 60 working days. See paragraphs 7.119 – 7.122 for more information on government responses to select committee reports. Select committee powers and natural justice procedures are set out in the chapter on select committees in the *Standing Orders*.

4.118 A select committee inquiry is usually initiated by the committee itself and is likely to focus on scrutinising a specific area of government activity. The House may, however, refer a matter to a select committee for inquiry, particularly where the matter is outside the committee's normal subject area.

4.119 Issues suitable for a select committee inquiry are likely to be those which would benefit from input from a wide range of interested groups and the general public, and on which the holding of an inquiry would have support from a number of parliamentary parties. Other matters to consider include the expertise and resources of the committee, and its legislative or other competing workload.

4.120 If a Minister considers that an issue may be suitable for a select committee inquiry, the Minister should first discuss the issue with the Prime Minister and the Leader of the House. If this course of action is agreed, the Minister may, after consulting other parliamentary parties, write to the select committee inviting it to initiate an inquiry. Alternatively, the Minister may, by motion, seek to have the matter referred by the House to the select committee. Occasionally the House may establish an ad hoc select committee to conduct an inquiry.

Related information

- CO (16) 2 *Cabinet Directions for the Conduct of Crown Legal Business 2016,* CO (14) 4 *Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown,* and CO (12) 6 *Fees framework for members appointed to bodies in which the Crown has an interest* are available on the Department of the Prime Minister and Cabinet's website, at www.dpmc.govt.nz/cabinet-office-circulars.
- The *New Zealand Gazette* is available at www.gazette.govt.nz.
- Information on establishing inquiries under the Inquiries Act 2013 is published by the Department of Internal Affairs on its website, www.dia.govt.nz.
- The *Standing Orders of the House of Representatives* are available on Parliament's website, www.parliament.nz.

The guidance listed here was current at time of going to press. For updates, see the online version of this manual at www.dpmc.govt.nz/cabinet-manual.

5
Cabinet Decision-making

Introduction

5.1 This chapter covers:

(a) Cabinet and Cabinet committees;

(b) the main principles and procedures governing decision-making by Ministers in the Cabinet and Cabinet committee system;

(c) the roles of the Secretary of the Cabinet and the Cabinet Office.

Cabinet

5.2 Cabinet is the central decision-making body of executive government. It is a collective forum for Ministers to decide significant government issues and to keep colleagues informed of matters of public interest and controversy.

5.3 Cabinet is central to New Zealand's system of government. It is established by convention, not law. The legal powers of the Executive are exercised by those with statutory authority to act (for example, the Governor-General, the Governor-General in Council, or individual Ministers). In practice, however, all significant decisions or actions taken by the Executive are first discussed and collectively agreed by Cabinet.

5.4 Cabinet determines and regulates its own procedures. Final decisions on Cabinet procedures rest with the Prime Minister, as the chair of Cabinet.

5.5 Cabinet comprises Ministers in Cabinet. Ministers outside Cabinet and Parliamentary Under-Secretaries, however, may on occasion attend Cabinet for discussion on particular items with the agreement of the Prime Minister.

Cabinet committees

5.6 Cabinet committees provide the forum for detailed consideration and discussion of issues before their reference to Cabinet, with officials available to assist Ministers if the committee wishes. Almost all matters are considered first by one or more Cabinet committees. Exceptions to this rule are proposals for and reports on overseas travel by Ministers.

5.7 Cabinet committees are usually established either around a subject area, such as social policy, or around a function across the broad front of government activity, such as expenditure and administration.

5.8 Cabinet committees derive their powers from Cabinet. All Cabinet committee decisions are reported to Cabinet for confirmation, and Cabinet retains the ultimate power of decision. Cabinet committee decisions may not be acted on until they have been confirmed (or amended) by Cabinet (except as set out in paragraph 5.9). Cabinet considers all committee decisions and frequently amends a committee decision or asks a committee to consider a matter further.

5.9 Occasionally, Cabinet or the Prime Minister will authorise a Cabinet committee or specified Ministers to have "power to act" (that is, power to take a final decision) on a clearly defined item. Where a committee or specified Ministers take a decision under power to act, the decision can be acted on immediately. Approval for power to act is usually sought by way of an oral item at Cabinet (see paragraphs 5.51 – 5.53). Decisions taken by a Cabinet committee under power to act are reported to Cabinet in the usual way. When authorising the taking of decisions by a specified group of Ministers under power to act, Cabinet may request that the Ministers report back to Cabinet.

5.10 The Prime Minister determines the structure of Cabinet committees and the membership, chair, and terms of reference of each Cabinet committee, taking into account practical and political considerations. Information on the current membership and terms of reference of Cabinet committees is available on the Department of the Prime Minister and Cabinet's website.

Principles of Cabinet decision-making

Items for consideration by Cabinet

5.11 As a general rule, Ministers should put before their colleagues the sorts of issues on which they themselves would wish to be consulted. Ministers should keep their colleagues informed about matters of public interest, importance, or controversy. Where there is uncertainty about the type of consideration needed, Ministers should seek advice from the Prime Minister or the Secretary of the Cabinet. Similarly, departments should seek advice from the office of the portfolio Minister, or from the Cabinet Office.

5.12 The following matters must be submitted to Cabinet (through the appropriate committee):

(a) significant policy issues;

(b) controversial matters;

(c) proposals that affect the government's financial position, or important financial commitments;

(d) proposals that affect New Zealand's constitutional arrangements (see paragraph 5.76);

(e) matters concerning the machinery of government;

(f) discussion and public consultation documents (before release);

(g) reports of a substantive nature relating to government policy or government agencies;

(h) proposals involving new legislation or regulations (see chapter 7 and the *CabGuide*);

(i) government responses to select committee recommendations and Law Commission reports (see paragraphs 7.21, 7.119 – 7.122, and the *CabGuide*);

(j) matters concerning the portfolio interests of a number of Ministers (particularly where agreement cannot be reached);

(k) significant statutory decisions (see paragraphs 5.34 – 5.38);

(l) all but the most minor public appointments (see the *CabGuide*);

(m) international treaties (see paragraphs 5.77 – 5.80); and

(n) any proposals to amend the provisions of the *Cabinet Manual*.

5.13 Matters that should not, as a general rule, be brought to Cabinet include:

(a) matters concerning the day-to-day management of a portfolio that have been delegated to a department;

(b) operational (non-policy) statutory functions; or

(c) the exercise of statutory decision-making powers (within existing policy) concerning individuals.

It may, nonetheless, be appropriate to bring an item falling into this list to Cabinet's attention if it is significant or likely to be controversial.

Consultation

Portfolio consultation

5.14 Ministers are expected to consult relevant ministerial colleagues before submitting papers that deal with significant or potentially controversial matters, or that affect other Ministers' portfolio interests. Papers that do not contain evidence that appropriate consultation has taken place may be deferred from a particular meeting. In particular, Ministers are required to consult:

(a) the Minister of Finance on all proposals seeking additional resources;

(b) the Minister of State Services on machinery of government issues;

(c) the Minister of Foreign Affairs on all proposals relating to international treaties;

(d) the Minister of Justice on all proposals affecting constitutional arrangements;

(e) the Attorney-General on all proposals raising significant legal issues; and

(f) the Attorney-General or the Minister responsible for Treaty of Waitangi settlement obligations, if there is one, on any proposal with potential impacts on existing Treaty of Waitangi settlements.

5.15 The *CabGuide* provides detailed guidance on consultation requirements.

Political consultation

5.16 In a coalition or minority government, the coalition or support partners are likely to agree to specific consultation procedures, which may be approved by Cabinet and promulgated by Cabinet Office circulars. Ministers are responsible for ensuring that consultation is undertaken in accordance with any coalition or support agreements entered into between political parties.

5.17 Careful planning, good faith, and a "no surprises" approach are key to making the arrangements work effectively. All Ministers and chief executives need to be familiar with the current arrangements and ensure that they have processes in place to implement them. Managing the consultation processes and other aspects of the relationships may take some time. Ministers and officials should factor the time required for consultation into their planning on each issue.

5.18 For more details on any current coalition or support agreements, see the *CabGuide* and relevant Cabinet Office circulars, available on the Department of the Prime Minister and Cabinet's website.

Departmental consultation

5.19 Almost all policy proposals have implications for other government agencies. The initiating department or other agency with policy responsibility and the portfolio Minister must ensure that all other agencies affected by a proposal are consulted at the earliest possible stage, and that their comments are taken into account and reflected in the paper as appropriate. Consultation may sometimes be needed with agencies that have an advisory role, such as the Office of the Privacy Commissioner. See the *CabGuide* for full guidance on consultation procedures, and paragraph 5.33 for guidance on collective decision-making and government agencies.

5.20 Departments and other agencies with policy or advisory responsibilities should work closely with one another when developing advice in preparation for papers for Cabinet and Cabinet committees and, where possible, reach consensus on advice and proposals submitted to the portfolio Minister. If consensus is not reached, a Cabinet paper may reflect different ministerial positions or departmental advice so that Cabinet can take decisions based on all the facts and an appreciation of the options.

Statutory consultation processes

5.21 In some cases, legislation may prescribe a consultation process to be followed before the Minister can make a statutory decision. The Minister and department concerned should ensure that the required consultation has taken place (see also paragraphs 5.34 – 5.38).

Public consultation

5.22 A key consideration in developing workable and effective policy is assessing the need for, and the timing of, consultation with Māori (including relevant iwi, hapū, and whānau), the public, and relevant stakeholder groups. Departments should bear in mind that consultation may be undertaken face-to-face, using discussion documents, or using digital consultation tools. See the *CabGuide* for information on public and stakeholder consultation.

Confidentiality

5.23 Discussion at Cabinet and Cabinet committee meetings is informal and confidential. Ministers and officials should not disclose proposals likely to be considered at forthcoming meetings, outside Cabinet-approved consultation procedures. Nor should they disclose or record the nature or content of the discussions or the views of individual Ministers or officials expressed at the meeting itself. The detail of discussion at Cabinet and Cabinet committee meetings is not formally recorded, or included in the minutes.

Collective responsibility

Principle of collective responsibility

5.24 The principle of collective responsibility underpins the system of Cabinet government. It reflects democratic principle: the House expresses its confidence in the collective whole of government, rather than in individual Ministers. Similarly, the Governor-General, in acting on ministerial advice, needs to be confident that individual Ministers represent official government policy. In all areas of their work, therefore, Ministers represent and implement government policy.

5.25 Acceptance of ministerial office (whether inside or outside Cabinet) means accepting collective responsibility. Issues are often debated vigorously in the confidential setting of Cabinet meetings, although consensus is usually reached and votes are rarely taken. Once Cabinet makes a decision, Ministers must support it (except as provided in paragraphs 5.27 – 5.29), regardless of their personal views and whether or not they were at the meeting concerned.

Collective responsibility and coalition Ministers

5.26 In a coalition government, Ministers are expected to show careful judgement when referring to party policy that differs from government policy. Subject to paragraphs 5.27 – 5.30, a Minister's support and responsibility for the collective government position must always be clear (see paragraph 6.18 on the difference between coalition and support arrangements).

5.27 coalition governments may decide to establish "agree to disagree" processes, which may allow Ministers within the coalition to maintain, in public, different party positions on particular issues or policies. Once the final outcome of any "agree to disagree" issue or policy has been determined (either at the Cabinet level or through some other agreed process), Ministers must implement the resulting decision or legislation, regardless of their position throughout the decision-making process.

5.28 "Agree to disagree" processes may only be used in relation to differing party positions within a coalition. Any public dissociation from Cabinet decisions by individual coalition Ministers outside the agreed processes is unacceptable.

Collective responsibility and support party Ministers

5.29 Ministers outside Cabinet from parliamentary parties supporting the government may be bound by collective responsibility only in relation to their particular portfolios, including any specific delegated responsibilities. Under these arrangements, when such Ministers speak about issues within their portfolios, they speak for the government and as part of the government. When they speak about matters outside their portfolios, however, they may speak as political party leaders or members of Parliament rather than as Ministers, and do not necessarily represent the government position.

5.30 When such Ministers represent the government internationally, they speak for the government on any issues that foreign governments may raise with them in their capacity as Ministers. When they are overseas in a personal capacity, for example as party leaders, they are not bound by collective responsibility. The capacity in which they are speaking must always be clear to those present.

Collective responsibility and Parliamentary Under-Secretaries

5.31 Parliamentary Under-Secretaries are also bound by the principle of collective responsibility, except as provided in paragraphs 5.26 – 5.30. See paragraphs 2.48 – 2.51 for the appointment of Parliamentary Under-Secretaries.

Law officer function

5.32 Special provisions apply to the exercise of the Attorney-General's law officer function in the collective context (see paragraph 4.4).

Collective decision making and government agencies

5.33 Once a decision is reached by Cabinet, particularly on a matter on which agencies hold differing views, both officials and Ministers need to take care when making comments or statements about the matter in the public arena. Comments or statements should reflect the fact that a collective government decision has been made. Officials from departments or other agencies with policy responsibilities may be required to comment publicly (for example, at a select committee hearing) on the effect of a particular decision on their area of operation. It is important that such comments are shaped as factually and neutrally as possible.

Exercise of Ministers' statutory powers and functions in the collective Cabinet context

Statutory decisions

5.34 Many statutes provide for individual Ministers to take certain actions or make certain decisions. In each case, the Minister must ensure that he or she considers all relevant matters and does not take into account irrelevant matters. Relevant matters will vary depending on the particular statute under which the decision is to be made. They may be expressly stated in the statute or implied (for example, in the scheme, the long title, and the purpose of the Act). If the Minister fails to consider all relevant matters in making a decision, or takes into account irrelevant matters, the decision may be susceptible to judicial review.

5.35 Ministers should, however, inform Cabinet of any exercise of an individual statutory power that merits attention at the Cabinet level (see paragraph 5.12 for a list of matters that should be taken to Cabinet). Informing Cabinet of the intended decision enables the Minister's colleagues to understand the basis on which the Minister intends to make the decision, and to defend the decision publicly and collectively.

5.36 Special considerations apply to protect the integrity of the statutory decision-making process when a Minister brings an item to Cabinet on a statutory decision or action he or she intends to make. Cabinet cannot make, or appear to make, a decision that the statute requires a Minister to make. Accordingly:

(a) the Cabinet paper should be presented in the form of an informative briefing for Ministers;

(b) Cabinet may provide a forum for Ministers other than the decision-maker to comment on and provide information on the intended decision, but the decision-making Minister may legitimately take into account only the information and comments that are relevant; and

(c) the Minister's intended decision should be noted rather than agreed to by Cabinet.

5.37 If Ministers are unsure about whether to take an issue concerning the exercise of a statutory power or function to Cabinet, they should seek guidance from the Prime Minister or the Secretary of the Cabinet. For further information about ministerial decision-making and judicial review, see paragraphs 4.19 – 4.26.

Statutory decisions and Executive Council

5.38 In some cases a Minister's statutory decision can be effected only by the Governor-General acting on the advice and with the consent of the Executive Council. The Executive Council is the formal institution through which the government collectively advises the Governor-General, and it is Cabinet that authorises the submission of items to the Executive Council. An individual Minister, therefore, can take an item to Executive Council only with Cabinet's collective agreement. See paragraphs 1.21 – 1.49, and the *CabGuide*, for further information on the Executive Council.

Cabinet and Cabinet committee procedures

Preparing and submitting Cabinet papers

5.39 Papers are submitted to Cabinet committees and Cabinet to enable Ministers to make collective decisions based on sound information and analysis. Good papers reflect robust policy development and consultation processes, are informed by evidence and insights from diverse perspectives, and are analytically sound. They are succinct yet sufficiently comprehensive to provide Ministers with all the information they need to reach an informed decision. See the *CabGuide* for further information on the qualities of good policy advice and papers.

5.40 Papers classified up to Sensitive or Restricted are submitted through the CabNet system, which is a secure electronic system for managing papers through the Cabinet and Cabinet committee process. CabNet is administered by the Cabinet Office, and access to CabNet material is limited to authorised users in Ministers' offices and departments in accordance with specified access permissions. More highly classified papers or papers with Special Handling Required or Addressee Only endorsements are submitted in hard copy to the Cabinet Office, and are not handled or stored in CabNet (see the *CabGuide* for further information on CabNet).

5.41 Ministers submit papers to Cabinet or Cabinet committees on issues concerning their own portfolios. All papers submitted through CabNet must be authorised for lodgement by the relevant portfolio Minister. Where a paper is submitted outside CabNet, the portfolio Minister's signature on the hard copy of the paper is required. If necessary, however, any Minister (including a Minister outside Cabinet but not a Parliamentary Under-Secretary) can sign a Cabinet or Cabinet committee paper on behalf of another. Ministers are responsible for the papers they submit to Cabinet and Cabinet committees and are expected to be fully conversant with them.

5.42 Associate Ministers may submit papers to Cabinet and Cabinet committees within their designated area of responsibility, provided that the submission clearly indicates that the portfolio Minister has been consulted and agrees that the paper may be lodged. This requirement may not apply if responsibility for the matter has been transferred to an Associate Minister because of a conflict of interest (see paragraph 2.74(c)).

5.43 The Cabinet Office sets standards for the quality, preparation, and submission of papers for Cabinet and Cabinet committees. These standards are set out in the *CabGuide.*

Deadlines and late papers

5.44 Cabinet and Cabinet committee papers must be lodged on CabNet, or submitted to the Cabinet Office as appropriate (see paragraph 5.40), before the relevant deadline, which is usually several days before a meeting. See the *CabGuide* for the current deadlines. Submitting papers on time ensures that Ministers have sufficient time to read and seek advice on papers, and to discuss them with colleagues if necessary.

5.45 If a Minister wishes to submit a late paper for Cabinet or a Cabinet committee, the Minister concerned should, by the deadline for the submission of the paper, seek the approval of the chair, through the Secretary of the Cabinet or the appropriate committee secretary, for acceptance of the paper, explaining why inclusion on the agenda is necessary (using the appropriate form set out in the *CabGuide*). The Secretary of the Cabinet or committee secretary will consult the Prime Minister or the chair of the committee, and advise the Minister of the outcome.

Amendments to papers

5.46 Amendments to Cabinet or Cabinet committee papers already lodged on CabNet or with the Cabinet Office, as appropriate, will not be accepted unless the change is of a minor editorial nature. If a Minister wishes to make substantive amendments to a paper he or she has already submitted, the usual practice is to withdraw the original paper and submit a new one.

5.47 The Cabinet Office will not accept changes suggested by one Minister to another Minister's paper before a meeting. The Minister should suggest any proposed changes at the meeting considering the paper.

Withdrawal of papers

5.48 Once the Cabinet Office has published a final agenda on CabNet, a paper can be withdrawn or deferred only at the meeting for which it was prepared. The Minister who authorised the paper for lodgement should provide notice of withdrawal as soon as possible, so that the chair can be informed.

Agendas

5.49 The Cabinet Office compiles the agendas for Cabinet and Cabinet committee meetings, on behalf of the Prime Minister and the chairs of committees.

5.50 The Secretary of the Cabinet is required to ensure that the agenda for Cabinet itself contains only items that have already been considered by a Cabinet committee, unless there are exceptional circumstances. As a rule, only proposals requiring urgent consideration or papers proposing or reporting on overseas travel should be considered by Cabinet without first being considered by a committee. If a Minister wishes to submit a paper directly to Cabinet, the prior agreement of the Prime Minister must be obtained.

Oral items

5.51 In cases of particular urgency or confidentiality, or to update Cabinet on a current issue, or to test preliminary support for a proposal, a Minister may wish to raise an oral item at a Cabinet or Cabinet committee meeting. Oral items for Cabinet will be accepted only with the approval of the Prime Minister, and should be notified to the Secretary of the Cabinet. Oral items at Cabinet committees will be accepted only with the approval of the committee chair.

5.52 Oral items at Cabinet are also the means by which Cabinet's agreement is sought for a Cabinet committee (or specified group of Ministers) to have power to act on a particular item (see paragraph 5.9).

5.53 Detailed guidance about the requirements for oral items, including the electronic form to be used for seeking the Prime Minister's approval to raise an oral item at Cabinet, can be found in the *CabGuide.*

Minutes

5.54 The Cabinet Office publishes on CabNet, and where required distributes in hard copy, minutes of Cabinet and Cabinet committee decisions as soon as possible after each meeting, recording the decisions in a form that allows the necessary action to be taken. The minutes do not record the detail of discussions at the meeting.

5.55 Further information on authorised access to minutes on CabNet can be found in the *CabGuide.*

Meetings

5.56 Cabinet usually meets in the Cabinet room on Mondays for most weeks of the year. Special Cabinet meetings may be held at other times and other places, if necessary.

5.57 Cabinet committees meet on a weekly or fortnightly basis or as necessary. Ad hoc committees meet as necessary. The Cabinet Office provides information about Cabinet committee meeting times to Ministers' offices and the public service.

Chairs of meetings

5.58 Meetings of Cabinet are chaired by the Prime Minister (or the next most senior Minister present, if the Prime Minister is absent). Cabinet committees are chaired by the designated chair (or, in the chair's absence, the most senior committee member present).

Attendance of Ministers

5.59 Ministers in Cabinet must attend every meeting of Cabinet, unless the Prime Minister has granted prior written approval on the required form, which is available on the ministerial intranet.

5.60 Ministers are expected to attend all meetings of the Cabinet committees of which they are members. If Ministers (including those who are not members of the committee but have papers on an agenda) are unable to attend, their senior private secretaries must advise the committee secretary before the meeting. This process allows the chair to be advised, and necessary adjustments to be made to the agenda.

5.61 A Minister who is unable to attend a Cabinet committee meeting may wish to brief another Minister (or his or her Associate Minister) to speak to a paper, or to ask for it to be deferred in his or her absence. Ministers who are members of select committees are expected to give priority to attendance at select committee meetings over attendance at Cabinet committee meetings.

5.62 When a Cabinet committee is to discuss a matter within the portfolio responsibility of a Minister who is not a member of the committee, the Minister will be provided with the relevant papers and may attend the meeting for the items concerned.

5.63 Arrangements for the representation of coalition and support party partners on Cabinet committees, and their attendance at meetings, are determined by the Prime Minister in consultation with the coalition or support party leaders.

Quorum

5.64 A quorum for Cabinet meetings is half the full membership of Cabinet, plus one. The chair of a Cabinet meeting may vary the quorum requirements if necessary.

5.65 There is no formal quorum for Cabinet committee meetings, although it is usually regarded as being three members. The quorum is decided by the chair of the meeting, taking into account the importance of the items under consideration, the presence of appropriate Ministers, and the advisability of taking decisions if few Ministers are present.

Attendance of officials and visiting dignitaries at Cabinet

5.66 The Secretary of the Cabinet and the Deputy Secretary of the Cabinet, who provide secretariat services to Cabinet, are the only officials to attend Cabinet meetings regularly. Occasionally, senior public service officials may be invited to give a special presentation to Ministers in the Cabinet room.

5.67 Visiting dignitaries may occasionally be invited to meet members of Cabinet in the Cabinet room. Such invitations should not be issued until the Prime Minister's approval has been obtained and arrangements made with the Secretary of the Cabinet and the Visits and Ceremonial Office of the Department of Internal Affairs.

Attendance of officials at Cabinet committee meetings

5.68 Relevant officials are required to be available to assist Ministers at Cabinet committee meetings. The permission of the committee chair is required for any officials, including those from ministerial offices, to attend. For detailed information about attendance at Cabinet committee meetings, see the *CabGuide*.

Financial matters and Cabinet

Government spending

5.69 Government spending must always be based on statutory authority. The government must have authority from Parliament to spend money before expenditure is incurred. This means that departments should check that proposed spending has been authorised by either:

(a) an Appropriation (Estimates or Supplementary Estimates) Act; or

(b) a Cabinet minute authorising expenses or capital expenditure to be met under an Imprest Supply Act pending passage of an Appropriation Act.

Expenditure should never be incurred on the basis that legislation will be introduced later to validate it.

The Budget cycle

5.70 Wherever possible, government spending should be planned and agreed by Cabinet during the annual Budget cycle. The Budget cycle has several phases, starting in the second half of the calendar year before the start of the financial year. In broad terms, these phases are:

(a) **Establishing high-level Budget priorities**: Under the fiscal responsibility provisions in the Public Finance Act 1989, the government must indicate the high-level financial and policy priorities guiding the preparation of the forthcoming Budget. These priorities are agreed by Cabinet and published in the annual Budget Policy Statement, which is usually published in November or December. Cabinet also agrees to the Budget timetable and process (which are usually promulgated by way of Treasury circulars).

(b) **Making detailed Budget decisions**: Cabinet then considers more detailed Budget proposals for each Vote, in line with the priorities set out in the Budget Policy Statement. Budget baselines, which set out the funding for existing policy over the next four or five financial years, are determined by Cabinet or by joint Ministers under authority delegated by Cabinet. Cabinet also considers proposals for new policies or changes in the size or cost of existing initiatives.

(c) **Presenting to the House**: Once Cabinet has completed final Budget decisions, the Budget documents are finalised, printed, and presented to the House, usually in May or June. The parliamentary processes involved are set out in the chapter on financial procedures in the *Standing Orders of the House of Representatives* (the *Standing Orders*).

5.71 The office of the Minister of Finance or the Treasury can provide further information on any aspect of the Budget cycle.

5.72 Outside the Budget cycle, practical or political considerations may require Cabinet to take decisions with financial implications. Special arrangements (including a requirement to consult the Minister of Finance) are in place to ensure that individual proposals do not run counter to Cabinet's decisions on Budget financial and policy priorities.

5.73 The details of these arrangements are set out in the *CabGuide* and in Cabinet Office circulars, available on the Department of the Prime Minister and Cabinet's website.

The Crown's financial veto

5.74 Some parliamentary initiatives may have an impact on the government's fiscal aggregates or the composition of a Vote. Departments, other agencies with policy responsibilities, and Ministers' offices must have processes for identifying such initiatives, which may require the exercise of the Crown's financial veto in the House. The financial veto is discussed in more detail in paragraphs 7.134 – 7.136.

Impact analysis for regulatory proposals

5.75 Departments are required to undertake impact analysis for any policy initiative that includes consideration of regulatory options (that is, options that will ultimately require creating, amending, or repealing Acts or disallowable instruments). Unless an exemption applies, any resulting policy proposals taken to Cabinet for approval that include a regulatory option must be accompanied by an impact statement or summary, even if the regulatory option is not what is finally proposed. Full information about impact analysis for regulatory proposals, and the requirements and exemptions for an impact statement or summary, are set out in the *CabGuide* and on the Treasury's website.

Constitutional issues and Cabinet

5.76 Any proposal that will affect New Zealand's constitutional arrangements must be submitted to Cabinet. Where significant constitutional change is contemplated, issues of process and appropriate public participation must be clearly and fully addressed in the Cabinet paper.

International treaties and Cabinet

5.77 A treaty is a written agreement between states or international organisations that is governed by international law. Treaties (whatever their particular title) create international legal obligations for the states that have expressed their consent to be bound.

5.78 The steps required to become bound depend on the terms of a given treaty. Sometimes there are two steps: signature, followed by binding treaty action (often called ratification). Sometimes there is only the binding treaty action (for example, accession or definitive signature). Other examples of binding treaty action include changing an existing reservation to a treaty, and termination of or withdrawal from a treaty. An amendment to a treaty may also involve a new treaty (and therefore a binding treaty action).

5.79 Any proposal for New Zealand to sign a treaty or to take binding treaty action must be submitted, with the text of the treaty, to Cabinet for approval. Domestic implementation (including any legislation and consultation) must be completed before binding treaty action is taken. For detailed guidance, see the *CabGuide*.

5.80 Where the *Standing Orders* require a treaty to be presented to the House for examination before binding treaty action is taken, a national interest analysis must also be prepared and submitted to Cabinet. Guidance on the parliamentary treaty examination process is provided in paragraphs 7.123 – 7.133.

5.81 The Ministry of Foreign Affairs and Trade can provide advice on all aspects of the treaty-making process, and on the making of non-binding international instruments (usually called arrangements). Departments should consult the ministry's legal division at an early stage if they are considering entering into any negotiations that may result in a treaty or arrangement.

Referral to Cabinet of decisions taken outside the Cabinet process

5.82 Decisions taken by Ministers at ad hoc meetings, and proposals to implement policies arising from manifesto commitments or coalition or support agreements, need to be referred through the Cabinet process if they concern matters that would usually be considered by Cabinet (see paragraph 5.12). This process ensures that:

(a) the proper consultation process is followed;

(b) decisions are taken with the authority of Cabinet;

(c) departments and the Parliamentary Counsel Office have clear instructions; and

(d) the financial implications of decisions taken outside the Cabinet process can be taken into account.

Secretary of the Cabinet and the Cabinet Office

5.83 The Cabinet Office is a government secretariat, providing continuity and impartial support for operations at the centre of government. The Cabinet Office is a unit within the Department of the Prime Minister and Cabinet, headed by the Secretary of the Cabinet. The Secretary of the Cabinet is a public servant and therefore politically neutral. The position is held by someone other than the holder of the position of Chief Executive of the Department of the Prime Minister and Cabinet.

5.84 The Secretary of the Cabinet is responsible directly to the Prime Minister for the impartial recording of Cabinet decisions and for the development and administration of Cabinet processes. The Secretary is also responsible to Cabinet as a collective for ensuring the confidentiality of Cabinet proceedings and the impartial and effective operation of the Cabinet system.

5.85 The Secretary of the Cabinet usually also holds the office of Clerk of the Executive Council (see paragraphs 1.33 – 1.37). The Clerk of the Executive Council is responsible directly to the Prime Minister and the Governor-General respectively for servicing the Executive Council and providing advice, as required, on constitutional and central government administrative matters.

5.86 The Secretary of the Cabinet is responsible for ensuring that the functions of the Cabinet Office are carried out effectively. These functions include:

(a) conducting and maintaining the central decision-making processes of executive government;

(b) providing secretariat services to Cabinet and Cabinet committees;

(c) attending all Cabinet and Cabinet committee meetings to facilitate and record impartially the decisions taken;

(d) maintaining and preserving the records of successive Cabinets;

(e) managing transitions between administrations and supporting continuity of government;

(f) providing advice (to the Prime Minister and, as required, Ministers and government departments) on certain central government issues (constitutional, honours, ethical, policy, procedural, and administrative), especially those specified in the *Cabinet Manual*;

(g) building and sustaining knowledge and understanding of centre-of-government constitutional functions;

(h) promoting effective relationships between Cabinet and departments and agencies, including providing advice on issues relating to Cabinet and Cabinet committee decision-making processes;

(i) providing guidance on central government operations and processes, through means including the *CabGuide* and Cabinet Office circulars;

(j) coordinating the policy and administrative aspects of the government's legislation programme; and

(k) advising on Ministers' conduct, public duty, and conflicts of interests.

5.87 The unique and significant nature of the Secretary/Clerk position in the constitutional arrangements of central government, and the need to preserve and support the impartiality and independence of the position, require the appointment process to be transparent and moderated. The Secretary/Clerk is appointed by the Chief Executive of the Department of the Prime Minister and Cabinet. The appointment process is modelled on the Chief Executive appointment process set out in the State Sector Act 1988. An appointment panel is convened, including the Chief Executive of the Department of the Prime Minister and Cabinet, the State Services Commissioner, and the Solicitor-General. The Prime Minister and the Governor-General are consulted about the appointment.

Related information

- Information about the membership and terms of reference of Cabinet committees, any coalition or support arrangements, and Cabinet Office circulars are available on the website of the Department of the Prime Minister and Cabinet, at www.dpmc.govt.nz/cabinet-office.
- Detailed guidance and information on Executive Council, Cabinet, and Cabinet committee processes is available in the *CabGuide*, at www.dpmc.govt.nz/cabguide.
- Detailed guidance on impact analysis for regulatory proposals is available on the Treasury website, www.treasury.govt.nz.
- Access to the ministerial intranet is provided to Ministers and their staff by Ministerial and Secretariat Services in the Department of Internal Affairs.
- The *Standing Orders of the House of Representatives* are available on the Parliament website, www.parliament.nz.

The guidance listed here was current at time of going to press. For updates, see the online version of this manual at www.dpmc.govt.nz/cabinet-manual.

6
Elections, Transitions, and Government Formation

Introduction

6.1 This chapter describes the principles and procedures that apply to elections, transitions, and government formation. It covers:

(a) the electoral cycle and its impact on government decision-making;

(b) the principles and procedures that apply to transitions between administrations;

(c) the operation of the caretaker convention;

(d) the principles and processes of government formation;

(e) the law, conventions, and procedures concerning outgoing and incoming Ministers;

(f) mid-term transitions and early elections;

(g) the provision of information by the state sector during transitions.

The electoral cycle

General

6.2 The term of Parliament in New Zealand is three years from the date fixed for the return of the writs issued for the previous general election (see section 17 of the Constitution Act 1986). Parliament may, however, be dissolved before the three-year term finishes, under section 18 of the Constitution Act. When the term of Parliament has ended, or Parliament has been dissolved, a general election is held to determine the composition of the next Parliament from which the next government will be formed.

6.3 The Governor-General has the formal power to dissolve, prorogue (that is, discontinue without dissolving), and summon Parliament, under section 18 of the Constitution Act. By convention, the Governor-General exercises this power on the advice of the Prime Minister, the Governor-General's principal adviser (see paragraphs 2.4 and 2.6).

6.4 Elections are held in accordance with the Electoral Act 1993. New Zealand's proportional representation electoral system lessens the likelihood that one party will win enough seats to be appointed as a single-party majority government. The election may result, for example, in a minority single-party government or a majority coalition government.

Cabinet and Ministers' decision-making before and after an election

6.5 Before and after a general election it may be difficult for Cabinet and Ministers to take decisions, for several reasons:

(a) The period before a general election is usually characterised by a period of reduced decision-making capacity at the ministerial and Cabinet level, while Ministers are occupied with the election campaign.

(b) Some decision-making constraints apply in the three months before an election (see paragraph 6.9).

(c) Immediately after the election, one of the two arms of the caretaker convention applies, under which decision-making is constrained (see paragraphs 6.21 – 6.40), and Ministers may be involved in coalition negotiations. In the past, the caretaker period has lasted from two weeks to two months.

6.6 Departments and agencies that plan and prepare for a protracted electoral period of weeks or even months are likely to experience few real problems. The importance of such planning cannot be overstated.

6.7 An additional practical consideration is the need to make significant decisions in time for them to be taken into account in the pre-election economic and fiscal update, which the Treasury is required to prepare under the fiscal responsibility provisions of the Public Finance Act 1989. This update is published 20 to 30 working days before election day. If short notice of an election is given, the update must be published not later than 10 working days after the day of the dissolution of Parliament. It must include information on all government decisions and all circumstances that may have a material effect on the fiscal and economic outlook.

6.8 It is therefore important for Ministers, departments, and other state sector agencies to ensure that all significant matters that will require ministerial attention in the course of the election year are dealt with well in advance of a general election. In particular, agencies should consider the effect of a general election on:

(a) the timing of any regular or annual processes that require ministerial decision or parliamentary action;

(b) processes with statutory deadlines; and

(c) the passage of legislation.

Pre-election period

6.9 In the period immediately before a general election, the government is not bound by the caretaker convention unless the election has resulted from the government losing the confidence of the House (see paragraphs 6.21 – 6.40 for information about the caretaker convention). Successive governments, however, have chosen to restrict their actions to some extent during this time, in recognition of the fact that an election, and therefore potentially a change of government, is imminent.

6.10 For example, significant appointments have been deferred, and some otherwise unexceptionable government advertising has been considered inappropriate during the election campaign, due to the heightened risk of a perception that public funds are being used to finance publicity for party political purposes (see the *Guidelines for Government Advertising*, available on the website of the Department of the Prime Minister and Cabinet, for general guidance).

6.11 In practice, restraints have tended to be applied from about three months before the general election is due or from the announcement of the election (if the period between the announcement of the election and polling day is less than three months).

6.12 Particular care should be taken to ensure the appropriate use of officials for policy development purposes in the lead-up to a general election or a by-election. Policy work carried out by officials for a Minister should not be used to develop party political material or be labelled as party policy. A "government policy" should generally be confirmed through the Cabinet and Cabinet committee decision-making process and then announced by the Minister in his or her official capacity. Once government decisions have been announced, however, they can appear in party political material used in an election campaign, as long as they are identified as government decisions (see also paragraphs 6.65 – 6.68 for information on provision of information by the state sector during transitions).

6.13 Political party policies that have not been worked on by officials or been the subject of government decisions may, of course, appear in party political material used in the election campaign. Such policies must not, however, be labelled "government policies".

6.14 Political advisers continue to assist their Minister in the normal way during the pre-election period.

6.15 The State Services Commission publishes guidance on the pre-election period for those agencies in the state services that are subject to the Commissioner's mandate. The guidance is available on the State Services Commission website, and sets out good practice that may also be useful for other agencies in the state sector. For guidance on the pre-election period, the State Services Commission is available to provide advice on the obligations of agencies and their employees, and the Secretary of the Cabinet is available to provide advice on decision-making.

Transitions following an election

General

6.16 The formation of a government following a general election is the usual process by which executive power is transferred from one government administration to another. For information on mid-term changes of government, see paragraphs 6.58 – 6.61.

6.17 Following an election, the Governor-General will appoint a Prime Minister and a government in accordance with the principles and processes set out in paragraphs 6.41 – 6.53.

Outcome of elections

6.18 Under New Zealand's proportional representation electoral system, it is likely that two or more parties will negotiate coalition or support agreements so that a government can be formed, whether it is a majority or minority government. A coalition agreement provides for a closer relationship between two or more parties than a support agreement, a distinguishing characteristic of coalition agreements being that coalition parties are represented in Cabinet. For an outline of how Cabinet collective responsibility operates in coalition and support arrangements, see paragraphs 5.26 – 5.31.

6.19 Even when the composition of the government has not changed greatly, it has become standard for the government holding office before the election to be deemed the outgoing government and for all Ministers to formally resign, marking the end of that administration. The beginning of the new administration is then marked with a full appointment ceremony (see paragraphs 2.20 and 6.48).

6.20 During the government formation process, before the incoming government is appointed, the outgoing government continues to govern, but it does so as a caretaker government governing under the caretaker convention (see paragraphs 6.24 – 6.30).

Caretaker convention

General

6.21 **On occasion, it is necessary for a government to remain in office for a period on an interim basis, when it has lost the confidence of the House, or (after an election) until a new ministry is appointed following the government formation process. During such periods, the incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office. However, governments in this situation have traditionally constrained their actions until the political situation is resolved, in accordance with what is known as the convention on caretaker government.**

6.22 **There are two sets of circumstances in which the government would see itself bound by the caretaker convention:**

(a) **After a general election**, one of the two arms of the caretaker convention applies until a new administration is appointed (see paragraph 6.24).

(b) **If the government has clearly lost the confidence of the House**, one of the two arms of the caretaker convention guides the government's actions until a new administration is appointed, following either negotiations between the parties represented in the current Parliament or a general election.

6.23 In both situations the government is likely to state explicitly that it is to operate as a caretaker government until the political situation is resolved.

Principles of the caretaker convention

Two arms of the convention

6.24 There are two arms to the caretaker convention, applying respectively:

(a) where it is not clear who will form the next government (see paragraphs 6.25 – 6.28); and

(b) where it is clear who will form the next government, but they have not yet taken office (see paragraphs 6.29 – 6.30).

The principles that apply in each situation are set out below.

Unclear outcome

6.25 Where it is not clear which party or parties will form the next government following a general election or mid-term loss of confidence in the government, the following principles apply to government business (at every level).

(a) In general terms, the normal business of government and the day-to-day administration of departments and other agencies in the state sector may continue during the caretaker period.

(b) Decisions taken and specific policy determined before the start of the caretaker period may be implemented by a caretaker government (subject to paragraph 6.26).

(c) Matters may arise, however, that would usually require decisions, such as those concerning:

- significant or potentially controversial issues;
- issues with long-term implications that would be likely to limit the freedom of action of an incoming government (such as the signing of a major contract, or the making of a significant appointment);
- new policy initiatives; or
- changes to existing policy.

(d) Decisions relating to those matters should:

- be deferred, if possible, until the political situation is resolved; or
- if deferral is not possible (or is no longer possible), be handled by way of temporary or holding arrangements that do not commit the government in the longer term (for example, extending a board appointment or rolling over a contract for a short period); or
- if neither deferral nor temporary arrangements are possible, be made only after consultation with other political parties, to establish whether the proposed action has the support of a majority of the House. The level of consultation might vary according to such factors as the complexity, urgency, and confidentiality of the issue (see also paragraph 6.37).

6.26 Occasionally a significant policy decision that was made before a caretaker period will need to be implemented during the caretaker period. Usually the implementation of such decisions can proceed during a caretaker period. If the proposed action would be difficult or impossible to reverse, however, it may be appropriate to consult other political parties about it.

6.27 The caretaker convention colours the whole conduct of government, and requires careful judgement by Ministers, public servants, Crown entities, and other state sector agencies as to whether particular decisions are affected.

6.28 No hard and fast rules are possible. Ministers may need to take into account various considerations (including political considerations), in deciding whether it is appropriate or necessary to proceed on a matter and how the matter should be handled. Decisions will also be considered against the background that the incumbent caretaker government has lawful executive authority, until replaced or confirmed in office.

Clear outcome

6.29 Where it is clear which party or parties will form the next government but Ministers have not yet been appointed, the outgoing government should:

(a) undertake no new policy initiatives; and

(b) act on the advice of the incoming government on any matter of such constitutional, economic, or other significance that it cannot be delayed until the new government formally takes office—even if the outgoing government disagrees with the course of action proposed.

6.30 Situations of this kind are likely to be relatively short-lived, as a swift transition between administrations is enabled by New Zealand's constitutional arrangements, including section 6(2)(a) of the Constitution Act 1986 (see paragraph 6.52).

Decision-making process under the caretaker convention

Departments and other state sector agencies

Day-to-day administration

6.31 The day-to-day administration of departments and agencies in the wider state sector will (in general terms) continue during the caretaker period. However, departmental officials and board members and employees of other state sector agencies should always take into account the fact that they are operating in a caretaker environment, and exercise special care when making decisions during this time.

Departments

6.32 Most decisions to which the caretaker convention applies are those relating to significant or potentially controversial issues, issues with long-term implications, new policy initiatives, or changes to existing policy. In the usual course of events, these decisions will be referred to the Minister. The Minister will decide (in consultation, if appropriate, with ministerial colleagues and/or the Prime Minister) how the convention applies and how the decision should be handled. The department should be ready to provide advice (if required) on applying the caretaker convention, and the options for handling the decision in terms of the convention. The Secretary of the Cabinet is available for guidance.

6.33 On rare occasions, caretaker convention issues may arise in relation to matters that, under statute, fall solely within the decision-making authority of a chief executive or statutory officer. Where this happens, chief executives and statutory officers should observe the principles of the caretaker convention (see paragraphs 6.24 – 6.30) when making such decisions. The Secretary of the Cabinet is available for guidance.

Crown entities, state-owned enterprises, and other state sector agencies

6.34 The statutory provisions governing decision-making within Crown entities, state-owned enterprises, and other state sector agencies impose different obligations from those applicable to decision-making within departments. Cabinet expects, however, that agencies in the state sector will apply the principles of the caretaker convention (see paragraphs 6.24 – 6.30) to decision-making during the caretaker period, as far as possible taking into account their legal obligations and statutory functions and duties. Cabinet also expects that the agencies will discuss with their Ministers any issues with caretaker convention implications. For general guidance on applying the caretaker convention, the heads of Crown entities or other state sector agencies may wish to contact relevant departmental chief executives or the Secretary of the Cabinet.

Ministerial decisions

6.35 As a general rule, Ministers should put before their Cabinet colleagues the sorts of issues on which they themselves would wish to be consulted (see paragraphs 5.11 – 5.12). Ministers may wish to discuss with their Cabinet colleagues whether the caretaker convention applies to a particular decision and how it should be handled. If Ministers are in any doubt about whether the caretaker convention applies to a particular matter, they should err on the side of caution and raise the matter with the Prime Minister or at Cabinet. If a Minister considers that a matter requires consultation with other political parties, the proposed consultation must be approved in advance by either Cabinet or the Prime Minister (see paragraphs 6.36 – 6.37).

Coordination and the Prime Minister's role

6.36 In cases where any doubt arises as to the application of the caretaker convention, Ministers should consult the Prime Minister. Final decisions concerning the caretaker convention rest with the Prime Minister.

6.37 All approaches to other political parties must be cleared in advance with the Prime Minister or Cabinet. Ministers should ensure that they notify the office of the Prime Minister as early as possible of any matters that may require consultation and action during periods of caretaker government.

Guidance on decisions about expenditure and the Official Information Act 1982

6.38 During a caretaker period, particular attention should be paid to decisions about expenditure, and requests under the Official Information Act 1982.

6.39 In relation to decisions on expenditure, there must always be authority from Parliament to spend money before expenditure is incurred (see paragraph 5.69).

6.40 The Official Information Act continues to operate during a caretaker period. In general, responding to requests for information should be seen as part of the day-to-day business of government, and should be dealt with in the usual way. On rare occasions, requests may raise issues that are likely to be of long-term significance for the operation of government and that require ministerial involvement. In this situation, it may be necessary to consider extending the time limit in order to consult the incoming Minister. Any such extension must comply with section 15A of the Official Information Act. For more information on the Official Information Act, see paragraphs 8.20 – 8.65.

Government formation

General

6.41 The process of government formation occurs most commonly following an election, but may be necessary if the government loses the confidence of the House mid-term. The principles and processes set out in paragraphs 6.42 – 6.47 apply in both post-election and mid-term government formation situations.

Principles and processes of government formation

6.42 The process of forming a government is political, and the decision to form a government must be arrived at by politicians.

6.43 Once the political parties have reached an adequate accommodation, and it is possible to form a government, it is expected that the parties will make appropriate public statements of their intentions. Any agreement reached by the parties during their negotiations may need to be confirmed subsequently by the political parties involved, each following its own internal procedures.

6.44 By convention, the role of the Governor-General in the government formation process is to ascertain where the confidence of the House lies, on the basis of the parties' public statements, so that a government can be appointed. It is not the Governor-General's role to form the government or to participate in any negotiations (although the Governor-General might wish to talk to party leaders if the talks were to have no clear outcome).

6.45 Accordingly, the Governor-General will, by convention, abide by the outcome of the government formation process in appointing a government. The Governor-General will also accept the political decision as to who will lead the government as Prime Minister.

6.46 During the government formation process, the Clerk of the Executive Council provides official, impartial support directly to the Governor-General, including liaising with party leaders as required on behalf of the Governor-General. The Clerk facilitates the transition between administrations if there is a change of government. The Clerk assists the outgoing and incoming Prime Ministers and provides constitutional advice, as appropriate, on any proposed government arrangements. See paragraphs 1.33 – 1.37 for further information about the role of the Clerk of the Executive Council.

6.47 Parliament must meet not later than six weeks after the date fixed for the return of the writs for a general election (see section 19 of the Constitution Act 1986), although it may be summoned to meet earlier. If, following an election, a government has not yet been formed by the time that Parliament meets, the Address in Reply debate may resolve matters, as it provides an early opportunity for a confidence vote. If Parliament is in session following a mid-term government formation process, a vote of confidence may also usefully be initiated to demonstrate where the confidence of the House lies.

Outgoing Ministers

6.48 Where a government formation process results in a change of administration, Ministers usually remain in office in a caretaker capacity until the new government is appointed, at which time the outgoing Prime Minister will advise the Governor-General to accept the resignations of the entire ministry.

6.49 Section 6(2)(b) of the Constitution Act may require some Ministers in the caretaker government to resign before the government formation process has concluded, following a general election. Section 6(2)(b) requires any Minister who has not been re-elected to Parliament to resign from the Executive within 28 days of ceasing to be a member of Parliament. In this event, the Prime Minister may ask another Minister in the caretaker government to be acting Minister in the relevant portfolio(s), or may appoint a new Minister to the portfolio(s) (in a caretaker capacity).

6.50 Ministerial and Secretariat Services in the Department of Internal Affairs provides practical assistance to outgoing Ministers in relation to staff, office, and other practical arrangements, including guidance on the storage and disposal of Ministers' official papers (see paragraphs 8.100 – 8.107). The Cabinet Office seeks information from outgoing Ministers about gifts they have received while in office (see paragraphs 2.84 – 2.92).

Appointment of a new government

6.51 Since the introduction of New Zealand's proportional representation electoral system, it has been the practice to hold a full appointment ceremony when a government is formed after an election, even when the composition of the government has not greatly changed. The ceremony formally marks the formation and commencement of the new administration and marks the end of the caretaker period.

6.52 Section 6(2)(a) of the Constitution Act helps ensure a swift transition between administrations. It provides that any candidate at a general election can be appointed as a Minister, before being confirmed as elected, but must vacate that office if not confirmed as a member of Parliament within 40 days of being appointed to the Executive. Section 6(2)(a) does not apply to Parliamentary Under-Secretaries, who cannot be appointed until their election as members of Parliament has been confirmed.

6.53 Further information on the appointment of Executive Councillors and Ministers is set out in paragraphs 1.26 – 1.28, and paragraphs 2.15 – 2.17.

Mid-term transitions

General

6.54 Some transitions between administrations may occur during the electoral term. There may be a transition to a new Prime Minister, or to a new governing party or coalition. The guidance in paragraphs 6.55 – 6.61 sets out the established constitutional principles and processes that apply in these situations.

Mid-term change of Prime Minister with no change of government

6.55 A change of Prime Minister may occur because the incumbent Prime Minister resigns, or as a result of the retirement, incapacity, or death of the incumbent Prime Minister.

6.56 In appointing a new Prime Minister, by convention the Governor-General accepts the outcome of the political process by which an individual is identified as the leader of the government.

6.57 In some cases (for example, in the event of the sudden death or incapacity of a Prime Minister), the Deputy Prime Minister acts as Prime Minister in a temporary capacity until the leadership of the government is determined.

Mid-term change of government

6.58 A basic principle of New Zealand's system of responsible government is that the government must have the confidence of the House of Representatives to stay in office. A government may lose the confidence of the House during its parliamentary term.

6.59 In some cases, the confidence of the House may be unclear, for example, when coalition or support arrangements change. The incumbent government will need to clarify where the confidence of the House lies, within a short time (allowing a reasonable period for negotiation and reorganisation). The caretaker convention applies in the mid-term context only when it becomes clear that the government has lost the confidence of the House.

6.60 Where loss of confidence is clear (for example, where the government has lost a vote of confidence in the House), the Prime Minister will, in accordance with convention, advise that the administration will resign. In this situation:

(a) a new administration may be appointed from the existing Parliament (if an administration that has the confidence of the House is available—see the information about government formation in paragraphs 6.41 – 6.47); or

(b) an election may be called (see paragraphs 6.62 – 6.64).

6.61 Until a new administration is appointed, the incumbent government continues in office, governing in accordance with the caretaker convention (see paragraphs 6.21 – 6.40).

Early election

6.62 As the Governor-General's principal adviser, the Prime Minister may advise the Governor-General to dissolve Parliament and call an election (see paragraphs 2.4 and 2.6). Usually this advice will be timed in accordance with the electoral cycle.

6.63 In some circumstances, a Prime Minister may decide that it is desirable to advise the Governor-General to call an early election. In accordance with convention, the Governor-General will act on the advice as long as the government appears to have the confidence of the House and the Prime Minister maintains support as the leader of that government.

6.64 A Prime Minister whose government does not have the confidence of the House would be bound by the caretaker convention (see paragraphs 6.21 – 6.23). The Governor-General would expect a caretaker Prime Minister to consult other parties on any decision to advise the calling of an early election, as the decision is a significant one (see paragraph 6.25). It is the responsibility of the members of Parliament to resolve matters so that the Governor-General is not required to consider dissolving Parliament and calling an election without ministerial advice (see paragraph 1.18 on the reserve powers).

Provision of information by the state sector during transitions

6.65 The neutrality of the public service and other agencies in the state sector must be protected throughout the pre-election period and the government formation process.

6.66 Before and after an election, the incumbent Ministers should ensure that any requests they make for advice or information from their officials is for the purposes of their portfolio responsibilities and not for party political purposes (see paragraph 6.12 for detail on policy development in the pre-election period).

6.67 At different stages of the election period or government formation process, different procedures apply for providing information and briefings to negotiating parties or to the incoming government:

(a) **During government formation negotiations**, negotiating parties may seek access to the public service or other agencies in the state sector for information and analysis on issues that might form part of a coalition or support agreement. Departmental officials may provide information to political parties for the purposes of government formation negotiations only when authorised to do so by the incumbent Prime Minister, and must follow guidance issued by the State Services Commission. This process is coordinated by the State Services Commissioner, working closely with the Department of the Prime Minister and Cabinet and the Treasury. All agencies in the state sector are expected to observe the State Services Commission guidance (see the State Services Commission website).

(b) **When the government formation negotiations have concluded, but portfolio allocations have not yet been announced**, in cases of great urgency, chief executives may provide advice to the incoming government through the Prime Minister-designate. The advice may be given only after the express consent of the incumbent Prime Minister has been obtained and a process has been agreed with the State Services Commissioner.

(c) **If portfolios have been allocated but the incoming Ministers have not yet been formally appointed**, chief executives may, with the approval of the incumbent Prime Minister and with the knowledge of the incumbent Minister and the State Services Commissioner, brief incoming Ministers on their portfolio responsibilities. The Secretary of the Cabinet will inform chief executives of any such authorisation from the Prime Minister.

(d) **After Ministers have been formally appointed**, each departmental chief executive must ensure that, as soon as possible, the Minister receives a briefing covering organisational issues, major policy issues, and issues needing immediate attention. For further guidance about briefing incoming Ministers, see paragraphs 3.16 – 3.21 and the State Services Commission website.

6.68 Incoming Ministers have access to the Cabinet records of previous administrations for continuity of government purposes (subject to certain conditions and to the rights and duties set out in the Official Information Act 1982) (see paragraphs 8.124 – 8.134).

Related information

- Speeches concerning the Governor-General's role during transitions and government formation are available on the Governor-General's website, www.gg.govt.nz.
- Detailed guidance for public servants during elections can be found on the State Services Commission website, www.ssc.govt.nz.

The guidance listed here was current at time of going to press. For updates, see the online version of this manual at www.dpmc.govt.nz/cabinet-manual.

7
The Executive, Legislation, and the House

Introduction

7.1 This chapter provides an overview of the main principles and procedures concerning the development of government legislation (Acts of Parliament and regulations—that is, primary and secondary legislation) at the executive level. The chapter covers:

(a) the Speech from the Throne and the Prime Minister's statement;

(b) the purpose, development, and monitoring of the government legislation programme;

(c) the role of the Legislation Coordinator in the Cabinet Office;

(d) the role of the Law Commission and its work programme;

(e) the process for the development and approval of government legislation;

(f) the process for making changes to policy after a bill has been introduced (including the approval process for Supplementary Order Papers);

(g) the role of Ministers in the development and approval of bills, including bills initiated by parties other than the government (local bills, private bills, and members' bills);

(h) the principles and procedures for the development of regulations, and the 28-day rule;

(i) the role of Ministers in relation to the House of Representatives and select committees;

(j) the examination of international treaties by the House;

(k) the Crown's financial veto;

(l) the government's role concerning referenda initiated under the Citizens Initiated Referenda Act 1993.

7.2 Enquiries about the legislation programme may be directed to the Legislation Coordinator in the Cabinet Office (see paragraph 7.15) or to the Parliamentary Counsel Office. Enquiries about legislation generally may be directed to the Parliamentary Counsel Office. Enquiries about papers for consideration by the Cabinet Legislation Committee should be directed to the secretary of that committee (in the Cabinet Office).

Speech from the Throne

7.3 The first formal opportunity for a government to outline its legislative intentions is the delivery of the Speech from the Throne. The Speech from the Throne is given by the Governor-General or the Sovereign (if in New Zealand) on the second sitting day of a parliamentary term, when the State Opening of Parliament is held. The formal purpose of the speech is to explain the reasons for summoning Parliament. It is usual for the speech to announce, in broad terms, the government's policy and legislative proposals on the principal issues of the day. The moving of the Address in Reply and the subsequent debate are the first opportunity after an election for the House of Representatives to express confidence in the government.

7.4 The Speech from the Throne is prepared following a process determined by the Prime Minister, with officials assisting as required. The Prime Minister sends a preview copy to the Governor-General. Once the final text is approved, the Cabinet Office arranges for presentation copies of the speech to be printed and for the speech to be published in the *New Zealand Gazette* after it has been given. The Prime Minister's Office disseminates the speech to the media.

Prime Minister's statement

7.5 In most years the Prime Minister presents a statement to the House on the first sitting day. This statement is to review public affairs and to outline the government's legislative and other policy intentions for the next 12 months (see the section entitled "Statements" in the chapter on non-legislative procedures in the *Standing Orders of the House of Representatives (*the *Standing Orders*)). The Prime Minister's statement is presented each year unless it is the first day of the Parliament (followed by the State Opening, with a Speech from the Throne) or an Address in Reply debate was commenced less than three months prior to the first sitting day.

Government legislation programme

Purpose of the legislation programme

7.6 The legislation programme provides an annual framework within which priorities are established for preparing, and managing the progress of, the government's proposed legislation.

7.7 The programme arranges groups of existing or proposed government bills in descending priority order, headed by bills that must be passed each year by law (such as Appropriation and Imprest Supply Bills). The legislation programme covers primary legislation only. It does not allocate priorities for the drafting of subordinate legislation.

7.8 The programme is amended as demands on the government change, new issues requiring legislation arise, and priorities change with the passage of time. Details of the programme, and the priority accorded to particular pieces of legislation, are integral to the government's management of its business in the House.

Confidentiality

7.9 The legislation programme is confidential, subject to the Official Information Act 1982. Recipients of requests for the legislation programme, or for information about details or priorities on the programme, should consult the Cabinet Office when considering their responses. Care should be taken over references to legislative priorities in any Cabinet material being considered for public release.

Development of the legislation programme

7.10 At the request of the Leader of the House and with the agreement of the Prime Minister or Cabinet, the Cabinet Office periodically issues a circular that invites Ministers to submit proposals for bills to be included in the programme. This circular is usually issued at the beginning of each parliamentary term and towards the end of intervening calendar years. An annual legislation programme is drawn up from the resulting information. The Cabinet Legislation Committee allocates a priority to each bill, and the programme is then submitted to Cabinet for approval.

7.11 Ministers may at any time submit new proposals for legislation, or seek changes to established priorities. Proposals for legislation may be submitted before public consultation or policy development is complete. A place on the legislation programme should be sought at an early stage if the policy issues are significant or the drafting task is likely to be substantial. If necessary, a Cabinet committee may make decisions on legislative priority at the same time as it considers the relevant policy proposals.

7.12 For guidance on the procedural requirements (including content and format) for the submission of bids to the Cabinet Legislation Committee, see the information on the legislation programme in the *CabGuide*.

Monitoring the legislation programme

7.13 Cabinet may review the legislation programme formally from time to time during the year, and adjust priorities as necessary. Bills that fall behind the agreed timetable may be assigned a lower priority or be set aside when Cabinet reviews the programme's progress. Ministers and departments should ensure that the Legislation Coordinator and the Parliamentary Counsel Office are alerted to matters that may significantly affect the content, coverage, or progress of bills on the programme, or that may lead to a proposal to add an item to the programme.

7.14 The Cabinet Legislation Committee may from time to time report to Cabinet on the progress of the legislation programme. Ministers should at all times be ready to discuss with their Cabinet colleagues the progress of any draft legislation for which they are responsible, including bills before select committees. To do this, Ministers should obtain briefings from their departments regularly and liaise with the chairs or senior government members of the select committees to check on progress.

Legislation Coordinator

7.15 The Legislation Coordinator, a member of the staff of the Cabinet Office, provides politically neutral support to the government of the day in developing, monitoring, and modifying the legislation programme. The Legislation Coordinator provides a broad view of progress and early warning of potential problems. The Legislation Coordinator is available to advise Ministers' offices and departmental officials about the legislation programme, or particular items on the programme.

Revision Bills

7.16 The Legislation Act 2012 introduced a mechanism for systematically revising the presentation of some New Zealand statutes to make them more accessible. After being revised, they are introduced as revision bills into Parliament for re-enactment. Revision is not intended to change the effect of a law.

7.17 The Attorney-General must prepare a revision programme for each new Parliament, setting out the statutes to be revised over each three-year period. The Parliamentary Counsel Office is responsible for preparing the revision programme in consultation with the Government departments that administer the legislation. Revision bills must be certified by a panel of eminent lawyers comprising the President of the Law Commission, the Solicitor-General, a retired High Court Judge, and the Chief Parliamentary Counsel.

7.18 Departments should review the legislation they administer, and consult with the Parliamentary Counsel Office to see if it would benefit from revision.

Law Commission work programme

7.19 The Law Commission is an independent Crown entity established by statute to undertake the systematic review, reform, and development of the law of New Zealand. Projects for the Law Commission may be proposed by any Minister or by the Law Commission. Each year the Minister responsible for the Law Commission writes to all Ministers inviting proposals suitable for government reference to the Law Commission, with the aim of finalising its work programme by the end of June.

7.20 Ministers are encouraged to consult the Parliamentary Counsel Office before proposing a legislation project for the Law Commission's work programme. Information on the current work programme can be found on the Law Commission's website. The Law Commission and relevant government agencies should collaborate closely during the course of a Law Commission project.

7.21 Following presentation of a Law Commission report, the portfolio Minister will submit a paper to Cabinet. If Cabinet accepts the recommendations in the Law Commission's report, no formal government response is made. If Cabinet rejects the recommendations, the government must present a formal response to the House within 120 working days of the presentation of the Law Commission's report. The processes for the government to respond to Law Commission reports are set out in the *CabGuide*. Further information about Cabinet and the Law Commission is set out in CO (09) 1 *Law Commission: Processes for Setting the Work Programme and Government Response to Reports*.

Development and approval of bills

From policy to enactment

7.22 The development of legislation is a complex and time-consuming process requiring careful planning and coordination. The basic process for developing government legislation can be summarised as follows:

(a) decision to pursue a policy proposal requiring legislation;

(b) policy development, including impact analysis for regulatory proposals (see paragraphs 7.35, 5.75, and the *CabGuide*);

(c) consultation (see paragraphs 7.27 – 7.49);

(d) allocation of legislative priority (see paragraphs 7.10 – 7.13);

(e) approval of policy proposals by Cabinet;

(f) preparing drafting instructions and further consultation (see paragraphs 7.52 – 7.53);

(g) drafting (see paragraphs 7.50 – 7.51);

(h) approval by the Cabinet Legislation Committee and Cabinet of the draft bill for introduction (see paragraphs 7.54 – 7.56);

(i) reference to government caucus(es) (see paragraphs 7.57 – 7.60) and non-government parliamentary parties, as appropriate (see paragraphs 7.61 – 7.64);

(j) introduction, first reading, and referral to select committee;

(k) policy changes to a bill after introduction (see paragraphs 7.72 – 7.77);

(l) consideration and report by select committee; and

(m) remaining parliamentary stages.

Process for developing bills

Assessing the need for legislation

7.23 In developing policy, Ministers and departments must ensure that the need for legislative action is not overlooked and, equally, that unnecessary new legislation is avoided. The Parliamentary Counsel Office can advise Ministers and departments in the early stages of policy development whether legislation is necessary. If it is, the Parliamentary Counsel Office can provide advice on the design of the legislation or form that it should take to give effect to the policy. Legislative and non-legislative options for achieving a policy objective are discussed in the Legislation Design and Advisory Committee's *Guidelines on Process and Content of Legislation* (known as the *LAC Guidelines*) and in guidance on impact analysis on the Treasury's website. The portfolio Minister may wish to consider at an early stage whether the proposal is suitable for inclusion in the Law Commission's annual work programme (see also paragraphs 7.19 – 7.21).

7.24 Where legislation is needed to give effect to a particular policy, the portfolio Minister should make a bid for a place on the legislation programme as early as possible in the policy development process. Such bids are usually made as part of the preparation of the annual legislation programme at the beginning of the year (see paragraphs 7.6 – 7.12).

7.25 Once the proposed bill is approved as part of the legislation programme, the relevant department should develop fully the policy that will form the basis of the bill, for consideration by the portfolio Minister and submission to the appropriate Cabinet committee and Cabinet.

7.26 Unless an exemption applies, all policy proposals submitted to Cabinet that include regulatory options or proposals (that is, options that would ultimately create, amend, or repeal Acts or disallowable instruments for the purposes of the Legislation Act 2012) must be accompanied by an impact statement or summary. An impact statement is a comprehensive outline of the results of impact analysis undertaken by the lead policy agency, and is intended to ensure that Cabinet has the best available information on the nature and extent of a policy problem, policy options, and risks and impacts. An impact statement or summary is published at the time that a government bill is introduced or disallowable instrument is notified in the *New Zealand Gazette*. Detailed information about impact analysis, including exemptions and the requirements for preparation and presentation of impact statements and summaries, is set out in the *CabGuide* and on the Treasury's website.

Consultation

Effective and appropriate consultation

7.27 Effective and appropriate consultation is a key factor in good decision-making, good policy, and good legislation. When legislation is being developed, the types of consultation outlined in paragraphs 7.28 – 7.46 should be considered.

Ministerial colleagues

7.28 Ministers may need to consult their colleagues during policy development and before submitting draft legislation to the Cabinet Legislation Committee or Cabinet. Where the subject matter of a bill affects the portfolio interests of another Minister, the Minister responsible for the bill should consult the other Minister.

Caucus(es)

7.29 Ministers may consider a policy issue to be suitable for consultation with caucus committees or caucuses during the policy development process. Caucuses are also consulted on draft bills before introduction (see paragraphs 7.57 – 7.60).

Political consultation

7.30 At all stages in the development and passage of a bill, Ministers should consider the need to confirm support for the bill from parties representing a majority of the members in the House (see paragraphs 7.61 – 7.64). This consultation may cover both the substance of the bill and the proposed process for its parliamentary consideration.

7.31 Coalitions and minority governments are likely to establish detailed procedures for political consultation, which will generally be promulgated by a Cabinet Office circular.

7.32 Ministers are responsible for consultation on proposed legislation with non-government parliamentary parties and any independent member of Parliament. Departments may be called on to support Ministers in this role (see paragraph 3.77, and the election period guidance issued by the State Services Commission, available on its website).

Inter-agency consultation

7.33 Proposed legislation will often affect the interests of other departments or agencies in the state services as well as the interests of the department responsible for the legislation. Lack of consultation within the state sector produces legislation that is likely to require early amendment or to have a protracted or difficult passage through the government policy process and the House. Other departments that have an interest in, or may be affected by, proposed legislation should therefore be consulted fully as policy is developed and before drafting instructions are prepared. Relevant agencies in the wider state sector should also be consulted as appropriate.

Ministry of Justice

7.34 The Ministry of Justice must be consulted on all bills, so that it can vet them for consistency with the New Zealand Bill of Rights Act 1990 (see paragraph 7.67). Bills developed by the Ministry of Justice are vetted by the Crown Law Office. The Ministry of Justice must also be consulted on all proposals to create new criminal offences or penalties or alter existing ones, to ensure that such provisions are consistent and appropriate. Departments should assess the implications of bills on existing Treaty of Waitangi settlements and consult the Ministry of Justice if they conclude there will be a potential impact. This is to safeguard the durability of Treaty settlements, and the renewed relationship that settlements have established.

Regulatory Quality Team, the Treasury

7.35 If impact analysis requirements will, or may, apply to a policy proposal, a department must contact the Regulatory Quality Team at the Treasury to confirm this, and to determine what type of impact statement or summary will be required and who will need to review it before it is submitted to Cabinet. The *CabGuide* and the Treasury's website include further information about the provision of independent quality assurance for impact statements and summaries.

Portfolios and the administration of legislation

7.36 The Cabinet Office should be consulted if the proposed legislation would:

(a) establish a new portfolio or changes existing portfolios;

(b) contain a definition of "Minister" or "department"; or

(c) require the responsibility for the administration of the legislation to be assigned to a portfolio and/or a department by the Prime Minister.

Directories containing information about ministerial portfolios are listed and described in paragraph 2.34.

Legislation Design and Advisory Committee

7.37 The Legislation Design and Advisory Committee is a government committee that provides advice to departments on bills early in their policy and legislative development. The committee's mandate is to help resolve problems in the architecture of legislation, and to identify potential rule of law issues, with the goal of ensuring that policy objectives are achieved and improving the quality of legislation.

7.38 The committee is responsible for the *LAC Guidelines*, which cover issues that are fundamental to the development of legislation, such as proper processes and basic legal principles. The guidelines have been endorsed by Cabinet as the government's key point of reference for assessing whether draft legislation conforms to accepted constitutional and legal principles.

7.39 Ministers and departments are encouraged to seek formal or informal advice and assistance from the committee at an early stage on projects that are significant, involve complicated legislative design issues, appear to have public law implications, or have implications for the overall coherence of the statute book. Departments should allow sufficient time for this consultation when setting legislative timeframes.

7.40 Requests for a place on the legislation programme must note whether bills will be referred to the committee. If departments are unclear whether they should consult the committee, they should discuss this with the Parliamentary Counsel Office. Cabinet may decide consultation is appropriate when it approves the legislation programme, or when it approves the addition of bills to the programme in the course of the year.

7.41 Through small ad hoc subcommittees of external members appointed by the Attorney-General, the committee will also scrutinise some bills and may make submissions to select committees on them. The committee would be acting independently for this purpose.

Officers of Parliament

7.42 Officers of Parliament should be consulted in their areas of interest as appropriate: for example, the Office of the Ombudsmen over the application of the Ombudsmen Act 1975 to a new agency. If proposed legislation would establish a new officer of Parliament, the Office of the Clerk should be consulted, following which the Minister responsible for the bill should consult the Officers of Parliament Committee (a select committee chaired by the Speaker) at an early stage before the legislation is developed.

Clerk of the House of Representatives

7.43 The Office of the Clerk should be consulted where legislative proposals have an impact on Parliament or the House or if they directly affect the Office of the Clerk.

Organisations outside the state services

7.44 Ministers may wish to consult other organisations such as Māori groups, professional or trade associations, non-government organisations, local government, or community groups, or to engage in a wider process of public consultation with citizens or affected parties, before policy decisions are finalised and the bill is drafted and introduced into the House.

7.45 In some sectors, departments may have specific policies and guidelines covering consultation with the public: for example, the generic tax policy process (Inland Revenue Department and the Treasury).

7.46 Once drafting has progressed, in some circumstances releasing an exposure draft of the legislation may be helpful. In considering consultation with organisations outside the public sector, Ministers should take into account the confidentiality constraints mentioned in paragraph 7.48.

Consultation timeframes and processes

7.47 Consultation is essential but can be time-consuming. At the beginning of the planning process for the development of legislation, consideration must be given to the type of consultation that will be necessary or appropriate. Realistic timeframes for that consultation must be built into the legislation timetable. Several rounds of consultation may be needed on complex or significant legislation.

7.48 At every stage of its development, draft legislation is confidential and must not be disclosed to individuals or organisations outside government, except in accordance with the Official Information Act 1982, any Cabinet-approved consultation procedures, or with CO (14) 4 *Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown*. Any such release or disclosure must first have the approval of the Minister concerned and, in most cases, the approval of the Attorney-General. Unauthorised or premature disclosure of the contents of a draft bill could embarrass the Minister, and imply that the role of Parliament is being usurped. Cabinet, government caucuses, and Parliament must always retain the freedom to amend, delay, or reject a bill.

7.49 Detailed information on consultation requirements and processes is set out in the *CabGuide*. Cabinet Office circulars are available on the website of the Department of the Prime Minister and Cabinet.

Drafting legislation

Role of the drafter

7.50 The key role of the drafter is to produce plain English drafts that are legally correct and give effect to government policy. The drafter takes a whole-of-statute-book perspective and ensures that the legislation is well structured and consistent with other statutes and legislative drafting principles. In drafting legislation, drafters act on instructions from instructing departments (see paragraphs 7.52 – 7.53 and the *Guide to Working with the Parliamentary Counsel Office*).

7.51 The Parliamentary Counsel Office is responsible for preparing all government legislation other than legislation administered by the Inland Revenue Department. Approval must be sought from the Cabinet Legislation Committee, and confirmed by Cabinet, before instructions for drafting legislation are given to anybody other than the Parliamentary Counsel Office or the Inland Revenue Department (for legislation administered by that department). Submissions seeking such approvals must state the expected cost of using a drafter outside the Parliamentary Counsel Office or the Inland Revenue Department, and the proposed source of funding. Where approval is obtained, the actual cost is subsequently to be advised to the Cabinet Legislation Committee. The Parliamentary Counsel Office must approve legislation that has been drafted by a drafter outside the Parliamentary Counsel Office or the Inland Revenue Department, before approval is sought for its introduction into the House.

Drafting instructions

7.52 Drafting instructions provide the basis on which bills are drafted. Unless the Attorney-General has approved that drafting commence before policy approvals have been obtained, Ministers and departments should not provide drafting instructions to the Parliamentary Counsel Office or other drafter until the bill has been given a place on the legislation programme, all appropriate consultation has taken place, and Cabinet has approved the developed policy. The Ministers and departments initiating legislation are responsible for ensuring that drafting instructions, and bills as drafted, reflect government policy fully and correctly.

7.53 Good instructions are essential to ensure the timely and efficient drafting of legislation. The matters that need to be included in proper drafting instructions are set out in the *LAC Guidelines* and in the *Guide to Working with the Parliamentary Counsel Office*. Drafting instructions for a bill must cite the approval of a Cabinet committee or Cabinet before parliamentary counsel or other drafters may begin drafting. The Parliamentary Counsel Office can advise departments on how to prepare instructions.

Consideration by Cabinet Legislation Committee and Cabinet

7.54 The Cabinet Legislation Committee examines all draft bills before they are approved for introduction, to ensure that their policy content has been approved by the appropriate Cabinet committee and that all the relevant requirements (as set out in the *Cabinet Manual*, the *CabGuide*, and any applicable circulars) have been satisfied. The Cabinet Legislation Committee also examines substantive Supplementary Order Papers. It is not the function of the Cabinet Legislation Committee to revisit policy decisions underlying a bill, or to round them out; rather, its function is to be assured that all necessary decisions have been taken properly and that the bill conforms with legal principle. The Cabinet Legislation Committee will then refer bills to Cabinet for final approval for introduction into the House, either as separate items on the Cabinet agenda or in the committee's weekly report to Cabinet. A bill may not be introduced into the House until it has been approved by the Cabinet Legislation Committee and confirmed by Cabinet, or approved by Cabinet itself.

7.55 If at any stage of the drafting process significant changes are proposed to the policy already approved by Cabinet, the matter should be brought back to the relevant Cabinet committee for consideration and additional approval. Additional consultation as set out in paragraphs 7.27 – 7.46 may also be necessary. If changes are proposed after a bill is approved for introduction by Cabinet, the matter should similarly be brought back to Cabinet for consideration and additional approval before introduction. See paragraphs 7.72 – 7.77 for information on policy changes to a bill after introduction.

7.56 There are particular requirements for Cabinet submissions seeking approval for bills to be introduced into the House. These requirements are set out in the information on bills in the *CabGuide*.

Reference to caucus(es)

7.57 A party caucus comprises all the members of Parliament belonging to a particular political party. The number of government caucuses will depend on the number of parties represented in government. Each party caucus is likely to meet separately, although joint caucus meetings may be held.

7.58 Ministers are responsible for ensuring that each draft bill is referred to the government caucus(es) before being introduced into the House to ensure (among other reasons) that the bill has adequate support to progress. Reference to caucus(es) will usually follow approval by Cabinet, but in some cases timing considerations may require consultation with caucus or a caucus committee to precede Cabinet approval. The portfolio Minister and, in a coalition or minority government, any Minister who is representing a coalition partner's or support party's interests on the bill are expected to ensure that the matter is placed on their respective caucus agendas. Each Minister should be present to explain the bill.

7.59 If caucus consideration results in changes to the bill, the draft will need to be reconsidered by the relevant Cabinet committee or the Cabinet Legislation Committee, Cabinet, and caucus(es) before being introduced.

7.60 A Minister may, from time to time, ask officials to attend a caucus committee or caucus meeting to assist with briefing on proposed or draft bills. Guidance on the role of officials in this situation is in paragraph 3.76.

Consultation with non-government parliamentary parties

7.61 Consultation may be undertaken with non-government parliamentary parties and any independent members of Parliament before bills are introduced, to:

(a) confirm the support of a majority of the House for a bill to progress; or

(b) facilitate aspects of the parliamentary process.

7.62 As with caucus consultation, changes proposed to a draft bill as a result of this consultation may mean that the draft needs to be reconsidered by the relevant Cabinet committee or the Cabinet Legislation Committee, Cabinet, and caucus(es) before being introduced.

7.63 The portfolio Minister should assess the consultation requirements for each bill on a case-by-case basis, and undertake that consultation according to agreed procedures. Close liaison with the Leader of the House may be needed.

7.64 Ministers should consult the Leader of the House on engagement with non-government parliamentary parties through the Business Committee. The Business Committee (a select committee chaired by the Speaker) is empowered to approve extended sittings, arrange how committees of the whole House consider bills, classify bills as cognate, determine that select committee reports are to be debated, and arrange House business.

Compliance with legal principles and obligations

7.65 Ministers must confirm that bills comply with certain legal principles or obligations when submitting bids for bills to be included in the legislation programme. In particular, Ministers must draw attention to any aspects of a bill that have implications for, or may be affected by:

(a) the principles of the Treaty of Waitangi;

(b) the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;

(c) the principles in the Privacy Act 1993;

(d) international obligations; and

(e) the guidance in the *LAC Guidelines*.

7.66 When a bill is subsequently submitted to the Cabinet Legislation Committee for approval for introduction, the Minister is required to confirm in the covering submission that the draft bill complies with the legal principles and obligations listed in paragraph 7.65. Ministers must also provide information on a range of other matters to ensure compliance with various public law standards (see the procedures for legislation in the *CabGuide* for details).

7.67 The Attorney-General is required to draw to the attention of the House any bill that appears to be inconsistent with the rights and freedoms contained in the New Zealand Bill of Rights Act. Such issues should be identified by the agency developing the bill at the earliest possible stage. The Ministry of Justice is responsible for examining all legislation for compliance with the New Zealand Bill of Rights Act and advising the Attorney-General. The Crown Law Office examines bills developed by the Ministry of Justice. The Attorney-General's report on a bill is referred to a select committee. Ministers are expected to assist the committee in considering New Zealand Bill of Rights Act issues.

Omnibus bills

7.68 The *Standing Orders* allow only certain types of omnibus bills (see the section entitled "Omnibus bills" in the chapter on legislative procedures in the *Standing Orders*). When developing omnibus bills, departments should consult the Office of the Clerk at an early stage. The types relevant to most Ministers and departments are:

(a) omnibus bills that deal with interrelated topics that can be regarded as implementing a single broad policy (advice on compliance with this requirement should be sought from the Office of the Clerk);

(b) finance bills or confirmation bills that validate an action or confirm a legislative instrument;

(c) taxation bills; and

(d) Statutes Amendment Bills.

7.69 Statutes Amendment Bills are designed as vehicles for technical, short, and non-controversial amendments to multiple Acts. Cabinet generally agrees to a Statutes Amendment Bill being included in the annual legislation programme. The Cabinet Office advises all Ministers and chief executives by Cabinet Office circular of the criteria, process, and deadlines for the development of the bill, which is then coordinated by the Ministry of Justice.

7.70 The need to obtain the agreement of all other parties and any independent members of Parliament on a Statutes Amendment Bill is particularly important. The *Standing Orders* provide for any clause in such a bill to be struck out if any member objects to it in the committee of the whole House.

7.71 Ministers seeking to promote minor amendments that have critical features (for example, in relation to timing or the need for immediate certainty) should consider seeking a priority for the amendments to proceed in their own right, even though they meet the criteria for inclusion in a Statutes Amendment Bill.

Policy changes to a bill after introduction

7.72 During the parliamentary process, it often becomes necessary to amend a bill. Changes can be made to a bill either as a result of the select committee process (that is, as recommended in the committee's report), or later during the committee of the whole House stage. Ministers are responsible for monitoring the progress of their legislation when it is before a select committee (see paragraphs 7.14 and 7.110 – 7.113).

7.73 Changes proposed by the Minister in charge of a bill are usually formally publicised by being set out on a Supplementary Order Paper (SOP). Changes proposed by the government at the select committee stage will normally be proposed in the report of departmental officials assisting the committee. It may, however, be practical and transparent for the Minister to invite a select committee to consider (and consult publicly on) changes set out on an SOP, especially where the proposed changes are extensive or significant.

7.74 Where amendments proposed to a bill before a select committee or the committee of the whole House are outside the scope of the bill as introduced, authorisation from the House (an "instruction") will be needed to enable the committee to consider the proposed amendments. Similarly, where proposed amendments are affected by the rules on omnibus bills in the *Standing Orders*, a suspension of *Standing Orders* will be needed. Procedural advice on these matters and on the parliamentary process should be obtained from the Office of the Clerk.

7.75 The procedures and consultation requirements set out in this chapter also apply to significant changes to a bill that is before the House or a select committee, whether or not the proposed changes are to be set out on an SOP or are outside the scope of the bill as introduced. The policy content of an SOP may be such that further approvals from Cabinet are needed for new policy or to alter existing policy approvals before the SOP is drafted and submitted to the Cabinet Legislation Committee (see paragraphs 7.54 – 7.56). This may include a new or supplementary impact statement or summary and, once the SOP is released, a revised or additional departmental disclosure statement.

7.76 Where a Minister's officials advising a select committee are to propose substantive amendments to a bill before the committee, Cabinet should be advised and prior policy approvals should be sought from Cabinet if time permits.

7.77 All SOPs that are outside the scope of a bill or that make substantive changes to a bill (particularly SOPs that are to be referred to a select committee for consideration) must first be submitted to the Cabinet Legislation Committee for approval. An SOP that serves a mechanical purpose (such as to divide a bill after its committee stage) or promotes minor technical improvements need not go through these procedures.

Non-government legislative proposals

7.78 Ministers should keep themselves informed about matters that may affect their portfolios, such as:

(a) the introduction of, and progress on, bills not promoted by the government (local bills, private bills, and members' bills); and

(b) legislative amendments proposed other than by government members of Parliament.

Cabinet consideration of the government position on whether to support such a bill or proposal may be required. In rare cases, the government may adopt a member's bill following Cabinet consideration, with the agreement of the member in charge of the bill.

7.79 Non-government proposals may have fiscal implications. Information on the Crown's financial veto is set out in paragraphs 7.134 – 7.136.

7.80 Under the *Standing Orders*, local bills, private bills, and members' bills that affect the rights and prerogatives of the Crown (for example, by seeking to bind the Crown) require the Crown's consent before they can be passed. This consent is conveyed to the House in a message from the Governor-General, who acts on the advice of the Prime Minister. The Office of the Clerk and the Parliamentary Counsel Office identify whether the rights and prerogatives of the Crown are affected by a bill. The Office of the Clerk seeks advice from the Leader of the House on whether the government wishes the bill to proceed. Cabinet consideration of the government position may be required if it has not already taken place at an earlier stage.

7.81 Under the *Standing Orders*, a Minister cannot promote a member's bill. On becoming a Minister, a member is obliged to transfer responsibility for a member's bill to a non-ministerial colleague.

Regulations

Authority to make regulations

7.82 In general, the principles and policies of the law are set out in Acts of Parliament. Parliament can delegate power to the Executive to make some laws, in the form of regulations. Regulations usually deal with matters of detail or implementation, matters of a technical nature, or matters likely to require frequent alteration or updating. The authority to make regulations is set out in the relevant Act. Regulations should not, in general, deal with matters of substantive policy, have retrospective operation, purport to levy taxes, or contain provisions that purport to amend primary legislation.

7.83 "Regulations" is a collective term that covers all subordinate instruments made under the power delegated by Parliament. Such instruments include regulations, a range of legal instruments such as rules or bylaws, instruments revoking regulations, and some Orders in Council, proclamations, notices, and warrants (for a full definition, see section 29 of the Interpretation Act 1999). Sometimes instruments that are not regulations as defined, are nevertheless "deemed" by statute to be regulations in order to subject them to scrutiny or publication requirements. Legislative instruments drafted by the Parliamentary Counsel Office are published in the Legislative Instruments Series, while instruments drafted by agencies are published or notified in the *New Zealand Gazette* or made available on the agencies' own websites.

Scrutiny of regulations

7.84 The limits of the regulation-making power will be defined as precisely as possible in the enabling Act. Therefore care must always be taken to ensure that the regulations fall within the scope of the power granted. The High Court can review regulations and declare them to be ultra vires and therefore invalid if they are outside the scope of the power to make them.

7.85 The Regulations Review Committee examines all regulations after they are made. This select committee considers whether it should draw the regulations to the attention of the House on any of a number of grounds relating to basic legal or constitutional principle (see the section entitled "Delegated legislation" in the chapter on legislative procedures in the *Standing Orders*). This scrutiny forms the basis for any recommendation to the House.

7.86 A process also exists under the Legislation Act 2012 and the *Standing Orders* to move a motion in the House for the disallowance of a regulation. The Regulations Review Committee also investigates complaints on the operation of regulations, on grounds set out in the *Standing Orders*.

Planning for the development of regulations

7.87 It is expected that departments will systematically monitor and review all regulations for which they are responsible. Each department is encouraged to prepare a schedule of the regulations that are likely to be required each year. Such a schedule would include, for example:

(a) regulations that will be needed as a consequence of new legislation being developed by the department;

(b) regulations that are required at specific dates each year; and

(c) amendments needed to existing regulations as a result of a review or changes in fees.

7.88 There is no formal programme for the drafting of regulations. However, when submitting a bill for a place on the annual legislation programme, Ministers are required to provide a summary of any associated regulations that it will be necessary to implement the legislation, and an indication of the likely timing of making the regulations. It is good practice for departments to give the Parliamentary Counsel Office information on any significant proposed regulations early in each year, when Cabinet decisions are being made on the legislation programme.

Process for developing regulations to be made by Order in Council

7.89 Some regulations are made by Order in Council. Such regulations must be developed and made by following a particular process. The *CabGuide* sets out detailed guidance on the process for developing regulations. The *LAC Guidelines* include extensive guidance on the development of delegated legislation. The *Guide to Working with the Parliamentary Counsel Office* also provides useful guidance for departmental legal advisers and other officials working with the Parliamentary Counsel Office. The *Legislation and House Procedure Handbook* contains additional guidance for staff in Ministers' offices.

7.90 The guidance provided in paragraphs 7.23 – 7.67 concerning the development of primary legislation applies equally to the development of regulations.

7.91 The steps in the process include:

(a) identifying the need for regulations (through departmental monitoring and consideration of the relevant statute);

(b) developing the policy behind the regulations (if necessary);

(c) consultation (as required):

- with relevant departments;

- with government caucus(es);

- with other parties represented in the House and independent members of Parliament;

- with affected groups if this is required by legislation, identified as necessary by the department or Ministers, or otherwise appropriate;

(d) submitting any policy, including an impact statement or summary, to a Cabinet committee and Cabinet for approval. If the regulations are routine and do not require new policy decisions, the Minister may authorise drafting without reference to Cabinet;

(e) drafting by parliamentary counsel;

(f) submitting the proposed regulations to the Cabinet Legislation Committee and Cabinet for authorisation for submission to the Executive Council;

(g) notification in the *New Zealand Gazette*;

(h) a 28-day period before the regulations come into force (see paragraphs 7.96 – 7.99 for further details on the 28-day rule); and

(i) publication in the legislative instruments series.

7.92 Departmental planning must take account of the time needed for all of these steps, allowing room for slippage at all stages. An absolute minimum of six weeks should be allowed between the completion of the drafting of the regulations and the date on which the regulations come into force, assuming all preceding steps have been completed satisfactorily.

7.93 It is increasingly common for the empowering Act to impose an obligation on those developing regulations to consult with interested groups. Care needs to be taken to ensure that sufficient time is allowed for meaningful consultation, and that proper consultation takes place. Failure to meet a statutory requirement to consult may lead to the regulations being invalidated by the courts. Consultation with others, such as the government caucus(es), non-government parliamentary parties in the House, or any independent members of Parliament, if required, may also take time.

7.94 The parliamentary counsel drafting the regulations will consider whether the regulations are within the regulation-making powers granted in the Act. If the draft regulations are not within these powers, restrict individual freedom unreasonably, or are otherwise undesirable from a legal perspective, the parliamentary counsel will notify the Attorney-General and the Minister and department concerned.

7.95 A small number of Orders in Council are drafted within departments and submitted directly to the Executive Council (see paragraph 1.41). The principles set out in paragraphs 7.89 – 7.94 in relation to regulations drafted by the Parliamentary Counsel Office apply to these orders. Technical requirements for such Orders in Council are included in the information on the Executive Council in the *CabGuide.*

The 28-day rule

7.96 It is a requirement of Cabinet that regulations must not come into force until at least 28 days after they have been notified in the *New Zealand Gazette*. The 28-day rule reflects the principle that the law should be publicly available and capable of being ascertained before it comes into force.

7.97 There are some instances where regulations do not require compliance on the part of the public, or where it is otherwise appropriate to seek a waiver of the 28-day rule. Some examples are:

(a) where a regulation has little or no effect on the public, or confers only benefits on the public;

(b) where the regulations are made in response to an emergency;

(c) where early commencement is necessary for compliance with statutory or international obligations;

(d) where early commencement is necessary to avoid unfair commercial advantage being taken, or the purpose of the regulations being defeated; or

(e) where irregularities need to be validated.

See the *CabGuide* for further details on the 28-day rule.

7.98 A paper seeking Cabinet's agreement to a waiver of the 28-day rule must set out the reasons for seeking the waiver, and include recommendations in the standard form (see the *CabGuide*). Each case will be considered on its merits. Cabinet will not grant a waiver of the 28-day rule unless there is good reason to do so.

7.99 The parliamentary counsel drafting the regulations will note any non-compliance with the 28-day rule when they certify the regulations as being in order for submission to Cabinet. The Cabinet Office also collects information on compliance with the 28-day rule. Where there appear to be ongoing difficulties in complying with the rule, the Cabinet Office will seek an explanation from the office of the Minister and the chief executive concerned to identify and resolve problems.

Publicising new regulations

7.100 All regulations must be printed, published, and notified in the *New Zealand Gazette*, as soon as they have been made. Publication in the legislative instruments series and notification in the *New Zealand Gazette* are the minimum publicity requirements for new regulations. Ministers and departments should consider what other steps may be needed to give adequate publicity to a particular law change.

7.101 The *Guide to Working with the Parliamentary Counsel Office* contains information on certifying, gazetting, and publishing regulations (see also paragraphs 1.50 – 1.52).

Ministers and the House

7.102 In addition to its legislative function, another key role of the House of Representatives is scrutiny of the Executive. Much of this scrutiny, such as consideration of the Estimates, takes place in select committees (see paragraphs 7.108 – 7.122). Ministers are also directly accountable to the House through written and oral questions. They may be required to participate in an urgent debate on a matter of current importance, take the opportunity to inform the House about the government's work in a General Debate, or make statements to the House on matters of significant public importance.

7.103 Further information can be found in the *Standing Orders* and the *Legislation and House Procedure Handbook*. Guidance for Ministers about participation in these processes is available from the office of the Leader of the House and from the Office of the Clerk of the House of Representatives.

Questions for oral or written answer

7.104 Questions for oral answer can be addressed to a Minister on any matter for which the Minister has ministerial responsibility. Questions are lodged with the Clerk of the House of Representatives in the morning of a sitting day, and notified to Ministers' offices once the list for the day has been determined. The Minister's office helps the Minister to prepare for answering the primary question and any follow-up (supplementary) questions that may be asked. Departments provide information to the Minister to support this process.

7.105 Questions for oral answer and supplementary questions are allocated according to the proportion of seats each party holds in the House. This means that a certain number of primary questions are available to be asked by members of Parliament from the parties represented in the government each sitting day.

7.106 Any member of Parliament can lodge a question for written answer. Questions must relate to an area of ministerial responsibility. They must be answered within six working days. All questions and answers are published on the Parliament's website, although the publication of replies is delayed to allow the member who received the reply to have first use of the information.

7.107 Further guidance on responding to questions is available on the ministerial intranet.

Ministers and select committees

General

7.108 The *Standing Orders* provide for select committees to be appointed to consider legislation and other business. Select committees play an important role in the House's functions of scrutinising the Executive and holding it to account, examining proposed and past expenditure, and considering bills. Cabinet Ministers are not usually appointed to the subject select committees, but Ministers outside Cabinet may be appointed as members.

7.109 All government bills, except those taken under urgency, and Appropriation and Imprest Supply Bills, are referred to select committees for consideration. Select committees also:

(a) consider petitions;

(b) receive briefings and carry out inquiries;

(c) examine certain international treaties (see paragraphs 7.123 – 7.132);

(d) examine the *Estimates*; and

(e) conduct the annual reviews of departments, Crown entities, state-owned enterprises, Offices of Parliament, and other public organisations.

Consideration of bills

7.110 Select committee consideration of bills allows members of Parliament, interest groups, and the general public to examine and have input into draft legislation before it passes into law. In considering a bill, a select committee usually calls for submissions from interested organisations and individuals. A select committee may also seek advice from officials at various stages. Select committees may recommend to the House amendments to a bill, provided that they are relevant to the subject matter and consistent with the principles and objects of the bill as introduced.

7.111 In general, a select committee must report on a bill to the House within six months; seeking a select committee report date less than four months away requires a separate debate in the House. For further information, see the chapter on legislative procedures in the *Standing Orders*. Information on the role and conduct of officials in relation to select committees is set out in paragraphs 3.72 – 3.75.

7.112 The *Standing Orders* allow a Minister to take part in the proceedings of a select committee even if the Minister is not a member of the select committee. In such cases, a Minister is not entitled to vote (see the section entitled "Conduct of proceedings" in the chapter on select committees in the *Standing Orders*). Recent practice has been for a Minister to be available to a select committee to explain the considerations underlying a government bill, and to otherwise facilitate the select committee's consideration of the bill.

7.113 A Minister should actively liaise with the chairs or senior government members of select committees that have the Minister's legislation before them, to be aware of progress and to personally ascertain any intervention or other action necessary to advance the legislation.

Submissions on bills by departments

7.114 Government policy should reflect a whole of government approach rather than a single departmental view. Departments must therefore not initiate submissions to a select committee on any bill (government bill, local bill, private bill, or member's bill), or any other matter such as a petition or an inquiry, without consulting their Minister in advance and obtaining the approval of the Cabinet Legislation Committee and Cabinet. When preparing requests to the Cabinet Legislation Committee, departments should give the reasons for making a submission to the select committee and set out the substance of the proposed submission.

7.115 Any department that is asked or invited to provide information, advice, or evidence to a select committee should inform the portfolio Minister of the details and clear the proposed response with the Minister (see paragraphs 8.82 – 8.85 and *Officials and Select Committees – Guidelines* on the State Services Commission website). The Minister may need to consult colleagues, particularly in a coalition government or if the issue affects several portfolios. Sometimes Ministers may direct that a policy-related issue be referred to the appropriate Cabinet committee for decision or a proposed response be referred for agreement by the Cabinet Legislation Committee.

7.116 If the subject matter is broader than the department's sphere of interest, the department should establish whether other departments have been similarly approached. If several departments have been approached, a lead department should be identified by Ministers to liaise with the other departments to ensure coordinated and comprehensive responses.

7.117 It is expected that agencies in the wider state sector that wish (or are invited) to make a submission to a select committee on any matter will discuss the matter first with their Minister.

7.118 In practice, the government's approach to a local bill, private bill, or member's bill is likely to be resolved at the political level or through a department providing advice to a select committee on a bill, rather than through the formal process of making a submission. Guidance on Ministers' responsibilities in relation to non-government legislative proposals is in paragraphs 7.78 – 7.81.

Government responses to reports of select committees

7.119 If a report from a select committee to the House on an inquiry or petition includes recommendations to the government, a government response to the recommendations must be presented to the House within 60 working days of the committee's report (see the section entitled "Reports" in the chapter on select committees in the *Standing Orders*).

7.120 The Office of the Clerk of the House of Representatives sends the Cabinet Office a copy of the select committee's report. The Cabinet Office asks the appropriate Minister to report on the recommendations and to prepare the text of the government response.

7.121 The Minister's report and the proposed government response are considered by the relevant Cabinet committee and Cabinet.

7.122 If the select committee's report on the inquiry or petition raises matters that require policy decisions by Cabinet, a paper should be submitted to the relevant Cabinet committee before approval is sought for the final government response. After Cabinet has approved the response, the office of the Minister concerned must arrange the presentation of the government response to the House, by delivering the response to the Office of the Clerk of the House of Representatives. Further information on procedures for the preparation and presentation to the House of government responses can be found in the *CabGuide*.

Parliamentary treaty examination

General

7.123 In New Zealand, the power to conclude treaties rests with the Executive. Any proposal to sign a treaty or to take binding treaty action must be submitted to Cabinet for approval (see paragraphs 5.77 – 5.81).

7.124 Before the government takes binding treaty action on them, multilateral treaties and major bilateral treaties of particular significance are presented to the House of Representatives for examination. The requirements for parliamentary treaty examination are set out in the *Standing Orders*. The Minister of Foreign Affairs determines whether a bilateral treaty amounts to a major bilateral treaty of particular significance.

7.125 The parliamentary treaty examination process takes time, which departments must factor into their planning. The government may take binding treaty action before parliamentary treaty examination only where this is urgently necessary in the national interest.

National interest analysis

7.126 Presenting a treaty to the House requires the preparation of a national interest analysis, addressing such matters as the reasons for becoming a party to the treaty, the advantages and disadvantages to New Zealand, and the means of implementing the treaty.

7.127 The department with the main policy interest in the treaty, in consultation with the legal division of the Ministry of Foreign Affairs and Trade, is responsible for preparing the national interest analysis according to the requirements of the *Standing Orders*. In cases where a treaty has regulatory impacts, an extended national interest analysis, which includes the elements of an impact statement for a regulatory proposal, must be prepared. The national interest analysis must be approved by Cabinet before it is presented to the House.

Select committee consideration

7.128 Once a treaty and accompanying national interest analysis have been presented to the House, they are referred to the Foreign Affairs, Defence and Trade Committee. This select committee may examine the treaty itself, or refer it to another more appropriate select committee.

7.129 The government refrains from taking any binding treaty action in respect of a treaty that has been presented to the House until the relevant select committee has reported, or 15 sitting days have elapsed from the date of presentation, whichever is sooner. The select committee may indicate to the government that it needs more time to consider the treaty, in which case the government may consider deferring binding treaty action.

7.130 The select committee may seek public submissions. In addition, the House itself may sometimes wish to give further consideration to the treaty: for example, by way of a debate in the House.

7.131 If the select committee report contains recommendations to the government, a government response to those recommendations must be presented within 60 working days of the report (or such other timeframe be specified in the *Standing Orders*). For further information, see paragraphs 7.119 – 7.122, and the section entitled "Reports" in the chapter on select committees in the *Standing Orders*.

Related legislation

7.132 Any legislation necessary to implement a treaty domestically should not be introduced into the House until after the treaty has been presented and the time for the select committee to report has expired. Departments may initiate the legislative process earlier, by seeking a place on the legislation programme for the bill and issuing drafting instructions to parliamentary counsel (on a conditional basis).

Further information

7.133 The Ministry of Foreign Affairs and Trade can provide advice on the parliamentary treaty examination process, including guidance on the required format and content of a national interest analysis. Further information is set out in the *CabGuide*.

Crown's financial veto

7.134 All members of Parliament can propose legislation or amendments to legislation that involve an increase or decrease in expenditure or taxation. They also have the power to move amendments to Votes in the *Estimates*. The *Standing Orders* give the government the power to veto such initiatives if, in the government's view, the proposal would have more than a minor impact on the Crown's fiscal aggregates as specified in section 26J(1)(a) of the Public Finance Act 1989, or on the composition of a Vote. The relevant House procedures are set out in the section entitled "Crown's financial veto" in the chapter on financial procedures in the *Standing Orders*. A practical explanation of the House procedures is in the *Legislation and House Procedure Handbook*.

7.135 As the timelines for the government to decide whether or not to exercise the financial veto can be very tight, departments and Ministers' offices must:

(a) have processes in place for monitoring developments in the House and select committees affecting their Minister's portfolio or Vote, and for recognising which initiatives may have an impact on the government's fiscal aggregates or the composition of a Vote;

(b) alert their Minister and the Minister of Finance or the Treasury as soon as possible to any such initiatives; and

(c) provide prompt advice on the fiscal implications of such initiatives.

7.136 Detailed administrative arrangements within government to support the veto power are approved by Cabinet from time to time. Advice on these arrangements and on the responsibilities of Ministers, their offices, and departments is contained in Cabinet Office circular CO (07) 2 *The Financial Veto and 24 Hour Rule.*

Citizens initiated referenda

7.137 The Citizens Initiated Referenda Act 1993 establishes a process that allows persons or organisations to initiate a non-binding national referendum on a subject of their choice, if 10 percent of registered voters sign a petition in support of the question. The Clerk of the House of Representatives determines the precise wording of the question to be asked in the petition, on the basis of the promoter's proposal and a public consultation process. The promoter then has 12 months in which to collect the necessary signatures to cause a referendum to be held. The costs of holding the referendum are borne by the government.

7.138 At times a government response to a petition or referendum will be necessary. Most petitions or referenda are likely to be the subject of public attention and to be politically significant. Any decision on when and how to respond will need to be made by the government collectively. Individual Ministers should in general refrain from becoming personally involved in a petition or referendum proposal without Cabinet approval.

7.139 The government may decide to respond to a referendum proposal at any stage of the referendum process. A response could involve:

(a) a declaration of support for the proposal;

(b) an indication of willingness to take account of public debate over the issue;

(c) a rejection of the proposal; or

(d) the provision of information to inform the debate.

If it is possible that the government might support the proposal, the question of a formal response should be addressed early in the process.

7.140 As a matter of principle, departments should avoid commenting publicly on the merits of referendum proposals unless they have the permission of the Minister to do so.

7.141 It is appropriate for departments to give the Clerk of the House of Representatives technical assistance in finalising the wording of the question. This assistance must be restricted to helping ensure that the question conveys clearly the purpose and effect of the proposal put forward by the promoter. Even the apparently technical task of assisting with wording may raise sensitive issues, however, and care must be taken to ensure that comment could not be perceived as partisan. Departments should note that their comments are made available to the promoter as part of the Clerk's consultation on the wording, and that information held by the Clerk about processes under the Citizens Initiated Referenda Act is subject to the Official Information Act 1982.

Related information

- Information about the Law Commission and its work programme is on its website, www.lawcom.govt.nz.
- The Legislation Design and Advisory Committee *Guidelines on Process and Content of Legislation* can be found on its website, www.ldac.org.nz.
- Information about requirements for impact analysis and for disclosure statements is available on the Treasury website, www.treasury.govt.nz.
- The *Guide to Working with the Parliamentary Counsel Office* can be found on the Parliamentary Counsel Office website, www.pco.govt.nz.
- Detailed procedural guidance on the requirements for submitting bids for the legislation programme and the procedures for taking legislative proposals through the Cabinet Legislation Committee and Cabinet can be found in the *CabGuide*, at www.dpmc.govt.nz/cabguide.
- The *Standing Orders of the House of Representatives* and *Speakers' Rulings* can be found on the Parliament website, www.parliament.nz.
- David McGee, *Parliamentary Practice in New Zealand,* Office of the Clerk of the House of Representatives, provides additional information about parliamentary practice and process, and is available on www.parliament.nz.
- Questions for written answer and replies can be accessed on www.parliament.nz.
- The *Legislation and House Procedure Handbook*, designed primarily for staff in Ministers' offices, is available on the ministerial intranet.
- Access to the ministerial intranet is provided to Ministers and their staff by Ministerial and Secretariat Services in the Department of Internal Affairs.
- Guidance concerning the interaction between public service officials, select committees, and political parties is available on the State Services Commission website, www.ssc.govt.nz.
- The *New Zealand Gazette* is available at www.gazette.govt.nz.
- Cabinet Office circulars are available on the Department of the Prime Minister and Cabinet's website, at www.dpmc.govt.nz/cabinet-office-circulars.

The guidance listed here was current at time of going to press. For updates, see the online version of this manual at www.dpmc.govt.nz/cabinet-manual.

8
Official Information and Public Records

Introduction

8.1 This chapter provides guidance about the protection, availability, use, and disclosure of information held by government. The chapter covers:

(a) the status of information held by government and when it may be disclosed;

(b) the key aspects of the Official Information Act 1982, the Ombudsmen Act 1975, the Privacy Act 1993, and the Public Records Act 2005, particularly as they relate to Ministers and Cabinet;

(c) the provision of information to select committees, the production or discovery of official documents in legal proceedings, and requests for parliamentary information;

(d) the creation, good management, preservation, and archiving of ministerial public records;

(e) the convention on access to documents of a previous administration, and guidelines for former Ministers on the disclosure and use of official information.

Information held by government

8.2 The government holds a large quantity of information of all kinds. The law governing the creation, collection, storage, and use of this information is set out mainly in the Public Records Act 2005 and the Privacy Act 1993. These Acts, together with the Official Information Act 1982, also govern the availability of this information and promote accountable government through transparency and reliable recordkeeping. They help to ensure that information generated or procured by the government is used for lawful purposes.

8.3 All information held by the government should be treated with care and protected from unauthorised or unlawful release.

8.4 Release may be authorised by the Cabinet, a Minister (see paragraphs 8.14 – 8.19), or officials holding the relevant statutory or delegated authority. Release of information may also be required under the Official Information Act, the Privacy Act, or other legislation. Information about the release of Cabinet material from a previous administration can be found in paragraphs 8.124 – 8.134.

8.5 The government, under the State Sector Act 1988, is expected to deliver public services collaboratively. This will often require personal information that has been collected by one agency to be shared with another. Departments should consider how to use and manage personal information early in the policy development process, and they are encouraged to seek advice from the Office of the Privacy Commissioner or discuss approaches with the Government Chief Privacy Officer. Information sharing can often be achieved in a way that is consistent with the Privacy Act's information privacy principles

(see paragraph 8.67). Where potential inconsistencies with the information privacy principles are identified, the Privacy Act and other legislative regimes contain tools that can enable the information sharing. In all cases, appropriate safeguards must be built into sharing arrangements.

Security classification of government documents

8.6 Government documents may be given a security classification. Classified documents must be handled according to the *Protective Security Requirements*. Guidance on the application of security classifications to Cabinet material is set out in the *CabGuide* (see paragraph 8.43 for information on the release of classified information under the Official Information Act).

Improper release or use of information held by the government

Unauthorised release of information

8.7 If information held by the government is released without authority, a range of responses may be considered, depending on the circumstances. They include:

(a) an internal inquiry by the chief executive of the department concerned, perhaps in association with the State Services Commission;

(b) an inquiry by the Secretary of the Cabinet;

(c) a non-statutory or statutory inquiry (see paragraphs 4.111 – 4.112);

(d) a State Services Commission inquiry at the direction of the Prime Minister or Minister concerned, or initiated by the State Services Commissioner;

(e) a police inquiry; or

(f) an inquiry by the Privacy Commissioner.

8.8 Sections 78A of the Crimes Act 1961 and 20A of the Summary Offences Act 1981 create an offence, in certain circumstances relating to the security and defence of New Zealand, of improperly disclosing, copying, or retaining official information.

Exploitation of information for private gain

8.9 The use by an official of information acquired in his or her official capacity for private gain or benefit of others, even if not involving the disclosure of information, is an offence under section 105A of the Crimes Act 1961. The use or disclosure of personal information that has been obtained as a result of an offence under section 105A is also an offence (whether or not the person using or disclosing the information is an official).

8.10 A government contractor or other person outside the public service entrusted with official information in confidence should not use or communicate that information other than for the purpose for which it was given. Where appropriate, Ministers and departments should ensure that the agreement with a contractor or consultant includes a confidentiality clause.

Information about commercial entities

8.11 Ministers and officials have access to a wide range of information about commercial entities that is not generally available to the public. They must ensure that they do not use this information in any way that affects their personal interests or the personal interests of their family, whānau, or close associates. Chapter 2 contains guidance for Ministers and former Ministers on identifying and managing conflicts of interest, including those arising from access to information. The State Services Commission can provide guidance on the management of officials' conflicts of interest.

8.12 In particular, Ministers and officials may receive or create information about companies that are listed on the stock exchange. Such information should be treated with care, as breaches of the insider trading and market manipulation regimes in the Financial Markets Conduct Act 2013 can result in significant fines or imprisonment. When dealing with information relating to companies that are listed on securities exchanges, Ministers and officials should therefore:

(a) take precautions to ensure that the information is handled appropriately;

(b) consider how and when to release information so as to minimise potential impacts on markets;

(c) take care when making statements that could inadvertently and inappropriately influence third parties; and

(d) avoid misleading the market.

8.13 In addition, Ministers and officials who hold information about a listed company that is not generally available to the market must not trade in the securities of that company. This prohibition includes trading through trusts or other vehicles if the Minister or official is aware that the trust or vehicle is undertaking the trading. More detailed guidance for Ministers and officials on the insider trading and market manipulation regimes is set out in Cabinet Office circular CO (12) 7 *Guidelines for Dealing with Inside Information about Public Issuers*.

Proactive release of information, including Cabinet material

8.14 Official information may be released proactively. Information that may be suitable for proactive release includes policies and procedures, research, evidence, and other material that would help the public to contribute to government decision-making and administration, and material that is likely to become subject to Official Information Act requests.

8.15 Proactive release of material is not covered by the Official Information Act, and therefore section 48, which protects agencies from civil or criminal sanctions when releasing official information in good faith, is not applicable.

8.16 Agencies should undertake due diligence processes to consider any potential liability, civil or criminal, that might result from the proactive release of official information or as a consequence of publication (for example, defamation or breach of contract) before deciding to publish the information.

8.17 It is generally expected that Cabinet material (Cabinet and Cabinet committee papers and minutes) on significant policy decisions will be released proactively once decisions have been taken, most often by publication online. Ministers have authority to approve the proactive release of Cabinet material within their portfolios. A Minister may also decide that it is appropriate for Cabinet material to be released proactively and published online following a request for information under the Official Information Act (see paragraphs 8.39 – 8.42 for guidance on requests for Cabinet material under the Official Information Act).

8.18 The following matters should be considered before Ministers give approval to proactively release and publish Cabinet material online:

(a) the application of the principles in the Official Information Act, the Privacy Act, and the *Protective Security Requirements* (see paragraph 8.6) to the information;

(b) whether the document contains any information that would have been withheld if the information had been requested under the Official Information Act;

(c) whether the document contains any information that must be withheld under the terms of any other legislation; and

(d) whether, in the circumstances, publication on the web is the best means of public release.

8.19 More detailed guidance on the process for publishing Cabinet material online is set out in the *CabGuide* and in Cabinet Office notices issued from time to time.

Official Information Act 1982

Purpose of the Act

8.20 The Official Information Act balances the Act's purpose of progressively increasing the availability of official information against the need to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

8.21 The purposes of the Act, as set out in section 4, include the promotion of good government and the enhancement of respect for the law by increasing the availability of official information progressively, in order to enable more effective public participation in the making and administration of laws and policies, and promote the accountability of Ministers and officials.

8.22 Section 5 of the Act sets out the key principle of availability:

> The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

What is official information?

8.23 "Official information" is defined in section 2 of the Act as any information held by a department or organisation (as defined, "organisation" includes most agencies in the wider state sector) or a Minister of the Crown (including a Parliamentary Under-Secretary) in his or her official capacity.

8.24 Information held by a Minister in his or her capacity as a member of a political party or as a member of Parliament, such as caucus material, is not official information for the purposes of the Act.

8.25 Ministers should always be clear about the capacity in which they are creating or using information. For example, a Minister corresponding about an electorate matter should sign as a member of Parliament.

8.26 The Attorney-General when performing law officer functions is not subject to the Official Information Act. Information held by the Attorney-General in this capacity is not, therefore, official information in terms of the Act.

8.27 Information held by an unincorporated body such as a ministerial or departmental committee is treated as official information held by the Minister or department concerned. Where independent contractors or consultants carry out work on behalf of a Minister or department, such information is also deemed to be official information held by the relevant Minister or department.

8.28 The definition of information is not confined to information on paper. Official information can include sound recordings, film, computer records, emails, text messages, and information known to a department, Minister, or organisation but not recorded in writing. Although an official or Minister could be required, under the Act, to write down information not yet in a written form, this is simply a means of making that existing information accessible to others. There is no obligation to form an opinion or create information in order to respond to a request.

8.29 Access by individuals to information about themselves is governed by the Privacy Act (see paragraphs 8.66 – 8.77). Access to official information about an identifiable person other than the requester, or where the requester is a corporate entity, is governed by the Official Information Act. In addition, the Official Information Act governs the right of requesters to be given reasons for decisions or recommendations that have affected them in their personal capacity, whether the requester is an individual or a corporate entity.

Complying with the Official Information Act

8.30 Requests under the Official Information Act must be dealt with carefully, conscientiously, and in accordance with the law. Ministers are personally responsible for complying with the duties imposed on them by the Act. Ministers must therefore ensure that staff in their offices are familiar with the legislation and have access to appropriate guidance.

8.31 Departmental chief executives, and the boards and chief executives of agencies in the wider state sector that are subject to the Act, are responsible for ensuring compliance with the Act within their organisations. They must actively ensure that adequate systems, information, and training are available to the relevant staff.

8.32 Ministers and officials must offer reasonable assistance to those requesting information under the Act (section 13) and assess each piece of information requested against the criteria in the Act. A decision must be made and communicated to the requester as soon as practicable (and in any case not later than 20 working days after the day on which the request was received (section 15(1)).

8.33 If consideration is being given to withholding information under one of the provisions of section 9(2), section 9(1) requires that an assessment be made in every case as to whether the public interest in release outweighs the need to withhold the information.

8.34 Under section 14 of the Act, the Minister or organisation that receives a request may be required to transfer it to another Minister, department, organisation, or local authority. The transferee should be consulted before the transfer is made. Transfers must be made promptly and within 10 working days of receiving the request, and the requester must be informed. A transfer of a request is not subject to review by an Ombudsman under the Official Information Act, but may be investigated under the Ombudsmen Act 1975, where the transfer was made by a department or other agency subject to the Ombudsmen Act.

8.35 The Act provides for extensions of time limits for response or transfer if the request is for a large quantity of information, or if consultation is necessary to make a decision on the request. The requester must be informed of any such extension within the 20-working-day period after receiving the request. The Ombudsman can investigate complaints about extensions. In addition, undue delay in releasing information may be deemed to be a refusal if the delay is investigated or reviewed by the Ombudsman.

8.36 The Act also provides requirements for the contents of the notice to the requester if it is advising of a refusal (section 19), where the information is not provided in the way preferred by the requester (section 16), or where information has been deleted or altered (section 17).

Informal advice and training

8.37 Ministers and departments may approach the Office of the Ombudsman for guidance about any official information request. This guidance can be offered only informally, as the Ombudsmen cannot make decisions that, legally, others should make. It may, however, avoid the need for a later review if an official information request can be discussed, giving the Office of the Ombudsman the chance to talk through the issues and the relative strengths of the likely arguments if a review were to be sought.

8.38 The Office of the Ombudsman can provide training to agencies about the Official Information Act. Further guidance can also be found on its website.

Requests for Cabinet material under the Official Information Act

8.39 There is no blanket exemption for any class of papers under the Official Information Act. Cabinet material is therefore covered by the Act in the usual way, and every request for Cabinet material must be considered on its merits against the criteria in the Act. See paragraph 8.43 for guidance on requests for documents with security classifications.

8.40 There is no requirement to consult the Cabinet Office on the release of Cabinet material, except in the case of Cabinet material of a previous opposition administration (see paragraphs 8.133 – 8.134). The Cabinet Office is available, however, for general guidance if departments have queries about the process for releasing Cabinet material. Departments who receive requests for the release of Cabinet material of a current government should consider whether the request should be transferred to the responsible Minister (see paragraph 8.34).

8.41 It is good practice to indicate on Cabinet material released under the Official Information Act that it has been approved for release.

8.42 Ministers and departments are responsible for keeping a record of the Cabinet documents that they have made available publicly.

Security classifications and endorsements and the Official Information Act

8.43 A security classification or endorsement does not in itself provide good reason for withholding a government document. A decision to withhold must be made under the criteria of the Official Information Act, as for all other official information. The security classification or endorsement determines how a document is handled within the government system, not whether it can be released externally. However, a high security classification or endorsement may provide a useful "flag", indicating that there may be good reason for withholding the document (or part of it) under the Official Information Act. It is good practice therefore to consult the author of the document before releasing it. Such a flag may become less relevant with the passage of time.

8.44 See paragraphs 4.69 – 4.72 for guidance on the release of legal advice, which is often endorsed "legally privileged".

Consultation on Official Information Act requests

Undertaking consultation

8.45 The Act envisages that Ministers or organisations dealing with requests may need to consult other Ministers or organisations before making a final decision on responding to requests for official information. See paragraph 8.35 for information on extending time limits, if necessary, to undertake consultation (section 15A of the Act). The outcome of any consultation on Official Information Act requests should be recorded in accordance with normal, prudent business practice (see paragraph 8.96).

Consultation by Ministers

8.46 When considering a request, Ministers (either directly or through their office staff) should consult other Ministers who have an interest in the subject matter of the request. Where a request seeks information that is particularly sensitive or potentially controversial, the Minister should also consider advising the Prime Minister's office. Responsibility for the request, however, remains with the Minister who received the request. From time to time, the Prime Minister may issue guidance to Ministers' offices setting out consultation protocols.

8.47 Special consultation arrangements apply to the release of Cabinet records that date from a previous opposition administration (see paragraph 8.134).

Consultation between departments

8.48 When considering a request, a department should consult another department when the information sought:

(a) was produced with substantial or critical input from that other department; or

(b) contains material that relates to the activities of the other department or that may result in publicity for that department.

8.49 Departments must advise the Cabinet Office as soon as possible of any requests for Cabinet documents dating from a previous opposition administration, to allow the Cabinet Office sufficient time to undertake consultation as set out in paragraph 8.134.

Departments' consultation with Ministers

8.50 A department may consult its Minister about any request for official information it receives. A department should consult its Minister if the request relates to Cabinet material, because such material relates to his or her activities as a Minister. It should be clear that the department is consulting rather than providing the request for the Minister's information, and sufficient time should be allowed for the Minister's office to raise any concerns about the proposed decision. The decision on how to respond to the request must nonetheless be made by the department, in accordance with the Official Information Act. It is good practice for Ministers and departmental chief executives to agree on how consultation arrangements on Official Information Act requests will be handled generally.

8.51 Departments should consider whether the information requested of them is more closely connected with the Minister's functions (as set out in paragraph 2.22). If so, the request should be transferred to the Minister under section 14 of the Official Information Act (see paragraph 8.34). For example, a request should be transferred if it is for information that relates to executive government decision-making functions, or for information that could, if released, prejudice the Minister's ability to perform these functions.

8.52 On being consulted, the Minister may take the view that information that the department considers should be released, should not be released. In such a case, transferring the request to the Minister may be an appropriate way forward, if the requirements of section 14 of the Act can be satisfied. Each case of this kind needs to be handled carefully at a senior level within the department, with reference to the Minister if necessary. Where the request is not transferred to the Minister, the views of the Minister are not determinative, and an assessment needs to be made by the department as to whether any of the withholding provisions apply.

8.53 A department should advise its Minister if it intends to release any information that is particularly sensitive or potentially controversial, in accordance with the "no surprises" principle (see paragraph 3.22). A notification for this purpose is not the same as consultation and should not unduly delay the release of information.

8.54 Advice on ministerial consultation or notification can be sought from the State Services Commission or the Office of the Ombudsman.

Coordinating Official Information Act requests

8.55 Sometimes requests are directed at or affect several Ministers or departments. In these cases, recipients of a request could consider the requirement in section 14 to transfer a request, or part of a request, where the information is more closely connected with the functions of another department or Minister or organisation.

8.56 It will not always be obvious that other departments and Ministers have had the same request addressed to them; requests that are potentially "common" should be checked with other departments or Ministers.

8.57 Departments may participate in cross-government forums to develop best practice in responding to Official Information Act requests. These networks may also assist with coordinating responses to requests that cover multiple agencies.

Charging for official information

8.58 The Ministry of Justice has issued guidelines on what the government regards as reasonable charges for the purposes of the Official Information Act. These guidelines should be followed in all cases unless good reason exists for not doing so. The guidelines are available from the Ministry of Justice website. The Office of the Ombudsman has also published guidance on charging on its website.

Review of decisions to withhold official information

Conduct of the review

8.59 A person who has requested official information can ask an Ombudsman to investigate a decision by a Minister or a department to refuse to supply all or part of any official information requested. The procedures for reviews are set out in Part 5 of the Official Information Act.

8.60 Where an Ombudsman undertakes a review, the Ministers, departments, and organisations concerned must comply fully with the requirements of the Act. An Ombudsman will not be content to accept superficial assertions, or the use of a blanket provision such as "free and frank discussion", to justify non-release of information. A department or Minister will be expected to provide a detailed justification in each case, and should use the review as an opportunity to set out the real concerns about the request.

8.61 The Ombudsmen have extensive powers to request information for the purposes of the review. Ministers and departments must respond within 20 working days to any such request. This time limit may be extended by notice to the Ombudsmen. Ombudsmen and their staff are required to conduct investigations in private and maintain secrecy except as provided for under sections 21(3) to (5) of the Ombudsmen Act 1975.

Ombudsman's recommendation

8.62 An Ombudsman, having investigated a complaint made under section 28 of the Act, will issue an opinion and may make such recommendations as he or she sees fit. If an Ombudsman considers that the original request should have been met, or that an unreasonable decision was taken, the Ombudsman will recommend to the Minister or department concerned the action to be taken.

8.63 Before making a recommendation, it is the Ombudsman's practice to first provide the Minister or department with a provisional opinion for comment, and to arrange for any other affected party to be consulted. The Ombudsman may also offer to discuss personally any case where his or her opinion differs from that of the holder of the information.

8.64 The Prime Minister may certify that the release of information would be likely to prejudice matters such as the security of New Zealand, or the Attorney-General may certify that release would be likely to prejudice such matters as the prevention of offences. In such cases, an Ombudsman cannot recommend the release of the information, but may recommend that the department or Minister concerned give further consideration to making the information available.

8.65 The information holder has a public duty to observe an Ombudsman's recommendation after 20 working days from receiving the recommendation. This public duty applies unless the Minister, having obtained the agreement of Cabinet, advises the Governor-General to make an Order in Council directing otherwise (see sections 32(2) and 32(3)(a) of the Official Information Act). Any such Order in Council:

(a) must set out the reasons for which it is made;

(b) must be published in the *New Zealand Gazette*;

(c) must be laid before the House of Representatives as soon as practicable;

(d) must be given to the Ombudsman who made the recommendations; and

(e) may be subject to review by the High Court and the appeal courts.

Privacy Act 1993

Purpose of the Act

8.66 The purpose of the Privacy Act 1993 is to promote and protect individual privacy, and in particular to establish principles on:

(a) collection, use, and disclosure of information relating to individuals; and

(b) access by individuals to information held about them.

The Act covers both the public and private sectors.

8.67 The Privacy Act covers "personal information", which is defined in section 2 of the Act as information about an identifiable individual. There are 12 information privacy principles (dealing with the collection, storage, use, and disclosure of personal information, and an individual's right to access his or her personal information and to request correction). Codes of practice that may modify or replace the information privacy principles (such as the Health Information Privacy Code 1994) are also issued from time to time.

Compliance

8.68 Ministers and departments are responsible for compliance with the law when they collect, use, or disclose information concerning individuals. A breach of the Act may result in legal action, including in some cases an award of damages.

8.69 Each agency must ensure that privacy officers within the agency are assigned responsibility to fulfil the compliance requirements set out in section 23 of the Privacy Act. The Office of the Privacy Commissioner is available for training, advice, and guidance in relation to the operation of the Privacy Act.

8.70 The Government Chief Privacy Officer is responsible for developing standards, issuing guidance, and providing assurance to support the public service in building capability in privacy and security management.

Ministerial access to and use of personal information

8.71 Ministers should exercise great care in dealing with personal information, and seek advice from the Office of the Privacy Commissioner in cases of doubt. In particular, Ministers and departments must handle personal information in accordance with the information privacy principles, as set out in section 6 of the Privacy Act. Other primary legislative provisions may vary the application of the information privacy principles. Ministers and departments should be aware of, and comply with, any differing approaches in their particular regulatory systems.

8.72 If a Minister requests (from his or her own department) personal information about an individual in order to deal with a portfolio issue, the department may in general provide this information to the Minister unless there is a legal obligation not to do so. The statutory provisions protecting information collected by the Inland Revenue Department are an example of such an obligation. The information privacy principles and any other relevant code should be considered carefully in relation to any such request.

8.73 If a Minister wishes to access information about an individual that is held by a department in another portfolio area, the Minister should, in line with the general principle that Ministers deal only with their own departments, seek assistance from the Minister with responsibility for that area (see paragraph 3.24).

8.74 The disclosure of information about an individual by Ministers or departments is governed by both the Official Information Act and the Privacy Act.

(a) If the person to whom the information relates requests the information, the request must be considered in accordance with the Privacy Act. Principle 6, in section 6 of the Act, gives individuals a legal right to access such personal information. Part 4 of the Act sets out reasons why such individual access request may be refused.

(b) If another person requests the information, the request must be considered in accordance with the Official Information Act. Section 9 of that Act provides that individual privacy may justify withholding the information if there is no overriding public interest in release. It will be important to identify and consider the strengths of all the relevant privacy interests and balance them against the strengths of the competing public interest in its release.

(c) A release by a Minister or department of information about an individual, in the absence of a request for it, is governed by Principle 11 of the Privacy Act. That principle allows only limited situations in which it would be appropriate to disclose personal information; for example:

- if the disclosure is directly related to the purposes for which the information was obtained;
- if disclosure is authorised by the individual concerned; or
- if disclosure is necessary to prevent a serious threat to public health or the life of another individual.

8.75 Further guidance can be found on the Privacy Commissioner's website.

Role of the Privacy Commissioner

8.76 The Privacy Commissioner can investigate complaints concerning breaches of the privacy principles in the Privacy Act (and of the rules in any code issued under that Act, such as the Health Information Privacy Code). Such a breach can occur when an individual is denied access to information about them or is wrongly refused the opportunity to correct information about them, or when an individual suffers some form of harm as a result of a breach of a privacy principle, a rule in a code of practice, or an information-matching or information-sharing provision.

8.77 The Privacy Commissioner's other responsibilities include monitoring proposed legislation to see if it affects the privacy of individuals, and commenting on any privacy problems. The *LAC Guidelines* give guidance about factors to consider when developing legislative proposals that could affect individual privacy (see paragraph 7.38), including proposed information matching between agencies.

Ombudsmen Act 1975

8.78 Under the Ombudsmen Act, Ombudsmen can investigate conduct by a department or organisation (central or local government) that relates to a matter of administration affecting any person in a personal capacity. They cannot investigate the decisions of Ministers, but can look into the departmental advice on which Ministers base decisions.

8.79 When investigating the actions of a department, an Ombudsman may consult a Minister concerned with the matter, or a Minister who requests a meeting. An Ombudsman may also require anyone to provide any information that, in the Ombudsman's opinion, relates to the matter under investigation. Any departmental official can be summoned to give information to an Ombudsman under oath. The Act makes it clear that compliance with such a request from an Ombudsman would not breach any obligation of security or non-disclosure.

8.80 An Ombudsman may recommend that remedial action be taken if a complaint is found to be justified. A copy of the recommendation will be sent to the Minister as well as to the department or organisation concerned. The recommendation is not binding, but the Ombudsman can report to the Prime Minister and subsequently to Parliament if dissatisfied with the action taken.

8.81 Section 20 of the Ombudsmen Act precludes the Ombudsmen from requiring information to be given to them where the Attorney-General certifies that to do so might have certain specified effects: for example, the disclosure of the deliberations or proceedings of Cabinet or Cabinet committees.

Providing information to select committees

8.82 Ministers and officials interact with select committees as part of ministerial accountability to the House. Select committees have the right to request information from Ministers or departments under the *Standing Orders* (see the section entitled "Powers of Committees" in the chapter on select committees). Ministers and their officials are expected to meet requests from committees to produce documents and to provide information, unless it is not in the public interest to do so.

8.83 Occasionally information requested by a select committee may be classified, or there may be a good reason to protect it from public release. While the Official Information Act specifies interests that may usefully inform a decision by officials not to release information to a committee, the Act itself does not bind or constrain the House and its committees, and any response declining to provide the requested information should not imply that it does.

8.84 On learning the reason why particular information needs to be protected, the select committee may choose to waive its request or consider a compromise option, such as a summary of the information requested. Officials should consult the relevant Minister, who is ultimately responsible for the release of information by officials to select committees.

8.85 Further guidance on this issue is provided by the State Services Commission in *Officials and Select Committees – Guidelines*.

Production or discovery of official documents in legal proceedings

8.86 Official documents, including Cabinet records, may be relevant to legal proceedings. If so they are likely to be included in the discovery process and may be produced in court.

8.87 When the discovery or production of official papers is sought for the purposes of legal proceedings, a claim of public-interest immunity may need to be considered. The justification for such a claim can be assessed only on a case-by-case examination of relevant documents. Sometimes there may be a conflict between the demands of the courts for evidence and the need to ensure the security of Cabinet proceedings or confidential departmental matters. If there is any doubt, the relevant Minister or department should seek advice from the Crown Law Office.

8.88 In line with the philosophy of the Official Information Act, the law relating to public-interest immunity as a means of protecting government documents has moved significantly in favour of disclosure. Cabinet documents do not occupy any specially privileged position. In a case where public interest immunity is claimed, the court may examine the documents in order to be satisfied, in respect of each document, that the claim to immunity should be upheld.

8.89 Where Cabinet documents dating from a previous administration are required for discovery or production in legal proceedings, the Opposition will need to be consulted, according to the procedure set out in paragraph 8.134.

Requests for parliamentary information

8.90 Requests under the Official Information Act for documents relating to parliamentary proceedings may be refused if releasing the document would amount to a contempt of the House (section 18(c)(ii)). Most documents relating to parliamentary proceedings are made available publicly by the Office of the Clerk as a matter of course, for example once a select committee has reported to the House. However, some proceedings remain confidential under the *Standing Orders* and the practices of the House, and so releasing them could constitute a contempt. The Office of the Clerk can advise whether this ground for refusal might apply to a particular request.

8.91 The *Protocol for the release of information from the parliamentary information, communication and security systems* applies to requests for information held on parliamentary systems, other than official information and Privacy Act requests. Requests for information that is about or relevant to Ministers in their capacity as members of Parliament is covered by the protocol. The protocol essentially prohibits the release of information unless the relevant member consents or the release is authorised by law. The protocol can be found on the Parliament website.

Ministers and Public Records

8.92 The Public Records Act 2005 establishes a regulatory framework for information and records management throughout the public sector. "Public records" for the purposes of the Public Records Act are records (information that is compiled, recorded, or stored in any form) that are created or received by public offices (including Ministers) in the conduct of their affairs.

8.93 Ministers create and receive a wide variety of public records while performing the roles and functions of ministerial office. These records are defined as "Ministers' papers" under the Act. They include:

(a) records of portfolio responsibilities and other assignments;

(b) Cabinet and Cabinet committee records (Cabinet material);

(c) briefings and reports to the Minister, and ministerial correspondence; and

(d) departmental papers and files.

8.94 Ministers also receive and hold records in their non-ministerial capacity; for example, correspondence with constituents, party political records, and private or personal papers. These are not public records, and are not covered by the Public Records Act.

8.95 The following paragraphs provide guidance on the proper management of public records held by Ministers during their time in office, and guidance on the secure treatment of those records on leaving office. Ministerial and Secretariat Services, Department of Internal Affairs is available to provide additional advice to Ministers and their staff.

Creating and maintaining records

8.96 Ministers must create full and accurate records of their ministerial affairs, in accordance with normal, prudent business practice.

8.97 "Records" for the purposes of the Public Records Act includes information held in various formats, such as emails or text messages sent or received on devices like mobile phones.

8.98 Systems must be put in place to ensure that all information created or received by a Minister in his or her official capacity is treated as a public record according to the requirements of the Public Records Act. This means that records are organised and maintained in a way that allows them to be accessed for as long as they are needed, and that they are disposed of in a way authorised by the Chief Archivist. In particular, Cabinet material and material classified Confidential or above should be filed separately from other information.

8.99 The Chief Archivist issues disposal authorities, which allow public offices to transfer control of or destroy public records in specified circumstances. Disposal authorities can be of general or specific application, and are published on Archives New Zealand's website. Ministers may not dispose of, or authorise the disposal of, their public records, except in accordance with such a disposal authority issued by the Chief Archivist.

Management of records

8.100 Ministerial and Secretariat Services provides guidance to Ministers' offices on the proper storage of public records that are held by a Minister and their proper disposal on leaving office.

8.101 Ministers' offices are encouraged to base their filing practices on this guidance, to ensure that when Ministers leave office each category of information can be identified easily. Guidance on leaving office will indicate what material should be returned (such as departmental briefings), what material may be accepted for deposit as Ministers' papers, and how to destroy the remaining material securely.

Cabinet and Cabinet committee records

8.102 Archives New Zealand receives an official set of Cabinet records from the Cabinet Office. The convention of access to documents of a former administration gives former Ministers ongoing access to all Cabinet material to which they had access while in office (see paragraphs 8.130 – 8.132).

8.103 On leaving office, Ministers should check the requirements of the current disposal schedule with Ministerial and Secretariat Services, including whether it requests the deposit of Cabinet records with extensive annotations that may be of historical significance.

8.104 Other personal copies of Cabinet papers should be destroyed in accordance with the disposal schedule, through a secure document destruction process.

Departmental papers and files

8.105 All files and papers that are internal departmental material should be returned to the originating department when Ministers leave office, including material classified Confidential or higher. No personal copies should be taken. Departmental files that concern or comment on individuals should be treated with particular care, and must be returned promptly to the department concerned.

8.106 Former Ministers who wish to have access to internal departmental material dating from their time in office should request this under the Official Information Act. It is expected that those handling requests by former Ministers will handle them expeditiously.

Remainder of Ministers' papers

8.107 Once the Cabinet and Cabinet committee records and departmental material have been addressed, Ministerial and Secretariat Services will advise on the disposal of the remaining Ministers' papers (public records). Any information classified Confidential or above should be returned to the security agencies, or to the author of the document, as appropriate. Some of the material with long-term historical value may be accepted for archiving by the Chief Archivist. The remainder may need to be destroyed securely.

Deposit of Ministers' papers with Archives New Zealand

8.108 The deposit of Ministers' papers (public records) with Archives New Zealand is provided for in section 42 of the Public Records Act. Depositing these public records in this way ensures their secure storage, the monitoring of agreed access arrangements, and the provision of research facilities, and allows the Minister ongoing access to the records.

8.109 The conditions on which any deposit of Ministers' papers is made are established by agreement between the Minister and the Chief Archivist. Ministerial and Secretariat Services will help draw up the agreement. Unless the Minister agrees otherwise in writing, the papers remain in the ownership and control of the Minister.

8.110 When setting conditions of access to Ministers' papers deposited with Archives New Zealand, Ministers should ensure that the access conditions reflect the sensitivity of the information and are no less robust than the conditions would be if the documentation were held by another entity that is subject to the Official Information Act. The Chief Archivist is subject to the Ombudsmen Act and is therefore obliged to ensure that the conditions of access to official documentation are reasonable.

8.111 Ministers who have agreed to allow public access to their papers in accordance with paragraph 8.109 will also be involved in assessing any requests for access to those papers. Further details of the procedure to be followed are set out in paragraphs 8.113 – 8.115.

8.112 If a Minister dies without having made arrangements for the disposition of their Ministers' papers, Ministerial and Secretariat Services will discuss with the Minister's family the lodging of any material with Archives New Zealand, and conditions on access to it.

Assessing requests for public access to Ministers' papers

Records deposited by current Ministers

8.113 The most appropriate route for the public to seek access to official information is to make a request under the Official Information Act to the relevant Minister or department. For that reason, where a request is received for access to a Minister's papers deposited at Archives New Zealand by a current Minister, the request will be transferred to the relevant Minister for a decision, on the basis that the information remains closely connected to the Minister (see section 14(b)(ii) of the Official Information Act).

Ministers' papers deposited by former Ministers

8.114 Where Archives New Zealand receives a request for access to a former Minister's papers deposited at Archives New Zealand, the Chief Archivist will allow access only in accordance with the access conditions agreed with the former Minister (see paragraph 8.109). If the former Minister has set access conditions that mirror the process set out in the Official Information Act, the following process will apply:

(a) Archives New Zealand will liaise with the former Minister (if required by the former Minister's access conditions), so that the relevant papers can be identified.

(b) With the former Minister's consent, Archives New Zealand will liaise with the relevant department about granting access to the Minister's papers. The relevant department will assess the documents, applying the principles set out in the Official Information Act.

(c) The Chief Archivist will liaise with the Secretary of the Cabinet about the outcome of the assessment of the documents.

(d) The Cabinet Office will advise the Prime Minister of the request and, where access is sought to documents of a previous administration not currently in government, the Leader of the Opposition.

(e) The Chief Archivist will advise the former Minister as to whether or not there appears to be good reason for withholding access to any of the documents.

(f) The final decision as to whether or not access will be granted to the Minister's papers will rest with the former Minister concerned.

8.115 With the agreement of the former Minister, special arrangements may be entered into from time to time to provide researchers with access to Ministers' papers deposited with Archives New Zealand. The Chief Archivist will liaise with the Secretary of the Cabinet, any relevant department, the Prime Minister, and the Leader of the Opposition (if necessary) about appropriate access arrangements for researchers.

Deposit of personal records

8.116 Records created or received by Ministers in their personal capacity, in their capacity as a member or leader of a political party, or as a member of Parliament are not public records. These papers may be retained by Ministers on leaving office, or deposited with Archives New Zealand or another repository.

8.117 Archives New Zealand provides guidance on the protocols and procedures for depositing papers with it. There are no additional factors that Ministers need to take into account when agreeing conditions of access to such records with Archives New Zealand.

8.118 Ministerial and Secretariat Services can provide guidance and facilitate discussions with Archives New Zealand.

8.119 Papers that Ministers do not wish to retain and that are of no interest to Archives New Zealand or any other repository should be destroyed through a secure document destruction process.

Disclosure and use of official information by former Ministers

8.120 Former Ministers should not disclose official information dating from their time in office.

8.121 Former Ministers may wish to publish memoirs, articles, or other material that relates to their time in office. The free flow of advice and comment among Ministers and between Ministers and officials, along with the concept of collective responsibility, justifies the following of certain standards by former Ministers who are contemplating publication of this kind.

8.122 The following guidance is designed to provide and preserve a confidential working environment for Ministers, and the officials who advise them. Such an environment allows diverse opinions to be freely canvassed and expressed without the constraint that would accompany the expectation of disclosure.

(a) Any Cabinet records drawn on for possible publication must be used with care, unless the information they contain has already been made public by authorised means. Disclosure should preferably be checked with the relevant department (through the Cabinet Office), so that the material can be assessed in terms of the Official Information Act.

(b) The views expressed by other Ministers, or the process by which a decision has been arrived at, should not be disclosed. It is impossible to lay down precise rules, but the closer the publication date to the actual event recorded, the more sensitive the approach required. Ministers may account for their own views, but should not reveal the attitudes or opinions of colleagues as to the government business with which they have been concerned without first consulting those colleagues.

(c) Comment from officials or others whose duty it has been to tender their advice or opinions should not be released without prior consultation. Any reference should be made only in general terms, without attribution to identifiable people.

(d) Before making public assessments or criticisms of those who have served them, or making judgements of competence or suitability, former Ministers should carefully consider the fact that, in most cases, the people concerned will not be in a position to respond.

(e) Former Ministers should not disclose the content of any discussion held during an Executive Council meeting. On appointment to office, all Executive Councillors swear or affirm an oath under the Oaths and Declarations Act 1957 that they "will not directly or indirectly reveal such matters as shall be debated in Council and committed to [their] secrecy".

8.123 If former Ministers retain any Ministers' papers after leaving office and receive requests to disclose any such records, they should contact the Cabinet Office. The Cabinet Office will arrange for the relevant department to assess the material in terms of the Official Information Act, so that appropriate considerations can be taken into account by the former Minister before a decision is made on the release of the information.

Convention on access to Cabinet records of a previous administration

General

8.124 The convention on access to documents of a previous administration allows Ministers of the current government to consult the Cabinet records of a previous government on a confidential basis. It also gives former Ministers ongoing access to Cabinet records dating from their time in office. The convention therefore emphasises the continuity of government, even though changes in the parties in government may occur.

8.125 The convention has been in place since 1957, when the incoming and outgoing Prime Ministers agreed to some arrangements concerning access to, and use of, Cabinet records of the outgoing government in an exchange of letters. Since that time, the convention has been modified by legislative changes, and the practical arrangements that reflect the convention have continued to develop.

8.126 There are two elements to the convention. They provide respectively:

(a) for incumbent Ministers to access Cabinet records of a previous administration (see paragraphs 8.128 – 8.129); and

(b) for former Ministers to access Cabinet records to which they had access when they were Ministers (see paragraphs 8.130 – 8.132).

Documents covered by the convention

8.127 Only documents that form part of the Cabinet record are covered by the convention. The Cabinet records of each government comprise Cabinet papers, memoranda, agendas, minutes, and other documentation relating to the formal business of Cabinet and Cabinet committees. Other documents, such as departmental briefing papers, are not covered by the convention.

Incumbent Ministers

8.128 Recognising that government is a continuing process and to ensure that decisions can be made in the light of precedent, incumbent Ministers are entitled to consult the Cabinet records of a previous administration on the basis that the confidentiality of the papers is respected (see paragraph 8.133). These Cabinet records may be accessed through the Minister's department or through the Cabinet Office.

8.129 Various constraints apply when incumbent Ministers are contemplating the release (including tabling in the House) of any Cabinet records of a previous opposition administration (see paragraph 8.134).

Former Ministers

8.130 Former Ministers are allowed access to those Cabinet records to which they would have had access when they were Ministers. Former Ministers should respect the ongoing confidentiality of those documents.

8.131 Former Ministers should contact the Cabinet Office if they wish to obtain copies of Cabinet records after leaving office. The Cabinet Office will endeavour to respond promptly to requests from former Ministers, subject to the demands of Cabinet business, which must take precedence. The Cabinet Office is required to inform the Prime Minister's office and the relevant Minister's office when it provides Cabinet records to former Ministers.

8.132 If a former Minister wishes to disclose Cabinet records dating from his or her time in office, he or she must first check whether there are reasons why the document should not be publicly disclosed (see paragraphs 8.120 – 8.123).

Releasing Cabinet documents of a previous opposition administration

8.133 The convention on access to documents of a previous opposition administration requires Ministers to keep the Cabinet documents of a previous administration confidential.

8.134 The convention is, however, unenforceable in a legal sense and relevant laws and rules governing the disclosure of information (the Official Information Act, the *Standing Orders*, the High Court Rules, and so on) must prevail over the convention. Where documents covered by the convention are requested and are required to be released by law, the convention requires that the Opposition be consulted about the proposed release, so that they can contribute their views (for example, as to whether there is good reason for withholding the documents). The following procedure must be observed in this situation:

(a) When a Minister's office or a government department receives an Official Information Act request for Cabinet records dating from a previous opposition administration, or is considering releasing such documents for some other reason (for example, a select committee request), the Cabinet Office should be advised as soon as possible.

(b) The Minister's office or department should give the Cabinet Office a copy of the request and copies of the papers requested, together with the view of the Minister or department concerned on whether there is any reason for withholding the papers sought.

(c) The Cabinet Office, on behalf of the Prime Minister, will then consult the Leader of the Opposition about the proposed release.

(d) The Leader of the Opposition will have an opportunity to express any concerns about the proposed release, in terms of the Official Information Act or other laws or rules. The Cabinet Office will pass on any such concerns to the relevant Minister or department, so that they can be taken into account when the Minister or department decides whether or not to release the information.

(e) The Minister or department that is considering the release should not release the relevant documents until the Cabinet Office has finished consulting the Opposition, unless required to release the documents by law. If necessary, the time limit for responding should be extended on the basis that the consultation necessary to make a decision on the request has yet to be completed.

Related information

- The *Protective Security Requirements* set out the Government's expectations for managing personnel, physical, and information security. They set out what agencies must consider to ensure that they are managing protective security effectively. They are available at www.protectivesecurity.govt.nz.

- Guidance on the application of the Official Information Act 1982:

  - *Practice Guidelines – Official Information* and *The Ombudsmen Quarterly Review* issued by the Office of the Ombudsmen are available on the website of the Office of the Ombudsmen, www.ombudsman.parliament.nz. The office is also available to advise on the application of the Act.

  - Information about charging for official information is available on the Ministry of Justice website, www.justice.govt.nz, and the Office of the Ombudsman website, www.ombudsman.parliament.nz.

- Guidance on the application of the Privacy Act 1993:

  - Agency privacy officers provide guidance on the application of the Privacy Act.

  - The Office of the Privacy Commissioner provides training workshops and advice on the Act for agency privacy officers, and is consulted on policy and legislative proposals with privacy implications. The office issues case notes and a newsletter, which are available on its website, www.privacy.org.nz.

  - Chapter 7 of the Legislation Design and Advisory Committee's guidelines (entitled *Privacy and dealing with information about people*) can be found on its website, www.ldac.org.nz.

- Information about the Ombudsmen Act 1975 is available from the Office of the Ombudsmen's website, www.ombudsman.parliament.nz.

- Information about the Public Records Act 2005 is available from the Archives New Zealand website, www.archives.govt.nz.

- Ministerial and Secretariat Services, Department of Internal Affairs can provide further guidance to Ministers and former Ministers on the disposal and storage of, and access to, Minister's papers.

- The *Protocol for the release of information from the parliamentary information, communication and security systems* prohibits the release of information unless the relevant member consents or the release is authorised by law. The protocol can be accessed at www.parliament.nz.

The guidance listed here was current at time of going to press. For updates, see the online version of this manual at www.dpmc.govt.nz/cabinet-manual.

APPENDIX AND INDEX

Appendix

Letters Patent Constituting the Office of Governor-General of New Zealand 1983

As amended in 1987 and 2006

Letters Patent Constituting the Office of Governor-General of New Zealand

(SR 1983/225)

ELIZABETH THE SECOND, by the Grace of God Queen of New Zealand and Her Other Realms and Territories, Head of the Commonwealth, Defender of the Faith:

To all to whom these presents shall come, Greeting:

Recites Letters Patent of 11 May 1917.

WHEREAS by certain Letters Patent under the Great Seal of the United Kingdom bearing date at Westminster the 11th day of May 1917, His late Majesty King George the Fifth constituted, ordered, and declared that there should be a Governor-General and Commander-in-Chief in and over the Dominion of New Zealand:

Recites Letters Patent of 18 December 1918.

AND WHEREAS by certain Letters Patent under the Great Seal of the United Kingdom bearing date at Westminster the 18th day of December 1918, His late Majesty King George the Fifth made other provision for the publication and the coming into operation of the said Letters Patent bearing date the 11th day of May 1917, in lieu of the provision made in the Fifteenth Clause thereof:

Recites Royal Instructions of 11 May 1917.

AND WHEREAS at the Court at St. James's on the 11th day of May 1917, His late Majesty King George the Fifth caused certain Instructions under the Royal Sign Manual and Signet to be given to the Governor-General and Commander-in-Chief:

Letters Patent Constituting the Office of Governor-General of New Zealand

Recites Dormant Commission of 23 July 1917.

AND WHEREAS at the Court at St. James's on the 23rd day of July 1917, His late Majesty King George the Fifth caused a Dormant Commission to be passed under the Royal Sign Manual and Signet, appointing the Chief Justice or the Senior Judge for the time being of the Supreme Court of New Zealand to administer the Government of New Zealand, in the event of the death, incapacity, or absence of the Governor-General and Commander-in-Chief and of the Lieutenant-Governor (if any):

Recites Approval by Executive Council of draft of new Letters Patent.

AND WHEREAS, by Order in Council bearing date at Wellington the 26th day of September 1983, Our Governor-General and Commander-in-Chief of New Zealand, acting by and with the advice and consent of the Executive Council of New Zealand, has requested the issue of new Letters Patent revoking and determining the said Letters Patent bearing date the 11th day of May 1917, the said Letters Patent bearing date the 18th day of December 1918, the said Instructions, and the said Dormant Commission, and substituting in place of the revoked documents other provision in the form of the draft of new Letters Patent set out in the First Schedule to that Order in Council:

Recites Application of Letters Patent, Royal Instructions, and Dormant Commission to Cook Islands and Niue.

AND WHEREAS the said Letters Patent bearing date the 11th day of May 1917, the said Letters Patent bearing date the 18th day of December 1918, the said Instructions, and the said Dormant Commission extend to the self-governing state of the Cook Islands and to the self-governing state of Niue as part of the law of the Cook Islands and of Niue, respectively:

Recites Approval by Government of Cook Islands and Government of Niue of draft of new Letters Patent.

AND WHEREAS approval of the said draft of new Letters Patent has been signified on behalf of the Government of the Cook Islands and the Government of Niue:

Letters Patent Constituting the Office of Governor-General of New Zealand

Effects Revocations.

NOW, THEREFORE, We do by these presents revoke and determine the said Letters Patent bearing date the 11th day of May 1917, the said Letters Patent bearing date the 18th day of December 1918, the said Instructions, and the said Dormant Commission, but without prejudice to anything lawfully done thereunder; and We do hereby declare that the persons who are members of the body known as the Executive Council of New Zealand immediately before the coming into force of these Our Letters Patent shall be members of Our Executive Council hereby constituted as though they had been appointed thereto under these Our Letters Patent.

AND WE do declare Our will and pleasure as follows:

Office of Governor-General and Commander-in-Chief constituted.

I. We do hereby constitute, order, and declare that there shall be, in and over Our Realm of New Zealand, which comprises—

(a) New Zealand; and
(b) The self-governing state of the Cook Islands; and
(c) The self-governing state of Niue; and
(d) Tokelau; and
(e) The Ross Dependency,—

a Governor-General and Commander-in-Chief who shall be Our representative in Our Realm of New Zealand, and shall have and may exercise the powers and authorities conferred on him by these Our Letters Patent, but without prejudice to the office, powers, or authorities of any other person who has been or may be appointed to represent Us in any part of Our Realm of New Zealand and to exercise powers and authorities on Our behalf.

Appointment of Governor-General and Commander-in-Chief.

II. And We do hereby order and declare that Our Governor-General and Commander-in-Chief (hereinafter called Our Governor-General) shall be appointed by Us, by Commission under the Seal of New Zealand, and shall hold office during Our pleasure.

Letters Patent Constituting the Office of Governor-General of New Zealand

Governor-General's powers and authorities.

III. And We do hereby authorise and empower Our Governor-General, except as may be otherwise provided by law,—

(a) To exercise on Our behalf the executive authority of Our Realm of New Zealand, either directly or through officers subordinate to Our Governor-General; and
(b) For greater certainty, but not so as to restrict the generality of the foregoing provisions of this clause, to do and execute in like manner all things that belong to the office of Governor-General including the powers and authorities hereinafter conferred by these Our Letters Patent.

Manner in which Governor-General's powers and authorities are to be executed.

IV. Our Governor-General shall do and execute all the powers and authorities of the Governor-General according to—

(a) The tenor of these Our Letters Patent and of such Commission as may be issued to Our Governor-General under the Seal of New Zealand; and
(b) Such laws as are now or shall hereafter be in force in Our Realm of New Zealand or in any part thereof.

Publication of Governor-General's Commission.

V. Every person appointed to fill the office of Governor-General shall, before entering on any of the duties of the office, cause the Commission appointing him to be Governor-General to be publicly read, in the presence of the Chief Justice, or some other Judge of the High Court of New Zealand, and of Members of the Executive Council thereof.

Letters Patent Constituting the Office of Governor-General of New Zealand

Oaths to be taken by Governor-General.

VI. Our Governor-General shall, immediately after the public reading of the Commission appointing him, take—

(a) The Oath of Allegiance in the form for the time being prescribed by the law of New Zealand; and

(b) The Oath for the due execution of the Office of Governor-General in the form following:

I, [*name*], swear that, as Governor-General and Commander-in-Chief of the Realm of New Zealand, comprising New Zealand; the self-governing states of the Cook Islands and Niue; Tokelau; and the Ross Dependency, I will faithfully and impartially serve Her [*or* His] Majesty [*specify the name of the reigning Sovereign, as thus:* Queen Elizabeth the Second], Queen of New Zealand [*or* King of New Zealand], Her [*or* His] heirs and successors, and the people of the Realm of New Zealand, in accordance with their respective laws and customs. So help me God.

which Oaths the Chief Justice or other Judge in whose presence the Commission is read is hereby required to administer.

Constitution of Executive Council.

VII. And We do by these presents constitute an Executive Council to advise Us and Our Governor-General in the Government of Our Realm of New Zealand.

Membership of Executive Council.

VIII. The Executive Council shall consist of those persons who, having been appointed to the Executive Council from among persons eligible for appointment under the Constitution Act 1986, are for the time being Our responsible advisers.

Letters Patent Constituting the Office of Governor-General of New Zealand

Quorum of Executive Council.

IX. The Executive Council shall not proceed to the despatch of business unless two Members at the least (exclusive of any Member presiding in the absence of Our Governor-General) be present throughout the whole of the meeting at which any such business is despatched, except that in a situation of urgency or emergency, members may be present by any method of communication that allows each member to participate effectively during the whole of the meeting.

Appointment of Members of Executive Council, etc.

X. And We do hereby authorise and empower Our Governor-General, from time to time in Our name and on Our behalf, to constitute and appoint under the Seal of New Zealand, to hold office during pleasure, all such Members of the Executive Council, Ministers of the Crown, Commissioners, Diplomatic or Consular Representatives of New Zealand, Principal Representatives of New Zealand in any other country or accredited to any international organisation, and other necessary Officers as may be lawfully constituted or appointed by Us.

Exercise of Prerogative of Mercy.

XI. And We do further authorise and empower Our Governor-General, in Our name and on Our behalf, to exercise the prerogative of mercy in Our Realm of New Zealand, except in any part thereof where, under any law now or hereafter in force, the prerogative of mercy may be exercised in Our name and on Our behalf by any other person or persons, to the exclusion of Our Governor-General; and for greater certainty but not so as to restrict the authority hereby conferred, Our Governor-General may:

(a) Grant, to any person concerned in the commission of any offence for which he may be tried in any court in New Zealand or in any other part of Our said Realm to which this clause applies or to any person convicted of any offence in any such court, a pardon, either free or subject to lawful conditions; or

Letters Patent Constituting the Office of Governor-General of New Zealand

(b) Grant, to any person, a respite, either indefinite or for a specified period, of the execution of any sentence passed on that person in any court in New Zealand or in any other part of Our said Realm to which this clause applies; or

(c) Remit, subject to such lawful conditions as he may think fit to impose, the whole or any part of any such sentence or of any penalty or forfeiture otherwise due to Us on account of any offence in respect of which a person has been convicted by any court in New Zealand or in any other part of Our said Realm to which this clause applies.

Administrator of the Government.

XII. Whenever the Office of Governor-General is vacant, or the holder of the Office is for any reason unable to perform all or any of the functions of the Office, We do hereby authorise, empower, and command the Chief Justice of New Zealand to perform the functions of the Office of Governor-General. If, however, there is for the time being no Chief Justice able to act as Governor-General, then the next most senior Judge of the New Zealand judiciary who is able so to act is so authorised, empowered, and commanded. The Chief Justice or the next most senior Judge, while performing all or any of the functions of the Office of Governor-General, is to be known as the Administrator of the Government; and in these Our Letters Patent every reference to Our Governor-General includes, unless inconsistent with the context, a reference to Our Administrator of the Government.

Letters Patent Constituting the Office of Governor-General of New Zealand

Oaths to be taken by Administrator of the Government.	XIII. The said Chief Justice or next most senior Judge of the New Zealand judiciary shall, on the first occasion on which he is required to act as Administrator of the Government and before entering on any of the duties of the office of Governor-General, take the Oaths hereinbefore directed to be taken by Our Governor-General, which Oaths, with such modifications as are necessary, shall be administered by some other Judge of the High Court of New Zealand, in the presence of not less than two Members of the Executive Council.
Powers and authorities of Governor-General not abridged.	XIV. While Our Administrator of the Government is performing all or any of the functions of the office of Governor-General, the powers and authorities of Our Governor-General shall not be abridged, altered, or in any way affected, otherwise than as We may at any time hereafter think proper to direct.
Governor-General's absence.	Revoked
Ministers to keep Governor-General informed.	XVI. Our Ministers of the Crown in New Zealand shall keep Our Governor-General fully informed concerning the general conduct of the Government of Our said Realm, so far as they are responsible therefor, and shall furnish Our Governor-General with such information as he may request with respect to any particular matter relating to the Government of Our said Realm.
Ministers and others to obey, aid, and assist Governor-General.	XVII. Our Ministers of the Crown and other Officers, civil and military, and all other inhabitants of Our Realm of New Zealand, shall obey, aid, and assist Our Governor-General in the performance of the functions of the office of Governor-General.
Power reserved to Her Majesty to revoke, alter, or amend the present Letters Patent.	XVIII. And We do hereby reserve to Ourselves, Our heirs and successors full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.

Letters Patent Constituting the Office of Governor-General of New Zealand

Present Letters Patent to have effect as law.

XIX. And We do further declare that these Our Letters Patent shall take effect as part of the law of Our Realm of New Zealand, comprising New Zealand, the self-governing state of the Cook Islands, the self-governing state of Niue, Tokelau, and the Ross Dependency on the 1st day of November 1983.

IN WITNESS WHEREOF We have caused these Our Letters to be made Patent, and for the greater testimony and validity thereof We have caused the Seal of New Zealand to be affixed to these presents, which We have signed with Our Regal Hand.

GIVEN the 28th day of October in the Year of Our Lord One Thousand Nine Hundred and Eighty-three and in the 32nd Year of Our Reign.

By Her Majesty's Command.

[L.S.]

R.D. MULDOON,
Prime Minister of New Zealand.

Issued under the authority of the Regulations Act 1936.

Date of notification in *Gazette*: 31 October 1983

Clause VI(b) was substituted, as from 22 August 2006, by clause I Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219).

Clause VIII was substituted, as from 1 January 1987, by the Letters Patent Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1987/8).

Clause IX was amended, as from 22 August 2006, by clause II Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219) by adding the words, "except that in a situation or urgency or emergency, members may be present by any method of communication that allows each member to participate effectively during the whole of the meeting".

Letters Patent Constituting the Office of Governor-General of New Zealand

Clause XII was substituted, as from 22 August 2006, by clause III Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219).

Clause XIII was amended, as from 22 August 2006, by clause IV Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219) by substituting the words "next most senior Judge of the New Zealand judiciary" for the words "President of the Court of Appeal or the Senior Judge for the time being of the Court of Appeal".

Clause XV was revoked, as from 22 August 2006, by clause V Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219).

Index

28-day rule 7.96–7.99

A

accountability
documents 3.15
statutory inquiries 4.110

Acting Attorney-General 4.11

acting Ministers 2.41–2.45

Acting Prime Minister 2.13–2.14, 2.41

Administrator of the Government 1.20

advertising and publicity 2.107–2.110, 6.10

advice
free and frank 3.9(d), 3.11(f), 3.59
from chief executives 3.11(f)
to Governor-General 1.15–1.16
to incoming government 6.67
to ministers 3.59
from outside public service 3.25, 3.26
political advisors 3.25–3.26, 6.14

advocacy by Ministers 2.68–2.71

affidavits by Ministers 4.31–4.32

amendments;
to bills 7.72–7.77
to Cabinet papers 5.46–5.47
out of scope of bill 7.74
See also bills, draft legislation, *and* legislation

appearance fees 2.95–2.96, 2.98

appointments
of Associate Ministers 2.36
of chief executives 3.28–3.32
deferral during election period 6.10
of Ministers 1.26–1.28, 2.15–2.17, 6.52–6.53
of new Ministers following transition 2.20, 6.19

Archives New Zealand
current Ministers' papers 8.113
Ministers' official papers 8.102–8.112, 8.114–8.115
Ministers' personal papers 8.116–8.119

Associate Ministers 2.35–2.40
appointment of 2.36
and Cabinet committees 2.40
and Cabinet papers 2.39, 5.42
collective responsibility 2.35
conflicts of interest 2.79–2.80
delegations to 2.37
limits on discretion 2.38

Attorney-General 4.2–4.11
absent or unavailable 4.10–4.11
acting 4.11
collective responsibility 4.5, 5.32
and Constitution Act 1986 4.10–4.11
discovery of official documents 4.28
and judiciary 4.8
law officer role 4.3–4.5, 5.32
legal proceedings involving the Crown 4.6–4.7
New Zealand Bill of Rights scrutiny 7.67
responsibility for agencies 4.9
scrutiny of draft bills 7.67
statutes revision programme 7.17

B

Bill of Rights compliance of draft legislation 7.65, 7.67

bills
allocation of priority 7.10, 7.12
assessing need for 7.23–7.26
Attorney-General's scrutiny 7.67
bids for place on legislation programme 7.24
consultation on 5.14–5.22, 7.27–7.49
creating or changing portfolios 7.36
definitions of "Minister" or "department" in 7.36
departmental submissions 7.114–7.118

development process 7.22–7.49
drafting process 7.50–7.56
impact analysis, statements, and summaries 5.75, 7.26, 7.35
LAC Guidelines 7.23
New Zealand Bill of Rights scrutiny 7.67
out of scope of bill 7.74
revision bills 7.16–7.18
select committee consideration 7.72–7.77
See also draft legislation 7.50–7.56

binding treaty action 5.78–5.81
deferred 7.129

boards of state-owned enterprises 3.53

briefing
of Ministers 3.22(a)–3.22(b)
"no surprises" principle 3.22(a)

briefing for incoming Ministers 3.16–3.21
presentation 3.18
release of content 3.19
timing 3.17

Budget
cycle 5.70–5.73
decisions 5.70(b)
financial decisions outside of 5.72
presentation 5.70(c)
priorities 5.70(a)

C

Cabinet 5.2–5.5
agendas 2.9, 5.49–5.50
approval of draft legislation 7.54–7.56
authorisation of submissions to Executive Council 5.38
chair of 2.9
collective responsibility 5.24–5.33
committees *see* cabinet committees
confidentiality 5.23, 8.122(a)–8.122(b)
consultation on Cabinet papers 5.14–5.22
decision-making principles 5.11–5.23, 5.33–5.38
documents *see* Cabinet documents
establishment of inquiries 4.97
financial matters 5.69–5.74
government spending 5.69
guidelines for submission of draft bills 7.56
indemnifying Minister's legal expenses 4.45–4.49
items for consideration by 5.11–5.12
items not to be submitted to 5.13
meetings *see* cabinet meetings
membership and attendance 5.5
Ministers of State 2.30
Ministers outside Cabinet 2.28–2.30
minutes 5.54–5.55
oral items 5.51–5.53
papers *see* cabinet papers
power to act sought 5.9, 5.52
procedures 5.4, 5.39–5.82
referral of prior decisions to 5.82
statutory authority for government spending 5.69
and statutory decision-making 4.25, 5.34–5.38
urgent matters 5.51–5.53
See also Ministers

Cabinet committees 5.6–5.10
Associate Ministers at 2.40
coalition and support parties 5.63
decision-making power 5.8
information on membership and terms of reference 5.10
meetings 5.57–5.68
non-member Ministers 5.62
officials at meetings 5.68
"power to act" 5.9
Prime Minister's functions 5.10
priority of select committee meetings 5.61
procedures 5.39–5.82
quorum 5.65
terms of reference 5.7

Cabinet documents
annotated 8.103
discovery of 8.86–8.89
proactive release 8.17–8.19
public interest immunity 8.87–8.88
requests for *see* Official Information Act requests
see also Cabinet papers, Cabinet records, *and* Ministers' papers

Cabinet Legislation Committee 7.10, 7.14
approval of draft legislation 7.54

Cabinet meetings 5.56–5.68
absences 2.21(a), 5.59–61
agendas 5.49–5.50, 5.60

attendance 5.59–5.68
chair 5.58
confidentiality 5.23
minutes 5.23, 5.54–5.55
normal place and day 5.56
officials at 5.66
quorum 5.64
special 5.56
visiting dignitaries at 5.67

Cabinet Office 5.83–5.87
advice on conflicts of interest 2.61
advice on Ministers' role 5.86(k)
advice to government 5.86(f)
functions of 5.86
Honours Unit 1.59
Secretary of the Cabinet 5.83–5.87

Cabinet papers
amendments to 5.46–5.47
Associate Ministers and 2.39, 5.42
authorisation 5.41
CabNet system 5.40
classified 5.40
conflict of interest 2.74(b), 2.74(c)
consensus on 5.20
consultation on 5.14–5.22
deadlines 5.44
deferral 5.48
late papers 5.45
portfolio ministers' authorisation 5.41
preparing and submitting 5.39–5.43
quality 5.39, 5.43
responsibility for 5.41–5.42
security classifications and endorsements 5.40
statutory decisions 5.36(a)
submission of 5.40
withdrawal of 5.48
See also Cabinet documents *and* Cabinet records

Cabinet records 5.86(d), 8.92–8.119
access for incoming Ministers 6.68
disclosure 8.122(a)
discovery of 8.86–8.89
former Ministers 8.120–8.123
management of 8.102–8.104
Ministers' papers 8.93, 8.107–8.115
of previous administration 8.129, 8.130, 8.132–8.134
Public Records Act 2005 8.92
See also Cabinet documents *and* Cabinet papers

CabNet system 5.40

calling general election 2.6(b), 6.2, 6.62–6.64

caretaker convention 1.30–1.31, 6.21–6.40
approaches to other political parties 6.25(d)–6.37
arms of 6.24
chief executives under 6.33
clear outcome from election 6.29–6.30
consultation with incoming Minister 6.40
consultation with other parties 6.25(d)
decision-making 6.25–6.26, 6.31–6.33
expenditure decisions 6.38–6.39
implementation of decisions and policy 6.25(b)–6.25(d)
loss of confidence of House 6.22, 6.60, 6.64
ministerial decisions 6.35
Official Information Act 1982 6.38–6.40
Prime Minister's role 6.36–6.37
principles of 6.24–6.30
unclear outcome from election 6.25–6.28

charitable fundraising 2.102

chief executives of departments
advice to Ministers 3.11(f)
appointment of 3.28–3.32
briefing for incoming Ministers 3.16–3.21
briefing of Ministers 3.22(b)
in caretaker period 6.33
conditions of employment 3.29
as employers 3.33–3.34
employment responsibilities 3.11(g), 3.13
responsibilities 3.11–3.13
stewardship 3.11(c), 3.11(d), 3.22(d)

Chief Justice as Administrator of the Government 1.20

citizens-initiated referenda 7.137–7.141
departmental assistance 7.141
government response 7.139
wording of questions 7.141

classified information
Cabinet papers 5.40
legal advice 4.67(c)
security classifications 8.6

Clerk of Executive Council 1.33–1.37, 5.85
constitutional advice 1.35
Secretary of Cabinet 1.36, 5.85

coalition and support parties
agreements 3.79, 5.82, 6.18
Cabinet committees 5.63
collective responsibility 5.26–5.30
consultation 5.16
Ministers 5.26–5.30

collective responsibility 5.24–5.33
Associate Ministers 2.35
coalition Ministers 5.26–5.30
departments 5.33
Ministers outside Cabinet 2.29, 5.25
officials 5.33
Parliamentary Private Secretaries 2.52
Parliamentary Under-Secretaries 5.31, 2.51
support party Ministers 5.29–5.30

College of Arms 1.73

commencement orders 1.52

comment
on Cabinet decisions by officials 5.33
on judicial decisions by Ministers 4.12–4.16
See also consultation

commercial information 8.11

communication with the Sovereign 2.5

companies in the state sector 3.51–3.56

conduct of Ministers 2.55–2.57

confidentiality
Cabinet 5.23, 8.122(a)–8.122(b)
draft legislation 7.48
Executive Council 1.49, 8.122(e)

confirmation of election to office 6.52

conflicts of interest 2.59–2.83
advocacy and association 2.68–2.71
associate Ministers 2.79–2.80
bills 2.76
blind trusts 2.74(f)
Cabinet Office's role 2.61
constituency matters 2.77–2.81
declaration of interest 2.74(a)
divestment 2.74(e)
family, whānau, and associates 2.65–2.67
managing of 2.72–2.74
Minister in charge of bill 2.76
not receiving Cabinet papers 2.74(b)
pecuniary interests 2.64
portfolio Ministers 2.76, 2.79–2.80
state sector companies 3.51
state sector employees 3.62–3.63
transferring responsibility 2.74(c), (d)

constituency issues 2.77

constitution
Constitution Act 1986 1.10, 2.16, 2.21, 6.2–6.3, 6.30, 6.49, 6.52
constitutional arrangements, proposals affecting 5.12(d), 5.14(d)
constitutional issues 5.76

consultation
Cabinet Office 7.36
on Cabinet papers 5.14–5.22
caucuses 7.29
Clerk of the House of Representatives 7.43
in coalition or minority governments 5.16
departments 5.19–5.20
external organisations 7.44–7.46
on inquiry terms of reference 4.102–4.105
impact assessment 7.35
inter-agency 7.33
on legislation 7.27–7.49
Legislation Design and Advisory Committee 7.37–7.41
Ministers 5.14, 7.28
Ministry of Justice 7.34
Officers of Parliament 7.42
political 5.16–5.18, 7.30–7.32
portfolio 5.14–5.15
statutory consultation obligations 5.21
timeframes and process 7.47–7.49
Treasury 7.35

costing political parties' policies 3.60

costs or damages awarded against or to Ministers 4.53–4.57

court proceedings *see* legal proceedings

criticism of judiciary 4.8, 4.13, 4.16

Crown
- Crown legal business 4.17–4.18
- defence of action against Minister 4.50–4.56
- excludes state-owned enterprises 1.4
- financial veto 5.74, 7.134–7.136
- indemnity for Minister's legal costs 4.36–4.61
- legal advice or services for 4.17–4.18
- meaning of 1.4

Crown entities 3.35–3.50
- boards of 3.48–3.49
- in caretaker period 6.34
- Crown Entities Act 2004 3.41, 3.50
- monitoring departments 3.50
- output agreements 3.42
- remuneration 3.41
- responsible Ministers 2.26
- *See also* state sector

Crown financial veto 5.74, 7.134–7.136

D

decision-making
- Cabinet powers 5.8
- by caretaker government 6.25–6.26, 6.32–6.33
- judicial review of 4.19–4.34
- outside Cabinet 5.82
- principles 5.11–5.23, 5.33–5.38
- to be referred to Cabinet 5.82
- *See also* collective responsibility

definitions of "department" or "Minister" included in bills 7.36

delegated legislation *see* regulations

delegations to Associate Ministers 2.37

"department" defined in bill 7.36

Department of Internal Affairs
- inquiries 4.75, 4.96, 4.98, 4.108–4.110

departments
- accountability 3.14–3.15
- advice 3.22(a), 3.59
- briefing of Ministers 3.22(a), 3.59
- comment on advice to Minister 3.70
- decision-making during caretaker period 6.32–6.33
- direction and priorities 3.7
- free and frank advice 3.59
- heads of *see* chief executives
- ministerial responsibility for 3.27
- performance information 3.15(a), 3.15(b)
- public comment on government policy 3.70–3.71
- requiring external legal services 4.17
- responsible Ministers 2.26–2.27, 3.12
- *See also* officials *and* public service

Deputy Prime Minister 2.13–2.14
- mid-term transitions 6.57

development of legislation 7.1–7.77
- *See also* bills

directions to support a whole of government approach 3.45–3.47

disclosure
- Cabinet records (current administration) 8.122(a)
- Cabinet records (previous administration) 8.129, 8.130, 8.132–8.134
- draft legislation 7.48
- Executive Council meetings 8.122(e)
- travel expenses 2.120
- wrongdoing in state sector 3.82–3.83
- *See also* discovery of documents *and* confidentiality

discontinuation of ministerial title 2.21(c)

discovery of documents 4.26–4.30
- Cabinet documents 4.29, 8.86–8.89
- in court proceedings 4.27–4.30
- departmental documents 4.29, 8.86–8.89
- in judicial review 4.31–4.32
- legal advice documents 4.30
- Ministers giving evidence 4.27–4.28
- public-interest immunity 4.28
- *See also* Official Information Act requests

discussion documents 5.12(f)

dissolving Parliament 2.6(b), 6.3

donations *see* political party donations *and* gifts

draft legislation
Cabinet Legislation Committee 7.54–7.55
confidentiality 7.48
consideration by Cabinet and Cabinet committee 7.54–7.55
consulting non-government parliamentary parties 7.61–7.64
drafter's role 7.50–7.51
drafting instructions 7.52–7.53
drafting process 7.50–7.56
legal compliance 7.65–7.67
omnibus bills 7.68–7.71
policy changes to 7.55, 7.72–7.77
portfolio Minister 7.63
reference to caucus(es) 7.57–7.60
responsibility for accuracy 7.52
responsibility for consultation 7.63
submission guidelines 7.56
Treaty of Waitangi compliance 7.65
See also bills

drafting instructions 7.52–7.53

duty Ministers 2.46–2.47

E

Earl Marshal 1.73

elections 6.2–6.40
caretaker convention 6.24–6.30
coalition and support agreements 6.18
decision-making before and after 6.5–6.15
deferral of appointments 6.10
early 6.62–6.64
electoral system 6.4
forming a government *see* government formation
government advertising 6.10
planning for 6.6–6.8
pre-election period 6.9–6.15
resignation of outgoing government 6.19
transitions after 6.16–6.20
unclear outcome 6.25–6.28

Electoral Act 1993 6.4

electoral cycle 6.2–6.15

endorsements of products or services 2.99–2.101

Executive Council 1.9, 1.21–1.54
announcement of decisions 1.53–1.54
attendance at meetings 1.42–1.48
Cabinet approval of items for 1.24, 1.39–1.41
Clerk of 1.33–1.37
confidentiality of proceedings 1.49, 8.122(e)
direct submission by Ministers 1.41
dissolution of Parliament 1.30–1.31, 6.21–6.40
matters requiring action from 1.38
meetings 1.27, 1.34(e), 1.38–1.49
membership 1.25–1.28
Orders in Council 1.23, 1.50–1.52
powers 1.21–1.24
preparing items for 1.39–1.41
presiding officer 1.25, 1.45, 1.47
Prime Minister-designate 1.26
quorum 1.45
resignations and dismissals from 1.29–1.32, 2.18–2.20
urgent matters 1.43–1.44

F

family
and conflicts of interest 2.65–2.67, 8.11
family trusts 2.104

financial veto 5.74, 7.134–7.136

Flags, Emblems, and Names Protection Act 1981 1.75

formation of government *see* government formation 6.41–6.53

former Ministers
access to Cabinet records of previous administration 8.130–8.132
disclosure and use of official information 8.120–8.123
disclosure of retained papers 8.123
memoirs 8.121–8.122
from previous administration 8.124–8.132
retention of papers 8.123

free speech and public servants 3.71

fundraising 2.98, 2.102

G

gazetting
and entry into force 1.50–1.52
establishing statutory inquiries 4.86, 4.105
regulations 7.26, 7.83, 7.91(g), 7.96, 7.100

general elections *see* elections

gifts 2.84–2.92
cultural 2.84–2.85, 2.90–2.92
disclosure 2.84–2.86
from foreign governments 2.87
from non-government organisations 2.88–2.89
retention of 2.85–2.92
travel or accommodation expenses 2.89

government advertising and publicity 2.107–2.110, 6.10

government formation 6.41–6.53
advice from officials 6.67
agreement between parties 6.43
appointment of new government 6.51–6.53
Clerk of the Executive Council's role 1.33–1.37, 6.46
deadline for Parliament to meet 6.47
Governor-General's role 6.44–6.45
negotiations 6.67
outgoing Ministers 6.48–6.50

government inquiries 4.85–4.86; *see also* inquiries *and* statutory inquiries

Government legislation programme 7.6–7.15
allocation of priority 7.10, 7.12
Cabinet Legislation Committee 7.10, 7.14
confidentiality 7.9
Legislation Coordinator 7.13, 7.15
monitoring of 7.13–7.14
Parliamentary Counsel Office 7.13, 7.17
proposals for bills 7.10–7.12
purpose 7.6–7.8
revision bills 7.16–7.18

Government spending
Budget cycle 5.70–5.73
Cabinet authority for 5.69

Governor-General 1.5–1.20
absence or unavailability 1.20
action in Council 1.22
advice of ministers 1.15
advice of Prime Minister 1.16
administrator of government 1.20
announcement of decisions 1.53–1.54
appointment 1.5
appointment of ministers 2.16–2.17
appointment of Prime Minister 1.26, 2.2, 6.42–6.53
discretion 1.18
exercise of powers and functions 1.14–1.19, 1.20
formal powers and functions 1.7–1.11
international role 1.13
Office of the 1.5–1.11
official communications with 1.34(g), 1.37
power to dissolve, prorogue, and summon Parliament 1.10, 2.6, 6.3
prerogative powers 1.8, 1.12
presiding at Executive Council 1.25, 1.45
reserve powers 1.18
Speech from the Throne 7.3–7.4
statutory decisions 5.38
See also Executive Council

H

head of executive Government 2.7

heraldry 1.73–1.76

honours 1.55–1.72
acceptance of foreign honours 1.59, 1.71–1.72
Cabinet committee 1.60
honorary appointments 1.64
Honours Unit, Cabinet Office 1.59, 1.76
nominations 1.60–1.62
for non-New Zealand citizens 1.63–1.64

Human Rights Act 1993 and draft legislation 7.65

I

impact analysis, statements, and summaries 5.75, 7.26, 7.35

incoming government
- access to Cabinet records 6.68
- advice from officials 6.67

indemnity of Ministers
- as defendants 4.36–4.57
- legal expenses 4.45–4.49
- as plaintiffs 4.58–4.61
- proceedings against Minister personally 4.39–4.42
- proceedings concerning exercise of ministerial powers 4.37–4.38

information
- held by government 8.2–8.5
- sharing 8.5
- use of by former Ministers 2.106
- *See also* disclosure *and* official information requests

inquiries 4.75–4.120
- non-statutory ministerial 4.111–4.113
- select committee 4.117–4.120
- statutory *see* statutory inquiries

insider trading 3.51, 8.12–8.13

integrity in state sector 3.11(g), 3.57–3.83

international treaties 5.77–5.81, 7.123–7.133

J

judges
- appointed to inquiries 4.106
- appointment of 4.8
- comment on decisions of 4.12–4.14
- criticism of 4.8

judicial review 4.19–4.26
- affidavits from Ministers 4.31–4.32
- cross-examination 4.31–4.32
- decisions and powers subject to 4.19–4.21
- discovery of documents 4.26
- grounds for 4.23
- and ministerial responsibility 4.24, 4.25
- officials as witnesses 4.24
- questions addressed by 4.22

K

Kings of Arms 1.73

koha 2.90–2.92

L

LAC Guidelines
- compliance of draft legislation 7.65
- delegated legislation 7.89
- drafting instructions 7.53
- policy objectives 7.23

Law Commission work programme 7.19–7.21

law officer role of Attorney-General 4.3–4.5, 5.32

legal advice
- in departmental documents and Cabinet papers 4.62, 4.66–4.67
- legal professional privilege 4.62–4.65
- "legally privileged" endorsement 4.65, 4.67(c)

legal compliance of draft legislation 7.65–7.67

legal expenses of Ministers 4.45–4.52
- *See also* legal proceedings

legal proceedings
- appearances by Ministers to give evidence 4.27–4.34
- comment in House 4.15
- costs or damages 4.53–4.61
- Crown defence of action against Minister 4.50–4.56
- exemption under parliamentary privilege 4.34
- involving the Crown 4.6–4.7
- involving Ministers 4.27–4.61
- indemnity of Minister as defendant 4.35–4.57
- indemnity of Minister as plaintiff 4.58–4.61
- service of court documents 4.35

"legally privileged" endorsement 4.65, 4.67(c)

legislation
drafting *see* draft legislation *and* bills
gazetting and entry into force 1.50–1.52
Law Commission review 7.19–7.21
Legislation Coordinator 7.13, 7.15
process 7.1–7.100

Legislation Design and Advisory Committee 7.37–7.41

legislative branch of government 3.5(b)

legislative process 7.1–7.100

legislative proposals 7.10–7.12

Letters Patent 1.5, 1.7–1.9
Executive Council 1.21
See also Appendix

litigation involving ministers
judicial review 4.19–4.23
See also legal proceedings

lobby groups 2.69

local bills 7.78–7.80

M

manifesto commitments 5.82

market manipulation 8.12–8.13

members' bills 7.78–7.81

mid-term transitions 6.54–6.64
change of government 6.58–6.61
change of Prime Minister 6.55–6.57
deputy Prime Minister 6.57
early elections 6.62–6.64
loss of confidence of the House 6.58–6.61
resignation of administration 6.60–6.61
temporary Prime Minister 6.57
See also government formation

"Minister" defined in bill 7.36

Minister of State Services 3.44, 5.14(b)

ministerial direction of state-owned enterprises 3.55

ministerial inquiries (non-statutory) 4.111–4.113

Ministerial List 2.34(a)

ministerial portfolios 2.32–2.34
Directory of Ministerial Portfolios 2.34(b)

ministerial rankings 2.7

ministerial responsibility for departmental actions 3.27

ministerial travel
accompanying family, staff, and officials 2.121–2.122
approval of 2.115–2.117
Cabinet papers 2.115, 2.123
costs 2.89, 2.97, 2.119–2.120
official visit programmes 2.118
overseas 2.111–2.125
personal travel 2.124–2.125
Prime Minister's approval 2.115, 2.117
proposals 2.115–2.117
purpose 2.114
reporting on 2.123
within New Zealand 2.128

Ministers 2.15–2.47
absence or unavailability 2.21(a), 2.41–2.45
accepting payments 2.57
advice from outside public service 3.25, 3.26
advocacy by 2.68–2.71
affidavits from 4.31–4.32
appointment 1.26–1.28, 2.15–2.17, 6.52–6.53
appointment before confirmation of election 6.52
appointment to Executive Council 2.17
appointment of new government 2.20, 6.19, 6.52
Associate 2.35–2.40
and Bill of Rights scrutiny 7.67
bills for legal expenses incurred by 4.52
briefing 3.16–3.21, 3.22(a)
business activities 2.103–2.104
and chief executives of departments 3.11–3.13
comment on judicial decisions 4.12–4.16
comment on law or policy on punishment 4.16
comment on legal cases 4.14
comment reflecting on judges 4.13

comment on sentencing 4.13–4.14
conduct guidelines 2.55–2.106
confirmation of election 6.52
conflicts of interest 2.59–2.81
costs or damages against 4.53–4.56
Crown defence of action against 4.50–4.57
decision-making in caretaker period 6.35
and departments other than their own 3.24
directions to Crown entities 3.43
directions to departments 3.22(c)
Directory of Ministerial Portfolios 2.34(b)
discontinuation of ministerial title 2.21(c)
dismissal of 1.29, 2.6, 2.18–2.20
duty Ministers 2.46–2.47
establishment of inquiries 4.97
exemption from appearance in court 4.34
financial responsibility 2.24–2.27
former 2.106, 8.130–8.132
and the House of Representatives 2.24–2.27, 7.102–7.107
indemnity against costs or damages 4.53–4.57
indemnity as plaintiffs 4.58–4.61
information held by 8.24, 8.25, 8.93–8.94
initiating select committee inquiries 4.120
instructions to officials 3.22(c)
interests of 2.58–2.81
judicial review of decisions by 4.19–4.35
and the law 4.1–4.120
legal advice pertaining to portfolios 4.17
legal power to act for other Ministers 2.21
litigation involving ministers 4.19–4.61
membership of Executive Council 1.28
and neutrality of public service 3.22(f)
and non-government organisations 2.82–2.83
outside Cabinet 2.28–2.30, 5.5
papers of *see* Ministers' papers
political advisers 3.25–3.26
portfolio allocation 2.7, 2.32–2.34
portfolio responsibility *see* portfolio ministers
portfolios 2.7–2.8, 2.11, 2.32–2.34
proceedings against personally 4.39–4.42
proceedings concerning exercise of ministerial powers 4.36–4.57
professional activities 2.103–104
provision of references 2.105
public duty 2.53–57
and public records 8.92–8.119
and the public service 3.6–3.34
public service staffing matters 3.33–3.34
ranking of 2.7
requests for information and advice during transitions 6.65–6.67
requests to produce papers to court 4.27–4.28
resignation and dismissal 1.29, 2.6, 2.18–2.20, 6.19
responsibility for departments 3.7–3.8, 3.27
retention of private counsel 4.51–4.52
role and powers 2.22–2.23
in select committee proceedings 7.112
of State 2.30
and the state sector 3.1–3.83
and state sector companies 3.51–3.56
statutory powers and functions 5.34–5.38
submission of items for Executive Council 1.41
subpoenas 4.33
travel *see* ministerial travel 2.111–2.128
vacant portfolios 2.21(b)
See also Parliamentary Under-Secretaries *and* Prime Minister

Ministers outside Cabinet 2.28–2.30, 5.5

Ministers' papers 8.92–8.119
Archives New Zealand 8.108–8.112, 8.113–8.119
death of Minister 8.112
disposal of 8.99, 8.100, 8.103, 8.104, 8.107
former Ministers 8.114–8.115, 8.123
management of 8.100–8.107
personal records 8.116–8.119
requests for access to 8.113–8.119, 8.123

Ministers of State 2.30

Ministry of Foreign Affairs and Trade
advice on treaties 5.81, 7.133
official travel 2.118

Ministry of Justice
consultation regarding Treaty of Waitangi 7.34
responsibility for compliance of bills with New Zealand Bill of Rights 7.34, 7.67

minutes
Cabinet and Cabinet committee meetings 5.54–5.55

monitoring departments for Crown entities 3.37, 3.50

N

national interest analysis 5.80, 7.126–7.127

neutrality of public service 3.10, 3.22(f), 3.60

New Zealand Bill of Rights Act 1990
compliance 7.34, 7.65, 7.67

New Zealand Herald of Arms Extraordinary 1.74, 1.75

New Zealand Royal Honours system 1.55–1.58
See also honours

"no surprises" principle 3.22(a), 8.53

non-Government legislative proposals 7.78–7.81

non-statutory ministerial inquiries 4.111–4.113

O

official information 8.1–8.134
about commercial entities 8.11–8.13
about individuals 8.29, 8.74
about listed companies 8.12–8.13
about oneself 8.29, 8.74(a)
charging for 8.58
definition 8.23–8.28
discovery 8.86–8.89
exploitation for private gain 8.9–8.10
financial markets 8.12–8.13
formats 8.28
government contractors 8.10
held by ministerial or departmental committees 8.27
held by Ministers 8.23–8.25
improper release of 8.7–8.11
in inquiries 4.94
inquiries into improper release 8.7
offences related to 8.8, 8.9, 8.12
proactive release 8.14–8.19
security classification 8.6
select committees 8.82–8.85
sharing 8.5
unauthorised release 8.3, 8.7, 8.8
unincorporated bodies 8.27

Official Information Act 1982 8.2, 8.20–8.65
application to inquiries 4.94
Attorney-General and 8.26
caretaker period 6.38, 6.40
chief executives and boards 8.31
coverage 8.23–8.29
compliance 8.30–8.36
definitions 8.23–8.29
and Ministers 8.30, 8.32–8.36
purpose 8.20–8.22

Official Information Act requests 8.30–8.59, 8.113
advice and training 8.37–8.38
Cabinet material 8.39–8.42
certification that release prejudicial 8.64
charging for material 8.58
consultation by Ministers 8.46–8.47
consultation on 8.45–8.54
consulting Ministers 8.50–8.54
coordinating of 8.55–8.57
deletion or alteration of information 8.36
to departments 8.48–8.49, 8.50–8.54
disclosure of information about individuals 8.29, 8.74
"no surprises" principle 8.53
notice of refusal 8.36
Ombudsman's review 8.59–8.65
parliamentary information 8.90–8.91
review of decisions 8.59–8.65
security classifications and endorsements 8.43–8.44

transfer of 8.34–8.35, 8.51–8.52, 8.55
withholding of information 8.33

official overseas visit programmes 2.118

officials
amendments to bills proposed by 7.76
at Cabinet committee meetings 5.68
at Cabinet meetings 5.66
caucus and caucus committees 3.76
and collective responsibility 5.33
discoverability of advice 4.24, 4.26
policy development in pre-election period 6.12
political neutrality 3.10
and political parties 3.77–3.79
private communications with Ministers 3.80–3.83
relationship with Ministers 3.22–3.26
responsibilities regarding Ministers 3.9–3.10
and select committees 3.72–3.74

Ombudsman
investigation of departmental actions 8.78–8.80
Ombudsmen Act 1975 8.78–8.81
review of Official Information Act requests 8.59–8.65

omnibus bills 7.68–7.71
Statutes Amendment Bills 7.69–7.71

oral items for Cabinet meetings 5.51–5.53

Orders in Council 1.23, 1.38
entry into force 1.52
establishing inquiry 4.84

Order of Precedence 1.77–1.79

out of scope amendments 7.74

"outgoing government" 6.19

P

Parliament
dissolving of 2.6
term 6.2

Parliamentary Private Secretaries 2.52

parliamentary privilege
exemption from court appearances 4.34
inquiries 4.90
requests for parliamentary information 8.90–8.91
select committee proceedings 3.74

Parliamentary Under-Secretaries 2.48–2.51
appointment 2.50
attendance at Cabinet 5.5
authority 2.49
collective responsibility 2.51, 5.24–5.31

Parties (political)
caucuses 3.76, 7.29, 7.57–7.60
donations 2.93
fundraising 2.98
and government formation 6.18, 6.41–6.47
policies 6.13
political advertising 2.99, 2.109
See also coalition or support parties

pecuniary interests 2.58, 2.64
See also Ministers' interests

personal travel overseas 2.124–2.125

political advisers 3.25, 3.26, 3.61, 6.14

political parties
caucuses 3.76, 7.29, 7.57–7.60
donations 2.93
fundraising 2.98
and government formation 6.18, 6.41–6.47
policies 6.13
political advertising 2.99
See also coalition or support parties

portfolio Ministers 2.24–2.26
authorisation of Cabinet papers 5.41
conflicts of interest 2.76, 2.79–2.80

portfolios
allocation 2.7, 2.32–2.33
control of 2.36
directories of 2.34
Prime Minister's responsibilities re 2.7–2.8
titles 2.8, 2.32–2.34
vacant 2.21(b)

"power to act" 5.9, 5.52

powers of Ministers 2.22–2.23

practising certificates 2.104

pre-election period 6.9–6.15
pre-election economic and fiscal update 6.7
See also transitions

Prime Minister 2.2–2.12
advice to Governor-General 1.27, 2.6
appointment of 1.26, 2.2, 6.42–6.53
chair of Cabinet 2.9
communication with Sovereign 2.5
constitutional roles 2.4–2.6
dismissal of Ministers 1.29, 2.18–2.29
dissolution of Parliament 2.6
head of executive government 2.7–2.11
party leadership 2.12
portfolio allocations and ministerial ranking 2.7, 2.32–2.33
role 2.3–2.12
security and intelligence role 2.11

Prime Minister's statement 7.5

principles of public service 3.57–3.69

Privacy Act 1993 8.2, 8.66–8.77
compliance 8.68–8.70
information-sharing 8.5, 8.76
information privacy principles 8.5, 8.67
Privacy Commissioner 8.76–8.77
purpose 8.66–8.67

private bills 7.78–7.80

product endorsement 3.51, 2.99–2.101

production of documents *see* discovery

professional partnerships 2.104

proportional representation system 6.4, 6.18

Protected Disclosures Act 2000 3.82

Public Finance Act 1989
fiscal responsibility 5.70, 6.7
Ministerial responsibility under 2.26–2.27
and public sector 3.6, 3.12, 3.26
and state sector 3.5
and state services 3.4, 3.45

public inquiries 4.83–4.84
Executive Council action 1.38(d)
See also inquiries

public interest in release of official information 8.33, 8.74(b)

public records 8.1–8.4, 8.92–8.115
deposit of Ministers' papers at Archives NZ 8.108–8.112
Public Records Act 2005 8.2, 8.92–8.94
See also official information *and* Ministers' papers

public service
defined 3.3
free speech 3.71
information and advice during transitions 6.65–6.67
neutrality 3.60
principles 3.57–3.69
social media 3.71
staffing matters 3.33–3.34
See also chief executives, conflicts of interest, officials *and* state sector

public-interest immunity 4.28, 8.86–8.89

Q

questions for oral or written answer 7.104–7.107

quorum
Cabinet 5.64
Cabinet committees 5.65
Executive Council 1.45

R

Realm of New Zealand 1.6

references, provision of 2.105

referenda *see* citizens-initiated referenda 7.137–7.141

regulations 7.82–7.101
28-day rule 7.96–7.99
amendments to existing 7.87(c)
departmental schedules 7.87
development process 7.91–7.95
early commencement 7.97
Executive Council action 1.38(a)
gazetting of 1.50–1.52, 7.100–7.101
legislation programme 7.88
to be made by Order in Council 7.89–7.95

Parliamentary Counsel 7.83, 7.88, 7.89, 7.91, 7.94
planning for 7.87–7.88
publicising new regulations 7.100–7.101
Regulations Review Committee 7.85–7.86
scope of power granted 7.84
scrutiny of 7.84–7.86
ultra vires 7.84

Regulations Review Committee 7.85–7.86

regulatory impact analysis *see* impact analysis

responsible Ministers 2.26–2.27, 3.12, 3.36

review of chief executives' performance 3.32

revision bills 7.16–7.18

Royal commissions 4.78, 4.81–4.82, 4.104

royal prerogative 1.12

S

scrutiny of regulations 7.84–7.86

Secretary of the Cabinet 5.83–5.87
appointment of 5.87
as Clerk of Executive Council 1.36, 5.85
political neutrality 5.83
responsibilities 5.84–5.87

security classification 8.6
Cabinet papers 5.40
legal advice 4.67(c)
release under the Official Information Act 8.43

select committee inquiries
government response 4.117, 7.119–7.122
initiation of 4.118
reporting 4.117
subject matter 4.119–4.120

select committees
advice from officials, 3.72–3.75, 7.110
Cabinet papers 7.122
consideration of bills 7.110–7.113
inquiries *see* select committee inquiries
non-member Ministers at 7.112
reports requiring decisions by Cabinet 7.115
role of Ministers 7.108–7.112
role of officials 3.72–3.75
timeframes for reporting 7.111
treaty examination 7.123–7.133

sentences
comment on 4.12–4.14

service of court documents 4.35

shareholding ministers 3.52–3.56

social media 3.71

Solicitor-General's law officer role 4.6, 4.10(b)

solicitor/client privilege
coverage 4.65
definition 4.64

Sovereign of New Zealand 1.2–1.3
communication with 2.5
Governor-General represents 1.5, 1.7
heraldry and 1.73–1.76
royal prerogative 1.12
transition to successor 1.2

speaking engagements 2.94–2.98

Speech from the Throne 7.3–7.4

state-owned enterprises 3.5(e), 3.52–3.56
accountability 3.53
boards 3.53
caretaker period 6.34
ministerial direction 3.55
shareholding ministers 3.52

state sector
companies 3.51–3.56
conduct and integrity 3.57–3.71
defined 3.5
non-public-service 3.68–3.69
State Sector Act 1988 3.3
See also public service

state services
component entities 3.4
defined 3.4

State Services Commissioner
appointment of chief executives 3.29–3.31
integrity and conduct in public service 3.65–3.69
performance review responsibilities 3.32

Statutes Amendment Bills 7.69–7.71

statutes revision programme 7.16–7.18

statutory consultation process 5.21

statutory decisions
and Cabinet 4.25, 5.35–5.37
Cabinet papers 5.36(a)
effected by Governor-General 5.38
Executive Council 5.38
by individual Ministers 5.34–5.37
informing Cabinet 5.35
judicial review of 4.19–4.26
relevancy 5.34

statutory inquiries 4.78–4.110
administrative support 4.95–4.96
appointment of inquirer or commissioner 4.106–4.107
budget 4.108, 4.110
Cabinet papers proposing 4.97
consultation with officials 4.76
duties, powers, and privileges 4.87–4.94
establishment of 4.97–4.110
fees for commissioners 4.107
findings 4.84, 4.86, 4.100
fiscal accountability 4.110
Government inquiries 4.85–4.86
independence of 4.76
judges appointed to 4.106
monitoring of 4.110
no power to determine liability 4.100
non-statutory ministerial inquiries 4.111–4.113
Official Information Act 1982 and 4.94
Order in Council establishing 4.104
parliamentary privilege 4.90
powers 4.89–4.90
public inquiries 4.83–4.84
purpose 4.101
recommendations 4.100
resourcing 4.96, 4.108
restrictions on access 4.93
restrictions on publication 4.93, 4.94
Royal commissions 4.78, 4.81–4.82, 4.104
secretariats 4.96, 4.108
select committee inquiries 4.117–4.120
statutory bodies with inquiry powers 4.114–4.116
statutory powers 4.89
subjects of 4.99–4.100
terms of reference 4.93, 4.102–4.105
timeframe 4.109, 4.110
types of 4.78–4.86
witnesses 4.89, 4.91

subordinate instruments *see* regulations

subpoenas 4.33

summonses 4.34

Supplementary Order Papers 7.73
Cabinet approval 7.75–7.77
select committee consideration of 7.73
See also amendments

support agreements 3.79, 5.16–5.18, 5.82, 6.18

suppression orders 4.14, 4.15

T

titles
The Honourable and The Right Honourable 1.59, 1.65–1.70
of portfolios 2.8, 2.32

transitions between administrations 6.52
Cabinet Office 5.86(e)
mid-term 6.58–6.61
requests for advice or information 6.65–6.67
See also caretaker convention *and* government formation

travel 2.111–2.128
approval for 2.115–2.117
Cabinet papers re 2.115, 2.123
costs (offers to meet) 2.89, 2.97, 2.119–2.120
family members 2.121
officials 2.122
personal 2.124–2.125
proposals 2.115–2.117
reporting on 2.123

treaties (international) 5.77–5.81, 7.123–7.133
Cabinet consideration 5.79
implementing legislation 5.79, 7.132
national interest analysis 5.80, 7.126–7.127
select committee examination 7.128–7.131

Treaty of Waitangi
compliance of draft bills with 7.65
implications for settlements 5.14(f), 7.34

U

ultra vires 7.84

urgent matters for Cabinet 5.51–5.53

V

vacancy in portfolio 2.21(b)

visits by overseas leaders 2.126–2.127

W

waiver of 28-day rule 7.97–7.98

whistle-blowing 3.82–3.83

whole of government approach
directions 3.45–3.47

witnesses
Ministers as 4.27–4.34
non-statutory inquiries 4.112
statutory inquiries 4.89, 4.91

wrong-doing in state sector 3.82–3.83