CABINET MANUAL

2008

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

New Zealand Government

Published in April 2008 by the Cabinet Office, Department of the Prime Minister and Cabinet,
Parliament Buildings, Wellington, New Zealand

Reprinted June 2008

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ISBN 978-0-477-10067-0 (paperback)
ISBN 978-0-477-10068-7 (www.cabinetmanual.cabinetoffice.govt.nz)

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Foreword

New Zealand's system of Cabinet government is one of the great strengths of our political system. Cabinet provides the forum in which Ministers collectively consider, debate, and decide on the key issues facing the nation.

Cabinet is not a creature of legislation - its procedures are not governed by statute. The *Cabinet Manual* guides Cabinet's procedure. The *Cabinet Manual* is an authoritative guide to central government decision making for Ministers, their offices, and those working within government. It is also a primary source of information on New Zealand's constitutional arrangements, as seen through the lens of the executive branch of government. Successive governments have endorsed the *Cabinet Manual* as a sound, transparent, and proven basis on which to operate.

The *Cabinet Manual* does not effect change but, rather, records incremental changes in the administrative and constitutional arrangements of executive government. This edition reflects, for example, the continued development of the conventions flowing from the establishment of the MMP electoral system, and changes in the relationships within the state sector introduced by the Crown Entities Act 2004.

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

Helen Clark
Prime Minister

Preface

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 re-commencement of the business of government.

As noted in the Preface to the 2001 edition, the *Cabinet Manual* has a venerable lineage, but is not set in stone. It is updated from time to time to reflect established changes in Cabinet procedures and constitutional developments. It is like a dictionary: it is authoritative, but essentially recording the current state of the constitutional and administrative language. Thus the content of the *Cabinet Manual* represents an orderly and continuous development of the conventions and procedures of executive government.

The text of the *Cabinet Manual* is reviewed regularly. The content of the *Cabinet Manual 2001* has been thoroughly reviewed and updated in this edition. Some guidance has been clarified and expanded. Other guidance has been updated to reflect important contextual changes such as the enactment of the Crown Entities Act 2004 and the new state sector code of conduct. In addition, the *Cabinet Manual* now encompasses guidance on matters not previously included, but on which the Cabinet Office regularly provides advice. For example, a new chapter entitled *Ministers and the Law* not only brings together current guidance about judicial review and litigation, but also includes new sections on the role of the Attorney-General and on public inquiries.

The book version of the *Cabinet Manual* is accompanied by an online version, on www.cabinetmanual.cabinetoffice.govt.nz. Any updates to the *Cabinet Manual*, prior to its next revision, will be incorporated into the version on the website.

The *Cabinet Manual* focuses on principles. Detailed information about Cabinet and Cabinet committee processes is contained in the *CabGuide*, an online resource at www.cabguide.cabinetoffice.govt.nz.

Reviewing the *Cabinet Manual* over the past six months has been a big task for the Cabinet Office. Particular thanks are due to Judith Wigglesworth, who coordinated the review.

I commend the *Cabinet Manual* not only to those working in government, but also to those with an interest the workings of executive government and in New Zealand's constitutional arrangements.

Diane Morcom
Secretary of the Cabinet

Updates to the *Cabinet Manual 2008*

The *Cabinet Manual 2008* is produced in book form and published online at www.cabinetmanual.cabinetoffice.govt.nz.

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 2008* in book form are encouraged to regularly check the website for updates and to print off any amended text, which may be kept in the pocket inside the back cover.

From time to time the Cabinet Office may issue Cabinet Office circulars to supplement or update guidance in the *Cabinet Manual*. The *Cabinet Manual 2008* refers to some current Cabinet Office circulars. These and other current circulars are available on the Cabinet Office website www.cabinetoffice.govt.nz.

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

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 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. 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 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 provides for Parliament 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 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, and the Judicature Act 1908, relating in turn to the three branches of government, as well as the Ombudsmen Act 1976, 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, the Act of Settlement 1700 (regulating succession to the throne among other matters) and the Habeas Corpus Acts, 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, 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 . . .

That 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 Orders 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

That 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 within the House or the governing party is unclear.

Situations like this 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. Where that support is unclear, the Governor-General relies on the elected representatives in the House, and especially the party leaders, to clarify 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 already 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 that 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 particular statute 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 through the House of Representatives and the ministry, 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 ensure supply – the money to fund the state's functions) that provides the government.

The importance of political parties in our constitutional system is recognised in the Electoral Act 1993 and in Standing Orders. 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 that 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 those obligations in accordance with important principles such as neutrality and independence, and as members of a career service.

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 also distinct from Ministers and not subject to their 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, or 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. Those reasons relate to public interest such as the national security and law enforcement, and to private interests such as confidences and privacy. Underlying that 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, including those just indicated, individuals and communities do 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. Under changes to parliamentary procedures, Parliament has a greater 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 which have just been mentioned.

Certain key elements of the electoral system can be amended only if the people in a referendum approve, or 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. In accordance with that requirement, the amendments made in the last 40 years to those 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 also appears to be accepted, at the level of convention, that those voting requirements also apply to any proposal to amend that protective provision. Similarly, Standing Orders provide that an entrenched provision should be introduced 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 the subject of formal statement. But such development, like other changes to the constitution, should always be based on relevant principle.

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1

Governor-General and Executive Council

Related information

- The Letters Patent Constituting the Office of Governor-General of New Zealand 1983, incorporating the 1986 and 2006 amendments, are in appendix A.
- 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.
- Information about the Executive Council is available on the Cabinet Office website, www.cabinetoffice.govt.nz.
- Guidance about Executive Council procedures is set out in the *CabGuide*, www.cabguide.cabinetoffice.govt.nz.
- Information about the New Zealand Royal Honours System is available from the Honours Secretariat or on the Secretariat's website, www.honours.govt.nz.
- Information about the New Zealand Herald of Arms Extraordinary is available on the Honours Secretariat's website, www.honours.govt.nz.

Introduction

1.1 This chapter covers:

(a) the formal and constitutional aspects of 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.

Governor-General

Office of Governor-General

1.2 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.

1.3 The Realm of New Zealand means the metropolitan state of New Zealand, together with its territories and associated states. (See clause I of the Letters Patent in appendix A.)

Formal powers and functions of office

1.4 Through the Letters Patent, the Queen authorises the Governor-General to exercise, on her 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.

1.5 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;

(b) exercise the prerogative of mercy.

These prerogative powers may be governed or supplemented by statute.

1.6 The Letters Patent also constitute the Executive Council over which the Governor-General presides. See paragraphs 1.18 – 1.25 for information about the Executive Council.

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

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

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

1.8 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

1.9 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 1.52 – 1.60 for details of the New Zealand Royal Honours System.

International role

1.10 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

1.11 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.

1.12 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

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Governor-General, like the Sovereign, acts on the advice of those Ministers. This advice is tendered either within 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.

1.13 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.

1.14 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.

1.15 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 taken.

1.16 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

1.17 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 appendix A.) 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

1.18 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.

1.19 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.

1.20 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.

1.21 The submission of almost all items for consideration by the Executive Council must be authorised by Cabinet. (See paragraphs 1.37 – 1.38.)

Membership of Executive Council

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

1.23 Following the formation of a government, the Governor-General appoints the Prime Minister-designate as an Executive Councillor, and then signs that person's 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 6.37 – 6.48.

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

1.25 Executive Councillors must be members of Parliament, as set out in the Constitution Act 1986 (with the exception of some transitional situations – see paragraph 1.28 and section 6 of the Constitution Act 1986). 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 Executive Councillors

1.26 Resignations and dismissals of Executive Councillors and Ministers are effected by the Governor-General, acting on the advice of the Prime Minister. See paragraphs 2.18 – 2.19 for further information on the resignation and dismissal of Ministers.

1.27 Following a dissolution of Parliament, Ministers continue in office (subject to the legal requirement set out in paragraph 1.28) until the result of the general election and government formation negotiations are known and the next administration is ready to be sworn in. Executive Councillors and Ministers act in a caretaker capacity until the negotiations are complete. The convention on caretaker government is set out in paragraphs 6.16 – 6.35.

1.28 Executive Councillors 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 1986 (see paragraph 2.20) or formally reassigned to other Ministers in the caretaker administration.

1.29 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

1.30 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.

1.31 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 every meeting 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;

(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.

1.32 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.

1.33 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 5.77 – 5.81.

1.34 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

1.35 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 1.49) and certain local government orders;

(c) some proclamations;

(d) instruments appointing Royal Commissions and Orders in Council appointing commissions of inquiry;

(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

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

1.37 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).

1.38 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 statutory regulations series, items affecting only a particular local district, or items required to give effect to the determination of a statutory body. Technical requirements for Orders in Council that are submitted directly to Executive Council are included in the information on the Executive Council in the *CabGuide*.

Meetings, quorum, and attendance

1.39 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 Executive Councillors. The agenda is distributed at the meeting.

1.40 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.

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

1.42 The Letters Patent provide that two Executive Councillors, 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.

1.43 Section 3A of the Constitution Act 1986 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.

1.44 If the Governor-General is outside New Zealand, the Administrator of the Government presides, if available (see paragraph 1.17). Section 3A of the Constitution Act 1986 also applies if the Administrator is unable to attend an Executive Council meeting.

1.45 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

1.46 Executive Council proceedings are confidential. When Executive Councillors 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

1.47 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.

1.48 Orders in Council made at the Monday meeting will appear in the *New Zealand Gazette* the following Thursday. In cases 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.)

1.49 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 their notification in the *New Zealand Gazette* ("the 28-day rule" – see paragraphs 7.91 – 7.94). 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 the day on which the order is made. (See section 10(3) of the Interpretation Act 1999.)

Announcement

1.50 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 that process by announcing that the decision has taken effect before the Governor-General has signed the necessary documents.

1.51 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

1.52 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. Military achievements may also be honoured in this way. Further information on all aspects of the honours system is available on the Honours Secretariat’s website, www.honours.govt.nz.

1.53 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 (four awards);

(e) New Zealand Bravery Awards (four awards);

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

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

1.54 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

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

(a) New Zealand Royal Honours for non-New Zealand citizens;

(b) use of the titles “The Right Honourable” and “The Honourable”;

(c) acceptance of foreign honours by New Zealand citizens.

Nominations

1.56 Any person may make a nomination for an honour by completing the appropriate nomination form or by writing to either the Prime Minister or the Honours Secretariat. A Cabinet committee chaired by the Prime Minister considers all nominations for the

regular honours lists, based on a consolidated list of nominations prepared by the Honours Secretariat.

1.57 Nominations for a Queen's Birthday honours list should reach the Honours Secretariat no later than 1 February and, for a New Year honours list, no later than 1 August.

1.58 Further information about the process for nominating someone for an award can be found on the Honours Secretariat's website, www.honours.govt.nz.

New Zealand Royal Honours for non-New Zealand citizens

1.59 Citizens of Commonwealth countries that have the Queen as Head of State may be nominated for New Zealand honours in the usual way.

1.60 Citizens of countries that do not have the Queen as Head of State may be considered for honorary awards. Nominations should be made on the standard nomination forms.

"The Honourable"

1.61 The Governor-General and former Governors-General are entitled to use the title "The Honourable" (abbreviated to "The Hon") if they do not already have the title "The Honourable" or "The Right Honourable". This entitlement is retained for life.

1.62 The title "The Honourable" may be used by the following (if they do not already have the title "The Right Honourable") while in office:

(a) Prime Minister;

(b) members of the Executive Council;

(c) Speaker of the House of Representatives;

(d) Chief Justice;

(e) Judges of the Supreme Court;

(f) Judges of the Court of Appeal;

(g) Judges of the High Court.

1.63 On relinquishing office, or on retirement from office, the holders of the offices listed in paragraph 1.62 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.

1.64 Further information about the titles "The Right Honourable" and "The Honourable" is available from the Honours Secretariat.

Acceptance of foreign honours by New Zealand citizens

1.65 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 Secretariat's website, www.honours.govt.nz.

1.66 Enquiries should be directed to the Director of the Honours Secretariat or the Protocol Division of the Ministry of Foreign Affairs and Trade.

Heraldry

1.67 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).

1.68 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 given.

1.69 The use of the New Zealand Coat of Arms is the responsibility of the Ministry of Culture and Heritage. The use of the Royal Crown is the responsibility of the New Zealand Herald of Arms. The use of state, royal, and vice-regal emblems is protected by the Flags, Emblems, and Names Protection Act 1981.

1.70 For more information on heraldry and the role of the New Zealand Herald of Arms Extraordinary, see the Honours Secretariat's website, www.honours.govt.nz.

2

Ministers of the Crown: Appointment and Role

Related information

- Information on the composition of the current ministry and the scope of ministerial portfolios can be found on the Cabinet Office website, www.cabinetoffice.govt.nz. Documents include:
  - *Ministerial List*;
  - *Directory of Ministerial Portfolios*;
  - *Schedule of Responsibilities Delegated to Associate Ministers*;
  - *Register of Assigned Legislation.*
- *A Guide to the Public Finance Act* (August 2005) is available on the Treasury website, www.treasury.govt.nz.
- The *Ministerial Office Handbook*, designed primarily for staff in Ministers' offices, is available from Ministerial Services.

Introduction

2.1 This chapter covers:

(a) the appointment and role 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 and therefore has a mandate to govern the country; and

(b) act on the outcome of the political process by which the individual 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, 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 is the Minister in charge of the Security Intelligence Service and Minister responsible for the Government Communications Security Bureau, and may also hold other portfolios.

2.12 The Prime Minister's ministerial and executive duties are separate from the leadership role within 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 appendix A), issued under the Sovereign's prerogative power, empower the Governor-General:

> …to constitute and appoint under the Seal of New Zealand, to hold office under 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 1.28, 6.44, and 6.47).

2.17 All Ministers must be appointed as Executive Councillors 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 Executive Councillor 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, both from individual portfolios and from the Executive Council. As with the appointment of Ministers, it is a constitutional convention that the Governor-General acts on the advice of the Prime Minister in dismissing Ministers or accepting their resignations.

2.19 Prime Ministers have advised the dismissal of Ministers for a range of 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.

Legal power for Ministers to act for other Ministers

2.20 Section 7 of the Constitution Act 1986 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 2.39 – 2.42);

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

(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 provided in that legislation (subject to any statutory provision preventing such a change).

Role and powers of Ministers

2.21 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, within 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 2.23 – 2.25);

(g) are supported by and (to varying degrees, depending on the nature of the entity) 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 1986) and are accountable to the House for their policies, their own performance, and the performance of entities within their portfolios;

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

2.22 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 2.32(d) for further information about ministerial responsibility for legislation.

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Financial responsibility of Ministers

2.23 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.

2.24 Under the Public Finance Act 1989, "Responsible Ministers" are responsible to Parliament for the financial performance of the departments within 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 interest in Crown entities within their portfolios. (See paragraphs 3.28 – 3.37.)

2.25 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 appropriations and Votes, see *A Guide to the Public Finance Act* (www.treasury.govt.nz).

Cabinet Ministers, Ministers outside Cabinet, and Ministers of State

2.26 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.

2.27 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 5.22 – 5.28.) 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 committees, attending other committees where relevant.

2.28 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 carry out as Associate Ministers.

2.29 For more information about the operation of Cabinet and Cabinet committees, see chapter 5. For information about Associate Ministers, see paragraphs 2.33 – 2.38.

Ministerial portfolios

2.30 The Prime Minister determines the allocation of portfolios to Ministers, taking into account various matters (including political considerations, particularly in a coalition

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.

2.31 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.

2.32 The Cabinet Office maintains four directories containing information about ministerial portfolios. All four directories are available on the Cabinet Office website, www.cabinetoffice.govt.nz.

(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 includes details of some transfers of ministerial functions and powers to other Ministers (see paragraph 2.35).

(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 within each portfolio or by each department; this is found in the *Directory of Ministerial Portfolios.*

Associate Ministers

2.33 The Prime Minister may, by letter, assign responsibilities to Associate Ministers. Associate Ministers assist portfolio Ministers to carry 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 1986. 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 5.22 – 5.28.)

2.34 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 relevant working arrangements. The Prime Minister, through the Secretary of the Cabinet, must be consulted on each letter before it is finalised. Once 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.

2.35 Delegations to Associate Ministers are set out in a schedule of delegations compiled by the Cabinet Office. The schedule is presented to the House of Representatives to clarify accountability (so that, for example, parliamentary questions can be directed to the appropriate Ministers for answer). The schedule is also publicly available. (See www.cabinetoffice.govt.nz.)

2.36 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 those parameters are respected.

2.37 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.

2.38 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

2.39 Sometimes a Minister will be absent overseas, or otherwise temporarily unavailable to perform official duties. In such a case, having first obtained the Prime Minister's agreement to the arrangement, 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 1986. (See paragraph 2.20.) 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.)

2.40 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.

2.41 In the case of a major portfolio, where 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.

2.42 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, where possible, before taking ministerial action or making any public comment.

Duty Ministers

2.43 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 Cabinet Office, with the authority of the Prime Minister, prepares a roster of duty Ministers for such periods to ensure that a Minister is always available.

2.44 The duty Minister’s role is to carry out urgent ministerial functions on behalf of absent colleagues 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 requires consideration by a wider group of Ministers or at the Cabinet level.

Parliamentary Under-Secretaries

2.45 The Governor-General, under section 8 of the Constitution Act 1986, 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 1986.

2.46 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 1986.)

2.47 The relevant Minister must provide to the Parliamentary Under-Secretary a formal letter clearly setting out the role of the Parliamentary Under-Secretary in the portfolio, any delegated responsibilities, and 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 with 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 delegations to Parliamentary Under-Secretaries may be included in the *Schedule of Responsibilities Delegated to Associate Ministers.* (See paragraphs 2.32(c) and 2.35.)

2.48 As members of the Executive, Parliamentary Under-Secretaries are bound by the principle of collective responsibility. (See paragraphs 5.22 – 5.28.)

Parliamentary Private Secretaries

2.49 Parliamentary Private Secretaries are members of Parliament who may be appointed by the Prime Minister to assist Ministers. Parliamentary Private Secretaries are not part of the Executive. They have no executive responsibilities and no policy, financial, statutory, or operational authority.

Conduct, public duty, and personal interests

General

2.50 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 2.52 – 2.96:

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

(b) assists Ministers to identify those personal interests that might be seen to influence their decision making;

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

2.51 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

2.52 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;

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

2.53 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. Ultimately, Ministers are accountable to the Prime Minister for their behaviour.

2.54 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;

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

Register of Pecuniary Interests of Members of Parliament

2.55 All members of Parliament are required to disclose certain assets and interests in an annual *Register of Pecuniary Interests of Members of Parliament*. This register, administered by the Registrar of Pecuniary Interests of Members of Parliament, is designed to promote accountability and transparency by identifying personal financial interests that might influence members of Parliament. 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 in the "MPs and

parties" section on Parliament's website, www.parliament.govt.nz. See also paragraphs 2.78 – 2.85 on gifts.

Ministers' interests

2.56 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.

2.57 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 an actual conflict 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.

2.58 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, both financial and non-financial;

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

(c) each year, following the publication of the *Register of Pecuniary 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;

(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.

2.59 Ministers themselves are responsible for proactively identifying and reviewing possible conflicts of interest and ensuring that any conflicts of interest are promptly addressed by taking one or more of the measures set out in paragraph 2.70.

Identifying conflicts of interest

Types of conflicts of interest

2.60 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

2.61 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

2.62 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 family members, whānau, or close associates. Passing on commercially sensitive information, or encouraging others to trade on the basis of that information, may also breach the insider trading regime. (See paragraphs 8.10 – 8.12.) Such a breach may result in a significant fine or term of imprisonment.

2.63 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;

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

2.64 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 paragraph 2.70.)

Association

2.65 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.

2.66 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;

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

2.67 Any possible conflict arising from association with a non-public body should be dealt with using the measures set out in paragraph 2.70.

2.68 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

2.69 Ministers must ensure that any conflicts of interest are promptly addressed. 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 require ongoing management. If in doubt about the appropriate course of action, Ministers should consult the Prime Minister or the Secretary of the Cabinet.

2.70 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. However, most conflicts can be managed by taking one or more of the following measures.

(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 that 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 on the issue 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 into a blind trust, as a precaution against unintended 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

2.71 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 Interests of Members of Parliament*. The *Standing Orders* define a financial interest as including an interest held by a member's spouse, domestic 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*.

2.72 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 is not permitted to be present in the House when another Minister moves the motions on the portfolio Minister's behalf, but may declare the conflict in a subsequent speech.

Constituency interests

2.73 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.

2.74 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).

2.75 Where the member also holds the relevant portfolio or is the Associate Minister, further measures, as set out in paragraph 2.70, 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 responsibility for it to another Minister.

2.76 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.

2.77 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.

Gifts

General

2.78 The *Standing Orders* require members of Parliament to disclose to the Registrar of Pecuniary Interests of Members of Parliament any gift accepted over a prescribed value, currently $500. This declaration includes hospitality and donations in cash or kind.

2.79 Ministers who accept gifts worth more than the prescribed value must not only disclose them to the Registrar of Pecuniary Interests of Members of Parliament, but also must relinquish them, unless they obtain the express permission of the Prime Minister to retain them. Any gift accepted 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.

Gifts from foreign governments

2.80 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 2.78), they should be relinquished before or at the time of leaving office, unless the express permission of the Prime Minister is obtained (see paragraph 2.79). 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

2.81 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 may choose to pay full value for it. The gift still needs to be disclosed to the Registrar of Pecuniary Interests of Members of Parliament, although an explanatory note might be added.

2.82 Payment for air travel or accommodation may constitute a gift and must be declared. Where such a gift 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

2.83 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.

2.84 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 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.

2.85 Acceptance of other cultural gifts such as fine mats or food is unlikely to create the same perception problems. The guidance in paragraphs 2.78 – 2.79 should be followed in such cases.

Political party donations

2.86 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.

Fees, endorsements, and outside activities

Product endorsement

2.87 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.

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

2.89 When accepting an invitation, a Minister should inform the organisation that it may not:

(a) use any photos taken of the Minister at the event; or

(b) publicise the event,

in a way that could be perceived as an endorsement by the Minister of the organisation, or its products or services.

2.90 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 that organisation, or its products or services.

Fees and other payments

2.91 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.

2.92 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 that member's annual disclosure of pecuniary interests. 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).

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

(a) the organisers;

(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.

2.94 Ministers asked to address fundraising functions for their own electorate or that of another member of Parliament may donate any fee received to the electorate organisation involved.

Business and professional activities

2.95 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.

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

Government advertising guidelines

2.97 The government has a responsibility to keep the public informed about important issues of the day and to ensure that the public is aware of services to which they are entitled. The government keeps the public informed through, for example, print, visual, or sound media, and appearances at conferences and other gatherings.

2.98 The *Guidelines for Government Advertising* (see appendix B) assist Ministers and government departments 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 departments on the guidelines, particularly if conduct and integrity issues arise. The Office of the Controller and Auditor-General is also available to provide advice, particularly as to probity and financial management.

2.99 Under the Electoral Finance Act 2007, special considerations apply to government advertising during an election year. The State Services Commission's guidance to departments in an election year includes guidance relating to the Act. (See www.ssc.govt.nz.)

Ministerial travel

Overseas travel

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

2.101 To ensure that their travel is approved properly and undertaken in an appropriate manner, Ministers must follow the principles set out in paragraphs 2.103 – 2.116, and

the more detailed procedural guidance contained in the *Ministerial Office Handbook* and the *CabGuide.*

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

Purpose of travel

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

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

(b) to familiarise themselves with specific issues;

(c) to meet international obligations.

Approval of travel

2.104 Travel proposals, including proposals to attend Australian Standing Council meetings, require the preliminary approval of the Prime Minister. A Cabinet paper proposing the travel must subsequently be submitted to and approved by Cabinet. Ministers must seek the agreement of another Minister or Ministers to act for them during their proposed period of absence. (See paragraphs 2.39 – 2.42.) No commitments or understandings regarding overseas travel are to be entered into before the Prime Minister's preliminary approval is given.

2.105 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.

2.106 When considering proposals for overseas travel by Ministers, the Prime Minister will take into account the numbers 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 any one time, although the Prime Minister may approve exceptions to this limit in special circumstances.

2.107 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

2.108 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 the Cabinet paper.

2.109 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 light of the guidance on the public duty and personal interests of Ministers. See in particular paragraphs 2.56, 2.60, and 2.61, and the guidance on gifts (paragraphs 2.78 – 2.82 and 2.93). The Secretary of the Cabinet is available for advice.

Accompanying family members, staff, and officials

2.110 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 on a case-by-case basis.

2.111 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 light of the nature of the visit.

Reporting on overseas travel

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

Personal travel overseas

2.113 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.

2.114 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 2.39 – 2.42.) The Cabinet Office should be advised of any such arrangements.

Visits by Ministers from other countries

2.115 The Prime Minister and the Minister of Foreign Affairs should be consulted if a visit by a Minister from another country is proposed. Guidance about the arrangements for a visit by an overseas Minister is available from the Visits and Ceremonial Office at the Department of Internal Affairs. (See www.dia.govt.nz.)

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

Travel within New Zealand

2.117 Details of the procedures and entitlements governing ministerial travel within New Zealand are set out in the *Ministerial Office Handbook*.

3

Ministers of the Crown and the State Sector

Related information

- Information on Cabinet and Cabinet committee processes is set out in the *CabGuide,* www.cabguide.cabinetoffice.govt.nz.
- Information on standards of integrity and conduct, political neutrality, briefings for incoming Ministers, contact between public servants and political parties, 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 (06) 08 *Fees Framework for Members of Statutory and Other Bodies Appointed by the Crown*, and can be found on the Cabinet Office website, www.cabinetoffice.govt.nz.
- Information on Ministers' relationships with Crown entities can be found in:
  - *Crown Entities: A Guide for Ministers* provided by the State Services Commission to Ministers and Ministers' offices;
  - Cabinet Office circular CO (06) 5 *Ministers' Roles and Responsibilities in Relation to Crown Entities,* www.cabinetoffice.govt.nz;
  - Cabinet Office circular CO (06) 6 *Whole of Government Directions under the Crown Entities Act 2004,* www.cabinetoffice.govt.nz.
- 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.

Introduction

3.1 This chapter covers:

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

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

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

Public service

3.2 "Public service" is the term used to describe all public service departments listed in the First Schedule to the State Sector Act 1988. The public service is part of the executive branch of government.

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State services

3.3 "State services" is the term used to refer to the broad range of organisations that serve as instruments of the Crown. The state services consist of:

(a) all public service departments;

(b) other departments in the executive branch of government that are not part of the public service (the New Zealand Police, the New Zealand Security and Intelligence Service, 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) a variety of organisations included in the government's annual financial statements by virtue of being listed in the Fourth Schedule to the Public Finance Act 1989, such as reserves boards, fish and game councils, and the Asia New Zealand Foundation; and

(e) the Reserve Bank of New Zealand.

State sector

3.4 "State sector" is the common term for the organisations whose financial position and performance are reported 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) departments that are part of the legislative branch of government, but not part of the state services, 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; and

(e) state-owned enterprises, which are listed in the First and Second Schedules of the State-Owned Enterprises Act 1986.

Ministers and the public service

Roles and responsibilities

3.5 Ministers decide both the direction and the priorities for their departments. They should not be 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. 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; and

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

Ministers' relationships with chief executives

3.6 The formal relationship between Ministers and the public service is governed primarily by the State Sector Act 1988 and the Public Finance Act 1989. The relationship is also governed by convention, key aspects of which are set out in this chapter.

3.7 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 1988, for:

(a) carrying out of the functions and duties of the department (including those imposed by statute or by the policies of the Government);

(b) tendering advice to their Minister(s) and other Ministers of the Crown;

(c) the general conduct of the department; and

(d) the efficient, effective, and economical management of the department.

3.8 Chief executives are also responsible to their Responsible Ministers for the financial management and performance of their departments under section 34 of the Public Finance Act 1989.

Accountability documents

3.9 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 several key accountability documents.

(a) One-year performance information is included in supporting information to the *Estimates*, which are primarily one-year documents providing information supporting the appropriations sought in the Appropriation Bills and specifying expected performance.

(b) Medium-term performance information is included in the statements of intent, which are at least three-year documents setting out departmental strategic

performance priorities, objectives, and capability. Statements of intent include the information required by section 40 of the Public Finance Act 1989.

(c) An output plan may be 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*.

(d) Every chief executive agrees performance expectations with his or her Responsible Minister. These expectations are outlined in the chief executive's job description and subsequent performance reviews.

Briefing for incoming Ministers

3.10 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:

(a) describes the organisation and responsibilities of the department or agency, as well as any Crown entities or other state sector agencies within the portfolio;

(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;

(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).

3.11 This briefing is usually given to the Minister after appointment. In some circumstances, however, it may be appropriate to give this briefing to the Minister between the announcement of the appointment and the appointment ceremony, with the knowledge of the incumbent Minister, the State Services Commissioner and, where appropriate, the Prime Minister.

3.12 The written briefing should be tailored to the needs of the new Minister, and prepared in similar presentation and style as 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.

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

3.14 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 and/or oral briefings as required.

3.15 The State Services Commission has issued further guidance on the content of briefings for incoming Ministers. (See the State Services Commission website, www.ssc.govt.nz.)

Ministers and officials

3.16 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 a "no surprises" principle. 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 when deciding whether 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.

(c) It would clearly be improper for Ministers to instruct their departments to act in an unlawful manner. Ministers should also take care to ensure that their actions 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. Chief executives must provide their Ministers with all relevant information to enable Ministers to set these priorities and objectives, taking into account the resources available to their departments.

(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 and departments need a clear understanding about which of them is responsible for media or other public comment on particular issues.

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

(h) 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 inappropriately influence officials, 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.

3.17 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 in Ministers' offices must take care

to ensure that they do not improperly influence matters that are the responsibility of others.

3.18 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.

3.19 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 to manage relationships with other political parties, to manage risk, and to negotiate support for policy and legislative initiatives.

3.20 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 1989.

Individual ministerial responsibility for departmental actions

3.21 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, those actions. 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 if any action to be taken involves members of their staff.

Appointment of chief executives

3.22 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.

3.23 The process of selecting most public service chief executives is managed by the State Services Commissioner, in accordance with Part III of the State Sector Act 1988. 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, subject to the agreement of the Prime Minister and the Minister of State Services.

3.24 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 1988. These appointments include:

(a) Solicitor-General;

(b) Chief Parliamentary Counsel and Compiler of Statutes;

(c) Secretary of the Cabinet/Clerk of the Executive Council (see paragraph 5.81);

(d) Director, Government Communications Security Bureau;

(e) Director, New Zealand Security Intelligence Service;

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

(g) Commissioner of Police and senior police appointments.

3.25 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 General Manager, Parliamentary Service and the Clerk of the House of Representatives) if requested to do so by the Speaker.

Chief executives as employers

3.26 Chief executives act as the employing authority for the departments to which they have been appointed. Under section 33 of the State Sector Act 1988, chief executives must act independently in matters such as 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.

3.27 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 3.16 (a) to 3.16 (c).

Ministers and Crown entities

General

3.28 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 1988, 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.

3.29 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.

3.30 The Crown entity's board directs the entity's day-to-day 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.

3.31 Detailed guidance on Ministers' roles and responsibilities in relation to Crown entities is contained in Cabinet Office circular CO (06) 5 *Ministers' Roles and Responsibilities in*

Relation to Crown Entities and in *Crown Entities: A Guide for Ministers*, published by the State Services Commission.

Role of Ministers

3.32 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.

3.33 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.

3.34 The Crown Entities Act 2004 (and other legislation that relates to particular Crown entities) sets out the extent of control that 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 (06) 8 *Fees Framework for Members of Statutory and other Bodies Appointed by the Crown*.)

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

3.36 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.

3.37 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 2004 and should be consulted when appropriate.

Whole of government directions under the Crown Entities Act 2004

3.38 The Ministers of Finance and State Services may issue whole of government directions under section 107 of the Crown Entities Act 2004 to specified categories or types of Crown entities as defined in the Act. The purpose of a whole of government direction is both to support a whole of government approach and (either directly or indirectly) to improve public services. Any Crown entity to which a whole of government direction is issued must give effect to that direction.

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3.39 Cabinet's approval must be sought for:

(a) a decision to use a whole of government direction to achieve a policy purpose;

(b) undertaking the consultation required by the Crown Entities Act 2004;

(c) issuing a whole of government direction.

3.40 Further guidance on whole of government directions is contained in Cabinet Office circular CO (06) 6 *Whole of Government Directions under the Crown Entities Act 2004*. This circular includes a checklist for whole of government direction proposals.

Role of Crown entity boards

3.41 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 2004. 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, the board's actions must be consistent with the Crown entity's objectives, functions, statement of intent, and output agreement (if any).

3.42 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

3.43 The Crown Entities Act 2004 provides for Ministers to participate in the process of monitoring Crown entity performance against the entity's strategic direction, as agreed with the Minister and set out in the statement of intent. Each Crown entity has a monitoring department, which monitors the Crown entity, provides the Minister with information about the Crown entity's performance, and ensures that the Crown entity's approach is consistent with government goals.

Ministers and companies in the state sector

General principles

3.44 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 2.87 – 2.90);

(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 2.56 – 2.70);

(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 8.10 – 8.12).

State-owned enterprises

3.45 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.

3.46 Every state-owned enterprise has a board of directors, appointed by shareholding Ministers, that 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.

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

(a) appointing directors;

(b) setting dividend levels;

(c) monitoring performance;

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

3.48 Most state-owned enterprises are subject to ministerial direction in relation to the content of the company's statement of corporate intent and the level of dividend payable, in accordance with section 13 of the State-Owned Enterprises Act 1986.

3.49 The Crown Company Monitoring Advisory Unit provides the government with advice that enables the shareholding Ministers to hold boards of state-owned enterprises and other Crown companies accountable for their performance.

Integrity and conduct across the state sector

Principles of public service

3.50 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, employees must be fair, impartial, responsible, and trustworthy.

3.51 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. Employees in the state sector 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

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a key element of impartial conduct. It provides the basis on which officials support the continuing process of government by successive administrations.

3.52 Advice given to Ministers must be honest, impartial, and comprehensive. It must also reflect the priorities determined by the government of the day. During the policy development process, the advice given by officials should be free and frank, so that Ministers can take decisions based on all the facts and appreciation of all the options. Once policy is determined, departments are responsible for its effective implementation.

3.53 Ministers may ask employees in the state sector to provide them with factual or analytical material, but should not require officials to offer comment or opinion on clearly political topics, such as policies mooted by other parties in Parliament.

3.54 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 appearance of a conflict, between personal interests and the interests of their employers.

3.55 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.

3.56 For further information on conflicts of interest, see guidance from the State Services Commission (www.ssc.govt.nz) and the Office of the Controller and Auditor-General (www.oag.govt.nz).

Processes for upholding the principles of public service

3.57 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.

3.58 The State Services Commissioner has issued a code of conduct for the state services, which is available on the State Services Commission website, www.ssc.govt.nz. Agencies within the state services must maintain policies and procedures that are consistent with the code of conduct. The code can be varied to reflect the circumstances of particular agencies.

3.59 Public service departments and agencies in the state services can seek advice and guidance from the State Services Commission on matters affecting 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;

(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.

3.60 Section 11 of the State Sector Act 1988 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.

3.61 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 that 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 3.58.)

Public comment on government policy

3.62 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 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 political parties

Select committees

3.63 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 Minister 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.

3.64 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. (See *Officials and Select Committees – Guidelines* on www.ssc.govt.nz and *Working with Select Committees* on www.parliament.nz.) 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**.**

3.65 The select committee guidance states that the House of Representatives must receive free and frank answers and evidence from those who appear before its committees. Parliamentary proceedings are subject to absolute 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 Minister.

3.66 See paragraphs 7.97 – 7.111 for information on the role of Ministers in relation to select committees.

Caucus and caucus committees

3.67 Ministers may from time to time ask officials to attend a meeting of a caucus committee or caucus, particularly to support Ministers when 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.

3.68 Detailed guidance on contact between public servants and political parties, including contact with caucus(es), has been issued by the State Services Commission, and is available on the State Services Commission website, www.ssc.govt.nz. See paragraphs 7.26 and 7.53 – 7.56 for information on the role of Ministers in relation to caucus(es) and caucus committees.

Supporting consultation and negotiation between political parties

3.69 Ministers are responsible for consultation and negotiation involving political parties represented in the House. On occasion, Ministers may call on public servants to support them in this process. Ministers should clearly instruct their officials on the nature of the contact, and whether their role is to support a factual briefing or to support a process of consultation and negotiation. Any contact between a public servant and a representative of a political party should take place only with the prior approval of the public servant's Minister.

3.70 Special rules apply in the period leading up to and following an election, and particular care should be taken at this time. (See chapter 6 and guidance on the State Services Commission website, www.ssc.govt.nz.)

3.71 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 the agreement(s), 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

3.72 Public servants 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. A public servant is entitled to the same information or level of detail in response to an official information request as would be given to any member of the public.

3.73 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.

3.74 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).

3.75 If, having disclosed a serious wrongdoing, the employee's concerns have 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.

4
Ministers and the Law

Related information

- Cabinet Directions for the Conduct of Crown Legal Business 1993 are in appendix C.
- The publication *Setting Up and Running Commissions of Inquiry*, published by the Department of Internal Affairs, can be found on the Department of Internal Affairs website, www.dia.govt.nz.

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) public 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 the House of Representatives 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 and the Crown Law Office, 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 4.41 – 4.45.)

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 and unfair public criticism, and discouraging ministerial colleagues from criticising judges and their decisions. (See paragraphs 4.12 – 4.15.)

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, for example, 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 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 1986.

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

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 these views could be regarded as reflecting adversely on the impartiality, personal views, or ability

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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 involve themselves in deciding whether a person should be prosecuted, or on what charge. Similarly, they should not comment on the results of particular cases 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. The *Standing Orders of the House of Representatives* (the *Standing Orders*) prohibit discussion in the House of matters awaiting judicial decision and provide useful guidance on when to refrain from comment. The requirement for restraint applies to both civil and criminal cases.

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

Crown legal business

4.16 The *Cabinet Directions for the Conduct of Crown Legal Business* are set out in appendix C. These directions set out the processes to be followed when:

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

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

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

Litigation involving Ministers

Judicial review

4.18 "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, are able to 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.

4.19 On occasion, the courts will review the exercise of other public powers, such as those arising under the royal prerogative. The courts are most unlikely to intervene, however, where the decision in question is part of the forming of policy by the government of the day.

4.20 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.

4.21 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 has been 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.

4.22 A Minister will be dependent on officials for many of the above matters, and often the relevant 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.

4.23 Referring any matter to Cabinet or a Cabinet committee where the Minister is acting under statutory authority must be carefully handled so that it is clear that the Minister is not asking Cabinet to make the decision. Paragraphs 5.31 – 5.35 contain detailed guidance about statutory decision making in the collective context.

4.24 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 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 detracts 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.

Appearance in court by Ministers to give evidence and production or discovery of documents

4.25 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.

4.26 Any Minister who receives a request to produce documents in legal proceedings should refer the request to the Attorney-General, who may consult the Solicitor-General on the question of whether public-interest immunity should be claimed.

4.27 Cabinet or departmental documents that are relevant to a legal proceeding are potentially subject to production or discovery. See paragraphs 8.69 – 8.72 for guidance.

4.28 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 4.58 – 4.68.

4.29 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 enable 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.

4.30 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 to appear before other quasi-judicial forums.

4.31 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.

4.32 In certain circumstances, the Speaker may issue a certificate exempting any member of Parliament from attendance at court in answer to a witness summons. The Speaker's power to issue such a certificate arises under the Legislature Act 1908. 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 that summons set aside. In either event, the Crown Law Office will assist the Minister in making the necessary applications.

Service of court documents

4.33 The Crown Law Office is authorised to accept service of all court documents relating to proceedings where a Minister is a party in his or her 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

4.34 The guidance in paragraphs 4.35 – 4.53 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

4.35 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 4.18 – 4.24.)

4.36 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 (except in exceptional cases – see paragraph 4.51).

Proceedings against a Minister personally

4.37 On occasion, Ministers may be sued for acts done while a Minister, but which have 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. Alternatively, 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.

4.38 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.

4.39 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 4.49 – 4.52.)

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

Preliminary steps

4.41 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

4.42 If the Attorney-General forms the view that the matter arose from the Minister's duties, the Attorney-General should 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.

4.43 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.

4.44 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 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 4.39 and 4.49 – 4.52.) The Minister concerned usually withdraws from the Cabinet meeting.

4.45 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 4.43(b) or 4.43(c).

Procedure where the Crown undertakes the defence

4.46 Where Cabinet decides that the Crown will undertake the defence (see paragraph 4.43(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

4.47 If Cabinet has agreed that the Crown will meet the Minister's costs in retaining private counsel (see paragraph 4.43(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.

4.48 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 4.44).

Payment of costs or damages awarded

4.49 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 4.51).

4.50 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.

4.51 The decision about 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 lead Cabinet to decline to authorise the indemnification of the Minister.

4.52 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

4.53 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

4.54 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 4.34 – 4.53 do not apply in these circumstances.

4.55 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 should 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.

4.56 Counsel will be retained in the same way as set out in paragraphs 4.47 – 4.48.

4.57 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

4.58 Legal advice in departmental documents and Cabinet papers should be protected from disclosure. The guidance in paragraphs 4.59 – 4.68 sets out the required approach to the release of legal advice.

Legal professional privilege

4.59 Legal professional privilege is a term that applies 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 1982 and section 29(f) of the Privacy Act 1993.) It is therefore important that legal professional privilege in legal advice provided to the government is maintained, and not inadvertently waived.

4.60 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.

4.61 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 opposed to other types of advice, such as policy advice) will attract solicitor/client privilege.

Guidelines for the presentation of legal advice

4.62 Some government documents necessarily include legal advice, so that Ministers and government agencies have all 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.

4.63 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

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

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

(b) **Implied waiver**: when a client refers to the legal advice in a way that would make it unfair to allow the privilege to be maintained. In this case, 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.

Release of legal advice

4.65 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;

(c) instruct all lawyers acting for the Crown.

4.66 When determining whether to release legal advice that has been provided to the government, or to refer to the content of that 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 of a release on current or potential legal proceedings; and

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

4.67 Where a Minister or a government department considers that it is necessary to release legal advice or refer to the content of that 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.

4.68 Where a request is made under the Official Information Act 1982, 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.

Public inquiries

General

4.69 This guidance provides information on different types of public inquiries, and the principles guiding the establishment of inquiries.

4.70 Further guidance on commissions of inquiry can be found in the Commissions of Inquiry Act 1908 and the Department of Internal Affairs publication *Setting Up and Running Commissions of Inquiry*.

4.71 Statutory commissions of inquiry, 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, on the choice of inquiry.

4.72 Any inquiry, whether statutory or non-statutory, acts independently from the government. Those conducting an inquiry may nonetheless consult with officials on technical matters and on the practical implications of any draft proposals.

4.73 All inquiries must follow the principles of natural justice.

Statutory commissions of inquiry

Commissions of inquiry

4.74 The Commissions of Inquiry Act 1908 provides that commissions of inquiry may be established by the Governor-General, by Order in Council, to inquire into and report on any question arising out of or concerning:

(a) the administration of the government;

(b) the working of any existing law;

(c) the necessity or expediency of any legislation;

(d) the conduct of any officer in the service of the Crown;

(e) any disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury; or

(f) any other matter of public importance.

4.75 The Department of Internal Affairs is responsible for administering the Commissions of Inquiry Act 1908. The department provides administrative support to commissions of inquiry, unless it is determined that it would be inappropriate for the department to do so (for example, because of an actual or perceived conflict of interest).

Royal commissions of inquiry

4.76 Royal commissioners may be appointed by the Governor-General under Clause X of the Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (see appendix A) to carry out inquiries. The Commissions of Inquiry Act 1908 extends to all royal commissions, which therefore have the same powers, functions, privileges, and immunities as commissioners appointed under the Act.

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Powers and privileges of statutory commissions of inquiry

4.77 Commissions of inquiry have the power 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 those powers is more appropriate.

4.78 Under the Commissions of Inquiry Act 1908, witnesses and counsel are protected by the same immunities and privileges that they would have before the courts. Commissioners are also protected under the Act.

4.79 Commissions of inquiry may refer disputed points of law for determination by a court.

4.80 Commissions of inquiry 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. Commissions of inquiry are not subject to the Official Information Act 1982.

Establishing a statutory commission of inquiry

4.81 A Minister must consult the Prime Minister and the Attorney-General when assessing whether to establish a commission of inquiry, prior to submitting any proposal to Cabinet. Cabinet papers proposing commissions of inquiry or royal commissions of inquiry are often joint papers from the portfolio Minister and the Minister of Internal Affairs, as Minister responsible for the Commissions of Inquiry Act 1908. 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 4.83 – 4.90.

4.82 Further guidance on the process for obtaining Cabinet approval for the establishment of a commission of inquiry is contained in the Department of Internal Affairs publication *Setting up and Running Commissions of Inquiry*.

Subject of inquiry

4.83 Legislation does not substantially limit the matters that commissions of inquiry can consider. An inquiry may be established to inquire into a matter of policy or a matter of conduct, or into an issue that requires consideration of both policy and conduct. A conduct inquiry should not usually be appointed, however, where an existing body has jurisdiction to carry out the investigation. While it is appropriate for inquiries to investigate instances of impropriety, they should not cut across the role of the police or the role of the courts in determining criminal or civil liability.

Purpose of inquiry

4.84 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;

(d) holding people and organisations to account.

Terms of reference

4.85 Terms of reference can be used to give direction or place restrictions on the inquiry, and give specific procedural directions not set out in the Commissions of Inquiry Act 1908. 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.

4.86 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. The warrant that includes the terms of reference is drafted by the Parliamentary Counsel Office.

Appointment of inquirer or commissioner

4.87 The Commissions of Inquiry Act 1908 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.

4.88 Depending on the size, complexity, and likely length of an inquiry, more than one inquirer can be appointed. Where more than one inquiry member is appointed, members should have skills and experience that complement each other. 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 (06) 8 *Fees Framework for Members of Statutory and Other Bodies Appointed by the Crown*.

Budget and time frame

4.89 The budget for a commission of inquiry should allow for the commission to have access to discrete resources and, in most cases, a secretariat established for the purpose of the inquiry. Commissions of inquiry are usually funded from Vote Internal Affairs. The Treasury and the Department of Internal Affairs should be consulted on the budget. Realistic time frames should be set, to acknowledge that the scope of the issues may not be clear until considerably further along in the process.

4.90 Commissions of inquiry must be fiscally accountable. The Department of Internal Affairs or the administering department, as appropriate, will establish the process for monitoring the budget and the reporting time frame for inquiries.

Ministerial inquiries

4.91 A Minister may establish a non-statutory inquiry. In order to do so, the Minister should seek the Prime Minister's agreement to the matters referred to in paragraphs 4.83 – 4.90, and advise Cabinet as soon as possible of these details.

4.92 Ministerial inquiries have no coercive powers. The immunities and privileges of the people involved – inquirers, lawyers, and witnesses – are not protected by statute.

Standing bodies with inquiry powers

Statutory bodies

4.93 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.

4.94 Before a commission of inquiry or ministerial inquiry is established, consideration should be given as 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.

4.95 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

4.96 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 90 days. See paragraphs 7.108 – 7.111 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*.

4.97 A select committee inquiry is usually initiated by a select committee 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.

4.98 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.

4.99 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 chair inviting the committee 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.

5
Cabinet Decision Making

Related information

- Detailed guidance and information on Cabinet and Cabinet committee processes is available in the *CabGuide*, www.cabguide.cabinetoffice.govt.nz.

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 express prior permission of the Prime Minister.

Cabinet committees

5.6 Cabinet committees provide the forum for detailed consideration and discussion of issues before 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 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, that decision can be acted on immediately. Approval for power to act is usually sought by way of an oral item at Cabinet. (See paragraph 5.47 – 5.49.) Decisions taken by a Cabinet committee under power to act are reported to Cabinet in the usual way. When authorising decisions to be taken 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 Cabinet Office website, www.cabinetoffice.govt.nz.

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 level and 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 5.72);

(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 7.108 – 7.111, 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 5.31 – 5.35);

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

(m) international treaties and agreements (see paragraphs 5.73 – 5.74);

(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;

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

It may, nonetheless, be appropriate to bring an item in 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. 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.

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 Cabinet Office website, www.cabinetoffice.govt.nz.

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 views are reflected accurately in the paper. Consultation may sometimes be needed with agencies that have an advisory role, for example, the Office of the Privacy Commissioner. See the *CabGuide* for full guidance on consultation procedures, and paragraphs 5.29 – 5.30 for guidance on collective decision making and government agencies.

Statutory consultation processes

5.20 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 appropriate consultation has taken place. (See also paragraphs 5.31 – 5.35.)

Confidentiality

5.21 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 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 contained in the minutes.

Collective responsibility

Collective responsibility and Ministers

5.22 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.

5.23 Acceptance of ministerial office means accepting collective responsibility. Issues are often debated vigorously within 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 5.25 – 5.27), regardless of their personal views and whether or not they were at the meeting concerned.

5.24 In a coalition government, Ministers are expected to show careful judgement when referring to party policy that differs from government policy. Subject to

paragraphs 5.25 – 5.27, a Minister's support and responsibility for the collective government position must always be clear.

5.25 Coalition governments may also 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.

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

5.27 Ministers outside Cabinet from parliamentary parties supporting the government may be bound by collective responsibility only in relation to their particular portfolios. 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. When such Ministers represent the government internationally, they speak for the government on all issues that foreign governments may raise with them in their capacity as Ministers.

5.28 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

5.29 Departments and other agencies with policy responsibilities should work closely with one another when preparing papers for Cabinet and Cabinet committees and, where possible, reach consensus on proposals they submit to Ministers. If consensus is not reached, a paper may reflect different ministerial or departmental positions. See the *CabGuide* for more information on managing departmental consultation and presenting departmental views.

5.30 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

5.31 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, from the scheme, the long title, and the purpose of the Act). If the Minister fails to consider all relevant matters, or takes

into account irrelevant matters in making a decision, the decision may be susceptible to judicial review.

5.32 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 that decision publicly and collectively.

5.33 Special considerations apply to protect the integrity of the relevant 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;

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

5.34 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 4.18 – 4.24.

Statutory decisions and Executive Council

5.35 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 1.18 – 1.46, and the *CabGuide* for further information on the Executive Council.

Cabinet and Cabinet committee procedures

Preparing and submitting Cabinet papers

5.36 Papers are submitted to Cabinet committees and Cabinet to enable Ministers to make collective decisions based on sound information. Good papers reflect sound policy development and consultation processes, and are succinct yet sufficiently comprehensive to provide Ministers with all the information they need to reach an informed decision.

5.37 Ministers submit papers to Cabinet or Cabinet committees on issues concerning their own portfolios. Where possible, all papers to Cabinet or Cabinet committees should be signed by the relevant portfolio Minister. 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 are expected to be fully conversant with them.

5.38 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 has been consulted and agrees with the submission of the paper. 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 2.70(c).)

5.39 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

5.40 Cabinet and Cabinet committee papers must be submitted to the Cabinet Office before the relevant deadline, which is usually several days before the relevant 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 required.

5.41 If a Minister wishes to submit a late paper for Cabinet or Cabinet committees, the Minister concerned should, by the deadline for submitting the paper to the Cabinet Office, write to the chair of the committee through the Secretary of the Cabinet or the appropriate committee secretary seeking approval for acceptance of the paper and explaining why inclusion on the agenda is necessary. 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

5.42 Amendments to Cabinet or Cabinet committee papers already lodged with the Cabinet Office 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.

5.43 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

5.44 Once the Cabinet Office has issued an agenda, a paper can be withdrawn or deferred only at the meeting for which it was prepared. The Minister who signed the paper should provide notice of withdrawal as soon as possible, so that the chair can be informed.

Agendas

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

5.46 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

5.47 In cases of particular urgency or confidentiality, 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 prior approval of the Prime Minister, and should be notified to the Secretary of the Cabinet. For Cabinet committee meetings, the office of the Minister raising an oral item must inform the secretary of the committee so that the secretary is able to give the chair prior notice of the Minister's intention.

5.48 Oral items at Cabinet (preceded by a letter to the Prime Minister) 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.)

5.49 Detailed guidance about the requirements for oral items can be found in the *CabGuide.*

Minutes

5.50 The Cabinet Office produces and distributes minutes of decisions as soon as possible after each meeting, recording the decisions in a form that enables the necessary action to be taken. The minutes do not record the detail of discussions at the meeting.

5.51 Further information on the distribution of minutes can be found in the *CabGuide.*

Meetings

5.52 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.

5.53 Cabinet committees meet on a weekly or fortnightly basis, usually on Wednesdays and Thursdays. Ad hoc committees meet as required. The Cabinet Office provides information about Cabinet committee meeting times to Ministers' offices and the public service.

Chairs of meetings

5.54 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

5.55 Ministers in Cabinet must attend every meeting of Cabinet, unless the Prime Minister has granted prior written approval on the required form in the *Ministerial Office Handbook*.

5.56 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 enables the chair to be advised, and necessary adjustments to be made to the agenda.

5.57 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.

5.58 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 sent the relevant papers and may attend the meeting for the item(s) concerned.

5.59 Arrangements for the representation of coalition partners at Cabinet committees, and the attendance at committees of representatives of parties supporting the government, are determined by the Prime Minister in consultation with other coalition/support party leaders.

Quorum

5.60 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.

5.61 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

5.62 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.

5.63 Visiting dignitaries may occasionally be invited to meet with 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 (see www.dia.govt.nz).

Attendance of officials at Cabinet committee meetings

5.64 Relevant officials are required to be available to assist Ministers at Cabinet committee meetings. For detailed information about attendance at Cabinet committee meetings, see the *CabGuide*.

Financial matters and Cabinet

Government spending

5.65 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 Impress Supply Act pending passage of an Appropriation Act.

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

The Budget cycle

5.66 Wherever possible, government spending should be planned and agreed by Cabinet during the annual Budget cycle. The Budget cycle has several phases, starting late in 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 Cabinet Office or 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 levels 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 are set out in the chapter on financial procedures in the *Standing Orders of the House of Representatives* (the *Standing Orders*).

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

5.68 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.

5.69 The details of these arrangements are set out in the *CabGuide* and Cabinet Office circular CO (02) 17 *Guidelines for Changes to Baselines.*

The Crown's financial veto

5.70 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 7.123 – 7.125.

Regulatory impact analysis

5.71 All policy proposals submitted to Cabinet that result in government bills (or a government decision to support or adopt a non-government bill), or statutory regulations must be accompanied by a regulatory impact statement, unless an exemption applies. Full information about regulatory impact analysis, and the requirements and exemptions for a regulatory impact statement are set out in the *CabGuide*.

Constitutional issues and Cabinet

5.72 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

5.73 Any proposal to sign an international treaty or agreement or to take binding treaty action must be submitted, with the text of the treaty, to Cabinet for approval. Binding treaty actions include ratification, accession, acceptance, definitive signature, approval, withdrawal, or denunciation of an international treaty or agreement.

5.74 Where a treaty or agreement is to be presented to the House of Representatives before binding treaty action is taken, a national interest analysis must also be prepared and submitted to Cabinet. Details of the approval process relating to international treaties and agreements are set out in paragraphs 7.112 – 7.122, and in the *CabGuide*.

Cabinet and the Resource Management Act 1991

5.75 Cabinet has agreed processes for consultation and decision making to be followed for ministerial interventions under the Resource Management Act 1991. Cabinet must be consulted when a Minister is considering or proposing certain interventions under the Act. Guidance on the procedures to be followed is set out in Cabinet Office circular CO (06) 7 *Ministerial Interventions under the Resource Management Act 1991*.

Referral to Cabinet of decisions taken outside the Cabinet process

5.76 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;

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

Secretary of the Cabinet and the Cabinet Office

5.77 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 Prime Minister and Cabinet.

5.78 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.

5.79 The Secretary of the Cabinet usually also holds the office of Clerk of the Executive Council. (See paragraphs 1.30 – 1.34.) 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.

5.80 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 contained 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, including through the Cabinet Office *CabGuide* and Cabinet Office circulars;

(j) coordinating the policy and administrative aspects of the government's legislation programme;

(k) advising on Ministers' conduct, public duty, and conflicts of interests.

5.81 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 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 Prime Minister and Cabinet, the State Services Commissioner, and the Solicitor-General. The Prime Minister and the Governor-General are consulted about the appointment.

6

Elections, Transitions, and Government Formation

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.

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 when there are 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 1986. 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 1986. 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 sworn in as a single-party majority government. The election may result in a minority single-party government, or a majority coalition government, or a minority 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, the caretaker convention is likely to apply, under which decision making is constrained (see paragraphs 6.16 – 6.35), 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 20–30 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 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;

(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 6.16 – 6.35 for information about the caretaker convention.) Successive governments, however, have chosen to restrict their actions to some extent at this time, in recognition of the fact that an election, and

therefore potentially a change of government, is imminent. 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 perception that public funds are being used to finance publicity for party political purposes. (See the *Guidelines for Government Advertising* in appendix B for general guidance.) 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).

6.10 The Secretary of the Cabinet is available to provide advice on decision making during the pre-election period.

Transitions following an election

General

6.11 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 6.53 – 6.55.

6.12 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 6.36 – 6.48.

Outcome of elections

6.13 Under the former "first past the post" electoral system, an election almost always resulted in a clear majority for a single party. Government formation negotiations were therefore unnecessary. If the incumbent administration was confirmed in office, it simply resumed normal government business, with the Prime Minister appointing some new Ministers if required. If the election resulted in a change to a new single-party majority administration, the outgoing government continued in office until the incoming government was sworn in. The outgoing government undertook no new policy initiatives and acted on the advice of the incoming administration, governing under the second arm of the caretaker convention. (See paragraphs 6.24 – 6.25.)

6.14 Under a 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. The principles and procedures that operate during the government formation process are set out in paragraphs 6.36 – 6.48.

6.15 During the government formation process, the outgoing government continues to govern, but it does so as a caretaker government governing under the first arm of the caretaker convention. (See paragraphs 6.20 – 6.23.)

Caretaker convention

General

6.16 On occasion, it may be necessary for a government to remain in office for some period, on an interim basis, when it has lost the confidence of the House, or (after an election) until a government is sworn in 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.

6.17 There are two 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 sworn in. (See paragraph 6.19.)

(b) **If the government has clearly lost the confidence of the House**, the caretaker convention guides the government's actions until a new administration takes office, following either negotiations between the parties represented in the current Parliament or a general election.

6.18 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

6.19 There are two arms to the caretaker convention:

(a) where it is not clear who will form the next government (see paragraphs 6.20 – 6.23);

(b) where it is clear who will form the next government, but they have not yet taken office (see paragraphs 6.24 – 6.25).

The principles that apply in each situation are set out below.

Unclear outcome

6.20 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 6.21).

(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 signing a major contract or making a significant appointment);

- new policy initiatives;
- 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, by extending a board appointment or by 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 6.32.)

6.21 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 with other political parties about it.

6.22 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.

6.23 No hard and fast rules are possible. Ministers may need to take into account various considerations (including political considerations), both on whether it is appropriate or necessary to proceed on a matter and on 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

6.24 Where it is clear which party or parties will form the next government but Ministers have not yet been sworn in, 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.

6.25 Situations of this kind are likely to be relatively short-lived, as the Constitution Act 1986 enables a swift transition between administrations once the composition of the new government has been confirmed.

Decision-making process under the caretaker convention

Departments and other state sector agencies

Day-to-day administration

6.26 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

6.27 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.

6.28 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 appropriate, chief executives and statutory officers should observe the principles of the caretaker convention (see paragraphs 6.19 – 6.25) when making those decisions. The Secretary of the Cabinet is available for guidance.

Crown entities, state-owned enterprises, and other state sector agencies

6.29 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 6.19 – 6.25) to decision making during the caretaker period, as far as is 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 that have 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

6.30 As a general rule, Ministers should put before their 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 6.31 – 6.32.)

Coordination and the Prime Minister's role

6.31 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.

6.32 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 all matters that may require consultation and action during periods of caretaker government.

Guidance on decisions about expenditure and the Official Information Act 1982

6.33 During a caretaker period, particular attention should be paid to decisions about expenditure, and requests under the Official Information Act 1982.

6.34 In relation to decisions on expenditure, there must always be authority from Parliament to spend money before expenditure is incurred. (See paragraph 5.65.)

6.35 The Official Information Act 1982 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 with the incoming Minister. Any such extension must comply with section 15A of the Official Information Act 1982. For more information on the Official Information Act 1982, see paragraphs 8.13 – 8.51.

Government formation

General

6.36 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 6.37 – 6.42 apply in both post-election and mid-term government formation situations.

Principles and processes of government formation

6.37 The process of forming a government is political, and the decision to form a government must be arrived at by politicians.

6.38 Once the political parties have reached an adequate accommodation, and a government is able to be formed, 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.

6.39 By convention, the role of the Governor-General in the government formation process is to ascertain where the confidence of the House lies, based on 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).

6.40 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 which individual will lead the government as Prime Minister.

6.41 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 1.30 – 1.34 for further information about the role of the Clerk of the Executive Council.

6.42 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

6.43 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 sworn in, at which time the outgoing Prime Minister will advise the Governor-General to accept the resignations of the entire ministry.

6.44 Section 6(2)(b) of the Constitution Act 1986 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).

6.45 Ministerial Services provides practical assistance to outgoing Ministers in relation to staff, office, and other practical arrangements. The Cabinet Office and Archives New Zealand provide guidance on the storage and disposal of Ministers' official papers. (See paragraphs 8.86 – 8.99.) The Cabinet Office also seeks information from outgoing Ministers about gifts they have received while in office. (See paragraphs 2.78 – 2.85.)

Appointment of a new government

6.46 Since the introduction of New Zealand's proportional representation electoral system, it has been the practice for a full appointment ceremony to be held 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.

6.47 Section 6(2)(a) of the Constitution Act 1986 enables 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, so long as that Minister is 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 sworn in until their election as members of Parliament has been confirmed.

6.48 Further information on the appointment of Executive Councillors and Ministers is set out in paragraphs 1.23 – 1.24, and paragraphs 2.15 – 2.17.

Mid-term transitions

General

6.49 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 6.50 – 6.55 sets out the established constitutional principles and processes that apply in these situations.

Mid-term change of Prime Minister with no change of government

6.50 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.

6.51 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.

6.52 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

6.53 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.

6.54 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 6.36 – 6.42); or

(b) an election may be called (see paragraphs 6.56 – 6.58).

Until a new administration is appointed, the incumbent government continues in office, governing in accordance with the caretaker convention. (See paragraphs 6.16 – 6.35.)

6.55 In some cases, the confidence of the House may be unclear, for example, in the case of a change in coalition arrangements. The incumbent government will need to clarify where the confidence of the House lies, within a short time frame (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.

Early election

6.56 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 that advice will be timed in accordance with the electoral cycle.

6.57 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.

6.58 A Prime Minister whose government does not have the confidence of the House would be bound by the caretaker convention. (See paragraphs 6.16 – 6.18.) The Governor-General would expect a caretaker Prime Minister to consult other parties on a decision to advise the calling of an early election, as the decision is a significant one. (See paragraph 6.20.) 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 1.15 on the reserve powers.)

Provision of information by the state sector during transitions

6.59 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.

6.60 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.

6.61 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 (caretaker) 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, www.ssc.govt.nz.)

(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, with the knowledge of the incumbent

Minister, the State Services Commissioner, and, where appropriate, the Prime Minister may, in some circumstances, brief new Ministers on their portfolio responsibilities.

(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 3.10 – 3.15 and the State Services Commission website, www.ssc.govt.nz.

6.62 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 8.75 – 8.85.)

7
The Executive, Legislation, and the House

Related information

- The *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* can be found on the Legislation Advisory Committee website, www.justice.govt.nz/lac.
- The *Guide to Working with the Parliamentary Counsel Office* can be found on the Parliamentary Counsel Office website, www.pco.parliament.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*, www.cabguide.cabinetoffice.govt.nz.
- The *Standing Orders of the House of Representatives* and *Speakers' Rulings* can be found on the Parliament website, www.parliament.govt.nz.
- David McGee, *Parliamentary Practice in New Zealand,* Office of the Clerk of the House of Representatives, 3rd edition, 2005.
- The *Legislation and House Procedure Handbook*, designed primarily for staff in Ministers' offices, is available from Ministerial Services.
- 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.

Introduction

7.1 This chapter provides an overview of the main principles and procedures concerning the development of government legislation (Acts of Parliament and statutory 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 relation to 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 select committees;

(j) the examination of international treaties by the House of Representatives;

(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.

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 makes 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 made in years when Parliament does not begin with either:

(a) a State Opening (and therefore a Speech from the Throne); or

(b) the completion of the Address in Reply debate on a Speech from the Throne given late in the previous year.

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 comprises groups of existing or proposed government bills in descending priority order, headed by bills that must be passed each year by law (for example, Appropriation and Imprest Supply Bills). The legislation programme covers primary legislation only. It does not allocate priorities for the drafting of secondary legislation (for example, regulations) or tertiary legislation (for example, codes).

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 response. 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 developed from this 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 required. Bills that fall behind the agreed timetable may be assigned a lower priority or be set aside when the Committee 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 all draft legislation for which they are responsible, including bills before select committees. To do this, Ministers should regularly obtain briefings from their departments 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.

Law Commission work programme

7.16 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. Cabinet is asked to agree to government references on the Law Commission's work programme on an annual basis. This process is initiated each year by the Minister responsible for the Law Commission, who writes to all Ministers inviting suitable proposals with the aim of finalising the work programme by the end of June.

7.17 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, www.lawcom.govt.nz.

7.18 The Law Commission and relevant government agencies should collaborate closely during the course of a Law Commission project. The processes for the government to respond to Law Commission reports are set out in the *CabGuide*. In some circumstances, the government's response may need to be presented to the House.

Development and approval of bills

From policy to enactment

7.19 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 regulatory impact analysis (see paragraphs 7.32, 5.71, and the *CabGuide*);

(c) consultation (see paragraphs 7.24 – 7.45);

(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 7.48 – 7.49);

(g) drafting (see paragraphs 7.46 – 7.47);

(h) approval by the Cabinet Legislation Committee and Cabinet of the draft bill for introduction (see paragraphs 7.50 – 7.52);

(i) reference to government caucus(es) (see paragraphs 7.53 – 7.56) and non-government parliamentary parties, as appropriate (see paragraphs 7.57 – 7.59);

(j) introduction, first reading, and referral to select committee;

(k) consideration and report by select committee;

(l) remaining parliamentary stages.

Process for developing bills

Assessing the need for legislation

7.20 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. Legislative and non-legislative options for achieving a policy objective are discussed in the *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (the *LAC Guidelines*). The portfolio Minister may wish to consider at an early stage whether the proposal is suitable for inclusion in the annual Law Commission work programme. (See also paragraphs 7.16 – 7.18.)

7.21 Where legislation is required 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.)

7.22 Once the proposed bill is approved as part of the legislation programme, the relevant department should fully develop 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.

7.23 All policy proposals submitted to Cabinet that result in government bills (or a government decision to support or adopt a non-government bill) or regulations must be accompanied by a regulatory impact statement. A regulatory impact statement must be published as part of the explanatory note to a government bill introduced into the House. Detailed requirements for regulatory impact statements and relevant exemptions are set out in the *CabGuide*.

Consultation

Effective and appropriate consultation

7.24 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 7.25 – 7.42 should be considered.

Ministerial colleagues

7.25 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 that other Minister.

Caucus(es)

7.26 Ministers may consider a policy issue to be suitable for consultation with a caucus committee or caucus(es) during the policy development process. Caucus(es) are also consulted on draft bills before introduction. (See paragraphs 7.53 – 7.56.)

Political consultation

7.27 At all points 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 7.57 – 7.59.) This consultation may cover both the substance of the bill and the proposed process for its parliamentary consideration.

7.28 Coalitions and minority governments are likely to establish detailed procedures for political consultation, which will generally be promulgated by a Cabinet Office circular (see www.dpmc.govt.nz/cabinet).

7.29 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 3.69, and the guidance issued by the State Services Commission entitled *Public Servants, Political Parties and Elections*, available on the State Services Commission website, www.ssc.govt.nz.)

Inter-agency consultation

7.30 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 government 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

7.31 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 7.62.) 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.

Regulatory Impact Analysis Unit

7.32 If a proposal is likely to have a significant impact on economic growth, the regulatory impact statement must be reviewed by the Regulatory Impact Analysis Unit in the Ministry of Economic Development. The *CabGuide* includes further information about the requirements for regulatory impact analysis and regulatory impact statements.

Portfolios and the administration of legislation

7.33 The Cabinet Office should be consulted if the proposed legislation:

(a) establishes a new portfolio or changes existing portfolios;

(b) contains a definition of “Minister” or “department”;

(c) requires 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 described in paragraph 2.32.

Legislation Design Committee

7.34 The Legislation Design Committee is a ministerial committee that receives research and advisory support from the Law Commission. The committee provides high-level, pre-introduction advice on the framework and design of legislation, with the goal of ensuring that policy objectives are achieved and the quality of legislation is improved.

7.35 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 in terms of their scope, involve complicated legislative design issues, require an innovative approach, or are likely to raise issues about the overall coherence of the statute book.

7.36 The committee may also approach departments to offer its assistance on relevant projects. The committee advises on the appropriateness of the legislative vehicle from a legal and constitutional perspective, and on any implementation issues.

Legislation Advisory Committee

7.37 This independent committee, established by the Minister of Justice, produces guidance on issues that are fundamental to the development of legislation, such as proper processes and basic legal principles, and scrutinises bills when requested to do so.

7.38 The committee’s views do not necessarily reflect those of the government of the day. Government departments developing new legislation should consider at an early stage whether there are issues they should discuss with the Legislation Advisory Committee. Where a draft bill appears to have public law implications, the portfolio Minister or the Cabinet Legislation Committee should consider referring it to the Legislation Advisory Committee for comment, if possible before introduction. The Legislation Advisory Committee may also make submissions to select committees on particular bills.

Offices of Parliament

7.39 Offices 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 legislation would establish a new officer of Parliament, the Officers of Parliament Committee (a select committee chaired by the Speaker) should be consulted by the Minister responsible for the bill at an early stage before the legislation is developed.

Organisations outside the state services

7.40 Ministers may wish to consult other organisations such as Māori groups, professional or trade associations, non-government organisations, 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.

7.41 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) or the guide for consultation with Māori (Ministry of Justice).

7.42 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 consider the confidentiality constraints referred to in paragraph 7.44.

Consultation time frames and processes

7.43 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 time frames for that consultation must be built into the legislation timetable. Several rounds of consultation may be needed on complex or significant legislation.

7.44 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 or Cabinet-approved consultation procedures. Any such release or disclosure must first have the approval of the Minister concerned. 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 caucus(es), and Parliament must always retain the freedom to amend, delay, or reject a bill.

7.45 Detailed information on consultation requirements and processes is contained in the *CabGuide*.

Drafting legislation

Role of the drafter

7.46 The key role of the drafter is to produce plain English drafts that are legally correct and give effect to government policy. In drafting legislation, drafters act on instructions from instructing departments. (See paragraphs 7.48 – 7.49 and the *Guide to Working with the Parliamentary Counsel Office.*)

7.47 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 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 is 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

7.48 Drafting instructions provide the basis on which bills are drafted. 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, fully and correctly reflect government policy.

7.49 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.

Consideration by Cabinet Legislation Committee and Cabinet

7.50 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 the relevant requirements (as set out in the *Cabinet Manual*, the *CabGuide*, and any applicable circulars) have been satisfied. 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 properly taken 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 as part of 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.

7.51 If at any stage of the drafting process 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 7.24 – 7.42 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 7.67 – 7.72 for information on policy changes to a bill after introduction.

7.52 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)

7.53 A party caucus comprises all the members of Parliament belonging to a particular 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 occur under coalition governments.

7.54 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 government, any Minister who is representing a coalition partner's

interests on the bill are expected to ensure that the matter is placed on their respective caucus agenda(s). Each Minister should be present to explain the bill.

7.55 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.

7.56 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 paragraphs 3.67 – 3.68.

Consultation with non-government parliamentary parties

7.57 Consultation with non-government parliamentary parties and any independent members of Parliament, before bills are introduced, may be undertaken to:

(a) confirm the support of a majority of the House for a bill to progress;

(b) facilitate aspects of the parliamentary process.

7.58 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.

7.59 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.

Compliance with legal principles and obligations

7.60 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;

(e) the guidance contained in the *LAC Guidelines*.

7.61 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 identified in paragraph 7.60. 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.)

7.62 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 1990. Such issues should be identified 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 1990 and advising the Attorney-General. The Crown Law Office examines bills developed by the Ministry of Justice.

Omnibus bills

7.63 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*.) The two types relevant to most Ministers and departments are:

(a) law reform or omnibus bills that deal with an interrelated topic that can be regarded as implementing a single broad policy (for example, a Taxation Reform Bill), or that propose to make amendments of a similar nature to a number of Acts. Such bills require the agreement of the Business Committee to their introduction as law reform or omnibus bills;

(b) Statutes Amendment Bills.

7.64 Statutes Amendment Bills are designed as vehicles for technical, short, and non-controversial amendments to a range of 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.

7.65 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 that any clause in the bill will be struck out if any member objects to it in the committee of the whole House.

7.66 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

7.67 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, recommended as part of 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 7.99 – 7.102.)

7.68 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 as part of 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.

7.69 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 of the House of Representatives.

7.70 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 7.50 – 7.52.)

7.71 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.

7.72 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 "break up" a bill after its committee stage) or promotes minor technical improvements need not go through these procedures.

Non-government legislative proposals

7.73 Ministers should keep themselves informed about:

(a) the introduction of, and progress on, bills not promoted by the government (local bills, private bills, and members' bills) that may affect their portfolios;

(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.

7.74 Non-government proposals may have fiscal implications. Information on the Crown's financial veto is set out in paragraphs 7.123 – 7.125.

7.75 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 of the House of Representatives identifies whether the rights and prerogatives of the Crown are affected by a bill and 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 this has not already taken place at an earlier stage.

7.76 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

7.77 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 contained 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.

7.78 The general term "regulations" includes, in addition to regulations themselves, 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 "deemed" by statute to be regulations in order to subject them to scrutiny or publication requirements.

Scrutiny of regulations

7.79 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 are 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.

7.80 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 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.

7.81 A process also exists under the Regulations (Disallowance) Act 1989 and the *Standing Orders* to move a motion for the disallowance of a regulation in the House. The Regulations Review Committee also investigates complaints on the operation of regulations under the *Standing Orders*.

Planning for the development of regulations

7.82 The Regulations Review Committee has recommended that departments systematically monitor and review all regulations for which they are responsible. All departments are encouraged to prepare a schedule of 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;

(c) amendments required to existing regulations as a result of a review or increases in fees.

7.83 There is no formal programme for the drafting of regulations. It is good practice, however, for departments to give the Parliamentary Counsel Office information on any significant proposed regulations early in each year when Cabinet decisions are made on the legislation programme.

Process for developing regulations to be made by Order in Council

7.84 The information on regulations in the *CabGuide* sets out detailed guidance on the process for developing regulations to be made by Order in Council. The *LAC Guidelines* contain 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.

7.85 The guidance provided in paragraphs 7.19 – 7.62 concerning the development of primary legislation applies equally to the development of regulations.

7.86 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 required by legislation or if otherwise appropriate;

(d) submitting the policy (if any) to a Cabinet committee and Cabinet for approval (if the regulations are entirely 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 7.91 – 7.94 for further details on the 28-day rule);

(i) publication in the statutory regulations series.

7.87 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.

7.88 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.

7.89 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.

7.90 A small number of Orders in Council are drafted within departments and submitted directly to the Executive Council. (See paragraph 1.38.) The principles set out in paragraphs 7.84 – 7.89 in relation to regulations drafted by the Parliamentary Counsel Office apply to those orders. Technical requirements for such Orders in Council are included in the information on the Executive Council in the *CabGuide.*

The 28-day rule

7.91 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.

7.92 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 defeat of the purpose of the regulations;

(e) where irregularities need to be validated.

See the *CabGuide* for further details on the 28-day rule.

7.93 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.

7.94 The parliamentary counsel drafting the regulations will note 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

7.95 All regulations must be printed, published, and notified in the *New Zealand Gazette*, as soon as they have been made. Publication in the statutory regulations 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 the law change.

7.96 The *Guide to Working with the Parliamentary Counsel Office* contains information on certifying, gazetting, and publishing regulations. (See also paragraphs 1.47 –1.49.)

Ministers and select committees

General

7.97 The *Standing Orders* provide for select committees to be appointed to consider legislation and other business (see the chapter entitled “Select committees”). Select committees play an important role in terms of 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 main subject select committees, but Ministers outside Cabinet may be appointed as members.

7.98 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) carry out inquiries;

(c) examine certain international treaties (see paragraphs 7.112 – 7.122);

(d) examine the *Estimates*;

(e) conduct the annual financial reviews of departments, Crown entities, state-owned enterprises, and other public organisations.

Consideration of bills

7.99 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 that are relevant to the subject matter and consistent with the principles and objects of the bill as introduced.

7.100 In general, a select committee must report on a bill to the House within six months. 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 3.63 – 3.65.

7.101 The *Standing Orders* enable 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.

7.102 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 identify any intervention or other action necessary to advance the legislation.

Submissions on bills by departments

7.103 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.

7.104 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 8.66 – 8.68 and *Officials and Select Committees – Guidelines* on the State Services Commission website, www.ssc.govt.nz.) The Minister may need to consult with 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 agreed to by the Cabinet Legislation Committee.

7.105 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.

7.106 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.

7.107 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 7.73 – 7.76.

Government responses to reports of select committees

7.108 If a report from a select committee to the House on an inquiry or petition includes recommendations to the government, a government response to those recommendations must be presented to the House within 90 days of the committee's report. (See the section entitled "Reports" in the chapter on select committees in the *Standing Orders*.)

7.109 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.

7.110 The Minister's report and the proposed government response are considered by the relevant Cabinet committee and Cabinet.

7.111 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 is contained in the *CabGuide*.

Examination of international treaties by the House

General

7.112 In New Zealand, the power to take treaty action rests with the Executive. Any proposal to take action in relation to an international treaty that will indicate New Zealand's intention to be bound or that will bind New Zealand must be submitted to Cabinet for approval. An intention to be bound is usually indicated by signature, to be followed by the subsequent binding step of ratification. Actions that bind New Zealand (that is, that formally change New Zealand's international obligations) are steps such as definitive signature (where there is no subsequent step of ratification), ratification, accession, and approval. The requirement to seek Cabinet approval also applies to proposals to sign or become bound by an amendment to a treaty, to withdraw from a treaty, or to change a reservation to a treaty.

7.113 Within this context, certain treaty actions (essentially those related to multilateral treaties and major bilateral treaties of particular significance) must also, after Cabinet's approval, be presented to the House for examination, before the Executive takes binding treaty action. The Minister of Foreign Affairs determines whether a bilateral treaty is a major bilateral treaty of particular significance.

7.114 The process of examination of international treaties by the House takes time – departments working on international treaty actions must factor that into their planning. Commitments cannot be entered into in advance of examination by the House. Only in very rare situations may the government take urgent treaty action in the national interest before the treaty is presented to the House. Where this occurs, the treaty must be presented as soon as possible after the binding action has been taken, together with a national interest analysis (see paragraphs 7.116 – 7.117) and an explanation from the government as to why it was considered necessary to take urgent action.

7.115 The Ministry of Foreign Affairs and Trade is able to provide advice on all matters relating to international treaties and instruments of less than treaty status, such as non-

binding arrangements with other governments. In particular, departments should consult the legal division of the Ministry at an early stage if they are considering entering into any negotiations that may result in action being taken on any international treaty or arrangement. The Ministry provides general guidance on international law issues and the process of presenting treaties to the House. It provides specific guidance on the required format and content of a national interest analysis. More information on the presentation of treaties to the House is contained in the *CabGuide*.

National interest analysis

7.116 Presenting a treaty to the House requires the preparation of a national interest analysis. The national interest analysis addresses:

(a) the reasons for New Zealand taking the binding treaty action;

(b) the implications for New Zealand of taking the binding treaty action; and

(c) the means of implementing the treaty action domestically.

7.117 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 developing the national interest analysis according to the requirements of the *Standing Orders*. Drafting guidance is available from the Ministry of Foreign Affairs. The national interest analysis must be approved by Cabinet before it is presented to the House.

Select committee consideration

7.118 Once a treaty has been presented to the House, the treaty is referred to the Foreign Affairs, Defence and Trade Committee. This select committee may examine the treaty, or may refer the treaty to another more appropriate select committee.

7.119 The government refrains from taking any binding treaty action on 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 taking binding treaty action.

7.120 The select committee may seek public submissions. In addition, the House itself may sometimes wish to give further consideration to the proposed treaty action; for example, by a debate in the House.

7.121 If the select committee report contains recommendations to the government, a government response to those recommendations must be presented within 90 days of the report. (See paragraphs 7.108 – 7.111, and the section entitled "Reports" in the chapter on select committees in the *Standing Orders*.)

Related legislation

7.122 Legislation necessary to bring domestic law into compliance with a treaty 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, however, initiate the legislative process before that time by seeking a place on the legislation programme for the bill and issuing drafting instructions to parliamentary counsel (on a conditional basis).

Crown's financial veto

7.123 All members of Parliament are able to 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 the composition of a Vote 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*.

7.124 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 identifying initiatives that 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/Treasury as soon as possible to any such initiatives;

(c) provide prompt advice on the fiscal implications of such initiatives.

7.125 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 issued by Cabinet Office circular CO (07) 2 *The Financial Veto and 24 Hour Rule.*

Citizens-initiated referenda

7.126 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, based on 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.

7.127 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.

7.128 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) rejection of the proposal; or

(d) the provision of information to assist 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.

7.129 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. Comment on the substantive merits of the proposal is not appropriate.

7.130 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.

8
Official Information

Related information

- 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.ombudsmen.govt.nz. The office is also available to advise on the application of the Act.
  - Information about interdepartmental consultation processes is contained in *Release of Official Information: Guidelines for Coordination,* available on the State Services Commission website, www.ssc.govt.nz.
  - Information about charging for official information is available on the Ministry of Justice website, www.justice.govt.nz.
- Guidance on the application of the Privacy Act 1993:
  - Agency privacy officers provide guidance on the application of the Privacy Act 1993.
  - 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 entitled *Private Word,* which are available on its website, www.privacy.org.nz.
  - Chapter 15 of the Legislation Advisory Committee Guidelines (entitled *Privacy and the Fair Handling of Personal Information*) can be found on the Ministry of Justice website, www.justice.govt.nz/lac.
- Information about the Ombudsmen Act 1975 is available from the Office of the Ombudsmen's website, www.ombudsmen.govt.nz.
- Information about the Public Records Act 2005 is available from the Archives New Zealand website, www.archives.govt.nz.
- The Secretary of the Cabinet and Archives New Zealand can provide further guidance on the disposal and storage of, and access to, the documents of Ministers and former Ministers.
- *Security in the Government Sector* is a manual issued by the Interdepartmental Committee on Security, on www.security.govt.nz.

Introduction

8.1 This chapter provides information about the protection, availability, and disclosure of official information, including information about individual people (often referred to as "personal information"). The chapter covers:

(a) the importance of protecting official information (subject to authorised disclosure);

(b) the security classification of official documents and the unauthorised disclosure of official information;

(c) the key aspects of the Official Information Act 1982, the Privacy Act 1993, the Public Records Act 2005, and the Ombudsmen Act 1975, particularly as those Acts relate to Ministers and Cabinet;

(d) the provision of information to select committees and the production or discovery of official documents in legal proceedings;

(e) the preservation and archiving of ministerial records;

(f) 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

Protection and classification of official information

8.2 The government holds a large quantity of information of all kinds. The law governing the collection, storage, release, and use of official information is mainly set out in the Public Records Act 2005, the Official Information Act 1982, and the Privacy Act 1993. All government information should be treated with care and protected from unauthorised release.

8.3 Government documents may be given a security classification. Classified documents must be handled according to the manual *Security in the Government Sector* (see www.security.govt.nz). Guidance on the application of security classifications to Cabinet material is set out in Cabinet Office circular CO (08) 1 *Security Classification System: Application to Cabinet Documents* and in the *CabGuide*. (See paragraph 8.34 for information on the release of classified information under the Official Information Act 1982.)

Proactive release of Cabinet material

8.4 Cabinet material (Cabinet and Cabinet committee papers and minutes) may be released proactively, most often through publication online. The proactive release of Cabinet material may result from a Minister directing its release, or from the relevant department seeking the Minister's approval to release it. The key principles for proactive release of Cabinet material follow.

(a) Only Ministers may approve the proactive release of Cabinet material (they may wish to first discuss the proposed release with Cabinet colleagues).

(b) The person administering the release of the material should:

- assess the information in light of the principles in the Official Information Act 1982, the Privacy Act 1993, and the *Security in the Government Sector* manual; and

- consider deleting any information that would have been withheld if the information had been requested under the Official Information Act 1982.

(c) Where appropriate, papers and relevant minutes should be published together so that readers have the background to the decisions made by Cabinet.

(d) The material released should preferably show that it has been approved for release.

(e) If the material is to be published online, the current *New Zealand Government Web Standards and Recommendations* should be followed (see www.e.govt.nz/standards).

8.5 More detailed guidance on the process for publishing Cabinet material online is set out in the *CabGuide*.

Improper release or use of official information

Unauthorised release of official information

8.6 If official information is released without authority, a range of responses may be considered, depending on the circumstances. These 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 ministerial inquiry (see paragraphs 4.91 – 4.92);

(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.

8.7 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 or retaining official information.

Exploitation of official information for private gain

8.8 The use by an official of official knowledge 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.

8.9 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. In appropriate cases, Ministers and departments should ensure that the agreement with a contractor or consultant includes a confidentiality clause.

Commercially sensitive information

8.10 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 others. Chapter 2 contains guidance for Ministers on identifying and managing conflicts of interest, including those arising from access to information. The State Services Commission provides guidance on the management of officials' conflicts of interest.

8.11 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 Securities Market Act 1998 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 appropriately handled;

(b) consider how and when to release information in a way that minimises potential impacts on markets;

(c) take care when making statements that could inadvertently and inappropriately influence third parties;

(d) avoid misleading the market.

8.12 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 and 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 (08) 5 *Guidance for Dealing with Information Relating to Public Issuers and Securities Markets*.

Official Information Act 1982

Purpose of the Act

8.13 The Official Information Act 1982 balances the public's right of access to official information against the government's need to withhold information where there is good reason to do so. 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.

8.14 The purposes of making information available, as set out in section 4 of the Act, include the promotion of good government and enhancement of respect for the law by enabling more effective public participation in the making and administration of laws and policies, and increasing the accountability of Ministers and officials.

Key provisions

8.15 The key provisions of the Official Information Act are:

(a) purposes and philosophy of the Act: sections 4 and 5;

(b) reasons for withholding information: sections 6, 7, 9, 10, 18, and 52;

(c) procedure for dealing with requests for official information: sections 12 – 19;

(d) duty to give access to internal rules affecting decisions: section 22;

(e) duty to give reasons for decisions affecting a person in their personal capacity: section 23;

(f) review by the Ombudsmen of certain decisions: sections 28 – 36.

What is official information?

8.16 "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 in his or her official capacity.

8.17 Information held by a Minister in his or her capacity as a member of a political party or as a member of Parliament, for example caucus material, is not official information for the purposes of the Act.

8.18 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.

8.19 The Attorney-General, when performing law officer functions, is not subject to the Official Information Act 1982. Information held by the Attorney-General in that capacity is not, therefore, official information in terms of the Act.

8.20 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, that information is also deemed to be official information held by the relevant Minister or department.

8.21 The definition of information is not confined to information on paper. Official information can include sound recordings, film, computer records, emails, and knowledge carried in someone's head. 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 information accessible to others. There is no obligation to "create" official information on something for which no information is held.

8.22 Access by individuals to information about themselves is governed by the Privacy Act 1993. (See paragraphs 8.52 – 8.56.) 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 1982. In addition, the Official Information Act 1982 governs the right of requesters to be given reasons for decisions or recommendations that have affected them in their personal capacity, whether or not the requester is an individual or a corporate entity.

Complying with the Official Information Act 1982

8.23 Requests under the Official Information Act 1982 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.

8.24 Departmental chief executives, and the boards and chief executives of agencies in the wider state sector (where those agencies 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 relevant staff.

8.25 In particular, Ministers and officials are reminded of the Act's requirements to offer reasonable assistance to those requesting information under the Act (section 13) and to respond to requests as soon as practicable (and in any case not later than 20 working days after receipt of the request – section 15(1)).

8.26 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 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 1982, 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 1975.

8.27 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. Undue delay may be deemed to be a refusal if the delay is investigated or reviewed.

8.28 The Act also provides requirements for the contents of the notice to the requester advising of a refusal (section 19), where the information is not provided in the way preferred by the requester (section 16), and where information has been deleted or altered (section 17).

Informal advice on particular issues

8.29 Ministers and departments may approach the Office of the Ombudsmen 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 Ombudsmen the chance to talk through the issues and relative strengths of the likely arguments if a review were to be sought.

Requests for Cabinet material under the Official Information Act 1982

8.30 There is no blanket exemption for any class of papers under the Official Information Act 1982. 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 8.34 for guidance on requests for documents with security classifications.

8.31 Departments or Ministers who receive requests for the release of Cabinet material of a current government must take the decision on release themselves, after consulting with other affected Ministers, departments, and agencies. (See paragraphs 8.36 – 8.42.) 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 8.83 – 8.84.) The Cabinet Office is available, however, for general guidance if departments have queries about the process for releasing Cabinet material.

8.32 As with Cabinet material that is released proactively (see paragraph 8.4), it is good practice to indicate on Cabinet material released under the Official Information Act 1982 that it has been approved for release.

8.33 Ministers and departments are responsible for keeping a record of the Cabinet documents that they have made publicly available.

Security classifications and endorsements and the Official Information Act 1982

8.34 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 1982, 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 1982. It is good practice therefore to consult with the author of the document before releasing it. This "flag" may become less relevant with the passage of time.

8.35 See paragraphs 4.65 – 4.68 for guidance on the release of legal advice, which is often endorsed "legally privileged".

Consultation on Official Information Act requests

Undertaking consultation

8.36 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 they receive. See paragraph 8.27 for information on extending time limits, if necessary, to undertake consultation (section 15A of the Act).

Consultation by Ministers

8.37 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.

8.38 Special consultation arrangements apply to the release of Cabinet records that date from a previous opposition administration. (See paragraph 8.84.)

Consultation by departments

8.39 The State Services Commission has issued guidelines on the need for coordination and consultation between government departments about requests for official information. The document *Release of Official Information: Guidelines for Coordination* is available on the State Services Commission website, www.ssc.govt.nz. This document states that 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 that other department.

8.40 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 8.84.

8.41 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 this material relates to his or her activities as a Minister. A department should advise its Minister if it intends to release any information that is particularly sensitive or potentially controversial. The decision on how to respond to the request must nonetheless be made by the department, in accordance with the Official Information Act 1982.

8.42 On being consulted, the Minister may take the view that information, which 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 Official Information Act 1982 can be satisfied. Each case of this kind needs to be carefully handled at a senior level within the department, with reference to the Minister if necessary.

Coordinating Official Information Act requests

8.43 Sometimes requests are directed at or affect several Ministers or departments. In these cases, a coordinated response should be aimed for by transferring – where possible – all the requests to the department or Minister that would be expected to coordinate policy development on the issue in question. 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. (See also the State Services Commission guidance entitled *Release of Official Information: Guidelines for Coordination*, www.ssc.govt.nz.)

Charging for official information

8.44 The Ministry of Justice has issued guidelines on what the government regards as reasonable charges for the purposes of the Official Information Act 1982. 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, www.justice.govt.nz.

Review of decisions to withhold official information

Conduct of the review

8.45 A person who has requested 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 V of the Official Information Act 1982.

8.46 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 outline the real concerns about the request.

8.47 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 securely store and maintain the secrecy of all information provided to them. Once an Ombudsman has made a finding, the material will be returned to the Minister, department, or organisation concerned to take the appropriate action.

Ombudsman's recommendation

8.48 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.

8.49 Before making a recommendation, it is the Ombudsman's practice to first provide the Minister or department with a provisional opinion for comment before reaching a final opinion and to arrange for any other affected party to be consulted. The Ombudsman will also offer to discuss personally a case where his or her opinion differs from that of the holder of the information.

8.50 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 release of the information, but would recommend that the department or Minister concerned give further consideration to making the information available.

8.51 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 1982.) 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; and

(d) may be subject to review by the High Court and the appeal courts.

To date, no Order in Council of this nature has been made.

Privacy Act 1993

Purpose of the Act

8.52 The purpose of the Privacy Act 1993 is to promote and protect individual privacy – in particular to establish principles on:

(a) collection, use, and disclosure of information relating to individuals;

(b) access by individuals to information held about them.

The Act covers both the public and private sectors.

Compliance

8.53 Ministers and departments must be careful to ensure that they comply with the law when they collect, use, and disclose information concerning individuals. A breach of the Act may result in legal action, including, in some cases, an award of damages.

8.54 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 1993. The Office of the Privacy Commissioner is available for training, advice, and guidance in relation to the operation of the Privacy Act 1993.

Key provisions

8.55 The Privacy Act 1993 covers "personal information", which is defined in section 2 of the Act as "information about an identifiable individual."

8.56 The key provisions of the Privacy Act 1993 are:

(a) the 12 information privacy principles (dealing with the collection, holding, use, and disclosure of personal information, and the assigning of unique identifiers): section 6;

(b) an individual's right to access their personal information held by an agency: section 6, principle 6;

(c) reasons for refusing access: Part IV;

(d) codes of practice and exemptions from information privacy principles: Part VI;

(e) public register privacy principles: Part VII;

(f) complaints to the Privacy Commissioner: sections 67 – 68;

(g) investigations by and proceedings of the Privacy Commissioner: sections 69 – 80;

(h) information matching guidelines: Part X.

Ministerial access to and use of personal information

8.57 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,

1 Governor-General and Executive Council
2 Ministers of the Crown: Appointment and Role
3 Ministers of the Crown and the State Sector
4 Ministers and the Law
5 Cabinet Decision Making
6 Elections, Transitions, and Government Formation
7 The Executive, Legislation, and the House
8 Official Information

Ministers and departments must handle personal information in accordance with the information privacy principles, as set out in section 6 of the Privacy Act 1993.

8.58 If a Minister requests personal information about an individual from his or her own department in order to deal with a portfolio issue, the department should in general provide that 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, as set out in section 6 of the Privacy Act 1993, should be carefully considered in relation to any such request.

8.59 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 3.18.)

8.60 The disclosure of information about an individual by Ministers is governed by both the Official Information Act 1982 and the Privacy Act 1993.

(a) If the person to whom the information relates requests the information, the request must be considered in accordance with the Privacy Act 1993. Principle 6, in section 6 of the Act, gives individuals a legal right to access such personal information. Sections 27 to 32 of the Act set 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 1982. 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 consider the principles of the Privacy Act 1993 when balancing competing interests under section 9.

(c) A release by a Minister of information about an individual, in the absence of a request for it, is governed by Principle 11 of the Privacy Act 1993. 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.

8.61 Further guidance can be found on the Privacy Commissioner's website, www.privacy.org.nz.

Ombudsmen Act 1975

8.62 Under this legislation (which covers the activities of local government as well as central government), Ombudsmen can investigate any matter of administration within a department or organisation. They cannot investigate the decisions of Ministers, but can look into the departmental advice on which Ministers base decisions.

8.63 When investigating the actions of a department, an Ombudsman may consult with a Minister concerned with the matter, or with 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.

8.64 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.

8.65 Section 20 of the Ombudsmen Act 1975 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, involving the disclosure of the deliberations or proceedings of Cabinet or Cabinet committees.

Providing information to select committees

8.66 Select committees have the right to request information from Ministers or departments under the *Standing Orders of the House of Representatives* (the *Standing Orders*). (See the section entitled “Powers of Committees” in the chapter on select committees.) Strictly speaking, a refusal to produce documents requested by a select committee may constitute contempt. Occasions may arise, however, when information requested by a select committee is classified, or there may be good reason to protect it from public release.

8.67 Although the Official Information Act 1982 does not bind or constrain the House and its select committees, officials may usefully apply the criteria in the Act when considering whether good grounds exist for withholding information. If such good grounds exist, the select committee should be made aware of the position in a constructive and timely way. On learning of the reason why the 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.

8.68 Further guidance on this issue is provided by the State Services Commission in *Officials and Select Committees – Guidelines*. (See www.ssc.govt.nz.)

Production or discovery of official documents in legal proceedings

8.69 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.

8.70 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 only be assessed 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.

8.71 In line with the philosophy of the Official Information Act 1982, 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.

8.72 Where Cabinet documents dating from a previous administration are required for discovery or production in legal proceedings, the Opposition will need to be advised, according to the procedure set out in paragraph 8.84.

Cabinet and ministerial records – overview

8.73 The following paragraphs provide guidance on:

(a) access by current and former Ministers to the Cabinet records of the government (sometimes referred to as the convention on access to official documents of a previous administration) (see paragraphs 8.75 – 8.85);

(b) storage and disposal of the records created or received by Ministers in their capacity as Ministers of the Crown, and ongoing access to these ministerial records by Ministers after they leave office (see paragraphs 8.86 – 8.99);

(c) depositing of ministerial records with Archives New Zealand or other approved repositories, setting of conditions for public access to those records, and assessment of access requests (see paragraphs 8.100 – 8.111);

(d) disclosure and use of official information by former Ministers (see paragraphs 8.112 – 8.115).

8.74 Key points for Ministers follow.

(a) Ministerial records are not Ministers’ own property. By convention, however, former Ministers are permitted to retain them during their lifetime, after which the records should be returned to Archives New Zealand.

(b) Many Ministers deposit their ministerial records with Archives New Zealand or other approved repositories. Depositing records in this way:

- ensures secure storage;
- provides for the monitoring of agreed access arrangements;
- makes the records available for research (on conditions agreed with the Minister);
- allows the Minister ongoing access to the records.

(c) Ministerial records form an important part of New Zealand’s historical record. Archives New Zealand has an interest in those documents being securely and carefully archived.

(d) Former Ministers are allowed ongoing access to all Cabinet records to which they had access when they were Ministers. They therefore do not need to retain their personal copies.

(e) If Ministers do not wish to deposit or retain their ministerial records, they should arrange for secure destruction of the records.

Convention on access to Cabinet records of a previous administration

General

8.75 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.

8.76 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.

8.77 There are two elements to the convention:

(a) for incumbent Ministers (see paragraphs 8.78 – 8.79);

(b) for former Ministers (see paragraphs 8.80 – 8.81).

Incumbent Ministers

8.78 Recognising that government is a continuing process and to ensure that decisions may 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 8.83.) These Cabinet records may be accessed through the Minister's department or through the Cabinet Office.

8.79 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 8.84.)

Former Ministers

8.80 Former Ministers are allowed access to those Cabinet records to which they would have had access when they were Ministers. The Cabinet Office will facilitate access to these records. (See paragraph 8.85.) Ministers should respect the ongoing confidentiality of those documents.

8.81 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 8.112 – 8.115.)

Documents covered by the convention

8.82 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 or departments releasing documents of a previous opposition administration

8.83 In terms of the convention on access to documents of a previous administration, Ministers are required to keep the Cabinet documents of a previous administration confidential.

8.84 The convention is, however, unenforceable in a legal sense and relevant laws and rules governing the disclosure of information (the Official Information Act 1982, 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 views 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 in accordance with procedures agreed between the Prime Minister and the Leader of the Opposition.

(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 1982 or other relevant laws or rules. The Cabinet Office will pass on the concerns (if any) 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 completed 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 consultation necessary to make a decision on the request has yet to be completed.

Former Ministers' access to Cabinet records dating from their time in office

8.85 Former Ministers are allowed access to those Cabinet records to which they had access when they were in office. 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.

Ministerial records

General

8.86 During their time in office, and on leaving office, Ministers will need to consider how to store or dispose of the papers created or received in their capacity as Ministers of the Crown ("ministerial records"). These papers fall broadly into the following three categories:

(a) Cabinet and Cabinet committee records (agendas, papers, and minutes);

(b) ministerial papers and files;

(c) departmental papers and files.

8.87 The following paragraphs provide guidance on the storage and disposal of ministerial records. The Cabinet Office and Archives New Zealand are able to provide additional advice.

8.88 Ministers also receive and hold papers in their non-ministerial capacity; for example, correspondence with constituents and private or personal papers. (These papers are referred to as "non-ministerial records".) Archives New Zealand is also able to provide guidance on the storage and disposal of these papers. (See paragraphs 8.98 and 8.99.)

Cabinet and Cabinet committee records

Disposal or storage

8.89 By convention, Ministers are permitted to retain personal copies of Cabinet records on leaving office. The documents, however, are not their personal property. The licence to retain Cabinet records continues only for a Minister's lifetime, after which the records should be returned to Archives New Zealand.

8.90 Ministers' rights of access to Cabinet records continue after leaving office (see paragraphs 8.75 – 8.85). Consequently, Ministers do not need to, and may not wish to, retain personal copies of Cabinet records. Ministers are encouraged to contact Archives New Zealand to discuss arrangements for the handling of their Cabinet records. Archives New Zealand receives an official set of Cabinet records from the Cabinet Office, but is interested in receiving from Ministers Cabinet records with annotations of historical significance. (See paragraphs 8.100 – 8.107 for details about depositing papers with Archives New Zealand and setting access conditions.) If Ministers do not deposit their Cabinet records with Archives New Zealand, they may arrange for the records to be destroyed through a secure document destruction process.

Access by former Ministers

8.91 Former Ministers have ongoing access to the Cabinet records to which they had access during their time in office. (See paragraphs 8.75 – 8.85.)

Ministerial papers and files

Disposal or storage

8.92 As with Cabinet documents, official ministerial papers and files (correspondence, briefing notes, speeches, and so on) may be retained on leaving office. Many Ministers, however, choose to deposit these papers with Archives New Zealand or other approved repositories.

8.93 Archives New Zealand has a role in preserving any public records that have long-term historical value, and many ministerial papers and files may fall into this category. Archives New Zealand provides guidance on the protocols and procedures for lodging papers with Archives New Zealand. (See paragraphs 8.100 – 8.107.)

8.94 Papers that Ministers do not wish to retain and that are of no interest to Archives New Zealand should be destroyed through a secure document destruction process. Archives New Zealand is available to discuss which documents are appropriate for destruction.

Access by former Ministers

8.95 Former Ministers will have continued access to ministerial papers and files from their time in office if they deposit them with Archives New Zealand. If, after leaving office, former Ministers wish to have access to ministerial papers (for example, departmental briefings to the Minister) held by the department, they should request them under the Official Information Act 1982. It is expected that those handling requests by former Ministers will handle them expeditiously.

Departmental papers and files

Disposal or storage

8.96 All files and papers that are internal departmental material should be returned to the originating department when Ministers leave office. No 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.

Access by former Ministers

8.97 Former Ministers who wish to have access to internal departmental material dating from their time in office should request them under the Official Information Act 1982.

Correspondence with constituents

8.98 Ministers hold constituency material in their personal capacity as members of Parliament, rather than as Ministers. Archives New Zealand does not generally accept constituent correspondence.

Private or personal papers

8.99 Ministerial Services and Archives New Zealand work with Ministers' offices to ensure, to the extent possible, that ministerial records are separated from private and personal

papers during Ministers' time in office. If former Ministers wish to deposit their private or personal papers with Archives New Zealand, and these papers are accepted for transfer, appropriate safeguards regarding access should be negotiated at the time of deposit. Ministers intending to transfer private or personal papers should contact Archives New Zealand to discuss conditions of access.

Access to archived ministerial records

General

8.100 Ministers may deposit their ministerial records with Archives New Zealand or other approved repositories under the Public Records Act 2005 while they are in office or when they leave office. Depositing records in this way:

(a) ensures secure storage;

(b) ensures agreed access arrangements are monitored;

(c) allows for the records to be made available for research (on conditions agreed with the Minister);

(d) allows the Minister ongoing access to the records.

8.101 If a Minister dies without having made arrangements for the disposition of his or her official papers, Archives New Zealand will discuss with the Minister's family the lodging of, and access to, the papers.

8.102 Generally speaking, public archives of 25 years and over are open to public access. Cabinet records are presently deposited with Archives New Zealand under special arrangements defined in an exchange of letters between the Chief Archivist and the Secretary of the Cabinet.

Setting conditions for public access to ministerial records

8.103 When depositing ministerial records, the Minister and the Chief Archivist agree on the conditions of access to those records.

8.104 The Minister may wish to allow public access to the ministerial records deposited, and is able to place conditions on that access. When setting conditions of access to ministerial records deposited with Archives New Zealand, Ministers should ensure that the conditions of access reflect the sensitivity of the information and are no less robust than those conditions that would otherwise govern access to that documentation if it were held by another entity that is subject to the Official Information Act 1982. The Chief Archivist is subject to the Ombudsmen Act 1975 and is therefore obliged to ensure that the conditions of access to official documentation are reasonable.

8.105 Ministers who have agreed to allow public access to the ministerial records in accordance with paragraph 8.104 will also be involved in assessing any requests for access to those records. Further details on the procedure to be followed are set out in paragraph 8.110.

8.106 If Ministers choose to deposit ministerial records with an institution other than Archives New Zealand, they are requested to ensure that the access conditions concerning their papers are similar to those set out in paragraph 8.104.

8.107 Ministers may wish to deposit non-ministerial records with Archives New Zealand. There are no special factors that Ministers need to take into account when agreeing conditions of access to such records with the Chief Archivist.

Assessing requests for public access to ministerial records

Records deposited by current Ministers

8.108 The most appropriate route for the public to seek access to official information is to make a request under the Official Information Act 1982 to the relevant Minister or department. For that reason, where a request is received for access to ministerial records 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 is more closely connected to that Minister. (See section 14(b)(ii) of the Official Information Act 1982.)

Records deposited by former Ministers

8.109 The most appropriate route for the public to seek access to ministerial records associated with a former administration is to make a request under the Official Information Act 1982 to the relevant current Minister or department.

8.110 Where Archives New Zealand receives a request for access to a former Minister's ministerial records deposited at Archives New Zealand, the Chief Archivist will allow access only in accordance with the access conditions agreed with the Minister. If the Minister has set access conditions that mirror the process set out in the Official Information Act 1982 (see paragraph 8.104), 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 ministerial records. The relevant department will assess the documents, applying the principles set out in the Official Information Act 1982;

(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 ministerial records will rest with the former Minister concerned.

8.111 With the agreement of the former Minister, special arrangements may be entered into from time to time to provide bona fide researchers with access to ministerial records deposited with Archives New Zealand in a timely manner. The Chief Archivist will liaise with the Secretary of the Cabinet, the relevant department(s), the Prime Minister, and the Leader of the Opposition (if required) about appropriate access arrangements for bona fide researchers.

Disclosure and use of official information by former Ministers

8.112 Former Ministers should not disclose official information dating from their time in office.

8.113 Former Ministers may wish to publish memoirs, articles, or other material that relate to their time in office. The free flow of advice and comment among Ministers and between Ministers and officials, as well as the concept of collective responsibility, justifies the following of certain standards by former Ministers who are contemplating publication of this kind.

8.114 The following guidance is designed to provide and preserve a confidential working environment for Ministers, and the officials who advise them. Such an environment enables diverse opinions to be freely canvassed and expressed without the restraint 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 through 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 1982.

(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, without first consulting those colleagues, the attitudes or opinions of colleagues as to the government business with which they have been concerned.

(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 persons.

(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 individuals 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".

8.115 If former Ministers retain any ministerial records after leaving office and receive requests to disclose any of those 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 1982, so that appropriate considerations can be taken into account before a decision is made on the release of the information.

APPENDICES AND INDEX

Appendix A

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:

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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:

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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.

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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.

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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

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(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.

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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.

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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".

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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).

Appendix B
Guidelines for Government Advertising

These guidelines were approved by Cabinet and issued on 20 November 1989

Introduction

1 This document provides guidelines for Ministers and government departments for the preparation of and expenditure of public funds on government advertising and publicity. The guidelines may also be a useful reference point for other organisations which spend public funds on advertising and publicity.

Purpose

2 Governments may legitimately use public funds for advertising and publicity to explain their policies, and to inform the public of the government services available to them and of their rights and responsibilities. These guidelines recognise the public concern that government advertising should not be conducted in a manner that results in public funds being used to finance publicity for party political purposes.

Scope

3 Government advertising refers to any process for which payment is made from public funds for the purpose of publicising any policy, product, service, or activity provided at public expense by the government.

4 Government advertising should deal with matters in which the government has direct responsibility. The objective of the advertising may be to:

(a) inform the public of proposed/new/revised/existing government policies;

(b) inform the public of government services available to them;

(c) advise the public of new/revised/existing entitlements or responsibilities;

(d) encourage the public to adopt certain kinds of social behaviour generally regarded as being in the public interest (eg road safety advertising).

Presentation

5 Government advertising should be presented in a manner which is:

(a) **Accurate, factual, truthful**. Factual information should be outlined clearly and accurately. Comment on and analysis of that information, to amplify its meaning, should be indicated as such.

(b) **Fair, honest, impartial**. The material should be presented in unbiased and objective language, and in a manner free from partisan promotion of government policy and political argument.

(c) **Lawful, proper**. The material should comply with the law.

Format and production

6 Government advertising may be in the form of:

(a) printed matter such as parliamentary papers, discussion and consultative documents, booklets, pamphlets, and posters;

(b) audio-visual material such as films and video-tapes;

(c) advertisements and sponsored features in the press, on radio, and on television.

7 The preparation of well structured public relations strategies, involving one or more of the above forms of advertising, may be appropriate to guide the announcement and dissemination of information about major approved policy initiatives, particularly if the issue is relevant to a number of Ministerial portfolios.

8 The development of advertising material may involve the use of public relations consultants, market research agencies, advertising agencies, or other specialist consultants. In such cases reasonable and fair procedures for the tendering and employment of consultants should be followed. Only exceptional circumstances, such as extreme urgency, should necessitate a departure from reasonable and fair tendering procedures.

Distribution

9 Major policy proposals may be presented to Parliament as White or Green papers, or publicly released by way of discussion documents. Such publications should be deposited in the Parliamentary Library at the time of publication and may be sent unsolicited to media representatives and interested parties. They are not, as a rule, distributed unsolicited to the general public, although copies may be provided on request either free or at a price to cover publication and distribution costs. A period allowing for public submission and comment is often specified.

10 Brief factual information documents and leaflets informing the public of new policies or entitlements may be sent unsolicited to the public, particularly when forming one element of a wider advertising strategy on a major policy issue, as suggested in paragraph 7 above.

Justification and accountability

11 Governments are accountable to Parliament for the use they make of all public funds. Government advertising should be undertaken only where there is an identified and justifiable information need by the intended recipients. This is particularly important in the case of major publicity strategies requiring significant amounts of public funds. It is appropriate in such cases to designate one person as project manager to be responsible for implementation. In any event every piece of material disseminated should include a clear attribution as to its origin and the Minister/agency accountable for it.

Implementation

12 The onus is on Ministers and government departments to ensure that these guidelines are followed. They need to be read in association with other requirements that govern the expenditure of public monies such as the presence of an appropriation and other statutory provisions affecting such expenditures.

References

These guidelines have been formulated with reference to the following documents:

1 The United Kingdom Cabinet Office Note on Central Government Conventions on Publicity and Advertising of 25 April 1985.

2 The Suggested Guidelines for a Convention on Publicly-Funded Government Advertising and Publicity, tabled in the House of Representatives by the Controller and Auditor-General on 2 May 1989.

Appendix C

Cabinet Directions for the Conduct of Crown Legal Business 1993

1 These Directions may be cited as the Cabinet Directions for the Conduct of Crown Legal Business 1993.

2 In these Directions, "department" means a department as defined in s2 of the State Sector Act 1988, the New Zealand Police, and any agency of the government subject to Ministerial direction or control, but does not include the Parliamentary Counsel Office or the Public Trust Office.

3 These Directions shall apply to all Ministers and departments. In cases of doubt, the Attorney-General shall decide whether these Directions apply to any particular agency.

4 All requests by Ministers for legal advice or representation in matters in relation to their portfolios should in the first instance be addressed to the Attorney-General or to the Solicitor-General.

5 Where any department requires legal services from outside of its own legal staff it shall first establish in which of the following categories the requirement for services falls:

Category 1

(a) Representation or advice in relation to actual or imminent litigation to which the government or agency is or may become a party

(b) Legal services involving questions of the lawfulness of the exercise of government power

(c) Constitutional questions including Treaty of Waitangi issues

(d) Issues relating to the enforcement of the criminal law

(e) Legal issues relating to the protection of the revenue

Category 2

All requirements for legal services not included in Category 1

6 (a) It shall be the duty of the chief executive of every department whenever the interests of the Crown so require, to ensure that the department obtains legal advice from its own legal staff or otherwise in accordance with these Directions.

(b) All requirements by any department for legal services within Category 1 to be provided other than by its own staff shall be referred to the Solicitor-General and will be dealt with either within or outside of the Crown Law Office as the Solicitor-General directs. Requests for such advice should be made to the Solicitor-General or other Crown Counsel designated by the Solicitor-General.

(c) No Crown Solicitor or other lawyer in private practice is to be instructed by any department in respect of requirements for legal services of a kind covered in Category 1, other than pursuant to a general or specific approval from the Solicitor-General, provided that any department may instruct a Crown Solicitor without further authority than these Directions in respect of a summary prosecution or the taking of depositions for an indictable prosecution. All requirements by any department or government agency for legal services to be provided other than by its own staff falling into Category 2 may be referred to Crown Solicitors or other lawyers in private practice without further authority than these Directions provided that the Solicitor-General may intervene at any stage in a particular case to require that the legal services concerned be provided as the Solicitor-General directs. Where any question or dispute arises as to the category into which a particular requirement for legal services falls, it shall be resolved by the Solicitor-General.

(d) Where the department seeks legal services in accordance with these Directions from lawyers in private practice it will be the duty of the chief executive to ensure that those lawyers engaged are free of conflicts of interest, have an appropriate level of expertise for the work they are asked to undertake, and are adequately supervised by the department in the work they are engaged to do.

7 Where an opinion is sought from the Crown Law Office, on an issue over which there is a difference between departments, both or all of those departments should advise the Crown Law Office of their views. An opinion will be given to all of them jointly.

8 Where an opinion relates to the responsibilities of more than one department the department which seeks the opinion shall be responsible for meeting the costs of it. Departments may however agree among themselves to share the cost of any opinion.The department having responsibility in the relevant area shall meet the costs of legal services provided:

(a) at the direction of Cabinet or a Cabinet committee; and

(b) as a result of the intervention of the Solicitor-General pursuant to these Directions.

9 A lawyer who is employed in a department or agency may appear on summary prosecutions in the District Court. Appearances by departmental legal staff in any other jurisdiction will require a general or specific approval from the Solicitor-General.

10 No appeal from the decision of any court or tribunal, or application for judicial review, is to be instituted by any Crown party without the specific approval of the Solicitor-General.

11 If an employee of a department is charged with a criminal offence arising out of the course of his or her employment, any claim for the reimbursement of the employee's legal costs shall be decided by the chief executive of the department concerned.

12 If an employee of a department is made a defendant in a civil action arising out of the course of his or her employment, the Crown shall bear the expenses of that defence, and the Attorney-General may take over the conduct of the case. For the purposes of this Direction "employee" includes a chief executive and a member of the Senior Executive Service.

13 Opinions provided by the Solicitor-General or the Crown Law Office are intended for the assistance of Ministers, and departments only. They are not to be sought for private bodies or individuals.

14 An opinion given by the Crown Law Office is the property of the Crown and in the charge of the person to whom it is addressed. Subject to the rights of the Attorney-General to be fully informed on all government legal business, the Solicitor-General and Crown Law Office will not disclose the contents of an opinion to any third party without the specific authority of the addressee. Requests to the Crown Law Office for copies of such opinions, whether under the Official Information Act 1982 or otherwise, will be transferred to the addressee who must decide whether to claim or waive any solicitor and client privilege attaching to the opinion. The Crown Law Office will, on request, give advice as to whether privilege should or may be claimed but the ultimate decision must be made by the addressee.

15 The Cabinet Rules for the Conduct of Crown Legal Business 1958 are hereby revoked.

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