



CABINET MANUAL

2023

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

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Foreword

The *Cabinet Manual* is the primary authority on the conduct of Cabinet government in New Zealand. It covers Cabinet procedure and provides guidance for Ministers, their offices and those working within the public service. It is part of New Zealand's constitutional arrangements, documenting the executive's view of how it functions and the main conventions that operate within government. The Manual provides guidance rather than prescribing rules, and generally contains settled understandings of government practice rather than leading change. The first item of business on the agenda of successive governments has been to endorse the *Cabinet Manual* as the basis on which they will operate.

This 2023 edition incorporates changes made to government processes since the previous version was published in 2017, including updated guidance on the importance of privacy, the modernised principles governing the public service, and changes to legislative processes following the passing of the Legislation Act 2019 and Secondary Legislation Act 2021.

Cabinet has approved the content of the *Cabinet Manual* 2023. I encourage all those working in government to consult the latest version and follow the guidance it contains.



Rt Hon Chris Hipkins
Prime Minister

Preface

The *Cabinet Manual* has been an authoritative guide to New Zealand's system of central government decision making since the publication of the first edition, then known as the *Cabinet Office Manual*, in 1979. This is the seventh edition of the *Cabinet Manual*. 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.

One of the great strengths of the *Cabinet Manual* is that it is not set in stone: it is updated periodically, and as a result reflects changes in political, administrative, legislative and constitutional arrangements and language. The content of this edition of the *Cabinet Manual* represents an orderly and continuous development of the conventions and procedures of Cabinet government.

In this edition, some guidance, such as that concerning the principles of the public service and consultation process during development of bills, has been clarified and expanded. Other guidance has been updated to reflect new legislation, such as the Privacy Act 2020, or to reflect changes in practice, like the ability for Cabinet and Cabinet committees to meet remotely if required. For the first time, the texts of the Treaty of Waitangi / Te Tiriti o Waitangi are appended to the *Cabinet Manual*.

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

The *Cabinet Manual* is produced in hard copy, and published online on the Department of the Prime Minister and Cabinet's website. Any substantial updates required before the next review will be incorporated into the online version. Users of the *Cabinet Manual* in hard copy are encouraged to check the website for updates regularly.

The review of the *Cabinet Manual* has been a significant task for the Cabinet Office over the past few years. I would like to acknowledge and thank all those who have contributed to the review, whether by revising existing text, or drafting new material. My particular thanks to the Cabinet Office team who coordinated the review project, and to our late friend and colleague Catherine Parkin.

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



Rachel Hayward
Secretary of the Cabinet and Clerk of the Executive Council

Updates and further guidance

The *Cabinet Manual 2023* is produced in book form and published online at dpmc.govt.nz/cabinet-manual.

The *Cabinet Manual* is reviewed periodically. Any substantial updates required before the next review will be incorporated into the website version. Users of the *Cabinet Manual 2023* in book form are encouraged to check the website for updates regularly.

From time to time the Cabinet Office may issue Cabinet Office circulars to supplement or update guidance in the *Cabinet Manual*. The *Cabinet Manual 2023* refers to some current Cabinet Office circulars. These and other current circulars are available on the Department of the Prime Minister and Cabinet's website dpmc.govt.nz/cabinet-office-circulars.

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

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

The Rt Hon Sir Kenneth Keith, 1990, updated 2008, 2017 and 2023

A constitution: What is it?

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

The New Zealand constitution: Its main features

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

The Constitution Act 1986

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

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

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

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

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

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

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

Other major sources of the constitution

The other major sources of the constitution include:

- **The prerogative powers of the Sovereign** 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 King appoints the Governor-General who, in general, exercises his prerogative powers. The King 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 Public Service Act 2020, the Electoral Act 1993, the Senior Courts Act 2016, and the District Court Act 2016, relating in turn to the three branches of government, as well as the Ombudsmen Act 1975, the Official Information Act 1982, the Public Finance Act 1989 and the New Zealand Bill of Rights Act 1990.
- Relevant **English and United Kingdom statutes**, such as Magna Carta 1297, the Bill of Rights 1688, and the Act of Settlement 1700 (regulating succession to the throne among other matters), all confirmed as part of the law of New Zealand by the Imperial Laws Application Act 1988. These statutes also regulate the relations between the state and the individual.
- Relevant **decisions of the courts**, for instance decisions upholding rights of the individual against the powers of the state, and determining the extent of those powers.
- **The Treaty of Waitangi**, which may indicate limits in our polity on majority decision-making. The law sometimes accords a special recognition to Māori rights and interests, particularly 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 King reigns . . .

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

. . . but the government rules . . .

The King 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 that has a majority in the House; or who are part of a coalition that 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 King or Governor-General.

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

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

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

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

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

Real power and legal form

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

The role of political parties

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

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

The role of the Prime Minister and Ministers

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

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

The role of the public service

The role of the public service is stated in some detail in legislation, particularly in the provisions of the Public Service Act 2020, 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 five 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 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;
- are to support constitutional and democratic government;
- when legislation so provides, are to act independently in accordance with the terms of that legislation.

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

Independent powers of decision: statutory bodies

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

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

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

Towards more open government

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

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

Individuals, autonomy and majority rule

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

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

The international context

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

Changing the constitution

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

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

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

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

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

1

Sovereign, Governor-General, and Executive Council

Introduction

- 1.1 This chapter covers:
- (a) the formal and constitutional aspects of the role of the Sovereign and the office of the Governor-General;
 - (b) the powers, membership, and meeting procedures of the Executive Council;
 - (c) the role of the Clerk of the Executive Council;
 - (d) the most important elements of the New Zealand Royal Honours system and heraldry.

Sovereign of New Zealand

- 1.2 New Zealand is a constitutional monarchy. The Sovereign in right of New Zealand is the head of state of New Zealand, and is known by the royal style and titles defined in statute from time to time. Upon the demise of a Sovereign, the transition to the Sovereign's successor is immediate and automatic.
- 1.3 The Sovereign exercises certain powers and functions as the head of state, acting on the advice of New Zealand Ministers—the Prime Minister being the principal adviser. The appointment of the Governor-General and the conferral of Royal Honours are the principal examples of the matters in relation to which the Sovereign exercises powers. The Sovereign is able to carry out any of the functions delegated to or conferred by statute on the Governor-General.

References to “the Crown”

- 1.4 The expression “the Crown” is used frequently in descriptions of New Zealand's current constitutional arrangements. The meaning of “the Crown” varies according to the context in which it is used. Generally, it describes executive government conducted by Ministers and their public service agencies (see chapter 3 for definition of the public service). It does not usually include organisations that have their own corporate identities, such as state-owned enterprises.

Governor-General

Office of Governor-General

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

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

Formal powers and functions of office

- 1.7 Through the Letters Patent, the Sovereign authorises the Governor-General to exercise, on the Sovereign's behalf, the executive authority of the Realm of New Zealand, except as may be otherwise provided by law. The Governor-General therefore plays an important role in many of the formal procedures associated with government.
- 1.8 In particular, the Letters Patent empower the Governor-General to:
- (a) constitute and appoint various officers, such as members of the Executive Council, the Prime Minister and other Ministers of the Crown, and diplomatic or consular representatives of New Zealand; and
 - (b) exercise the prerogative of mercy.
- These prerogative powers may be governed or supplemented by statute.
- 1.9 The Letters Patent also constitute the Executive Council over which the Governor-General presides. See paragraphs 1.21 – 1.28 for information about the Executive Council.
- 1.10 The Constitution Act 1986 empowers the Governor-General to:
- (a) summon, prorogue (that is, discontinue without dissolving), and dissolve Parliament; and
 - (b) assent to bills passed by the House of Representatives.
- 1.11 The Governor-General also exercises a range of statutory powers, including making statutory appointments. The Sovereign can exercise every power conferred on the Governor-General.

Royal prerogative

- 1.12 The royal prerogative is the discretionary power held by the Sovereign under common law. Most of the Sovereign's prerogative powers have been delegated to the Governor-General. The Sovereign has retained a number of prerogative powers, including the conferment of certain honours. See paragraphs 1.55 – 1.75 for details of the New Zealand Royal Honours system.

International role

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

Exercising the powers and functions of office

- 1.14 The office of Governor-General is apolitical. By convention, the Governor-General avoids becoming involved in the party politics of government, despite having an integral role in the formal processes of government.
- 1.15 As members of the Executive Council, Ministers of the Crown are the Governor-General's responsible advisers. In exercising the powers and functions of office, the Governor-General, like the Sovereign, acts on the advice of those Ministers. This advice is tendered either in the forum of the Executive Council, or directly to the Governor-General by the Prime Minister or by another Minister of the Crown. By convention, the Governor-General acts on the advice of Ministers as long as the government of the day retains the confidence of the House of Representatives.
- 1.16 Similarly, the Governor-General acts on the advice of the Prime Minister as long as the government commands the confidence of the House, and the Prime Minister maintains support as the leader of that government.
- 1.17 The Governor-General is required by the Letters Patent to execute the powers and authorities of the office in accordance with the laws of the Realm or any part of the Realm.
- 1.18 In only a very few cases may the Governor-General exercise a degree of personal discretion, under what are known as the "reserve powers". Even then, convention usually dictates what decision should be made.
- 1.19 The Letters Patent require Ministers to keep the Governor-General fully informed about the general conduct of the government, and to furnish the Governor-General with all information the Governor-General may request on any matter relating to the government of New Zealand.

Administrator of the Government

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

Executive Council

Powers

- 1.21 The Executive Council, which is constituted by the Letters Patent, is the highest formal instrument of government. It is the institution through which the government collectively and formally advises the Governor-General.
- 1.22 Action by the Governor-General in Council requires two elements:
 - (a) a recommendation by a Minister or Ministers (that is, a member or members of the Executive Council); and

- (b) the advice and consent of the Executive Council that the Governor-General in Council act in accordance with the recommendation of the Minister or Ministers.
- 1.23 Orders in Council are the main method, apart from Acts of Parliament, by which the government implements decisions that require the force of law. Meetings of the Executive Council are called for the purpose of making such orders and carrying out other formal acts of state.
- 1.24 The submission of almost all items for consideration by the Executive Council must be authorised by Cabinet (see paragraphs 1.39 – 1.41).

Membership of Executive Council

- 1.25 The Governor-General presides over, but is not a member of, the Executive Council.
- 1.26 Following the formation of a government, the Governor-General appoints the Prime Minister-designate as a member of the Executive Council, and then signs their warrant of appointment as Prime Minister. For further information about government formation and the appointment of the Prime Minister, see paragraphs 2.2 and 6.42 – 6.53.
- 1.27 Once appointed, the Prime Minister advises the Governor-General on the appointment of the other members of the Executive Council. After the Executive Council has been appointed, a meeting of the Council is convened and the Council members take the oaths or affirmations prescribed in the Oaths and Declarations Act 1957.
- 1.28 Members of the Executive Council must be members of Parliament, as set out in the Constitution Act 1986 (with an exception in some transitional situations—see paragraph 1.31 and section 6 of the Constitution Act 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 members of the Executive Council

- 1.29 Resignations and dismissals of members of the Executive Council and Ministers are effected by the Governor-General, acting on the advice of the Prime Minister. See paragraphs 2.18 – 2.20 for further information on resignation and dismissal.
- 1.30 Following a dissolution of Parliament, Ministers continue in office (subject to the legal requirement set out in paragraph 1.31) until the result of the general election and government formation negotiations are known and the next administration is ready to be sworn in. Members of the Executive Council and Ministers act in a caretaker capacity until the negotiations are complete. The convention on caretaker government is set out in paragraphs 6.21– 6.406 .
- 1.31 Members of the Executive Council and Ministers must vacate office within 28 days of ceasing to be members of Parliament. If a caretaker administration continues in office beyond this 28-day period, Ministers who are no longer members of Parliament must leave office at the end of the 28-day period. Their portfolio responsibilities will be either carried out by other Ministers under section 7 of the Constitution Act 1986 (see paragraph 2.21) or formally reassigned to other Ministers in the caretaker administration.
- 1.32 The transition between administrations, including the principles and processes concerning a change of Prime Minister, is covered further in chapter 6.

Clerk of the Executive Council

- 1.33 The Clerk of the Executive Council is formally appointed by the Governor-General by warrant under the Letters Patent, on the advice of the Prime Minister. The primary role of the Clerk is to provide impartial secretariat support for the Executive Council and associated support to the Governor-General and the Prime Minister.
- 1.34 The main functions of the Clerk of the Executive Council are to:
- (a) advise on matters affecting the role of the Governor-General;
 - (b) provide, coordinate, and monitor official support and advice to, and consultation with, the Governor-General;
 - (c) provide a channel of communication and liaison between the government and the Governor-General and, if necessary, between party leaders and the Governor-General;
 - (d) facilitate, on behalf of the Governor-General, the constitutional processes of government that involve the Governor-General (particularly those associated with the transition between administrations—see chapter 6);
 - (e) attend meetings of the Executive Council in order to witness its proceedings and keep its records;
 - (f) countersign any proclamation, Order in Council, or other instrument made or issued by the Governor-General in Council;
 - (g) be responsible for the New Zealand Royal Honours system; and
 - (h) liaise with the Palace and the Sovereign as necessary.

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

- 1.35 The Clerk of the Executive Council is responsible directly to the Prime Minister and the Governor-General for servicing the Executive Council and providing such advice as may be required from time to time on constitutional matters.
- 1.36 The offices of the Secretary of the Cabinet and the Clerk of the Executive Council are usually held by the same person. The role of the Secretary of the Cabinet, and the appointment process for the Secretary/Clerk, are outlined in paragraphs 5.84 – 5.88.
- 1.37 Official communication with the Governor-General is conducted through Ministers' offices and the Clerk of the Executive Council. Agencies do not usually deal directly with Government House.

Meetings of Executive Council

Items for consideration by Executive Council

- 1.38 Matters requiring Executive Council action include:
- (a) regulations, commencement orders, and other secondary legislation made by Orders in Council;

- (b) other Orders in Council; for example, certain local government orders;
- (c) some proclamations;
- (d) establishing a public inquiry under the Inquiries Act 2013; and
- (e) various appointments, including of chief executives of agencies.

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

Preparing items for Executive Council

- 1.39 The Parliamentary Counsel Office is responsible for drafting most of the documents for the Executive Council.
- 1.40 The submission of almost all matters for consideration by the Executive Council must first be approved by Cabinet. Once Cabinet authorises the submission of a proposed item, the item will be submitted to the Governor-General in Executive Council (in most cases, on the same day).
- 1.41 A few items, however, are drafted by the agency concerned and are submitted directly to the Executive Council by the relevant Minister. In general, these are items that are not published in the legislative instruments series, items affecting only a particular local district, or items required to give effect to the determinations of statutory bodies. Technical requirements for Orders in Council that are submitted directly to the Executive Council are included in the information on the Executive Council in the *CabGuide*.

Meetings, quorum, and attendance

- 1.42 The Executive Council usually meets with the Governor-General after Cabinet on Monday afternoons in the parliamentary complex. The Clerk sends a notice of meeting to the members of the Executive Council. The agenda is distributed at the meeting.
- 1.43 For urgent matters, the Cabinet Office, with the relevant Minister’s office, may arrange special meetings of the Executive Council at other times and at other venues.
- 1.44 The Letters Patent provide that in a situation of emergency or urgency, the Executive Council can meet in any way that allows all members to participate effectively during the whole of the meeting. This provision allows the Executive Council to meet by teleconference or videoconference, if necessary.
- 1.45 The Letters Patent provide that two members of the Executive Council, plus the presiding officer, constitute a quorum. When available to attend, the Governor-General presides over the Executive Council. When the Governor-General is not available, the most senior member of the Executive Council present at the meeting is the presiding officer.
- 1.46 Section 3A of the Constitution Act 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.

- 1.47 If the Governor-General is outside New Zealand, the Administrator of the Government presides, if available (see paragraph 1.20). Section 3A of the Constitution Act 1986 also applies if the Administrator is unable to attend an Executive Council meeting.
- 1.48 The Governor-General may wish to ask questions at the Executive Council meeting. For this reason, Ministers with items on the agenda should make a special effort to attend. If they are unable to do so, they must brief another Minister to represent them.

Confidentiality

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

Gazetting and entry into force

- 1.50 Laws should enter into force only after their publication. The exceptions to this important constitutional convention are matters of national security or of great commercial or legal significance where time is an overriding factor. Accordingly, Orders in Council must be published as soon (and as widely) as possible. To satisfy this requirement, Orders in Council and other instruments made in Executive Council are notified in the *New Zealand Gazette*, which is the official journal of the government.
- 1.51 Orders in Council made at a Monday meeting will appear in the *New Zealand Gazette* the following Thursday. In a case where an Order in Council must enter into force before the next regular issue of the *New Zealand Gazette*, a special *Gazette* may be arranged (see the *CabGuide* for further information).
- 1.52 Orders in Council enter into force on the date stated on the order. For an order making regulations or other secondary legislation, this date should be no earlier than 28 days after the date of its notification in the *New Zealand Gazette* (“the 28-day rule”—see paragraphs 7.101 – 7.104). Even if the 28-day rule is waived, it is most unusual for regulations to enter into force any earlier than the day immediately following the Executive Council meeting. An Order appointing a day for an enactment to enter into force, known as a “commencement order”, may, however, enter into force on the same day as that on which the order is made (see section 29 of the Legislation Act 2019).

Announcement

- 1.53 The Governor-General or the Governor-General in Council may need to formally execute a decision to give effect to it (for example, an appointment decision). In such cases, Ministers should not pre-empt the outcome of this process by announcing that the decision has taken effect before the Governor-General has signed the necessary documents.
- 1.54 If it is necessary to announce a decision or an appointment before the Governor-General has signed the relevant documents, staff in the appropriate Minister’s office should:
- (a) advise staff at Government House in advance, as a matter of courtesy; and
 - (b) ensure that the wording of the announcement reflects the fact that the decision or appointment has not yet been formally effected (for example, “The Minister will today advise the Governor-General to appoint...”).

New Zealand Royal Honours System

General

- 1.55 The New Zealand Royal Honours system provides a way for New Zealand to thank and congratulate people who have served their communities and to recognise people's achievements. Further information on all aspects of the honours system is available on the Department of the Prime Minister and Cabinet's website.
- 1.56 The New Zealand Royal Honours system comprises:
- (a) The Order of New Zealand (ONZ);
 - (b) The New Zealand Order of Merit (NZOM);
 - (c) The Queen's Service Order (QSO) and its associated Queen's Service Medal (QSM);
 - (d) New Zealand Gallantry Awards;
 - (e) New Zealand Bravery Awards;
 - (f) The New Zealand Antarctic Medal (NZAM); and
 - (g) The New Zealand Distinguished Service Decoration (DSD).
- 1.57 Besides these core elements, the armed forces and uniformed services also have medals for their personnel, which those agencies administer. For a complete list of all the orders, decorations, and medals that are officially part of the New Zealand Royal Honours system, see the honours listed in the *Order of Wear*, available on the Department of the Prime Minister and Cabinet's website.
- 1.58 New Zealand Royal Honours are conferred by the Sovereign on the advice of the Prime Minister. They are usually announced in regular honours lists on the New Zealand observance of the Sovereign's Birthday (the first Monday in June) and at the New Year (30–31 December). Gallantry and Bravery Awards are usually announced in special honours lists.

Administration

- 1.59 The New Zealand Royal Honours system is administered by the Honours Unit, which is part of the Cabinet Office. The Unit is also responsible for all matters relating to:
- (a) use of the titles "The Right Honourable" and "The Honourable";
 - (b) acceptance of foreign honours by New Zealand citizens; and
 - (c) general honours policy, including establishment of new honours and awards.

Nominations

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

- 1.61 Honours nominations are accepted throughout the year, but the processing and consideration of nominations is likely to take at least six months preceding the announcement of an honours list (see paragraph 1.58).
- 1.62 Further information about the nomination process can be found on the Department of the Prime Minister and Cabinet's website.

New Zealand Royal Honours for non-New Zealand citizens

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

Forfeiture of honours

- 1.65 The Prime Minister may advise the Sovereign to cancel the appointment or the award of a New Zealand Royal Honour where an individual's actions are such that, if they continue to hold that honour, the honours system would be brought into disrepute.
- 1.66 A person can also resign their New Zealand Royal Honour voluntarily. In such a case, the Prime Minister would inform the Sovereign and advise them to cancel the individual's honour.
- 1.67 Further information on the forfeiture of New Zealand Royal Honours can be found on the Department of the Prime Minister and Cabinet's website.

"The Right Honourable" and "The Honourable"

- 1.68 The Sovereign approved rules regarding the use of the titles "The Right Honourable" and "The Honourable" in August 2010.
- 1.69 Before August 2010, the title "The Right Honourable" was associated with appointment to the United Kingdom's Privy Council. People entitled to use the title "The Right Honourable" who are also members of the Privy Council may use the letters "PC" after their name to denote this membership. New Zealand appointments to the Privy Council ceased informally from 2000, and formally from August 2010.
- 1.70 The 2010 rules provide that the title "The Right Honourable" (abbreviated to "The Rt Hon") is granted to, and may be used by, the Governor-General, the Prime Minister, the Speaker of the House of Representatives, and the Chief Justice. This entitlement is retained for life.
- 1.71 Members of the Executive Council and Judges of the High Court (including Judges of the Supreme Court and the Court of Appeal) are entitled to use the title "The Honourable" (abbreviated to "The Hon") while they hold office, if they do not already have the title "The Right Honourable".

- 1.72 On relinquishing office, or on retirement from office, the holders of the offices in paragraph 1.71 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.
- 1.73 Further information about the titles “The Right Honourable” and “The Honourable” is available from the Honours Unit.

Acceptance of foreign honours by New Zealand citizens

- 1.74 Commonwealth and other foreign governments or international organisations may on occasion wish to confer an honour on a New Zealand citizen. The Sovereign has approved rules relating to the acceptance and wearing of foreign honours by New Zealand citizens. These rules are available on the Department of the Prime Minister and Cabinet’s website.
- 1.75 Enquiries should be directed to the Honours Unit or the Protocol Division of the Ministry of Foreign Affairs and Trade.

Heraldry

- 1.76 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”. The Sovereign has delegated this prerogative in New Zealand to the Earl Marshal and the Kings of Arms (College of Arms).
- 1.77 Their representative in New Zealand is the New Zealand Herald of Arms Extraordinary, who acts as the formal channel of communication with the College of Arms. All matters relating to heraldry, associated genealogical research, and registrations should be directed to the New Zealand Herald of Arms. As the New Zealand Herald of Arms is an independent officer, fees may be charged for services and advice.
- 1.78 The use of state, royal, and vice-regal emblems is protected by the Flags, Emblems, and Names Protection Act 1981. The Ministry for Culture and Heritage is responsible for the administration of this Act. The New Zealand Herald of Arms advises on matters relating to the use of such emblems where the proposed use requires consideration of heraldic matters.
- 1.79 Information on heraldry and the role of the New Zealand Herald of Arms Extraordinary can be found on the Department of the Prime Minister and Cabinet’s website.

Order of Precedence

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

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

Related information

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

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

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

Introduction

2.1 This chapter covers:

- (a) the appointment and roles of the Prime Minister, Deputy Prime Minister, Ministers (including Associate Ministers, acting Ministers, and duty Ministers), Parliamentary Under-Secretaries, and Parliamentary Private Secretaries;
- (b) standards of personal conduct and management of conflicts of interest for Ministers and Parliamentary Under-Secretaries;
- (c) guidance for the handling of gifts and awards received by Ministers and Parliamentary Under-Secretaries;
- (d) key principles concerning travel by Ministers and Parliamentary Under-Secretaries.

Prime Minister

Appointment

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

- (a) act on the outcome of the electoral process and subsequent discussions between political parties. These discussions ascertain which party, or group of parties, appears able to command the confidence of the House of Representatives (expressed through public statements) and therefore has a mandate to govern the country; and
- (b) act on the outcome of the political process by which the person who will lead the government as Prime Minister is identified.

Chapter 6 contains further information on government formation.

Role

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

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

- 2.5 By constitutional convention, formal communication with the Sovereign is a matter for the Prime Minister. The Prime Minister advises the Sovereign on substantive matters: for example, the appointment of a new Governor-General, amendments to the Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (the Letters Patent), and the conferment of royal honours.
- 2.6 The Prime Minister alone has the right to advise the Governor-General to:
- (a) appoint, revoke the appointment of, 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 agencies, Crown entities, and other organisations reporting within the portfolio; and (where necessary) the relevant Vote(s) or appropriations within Votes.
- 2.9 As the chair of Cabinet, the Prime Minister approves the agenda, leads the meetings, and is the final arbiter of Cabinet procedure. The Prime Minister determines the terms of reference and membership of Cabinet committees.
- 2.10 The Prime Minister has an important role in maintaining and coordinating the government by overseeing the government’s general policy direction.
- 2.11 The Prime Minister customarily has overall ministerial responsibility for national security and intelligence matters, and for Ministerial Services, and may also hold other portfolios.
- 2.12 The Prime Minister’s ministerial and executive duties are separate from the leadership role in the Prime Minister’s own political party and caucus.

Deputy Prime Minister

- 2.13 The Deputy Prime Minister is appointed by warrant. If the Prime Minister is unavailable or unable to exercise the statutory or constitutional functions and powers of the office, the Deputy Prime Minister can, if necessary, exercise those powers and functions (see paragraph 6.57 on the role of the Deputy Prime Minister in the event of the sudden death or incapacity of the Prime Minister).
- 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. The Prime Minister may specify their expectations of the Acting Prime Minister.

Ministers

Appointment

- 2.15 The Letters Patent (see appendix B), issued under the Sovereign’s prerogative power, empower the Governor-General:
- ... to constitute and appoint under the Seal of New Zealand, to hold office during pleasure, all such Members of the Executive Council [and] Ministers of the Crown ... as may be lawfully constituted or appointed by [the Sovereign].
- 2.16 In appointing Ministers, the Governor-General acts on the advice of the Prime Minister. Practical and political considerations, such as internal party rules or the terms of a coalition agreement, may affect the process by which the Prime Minister reaches decisions on the advice to be given to the Governor-General. The primary legal restriction, as set out in the Constitution Act 1986, is that all Ministers of the Crown must be members of Parliament (except in some transitional circumstances—see paragraphs 1.31, 6.49 and 6.52).
- 2.17 All Ministers must be appointed as members of the Executive Council before they are appointed as Ministers. The Governor-General signs a warrant of appointment for each member of the Executive Council, and separate warrants for each ministerial portfolio. Warranted appointments must be published in the *New Zealand Gazette*. Each member of the Executive Council must take the relevant oaths or affirmations set out in legislation.

Resignation and dismissal

- 2.18 The Governor-General formally effects a Minister’s departure from office by accepting the Prime Minister’s advice on the Minister’s resignation or dismissal from, or the revocation of appointment to, both individual portfolios and the Executive Council. As in the appointment of Ministers, it is a constitutional convention that the Governor-General acts on the advice of the Prime Minister in dismissing Ministers, accepting their resignations, or revoking their appointments.
- 2.19 Prime Ministers have advised the dismissal of Ministers for various reasons. Procedurally, all that is required is for the Governor-General to execute an advice sheet that has been signed by the Prime Minister. The Prime Minister is not legally required to give grounds for dismissing a Minister.
- 2.20 Following a general election, irrespective of the outcome and even when the composition of the government has not changed greatly, it has been the practice for all Ministers from the outgoing administration to resign as Ministers and from the Executive Council. This formal process, which marks the end of the administration, takes effect at the time of the appointment of the new administration (see paragraph 6.48).

Legal power for Ministers to act for other Ministers

- 2.21 Section 7 of the Constitution Act 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 2.41 – 2.45);
 - (b) if there is a temporary vacancy in a portfolio, the Prime Minister may ask a Minister to carry out the responsibilities of the portfolio until a formal appointment is made;
 - (c) if a ministerial title (as specified in legislation) is discontinued, the Prime Minister may authorise a Minister with a different title to carry out all the ministerial functions and powers relating to the discontinued title as provided in that legislation (subject to any statutory provision preventing such a change) (see paragraph 2.34(d)); and
 - (d) to manage an actual or perceived conflict, a Minister may transfer a particular responsibility to another Minister with the agreement of the Prime Minister (see paragraphs 2.81 – 2.83).

Role and powers of Ministers

- 2.22 Collectively, Ministers direct the executive branch of government. Ministers:
- (a) are members of the Executive Council (see chapter 1);
 - (b) formally advise the Governor-General—either individually, or collectively in the context of the Executive Council (see chapter 1);
 - (c) take significant decisions and determine government policy collectively, through the Cabinet decision-making process (see chapter 5);
 - (d) exercise statutory functions and powers under legislation within their portfolios, in the collective Cabinet decision-making context (see chapter 5);
 - (e) determine both the policy direction and the priorities for their departments (see chapter 3);
 - (f) in most cases have financial responsibilities (see paragraphs 2.24 – 2.27);
 - (g) are supported by and (to varying degrees, depending on the nature of the entities concerned) direct officials in the public 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, public spending, and the performance of entities within their portfolios; and
 - (i) have a political role in maintaining government stability, which includes maintaining close working relationships with other parties as issues arise.

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

Financial responsibility of Ministers

- 2.24 Portfolio Ministers in most cases have responsibility for appropriations in one or more Votes, which are administered on their behalf by their agencies (note that "agencies" also refers to any department that is part of the Crown. See definition in paragraph 3.2(b)). 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 agencies, Crown entities, and other bodies;
 - (b) other operating expenses, such as social welfare benefits or official development assistance; and
 - (c) capital expenditure.
- 2.25 After the end of each financial year, appropriation Ministers are required to ensure information is presented to the House on what has been achieved with each appropriation for which they are responsible.
- 2.26 Under the Public Finance Act 1989, "responsible Ministers" are responsible to Parliament for the financial performance of the agencies in their portfolios and for protecting the Crown's interest in those agencies. Similarly, under the Crown Entities Act 2004, "responsible Ministers" are responsible for the Crown's interests in, and relationship with, Crown entities in their portfolios (see paragraphs 3.39 – 3.41).
- 2.27 Some agencies administer only one Vote and report to only one Minister. For these agencies, the Minister responsible for the appropriations administered by the agency and the responsible Minister for the agency are likely to be the same Minister. For more information on the public finance system, see *A Guide to Appropriations*, *A Guide to the Public Finance Act* and *The Responsibilities of an Appropriation Administrator* on the Treasury's website.

Cabinet Ministers, Ministers outside Cabinet, and Ministers of State

- 2.28 The Prime Minister determines the size and membership of Cabinet. Although all Ministers are members of the Executive Council (see chapter 1), they are not usually all members of Cabinet. Ministers who are members of Cabinet attend Cabinet meetings. They are members of one or more Cabinet committees, and may attend others when relevant.
- 2.29 Ministers outside Cabinet have full legal powers as Ministers, and may be appointed to full portfolios. They have the same role, duties, and responsibilities as Ministers inside Cabinet, and are also bound by the principle of collective responsibility (see paragraphs 5.24 – 5.31). They do not usually attend Cabinet, but, with the agreement of the Prime Minister, may attend for particular items relating to their portfolio interests. They are usually members of one or more Cabinet committees, attending other committees where relevant.

- 2.30 Ministers inside or outside Cabinet may be appointed to full portfolio positions or they may be appointed as Ministers of State. The Prime Minister may assign Ministers of State a range of roles and responsibilities, which they may carry out as Ministers or Associate Ministers.
- 2.31 For more information about the operation of Cabinet and Cabinet committees, see chapter 5. For information about Associate Ministers, see paragraphs 2.35 – 2.40.

Ministerial portfolios

- 2.32 The Prime Minister determines the allocation of portfolios to Ministers, taking into account various matters (including political considerations, particularly in a coalition or support party context). The Prime Minister also decides on portfolio titles. There are no precise rules governing the application of portfolio titles; their use varies between administrations.
- 2.33 Each Minister generally holds more than one position and may, for example, be the Minister in one portfolio and an Associate Minister in another. Full portfolio appointments are made by warrant signed by the Governor-General. The Prime Minister may allocate other ministerial responsibilities (including those given to Associate Ministers) by letter. The Prime Minister may also assign, by letter, ministerial responsibility for leading or coordinating a particular area of government activity or significant policy issue that spans several portfolios and agencies.
- 2.34 Information about ministerial portfolios is available on the website of the Department of the Prime Minister and Cabinet.
- (a) The *Ministerial List* issued under the authority of the Prime Minister generally lists Ministers in order of their rankings or seniority, 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 agencies, Crown entities, and other organisations, the Votes or appropriations within Votes, and the legislation administered within the portfolio.
 - (c) The *Schedule of Responsibilities Delegated to Associate Ministers* is presented to the House from time to time. This schedule sets out defined responsibilities formally delegated to Associate Ministers, and may include responsibilities allocated to Parliamentary Under-Secretaries (see paragraphs 2.37 and 2.50).
 - (d) The *Register of Assigned Legislation* lists various Acts of Parliament and the Ministers (and/or public service agencies) authorised by the Prime Minister to administer them. 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 agency) for the purposes of the Act as the Minister (and/or agency) authorised by the Prime Minister to be responsible for administering the Act. The *Register of Assigned Legislation* lists these Acts. It is not a complete list of the Acts administered in each portfolio or by each agency; this is found in the *Directory of Ministerial Portfolios*.

Associate Ministers

- 2.35 The Prime Minister may, by letter, assign responsibilities to Associate Ministers. Associate Ministers assist portfolio Ministers in carrying out tasks relating to their portfolios. Any statutory powers or functions that they exercise on behalf of the portfolio Minister are exercised under the authority of section 7 of the Constitution Act 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 5.24 – 5.31).
- 2.36 Responsibility for a portfolio always rests with the “portfolio” or “principal” Minister. When an Associate Minister is appointed to support a portfolio Minister, the principal Minister must provide a formal letter clearly setting out the role of the Associate Minister in the portfolio, any delegated responsibilities, and the relevant working arrangements. The Prime Minister, through the Secretary of the Cabinet, must be consulted on each letter before it is finalised. Once the proposed delegation has been approved by the Prime Minister and the letter has been finalised, the portfolio Minister provides copies to the Secretary of the Cabinet and to the chief executive of the agency or agencies concerned.
- 2.37 Information on the delegations to Associate Ministers is set out in a schedule compiled by the Cabinet Office. The schedule is available on the website of the Department of the Prime Minister and Cabinet. The schedule is also presented to the House of Representatives (so that, for example, parliamentary questions can be directed to the appropriate Associate Ministers for answer).
- 2.38 Associate Ministers should take particular care to avoid making public statements or taking initiatives of any sort without the knowledge and approval of their portfolio Minister. The delegation letter generally sets the parameters of the Associate Minister’s communication with agencies. Associate Ministers should ensure that the parameters are respected.
- 2.39 Associate Ministers may submit papers to Cabinet committees or Cabinet within their designated area of responsibility, provided that the portfolio Minister has been consulted and agrees with the submission of the paper.
- 2.40 Associate Ministers who are not already members of a Cabinet committee in their own right may attend the committee to take through a paper submitted by the appropriate portfolio Minister, with the approval of that Minister and the committee chair. If a committee is considering an item that is relevant to an Associate Minister’s own responsibilities, the Associate Minister will receive the relevant papers and may attend the meeting.

Acting Ministers

- 2.41 Sometimes a Minister will be absent overseas, or otherwise temporarily unavailable to perform official duties. In such a case, the Minister will ask another Minister or Ministers to act in their place under the authority of section 7 of the Constitution Act 1986 (see paragraph 2.21). The acting Minister will undertake duties in the portfolio until the portfolio Minister returns to normal official duties. Special considerations apply in the case of an Acting Prime Minister (see paragraph 2.14).
- 2.42 Similarly, if an unforeseen temporary vacancy occurs in a portfolio or the Minister is unexpectedly incapacitated, the Prime Minister may appoint a Minister to act in the portfolio until a formal appointment is made, or until the Minister is able to return to ministerial duties.

- 2.43 In the case of a major portfolio, if an absence of more than a day or so is envisaged, the acting Minister should be a Minister inside Cabinet. There are no other particular requirements to take into account when choosing an acting Minister for a portfolio. Care should still be taken when temporarily assigning a portfolio from one Minister to another, to ensure that potential conflicts are avoided.
- 2.44 If an Associate Minister is absent overseas, or otherwise temporarily unavailable to perform official duties, the portfolio Minister usually takes up any delegated responsibilities during the period of the Associate Minister's absence, unless arrangements have been made for another Minister to act as the Associate Minister during the period of absence.
- 2.45 Absent Ministers (particularly those travelling overseas) should in general leave the day-to-day management of their portfolios to the Ministers acting for them in their absence. Public statements, in particular, are usually best made by the acting Minister in New Zealand so that due account can be taken of the domestic context. If a significant matter arises during the portfolio Minister's absence, however, the acting Minister should consult the portfolio Minister if possible before taking ministerial action or making any public comment.

Duty Ministers

- 2.46 A "duty Minister" is assigned to deal with urgent issues requiring ministerial involvement during extended holiday periods, most notably Christmas and New Year. The Prime Minister's Office prepares a roster of duty Ministers for such periods to ensure that a Minister is always available.
- 2.47 The duty Minister's role is to carry out urgent ministerial functions on behalf of absent colleagues under the authority of section 7 of the Constitution Act (see paragraph 2.21) and to act as the first point of contact for officials. The duty Minister should, where possible, contact the relevant portfolio Minister(s) before making a public statement, making a decision, or issuing instructions to officials. The duty Minister should contact the Prime Minister or Acting Prime Minister if:
- (a) the portfolio Minister cannot be contacted; or
 - (b) the portfolio Minister considers that the matter needs consideration by a wider group of Ministers or at the Cabinet level.

Parliamentary Under-Secretaries

- 2.48 The Governor-General, under section 8 of the Constitution Act 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.
- 2.49 Parliamentary Under-Secretaries are appointed to assist Ministers, and their authority derives solely from the Minister they are assisting (see section 9 of the Constitution Act 1986). At the Prime Minister's discretion, they may be a member of one or more Cabinet committees.

- 2.50 The relevant Minister must give the Parliamentary Under-Secretary a formal letter clearly setting out the role of the Parliamentary Under-Secretary in the portfolio, any assigned responsibilities, and the relevant working arrangements. The draft letter must be approved by the Prime Minister through the Secretary of the Cabinet, and the Minister should provide copies of the final letter to the Secretary of the Cabinet and the chief executive of the agency concerned. As for Associate Ministers, the letter should set out clearly the Parliamentary Under-Secretary's area of responsibility, including any limits on authority, on the ability to make public statements, and on the relationship with the agency. Details of assignments to Parliamentary Under-Secretaries may be included in the *Schedule of Responsibilities Delegated to Associate Ministers* (see paragraphs 2.34(c) and 2.37).
- 2.51 As members of the Executive, Parliamentary Under-Secretaries are bound by the principle of collective responsibility (see paragraphs 5.24 – 5.31).

Parliamentary Private Secretaries

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

Conduct, public duty, and personal interests

General

- 2.53 To protect the integrity of the decision-making process of executive government and to maintain public trust in the Executive, Ministers and Parliamentary Under-Secretaries must conduct themselves in a manner appropriate to their office. Accordingly, the guidance in paragraphs 2.55 – 2.114:
- (a) explains the standards of personal conduct expected of Ministers;
 - (b) helps Ministers to identify personal interests that might be seen to influence their decision-making; and
 - (c) sets out options for managing conflicts of interest where necessary.
- 2.54 The guidance on conduct, public duty, and personal interests applies to all Ministers (inside and outside Cabinet) and Parliamentary Under-Secretaries. References to Ministers in this guidance include Parliamentary Under-Secretaries.

Conduct of Ministers

- 2.55 A Minister of the Crown, while holding a ministerial warrant, acts in a number of different capacities:
- (a) **in a ministerial capacity**, making decisions and determining and promoting policy within particular portfolios;
 - (b) **in a political capacity** as a member of Parliament, representing a constituency or particular community of interest; and
 - (c) **in a personal capacity**.

- 2.56 In all of these roles and at all times, Ministers are expected to act lawfully and behave in a way that upholds, and is seen to uphold, the highest ethical and behavioural standards. This includes exercising a professional approach and good judgement in their interactions with the public, staff, and officials, and in all their communications, personal and professional. Ultimately, all Ministers are accountable to the Prime Minister for their behaviour.
- 2.57 Holding ministerial office is regarded as a full-time occupation and is remunerated as such. Accordingly:
- (a) accepting additional payment for doing anything that could be regarded as a ministerial function is not permissible; and
 - (b) accepting payment for any other activities requires the prior approval of the Prime Minister.

Register of Pecuniary and Other Specified Interests of Members of Parliament

- 2.58 All members of Parliament are required to disclose certain assets and interests in an annual *Register of Pecuniary and Other Specified Interests of Members of Parliament*. The purpose of this register, administered by the Registrar of Pecuniary and Other Specified Interests of Members of Parliament, is to facilitate the transaction of business by the House by promoting the highest standards of behaviour and conduct by members, and thereby strengthening public trust and confidence in parliamentary processes and decision-making. The detailed requirements are set out in appendix B of the *Standing Orders of the House of Representatives* (the *Standing Orders*) and in the explanatory notes on members' financial interests provided to members by the Registrar (see also paragraphs 2.92 – 2.100 on gifts).

Ministers' interests

- 2.59 Additional requirements apply to Ministers' interests. Conflicts of interest may arise between Ministers' personal interests and their public duty because of the influence and power that Ministers exercise, and the information to which they have access, both in the individual performance of their portfolio responsibilities and as members of the Executive.
- 2.60 Ministers are responsible for ensuring that no conflict exists or appears to exist between their personal interests and their public duty. Ministers must conduct themselves at all times in the knowledge that their role is a public one; appearances and propriety can be as important as actual conflicts of interest. Ministers should avoid situations in which they or those close to them gain remuneration or other advantage from information acquired only by reason of their office.
- 2.61 The Cabinet Office, on behalf of the Prime Minister, supports Ministers in identifying and managing conflicts of interest that may arise in relation to their portfolios or other ministerial responsibilities. Accordingly:
- (a) the Cabinet Office contacts all Ministers on appointment and provides them with a worksheet containing questions and guidance designed to prompt Ministers' thinking about a broad range of interests and possible areas of conflict, financial and non-financial;

- (b) the Cabinet Office then meets each Minister for a confidential discussion about their worksheet and any issues that may arise;
 - (c) each year, following the publication of the *Register of Pecuniary and Other Specified Interests of Members of Parliament*, the Cabinet Office reminds all Ministers to review their interests in the light of their portfolio or other ministerial responsibilities, to consider any possible conflict issues, and to seek advice where necessary;
 - (d) the Cabinet Office is available during the year to provide guidance on any conflict issues that may arise, and on the acceptance of payments or gifts; and
 - (e) the management of any conflicts that are identified is agreed between the Prime Minister and the Minister concerned, with advice as required from the Cabinet Office.
- 2.62 Ministers themselves are responsible for proactively identifying and reviewing possible conflicts of interest, and ensuring that any conflicts of interest are addressed promptly by taking one or more of the measures set out in paragraphs 2.75 – 2.76.

Identifying conflicts of interest

Types of conflicts of interest

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

Pecuniary interests

- 2.64 Pecuniary interests are financial interests such as assets, debts, and gifts. A pecuniary conflict of interest may arise if a Minister could reasonably be perceived as standing to gain or lose financially from decisions or acts for which they are responsible, or from information to which they have 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. Ministers' investments in managed funds will not usually create a conflict of interest for a Minister (where those funds are broadly diversified, and the Minister has no control over investment decisions).

Interests of family, whānau, and close associates

- 2.65 A conflict may arise if people close to a Minister, such as a Minister's family, whānau, or close associates, might derive, or be perceived as deriving, some personal, financial, or other benefit from a decision or action by the Minister or the government. Ministers must therefore be careful not to use information they access in the course of their official activities in a way that might provide some special benefit to their family members, whānau, or close associates. Passing on commercially sensitive information, or encouraging others to trade on the basis of such information, may also breach the insider trading regime (see paragraphs 8.14 – 8.16). Such a breach may result in a significant fine or term of imprisonment.

- 2.66 Similarly, it may not be appropriate for Ministers to participate in decision-making on matters affecting family members, whānau, or close associates, for example, by:
- (a) attempting to intercede on their behalf on some official matter;
 - (b) proposing family members for appointments; or
 - (c) participating in decisions that will affect the financial position of a family member.
- 2.67 Whether someone is a “close associate” will involve questions of judgement and degree. New Zealand is a small and interconnected country. Simply being acquainted with someone, having worked with them, or having had official dealings with them will not usually create a conflict of interest, but a longstanding, close, or very recent association or dealing might.
- 2.68 Public perception is a very important factor. If a conflict arises in relation to the interests of family, whānau, or close associates, Ministers should take appropriate action (see paragraphs 2.75 – 2.76).

Association

- 2.69 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.
- 2.70 Ministers should take care, however, to ensure that they do not become associated with non-government organisations or community groups where:
- (a) the group’s objectives may conflict with government policy;
 - (b) the organisation is a lobby group; or
 - (c) the organisation receives or applies for government funding.
- 2.71 Any possible conflict arising from association with a non-public body should be dealt with using the measures set out in paragraphs 2.75 – 2.76.
- 2.72 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.

Iwi and hapū interests

- 2.73 Ministers may have a whakapapa connection with certain iwi and hapū. A Minister’s whakapapa will not, of itself, create an interest. However, an interest may arise where a Minister’s whakapapa is accompanied by a pecuniary, family, whānau, or close association interest. In those cases, the guidance in paragraphs 2.63 – 2.72 should be considered.

Managing conflicts of interest

- 2.74 Ministers must ensure that any conflicts of interest are addressed promptly. The Secretary of the Cabinet (and, where appropriate, the chief executive of the agency concerned) should be kept informed of conflicts of interest as they arise. In addition, the Prime Minister should be advised in writing of conflicts that are of particular concern or that will require ongoing management. If in doubt about the appropriate course of action, Ministers should consult the Prime Minister or the Secretary of the Cabinet.
- 2.75 If a conflict between a Minister's portfolio responsibilities and a personal interest is substantial and enduring, it may be necessary to consider a permanent change to some or all of the Minister's portfolio responsibilities.
- 2.76 Most conflicts can be managed by taking one or more of the following measures, in consultation with, and on the advice of, the Cabinet Office.
- (a) **Declaration of interest:** Where a Minister has a conflict of interest that arises during general decision-making (for example, at a meeting of Cabinet or a Cabinet committee), but the Minister does not have ministerial responsibility for the issue, a declaration of interest will generally be sufficient. Having declared the interest, the Minister should either withdraw from the discussion or seek the agreement of colleagues to continue to take part. The declaration of interest will be recorded. (Withdrawal from a Cabinet or Cabinet committee discussion on the grounds of conflict of interest does not absolve a Minister from collective responsibility for any decision resulting from the discussion.)
 - (b) **Not receiving papers:** A Minister's personal interest in an issue may mean that it is inappropriate for the Minister to receive official information on the issue. In this case, the Minister should instruct the Cabinet Office (and/or other officials, as appropriate) to ensure that the Minister does not receive official papers or reports about the issue.
 - (c) **Transferring responsibility to another Minister:** A Minister with a conflict of interest concerning a particular issue within their 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 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. In these situations, the Minister who receives the transfer should be referred to as the "Acting Minister of xx /for xx".
 - (d) **Transferring responsibility to the agency:** If a conflict arises in the Minister's portfolio concerning a minor issue, the Minister may be able to handle the matter without further difficulty by passing the issue on to the agency. The Minister should take care to ensure, however, that there is no attempt to influence the agency 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 themselves of the interest.

- (f) **Blind investment vehicles:** Ministers with complicated or extensive shareholdings may wish to consider placing their investments in a blind investment vehicle (for example, a blind trust), as a precaution against inadvertent conflicts of interest.
- (g) **Resignation from an organisation:** Where a conflict of interest arises from association with a non-government organisation, the Minister may need to resign from that organisation.

Conflicts of interest in the House

- 2.77 The *Standing Orders* require a member of Parliament who has a financial interest in an item of business in the House to declare that interest before consideration of the item. The member need not declare an interest that has already been disclosed in the *Register of Pecuniary and Other Specified Interests of Members of Parliament*. The *Standing Orders* define a financial interest as including an interest held by a member's spouse, partner, or dependent child. The Speaker can decide any dispute about whether a conflict exists. The rules are set out in the section entitled "Declaration of financial interests" in the chapter on general procedures in the *Standing Orders*.
- 2.78 Occasionally, a Minister may find that they have a conflict concerning a bill, or part of a bill, for which they have 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 they are in charge. Nonetheless, a Minister with any conflict concerning a bill for which they have portfolio responsibility may choose to arrange for another Minister to move formal motions relating to that bill. Any issue of this sort must be discussed in advance with the Prime Minister, the Leader of the House, and the relevant whip. The portfolio Minister must be absent from the House for another Minister to move the motions on the portfolio Minister's behalf, but may declare the conflict in a subsequent speech.

Constituency interests

- 2.79 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.
- 2.80 Where a member of Parliament is also a Minister, but has no portfolio responsibility in the areas relating to the issue of interest to them as a member of Parliament, the Minister may make representations to the Minister with the portfolio responsibility. Ministers representing the concerns of constituents (or the concerns of other sectors of the community, for example in the case of list members) should be clear at all times, however, that they are acting in their capacity as members of Parliament (for example, by signing correspondence as a member of Parliament and not using ministerial letterhead).
- 2.81 Where the member also holds the relevant portfolio or is the Associate Minister, further measures, as set out in paragraphs 2.75 – 2.76, 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 agency. If the matter is more significant, the Minister may instead pass ministerial responsibility for it to another Minister.
- 2.82 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.

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

Interactions with representatives from non-government or commercial organisations

- 2.84 In a democracy, everyone has the right to make representations to Ministers on matters that concern them. Ministers will receive a large number of requests for meetings with people and organisations seeking either to influence government policy or to position themselves for providing services.
- 2.85 It is a valid and appropriate aspect of a Minister's role to engage with representatives of non-government and commercial organisations. Care should be taken, however, to avoid creating a perception that representatives or lobbyists from any one organisation or group enjoy an unfair advantage with the government.

Personal email accounts and phone numbers

- 2.86 As far as possible, Ministers should not use their personal email account or phone number to conduct ministerial business. Where the use of a personal account or phone number for ministerial business is unavoidable (for example, when Ministers are travelling and/or have issues accessing their ministerial account) it is important that:
- (a) information is protected from unauthorised access, use, and disclosure and that classified and personal information is handled appropriately;
 - (b) the Minister's office and officials have ready access to relevant information;
 - (c) timely responses can be made to requests for access to that information, for example, under the Official Information Act 1982 and the Privacy Act 2020; and
 - (d) accurate records can be preserved of ministerial decision-making in line with the Public Records Act 2005 (see also paragraph 8.104).
- 2.87 Where a personal email account or phone number is used, steps should be taken to ensure those communications are captured for the official record.

Gifts and awards

General

- 2.88 The *Standing Orders* require members of Parliament to disclose to the Registrar of Pecuniary and Other Specified Interests of Members of Parliament any gift received with an estimated market value of more than a prescribed amount (or more than one gift from the same donor in the period with a total value of more than the prescribed amount), and the name of the donor. This declaration includes hospitality and donations in cash or kind.
- 2.89 Ministers who receive gifts worth more than the prescribed value must not only disclose them in their annual (or initial) return to the Registrar, but must also relinquish them, unless they obtain the express permission of the Prime Minister to retain them. Any gift received by Ministers may be relinquished to the Parliamentary Service to arrange appropriate display or storage. Gifts that Ministers receive from close family members need not be relinquished.

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

Gifts from foreign governments

- 2.91 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 2.88), they should be relinquished before or at the time of leaving office, unless the express permission of the Prime Minister is obtained to retain them (see paragraph 2.89). 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

- 2.92 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 (as defined in the *Standing Orders*), the Minister should seek the express permission of the Prime Minister to retain it, or pay full value for it. The gift still needs to be disclosed to the Registrar, although an explanatory note might be added.
- 2.93 Payment for air travel or accommodation may constitute a gift, and must be declared in the member's annual return. Where payment for air travel or accommodation is offered to a Minister, consideration should be given to whether it is appropriate instead for the government to pay for the air travel and accommodation, to avoid any potential or perceived conflict of interest. Where another country or an international organisation offers to pay for a Minister's travel costs, the guidance at paragraphs 2.127 and 2.128 should be considered.

Cultural gifts

- 2.94 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.
- 2.95 Although cultural gifts may be offered to a Minister with the best of intentions, accepting such gifts may create a perception of a conflict of interest or attract accusations of "double dipping". Ministers should return gifts of cash immediately, with a respectful statement explaining that they honour the intent behind the gift, but that it is their job to serve, and that they are already well remunerated for their work.
- 2.96 Acceptance of other cultural gifts such as fine mats or food is unlikely to create the same perception problems. The guidance in paragraphs 2.88 – 2.89 should be followed in such cases.

Awards and other recognition

- 2.97 On occasion, Ministers may be offered awards or other forms of recognition. Offers of awards or other recognition can come from a variety of organisations, including foreign governments, non-government organisations and universities.
- 2.98 Before accepting a significant award or other form of recognition, Ministers should consider the guidance at paragraphs 2.84 – 2.85 (lobbying) and paragraphs 2.88 – 2.96 (gifts and awards). The Cabinet Office is available for further advice on these matters.
- 2.99 Where the offer of a foreign honour is made to a Minister, the guidance at paragraphs 1.74 – 1.75 should be considered.

Candidate and party donations to a Minister

- 2.100 Ministers, as members of Parliament, may accept political donations (either to their political party or their own campaign). In the case of donations to their political party, the fact that the Minister is accepting the money on behalf of the party must be made clear, and the Minister must pass the money on as soon as possible. Before accepting donations to their own political campaign, Ministers should consider the guidance at paragraphs 2.59 – 2.62 and paragraphs 2.84 – 2.85.

Speaking engagements, endorsements, and non-ministerial activities

Speaking engagements

- 2.101 Ministers receive many invitations to events and offers of speaking engagements. Ministers should consider carefully which invitations they will accept, and try to honour invitations from a variety of organisations.
- 2.102 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.
- 2.103 If an appearance fee or other personal payment for any non-ministerial activity is offered to a Minister, the Minister may accept it only with the agreement of the Prime Minister. Such a payment must be declared in the Minister's annual disclosure of pecuniary interests (see paragraph 2.58). Unsolicited payments should be returned. With the agreement of the Prime Minister, fees may be accepted and donated directly to a recognised charity, but must still be declared (with an explanatory note).
- 2.104 Where travel and accommodation expenses are incurred by a Minister undertaking non-ministerial activities, they may be met by:
- (a) the organisers, in which case the travel and accommodation must be declared to the Registrar of Pecuniary and Other Specified Interests of Members of Parliament (subject to the exemptions in appendix B of the *Standing Orders*);
 - (b) the Minister personally; or
 - (c) the Crown, initially, in which case reimbursement must be made to a Crown bank account by the person or organisers concerned.

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

Endorsement of products, services, or organisations

- 2.106 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.
- 2.107 When accepting an invitation to speak or appear at an event, a Minister should inform the organisation that it may not publicise the event, or use any photos taken of the Minister at the event, in any way that could be perceived as an endorsement of the organisation, its products, or its services.
- 2.108 In speeches, statements, or videos (including social media posts), it is appropriate for a Minister to make positive statements about the objectives and achievements of an organisation or business. It is not appropriate for a Minister to explicitly promote the organisation, or its products or services.

Charitable fundraising

- 2.109 Ministers may be approached to participate in events designed to raise funds for charitable purposes. In considering any request to assist with charitable activities, Ministers should consider the guidance in paragraphs 2.70 and 2.106 – 2.108, noting that charities often operate in a competitive environment. In particular, Ministers participating in any charitable fund-raising activities should be careful not to place, or appear to place, themselves under an obligation as a Minister to those from whom funds are sought.

Business and professional activities

- 2.110 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.
- 2.111 Provided no conflict of interest arises, Ministers are not required to dissolve any professional partnerships, allow practising certificates to lapse, or dispose of businesses. They may also continue to advise in relation to family trusts, or similar matters of personal interest.

Provision of references

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

Use of information after leaving office

- 2.113 Ministers must ensure that, after leaving office, they do not use any confidential, commercially sensitive, or legally privileged information to which they have had access as a Minister in any way that affects their personal interests or the personal interests of their family, whānau, or close associates, while that information is not generally available to the public (see also paragraphs 8.14 – 8.16).

Post-ministerial employment

- 2.114 Ministers are entitled to engage in employment after they cease to hold office. While in office, Ministers' conduct and decisions should not be influenced by the prospect or expectation of future employment with a particular organisation or sector. When negotiating or engaging in post-ministerial employment, Ministers should also follow the guidance in paragraph 2.113.

Government advertising and publicity guidelines

- 2.115 Governments have a responsibility to keep the public informed about important issues of the day. They may legitimately use public funds and resources for advertising and other publicity that explains their policies, informs the public of the government services available to them, or sets out the public's rights and responsibilities. Government advertising and publicity must be accurate, factual, and objective, and comply with all relevant legislation and government policies.
- 2.116 The *Guidelines for Government Advertising* (available on the website of the Department of the Prime Minister and Cabinet) assist Ministers and the public sector in preparing advertising and publicity, and in the expenditure of public funds for this purpose. The Public Service Commission is available to provide advice to the state services on the guidelines, particularly if conduct or integrity issues arise.
- 2.117 Members of Parliament (including Ministers) and all parliamentary political parties can access funding from Vote Parliamentary Service for communications related to parliamentary business. For parliamentary political parties, this funding is based on the number of seats they hold in the House. Guidance on the use of these funds is available on Parliament's website. Public funds may not be used to finance publicity for party political purposes except for election advertising provided for under the Broadcasting Act 1989.
- 2.118 Special considerations apply to government advertising during an election year (see paragraphs 6.9 – 6.11). The Public Service Commission releases guidance to the public sector in an election year, which includes guidance relating to advertising and other communication activities (see the Commission's website).

Ministerial travel

Overseas travel

- 2.119 Overseas travel by Ministers or Parliamentary Under-Secretaries can provide important benefits to their portfolios and to New Zealand generally.
- 2.120 To ensure that their travel is approved properly and undertaken in an appropriate manner, Ministers must follow the principles set out in paragraphs 2.123 – 2.136, and the more detailed procedural guidance from Ministerial Services in the Department of Internal Affairs and in the *CabGuide*.

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

Purpose of travel

- 2.122 Ministers' travel should usually be for one or more of the following purposes relating to their portfolios:
- (a) to attend specific conferences, meetings, or events;
 - (b) to familiarise themselves with specific issues;
 - (c) to meet international obligations; or
 - (d) to represent New Zealand on significant occasions.

Approval of travel

- 2.123 Travel proposals require the preliminary approval of the Prime Minister. Ministers wishing to travel during a House sitting period will also need leave approved from the party whips. A Cabinet paper proposing the travel must subsequently be submitted to and approved by Cabinet (except for travel to Australia and the Ross Dependency in Antarctica, for which the Prime Minister's approval is sufficient). Ministers must seek the agreement of another Minister or Ministers to act for them during their proposed absence (see paragraphs 2.41 – 2.45). No commitments or understandings regarding overseas travel are to be entered into before the Prime Minister's preliminary approval is given.
- 2.124 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.
- 2.125 When considering proposals for overseas travel by Ministers, the Prime Minister will take into account the number of Ministers overseas at any one time. Usual practice is for no more than four Ministers in Cabinet to be absent from New Zealand on official business at the same time, although the Prime Minister may approve exceptions to this limit in special circumstances.
- 2.126 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

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

- 2.128 Any proposals for bodies other than government organisations to fund any of the travel, accommodation, or other expenses incurred by Ministers should be assessed in the light of the guidance on the public duty and personal interests of Ministers. See in particular paragraphs 2.59, 2.63, and 2.64, and the guidance on gifts (paragraphs 2.88 – 2.93 and 2.103). The Secretary of the Cabinet is available for advice. The *Standing Orders* require members of Parliament to disclose to the Registrar of Pecuniary and Other Specified Interests of Members of Parliament the name of any person who contributed in whole or in part to the costs of travel or accommodation for each country other than New Zealand to which the member travelled.

Accompanying family members, staff, and officials

- 2.129 It may be appropriate for a Minister to be accompanied by a spouse, partner, or family member, or, in some cases, a person providing personal support to the Minister, as a member of the official party. Approval is not given automatically; the Prime Minister will consider requests case by case. Requests should make it clear how the accompanying person's travel is proposed to be funded.
- 2.130 Ministers may be accompanied on overseas visits by staff from their own offices or officials from their public service agencies. The number of accompanying staff must be kept to an absolute minimum, and should be determined in the light of the nature of the visit.

Reporting on overseas travel

- 2.131 Within a month of their return, Ministers must report to Cabinet on the achievements and outcomes of their overseas travel. This reporting requirement does not apply in relation to ministerial travel to Australia (unless for a significant bilateral visit) or to the Ross Dependency in Antarctica.

Personal travel overseas

- 2.132 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.
- 2.133 Ministers may make personal visits overseas if they obtain the Prime Minister's prior approval, which will be subject to obtaining leave to be absent from the House. Ministers must also obtain the agreement of another Minister or Ministers to act during such periods of absence (see paragraphs 2.41 – 2.45). The Cabinet Office should be advised of any such arrangements.

Visits by Leaders and Ministers from other countries

- 2.134 The Prime Minister and the Minister of Foreign Affairs should be consulted if a visit by a leader or a Minister from another country is proposed. Guidance about the arrangements for a visit by an overseas leader or Minister is available from the Visits and Ceremonial Office at the Department of Internal Affairs.
- 2.135 The New Zealand government does not usually offer payment of international airfares for leaders or Ministers from other countries who are visiting New Zealand, although it may provide some assistance with internal costs.

Travel within New Zealand

- 2.136 Details of the procedures and entitlements governing ministerial travel within New Zealand are available from Ministerial Services, Department of Internal Affairs.

Related information

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

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

3 Ministers of the Crown and the Public Sector

Introduction

- 3.1 This chapter covers:
- (a) the relationship between Ministers and the various organisations that are part of the executive branch of government;
 - (b) the standards of integrity and conduct expected throughout the public sector.
- 3.2 In this chapter, the term:
- (a) “officials” covers both employees within the public service and those of the public sector, except where the context signals that it covers employees in the public service only;
 - (b) “agency” refers to any department that is part of the Crown, whether or not it is part of the public service. In some contexts, this includes those Crown entities that are Crown agents.
- 3.3 Guidance in this chapter may also be relevant for organisations outside the Crown.

The public service and the public sector

Public service

- 3.4 “Public service” is the term used to describe all public service departments, departmental agencies, interdepartmental executive boards, and interdepartmental ventures listed in Schedule 2 of the Public Service Act 2020 (together referred to as public service agencies). For the purposes of subparts 2 and 4 of Part 1 of the Public Service Act 2020, Crown agents are part of the public service. The public service is part of the executive branch of government.

Public sector

- 3.5 “Public sector” includes a broad range of organisations that serve as instruments of the Crown in respect of the Executive Government of New Zealand, including:
- (a) the public service;
 - (b) other departments in the executive branch of government that are not part of the public service (such as the New Zealand Police, the New Zealand Defence Force, and the Parliamentary Counsel Office);
 - (c) Crown entities;
 - (d) the various organisations listed in Schedule 4, and companies named in Schedule 4A, of the Public Finance Act 1989;

- (e) the Reserve Bank of New Zealand;
 - (f) organisations that are part of the legislative branch of government, such as the Office of the Clerk of the House of Representatives and the Parliamentary Service;
 - (g) offices of Parliament;
 - (h) state-owned enterprises, which are listed in Schedule 1 of the State-Owned Enterprises Act 1986; and
 - (i) mixed ownership model companies listed in Schedule 5 of the Public Finance Act 1989.
- 3.6 The term “state services” continues to be used in legislation to refer to specific organisations, and is defined in the Public Service Act 2020.
- 3.7 Local government is also generally considered part of the wider public sector, although this manual does not apply to that sector.

Ministers and the public service

- 3.8 The formal relationship between Ministers and the public service is governed primarily by the Public Service Act 2020 and the Public Finance Act 1989. The relationship is also governed by convention, the main aspects of which are set out in this chapter.

Roles and responsibilities

- 3.9 Ministers decide both the direction of and the priorities for the agencies for which they hold portfolio responsibilities. They are generally not involved in their agencies’ day-to-day operations. In general terms, Ministers are responsible for determining and promoting policy, defending policy decisions, and answering in the House on both policy and operational matters.
- 3.10 Ministers have a duty to give fair consideration and due weight to free and frank advice provided by the public service.
- 3.11 Officials are responsible for:
- (a) supporting Ministers in carrying out their ministerial functions;
 - (b) serving the aims and objectives of Ministers by developing and implementing policy and strategy;
 - (c) actively monitoring the performance or condition of public sector organisations, government assets, and regulatory regimes within their Ministers’ portfolios, and delivering high-quality and efficient public services;
 - (d) informing Ministers of significant developments within their portfolios, and tendering free and frank advice; and
 - (e) implementing the decisions of the government of the day.
- 3.12 Officials must be politically neutral in their work, serving the current Minister in such a way that they will equally be able to serve any future holder of the office. This principle of political neutrality is central to the public service’s ability to support the government of the day and any future government. See paragraphs 3.72 – 3.77.

Ministers' relationships with chief executives

- 3.13 The main point of contact between the Minister and a public service agency is the chief executive. Chief executives are responsible to their portfolio Ministers, under section 52 of the Public Service Act 2020, for:
- (a) improving ways of working across public service agencies;
 - (b) their agency's responsiveness on matters relating to the collective interests of government;
 - (c) the operation of their agency, including in carrying out the purpose of the public service;
 - (d) supporting their portfolio Minister to act as a good steward of the public interest, including by maintaining public institutions, assets, and liabilities; maintaining the currency of any legislation administered by their agency; and providing advice on the long-term implications of policies;
 - (e) the performance of the functions and duties and the exercise of the powers of the chief executive or of their agency (whether those functions, duties, or powers are imposed or conferred by an enactment or by the policies of the government);
 - (f) giving advice to Ministers;
 - (g) the integrity and conduct of the employees for whom the chief executive is responsible; and
 - (h) the efficient and economical delivery of the goods or services provided by the agency and how effectively those goods or services contribute to the intended outcomes.
- 3.14 Chief executives are also responsible to their responsible Ministers for the financial management, performance, and sustainability of their agency under section 34 of the Public Finance Act 1989. They advise appropriation Ministers on the efficiency and effectiveness of expenditure under both departmental and non-departmental appropriations administered by their agencies.
- 3.15 Chief executives are responsible for matters relating to the employment of individuals within their agency (see paragraphs 3.37 – 3.38). Chief executives, or other staff within the agency, may also have independent statutory functions. While they are required to exercise these independently, chief executives should still keep Ministers informed as appropriate under the “no surprises” principle (see paragraph 3.26(a)).

Accountability documents

- 3.16 Ministers are concerned not only with the short-term performance of their agencies, but also with the capability of their agencies to continue to deliver government objectives in the longer term. Ministers' priorities for agencies and the standard of performance expected of their agencies are specified in key accountability documents.
- 3.17 Accountability documents may include:
- (a) one-year performance information, to be found for example in supporting information to the *Estimates of Appropriations*;

- (b) medium-term performance information, found for example in information on strategic intentions as required by section 40 of the Public Finance Act 1989;
- (c) plans providing a medium and long-term perspective on agencies in the context of their longer-term vision, and, as appropriate, for the nature of their operations, such as investment or workforce plans; and
- (d) short-term plans and reporting as agreed between the chief executive and the relevant portfolio Minister for each Vote the agency administers when more detail is needed than that included in the supporting information to the *Estimates*.

Briefing for incoming Ministers

- 3.18 When a new Minister is appointed or a Minister assumes a new portfolio (whether after a general election or during the term of a government), the chief executive of the agency prepares a written briefing for the Minister. The briefing generally:
- (a) describes the organisation and responsibilities of the department or agency, including the main Crown assets and liabilities, and any Crown entities or other public sector agencies within the portfolio, and specifies any decision-making that has been delegated to the chief executive;
 - (b) sets out the terms of reference, membership, and terms of office for all boards, commissions, tribunals, and so on, for which the Minister has responsibility;
 - (c) describes any legislation for which the Minister is responsible;
 - (d) includes an account of major outstanding or emerging policy issues and the implementation of current programmes; and
 - (e) 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).
- 3.19 The chief executive may give this briefing to the Minister after the announcement of the Minister's appointment, with the approval of the incumbent Prime Minister and with the knowledge of the incumbent Minister and the Public Service Commissioner.
- 3.20 The written briefing should be tailored to the needs of the new Minister, and prepared in similar presentation and style to other agency 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.
- 3.21 Whether a briefing is proactively released publicly is a matter for the Minister, not the agency, to decide.
- 3.22 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 their initial requirements. This initial briefing will need to be supplemented, over a number of weeks, with further written or oral briefings as required.
- 3.23 The Public Service Commission has issued further guidance on the content of briefings for incoming Ministers (see the Public Service Commission website).

Long-term insights briefings

- 3.24 The chief executive of a public service agency must give an independent long-term insights briefing to the relevant portfolio Minister at least once every three years. The briefing is also intended to provide public-facing information on medium and long-term trends, risks, and opportunities that affect or may affect New Zealand, including analysis on the policy options for responding to these matters. The Minister must present a copy of the briefing to the House of Representatives as soon as is reasonably practicable after receiving it.
- 3.25 The Public Service Commission has issued further guidance on the contents of long-term insights briefings (see the Public Service Commission website).

Ministers and officials

- 3.26 The style of the relationship and frequency of contact between Minister and agency will develop according to the Minister's personal preference. The following guidance may be helpful.
- (a) In their relationship with Ministers, officials should be guided by the “no surprises” principle. As a general rule, they should inform Ministers promptly of matters of significance within their portfolio responsibilities, particularly where these matters may be controversial or may become the subject of public debate. This principle does not override the requirements for disclosing information under the Privacy Act 2020 and the Official Information Act 1982 (or other statutory restrictions).
 - (b) A chief executive should exercise judgement as to whether, when, and how to inform a Minister of any matter for which the chief executive has statutory responsibility. Generally a briefing of this kind is provided for the Minister's information only, although occasionally the Minister's views may be a relevant factor for the chief executive to take into account. In all cases, the chief executive should ensure that the Minister knows why the matter is being raised, and both the Minister and the chief executive should act to maintain the independence of the chief executive's decision-making process. The timing of any briefing may be critical in this regard. As a matter of best practice, briefings should be in writing or at least documented in writing.
 - (c) It would clearly be improper for Ministers to instruct their agencies to act in an unlawful way. Ministers should also take care to ensure that any direction they give their chief executive could not be construed as improper intervention in administrative, financial, operational, or contractual decisions that are the responsibility of the chief executive.
 - (d) Ministers are ultimately responsible for setting the government's policy priorities and objectives and are accountable for them in the House. Chief executives must provide their Ministers with all the relevant information and advice to enable the Ministers to set these priorities and objectives. In providing this information and advice, chief executives must take into account the resources available to their agencies and the need for stewardship of their agencies' future capability.
 - (e) On a day-to-day basis a Minister will have contact with the senior officials best able to provide the necessary information or advice. Agency staff and the Minister's office should keep the chief executive informed, at least in general terms, of any contact between the agency and the Minister. This information helps to keep lines of communication and accountability between the Minister and the agency clear.

- (f) Ministers should exercise a professional approach and good judgement in their interactions with officials. Ministers must respect the political neutrality of the public service and not request that officials act in a way that would conflict with the standards of integrity and conduct set by the Public Service Commissioner (see paragraphs 3.72 – 3.77).
 - (g) Ministers and agencies need a clear shared understanding as to which of them is responsible for media or other public comment on particular issues.
 - (h) Ministers and senior officials are likely to benefit from ongoing discussion about strategy for the agency, and the agency's capability and performance.
 - (i) Ministers should bear in mind that they have the capacity to exercise considerable influence over the public service. Ministers should take care to ensure that their intentions are not misunderstood, and that they do not influence officials inappropriately, or involve themselves in matters that are not their responsibility. Particular care should be taken with officials who are unlikely to have frequent or direct contact with Ministers, who may be less familiar with the principles, conventions, and working guidelines that govern the interaction between the public service and Ministers.
- 3.27 Ministers should ensure that staff and advisers in their offices understand the principles governing the Minister's role and the Minister's relationship with officials and entities in the public sector. Like Ministers, staff and advisers in Ministers' offices must take care to ensure that they do not improperly influence matters that are the responsibility of others.
- 3.28 Ministers who wish to obtain information from, or the assistance of, an agency other than one for which they are responsible should do so through the relevant portfolio Minister.
- 3.29 In addition to taking advice from the public service and other parts of the public sector, Ministers may take advice from other sources, including political advisers in their offices. Political advisers have an important role in supporting Ministers in their management of relationships with other political parties and of risk, and in negotiating support for policy and legislative initiatives.
- 3.30 A Minister may involve political advisers in policy development and other areas of work that might otherwise be performed within the Minister's agency. The Minister and the chief executive must establish a clear understanding to ensure that:
- (a) agency 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 agency actions

- 3.31 Ministers are accountable to the House for ensuring that the agencies 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 an agency when errors are made, even when the Minister had no knowledge of, or involvement in, the actions concerned. The question of subsequent action in relation to individual public servants may be a matter for the Public Service Commissioner (in the case of chief executives), or for chief executives in the case of members of their staff.

Appointment and review of chief executives

- 3.32 The Public Service 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.
- 3.33 The process of selecting most public service chief executives is managed by the Public Service Commissioner, in accordance with Schedule 7 of the Public Service Act 2020. An appointing panel is established, and the chairperson of the panel recommends an applicant to the Minister for the Public Service for appointment, who then refers the recommendation to the Governor-General in Council. 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 Public Service Commissioner and the chief executive, but the Commissioner must consult the Prime Minister and the Minister for the Public Service before finalising the conditions.
- 3.34 The Public Service Commissioner also has a role in managing the appointment process for a range of other chief executives and senior officers in the executive branch, beyond those for which the Commissioner has responsibility under the Public Service Act 2020. These appointments include:
- (a) Solicitor-General;
 - (b) Chief Parliamentary Counsel;
 - (c) Secretary of the Cabinet/Clerk of the Executive Council (see paragraph 5.88);
 - (d) Chief of Defence Force and senior defence appointments; and
 - (e) Commissioner of Police and senior police appointments.
- 3.35 The Public Service Commissioner may assist in the appointment process for certain chief executives and senior officers in the legislative branch of the public sector (for example, the Clerk of the House of Representatives) if requested to do so by the Speaker.
- 3.36 The Public Service Commissioner is also responsible under the Public Service Act 2020 for reviewing the performance of public service chief executives and their agencies. Various statutory and other mechanisms also enable the Commissioner to carry out performance reviews in relation to the heads of other agencies including the New Zealand Police, the New Zealand Defence Force, the Parliamentary Counsel Office, the Parliamentary Service, and the Office of the Clerk of the House of Representatives.

Chief executives as employers

- 3.37 The public service is established on the principle of merit-based appointments. Chief executives act as the employing authority for the agencies to which they have been appointed. Under section 54 of the Public Service Act 2020, chief executives must act independently in matters such as the appointment, promotion, or disciplining of individual employees. They are not responsible to their Minister in such matters. Generally, the duty of independence and the obligation to act as a good employer will make it inappropriate for a chief executive to involve their Minister in any staffing matter.

- 3.38 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 3.26.

Ministers and Crown entities

General

- 3.39 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 Public Service Act 2020, Crown entities (except tertiary education institutions and their Crown entity subsidiaries) are, however, instruments of the Crown. Ministers, Crown entity boards, and monitoring agencies participate in the governance of Crown entities in different ways.
- 3.40 Ministers play an important 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.
- 3.41 The Crown entity’s board governs the entity’s operations. A monitoring agency 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 agencies.
- 3.42 Detailed guidance on Ministers’ roles and responsibilities in relation to Crown entities is set out in the *Guide for Ministers: Statutory Crown Entities*, and accompanying resources published by the Public Service Commission.

Role of Ministers

- 3.43 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.
- 3.44 The Minister’s role and responsibilities are to:
- (a) appoint and maintain an effective governance board. Appointments must be made based on merit and in accordance with any other statutory criteria and process for appointment;
 - (b) provide the Crown entity board with clear performance expectations;
 - (c) participate in setting the direction of Crown entities, which may include setting the direction for multiple agencies in a sector;
 - (d) monitor and review Crown entity operations and performance; and
 - (e) manage risks on behalf of the Crown.

- 3.45 The Crown Entities Act 2004 (and other legislation that relates to particular Crown entities) sets out the extent of the control the Minister has over a Crown entity. The extent of this control depends on the entity's category and type, and whether it has any statutorily independent functions. For example, Crown agents must give effect to, and autonomous Crown entities must have regard to, any government policy that relates to the entity's functions and objectives, when directed by the relevant responsible Minister. A Minister may not direct an independent Crown entity to have regard to government policy unless specifically provided for in an Act. 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 (22) 2 *Revised Fees Framework for members appointed to bodies in which the Crown has an interest*).
- 3.46 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.
- 3.47 The Minister for the Public Service's portfolio responsibility includes responsibility for Crown entities. Ministers should consult the Minister for the Public Service 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.

Directions to support a whole of government approach

- 3.48 The Minister of Finance and Minister for the Public Service may issue directions to support a whole of government approach under section 107 of the Crown Entities Act 2004 to specified categories or types of Crown entities as defined in the Act, or to a group of such entities. (Companies named in Schedule 4A of the Public Finance Act 1989 may be treated as a category of Crown entity for the purposes of such directions.) Such a direction can be issued for any of the following purposes:
- (a) to improve (directly or indirectly) public services;
 - (b) to secure economies or efficiencies;
 - (c) to develop expertise and capability;
 - (d) to ensure business continuity; or
 - (e) to manage risks to the Government's financial position.
- 3.49 Any Crown entity to which a direction to support a whole of government approach is issued must give effect to the direction.
- 3.50 The Crown Entities Act 2004 specifies requirements for consultation on the draft direction and presentation of the final direction to the House of Representatives. Further information can be sought from the Public Service Commission and Treasury. These agencies should also be consulted in relation to any advice on the proposed use of a whole of government direction.

Role of Crown entity boards

- 3.51 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, a board's actions must be consistent with the Crown entity's objectives, functions, statement of intent, and any statement of performance expectations.
- 3.52 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

- 3.53 The Crown Entities Act 2004 provides for Ministers to participate in the process of setting the entity's strategic direction through its statement of intent, and setting the annual performance expectations through its statement of performance expectations, and monitoring their performance. Each Crown entity has a monitor (usually the agency in the relevant portfolio), which assists the Minister with appointing and maintaining an effective board, setting direction and performance expectations, and monitoring performance. In addition, monitors undertake other statutory functions on their own behalf, administering appropriations and legislation, tendering advice to Ministers, and undertaking any other activities required under statute. The monitor's role for statutory entities is set out in section 27A of the Crown Entities Act 2004, and in section 88A for Crown entity companies.

Ministers and companies in the public sector

General principles

- 3.54 The Crown has an ownership interest in a range of companies in the public sector.
- 3.55 Companies that are wholly or majority owned by the Crown are usually (although not always) subject to a statutory accountability regime, such as Crown entity companies, companies listed on Schedule 4A of the Public Finance Act 1989, state-owned enterprises, and mixed-ownership model companies. For all such regimes, the Crown's interest is held through two shareholding Ministers—the Minister of Finance and one other.
- 3.56 All companies are bound by the provisions of the Companies Act 1993. Each company has a board of directors, which has responsibility for running the business. The board of directors is accountable to the shareholding Ministers for the company's performance.

- 3.57 The relationship between Ministers and companies in the public sector differs from the relationship between Ministers and agencies in the public service. 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 public sector (see paragraphs 2.106 – 2.108).
 - (c) **Avoidance of conflict between public duty and personal interests:** As in all areas of their portfolio responsibilities, Ministers should take care to ensure that no conflict exists or appears to exist between their public duty and their personal interests (see paragraphs 2.59 – 2.76).
 - (d) **Careful use of information:** Information relating to companies that are listed on the New Zealand stock exchange (NZX) and NZX Debt Market (NZDX) must be treated with particular care to avoid breaches of the insider trading regime (see paragraphs 8.14 – 8.16).
- 3.58 The applicable monitoring department (usually the Treasury) provides the government with advice to enable the shareholding Ministers to hold boards of Crown-owned companies accountable for their performance.

Crown entity companies and Public Finance Act 1989 Schedule 4A companies

- 3.59 Crown entity companies are 100 percent owned by the Crown. Public Finance Act 1989 Schedule 4A companies must be more than 50 percent (and can be up to 100 percent) owned by the Crown.
- 3.60 The expectations of Crown entity companies and Public Finance Act 1989 Schedule 4A companies vary in accordance with their constitution, strategic direction, and performance expectations. Crown entity companies are subject to the accountability regime set out in the Crown Entities Act 2004. Public Finance Act 1989 Schedule 4A companies are subject to Part 5AAA of the Public Finance Act 1989, which applies select provisions of the Crown Entities Act 2004 to all Public Finance Act 1989 Schedule 4A companies as though they were Crown entity companies.
- 3.61 The role of the shareholding Ministers is prescribed in the Crown Entities Act 2004 (in the case of Public Finance Act 1989 Schedule 4A companies, to the extent applicable). Their functions include:
- (a) appointing directors;
 - (b) if applicable, approving the exercise of key financial powers (such as lending, borrowing, and guarantees) and directing payment of surpluses;
 - (c) reviewing the company's operations and performance and requesting information;
 - (d) monitoring performance; and
 - (e) participating in the process of setting the company's strategic direction and performance expectations, and presenting them to the House.

State-owned enterprises

- 3.62 State-owned enterprises are 100 percent owned by the Crown. All state-owned enterprises are required by the State-Owned Enterprises Act 1986 to operate as successful businesses.
- 3.63 The role of the shareholding Ministers is prescribed in the State-Owned Enterprises Act 1986. Their functions include:
- (a) appointing directors; and
 - (b) presenting to the House the state-owned enterprise's statement of corporate intent and annual report.
- 3.64 Most state-owned enterprises are subject to ministerial direction as to certain aspects of the content of the company's statement of corporate intent and the amount of dividend payable, in accordance with section 13 of the State-Owned Enterprises Act 1986.

Mixed-ownership model companies

- 3.65 The mixed-ownership model allows for ownership by the Crown and minority shareholders. The Crown must retain at least a 51 percent shareholding and no other party may own more than 10 percent of the shares.
- 3.66 Unlike Crown entity companies, Public Finance Act 1989 Schedule 4A companies, and state-owned enterprises, mixed-ownership model companies are publicly listed on a registered market.
- 3.67 The publicly listed companies are bound by the provisions of the Companies Act 1993 and NZX rules.
- 3.68 The shareholding Ministers have the role of a shareholder of a publicly listed company. As the Crown is the majority shareholder, the Crown's vote determines the outcomes of resolutions on matters such as director appointments. The Minister of Finance must approve the board's choice of chair. Unlike other statutory regimes for Crown-owned companies, shareholding Ministers have no formal powers to issue ministerial directions to the listed companies.

Integrity and conduct throughout the public sector

Principles of public service

- 3.69 New Zealand's public sector is founded on the principles of political neutrality, free and frank advice, merit-based appointments, open government, and stewardship. These principles and agencies' responsibilities are set out in section 12 of the Public Service Act 2020.
- 3.70 Employees in the public sector act with a spirit of service to the community and must meet high standards of integrity and conduct in everything they do. In particular, officials must be impartial, accountable, trustworthy, respectful, and responsive.
- 3.71 The Public Service Commissioner sets minimum standards of integrity and conduct, including in relation to public service values and principles. A code of conduct and related guidance are published on the Public Service Commission's website.

Political neutrality

- 3.72 Political neutrality requires officials to support the government of the day to develop and implement its policies and follow lawful instructions from Ministers to the best of their professional ability and irrespective of their own political opinions. Officials are expected to act in such a way that their agency maintains the confidence of its current Minister and of future Ministers. This principle is central to the public service's ability to serve the government of the day and any future government.
- 3.73 Ministers must respect the political neutrality of the public service and not ask officials to act in any way that would conflict with their obligation of neutrality. Ministers may ask officials to provide them with factual or analytical material, but should not require them to offer comment or opinion on clearly political topics, such as policies mooted by other parties in Parliament. The Public Service Commission issues advice about political neutrality and integrity and conduct over an election period, including costing political parties' policies, in its pre-election guidance.
- 3.74 Political advisers have a specific exemption from the political neutrality requirements. Otherwise, they are subject to the same standards of integrity and conduct as other public servants.
- 3.75 Employees in the public sector, including staff in Ministers' offices, should ensure that their personal interests or activities do not interfere with, or appear to interfere with, their obligation to serve the aims and objectives of their employer. They must seek to avoid situations where there could be a conflict, or the appearance of a conflict, between their personal interests and the interests of their employers.
- 3.76 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.
- 3.77 For further information on conflicts of interest, see guidance from the Public Service Commission and the Office of the Controller and Auditor-General.

Free and frank advice

- 3.78 Advice to Ministers must be free and frank. It should be based on officials' professional opinions and best judgement. Free and frank advice is honest and fearless but should also be responsive to the priorities determined by the government of the day, and be offered with an understanding of the government's political context.
- 3.79 The provision of free and frank advice allows Ministers to take decisions based on the best available evidence and an appreciation of the expected major benefits, costs, risks, and issues. In the end, it is Ministers who decide on policy and, once a decision is made, the public service should implement that decision as effectively as possible.
- 3.80 The Department of the Prime Minister and Cabinet and the Public Service Commission issue guidance on how to deliver effective free and frank advice. See the websites of these agencies for further information.

Merit-based appointments

- 3.81 When making an appointment within the public sector, preference must be given to the person who is best suited to the position, maintaining procedural fairness for all candidates. Further information about making merit-based appointments is on the Public Service Commission website.

Open government

- 3.82 Open government is about transparency, participation, and accountability. It allows the public to understand what government does and why, and hold the government to account. The principle of open government is to encourage and support the involvement of people in democratic processes and the business of government. Openness does not preclude confidentiality. The existing commitments to open government are outlined on the Public Service Commission website.

Stewardship

- 3.83 Stewardship is a proactive duty to care for resources that belong to or exist for the benefit of others. It involves building the capability and experience to think, plan, and manage with a focus on the long-term interests of citizens. The public service must look ahead to the medium and long term to identify and meet future challenges, and to take opportunities to strengthen the governance and security of New Zealand and its people. The public service also must be able to connect these long-term perspectives with the shorter-term priorities of the government of the day.

Processes for upholding the principles of public service

- 3.84 The Public Service Commissioner has a mandate to set minimum standards for integrity and conduct for much of the public sector, including public service agencies and most Crown entities.
- 3.85 These standards are available on the Public Service Commission website. Agencies that the standards apply to must maintain policies and procedures that are consistent with the standard. The Commissioner can vary the standard to reflect the circumstances of particular agencies, or of any people undertaking particular functions in an agency.
- 3.86 Agencies in the public sector can seek advice and guidance from the Public Service Commission on matters relating to the integrity and conduct of employees. The Commission can advise on:
- (a) compliance with the principles of public service; and
 - (b) the interpretation and application of standards, including advice on any particular cases of actual or potential conflict of interest.
- 3.87 Schedule 3 clause 5 of the Public Service Act 2020 sets out the circumstances under which the Public Service Commissioner may carry out certain statutory functions and powers in relation to parts of the public sector that are not part of the public service (subject to any legislative provision to the contrary).
- 3.88 In relation to integrity and conduct, the Public Service Commissioner has only the functions and powers for those agencies that are specifically authorised by legislation. A Minister with portfolio responsibility for an agency in the public sector may therefore wish to clarify their expectations with the chair of the board of the agency at the beginning of their relationship. These expectations may include an understanding that the agency will observe appropriate standards of ethics and conduct equivalent to those set out in the standards issued by the Public Service Commissioner (see paragraph 3.85).

Public comment on government policy

- 3.89 Authorised spokespeople for agencies may publicly explain government policy. Defending or justifying it is the Minister’s role. If an official is approached to discuss advice given to a Minister, the “no surprises” principle applies, and ministerial agreement may be needed. Having provided advice that becomes public (such as impact statements or agency briefings), it is usually appropriate for an agency rather than the Minister to take responsibility for responding to questions about the advice tendered. However, if the Minister chooses to comment publicly on the advice, officials should not generally respond to those comments in public.
- 3.90 Generally, public servants acting in a private capacity have the same rights of free speech and conduct of their private affairs as other members of the public. They should, however, ensure that their personal contribution to public discussion, including any on social media, maintains a level of discretion appropriate to the position they hold. Senior public servants, or those working closely with Ministers, need to exercise particular care.

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

Select committees

- 3.91 The select committee is the main parliamentary institution with which public servants have contact. Senior public servants regularly represent the Executive and support the government in terms of the government’s accountability to the House of Representatives through select committees. The primary responsibility of officials is to their Ministers when they provide information or advice to select committees. Officials are subject to ministerial direction on answers to be given and information to be supplied to select committees.
- 3.92 The Public Service Commission and the Office of the Clerk of the House of Representatives have issued detailed guidance on the relationship between officials and select committees (*Officials and Select Committees – Guidelines*, available on the Public Service Commission’s website and *Working with Select Committees*, on the Parliament website). Officials should consult these guidelines before attending a select committee (either as an adviser or as a witness) or providing information to a select committee.
- 3.93 The House of Representatives must receive free and frank answers and evidence from those who appear before its committees. Parliamentary proceedings are protected by parliamentary privilege to ensure that those participating in them, including witnesses before select committees, do so without fear of external consequences. Officials from public sector agencies appear before select committees to support ministerial accountability, and their conduct must be consistent with this principle. Therefore, at a minimum, they have an obligation to manage risks and apply a “no surprises” approach in briefing their Ministers.
- 3.94 See paragraphs 7.112 – 7.126 for information on the role of Ministers in relation to select committees.

Caucus and caucus committees, and members of Parliament

- 3.95 Ministers may from time to time ask officials to attend a meeting of a caucus committee or caucus, or provide a briefing to a member or members of Parliament, particularly to support Ministers in briefing their colleagues about a current issue or proposed legislation. Requests from other sources for officials to attend caucus or caucus committee meetings, or to brief a member of Parliament, must be relayed through the relevant Minister and should be accepted only with the Minister's agreement. The role of officials at these meetings is to provide factual information only. Officials should not comment on the merits of government or party proposals. See paragraphs 7.30 and 7.60 – 7.63 for information on the role of Ministers in relation to caucus(es) and caucus committees.

Supporting consultation and negotiation between political parties

- 3.96 Ministers are responsible for consultation and negotiation involving political parties represented in the House. On occasion, Ministers may call on officials to support them in this process. Ministers should instruct their officials clearly on the nature of the contact, and on whether their role is to support a factual briefing or to support a process of consultation and negotiation. Any contact between an official and a representative of a political party should take place only with the prior approval of the official's Minister.
- 3.97 Special rules apply in the period leading up to and following an election, and particular care should be taken at these times (see chapter 6 and guidance on the Public Service Commission website).
- 3.98 Information on the coalition and/or support agreements entered into by the parties forming a government is issued from time to time in a Cabinet Office circular. The circular sets out the practical arrangements for implementing any agreement, and provides guidance for Ministers, their staff, and officials on their respective roles and responsibilities in relation to the arrangements.

Private communications with Ministers and members of Parliament

- 3.99 Officials may communicate with Ministers and members of Parliament about matters affecting them as private citizens. Senior officials or those working closely with Ministers, however, should exercise particular care in doing so. An official is entitled to the same information and level of detail in response to an official information request as any member of the public.
- 3.100 If an employee wishes to communicate privately with a Minister about a matter concerning the agency by which they are employed, the Minister should ensure that the employee has first raised the matter with the agency's chief executive.
- 3.101 An employee may wish to disclose a serious wrongdoing in or by an agency under the Protected Disclosures (Protection of Whistleblowers) Act 2022. 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).
- 3.102 If, an employee having disclosed a serious wrongdoing, the matter has not been resolved to the employee's satisfaction, the Minister may:
- (a) refer the matter to an appropriate authority or to the Ombudsman for consideration, if the Ombudsman has not already considered the matter; or
 - (b) where appropriate, commission an independent investigator to investigate the disclosure on the Minister's behalf.

Related information

- Information on Cabinet and Cabinet committee processes is set out in the *CabGuide*, dpmc.govt.nz/publications/cabguide.
- Information on standards of integrity and conduct, political neutrality, briefings for incoming Ministers, contact between public servants and political parties, working with select committees, pre-election guidance, and board appointment and induction guidelines can be found on the Public Service Commission website, publicservice.govt.nz.
- Practical guidance about free and frank advice can be found on the Department of the Prime Minister and Cabinet website, dpmc.govt.nz/our-programmes/policy-project/policy-advice-themes/free-and-frank-advice.
- Further advice on the public service principles of political neutrality, free and frank advice, merit-based appointments, open government, and stewardship can also be found on the Public Service Commission website, publicservice.govt.nz.
- The fees framework for members of statutory and other bodies appointed by the Crown is contained in Cabinet Office circular CO (22) 2 *Revised Fees Framework for members appointed to bodies in which the Crown has an interest*, and can be found on the Department of the Prime Minister and Cabinet's website, dpmc.govt.nz/publications/cabinet-office-circulars-and-notice.
- Guidance on accountability documents is available on the Treasury's website, treasury.govt.nz/information-and-services/state-sector-leadership/guidance.
- Information on Ministers' relationships with Crown entities can be found in *Guide for Ministers: Statutory Crown entities*, and other resources published by the Public Service Commission, available at publicservice.govt.nz.
- The Office of the Auditor-General's publication *Managing Conflicts of Interest: A guide for the public sector* (2020) can be found on the website of the Controller and Auditor-General, oag.parliament.nz.
- A guide for officials advising select committees, *Working with Select Committees*, is available on the Parliament website, parliament.nz.

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

4 Ministers, the Law, and Inquiries

Introduction

- 4.1 This chapter covers:
- (a) the role of the Attorney-General, including the law officer role;
 - (b) the relationship between Ministers and the judiciary;
 - (c) litigation involving Ministers, including judicial review and proceedings taken by or against a Minister personally;
 - (d) legal advice and professional privilege;
 - (e) inquiries.

Attorney-General

General

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

Role of the Attorney-General

Law officer role

- 4.3 The Attorney-General has particular responsibility for maintaining the rule of law. The Attorney-General has a responsibility to notify Cabinet of any proposals or government actions that do not comply with existing law and to propose action to remedy such matters. The New Zealand Bill of Rights Act 1990 requires the Attorney-General to report to Parliament if a bill appears to be inconsistent with this Act.
- 4.4 The Attorney-General may take into account public policy considerations when exercising the law officer functions. By convention, however, the Attorney-General is not influenced by party political considerations, and should avoid appearing to be so influenced. Consequently, when acting in the law officer capacity, the Attorney-General is not subject to collective responsibility. The Attorney-General may seek the views of other Ministers, and they may volunteer their views.
- 4.5 The Attorney-General, as a Minister, whether inside or outside Cabinet, shares collective responsibility for the decisions of Cabinet that do not relate to the law officer role.

Legal proceedings involving the Crown

- 4.6 The conduct of legal proceedings involving the Crown is the responsibility of the Attorney-General. In practice, the Solicitor-General, the Crown Law Office, or departmental legal teams, acting on the Attorney-General's behalf, generally provide legal services to the portfolio Minister or the department involved in proceedings. The Attorney-General monitors litigation or prosecutions in which the Crown is involved, and informs Cabinet of progress.
- 4.7 The Attorney-General also has a role in advising Cabinet on the indemnity of individual Ministers involved in legal proceedings (see paragraphs 4.45 – 4.49).

Link between the judiciary and the government

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

Responsibility for agencies

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

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

- 4.10 When the Attorney-General is overseas, unwell, or otherwise temporarily unavailable:
- (a) another Minister may exercise the Attorney-General's ministerial functions under section 7 of the Constitution Act 1986; and
 - (b) the Solicitor-General may exercise the Attorney-General's law officer functions under section 9A of the Constitution Act 1986.
- 4.11 If necessary, an Acting Attorney-General may be appointed by warrant to exercise the law officer functions of the Attorney-General (for example, an Acting Attorney-General is needed to exercise the functions of the Attorney-General under section 7 of the New Zealand Bill of Rights Act 1990).

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 matters before the courts or judicial decisions, whether generally, or in relation to the specifics of an individual case (for example, the sentence).
- 4.13 Ministers should not express any views that are likely to be publicised if they could be regarded as reflecting adversely on the impartiality, personal views, or ability of any judge. If a Minister has grounds for concern over a sentencing decision, the Attorney-General should be informed.

- 4.14 Following a long-established principle, Ministers do not comment on or involve themselves in the investigation of offences or the decision as to whether a person should be prosecuted, or on what charge. Similarly, they should not comment on the results of particular cases, on matters that are subject to suppression orders, or on any sentence handed down by a court. Ministers must avoid commenting on any sentences within the appeal period, and should avoid at all times any comment that could be construed as being intended to influence the courts in subsequent cases.
- 4.15 The *Standing Orders of the House of Representatives* (the *Standing Orders*) prohibit discussion in the House of matters that are awaiting judicial decision or that are the subject of a suppression order, subject to the discretion of the Speaker. The *Standing Orders* provide useful guidance on when to refrain from comment. The requirement for restraint applies to both civil and criminal cases.
- 4.16 Ministers may comment on the effectiveness of the law, or about policies on punishment (that is, on matters where the Executive has a proper involvement), but not where the performance of the courts is brought into question.

Crown legal business

- 4.17 Cabinet Office Circular CO (16) 2 *Cabinet Directions for the Conduct of Crown Legal Business* is available on the Department of the Prime Minister and Cabinet's website. These directions set out the processes to be followed when:
- (a) Ministers seek legal advice or representation in matters concerning their portfolios; or
 - (b) an agency requires legal services from outside its agency legal staff.
- 4.18 All enquiries regarding the directions should be directed to the Crown Law Office.

Litigation involving Ministers

Judicial review

- 4.19 "Judicial review" is the review by a Judge of the High Court of any exercise of, or non-exercise of, a decision-making power in order to determine whether or not the decision was lawful or valid. Most formal decisions taken by the executive arm of government (including Ministers), and the process by which they are reached, can be reviewed by a court. Ordinarily, a power that is the subject of review proceedings will be one that has been conferred on the decision-maker by statute.
- 4.20 On occasion, the courts will review the exercise of other public powers. In principle, all exercises of public power are reviewable, whether the relevant power is derived from statute, the royal prerogative, or any other source. However, the courts acknowledge that some exercises of public power are not suitable for judicial review because of their subject matter. The courts would be most unlikely to intervene in decisions about policy formation by the government of the day or involving political or fiscal considerations.
- 4.21 This does not mean that any decision having a policy context will be inappropriate for review if the Court considers some principle of public law decision-making has been breached. In addition, even if not appropriate for judicial review, a policy decision may be open to challenge in another forum, such as the Waitangi Tribunal.

4.22 The following are the two basic questions for judicial review.

- (a) Has the decision-maker acted within the scope of their power or discretion conferred?
- (b) Has the decision-maker acted reasonably and fairly?

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

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

- (a) acted outside the scope of the power or discretion;
- (b) misinterpreted the applicable law;
- (c) did not make up their own mind on the matter that they were 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 they failed to hear from or consult with persons or groups who would be affected by, or otherwise had an interest in, the particular decision.

4.24 Generally, a decision will have been made following advice from officials, which is likely to touch on many of the matters listed in paragraph 4.23, and often those officials will be the key witnesses in judicial review proceedings. Where the Minister is required to make the final decision, however, the court will regard the Minister as the person who is ultimately responsible for ensuring that the decision is made reasonably, fairly, and according to law.

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

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

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

- 4.27 Requests to produce Cabinet or departmental papers to a court or other quasi-judicial body, or to give evidence in court or to another quasi-judicial body on official matters, usually take the form of a formal notice or order in existing proceedings. These documents are unlikely to be received by Ministers directly, as the Crown Law Office is generally authorised to accept service on a Minister's behalf.
- 4.28 Any Minister who receives such a request should refer it to the Attorney-General, who may consult the Solicitor-General on the question of whether public-interest immunity should be claimed. Public-interest immunity is a term that applies to the protection of official information from disclosure where its disclosure would be injurious to the public interest (see paragraph 8.99).
- 4.29 Cabinet or departmental documents that are relevant to a legal proceeding are potentially subject to production or discovery. See paragraphs 8.98 – 8.101 for guidance.
- 4.30 If a Minister or government department considers that it is necessary to release any documents containing legal advice provided to the government, approval must first be obtained from the Attorney-General, through the Crown Law Office. This principle applies to documents containing legal advice from the Crown Law Office, internal legal advisers, or lawyers in private practice. See the guidance on legal advice and legal professional privilege in paragraphs 4.62 – 4.73.
- 4.31 In judicial review proceedings, the Court of Appeal has indicated that an affidavit from the relevant Minister may be desirable to ensure that the court has reliable evidence of the reasons why the Minister acted in a particular way. Cross-examination on an affidavit made by a Minister is unlikely to be permitted unless the court concludes that cross-examination is necessary to allow the case to be disposed of fairly. Cross-examination is unlikely to be ordered if:
- (a) the chain of documents culminating in a decision is sufficiently complete; and
 - (b) the Minister's affidavit addresses the matters raised in the case.
- 4.32 The practice of limiting cross-examination reflects a balance between two competing objectives. The first is to ensure that the courts are able to discharge their functions properly. The second is to preserve the relationship of mutual respect and deference between the branches of government, acknowledging that the first call on a Minister's time must be the House and the duties of executive office. Similar considerations arise when considering requests for Ministers to appear before other quasi-judicial forums.
- 4.33 A subpoena or any less formal attempt to require a Minister to give evidence in person should always be referred to the Crown Law Office for advice.
- 4.34 In certain circumstances, the Speaker may issue a certificate exempting any member of Parliament from attendance at court in answer to a summons to attend as a party or witness in a civil proceeding, or as a witness in a criminal proceeding. The Speaker's power to issue such a certificate arises under the Parliamentary Privilege Act 2014. Additionally, where a Minister is unable to give any relevant and admissible evidence in the proceedings for which the witness summons has been issued, an application can be made to the court to have the summons set aside. In either event, the Crown Law Office will help the Minister make the necessary applications.

Service of court documents

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

Indemnity of Minister as a defendant

Proceedings brought against Ministers

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

Proceedings concerning the exercise of ministerial powers

- 4.37 Ministers may be named as defendants in court proceedings, almost always in relation to the exercise of their ministerial powers. Most proceedings will be by way of judicial review, which generally involves a legal challenge to the way in which a particular (usually statutory) power has been exercised (see paragraphs 4.19 – 4.26).
- 4.38 Ministers would not be at risk of judicial review proceedings at all if it were not for their official position. It is a convention of government, therefore, that Ministers should be indemnified by the Crown for any actions taken against them for things done or decisions made in the course of their ministerial duties. The indemnity will cover the cost of defending the proceedings, and any costs or damages awarded against the Minister (in all but exceptional cases—see paragraph 4.55).

Proceedings against a Minister personally

- 4.39 On occasion, Ministers may be sued for acts done while a Minister, but having a more “personal” aspect. For example, a Minister may be sued in defamation arising from the contents of a particular speech or other public statement. Or proceedings may be instituted alleging that a Minister has acted dishonestly or in bad faith. The extent to which a Minister will be personally liable will depend on the law relating to the particular matter.
- 4.40 By their very nature, cases against a Minister personally raise issues about whether the Minister has acted so far beyond the scope of their authority that the Minister should not be indemnified by the Crown in relation to the proceedings. No absolute legal right to indemnity by the Crown exists just because a Minister was acting as a Minister in doing, or refraining from doing, the act that is the subject of the claim.
- 4.41 Where a Minister is sued or threatened with legal action personally and it is uncertain whether they should be indemnified, the normal arrangement is to seek Cabinet’s agreement in advance to meet the expenses of legal representation. The question of indemnity on costs and damages will be held over until judgment has been given (see paragraphs 4.53 – 4.56).
- 4.42 If an indemnity is given to a Minister, the government may be called on to answer for it in the House.

Indemnity in other cases

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

Preliminary steps

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

Cabinet consideration

- 4.45 If the Attorney-General forms the view that the matter arose from the Minister's duties, the Attorney-General should consult the Prime Minister and the Minister of Finance and submit a paper to Cabinet seeking a decision on whether or not to indemnify the Minister's expenses. The Attorney-General should also advise the Secretary of the Cabinet of their intention to seek a Cabinet decision.
- 4.46 The Cabinet paper should note that the Attorney-General is satisfied that the matter has arisen as a consequence of the Minister carrying out their ministerial duties. It should seek a decision from Cabinet on whether the Crown will:
- (a) undertake the defence of the proceedings, that is, treat it as an ordinary action against the Crown (this will usually be the case for judicial review proceedings); or
 - (b) if the proceedings are against the Minister personally, such as defamation proceedings, meet the Minister's costs in retaining private counsel (for example, to obtain preliminary advice on the situation or to undertake the defence of the proceedings); or
 - (c) leave the Minister to handle the case privately as a personal expense.
- 4.47 The Cabinet paper should seek Cabinet's agreement to the Vote and appropriation from which the expenses would be met. It may, if necessary, seek a Cabinet decision on whether or not it would be appropriate, given the circumstances, to indemnify the Minister against an award of costs or damages, or whether to defer this decision pending the outcome of the proceedings (see paragraphs 4.41 and 4.53 – 4.56). The Minister concerned usually withdraws from the Cabinet meeting.
- 4.48 The Cabinet paper should recognise that the statutory decision on whether to give an indemnity in such a situation must be taken by the Minister of Finance under section 65ZD of the Public Finance Act 1989.
- 4.49 If any doubt exists about the capacity in which the Minister is defending legal proceedings (that is, whether the proceedings are against the Minister personally or not), the case should be dealt with according to the guidance in paragraph 4.46(b) or 4.46(c).

Procedure where the Crown undertakes the defence

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

Procedure where private counsel is retained

- 4.51 If Cabinet has agreed that the Crown will meet the Minister's costs in retaining private counsel (see paragraph 4.46(b)), the choice of counsel is made by the Minister only after consultation with the Attorney-General (who will usually consult the Solicitor-General). Once that choice has been made, the practice is for the Solicitor-General to retain counsel and to settle the basis on which the fees will be charged.
- 4.52 Once the Solicitor-General has retained private counsel to act for the Minister, the Minister should refer bills for legal expenses to the Crown Law Office for certification before the bills are paid. If private counsel was engaged by a Minister before the matter had been referred to Cabinet, the bill should be promptly referred to the Attorney-General, who will, if necessary, refer it to Cabinet for a decision on payment. Counsel's bills for legal expenses will be charged against the relevant Vote and appropriation (as determined by Cabinet—see paragraph 4.47).

Payment of costs or damages awarded

- 4.53 Where a Minister defends proceedings concerning the exercise of ministerial powers (such as judicial review proceedings), the Minister will usually be indemnified against any award of costs or damages (except in exceptional cases—see paragraph 4.55).
- 4.54 Where proceedings have been taken personally against a Minister, Cabinet will usually defer the issue of an indemnity on costs or damages until after the trial, at which point Cabinet will decide the issue on the advice of the Attorney-General or the Solicitor-General.
- 4.55 The decision as to whether a Minister should be indemnified against costs or damages will usually depend on the extent to which the costs or damages awarded against the Minister might be said to arise from the Minister's personal wrongdoing or impropriety. The Attorney-General may defer such a decision until judgment has been given. For example, in a defamation case, if a court finds that a particular Minister had made the statement complained of dishonestly or maliciously, Cabinet may consider that the Minister's words went beyond the bounds of duty, for it is no part of a Minister's duty to act for malicious reasons. "Malice" in a legal sense, and in broad terms, means for a dishonest or improper motive. Other exceptional cases may also lead Cabinet to decline to authorise the indemnification of the Minister.
- 4.56 If Cabinet agrees that the Minister should be indemnified against an award of costs and/or damages made against the Minister, those costs may be charged to the relevant Vote and appropriation, as determined by Cabinet.

Receipt of costs or damages awarded

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

Indemnity of Minister as plaintiff

- 4.58 A Minister may contemplate taking a suit as a plaintiff in a personal capacity to uphold their integrity as a Minister, for example, in a defamation suit. In such a case, the Minister may wish to be indemnified against the costs of the proceedings. Paragraphs 4.36 – 4.57 do not apply in these circumstances.
- 4.59 Any intention to take proceedings as a plaintiff must first be discussed with the Prime Minister and the Attorney-General (who will usually consult the Solicitor-General). The Attorney-General will then ask Cabinet to agree that the matter be investigated by the Solicitor-General or by private counsel to determine whether it would be in the public interest for the Minister to take a personal action in the courts at the Crown's expense to resolve the matter. An opinion on the merits of the claim, prepared by either the Solicitor-General or private counsel, will be provided to the Attorney-General, together with the Solicitor-General's views on the public interest aspect. On the basis of this advice, the Attorney-General may seek Cabinet's authorisation for the Minister to pursue the claim at the Crown's expense.
- 4.60 Counsel will be retained in the way set out in paragraphs 4.51 – 4.52.
- 4.61 If a Minister is successful as a plaintiff in proceedings that have been funded by the Crown, any costs or damages awarded should be paid into a Crown or departmental bank account unless Cabinet directs otherwise (for example, where the Crown has contributed only part of the Minister's costs).

Legal advice and legal professional privilege

General

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

Legal professional privilege

- 4.63 Legal professional privilege is a term applied to the protection of confidential communications between a lawyer and a client. If legal advice is protected by legal professional privilege, it may be withheld under the Official Information Act 1982 and the Privacy Act 2020, and will not be required to be produced for inspection during discovery in legal proceedings. It is therefore important that legal professional privilege in legal advice provided to the government is maintained, and not inadvertently waived.
- 4.64 There are two categories of legal professional privilege.
- (a) **Solicitor–client privilege** applies to communications between a lawyer and a client, where the lawyer is acting in their professional capacity, the communication is intended to be confidential, and the communication is for the purpose of obtaining legal advice.
 - (b) **Litigation privilege** applies to communications or information compiled for the dominant purpose of preparing for a proceeding or an apprehended proceeding. It applies to communication between a party to the proceeding and any other person and communication between the party's legal adviser and any person. It also applies to information compiled or prepared by, or at the request of, the party or the party's legal adviser.

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

Guidelines for the presentation of legal advice

- 4.66 Some government documents necessarily include legal advice, so that Ministers and government agencies have all the relevant information and advice before them when they make a decision. For example, a Cabinet paper may contain legal advice on a proposed transaction, or on the government’s proposed strategy for settling or conducting legal proceedings.
- 4.67 To ensure that legal advice provided to the government is properly protected by solicitor–client privilege, all those involved in preparing documents containing legal advice should follow these guidelines.
- (a) Legal advice should be clearly separated from policy advice, even if the two kinds of advice are provided in one document. Departmental lawyers are encouraged to consider carefully the role they are performing (that is, whether they are providing legal or policy advice, or both), and the way in which their advice is given and will be used.
 - (b) Depending on its nature and extent, the legal advice should be either:
 - contained in a separate section, and described in a way that makes it plain that it is legal advice from the Crown’s lawyers (for example, “The Crown Law Office advises that ...” or “Counsel from the Ministry advises that ...”); or
 - attached as an appendix in the form of an opinion from a legal adviser (for example, Crown Law Office, Solicitor-General, or in-house counsel from the department).
 - (c) It is also useful if the document clearly shows that the legal advice is “legally privileged”. If a paper contains legally privileged information, a security classification and endorsement such as “Legally Privileged: In Confidence” may be appropriate.

Waiver of legal privilege

- 4.68 The protection of legal professional privilege may be lost in two sets of circumstances.
- (a) **Express waiver** occurs when a client chooses to waive privilege in the legal advice and release it.

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

Release of legal advice

- 4.69 As part of the Attorney-General’s constitutional role, the Attorney-General represents the Crown in the courts and provides legal advice to the government. Day-to-day instructions to legal advisers are usually provided by departments, agencies, or other Ministers under the authority of the Attorney-General. Nevertheless, the constitutional responsibility of the Attorney-General remains. The Attorney-General has the right to:
- (a) obtain copies of all legal advice provided to the Crown (from whatever source);
 - (b) determine whether to release that advice; and
 - (c) instruct all lawyers acting for the Crown.
- 4.70 When determining whether to release legal advice that has been provided to the government, or to refer to the content of such advice, and waive (or potentially waive) legal privilege, there is a need to:
- (a) ensure a coordinated government approach to release;
 - (b) avoid any adverse impact from a release on current or potential legal proceedings; and
 - (c) ensure that no single release will create an undesirable precedent.
- 4.71 Where a Minister or a government department considers that it is necessary to release legal advice or refer to the content of such advice, the matter must first be referred to the Crown Law Office. The Crown Law Office will in turn refer the matter to the Attorney-General’s office for approval.
- 4.72 Where a request is made under the Official Information Act 1982 or the Privacy Act 2020, the decision on release must be made by the Minister or chief executive who received it. The Attorney-General (through the Crown Law Office) should be consulted about the request.
- 4.73 A separate protocol for the release of draft government legislation outside the Crown is set out in Cabinet Office circulars.

Inquiries

General

- 4.74 This guidance provides information on the different types of inquiry, and the principles that apply to their establishment.
- 4.75 Statutory inquiries, non-statutory ministerial inquiries, and standing statutory bodies with powers of inquiry have different powers and privileges, which should be considered when deciding on the most appropriate form of inquiry. Ministers and agencies may seek advice from the Attorney-General or Solicitor-General, and from the Cabinet Office and the Department of Internal Affairs, on matters relating to the establishment of an inquiry. Further guidance on statutory inquiries can be found in the Inquiries Act 2013 and on the Department of Internal Affairs' website.
- 4.76 All inquiries act independently of the government. Those conducting an inquiry may nonetheless consult with officials on technical matters and on the practical implications of any draft proposals.
- 4.77 All inquiries must follow the principles of natural justice.

Statutory inquiries

- 4.78 The Inquiries Act 2013 provides for three types of inquiry:
- (a) Royal commissions;
 - (b) public inquiries; and
 - (c) government inquiries.
- 4.79 These three types of inquiry have identical powers, and differ only in status, method of appointment, and the way they report back. The options allow a flexibility of approach in establishing an inquiry.
- 4.80 The Inquiries Act 2013 is largely enabling. Where Ministers are satisfied that a matter of public importance requires an inquiry, the decision to then establish an inquiry is a judgement made by Ministers. There is no statutory threshold that determines whether or not an inquiry will be held.
- 4.81 The Inquiries Act 2013 distinguishes between the roles of the appointing and the appropriate Minister. In the case of a government inquiry, the Minister who establishes the inquiry under section 6(3) of the Inquiries Act 2013 is known as the “appointing Minister”. A government inquiry reports to the appointing Minister, and the appointing Minister makes the decision about any public release of the inquiry's report.
- 4.82 The “appropriate Minister” in relation to any type of inquiry is the Minister who, under the authority of any warrant or with the authority of the Prime Minister, is responsible for the relevant agency administering the inquiry. The choice of appropriate Minister may simply follow from the choice of the relevant agency best suited to support the inquiry. In the case of a government inquiry, a Minister may be both the appointing Minister and the appropriate Minister.
- 4.83 Which Minister will take responsibility for an inquiry is ultimately a matter for the Prime Minister to decide.

Royal commissions

- 4.84 Royal commissions are typically reserved for the most serious matters of public importance. They are appointed by the Governor-General, in the name of the Sovereign and on the advice of the Executive Council, under clause X of the Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (see appendix B).
- 4.85 The Inquiries Act 2013 applies to Royal commissions as if they were public inquiries.

Public inquiries

- 4.86 Public inquiries may be established under the Inquiries Act 2013 for the purpose of inquiring into, and reporting on, any matter of public importance. A matter may require a public inquiry when it pertains to a particularly significant or wide-reaching issue that causes a high level of concern to the public and to Ministers.
- 4.87 A public inquiry is established by the Governor-General by Order in Council. The final report of a public inquiry is presented to the Governor-General, and must be presented by the appropriate Minister to the House of Representatives as soon as practicable thereafter.

Government inquiries

- 4.88 Government inquiries may be established under the Inquiries Act 2013 for the purpose of inquiring into, and reporting on, any matter of public importance. In practice, government inquiries typically deal with smaller and more immediate issues where a quick and authoritative answer is required from an independent inquirer.
- 4.89 A government inquiry is established by one or more Ministers by notice in the *New Zealand Gazette* and reports directly to the appointing Minister(s). There is no requirement that the report of a government inquiry be tabled in Parliament.

Duties, powers, immunities, and privileges of statutory inquiries

- 4.90 All inquiries must act independently, impartially, and fairly.
- 4.91 An inquiry may regulate its own procedures as it considers appropriate, unless otherwise specified by the Inquiries Act 2013 or by the inquiry's terms of reference. This broad discretion allows a degree of flexibility in the level of formality required.
- 4.92 However, all public inquiries and government inquiries have statutory powers to require the production of evidence, to compel witnesses, and to take evidence on oath. Where powers of search and seizure are considered necessary, investigation by a specialist agency with these powers is more appropriate.
- 4.93 Where an inquiry is established under the Inquiries Act 2013, the exercise of statutory powers in relation to members of Parliament and parliamentary agencies will require the recognition of parliamentary privilege.
- 4.94 Witnesses and counsel are protected by the same immunities and privileges that they would have before the courts. Commissioners are also protected.
- 4.95 Inquiries may refer questions of law for determination by a court.

- 4.96 Inquiries usually hold open hearings with public and media access, but may restrict access as the need arises. The inquiry's terms of reference may also limit public access. An inquiry may make orders to forbid the publication of certain information, including evidence and submissions, or to restrict public access to any part or aspect of the inquiry. Before doing so the inquiry must take into account certain specified criteria, such as privacy and the benefits of open justice.
- 4.97 Statutory inquiries are excluded from the definition of "New Zealand agency" in the Privacy Act 2020, which means that the requirements of the Act do not apply to such inquiries. However, inquiries may still choose to handle personal information they collect and hold in accordance with some or all of the privacy principles in the Privacy Act 2020.
- 4.98 An inquiry is subject to the Official Information Act 1982 once it has presented a final report. However, information that is the subject of an order imposing restrictions on access and certain documents that relate to the internal deliberations of the inquiry are not official information for the purposes of the Official Information Act 1982.

Administrative support for inquiries

- 4.99 The Inquiries Act 2013 is administered by the Department of Internal Affairs.
- 4.100 The Department of Internal Affairs is the default agency for providing administrative support to inquiries (known under the Inquiries Act 2013 as the "relevant department"). However, another agency may be appointed the relevant department, under the terms of reference for the inquiry, if it is better placed to provide technical or subject matter expertise, or if it is determined that it would be inappropriate for the Department of Internal Affairs to be appointed the relevant department (for example, because of an actual or perceived conflict of interest).

Establishing an inquiry

- 4.101 A Minister must consult the Prime Minister and the Attorney-General when assessing whether to establish an inquiry, prior to submitting any proposal to Cabinet. Cabinet papers proposing the establishment of an inquiry are often joint papers from the portfolio Minister and the Minister responsible for the Inquiries Act 2013. 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 4.103 – 4.114.
- 4.102 Further guidance on the process for obtaining Cabinet approval for the establishment of an inquiry is contained in guidance material issued by the Department of Internal Affairs.

Subject of inquiry

- 4.103 An inquiry may be established to inquire into any matter of public importance. An inquiry should not usually be appointed, however, where an existing body has jurisdiction to carry out the investigation.
- 4.104 Although inquiries are not prevented from making findings of fault or making recommendations that further steps be taken to determine liability, an inquiry has no power to determine the civil, criminal, or disciplinary liability of any person.

Purpose of inquiry

- 4.105 The purpose of an inquiry may include:
- (a) establishing facts or developing policy;
 - (b) learning from events;
 - (c) providing an opportunity for reconciliation and resolution; or
 - (d) holding people and organisations to account.

Terms of reference

- 4.106 Terms of reference can be used to give direction to or place restrictions on the inquiry, and to give specific procedural directions not set out in the Inquiries Act 2013. 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.
- 4.107 The relevant agencies should be consulted on the terms of reference, along with, ideally, the proposed commissioner or inquirer, and directly interested or involved persons.
- 4.108 The commission appointing a Royal commission and the Order in Council establishing a public inquiry are drafted by the Parliamentary Counsel Office.
- 4.109 A *New Zealand Gazette* notice establishing a government inquiry is drafted by the responsible agency, in consultation with the Crown Law Office and any other relevant agencies.

Appointment of inquirer or commissioner

- 4.110 The Inquiries Act 2013 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 exercises powers of compulsion and undertakes formal examination and cross-examination of witnesses, 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.
- 4.111 Depending on the size, complexity, and likely length of an inquiry, more than one inquirer may be appointed. Where more than one inquiry member is appointed, members should have complementary skills and experience. If one inquirer is unable to continue, the remaining inquiry members should still have the broad skills required to complete the task. Fees for commissioners are set under the fees framework set out in Cabinet Office circular CO (22) 2 *Revised Fees Framework for members appointed to bodies in which the Crown has an interest*.

Budget and timeframe

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

- 4.113 Realistic timeframes should be set, acknowledging that the scope of the issues may not be clear until considerably further along in the process.
- 4.114 Inquiries must be fiscally accountable. The Department of Internal Affairs or the responsible agency, as appropriate, will establish the process for monitoring the budget and the reporting timeframe.

Other inquiries

Non-statutory ministerial inquiries

- 4.115 In some cases, it may be considered appropriate or desirable for a Minister to establish a non-statutory inquiry into an area for which they have portfolio responsibility. However, the ability to establish a government inquiry under the Inquiries Act 2013 means there are likely to be fewer circumstances than previously in which a non-statutory inquiry would be established.
- 4.116 Non-statutory inquiries have no coercive powers, and therefore rely solely on witnesses' cooperation. They offer no immunities for those taking part, including inquirers, lawyers, and witnesses. Information relating to a non-statutory ministerial inquiry will be subject to the Official Information Act 1982 in the normal way.
- 4.117 In order to establish a non-statutory inquiry, the Minister should seek the Prime Minister's agreement to the matters referred to in paragraphs 4.103 – 4.114 and advise Cabinet as soon as possible of these details.

Statutory bodies with inquiry powers

- 4.118 A wide variety of statutory bodies has powers to inquire into events or issues. Examples include the Public Service Commissioner, the Ombudsmen, the Auditor-General, the Law Commission, the Health and Disability Commissioner, the Independent Police Conduct Authority, the Privacy Commissioner, and the Inspector-General of Intelligence and Security. Some inquiries may be initiated by a statutory body; in other cases, a Minister may ask a statutory body to investigate certain issues.
- 4.119 Before an inquiry is established, consideration should be given to whether any of these existing bodies can more appropriately conduct the inquiry. Factors to consider will be the size and complexity of the matter at hand, and the capacity of the body to conduct the inquiry within its existing resources.
- 4.120 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

- 4.121 A select committee may hold an inquiry within its subject area. After considering evidence and advice, a committee may report to the House with its conclusions and recommendations, which may be addressed to the government. The government must respond to such recommendations within 60 working days. See paragraphs 7.123 – 7.126 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*.

- 4.122 A select committee inquiry is usually initiated by the committee itself and is likely to focus on scrutinising a specific area of government activity. The House may, however, refer a matter to a select committee for inquiry, particularly where the matter is outside the committee's normal subject area.
- 4.123 Issues suitable for a select committee inquiry are likely to be those that 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.
- 4.124 If a Minister considers that an issue may be suitable for a select committee inquiry, the Minister should first discuss the issue with the Prime Minister and the Leader of the House. If this course of action is agreed, the Minister may, after consulting other parliamentary parties, write to the select committee inviting it to initiate an inquiry. Alternatively, the Minister may, by motion, seek to have the matter referred by the House to the select committee. Occasionally the House may establish an ad hoc select committee to conduct an inquiry.

Related information

- Cabinet Office circular CO (16) 2 *Cabinet Directions for the Conduct of Crown Legal Business 2016*, Cabinet Office circular CO (19) 2 *Attorney-General's Protocol for Release of Draft Government Legislation Outside the Crown*, and Cabinet Office circular CO (22) 2 *Revised Fees Framework for members appointed to bodies in which the Crown has an interest* are available on the Department of the Prime Minister and Cabinet's website, dpmc.govt.nz/publications/cabinet-office-circulars-and-notice.
- The *New Zealand Gazette* is available at [gazette.govt.nz](https://www.gazette.govt.nz).
- Information on establishing inquiries under the Inquiries Act 2013 is published by the Department of Internal Affairs on its website, [dia.govt.nz](https://www.dia.govt.nz). Further information is available through the Department's Inquiries Directorate.
- The *Standing Orders of the House of Representatives* are available on Parliament's website, [parliament.nz](https://www.parliament.nz).

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

5 Cabinet Decision-making

Introduction

- 5.1 This chapter covers:
- (a) Cabinet and Cabinet committees;
 - (b) the main principles and procedures governing decision-making by Ministers in the Cabinet and Cabinet committee system;
 - (c) the roles of the Secretary of the Cabinet and the Cabinet Office.

Cabinet

- 5.2 Cabinet is the central decision-making body of executive government. It is a collective forum for Ministers to decide significant government issues and to keep colleagues informed of matters of public interest and controversy.
- 5.3 Cabinet is central to New Zealand's system of government. It is established by convention, not law. The legal powers of the Executive are exercised by those with statutory authority to act (for example, the Governor-General, the Governor-General in Council, or individual Ministers). In practice, however, all significant decisions or actions taken by the Executive are first discussed and collectively agreed by Cabinet.
- 5.4 Cabinet determines and regulates its own procedures. Final decisions on Cabinet procedures rest with the Prime Minister, as the chair of Cabinet.
- 5.5 Cabinet comprises Ministers in Cabinet (see paragraphs 2.28 – 2.31). Ministers outside Cabinet and Parliamentary Under-Secretaries, however, may on occasion attend Cabinet for discussion on particular items with the agreement of the Prime Minister.

Cabinet committees

- 5.6 Cabinet committees provide the forum for detailed consideration and discussion of issues before their reference to Cabinet, with officials available to assist Ministers if the committee wishes. Almost all matters are considered first by one or more Cabinet committees. Exceptions to this rule are proposals for and reports on overseas travel by Ministers.
- 5.7 Cabinet committees are usually established either around a subject area, such as social policy, or around a function across the broad front of government activity, such as expenditure and administration.

- 5.8 Cabinet committees derive their powers from Cabinet. All Cabinet committee decisions are reported to Cabinet for confirmation, and Cabinet retains the ultimate power of decision. Cabinet committee decisions may not be acted on until they have been confirmed (or amended) by Cabinet (except as set out in paragraph 5.9). Cabinet considers all committee decisions and frequently amends a committee decision or asks a committee to consider a matter further.
- 5.9 Occasionally, Cabinet or the Prime Minister will authorise a Cabinet committee or specified Ministers to have “power to act” (that is, power to take a final decision) on a clearly defined item. Where a committee or specified Ministers take a decision under power to act, the decision can be acted on immediately. Approval for power to act is usually sought by way of an oral item at Cabinet (see paragraphs 5.51 – 5.53). Decisions taken by a Cabinet committee under power to act are reported to Cabinet in the usual way. When authorising the taking of decisions by a specified group of Ministers under power to act, Cabinet may request that the Ministers report back to Cabinet.
- 5.10 The Prime Minister determines the structure of Cabinet committees and the membership, chair, and terms of reference of each Cabinet committee, taking into account practical and political considerations. Information on the current membership and terms of reference of Cabinet committees is available on the Department of the Prime Minister and Cabinet’s website.

Principles of Cabinet decision-making

Items for consideration by Cabinet

- 5.11 As a general rule, Ministers should put before their colleagues the sorts of issues on which they themselves would wish to be consulted. Ministers should keep their colleagues informed about matters of public interest, importance, or controversy. Where there is uncertainty about the type of consideration needed, Ministers should seek advice from the Prime Minister or the Secretary of the Cabinet. Similarly, agencies 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, including proposals seeking additional financial resources;
 - (d) proposals that affect New Zealand’s constitutional arrangements (see paragraph 5.77);
 - (e) matters concerning the machinery of government;
 - (f) discussion and consultation documents (before their public release), other than those relating to minor or technical matters that fall within existing policy and that have been authorised for release by the Minister;
 - (g) reports of a substantive nature relating to government policy or government agencies;
 - (h) proposals involving new legislation (see chapter 7 and the *CabGuide*);

- (i) government responses to select committee recommendations and Law Commission reports (see paragraphs 7.22 and 7.123 – 7.126, and the *CabGuide*);
- (j) matters concerning the portfolio interests of a number of Ministers (particularly where agreement cannot be reached);
- (k) significant statutory decisions (see paragraphs 5.34 – 5.38);
- (l) all appointments made by Ministers or by the Governor-General on the advice of a Minister (see the *CabGuide*);
- (m) international treaties (see paragraphs 5.78 – 5.82) and significant matters concerning New Zealand's international relationships, security, foreign policy and deployments offshore; and
- (n) any proposals to amend the provisions of the *Cabinet Manual*.

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

- (a) matters concerning the day-to-day management of a portfolio that have been delegated to an agency;
- (b) operational (non-policy) statutory functions; or
- (c) the exercise of statutory decision-making powers (within existing policy) concerning individuals.

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

Consultation

Portfolio consultation

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

- (a) the Minister of Finance on all proposals seeking additional resources;
- (b) the Minister for the Public Service on machinery of government issues;
- (c) the Minister of Foreign Affairs on all proposals relating to international treaties and New Zealand's strategic international interests;
- (d) the Minister of Justice on all proposals affecting constitutional arrangements, including the Treaty of Waitangi, and human rights;
- (e) the Attorney-General on all proposals raising significant legal issues; and
- (f) the Attorney-General or the Minister(s) with responsibilities relating to Treaty of Waitangi settlement obligations and/or Māori-Crown relations on any proposal with potential impacts on existing Treaty of Waitangi settlements.

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

Political consultation

- 5.16 In a coalition or minority government, the coalition or support partners are likely to agree to specific consultation procedures, which may be approved by Cabinet and promulgated by Cabinet Office circulars. Ministers are responsible for ensuring that consultation is undertaken in accordance with any 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 agreements between political parties, see the *CabGuide* and relevant Cabinet Office circulars, available on the Department of the Prime Minister and Cabinet’s website.

Agency consultation

- 5.19 Almost all policy proposals have implications for other government agencies. The initiating agency or another agency with policy responsibility and the portfolio Minister must ensure that all other agencies affected by a proposal are consulted at the earliest possible stage, and that their comments are taken into account and reflected in the paper as appropriate. Consultation may sometimes be needed with bodies that have an advisory role, such as the Office of the Privacy Commissioner. See the *CabGuide* for full guidance on consultation procedures, and paragraph 5.33 for guidance on collective decision-making and government agencies.
- 5.20 Agencies should work closely with one another when developing advice in preparation for papers for Cabinet and Cabinet committees and, where possible, reach consensus on advice and proposals submitted to the portfolio Minister. If consensus is not reached, a Cabinet paper may reflect different ministerial positions or agency advice so that Cabinet can take decisions based on all the facts available and an appreciation of the options.

Statutory consultation processes

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

Public consultation

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

Confidentiality

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

Collective responsibility

Principle of collective responsibility

- 5.24 The principle of collective responsibility underpins the system of Cabinet government. It reflects democratic principle: the House expresses its confidence in the collective whole of government, rather than in individual Ministers. Similarly, the Governor-General, in acting on ministerial advice, needs to be confident that individual Ministers represent official government policy. In all areas of their work, therefore, Ministers represent and implement government policy.
- 5.25 Acceptance of ministerial office (whether inside or outside Cabinet) means accepting collective responsibility. Issues are often debated vigorously in the confidential setting of Cabinet meetings, although consensus is usually reached and votes are rarely taken. Once Cabinet makes a decision, Ministers must support it (except as provided in paragraphs 5.27 – 5.29), regardless of their personal views and whether or not they were at the meeting concerned.

Collective responsibility and coalition Ministers

- 5.26 In a coalition government, Ministers are expected to show careful judgement when referring to party policy that differs from government policy. Subject to paragraphs 5.27 – 5.30 a Minister's support and responsibility for the collective government position must always be clear (see paragraph 6.18 on the difference between coalition and other formal arrangements between political parties).
- 5.27 Coalition governments may decide to establish "agree to disagree" processes, which may allow Ministers within the coalition to maintain, in public, different party positions on particular issues or policies. Once the final outcome of any "agree to disagree" issue or policy has been determined (either at the Cabinet level or through some other agreed process), Ministers must implement the resulting decision or legislation, regardless of their position throughout the decision-making process.
- 5.28 "Agree to disagree" processes may only be used in relation to differing party positions within a coalition. Any public dissociation from Cabinet decisions by individual coalition Ministers outside the agreed processes is unacceptable.

Collective responsibility and Ministers from other political parties

- 5.29 Ministers from parliamentary parties supporting the government may be bound by collective responsibility only in relation to their particular portfolios, including any specific delegated responsibilities. Political parties may by agreement specify the circumstances in which a Cabinet or Cabinet committee minute records that a decision relating to the Minister's portfolio area is not consistent with a party's position. Outside of any such agreement, when such Ministers speak about issues within their portfolios, they speak for the government and as part of the government. When they speak about matters outside their portfolios, however, they may speak as political party leaders or members of Parliament rather than as Ministers, and do not necessarily represent the government position.
- 5.30 When such Ministers represent the government internationally, they speak for the government on any issues that foreign governments may raise with them in their capacity as Ministers. When they are overseas in a personal capacity, for example as party leaders, they are not bound by collective responsibility. The capacity in which they are speaking must always be clear to those present.

Collective responsibility and Parliamentary Under-Secretaries

- 5.31 Parliamentary Under-Secretaries are also bound by the principle of collective responsibility, except as provided in paragraphs 5.26 – 5.30. See paragraphs 2.48 – 2.50 for detail on the appointment of Parliamentary Under-Secretaries.

Law officer function

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

Collective decision-making and government agencies

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

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

Statutory decisions

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

- 5.35 Ministers should, however, inform Cabinet of any exercise of an individual statutory power that merits attention at the Cabinet level (see paragraph 5.12 for a list of matters that should be taken to Cabinet). Informing Cabinet of the intended decision enables a Minister's colleagues to understand the basis on which the Minister intends to make the decision, and to defend the decision publicly and collectively.
- 5.36 Special considerations apply to protect the integrity of the statutory decision-making process when a Minister brings an item to Cabinet on a statutory decision or action they intend to make. Cabinet cannot make, or appear to make, a decision that the statute requires a Minister to make. Accordingly:
- (a) the Cabinet paper should be presented in the form of an informative briefing for Ministers;
 - (b) Cabinet may provide a forum for Ministers other than the decision-maker to comment on and provide information on the intended decision, but the decision-making Minister may legitimately take into account only the information and comments that are relevant; and
 - (c) the Minister's intended decision should be noted rather than agreed to by Cabinet.
- 5.37 If Ministers are unsure about whether to take an issue concerning the exercise of a statutory power or function to Cabinet, they should seek guidance from the Prime Minister or the Secretary of the Cabinet. For further information about ministerial decision-making and judicial review, see paragraphs 4.19 – 4.26.

Statutory decisions and Executive Council

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

Cabinet and Cabinet committee procedures

Preparing and submitting Cabinet papers

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

- 5.40 Papers classified up to Sensitive or Restricted are submitted through the CabNet system, which is a secure electronic system for managing papers through the Cabinet and Cabinet committee process. CabNet is administered by the Cabinet Office, and access to CabNet material is limited to authorised users in Ministers' offices and agencies in accordance with specified access permissions. More highly classified papers or papers with Special Handling Required or Addressee Only endorsements are submitted in hard copy to the Cabinet Office, and are not handled or stored in CabNet (see the *CabGuide* for further information on CabNet).
- 5.41 Ministers submit papers to Cabinet or Cabinet committees on issues concerning their own portfolios. All papers submitted through CabNet must be authorised for lodgement by the relevant portfolio Minister. Where a paper is submitted outside CabNet, the portfolio Minister's signature on the hard copy of the paper is required. If necessary, however, any Minister (including a Minister outside Cabinet but not a Parliamentary Under-Secretary) can sign a Cabinet or Cabinet committee paper on behalf of another. Ministers are responsible for the papers they submit to Cabinet and Cabinet committees and are expected to be fully conversant with them.
- 5.42 Associate Ministers may submit papers to Cabinet and Cabinet committees within their designated area of responsibility, provided that the portfolio Minister has been consulted and agrees that the paper may be lodged. This requirement may not apply if responsibility for the matter has been transferred to an Associate Minister because of a conflict of interest (see paragraph 2.76(c)).
- 5.43 The Cabinet Office sets standards for the quality, preparation, and submission of papers for Cabinet and Cabinet committees. These standards are set out in the *CabGuide*.

Deadlines and late papers

- 5.44 Cabinet and Cabinet committee papers must be lodged on CabNet, or submitted to the Cabinet Office as appropriate (see paragraph 5.40), before the relevant deadline, which is usually several days before a meeting. See the *CabGuide* for the current deadlines. Submitting papers on time ensures that Ministers have sufficient time to read and seek advice on papers, and to discuss them with colleagues if necessary.
- 5.45 If a Minister wishes to submit a late paper for Cabinet or a Cabinet committee, the Minister concerned should, by the deadline for the submission of the paper, seek the approval of the chair, through the Secretary of the Cabinet or the appropriate committee secretary, for acceptance of the paper, explaining why inclusion on the agenda is necessary (using the appropriate form set out in the *CabGuide*). The Secretary of the Cabinet or committee secretary will consult the Prime Minister or the chair of the committee, and advise the Minister of the outcome.

Amendments to papers

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

- 5.47 The Cabinet Office will not accept changes suggested by one Minister to another Minister's paper before a meeting. The Minister should suggest any changes they propose at the meeting considering the paper. Papers do not need to be amended to reflect the discussions at the meeting; the principles of executive government allow for Cabinet and Cabinet committees to disagree with a paper's content and recommendations, and for decisions to be reflected in the minute.

Withdrawal of papers

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

Agendas

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

Oral items

- 5.51 In cases of particular urgency or confidentiality, or to update Cabinet on a current issue, or to test preliminary support for a proposal, a Minister may wish to raise an oral item at a Cabinet or Cabinet committee meeting. Oral items for Cabinet will be accepted only with the approval of the Prime Minister, and should be notified to the Secretary of the Cabinet. Oral items at Cabinet committees will be accepted only with the approval of the committee chair.
- 5.52 Oral items at Cabinet are also the means by which Cabinet's agreement is sought for a Cabinet committee (or specified group of Ministers) to have power to act on a particular item (see paragraph 5.9).
- 5.53 Detailed guidance about the requirements for oral items, including the electronic form to be used for seeking the Prime Minister's approval to raise an oral item at Cabinet, can be found in the *CabGuide*.

Minutes

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

Meetings

- 5.56 Cabinet usually meets in the Cabinet room on Mondays for most weeks of the year. Special Cabinet meetings may be held at other times and in other places, if necessary.
- 5.57 Cabinet committees meet on a weekly or fortnightly basis or as necessary. Ad hoc committees meet as necessary. The Cabinet Office provides information about Cabinet committee meeting times to Ministers' offices and agencies.
- 5.58 With the Prime Minister's agreement, Cabinet and Cabinet committees may meet remotely, if required.

Chairs of meetings

- 5.59 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 designated deputy chair or the most senior committee member present).

Attendance of Ministers

- 5.60 Ministers in Cabinet must attend every meeting of Cabinet, unless the Prime Minister has granted prior written approval on the required form, which is available from the Cabinet Office.
- 5.61 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 of this before the meeting. This process allows the chair to be advised, and necessary adjustments to be made to the agenda.
- 5.62 A Minister who is unable to attend a Cabinet committee meeting may wish to brief another Minister (or their Associate Minister) to speak to a paper, or to ask for it to be deferred in their 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.
- 5.63 When a Cabinet committee is to discuss a matter within the portfolio responsibility of a Minister who is not a member of the committee, the Minister will be provided with the relevant papers and may attend the meeting for the items concerned.
- 5.64 Arrangements for the representation of coalition and any other political parties on Cabinet committees, and their attendance at meetings, are determined by the Prime Minister in consultation with the relevant party leaders.

Quorum

- 5.65 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.
- 5.66 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

- 5.67 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 attend Cabinet meetings to provide advice to Ministers on specific items or to give a special presentation to Ministers in the Cabinet room.
- 5.68 Visiting dignitaries may occasionally be invited to meet members of Cabinet in the Cabinet room. Such invitations should not be issued until the Prime Minister's approval has been obtained and arrangements made with the Secretary of the Cabinet and the Visits and Ceremonial Office of the Department of Internal Affairs.

Attendance of officials at Cabinet committee meetings

- 5.69 Relevant officials should be available to speak to items on Cabinet committee agendas if specifically requested by their Minister, the Cabinet committee, or the chair of the Cabinet committee. Agencies should check with their Minister's office as to whether officials need to be available. For detailed information about attendance at Cabinet committee meetings, see the *CabGuide*.

Financial matters and Cabinet

Government spending

- 5.70 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 agencies should check that proposed spending has been authorised by either:
- (a) an Appropriation (Estimates or Supplementary Estimates) Act; or
 - (b) a Cabinet minute authorising expenses or capital expenditure to be met under an Imprest Supply Act pending passage of an Appropriation Act.

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

The Budget cycle

- 5.71 Wherever possible, government spending should be planned and agreed by Cabinet during the annual Budget cycle. The Budget cycle has several phases, starting in the second half of the calendar year before the start of the new financial year. In broad terms, these phases are as follows.
- (a) **Establishing high-level Budget priorities:** Under the fiscal responsibility provisions in the Public Finance Act 1989, the government must indicate the high-level financial and policy priorities guiding the preparation of the forthcoming Budget. These priorities are agreed by Cabinet and published in the annual Budget Policy Statement, which is usually published in November or December. Cabinet also agrees to the Budget timetable and process (which are usually promulgated by way of Treasury circulars).

- (b) **Making detailed Budget decisions:** Cabinet then considers more detailed Budget proposals for each Vote or cluster of Votes, in line with the priorities set out in the Budget Policy Statement. Budget baselines, which set out the funding for existing policy over the next four or five financial years, are determined by Cabinet or by joint Ministers under authority delegated by Cabinet. Cabinet also considers proposals for new policies or changes in the size or cost of existing initiatives.
 - (c) **Presenting to the House:** Once Cabinet has completed final Budget decisions, the Budget documents are finalised, printed, and presented to the House, usually in May or June. The parliamentary processes involved are set out in the chapter on financial procedures in the *Standing Orders of the House of Representatives* (the *Standing Orders*).
- 5.72 The office of the Minister of Finance or the Treasury can provide further information on any aspect of the Budget cycle.
- 5.73 Outside of 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.
- 5.74 The details of these arrangements are set out in the *CabGuide* and in Cabinet Office circulars, available on the Department of the Prime Minister and Cabinet's website.

The Crown's financial veto

- 5.75 Some parliamentary initiatives may have an impact on the government's fiscal aggregates or the composition of a Vote. Agencies 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 described in more detail in paragraphs 7.138 – 7.140.

Impact analysis for regulatory proposals

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

Constitutional issues and Cabinet

- 5.77 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

- 5.78 A treaty is a written agreement between states or international organisations that is governed by international law. Treaties (whatever their particular title) create international legal obligations for the states that have expressed their consent to be bound.
- 5.79 The steps required to become bound depend on the terms of a given treaty. Sometimes there are two steps: signature, followed by binding treaty action (often called ratification). Sometimes there is only the binding treaty action (for example, accession or definitive signature). Other examples of binding treaty action include changing an existing reservation to a treaty, and termination of or withdrawal from a treaty. An amendment to a treaty may also involve a new treaty (and therefore a binding treaty action).
- 5.80 Any proposal for New Zealand to sign a treaty or to take binding treaty action must be submitted, with the text of the treaty, to Cabinet for approval. Domestic implementation (including any legislation and consultation) must be completed before binding treaty action is taken. For detailed guidance, see the *CabGuide*.
- 5.81 Where the *Standing Orders* require a treaty to be presented to the House for examination before binding treaty action is taken, a national interest analysis must also be prepared and submitted to Cabinet. Guidance on the parliamentary treaty examination process is provided in paragraphs 7.127 – 7.137.
- 5.82 The Ministry of Foreign Affairs and Trade can provide advice on all aspects of the treaty-making process, and on the making of non-binding international instruments (usually called arrangements). Agencies should consult the ministry's legal division at an early stage if they are considering entering into any negotiations that may result in a treaty or arrangement.

Referral to Cabinet of decisions taken outside the Cabinet process

- 5.83 Decisions taken by Ministers at ad hoc meetings, and proposals to implement policies arising from manifesto commitments or coalition or other agreements between political parties, 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) agencies and the Parliamentary Counsel Office have clear instructions; and
 - (d) the financial and regulatory implications of decisions taken outside the Cabinet process can be taken into account.

Secretary of the Cabinet and the Cabinet Office

- 5.84 The Cabinet Office is a government secretariat, providing continuity and impartial support for operations at the centre of government. The Cabinet Office is a unit within the Department of the Prime Minister and Cabinet, headed by the Secretary of the Cabinet. The Secretary of the Cabinet is a public servant and therefore politically neutral. The position is held by someone other than the holder of the position of Chief Executive of the Department of the Prime Minister and Cabinet.
- 5.85 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.
- 5.86 The Secretary of the Cabinet usually also holds the office of Clerk of the Executive Council (see paragraphs 1.33 – 1.37). The Clerk of the Executive Council is responsible directly to the Prime Minister for servicing the Executive Council and to the Governor-General for providing advice, as required, on constitutional and central government administrative matters.
- 5.87 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 agencies) on certain central government issues (constitutional, honours, ethical, policy, procedural, and administrative), especially those specified in the *Cabinet Manual*;
 - (g) building and sustaining knowledge and understanding of centre-of-government constitutional functions;
 - (h) promoting effective relationships between Cabinet and agencies, including providing advice on issues relating to Cabinet and Cabinet committee decision-making processes;
 - (i) providing guidance on central government operations and processes, through means including the *CabGuide* and Cabinet Office circulars;
 - (j) coordinating the policy and administrative aspects of the government's legislation programme; and
 - (k) advising on Ministers' conduct, public duty, and conflicts of interests.

- 5.88 The unique and significant nature of the Secretary/Clerk position in the constitutional arrangements of central government, and the need to preserve and support the impartiality and independence of the position, require the appointment process to be transparent and moderated. The Secretary/Clerk is appointed by the Chief Executive of the Department of the Prime Minister and Cabinet. The appointment process is modelled on the process for the appointment and performance review of public service chief executives set out in the Public Service Act 2020. An appointment panel, which includes the Chief Executive of the Department of the Prime Minister and Cabinet, the Public Service Commissioner, and the Solicitor-General, is convened for this purpose. The Prime Minister and the Governor-General are consulted about the appointment.

Related information

- Information about the membership and terms of reference of Cabinet committees, any coalition or other agreements between political parties, and Cabinet Office circulars is available on the website of the Department of the Prime Minister and Cabinet, dpmc.govt.nz/our-business-units/cabinet-office.
- Detailed guidance and information on Executive Council, Cabinet, and Cabinet committee processes are available in the *CabGuide*, dpmc.govt.nz/publications/cabguide.
- Detailed guidance on impact analysis for regulatory proposals is available on the Treasury website, treasury.govt.nz.
- The *Standing Orders of the House of Representatives* are available on the Parliament website, parliament.nz.

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

6 Elections, Transitions, and Government Formation

Introduction

- 6.1 This chapter describes the principles and procedures that apply to elections, transitions, and government formation. It covers:
- (a) the electoral cycle and its impact on government decision-making;
 - (b) the principles and procedures that apply to transitions between administrations;
 - (c) the operation of the caretaker convention;
 - (d) the principles and processes of government formation;
 - (e) the law, conventions, and procedures concerning outgoing and incoming Ministers;
 - (f) mid-term transitions and early elections;
 - (g) the provision of information by the public 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 appointed as a single-party majority government. The election may result, for example, in a majority coalition government.

Cabinet and Ministers' decision-making before and after an election

- 6.5 Before and after a general election, it may be difficult for Cabinet and Ministers to take decisions, for several reasons.
- (a) The period before a general election is usually characterised by a period of reduced decision-making capacity at the ministerial and Cabinet level, while Ministers are occupied with the election campaign.
 - (b) Some decision-making constraints apply in the three months before an election (see paragraphs 6.9 – 6.15).
 - (c) Immediately after the election, one of the two arms of the caretaker convention applies, under which decision-making is constrained (see paragraphs 6.21 – 6.40), and Ministers may be involved in government formation negotiations. In the past, the length of the caretaker period has varied from two weeks to two months.
- 6.6 Agencies should plan and prepare for a protracted electoral period of weeks or even months. The importance of such planning cannot be overstated.
- 6.7 An additional practical consideration is the need to make significant decisions in time to take them into account in the pre-election economic and fiscal update, which the Treasury is required to prepare under the fiscal responsibility provisions of the Public Finance Act 1989. This update is published 20 to 30 working days before election day. If short notice of an election is given, the update must be published not later than 10 working days after the day of the dissolution of Parliament. It must include information on all government decisions and all circumstances that may have a material effect on the fiscal and economic outlook.
- 6.8 It is therefore important for Ministers and the public sector 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, the public sector should consider the effect of a general election on:
- (a) the timing of any regular or annual processes that require ministerial decision or parliamentary action;
 - (b) processes with statutory deadlines; and
 - (c) the passage of legislation.

Pre-election period

- 6.9 In the period immediately before a general election, the government is not bound by the caretaker convention unless the election has resulted from the government losing the confidence of the House (see paragraphs 6.21 – 6.40 for information about the caretaker convention). Successive governments, however, have chosen to restrict their actions to some extent during this time, in recognition of the fact that an election, and therefore potentially a change of government, is imminent.
- 6.10 For example, significant appointments have been deferred, and some otherwise unexceptionable government advertising has been considered inappropriate during the pre-election period, due to the heightened risk of a perception that public funds are being used to finance publicity for party political purposes. (See the *Guidelines for Government Advertising*, available on the website of the Department of the Prime Minister and Cabinet, for general guidance.)

- 6.11 In practice, restraints have tended to be applied from about three months before the general election is due or, if the period between the announcement of the election and polling day is less than three months, from the time of the announcement of the election.
- 6.12 Particular care should be taken to ensure the appropriate use of officials for policy development purposes in the lead-up to a general election or a by-election. Policy work carried out by officials for a Minister should not be used to develop party political material or be labelled as party policy. A “government policy” should generally be confirmed through the Cabinet and Cabinet committee decision-making process and then announced by the Minister in their official capacity. Once government decisions have been announced, however, they can appear in party political material used in an election campaign, as long as they are identified as government decisions. (See also paragraphs 6.65 – 6.68 for information on provision of information by the public sector during transitions.)
- 6.13 Political party policies that have not been worked on by officials or been the subject of government decisions may, of course, appear in party political material used in the election campaign. Such policies must not, however, be labelled “government policies”.
- 6.14 Political advisers continue to assist their Minister in the normal way during the pre-election period.
- 6.15 The Public Service Commission publishes guidance on the pre-election period for those agencies in the public sector that are subject to the Commissioner’s mandate, which sets out good practice. For guidance on the pre-election period, the Public Service Commission is available to provide advice on the obligations of agencies and their employees, and the Secretary of the Cabinet is available to provide advice on decision-making.

Transitions following an election

General

- 6.16 The formation of a government following a general election is the usual process by which executive power is transferred from one government administration to another. For information on a mid-term change of government, see paragraphs 6.58 – 6.61.
- 6.17 Following an election, the Governor-General will appoint a Prime Minister and a government in accordance with the principles and processes set out in paragraphs 6.41 – 6.53.

Outcome of elections

- 6.18 Under New Zealand’s proportional representation electoral system, it is likely that two or more parties will negotiate coalition or support agreements so that a government can be formed. A coalition agreement provides for a closer relationship between two or more parties than a support agreement, with a distinguishing characteristic of coalition agreements being that coalition parties are represented in Cabinet. For an outline of how Cabinet collective responsibility operates in coalition and support arrangements, see paragraphs 5.26 – 5.31.

- 6.19 Even when the composition of the government has not changed greatly, it has become standard for the government holding office before the election to be deemed the outgoing government and for all Ministers to formally resign, marking the end of that administration. The beginning of the new administration is then marked with a full appointment ceremony (see paragraphs 2.20 and 6.48).
- 6.20 During the government formation process, before the incoming government is appointed, the outgoing government continues to govern, but it does so as a caretaker government governing under the caretaker convention (see paragraphs 6.24 – 6.40).

Caretaker convention

General

- 6.21 On occasion, it is necessary for a government to remain in office on an interim basis, when it has lost the confidence of the House or, after an election, until a new ministry is appointed following the government formation process. During such periods, the incumbent government is still the lawful executive authority, with all the powers and responsibilities that go with executive office. However, governments in this situation have traditionally constrained their actions until the political situation is resolved, in accordance with what is known as the convention on caretaker government.
- 6.22 There are two sets of circumstances in which the government would see itself bound by the caretaker convention.
- (a) **After a general election**, one of the two arms of the caretaker convention applies until a new administration is appointed (see paragraph 6.24).
 - (b) **If the government has clearly lost the confidence of the House**, one of the two arms of the caretaker convention guides the government's actions until a new administration is appointed, following either negotiations between the parties represented in the current Parliament or a general election.
- 6.23 In both situations, the government is likely to state explicitly that it is to operate as a caretaker government until the political situation is resolved.

Principles of the caretaker convention

Two arms of the convention

- 6.24 There are two arms to the caretaker convention. Which arm applies depends on whether:
- (a) it is not clear who will form the next government (see paragraphs 6.25 – 6.28); or
 - (b) it is clear who will form the next government, but they have not yet taken office (see paragraphs 6.29 – 6.30).

The principles that apply in each situation are set out in paragraphs 6.25 – 6.30.

Unclear outcome

- 6.25 Where it is not clear which party or parties will form the next government after 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 the public sector may continue during the caretaker period.
 - (b) Decisions taken and specific policy determined before the start of the caretaker period may be implemented by a caretaker government (subject to paragraph 6.26).
 - (c) Matters may arise, however, that would usually require decisions, such as those concerning:
 - significant or potentially controversial issues;
 - issues with long-term implications that would be likely to limit the freedom of action of an incoming government (such as the signing of a major contract, or the making of a significant appointment);
 - national or local emergencies;
 - a major international event, crisis, or disruption;
 - new policy initiatives; or
 - changes to existing policy.
 - (d) Decisions relating to those matters should:
 - be deferred, if possible, until the political situation is resolved; or
 - if deferral is not possible (or is no longer possible), be handled by way of temporary or holding arrangements that do not commit the government in the longer term (for example, extending a board appointment or rolling over a contract for a short period); or
 - if neither deferral nor temporary arrangements are possible, be made only after consultation with other political parties, to establish whether the proposed action has the support of a majority of the House. The level of consultation might vary according to such factors as the complexity, urgency, and confidentiality of the issue (see also paragraph 6.37).
- 6.26 Occasionally a significant policy decision that was made before a caretaker period will need to be implemented during the caretaker period. Usually the implementation of such decisions can proceed during a caretaker period. If the proposed action would be difficult or impossible to reverse, however, it may be appropriate to consult other political parties about it.
- 6.27 The caretaker convention colours the whole conduct of government, and requires careful judgement by Ministers, public servants, Crown entities, and other public sector agencies as to whether particular decisions are affected.

- 6.28 There are no hard and fast rules. Ministers may need to take into account various considerations (including political considerations), in deciding whether it is appropriate or necessary to proceed on a matter and how the matter should be handled. Decisions will also be considered against the background that the incumbent caretaker government has lawful executive authority, until replaced or confirmed in office.

Clear outcome

- 6.29 Where it is clear which party or parties will form the next government but Ministers have not yet been appointed, the outgoing government should:
- (a) undertake no new policy initiatives; and
 - (b) act on the advice of the incoming government on any matter of such constitutional, economic, or other significance that it cannot be delayed until the new government formally takes office—even if the outgoing government disagrees with the course of action proposed.
- 6.30 Situations of this kind are likely to be relatively short-lived, as a swift transition between administrations is enabled by New Zealand’s constitutional arrangements, including section 6(2)(a) of the Constitution Act 1986 (see paragraph 6.52).

Decision-making process under the caretaker convention

Public sector

Day-to-day administration

- 6.31 The day-to-day administration of public service agencies and other agencies in the public sector will (in general terms) continue during the caretaker period. However, agency officials and board members and employees of other public 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.

Public service agencies and non-public service departments

- 6.32 Most decisions to which the caretaker convention applies are those relating to significant or potentially controversial issues, issues with long-term implications, new policy initiatives, or changes to existing policy. In the usual course of events, these decisions will be referred to the Minister. The Minister will decide (in consultation, if appropriate, with ministerial colleagues and/or the Prime Minister) how the convention applies and how the decision should be handled. The agency should be ready to provide advice (if required) on applying the caretaker convention, and the options for handling the decision in terms of the convention. The Secretary of the Cabinet is available for guidance.
- 6.33 On rare occasions, caretaker convention issues may arise in relation to matters that, under statute, fall solely within the decision-making authority of a chief executive or statutory officer. Where this happens, chief executives and statutory officers should observe the principles of the caretaker convention (see paragraphs 6.24 – 6.30) when making such decisions. The Secretary of the Cabinet is available for guidance.

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

- 6.34 The statutory provisions governing decision-making within Crown entities, state-owned enterprises, and other public sector agencies impose different obligations from those applicable to decision-making within public service agencies and non-public service departments. Cabinet expects, however, that agencies in the state sector will apply the principles of the caretaker convention (see paragraphs 6.24 – 6.30) to decision-making during the caretaker period, as far as possible taking into account their legal obligations and statutory functions and duties. Cabinet also expects that the agencies will discuss with their Ministers any issues with caretaker convention implications. For general guidance on applying the caretaker convention, the heads of Crown entities or other public sector agencies may wish to contact relevant public service agency chief executives or the Secretary of the Cabinet.

Ministerial decisions

- 6.35 As a general rule, Ministers should put before their Cabinet colleagues the sorts of issues on which they themselves would wish to be consulted (see paragraphs 5.11 – 5.12). Ministers may wish to discuss with their Cabinet colleagues whether the caretaker convention applies to a particular decision and how it should be handled. If Ministers are in any doubt about whether the caretaker convention applies to a particular matter, they should err on the side of caution and raise the matter with the Prime Minister or at Cabinet. If a Minister considers that a matter requires consultation with other political parties, the proposed consultation must be approved in advance by either Cabinet or the Prime Minister (see paragraphs 6.36 – 6.37).

Coordination and the Prime Minister's role

- 6.36 In cases where any doubt arises as to the application of the caretaker convention, Ministers should consult the Prime Minister. Final decisions concerning the caretaker convention rest with the Prime Minister.
- 6.37 All approaches to other political parties must be cleared in advance with the Prime Minister or Cabinet. Ministers should ensure that they notify the Prime Minister as early as possible of any matters that may require consultation and action during periods of caretaker government.

Guidance on decisions about expenditure, and the Official Information Act 1982

- 6.38 During a caretaker period, particular attention should be paid to decisions about expenditure, and requests under the Official Information Act 1982.
- 6.39 In relation to decisions on expenditure, there must always be authority from Parliament to spend money before expenditure is incurred (see paragraph 5.70).
- 6.40 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 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 8.22 – 8.71.

Government formation

General

- 6.41 The process of government formation occurs most commonly following an election, but may be necessary if the government loses the confidence of the House mid-term. The principles and processes set out in paragraphs 6.42 – 6.47 apply in situations of both post-election and mid-term government formation.

Principles and processes of government formation

- 6.42 The process of forming a government is political, and the decision to form a government must be arrived at by politicians. Government formation may involve one or more parties.
- 6.43 In a case where government formation involves multiple parties, once the political parties have reached an adequate accommodation, and it is possible to form a government, it is expected that the parties will make appropriate public statements of their intentions. Where negotiations between parties are required, any agreement reached by the parties during their negotiations may need to be confirmed subsequently by the political parties involved, each following its own internal procedures.
- 6.44 By convention, the role of the Governor-General in the government formation process is to ascertain where the confidence of the House lies, on the basis of the parties' public statements, so that a government can be appointed. It is not the Governor-General's role to form the government or to participate in any negotiations (although the Governor-General might wish to talk to party leaders if the talks were to have no clear outcome).
- 6.45 Accordingly, the Governor-General will, by convention, abide by the outcome of the government formation process in appointing a government. The Governor-General will also accept the political decision as to who will lead the government as Prime Minister.
- 6.46 During the government formation process, the Clerk of the Executive Council provides official, impartial support directly to the Governor-General, including liaising with party leaders as required on behalf of the Governor-General. The Clerk facilitates the transition between administrations if there is a change of government. The Clerk assists the outgoing and incoming Prime Ministers and provides constitutional advice, as appropriate, on any proposed government arrangements. See paragraphs 1.33 – 1.37 for further information about the role of the Clerk of the Executive Council.
- 6.47 Parliament must meet not later than six weeks after the date fixed for the return of the writs for a general election (see section 19 of the Constitution Act 1986), although it may be summoned to meet earlier. If, following an election, a government has not yet been formed by the time that Parliament meets, the Address in Reply debate may resolve matters, as it provides an early opportunity for a confidence vote. If Parliament is in session following a mid-term government formation process, a vote of confidence may also usefully be initiated to demonstrate where the confidence of the House lies.

Outgoing Ministers

- 6.48 Where a government formation process results in a change of administration, Ministers usually remain in office in a caretaker capacity until the new government is appointed, at which time the outgoing Prime Minister will advise the Governor-General to accept the resignations of the entire ministry.

- 6.49 Section 6(2)(b) of the Constitution Act 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).
- 6.50 Ministerial Services in the Department of Internal Affairs provides practical assistance to outgoing Ministers in relation to staff, office, and other practical arrangements, including guidance on the storage and disposal of Ministers' official papers (see paragraphs 8.112 – 8.119). The Cabinet Office seeks information from outgoing Ministers about gifts they have received while in office (see paragraphs 2.88 – 2.96). See also the guidance about post-Ministerial employment at paragraph 2.114.

Appointment of a new government

- 6.51 Since the introduction of New Zealand's proportional representation electoral system, it has been the practice to hold a full appointment ceremony when a government is formed after an election, even when the composition of the government has not greatly changed. The ceremony formally marks the formation and commencement of the new administration and marks the end of the caretaker period.
- 6.52 Section 6(2)(a) of the Constitution Act 1986 helps ensure a swift transition between administrations. It provides that any candidate at a general election can be appointed as a Minister, before being confirmed as elected, but must vacate that office if not confirmed as a member of Parliament within 40 days of being appointed to the Executive. Section 6(2)(a) does not apply to Parliamentary Under-Secretaries, who cannot be appointed until their election as members of Parliament has been confirmed.
- 6.53 Further information on the appointment of Executive Councillors and Ministers is set out in paragraphs 1.26 – 1.27 and 2.15 – 2.17.

Mid-term transitions

General

- 6.54 Some transitions between administrations may occur during the electoral term. There may be a transition to a new Prime Minister, or to a new governing party or coalition. The guidance in paragraphs 6.55 – 6.61 sets out the established constitutional principles and processes that apply in these situations.

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

- 6.55 A change of Prime Minister may occur because the incumbent Prime Minister resigns, or as a result of the retirement, incapacity, or death of the incumbent Prime Minister.
- 6.56 In appointing a new Prime Minister, by convention the Governor-General accepts the outcome of the political process by which an individual is identified as the leader of the government.
- 6.57 In some cases (for example, in the event of the sudden death or incapacity of a Prime Minister), the Deputy Prime Minister acts as Prime Minister in a temporary capacity until the leadership of the government is determined.

Mid-term change of government

- 6.58 A basic principle of New Zealand's system of responsible government is that the government must have the confidence of the House of Representatives to stay in office. A government may lose the confidence of the House during its parliamentary term.
- 6.59 In some cases, the confidence of the House may be unclear, for example, when coalition or support arrangements change. The incumbent government will need to clarify where the confidence of the House lies, within a short time (allowing a reasonable period for negotiation and reorganisation). The caretaker convention applies in the mid-term context only when it becomes clear that the government has lost the confidence of the House.
- 6.60 Where loss of confidence is clear (for example, where the government has lost a vote of confidence in the House), the Prime Minister will, in accordance with convention, advise that the administration will resign. In this situation, either:
- (a) a new administration may be appointed from the existing Parliament (if an administration that has the confidence of the House is available—see the information about government formation in paragraphs 6.41 – 6.47); or
 - (b) an election may be called (see paragraphs 6.62 – 6.64).
- 6.61 Until a new administration is appointed, the incumbent government continues in office, governing in accordance with the caretaker convention (see paragraphs 6.21 – 6.40).

Early election

- 6.62 As the Governor-General's principal adviser, the Prime Minister may advise the Governor-General to dissolve Parliament and call an election (see paragraphs 2.4 and 2.6). Usually this advice will be timed in accordance with the electoral cycle.
- 6.63 In some circumstances, a Prime Minister may decide that it is desirable to advise the Governor-General to call an early election. In accordance with convention, the Governor-General will act on the advice as long as the government appears to have the confidence of the House and the Prime Minister maintains support as the leader of that government.
- 6.64 A Prime Minister whose government does not have the confidence of the House would be bound by the caretaker convention (see paragraphs 6.21 – 6.23). The Governor-General would expect a caretaker Prime Minister to consult other parties on any decision to advise the calling of an early election, as the decision is a significant one (see paragraph 6.25). It is the responsibility of the members of Parliament to resolve matters so that the Governor-General is not required to consider dissolving Parliament and calling an election without ministerial advice (see paragraph 1.18 on the reserve powers).

Provision of information by the public sector during transitions

- 6.65 The neutrality of the public sector must be protected throughout the pre-election period and the government formation process.
- 6.66 Before and after an election, the incumbent Ministers should ensure that any requests they make for advice or information from their officials are for the purposes of their portfolio responsibilities and not for party political purposes (see paragraph 6.12 for detail on policy development in the pre-election period).

- 6.67 At different stages of the election period or government formation process, different procedures apply for providing information and briefings to negotiating parties or to the incoming government.
- (a) **During government formation negotiations**, negotiating parties may seek access to the public service or other agencies in the public sector for information and analysis on issues that might form part of a coalition or support agreement. The Public Service Act 2020 requires negotiating parties to first make a request to the Public Service Commissioner for access to the public service agency. If the Commissioner approves the request, the agency must follow standards set by the Commissioner when complying with the request. This process is set out in Schedule 3, clauses 17–20 of the Public Service Act 2020. All agencies in the public sector are expected to observe the Public Service Commission guidance (see the Public Service Commission website).
 - (b) **When the government formation negotiations have concluded, but portfolio allocations have not yet been announced**, in cases of great urgency, chief executives may provide advice to the incoming government through the Prime Minister-designate. The advice may be given only after the express consent of the incumbent Prime Minister has been obtained and a process has been agreed with the Public Service Commissioner.
 - (c) **If portfolios have been allocated but the incoming Ministers have not yet been formally appointed**, chief executives may, with the approval of the incumbent Prime Minister and with the knowledge of the incumbent Minister and the Public Service Commissioner, brief incoming Ministers on their portfolio responsibilities. The Secretary of the Cabinet will inform chief executives of any such authorisation from the Prime Minister.
 - (d) **After Ministers have been formally appointed**, each agency 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 3.18 – 3.23 and the Public Service Commission website.
- 6.68 Incoming Ministers have access to the Cabinet records of previous administrations for continuity of government purposes (subject to certain conditions and to the rights and duties set out in the Official Information Act 1982) (see paragraphs 8.136 – 8.151).

Related information

- Speeches concerning the Governor-General’s role during transitions and government formation are available on the Governor-General’s website, gg.govt.nz.
- Detailed guidance for public servants during elections can be found on the Public Service Commission website, publicservice.govt.nz.

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

7

The Executive, Legislation, and the House

Introduction

- 7.1 This chapter provides an overview of the main principles and procedures concerning the development of government legislation (Acts of Parliament and 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 (SOPs));
 - (g) the role of Ministers in the development and approval of bills, including bills initiated by parties other than the government (local bills, private bills, and members' bills);
 - (h) the principles and procedures for the development of secondary legislation, and the 28-day rule;
 - (i) the role of Ministers in relation to the House of Representatives and select committees;
 - (j) the examination of international treaties by the House;
 - (k) the Crown's financial veto;
 - (l) the government's role concerning referenda initiated under the Citizens Initiated Referenda Act 1993.
- 7.2 Enquiries about the legislation programme may be directed to the Legislation Coordinator in the Cabinet Office (see paragraph 7.15) or to the Parliamentary Counsel Office. General enquiries about legislation may be directed to the Parliamentary Counsel Office. Enquiries about papers for consideration by the Cabinet Legislation Committee should be directed to the secretary of that committee (in the Cabinet Office).

Speech from the Throne

- 7.3 The first formal opportunity for a government to outline its legislative intentions is the delivery of the Speech from the Throne. The Speech from the Throne is given by the Governor-General or the Sovereign (if in New Zealand) on the second sitting day of a parliamentary term, when the State Opening of Parliament is held. The formal purpose of the speech is to explain the reasons for summoning Parliament. It is usual for the speech to announce, in broad terms, the government's policy and legislative proposals on the principal issues of the day. The moving of the Address in Reply and the subsequent debate are the first opportunity after an election for the House of Representatives to express confidence in the government.
- 7.4 The Speech from the Throne is prepared following a process determined by the Prime Minister, with officials assisting as required. The Prime Minister sends a preview copy to the Governor-General. Once the final text is approved, the Cabinet Office arranges for presentation copies of the speech to be printed and for the speech to be published in the *New Zealand Gazette* after it has been given. The Prime Minister's Office disseminates the speech to the media.

Prime Minister's statement

- 7.5 In most years the Prime Minister presents a statement to the House on the first sitting day. This statement is to review public affairs and to outline the government's legislative and other policy intentions for the next 12 months (see the section entitled "Statements" in the chapter on non-legislative procedures in the *Standing Orders of the House of Representatives* (the Standing Orders)). The Prime Minister's statement is presented each year unless it is the first day of the Parliament (followed by the State Opening, with a Speech from the Throne) or an Address in Reply debate was commenced less than three months prior to the first sitting day.

Government legislation programme

Purpose of the legislation programme

- 7.6 The legislation programme provides an annual framework within which priorities are established for preparing, and managing the progress of, the government's proposed bills.
- 7.7 The programme arranges groups of existing or proposed government bills in descending priority order, headed by bills that must be passed each year by law (such as Appropriation and Imprest Supply Bills). The legislation programme covers primary legislation only. It does not allocate priorities for the drafting of secondary legislation.
- 7.8 The programme is amended as demands on the government change, new issues requiring legislation arise, and priorities change with the passage of time. Details of the programme, and the priority accorded to particular pieces of legislation, are integral to the government's management of its business in the House.

Confidentiality

- 7.9 The legislation programme is confidential, subject to the Official Information Act 1982. Recipients of requests for the legislation programme, or for information about details or priorities on the programme, should consult the Cabinet Office when considering their responses. Care should be taken over references to legislative priorities in any Cabinet material being considered for public release.

Development of the legislation programme

- 7.10 At the request of the Leader of the House and with the agreement of the Prime Minister or Cabinet, the Cabinet Office periodically issues a circular that invites Ministers to submit proposals for bills to be included in the programme. This circular is usually issued at the beginning of each parliamentary term and towards the end of intervening calendar years. An annual legislation programme is drawn up from the resulting information. The Cabinet Legislation Committee allocates a priority to each bill, and the programme is then submitted to Cabinet for approval.
- 7.11 Ministers may at any time submit new proposals for legislation or seek changes to established priorities. Proposals for legislation may be submitted before public consultation or policy development is complete. A place on the legislation programme should be sought at an early stage if the policy issues are significant or the drafting task is likely to be substantial. If necessary, a Cabinet committee may make decisions on legislative priority at the same time as it considers the relevant policy proposals.
- 7.12 For guidance on the procedural requirements (including content and format) for the submission of bids to the Cabinet Legislation Committee, see the information on the legislation programme in the *CabGuide*.

Monitoring the legislation programme

- 7.13 Cabinet may review the legislation programme formally from time to time during the year and adjust priorities as necessary. Bills that fall behind the agreed timetable may be assigned a lower priority or be set aside when Cabinet reviews the programme's progress. Ministers and agencies should ensure that the Legislation Coordinator and the Parliamentary Counsel Office are alerted to matters that may significantly affect the content, scope, or progress of bills on the programme, or that may lead to a proposal to add an item to the programme.
- 7.14 The Cabinet Legislation Committee may from time to time report to Cabinet on the progress of the legislation programme. Ministers should at all times be ready to discuss with their Cabinet colleagues the progress of any draft legislation for which they are responsible, including bills before select committees. To do this, Ministers should obtain briefings from their agencies regularly and liaise with the chairs or senior government members of the select committees to check on progress.

Legislation Coordinator

- 7.15 The Legislation Coordinator, a member of the staff of the Cabinet Office, provides politically neutral support to the government of the day in developing, monitoring, and modifying the legislation programme. The Legislation Coordinator provides a broad view of progress and early warning of potential problems. The Legislation Coordinator is available to advise Ministers' offices and agency officials about the legislation programme or particular items on the programme.

Revision bills

- 7.16 The Legislation Act 2019 contains a mechanism for systematically revising the presentation of some New Zealand Acts to make them more accessible. After being revised, they are introduced as revision bills into Parliament for re-enactment. Revision is not intended to change the substantive effect of the law.
- 7.17 The Attorney-General must prepare a revision programme for each new Parliament, setting out the statutes to be revised over each three-year period. The Parliamentary Counsel Office is responsible for preparing the revision programme in consultation with the agencies that administer the legislation. Revision bills must be certified before introduction by a panel comprising the President of the Law Commission, the Solicitor-General, a retired High Court Judge, and the Chief Parliamentary Counsel. This panel certifies that the revision powers have been exercised appropriately and the effect of the law is not changed except as authorised. If this is the case, the revision bill can proceed through the House under a streamlined process.
- 7.18 Although revision bills must be certified as outlined in paragraph 7.17 as not making more than minor alterations to the substance of law, amendments may be made during the legislative process that make more substantive alterations. If such substantive amendments are sought, a revision bill should, on introduction, be accompanied by an SOP that sets out any amendments expressly identified as intended to change the effect of the old law. The Attorney-General should draw this SOP to the attention of the Business Committee.
- 7.19 Agencies should review the legislation they administer and consult with the Parliamentary Counsel Office to see if it would benefit from revision.

Law Commission work programme

- 7.20 The Law Commission is an independent Crown entity established by statute to undertake the systematic review, reform, and development of the law of New Zealand. Projects for the Law Commission may be proposed by any Minister or by the Law Commission. Each year the Minister responsible for the Law Commission writes to all Ministers inviting proposals suitable for government reference to the Law Commission, with the aim of finalising its work programme by the end of June.
- 7.21 Ministers are encouraged to consult the Parliamentary Counsel Office and the Ministry of Justice before proposing a legislation project for the Law Commission's work programme. Information on the current work programme can be found on the Law Commission's website. The Law Commission and relevant government agencies should collaborate closely during the course of a Law Commission project.
- 7.22 Following presentation of a Law Commission report, the portfolio Minister will submit a paper to Cabinet. If Cabinet accepts the recommendations in the Law Commission's report, no formal government response is made. If Cabinet rejects the recommendations, the government must present a formal response to the House within 120 working days of the presentation of the Law Commission's report. The processes for the government to respond to Law Commission reports are set out in the *CabGuide*. Further information about Cabinet and the Law Commission is set out in Cabinet Office circular CO (09) 1 *Law Commission: Processes for Setting the Work Programme and Government Response to Reports*.

Development and approval of bills

From policy to enactment

- 7.23 The development of bills is a complex and time-consuming process requiring careful planning and coordination. The basic process for developing government bills can be summarised as follows:
- (a) decision to pursue a policy proposal requiring a bill;
 - (b) policy development, including impact analysis for regulatory proposals (see paragraph 7.38 and the *CabGuide*);
 - (c) consultation (see paragraphs 7.28 – 7.52);
 - (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 7.55 – 7.56);
 - (g) drafting (see paragraphs 7.53 – 7.54);
 - (h) preparation of departmental disclosure statements (see paragraphs 7.57 – 7.59);
 - (i) approval by the Cabinet Legislation Committee and Cabinet of the draft bill for introduction (see paragraphs 7.57 – 7.59);
 - (j) reference to government caucus(es) (see paragraphs 7.60 – 7.63) and non-government parliamentary parties, as appropriate (see paragraphs 7.64 – 7.67);
 - (k) introduction, first reading, and referral to select committee;
 - (l) policy changes to a bill after introduction (see paragraphs 7.75 – 7.80);
 - (m) consideration and report by select committee; and
 - (n) remaining parliamentary stages.

Process for developing bills

Assessing the need for a bill

- 7.24 In developing policy, and discharging their regulatory stewardship responsibilities, Ministers and agencies must ensure that the need for legislative action is not overlooked and, equally, that unnecessary new legislation is avoided. The Parliamentary Counsel Office can advise Ministers and agencies in the early stages of policy development whether a bill is necessary. If it is, the Parliamentary Counsel Office can provide advice on the design of the bill or form that it should take to give effect to the policy. Legislative and non-legislative options for achieving a policy objective are outlined in the Legislation Design and Advisory Committee’s *Legislation Guidelines* (known as the *LDAC Guidelines*) and in guidance on impact analysis on the Treasury’s website. The portfolio Minister may wish to consider at an early stage whether the proposal is suitable for inclusion in the Law Commission’s annual work programme (see also paragraphs 7.20 – 7.22).

- 7.25 Where a bill is needed to give effect to a particular policy, the portfolio Minister should make a bid for a place on the legislation programme as early as possible in the policy development process. Such bids are usually made as part of the preparation of the annual legislation programme at the beginning of the year (see paragraphs 7.6 – 7.12).
- 7.26 Once the proposed bill is approved as part of the legislation programme, the relevant department should develop fully the policy that will form the basis of the bill, for consideration by the portfolio Minister and submission to the appropriate Cabinet committee and Cabinet.
- 7.27 Unless an exemption applies, all policy proposals submitted to Cabinet or ministerial groups that include regulatory options or proposals (that is, options that would ultimately create, amend, or repeal primary or secondary legislation) must be accompanied by an impact statement. An impact statement is a comprehensive outline of the results of impact analysis undertaken by the lead policy agency, and is intended to ensure that Cabinet has the best available information on the nature and extent of a policy problem, policy options, and risks and impacts. An impact statement is published at the time that a government bill is introduced or secondary legislation that is subject to disallowance is notified in the *New Zealand Gazette*. Detailed information about impact analysis, including exemptions and the requirements for preparation and presentation of impact statements, is set out in the *CabGuide* and on the Treasury's website.

Consultation

Effective and appropriate consultation

- 7.28 Effective and appropriate consultation is an important factor in good decision-making, good policy, and good legislation. When a bill is being developed, the types of consultation outlined in paragraphs 7.29 – 7.49 should be considered.

Ministerial colleagues

- 7.29 Ministers may need to consult their colleagues during policy development and before submitting draft bills to the Cabinet Legislation Committee or Cabinet. Where the subject matter of a bill affects the portfolio interests of another Minister, the Minister responsible for the bill should consult the other Minister.

Caucus(es)

- 7.30 Ministers may consider a policy issue to be suitable for consultation with caucus committees or caucuses during the policy development process. Caucuses are also consulted on draft bills before introduction (see paragraphs 7.60 – 7.63).

Political consultation

- 7.31 At all stages in the development and passage of a bill, Ministers should consider the need to confirm support for the bill from parties representing a majority of the members in the House (see paragraphs 7.64 – 7.67). This consultation may cover both the substance of the bill and the proposed process for its parliamentary consideration.
- 7.32 Coalitions and minority governments are likely to establish detailed procedures for political consultation, which will generally be promulgated by a Cabinet Office circular.
- 7.33 Ministers are responsible for consultation on proposed bills with non-government parliamentary parties and any independent member of Parliament. Agencies may be called on to support Ministers in this role (see paragraph 3.96, and the election period guidance issued by the Public Service Commission, available on its website).

Inter-agency consultation

- 7.34 A proposed bill will often affect the interests of other agencies in the public sector as well as the interests of the agency responsible for the bill. Lack of consultation within the public sector produces legislation that is likely to require early amendment or to have a protracted or difficult passage through the government policy process and the House. Other agencies that have an interest in, or may be affected by, a proposed bill should therefore be consulted fully as policy is developed and before drafting instructions are prepared. Relevant agencies in the public sector should also be consulted as appropriate.

Parliamentary Counsel Office

- 7.35 Agencies should consult the Parliamentary Counsel Office before a paper is submitted to Cabinet seeking approval to issue drafting instructions. Parliamentary counsel can give advice on the content required in such a paper, including how detailed the paper needs to be.

Ministry of Justice

- 7.36 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 7.70). Bills developed by the Ministry of Justice are vetted by the Crown Law Office. The Ministry of Justice must also be consulted on anything affecting constitutional arrangements and all proposals to create new criminal offences or penalties or alter existing ones, to ensure that such provisions are consistent and appropriate.

The Office for Māori Crown Relations – Te Arawhiti

- 7.37 Agencies should assess the implications of bills on existing Treaty of Waitangi settlements and consult the Office for Māori Crown Relations – Te Arawhiti if they conclude there will be a potential impact. This is to ensure agencies safeguard the durability of Treaty settlements, and the renewed relationship that settlements have established. Te Haeata – the Settlement Portal is a tool that can assist agencies to understand the range of commitments made in Treaty settlements.

Regulatory Impact Analysis Team, the Treasury

- 7.38 If impact analysis requirements will, or may, apply to a policy proposal, an agency must contact the Regulatory Impact Analysis Team at the Treasury to confirm this and to determine what type of impact statement will be required and who will need to review it before it is submitted to Cabinet. The *CabGuide* and the Treasury's website include further information about the provision of independent quality assurance for impact statements.

Portfolios and the administration of legislation

- 7.39 The Cabinet Office should be consulted if the proposed bill would:
- (a) establish a new portfolio or change existing portfolios;
 - (b) contain a definition of “Minister”, “department”, or “public service agency”; or
 - (c) require the responsibility for the administration of the legislation to be assigned to a portfolio and/or an agency by the Prime Minister.

Directories containing information about ministerial portfolios are listed and described in paragraph 2.34.

Legislation Design and Advisory Committee

- 7.40 The Legislation Design and Advisory Committee is a government committee that provides advice to agencies on bills early in their policy and legislative development. The committee's mandate is to help resolve problems in the architecture of legislation, and to identify potential rule of law issues, with the goal of ensuring that policy objectives are achieved and improving the quality of legislation.
- 7.41 The committee is responsible for the *LDAC Guidelines*, which cover issues that are fundamental to the development of legislation, such as proper processes and basic legal principles. The guidelines have been endorsed by Cabinet as the government's main point of reference for assessing whether draft legislation conforms to accepted constitutional and legal principles.
- 7.42 Ministers and agencies are encouraged to seek formal or informal advice and assistance from the committee at an early stage on projects that are significant, involve complicated legislative design issues, appear to have public law implications, or have implications for the overall coherence of the statute book. Agencies should allow sufficient time for this consultation when setting legislative timeframes.
- 7.43 Requests for a place on the legislation programme must note whether bills will be referred to the committee. If agencies are unclear whether they should consult the committee, they should discuss this with the Parliamentary Counsel Office and the committee's secretariat. Cabinet may decide consultation is appropriate when it approves the legislation programme, or when it approves the addition of bills to the programme in the course of the year.
- 7.44 The committee will also proactively scrutinise some bills, particularly when there has been no engagement with the committee, and may make submissions to select committees on them. The committee's members include experienced government officials, legal practitioners, academics, and regulators.

Officers of Parliament

- 7.45 Officers of Parliament should be consulted in their areas of interest as appropriate: for example, the Ombudsman over the application of the Ombudsmen Act 1975 to a new agency. The Officers of Parliament generally should also be consulted where a proposal would affect them as agencies that are part of the wider public sector: for example, broad reforms of the public sector that may have consequences for the Officers. If a proposed bill would establish a new officer of Parliament, the Office of the Clerk should be consulted, following which the Minister responsible for the bill should consult the Officers of Parliament Committee (a select committee chaired by the Speaker) at an early stage before the bill is developed.

Clerk of the House of Representatives

- 7.46 The Office of the Clerk should be consulted where legislative proposals have an impact on Parliament or the House or if they directly affect the Office of the Clerk as an entity.

Other organisations

- 7.47 Ministers may wish to consult other organisations such as Māori groups, professional or trade associations, non-government organisations, local government, or community groups, or to engage in a wider process of public consultation with citizens or affected parties, before policy decisions are finalised and the bill is drafted and introduced into the House.

- 7.48 In some sectors, agencies may have specific policies and guidelines covering consultation with the public: for example, the generic tax policy process (Inland Revenue Department and the Treasury).
- 7.49 Once drafting has progressed, in some circumstances, releasing an exposure draft of the bill may be helpful. In considering consultation with organisations outside the public sector, Ministers should take into account the confidentiality constraints mentioned in paragraph 7.51.

Consultation timeframes and processes

- 7.50 Consultation is essential but can be time-consuming. At the beginning of the planning process for the development of a bill, consideration must be given to the type of consultation that will be necessary or appropriate. Realistic timeframes for that consultation must be built into the bill's timetable. Several rounds of consultation may be needed on complex or significant bills.
- 7.51 At every stage of its development, a draft bill is confidential and must not be disclosed to individuals or organisations outside government, except in accordance with the Official Information Act 1982, any Cabinet-approved consultation procedures, or with CO (19) 2 *Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown*. Any such release or disclosure must first have the approval of the Minister concerned and, in some cases, the approval of the Attorney-General. Unauthorised or premature disclosure of the contents of a draft bill could embarrass the Minister, and imply that the role of Parliament is being usurped. Cabinet, government caucuses, and Parliament must always retain the freedom to amend, delay, or reject a bill.
- 7.52 Detailed information on consultation requirements and processes is set out in the *CabGuide*. Cabinet Office circulars are available on the website of the Department of the Prime Minister and Cabinet.

Drafting legislation

Role of the drafter

- 7.53 The main role of the drafter is to produce plain English drafts that are legally correct and give effect to government policy. In broad terms, the drafter is responsible for the way that the legislation is expressed and presented. The drafter takes a whole-of-statute-book perspective and ensures that the legislation is well structured and consistent with other statutes and legislative drafting principles. In drafting legislation, drafters act on instructions from instructing agencies (see paragraphs 7.55 – 7.56 and the Parliamentary Counsel Office *Turning Policy Into Law Guide*, which links to an instruction kit).
- 7.54 The Parliamentary Counsel Office is responsible for preparing all government bills other than bills administered by the Inland Revenue Department. Approval must be sought from the Cabinet Legislation Committee, and confirmed by Cabinet, before instructions for drafting a bill are given to anybody other than the Parliamentary Counsel Office, or the Inland Revenue Department for legislation administered by that agency. Submissions seeking such approvals must state the expected cost of using a drafter outside the Parliamentary Counsel Office or the Inland Revenue Department, and the proposed source of funding. Where approval is obtained, the actual cost is subsequently to be advised to the Cabinet Legislation Committee. The Parliamentary Counsel Office must approve legislation that has been drafted by a drafter outside the Parliamentary Counsel Office or the Inland Revenue Department, before approval is sought for its introduction into the House.

Drafting instructions

- 7.55 Drafting instructions provide the basis on which bills are drafted. Unless the Attorney-General has approved that drafting commence before policy approvals have been obtained, Ministers and agencies 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 agencies initiating legislation are responsible for ensuring that drafting instructions, and bills as drafted, reflect government policy fully and correctly.
- 7.56 Good instructions are essential to ensure the timely and efficient drafting of legislation. The matters that need to be included in proper drafting instructions are set out in the *LDAC Guidelines* and in the *Turning Policy Into Law Guide* and Instruction Kit on the Parliamentary Counsel Office website. Cabinet or a Cabinet committee must approve the issuing of any instructions before drafting can begin. Any instructions issued should allow for a realistic timeframe so that agencies have enough time to address policy and legal complexities they identify during drafting, resulting in a good-quality bill that can pass smoothly through the House. The Parliamentary Counsel Office can advise agencies on how to prepare instructions and realistic timeframes.

Consideration by Cabinet Legislation Committee and Cabinet

- 7.57 The Cabinet Legislation Committee examines all draft bills and agency disclosure statements before they are approved for introduction, to ensure that their policy content has been approved by the appropriate Cabinet committee and that all the relevant requirements (as set out in the *Cabinet Manual*, the *CabGuide*, and any applicable circulars) have been satisfied. The Cabinet Legislation Committee also examines substantive SOPs. It is not the function of the Cabinet Legislation Committee to revisit policy decisions underlying a bill, or to round them out. The committee's function is to be assured that all necessary decisions have been taken properly and that the bill or SOP conforms with legal principle, and that a completed departmental disclosure statement is available to accompany the bill or SOP where required. The Cabinet Legislation Committee will then refer bills to Cabinet for final approval for introduction into the House, either as separate items on the Cabinet agenda or in the committee's weekly report to Cabinet. A bill may not be introduced into the House until it has been approved by the Cabinet Legislation Committee and confirmed by Cabinet, or approved by Cabinet itself.
- 7.58 If at any stage of the drafting process significant changes are proposed to the policy already approved by Cabinet, the matter should be brought back to the relevant Cabinet committee for consideration and additional approval. Additional consultation as set out in paragraphs 7.28 – 7.49 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 7.75 – 7.80 for information on policy changes to a bill after introduction.
- 7.59 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)

- 7.60 A party caucus comprises all the members of Parliament belonging to a particular political party. The number of government caucuses will depend on the number of parties represented in government. Each party caucus is likely to meet separately, although joint caucus meetings may be held.
- 7.61 Ministers are responsible for ensuring that each draft bill is referred to the government caucus(es) before being introduced into the House to ensure (among other reasons) that the bill has adequate support to progress. Reference to caucus(es) will usually follow approval by Cabinet, but in some cases timing considerations may require consultation with caucus or a caucus committee to precede Cabinet approval. The portfolio Minister and, in a coalition or minority government, any Minister who is representing a coalition partner's or support party's interests on the bill are expected to ensure that the matter is placed on their respective caucus agendas. Each Minister should be present to explain the bill.
- 7.62 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.
- 7.63 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 given in paragraph 3.95.

Consultation with non-government parliamentary parties

- 7.64 Consultation may be undertaken with non-government parliamentary parties and any independent members of Parliament before bills are introduced, to:
- (a) confirm the support of a majority of the House for a bill to progress; or
 - (b) facilitate aspects of the parliamentary process.
- 7.65 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.
- 7.66 The portfolio Minister should assess the consultation requirements for each bill on a case-by-case basis, and undertake that consultation according to agreed procedures. Close liaison with the Leader of the House may be needed.
- 7.67 Ministers should consult the Leader of the House on engagement with non-government parliamentary parties through the Business Committee. The Business Committee (a select committee chaired by the Speaker) is empowered to approve extended sittings, expand or restrict select committees' powers with respect to the consideration of a bill, arrange how committees of the whole House consider bills, including by allowing out of scope amendments, classify bills as cognate, determine that select committee reports are to be debated, and arrange House business.

Compliance with legal principles and obligations

- 7.68 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 2020;
 - (d) international obligations; and
 - (e) the guidance in the *LDAC Guidelines*.
- 7.69 When a bill is subsequently submitted to the Cabinet Legislation Committee for approval for introduction, the Minister is required to confirm in the covering submission that the draft bill complies with the legal principles and obligations listed in paragraph 7.68. Where a bill does not comply with these principles and obligations, the Minister must draw attention to the inconsistency, and justify it. 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).
- 7.70 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. There is an expectation that such issues will be identified by the agency developing the bill at the earliest possible stage. The Ministry of Justice is responsible for examining all bills 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. The Attorney-General's report on a bill is referred to a select committee. Ministers are expected to assist the committee in considering New Zealand Bill of Rights Act 1990 issues. For information about what happens when a court makes a declaration that an Act is inconsistent with the New Zealand Bill of Rights Act 1990, see paragraphs 7.146 – 7.147.

Omnibus bills

- 7.71 The *Standing Orders* allow only certain types of omnibus bills (see the section entitled “Omnibus bills” in the chapter on legislative procedures in the *Standing Orders*). When developing omnibus bills, agencies should consult the Office of the Clerk at an early stage. The types relevant to most Ministers and agencies are:
- (a) omnibus bills that deal with interrelated topics that can be regarded as implementing a single broad policy (advice on compliance with this requirement should be sought from the Office of the Clerk);
 - (b) finance bills or confirmation bills that validate an action or confirm secondary legislation;
 - (c) taxation bills; and
 - (d) Statutes Amendment Bills.

- 7.72 Statutes Amendment Bills are designed as vehicles for technical, short, and non-controversial amendments to multiple Acts. Cabinet generally agrees to a Statutes Amendment Bill being included in the annual legislation programme. The Cabinet Office advises all Ministers and chief executives by Cabinet Office circular of the criteria, process, and deadlines for the development of the bill, which is then coordinated by the Ministry of Justice.
- 7.73 The need to obtain the agreement of all other parties and any independent members of Parliament on a Statutes Amendment Bill is particularly important. The *Standing Orders* provide for any clause in such a bill to be struck out if any member objects to it in the committee of the whole House.
- 7.74 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

- 7.75 During the parliamentary process, it often becomes necessary to amend a bill. Changes can be made to a bill either as a result of the select committee process (that is, as recommended in the committee's report), or later during the committee of the whole House stage. Ministers are responsible for monitoring the progress of their legislation when it is before a select committee (see paragraphs 7.14 and 7.114 – 7.117).
- 7.76 Changes proposed by the Minister in charge of a bill are usually formally publicised in an SOP. Changes proposed by the government at the select committee stage will usually be proposed in the report of the agency 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 in an SOP, especially where the proposed changes are extensive or significant.
- 7.77 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. Where proposed amendments are affected by the rules on omnibus bills in the *Standing Orders*, the Business Committee may agree for a bill to be converted into an omnibus bill. Procedural advice on these matters and on the parliamentary process should be obtained from the Office of the Clerk.
- 7.78 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 in 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 7.57 – 7.59). This may include a new or supplementary impact statement and, once the SOP is released, a revised or additional agency disclosure statement.
- 7.79 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.

- 7.80 All SOPs that are outside the scope of a bill or that make substantive changes to a bill (particularly SOPs that are to be referred to a select committee for consideration) must first be submitted to the Cabinet Legislation Committee for approval. An SOP that serves a mechanical purpose (such as to divide a bill after its committee stage) or promotes minor technical improvements need not go through these procedures.

Non-government legislative proposals

- 7.81 Ministers should keep themselves informed about matters that may affect their portfolios, such as:

- (a) the introduction of, and progress on, bills not promoted by the government (local bills, private bills, and members' bills); and
- (b) legislative amendments proposed other than by government members of Parliament.

Cabinet consideration of the government position on whether to support such a bill or proposal may be required. In rare cases, the government may adopt a member's bill following Cabinet consideration, with the agreement of the member in charge of the bill.

- 7.82 Non-government proposals may have fiscal implications. Information on the Crown's financial veto is set out in paragraphs 7.138 – 7.140.
- 7.83 Under the *Standing Orders*, local bills, private bills, and members' bills that affect the rights and prerogatives of the Crown (for example, by seeking to bind the Crown) require the Crown's consent before they can be passed. This consent is conveyed to the House in a message from the Governor-General, who acts on the advice of the Prime Minister. The Office of the Clerk and the Parliamentary Counsel Office identify whether the rights and prerogatives of the Crown are affected by a bill. The Office of the Clerk seeks advice from the Leader of the House on whether the government wishes the bill to proceed. Cabinet consideration of the government position may be required if it has not already taken place at an earlier stage.
- 7.84 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. The same does not apply to Parliamentary Under-Secretaries.

Secondary legislation

Authority to make secondary legislation

- 7.85 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 secondary legislation. Secondary legislation usually deals with matters of detail or implementation, matters of a technical nature, or matters likely to require frequent alteration or updating. The authority to make regulations is set out in the relevant Act. Secondary legislation 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.

- 7.86 Secondary legislation is law made by someone other than Parliament, under a power that Parliament has formally delegated in a particular Act of Parliament and that the Act states is secondary legislation. It is an umbrella term covering many types of secondary legislation, including regulations, orders, rules, notices, and so on, the names of which reflect their different nature. Local authority bylaws are also secondary legislation under section 161A of the Local Government Act 2002. In a small number of cases, secondary legislation is made, not under an Act, but under the royal prerogative. Secondary legislation must be published in accordance with Part 3 of the Legislation Act 2019, with the relevant requirements set out in a table found under the empowering provision in the Act.

Scrutiny of secondary legislation

- 7.87 The scope of the power to make secondary legislation will depend on the wording of the enabling Act. Therefore, care must always be taken to ensure that secondary legislation falls within the scope of the power to make it. The High Court can review secondary legislation and declare it to be ultra vires and therefore invalid if it is outside the scope of the power to make it.
- 7.88 The Regulations Review Committee examines all secondary legislation after it is made. This select committee considers whether it should draw the secondary legislation to the attention of the House on any of a number of grounds relating to basic legal or constitutional principle (see the section entitled “Delegated legislation” in the chapter on legislative procedures in the *Standing Orders*). This scrutiny forms the basis for any recommendation to the House.
- 7.89 A process also exists under Part 5 of the Legislation Act 2019 and the *Standing Orders* to move a motion in the House for the disallowance of secondary legislation. The Regulations Review Committee also investigates complaints on the operation of secondary legislation, on grounds set out in the *Standing Orders*.
- 7.90 Part 5 of the Legislation Act 2019 also requires secondary legislation to be presented to the House by the relevant Minister. Currently this applies to all secondary legislation made by Order in Council and some other secondary legislation. The presentation requirements for secondary legislation are set out in a table found under the empowering provision in the Act.

Planning for the development of secondary legislation

- 7.91 It is expected that agencies will systematically monitor and review all secondary legislation for which they are responsible, as part of their regulatory system stewardship responsibilities. Each agency should monitor the secondary legislation that it is likely to require each year, including:
- (a) secondary legislation that will be needed as a consequence of new legislation being developed by the agency;
 - (b) secondary legislation that is required at specific dates each year; and
 - (c) amendments needed to existing secondary legislation as a result of a review or changes in fees.

- 7.92 There is no formal programme for the drafting of secondary legislation. However, when submitting a bill for a place on the annual legislation programme, Ministers are required to provide a summary of any associated secondary legislation that will be necessary to implement the Bill, and an indication of the likely timing of making the secondary legislation. It is good practice for agencies to give the Parliamentary Counsel Office information on any significant proposed secondary legislation early in each year, when Cabinet decisions are being made on the legislation programme.

Process for developing secondary legislation to be made by Order in Council

- 7.93 Regulations, commencement orders, and some other secondary legislation are made by Order in Council. Such secondary legislation must be developed and made by following a particular process. The *CabGuide* sets out detailed guidance on the process for developing regulations. The *LDAC Guidelines* include extensive guidance on the development of secondary legislation. The Parliamentary Counsel Office *Turning Policy Into Law Guide* also provides useful guidance for agencies' legal advisers and other officials working with the Parliamentary Counsel Office.
- 7.94 The guidance provided in paragraphs 7.24 – 7.70 concerning the development of primary legislation applies equally to the development of secondary legislation.
- 7.95 The steps in the process include:
- (a) identifying the need for regulations or amendments to secondary legislation (through agency monitoring and consideration of the relevant statute and regulatory system);
 - (b) developing the policy behind the secondary legislation (if necessary);
 - (c) consultation (as required):
 - with relevant agencies;
 - with government caucus(es);
 - with other parties represented in the House and independent members of Parliament; and
 - with affected groups if this is required by the empowering Act, identified as necessary by the department or Ministers, or otherwise appropriate;
 - (d) submitting any policy, including an impact statement, to a Cabinet committee and Cabinet for approval. If the secondary legislation is routine and does not require new policy decisions, the Minister may authorise drafting without reference to Cabinet;
 - (e) drafting by the Parliamentary Counsel Office;
 - (f) submitting the proposed secondary legislation to the Cabinet Legislation Committee and Cabinet for authorisation for submission to the Executive Council;
 - (g) notification in the *New Zealand Gazette*;

- (h) a minimum 28-day period before the secondary legislation comes into force (see paragraphs 7.100 – 7.103 for further details on the 28-day rule); and
 - (i) publication by the Parliamentary Counsel Office on the legislation website.
- 7.96 Agency 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 secondary legislation and the date on which the secondary legislation comes into force, assuming all preceding steps have been completed satisfactorily.
- 7.97 It is increasingly common for the empowering Act and international treaties entered into by New Zealand to impose an obligation on those developing secondary legislation 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 secondary legislation 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.
- 7.98 The drafter of the secondary legislation will consider whether the secondary legislation is within the scope of the powers to make it granted by the Act. If proposed secondary legislation is not within these powers, restricts individual freedom unreasonably, or is otherwise undesirable from a legal perspective, the Parliamentary Counsel Office will notify the Attorney-General and the Minister and department concerned.
- 7.99 A small number of Orders in Council are drafted within agencies and submitted directly to the Executive Council (see paragraph 1.41). The principles set out in paragraphs 7.93 – 7.98 in relation to secondary legislation drafted by the Parliamentary Counsel Office apply to these orders. Technical requirements for such Orders in Council are included in the information on the Executive Council in the *CabGuide*.

The 28-day rule

- 7.100 It is a requirement of Cabinet that secondary legislation made by Order in Council must not come into force until at least 28 days after it has 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.
- 7.101 There are some instances where secondary legislation does 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 the secondary legislation has little or no effect on the public, or confers only benefits on the public;
 - (b) where the secondary legislation is made in response to an emergency;
 - (c) where early commencement is necessary for compliance with statutory or international obligations;
 - (d) where early commencement is necessary to avoid unfair commercial advantage being taken, or the purpose of the secondary legislation being defeated; or
 - (e) where irregularities need to be validated.

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

- 7.102 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.
- 7.103 The drafter of the secondary legislation will note any non-compliance with the 28-day rule when they certify the regulations as being in order for submission to Cabinet. The Cabinet Office also collects information on compliance with the 28-day rule. Where there appear to be ongoing difficulties in complying with the rule, the Cabinet Office will seek an explanation from the office of the Minister and the chief executive concerned to identify and resolve problems.

Publishing secondary legislation

- 7.104 All secondary legislation made by Order in Council must be published on the legislation website and notified in the *New Zealand Gazette*, as soon as it has been made. This is done by the Parliamentary Counsel Office. These are the minimum publicity requirements for new secondary legislation. Ministers and agencies should consider what other steps may be needed to give adequate publicity to a particular law change.
- 7.105 The *Turning Policy Into Law Guide* contains information on certifying, gazetting, and publishing regulations (see also paragraphs 1.50 – 1.52).

Ministers and the House

- 7.106 In addition to its legislative function, another key role of the House of Representatives is scrutiny of the Executive. Much of this scrutiny, such as consideration of the Estimates, takes place in select committees (see paragraphs 7.112 – 7.126). Ministers are also directly accountable to the House through written and oral questions. They may be required to participate in an urgent debate on a matter of current importance, take the opportunity to inform the House about the government's work in a General Debate, or make statements to the House on matters of significant public importance.
- 7.107 Further information can be found in the *Standing Orders*. Guidance for Ministers about participation in these processes is available from the office of the Leader of the House and from the Office of the Clerk of the House of Representatives.

Questions for oral or written answer

- 7.108 Questions for oral answer can be addressed to a Minister on any matter for which the Minister has ministerial responsibility. Questions are lodged with the Clerk of the House of Representatives in the morning of a sitting day, and notified to Ministers' offices once the list for the day has been determined. The Minister's office helps the Minister to prepare for answering the primary question and any follow-up (supplementary) questions that may be asked. Agencies provide information to the Minister to support this process.
- 7.109 Questions for oral answer and supplementary questions are allocated according to the proportion of seats each party holds in the House. This means that a certain number of primary questions are available to be asked by members of Parliament from the parties represented in the government each sitting day.
- 7.110 Any member of Parliament can lodge a question for written answer. Questions must relate to an area of ministerial responsibility. They must be answered within six working days.

- 7.111 All questions and answers are published on the Parliament website, although the publication of replies is delayed to allow the member who received the reply to have first use of the information.

Ministers and select committees

General

- 7.112 The *Standing Orders* provide for select committees to be appointed to consider bills and other business. Select committees play an important role in the House's functions of scrutinising the Executive and holding it to account, examining proposed and past expenditure, and considering bills. Cabinet Ministers are not usually appointed to the subject select committees, but Ministers outside Cabinet may be appointed as members.
- 7.113 All government bills, except those taken under urgency, and Appropriation and Imprest Supply Bills, are referred to select committees for consideration. Select committees also:
- (a) consider petitions;
 - (b) receive briefings and carry out inquiries;
 - (c) examine certain international treaties (see paragraphs 7.127 – 7.137);
 - (d) examine the *Estimates*; and
 - (e) conduct the annual reviews of agencies, Crown entities, state-owned enterprises, Offices of Parliament, and other public organisations.

Consideration of bills

- 7.114 Select committee consideration of bills allows members of Parliament, interest groups, and the general public to examine and have input into draft bills before they pass into law. In considering a bill, a select committee usually calls for submissions from interested organisations and individuals. A select committee may also seek advice from officials at various stages. Select committees may recommend to the House amendments to a bill, provided that they are relevant to the subject matter and consistent with the principles and objects of the bill as introduced.
- 7.115 By default, a select committee must report on a bill to the House within six months. A longer or shorter reporting deadline can be sought when the House refers the bill to committee, but seeking a date less than four months away requires a separate, unlimited debate in the House. For further information, see the chapter on legislative procedures in the *Standing Orders*. Information on the role and conduct of officials in relation to select committees is set out in paragraphs 3.91– 3.94.
- 7.116 The *Standing Orders* allow a Minister to take part in the proceedings of a select committee, even if the Minister is not a member of the select committee. In such cases, a Minister is not entitled to vote (see the section entitled “Conduct of proceedings” in the chapter on select committees in the *Standing Orders*). Recent practice has been for a Minister to be available to a select committee to explain the considerations underlying a government bill, and to otherwise facilitate the select committee's consideration of the bill.
- 7.117 A Minister should actively liaise with the chairs or senior government members of select committees that have the Minister's bills before them, to be aware of progress and to personally ascertain any intervention or other action necessary to advance the bills.

Submissions on bills by agencies

- 7.118 Government policy should reflect a whole of government approach rather than a single agency's view. Agencies 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, agencies should give the reasons for making a submission to the select committee and set out the substance of the proposed submission.
- 7.119 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 8.94 – 8.97 and *Officials and Select Committees – Guidelines* on the Public Service Commission website). The Minister may need to consult colleagues, particularly in a coalition government or if the issue affects several portfolios. Sometimes Ministers may direct that a policy-related issue be referred to the appropriate Cabinet committee for decision or a proposed response be referred for agreement by the Cabinet Legislation Committee.
- 7.120 If the subject matter is broader than the agency's sphere of interest, the agency should establish whether other agencies have been similarly approached. If several agencies have been approached, a lead agency should be identified by Ministers to liaise with the other agencies, to ensure coordinated and comprehensive responses.
- 7.121 It is expected that agencies in the public 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.
- 7.122 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 7.81 – 7.84.

Government responses to reports of select committees

- 7.123 If a report from a select committee to the House on an inquiry or petition includes recommendations to the government, a government response to the recommendations must be presented to the House within 60 working days of the committee's report.
- 7.124 The Office of the Clerk of the House of Representatives advises the Cabinet Office that a response to a select committee's report or petition referral is required. The Cabinet Office asks the appropriate Minister to report on the recommendations and to prepare the text of the government response.
- 7.125 The Minister's report and the proposed government response are considered by the relevant Cabinet committee and Cabinet.
- 7.126 If the select committee's report on the inquiry or petition raises matters that require policy decisions by Cabinet, a paper should be submitted to the relevant Cabinet committee before approval is sought for the final government response. After Cabinet has approved the response, the office of the Minister concerned must arrange the presentation of the government response to the House, by delivering the response to the Office of the Clerk of the House of Representatives. Further information on procedures for the preparation and presentation to the House of government responses can be found in the *CabGuide*.

Parliamentary treaty examination

General

- 7.127 In New Zealand, the power to conclude treaties rests with the Executive. Any proposal to sign a treaty or to take binding treaty action must be submitted to Cabinet for approval (see paragraphs 5.78 – 5.82).
- 7.128 Before the government takes binding treaty action on them, multilateral treaties and major bilateral treaties of particular significance are presented to the House of Representatives for examination. The requirements for parliamentary treaty examination are set out in the *Standing Orders*. The Minister of Foreign Affairs determines whether a bilateral treaty amounts to a major bilateral treaty of particular significance.
- 7.129 The parliamentary treaty examination process takes time, which agencies must factor into their planning. The government may take binding treaty action before parliamentary treaty examination only where this is urgently necessary in the national interest.

National interest analysis

- 7.130 Presenting a treaty to the House requires the preparation of a national interest analysis, addressing such matters as the reasons for becoming a party to the treaty, the advantages and disadvantages to New Zealand, and the means of implementing the treaty.
- 7.131 The agency with the main policy interest in the treaty, in consultation with the legal division of the Ministry of Foreign Affairs and Trade, is responsible for preparing the national interest analysis according to the requirements of the *Standing Orders*. In cases where a treaty has regulatory impacts, an extended national interest analysis, which includes the elements of an impact statement for a regulatory proposal, must be prepared. The national interest analysis must be approved by Cabinet before it is presented to the House.

Select committee consideration

- 7.132 Once a treaty and accompanying national interest analysis have been presented to the House, they are referred to the Foreign Affairs, Defence and Trade Committee. This select committee may examine the treaty itself or refer it to another more appropriate select committee.
- 7.133 The government refrains from taking any binding treaty action in respect of a treaty that has been presented to the House until the relevant select committee has reported, or 15 sitting days have elapsed from the date of presentation, whichever is sooner. The select committee may indicate to the government that it needs more time to consider the treaty, in which case the government may consider deferring binding treaty action.
- 7.134 The select committee may seek public submissions. In addition, the House itself may sometimes wish to give further consideration to the treaty: for example, by way of a debate in the House.
- 7.135 If the select committee report contains recommendations to the government, a government response to those recommendations must be presented within 60 working days of the report (or such other timeframe as specified in the *Standing Orders*). For further information, see paragraphs 7.123 – 7.126, and the section entitled “Reports” in the chapter on select committees in the *Standing Orders*.

Related bills

- 7.136 Any bill necessary to implement a treaty domestically should not be introduced into the House until after the treaty has been presented and the time for the select committee to report has expired. Agencies may initiate the legislative process earlier, by seeking a place on the legislation programme for the bill and issuing drafting instructions to parliamentary counsel (on a conditional basis).

Further information

- 7.137 The Ministry of Foreign Affairs and Trade can provide advice on the parliamentary treaty examination process, including guidance on the required format and content of a national interest analysis. Further information is set out in the *CabGuide*.

Crown's financial veto

- 7.138 All members of Parliament can propose bills or amendments to bills that involve an increase or decrease in expenditure or taxation. They also have the power to move amendments to Votes in the *Estimates*. The *Standing Orders* give the government the power to veto such initiatives if, in the government's view, the proposal would have more than a minor impact on the Crown's fiscal aggregates as specified in section 26J(1)(a) of the Public Finance Act 1989, or on the composition of a Vote. The relevant House procedures are set out in the section entitled "Crown's financial veto" in the chapter on financial procedures in the *Standing Orders*.
- 7.139 As the timelines for the government to decide whether or not to exercise the financial veto can be very tight, agencies and Ministers' offices must:
- (a) have processes in place for monitoring developments in the House and select committees affecting their Minister's portfolio or Vote, and for recognising which initiatives may have an impact on the government's fiscal aggregates or the composition of a Vote;
 - (b) alert their Minister and the Minister of Finance or the Treasury as soon as possible to any such initiatives; and
 - (c) provide prompt advice on the fiscal implications of such initiatives.
- 7.140 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 agencies is contained in Cabinet Office circular CO (07) 2 *The Financial Veto and 24 Hour Rule*.

Citizens initiated referenda

- 7.141 The Citizens Initiated Referenda Act 1993 establishes a process that allows persons or organisations to initiate a non-binding national referendum on a subject of their choice, if 10 percent of registered voters sign a petition in support of the question. The Clerk of the House of Representatives determines the precise wording of the question to be asked in the petition, on the basis of the promoter's proposal and a public consultation process. The promoter then has 12 months in which to collect the necessary signatures to cause a referendum to be held. The costs of holding the referendum are borne by the government.

- 7.142 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.
- 7.143 The government may decide to respond to a referendum proposal at any stage of the referendum process. A response could involve:
- (a) a declaration of support for the proposal;
 - (b) an indication of willingness to take account of public debate over the issue;
 - (c) a rejection of the proposal; or
 - (d) the provision of information to inform the debate.
- If it is possible that the government might support the proposal, the question of a formal response should be addressed early in the process.
- 7.144 As a matter of principle, agencies should avoid commenting publicly on the merits of referendum proposals unless they have the permission of the Minister to do so.
- 7.145 It is appropriate for agencies 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. Agencies should note that their comments are made available to the promoter as part of the Clerk's consultation on the wording, and that information held by the Clerk about processes under the Citizens Initiated Referenda Act 1993 is subject to the Official Information Act 1982.

Declarations of inconsistency

- 7.146 A senior court may declare that an Act is inconsistent with rights set out in the New Zealand Bill of Rights Act 1990 in a way that has not been justified in a free and democratic society. The Human Rights Review Tribunal may issue an equivalent declaration under the Human Rights Act 1993 (in respect of the right to freedom from discrimination). The Attorney-General is required to notify the House of Representatives and the government must formulate a response when any such declaration is made.
- 7.147 The Attorney-General must first notify the House within six sitting days that a declaration has been made. This notice triggers a process of parliamentary consideration of the declaration. A select committee will consider the declaration and may make any recommendations to address the declaration. The committee will report its findings to the House within four months of the Attorney-General's notice, and the government must present its own response within six months of the notice (or by a date otherwise decided by the House). A parliamentary debate on the declaration, select committee report, and government response must be held within six sitting days of the government response being presented. There is no statutory requirement for the government or the House to respond in any particular way to a declaration of inconsistency. The processes established for considering declarations are intended to promote reconsideration of significant rights issues by Parliament and the Executive in the light of advice from the senior courts.

Related information

- Information about the Law Commission and its work programme is on its website, lawcom.govt.nz.
- The Legislation Design and Advisory Committee guidelines can be found on its website, ldac.org.nz.
- Information about requirements for impact analysis and disclosure statements, and the government's expectations for good regulatory practice, including regulatory stewardship expectations, is available on the Treasury website, treasury.govt.nz.
- The *Turning Policy Into Law Guide* can be found on the Parliamentary Counsel Office website, pco.govt.nz.
- Detailed procedural guidance on the requirements for submitting bids for the legislation programme and the procedures for taking legislative proposals through the Cabinet Legislation Committee and Cabinet can be found in the *CabGuide*, at dpmc.govt.nz/publications/cabguide.
- The *Standing Orders of the House of Representatives* and *Speakers' Rulings* can be found on the Parliament website, parliament.nz.
- David McGee, *Parliamentary Practice in New Zealand*, Office of the Clerk of the House of Representatives, provides additional information about parliamentary practice and process, and is available on parliament.nz.
- Questions for written answer and replies can be accessed on parliament.nz.
- Guidance concerning the interaction between public service officials, select committees, and political parties is available on the Public Service Commission website, publicservice.govt.nz.
- Guidance for policy-makers on when and how to provide for the Treaty of Waitangi in legislation is available on the Office for Māori Crown Relations – Te Arawhiti website, tearawhiti.govt.nz. Te Arawhiti also administers the Treaty provisions oversight group, which is available to meet with agencies to support the development of legislative provisions.
- The *New Zealand Gazette* is available at gazette.govt.nz.
- Cabinet Office circulars are available on the Department of the Prime Minister and Cabinet website, dpmc.govt.nz/publications/cabinet-office-circulars-and-notice.

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

8 Official Information and Public Records

Introduction

- 8.1 This chapter provides guidance about the protection, availability, use, and disclosure of information held by government. The chapter covers:
- (a) the status of information held by government and when it may be disclosed;
 - (b) the main aspects of the Official Information Act 1982, the Ombudsmen Act 1975, the Privacy Act 2020, and the Public Records Act 2005, particularly as they relate to Ministers and Cabinet;
 - (c) the provision of information to select committees, the production or discovery of official documents in legal proceedings, and requests for parliamentary information;
 - (d) the creation, good management, preservation, and archiving of ministerial public records;
 - (e) the convention on access to documents of a previous administration, and guidelines for former Ministers on the disclosure and use of official information.

Information held by government

- 8.2 The government holds a large quantity of information of all kinds. The law governing the creation, collection, storage, and use of this information is set out mainly in the Public Records Act 2005 and the Privacy Act 2020. These Acts, together with the Official Information Act 1982, also govern the availability of this information and promote accountable government through transparency and reliable recordkeeping. They help to ensure that information generated or procured by the government is used for lawful purposes.
- 8.3 All information held by the government should be treated with care and protected from unauthorised or unlawful release.
- 8.4 Release may be authorised by the Cabinet, a Minister (see paragraphs 8.17 – 8.21), or officials holding the relevant statutory or delegated authority. Release of information may also be required under the Official Information Act 1982, the Privacy Act 2020, or other legislation.
- 8.5 Ministers and (in the case of material from a previous administration) public service agencies are responsible for their own Cabinet material. Any requests for access to Cabinet documents, including by an inquiry or judicial body, must be handled by the responsible Minister or agency. While the Cabinet Office holds Cabinet papers and minutes, it is not the appropriate agency to make decisions on their release under the Official Information Act 1982. Information about the release of Cabinet material from a previous administration can be found in paragraphs 8.136 – 8.151.

- 8.6 The government, under the Public Service Act 2020, is expected to deliver public services collaboratively. This will often require personal information that has been collected by one agency to be shared with another. Agencies should consider how to use and manage personal information early in the policy development process, and they should seek advice from their legal or privacy advisers, the Government Chief Privacy Officer or the Office of the Privacy Commissioner. Information sharing can often be achieved in a way that is consistent with the Privacy Act 2020's information privacy principles (see paragraph 8.73). Where potential inconsistencies with the information privacy principles are identified, the Privacy Act 2020 and other legislative regimes contain tools that can enable the information sharing. In all cases, appropriate safeguards must be built into sharing arrangements.

Security classification of government documents

- 8.7 Government documents may be given a security classification. Classified documents must be handled according to the *Protective Security Requirements*. Guidance on the application of security classifications to Cabinet material is set out in the *CabGuide* (see paragraph 8.46 for information on the release of classified information under the Official Information Act 1982).

Improper release or use of information held by the government

Unauthorised release of information

- 8.8 If information held by the government is released without authority, a range of responses may be considered, depending on the circumstances. They include:
- (a) an internal inquiry by the chief executive of the agency concerned, perhaps in association with the Public Service Commission;
 - (b) an inquiry by the Secretary of the Cabinet;
 - (c) a non-statutory or statutory inquiry (see paragraphs 4.115 – 4.116);
 - (d) a Public Service Commission inquiry at the direction of the Prime Minister or Minister concerned, or initiated by the Public Service Commissioner;
 - (e) a police inquiry; or
 - (f) an inquiry by the Privacy Commissioner.
- 8.9 Information released by an official with relevant delegations and in good faith in response to a request under the Official Information Act 1982 is an authorised release. Under section 48 of the Official Information Act 1982, no civil or criminal proceedings can be taken against any person in respect of such a release.
- 8.10 Section 78A of the Crimes Act 1961 and section 20A of the Summary Offences Act 1981 create an offence, in certain circumstances relating to the security and defence of New Zealand, of improperly disclosing, copying, or retaining official information.
- 8.11 A government contractor or other person outside the public service entrusted with official information in confidence should not use or communicate that information other than for the purpose for which it was given. Where appropriate, Ministers and agencies should ensure that the agreement with a contractor or consultant includes a confidentiality clause.

- 8.12 If there is unauthorised access to, disclosure, or loss of personal information held by an agency, the agency concerned must comply with the privacy breach notification requirements in the Privacy Act 2020.

Exploitation of information for private gain

- 8.13 The corrupt use or disclosure by an official of official information acquired in their official capacity for private gain for themselves or any other person is an offence under section 105A of the Crimes Act 1961. The knowing use or disclosure of personal information that has been obtained as a result of an offence under section 105A is also an offence under section 105B of the Crimes Act 1961 (whether or not the person using or disclosing the information is an official).

Information about commercial entities

- 8.14 Ministers and officials have access to a wide range of information about commercial entities that is not generally available to the public. They must ensure that they do not use this information in any way that affects their personal interests or the personal interests of their family, whānau, or close associates. Chapter 2 contains guidance for Ministers and former Ministers on identifying and managing conflicts of interest, including those arising from access to information. The Public Service Commission can provide guidance on the management of officials' conflicts of interest.
- 8.15 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, because breaches of the insider trading and market manipulation regimes in the Financial Markets Conduct Act 2013 can result in significant fines or imprisonment. When dealing with information relating to companies that are listed on securities exchanges, Ministers and officials should therefore:
- (a) take precautions to ensure that the information is handled appropriately;
 - (b) consider how and when to release information so as to minimise potential impacts on markets;
 - (c) take care when making statements that could inadvertently and inappropriately influence third parties; and
 - (d) avoid misleading the market.
- 8.16 In addition, Ministers and officials who hold information about a listed company that is not generally available to the market must not trade in the securities of that company. This prohibition includes trading through trusts or other vehicles if the Minister or official is aware that the trust or vehicle is undertaking the trading. More detailed guidance for Ministers and officials on the insider trading and market manipulation regimes is set out in Cabinet Office circular CO (12) 7 *Guidelines for Dealing with Inside Information about Public Issuers*.

Proactive release of information, including Cabinet material

- 8.17 Official information may be released proactively. Information that may be suitable for proactive release includes Cabinet papers and minutes, policies and procedures, research, evidence, and other material that would help the public to contribute to government decision-making and administration, and material likely to become subject to Official Information Act 1982 requests.

- 8.18 Proactive release of material is not covered by the Official Information Act 1982, and therefore section 48, which protects agencies from civil or criminal sanctions when releasing official information in good faith, is not applicable.
- 8.19 All Cabinet and Cabinet committee papers and minutes must be proactively released and published online within 30 business days of final decisions being taken by Cabinet. This should occur unless there is good reason not to publish all or part of the material, or to delay the release beyond 30 business days. Ministers may also decide to release related key advice papers. Reasons should be given if a Cabinet paper or minute is not intended to be proactively released. Only Cabinet Appointments and Honours Committee (APH) papers and minutes are explicitly excluded from the proactive release policy, for reasons of privacy.
- 8.20 Where a Cabinet paper has been confirmed by Cabinet, with a stated intention by the Minister to proactively release, but has not been proactively released at the time of a change of administration, the new Minister holding the portfolio should be notified of the proposed release. There is no requirement to consult with the former Minister on the release of that information. Should the current Minister wish to change the proposed approach for proactive release, they may wish to consider whether Cabinet should be informed.
- 8.21 More detailed guidance on the proactive release of Cabinet material is set out in Cabinet Office circular CO (18) 4 *Proactive Release of Cabinet Material: Updated Requirements* and the *CabGuide*.

Official Information Act 1982

Purpose of the Act

- 8.22 The Official Information Act 1982 balances the Act's purpose of progressively increasing the availability of official information against the need to protect official information to the extent consistent with the public interest and the preservation of personal privacy.
- 8.23 The purposes of the Act, as set out in section 4, include the promotion of good government and the enhancement of respect for the law by increasing the availability of official information progressively. This enables more effective public participation in the making and administration of laws and policies, and promotes the accountability of Ministers and officials.
- 8.24 Section 5 of the Act sets out the important principle of availability:
- The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

What is official information?

- 8.25 "Official information" is defined in section 2 of the Act as any information held by a public service agency or organisation (as defined, "organisation" includes most agencies in the wider public sector) or a Minister of the Crown (including a Parliamentary Under-Secretary) in their official capacity.

- 8.26 Information held by a Minister in their capacity as a member of a political party or as a member of Parliament, such as caucus material, is not official information for the purposes of the Act unless and until it is used in their ministerial capacity.
- 8.27 Ministers should always be clear about the capacity in which they are creating or using information. For example, a Minister corresponding in their capacity as a member of Parliament about an electorate matter should sign as a member of Parliament.
- 8.28 The Attorney-General when performing law officer functions is not subject to the Official Information Act 1982. Information held by the Attorney-General in this capacity is not, therefore, official information in terms of the Act.
- 8.29 Information held by an unincorporated body, such as a ministerial or agency committee, is treated as official information held by the Minister or agency concerned. Where independent contractors or consultants carry out work on behalf of a Minister or agency, such information is also deemed to be official information held by the relevant Minister or agency.
- 8.30 The definition of information is not confined to information on paper. Official information can include sound recordings, film, computer records, emails, text messages, and information known to an agency, Minister, or organisation but not recorded in writing. Although an official or Minister could be required, under the Act, to write down information not yet in a written form, this is simply a means of making that existing information accessible to others. There is no obligation to form an opinion or create information in order to respond to a request.
- 8.31 Access by individuals to information about themselves is governed by the Privacy Act 2020 (see paragraphs 8.72 – 8.89). 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. Part 4 of the Official Information Act 1982 applies to requests by a corporate entity for information about that entity. 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 the requester is an individual or a corporate entity. There is also a specific “right” of access under section 22 of the Official Information Act 1982 to policies, principles, rules, or guidelines that are used to make decisions about people.

Complying with the Official Information Act 1982

- 8.32 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.
- 8.33 Public service chief executives, and the boards and chief executives of agencies in the wider public sector that are subject to the Act, are responsible for ensuring compliance with the Act within their organisations. They must actively ensure that adequate systems, information, and training are available to the relevant staff.
- 8.34 Ministers and officials must offer reasonable assistance to those requesting information under the Act (section 13) and assess each piece of information requested against the criteria in the Act. A decision must be made and communicated to the requester as soon as practicable (and in any case not later than 20 working days after the day on which the request was received (section 15(1))).

- 8.35 If consideration is being given to withholding information under one of the provisions of section 9(2), section 9(1) requires that an assessment be made in every case as to whether the public interest in release outweighs the need to withhold the information.
- 8.36 Under section 14 of the Act, the Minister or organisation that receives a request may be required to transfer it to another Minister, agency, organisation, or local authority. Requests must be transferred if the information is not held by the agency receiving the request but is believed to be held by another agency, or if the information is believed to be more closely connected with the functions of another agency. The transferee should be consulted before the transfer is made. Transfers must be made promptly and within 10 working days of receiving the request, and the requester must be informed. A transfer of a request is not subject to review by an Ombudsman under the Official Information Act 1982, but may be investigated under the Ombudsmen Act 1975, where the transfer was made by an agency subject to the Ombudsmen Act 1975.
- 8.37 The Act provides for extensions of time limits for response or transfer if the request is for a large quantity of information, or if consultation is necessary to make a decision on the request. The requester must be informed of any such extension within the 20-working-day period after receiving the request. The Ombudsman can investigate complaints about extensions. In addition, undue delay in releasing information may be deemed to be a refusal if the delay is investigated or reviewed by the Ombudsman.
- 8.38 The Act also provides requirements for the contents of the notice to the requester if it is advising of a refusal (section 19), where the information is not provided in the way preferred by the requester (section 16), or where information has been deleted or altered (section 17). If a request is refused, section 19 requires the agency to give the reasons for refusal and advise the requester of their right to complain to the Ombudsman.

Advice and training

- 8.39 Ministers and agencies may approach the Ombudsman for guidance about any official information request. This guidance can be offered only informally, because 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 staff of the Ombudsman the chance to talk through the issues and the relative strengths of the likely arguments if a review were to be sought.
- 8.40 The Ombudsman can provide training to agencies about the Official Information Act 1982. Guidance can also be found on the Ombudsman website.
- 8.41 The Ombudsman should be consulted on policy and legislative proposals with implications for access to official information. This can include when a proposal is made to exclude particular information from the Official Information Act 1982. See the Ombudsman's *Guidance on when to engage the Ombudsman in law reform proposals*.

Requests for Cabinet material under the Official Information Act 1982

- 8.42 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 8.46 for guidance on requests for documents with security classifications.

- 8.43 There is no requirement to consult the Cabinet Office on the release of Cabinet papers or minutes, except in the case of Cabinet material of a previous opposition administration (see paragraphs 8.150 – 8.151). However, the Cabinet Office should be consulted on the release of any other Cabinet material, including summary tops and agendas. The Cabinet Office is also available for general guidance, if agencies have queries about the process for releasing Cabinet material. Agencies that receive requests for the release of Cabinet material of a current government should consider whether the request should be transferred to the responsible Minister (see paragraph 8.36).
- 8.44 It is good practice to indicate on Cabinet material released under the Official Information Act 1982 that it has been approved for release. However, watermarks across text are discouraged because these can interfere with the accessibility of a document.
- 8.45 Ministers and agencies are responsible for keeping a record of the Cabinet documents that they have made available publicly, whether proactively or in response to a request under the Official Information Act 1982.

Security classifications and endorsements and the Official Information Act 1982

- 8.46 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 the author of the document before releasing it. Such a flag may become less relevant with the passage of time. More detailed guidance on security classifications is included in the New Zealand Government’s *Protective Security Requirements*.
- 8.47 See paragraphs 4.69 – 4.73 for guidance on the release of legal advice, which is often endorsed “legally privileged”.

Consultation on Official Information Act 1982 requests

Undertaking consultation

- 8.48 The Act envisages that Ministers or organisations dealing with requests may need to consult other Ministers, organisations, or third parties before making a final decision on responding to requests for official information. Consultation may be undertaken where that is “necessary to make a decision on the request”. See paragraph 8.37 for information on extending time limits, if necessary, to undertake consultation (section 15A of the Act). The outcome of any consultation on Official Information Act 1982 requests should be recorded in accordance with normal, prudent business practice (see paragraph 8.108).

Consultation by Ministers

- 8.49 When considering a request, Ministers 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.

- 8.50 Special consultation arrangements apply to the release of Cabinet records that date from a previous opposition administration (see paragraph 8.151).

Consultation between agencies

- 8.51 When considering a request, an agency should consult another agency when the information sought:
- (a) was produced with substantial or critical input from that other agency; or
 - (b) contains material that relates to the activities of the other agency or that may result in publicity for that agency.
- 8.52 Agencies 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 8.151.

Agencies' consultation with Ministers

- 8.53 An agency may consult its Minister about any request for official information it receives. An agency should consult its Minister if the request relates to Cabinet material, because such material relates to their activities as a Minister. Ministerial consultation on an Official Information Act 1982 request is no different from any other consultation process. It should be clear that the agency is consulting rather than providing the request for the Minister's information, and sufficient time should be allowed for the Minister's office to provide any input about the proposed decision. The decision on how to respond to the request must nonetheless be made by the agency, in accordance with the Official Information Act 1982. It is good practice for Ministers and chief executives to agree on how consultation arrangements on Official Information Act 1982 requests will be handled generally. The Ombudsman has published a "model protocol" that can be used to guide these arrangements, and encourages agencies to proactively publish such arrangements.
- 8.54 Agencies should consider whether the information requested of them is more closely connected with the Minister's functions (as set out in paragraph 2.22). If so, the request must be transferred to the Minister under section 14 of the Official Information Act 1982 (see paragraph 8.36). For example, a request should be transferred if it is for information that relates to executive government decision-making functions, or for information that could, if released, prejudice the Minister's ability to perform these functions.
- 8.55 On being consulted, the Minister may take the view that information that the agency considers should be released, should not be released. In such a case, transferring the request to the Minister may be an appropriate way forward, if the requirements of section 14 of the Act can be satisfied. Each case of this kind needs to be handled carefully at a senior level within the agency, with reference to the Minister if necessary. Where the request is not transferred to the Minister, the views of the Minister are not determinative, and an assessment needs to be made by the agency as to whether any of the withholding provisions apply.
- 8.56 An agency should advise its Minister if it intends to release any information that is particularly sensitive or potentially controversial, in accordance with the "no surprises" principle (see paragraph 3.26). A notification for this purpose is not the same as consultation and should be done at the same time as, or just before, sending the decision to the requester, so as not to delay the agency's decision on a request.

- 8.57 Advice on ministerial consultation or notification can be sought from the Public Service Commission or the Ombudsman. Further information is also available on the Public Service Commission website.

Coordinating Official Information Act 1982 requests

- 8.58 Sometimes requests are directed at or affect several Ministers or agencies. In these cases, recipients of a request should consider the requirement in section 14 to transfer a request, or part of a request, together with any relevant information, where the information is more closely connected with the functions of another agency or Minister or organisation.
- 8.59 It will not always be obvious that other agencies and Ministers have had the same request addressed to them; requests that are potentially “common” should be checked with other agencies or Ministers.
- 8.60 Agencies may participate in cross-government forums to develop best practice in responding to Official Information Act 1982 requests. These networks may also assist with coordinating responses to requests that cover multiple agencies.

Effect of change of Minister or administration

- 8.61 Sometimes a request for official information that was received by a previous Minister or administration will not have been responded to before the appointment of a new Minister or administration. In these cases, the request for information continues and the new Minister must respond to the request in accordance with the provisions of the Official Information Act 1982.
- 8.62 The Minister should assess whether they, or any others who are subject to the Act, hold the information requested. If the Minister does not hold the information but believes it to be held by another agency or Minister, then the Minister should transfer the request under section 14 of the Act. If the information requested is not held by any Minister or other agency then the request can be refused under section 18(g) of the Act.
- 8.63 In the event of a complaint, the Ombudsman may inquire into the steps taken by the incumbent Minister before reaching a view on the complaint.

Charging for official information

- 8.64 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. The Ombudsman has also published guidance on charging on its website.

Review of decisions to withhold official information

Conduct of the review

- 8.65 A person who has requested official information can ask an Ombudsman to investigate a decision by a Minister or an agency to refuse to supply all or part of any official information requested. The procedures for reviews are set out in Part 5 of the Official Information Act 1982.

- 8.66 Where an Ombudsman undertakes a review, the Ministers, agencies, 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. An agency or Minister will be expected to provide a detailed justification in each case, and should use the review as an opportunity to set out their concerns about meeting the request.
- 8.67 The Ombudsmen have extensive powers to require information for the purposes of the review. Ministers and agencies must respond as soon as reasonably practicable and in no case later than 20 working days of any such request. This time limit may be extended under section 29A for specified reasons by notice to the Ombudsmen. Ombudsmen and their staff are required to conduct investigations in private and maintain secrecy except as provided for under sections 21(3) to (5) of the Ombudsmen Act 1975.

Ombudsman’s recommendation

- 8.68 An Ombudsman, having investigated a complaint made under section 28 of the Official Information Act 1982, will issue an opinion and may make such recommendations as they see 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 agency concerned the action to be taken.
- 8.69 Before forming a final opinion and making a recommendation, it is the Ombudsman’s practice to first provide the Minister or agency with a provisional opinion for comment, and to arrange for any other affected party to be consulted. The Ombudsman may also offer to discuss personally any case where their opinion differs from that of the holder of the information.
- 8.70 The Prime Minister may certify that the release of information would be likely to prejudice matters such as the security of New Zealand, or the Attorney-General may certify that release would be likely to prejudice such matters as the prevention of offences. In such cases, an Ombudsman cannot recommend the release of the information, but may recommend that the agency or Minister concerned give further consideration to making the information available.
- 8.71 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;
 - (d) must be given to the Ombudsman who made the recommendations; and
 - (e) may be subject to review by the High Court and the appeal courts.

Privacy Act 2020

Purpose of the Act

- 8.72 The purpose of the Privacy Act 2020 is to promote and protect individual privacy, by:
- (a) providing a framework for protecting privacy of personal information, including access by individuals to their information, while also recognising other rights and interests; and
 - (b) giving effect to international privacy obligations and standards.

The Act covers both the public and private sectors.

- 8.73 The Privacy Act 2020 covers “personal information”, which is defined in section 7 of the Act as information about an identifiable individual. There are 13 information privacy principles (dealing with the collection, storage, use, and disclosure of personal information, and an individual’s right to access their personal information and to request correction). Codes of practice that may modify the information privacy principles (such as the Health Information Privacy Code 2020) are also issued from time to time.

Compliance

- 8.74 Ministers and agencies are responsible for compliance with the law when they collect, use, hold, or disclose information concerning individuals. A breach of the Privacy Act 2020 may lead to a complaint to the Privacy Commissioner, or the Privacy Commissioner can take compliance action without receiving a complaint. Agencies that breach the Act can face financial penalties, or may have to provide redress, which could include paying damages. A Minister and agency must not collect personal information unless the collection is necessary for a lawful purpose related to their functions. Section 7 of the Privacy Act 2020 defines “collect” as “to take any step to seek or obtain the personal information, but does not include receipt of unsolicited information”.
- 8.75 Ministers and agencies are also responsible for complying with requirements in the Privacy Act 2020 to notify the Privacy Commissioner and (in most cases) affected individuals of privacy breaches that are likely to cause serious harm.
- 8.76 Ministers are subject to the Privacy Act 2020 in their role as Ministers. They are not subject to the Privacy Act 2020 in their official capacity as members of Parliament. This distinction is set out in relation to official information at paragraph 8.26.
- 8.77 Each agency must appoint a privacy officer for the agency (within or outside the agency) who is assigned responsibility to fulfil the compliance requirements set out in section 201 of the Privacy Act 2020. The Office of the Privacy Commissioner is available for advice and guidance in relation to the operation of the Privacy Act 2020.
- 8.78 The Government Chief Privacy Officer is responsible for developing standards, issuing guidance, and providing assurance to support the public service in building capability in privacy and security management.

Ministerial access to and use of personal information

8.79 Ministers should exercise great care in dealing with personal information, and seek advice from the Office of the Privacy Commissioner in cases of doubt. In particular, Ministers and agencies must handle personal information in accordance with the information privacy principles, as set out in section 22 of the Privacy Act 2020. Other primary legislative provisions may vary the application of the information privacy principles. Ministers and agencies should be aware of, and comply with, any differing approaches in their particular regulatory systems.

8.80 In the course of their duties, Ministers may have occasion to be provided with or to request personal information held by the agencies for which they are responsible. There are types of disclosure of information that are routine and clearly authorised, such as when the Minister requires personal information to:

- (a) exercise statutory functions; and
- (b) respond to individuals who seek the Minister's assistance with their cases.

Other circumstances involve a case-by-case assessment of whether personal information can be disclosed in connection with a Minister's general portfolio responsibilities and accountability to the House. Decisions by officials to provide personal information to Ministers require judgement and discretion, and should be finely tuned to particular circumstances.

8.81 Agencies need to have a clear understanding of the lawful basis on which they are able to disclose personal information to Ministers, and to ensure that any such disclosures comply with the Privacy Act 2020. Before disclosing personal information to a Minister, an agency must be satisfied that the disclosure is consistent with information privacy principle 11 in section 22 of the Act or another statutory provision. It must also consider whether there is a legal obligation under other legislation not to disclose the information (for example, under the statutory provisions protecting information collected by the Inland Revenue Department). The convention of ministerial accountability and the "no surprises" principle do not override the Privacy Act 2020's disclosure principles or other statutory restrictions on disclosure. Best practice is for the agency to consider whether personal details need to be disclosed to adequately inform the Minister, including:

- (a) whether the Minister needs to be briefed on an issue;
- (b) if a briefing is needed, whether it needs to include information about identifiable individuals; and
- (c) if it is necessary to provide personal information, how much information is required, and whether some personal details are irrelevant or unnecessary for the briefing.

Where the agency believes, on reasonable grounds, that disclosure of personal information to a Minister is one of the purposes for which the information was collected or is directly related to one of those purposes, the disclosure will not be a breach of information privacy principle 11.

8.82 If a Minister wishes to access information about an individual that is held by an agency in another portfolio area, the Minister should, in line with the general principle that Ministers deal only with their own agencies, seek assistance from the Minister with responsibility for that area (see paragraph 3.28).

- 8.83 The disclosure of information about an individual by Ministers or agencies is governed by both the Official Information Act 1982 and the Privacy Act 2020.
- (a) If the person to whom the information relates requests the information, the request must be considered in accordance with the Privacy Act 2020. Information privacy principle 6, in section 22 of the Act, gives individuals a legal right to access such personal information. Part 4 of the Act sets out reasons why such an 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 the Act provides that the need to protect an individual's privacy may justify withholding the information if there is no overriding public interest in release. It will be important to identify and consider the strengths of all the relevant privacy interests and balance them against the strengths of the competing public interest in its release.
 - (c) A disclosure by a Minister or agency of information about an individual, (including from agencies to Ministers) in the absence of a request for it, is governed by information privacy principle 11 of the Privacy Act 2020 (unless subject to other statutory provisions). That principle allows only limited situations in which it would be appropriate to disclose personal information; for example:
 - if the disclosure is one of the purposes for which the information was obtained, or is directly related to one of those purposes;
 - if disclosure does not relate to an identifiable individual;
 - if disclosure is authorised by the individual concerned;
 - if the information is already publicly available and its disclosure would not be unfair or unreasonable in the circumstances; or
 - if disclosure is necessary to prevent a serious threat to public health or the life of another individual.
- 8.84 Parliamentary privilege affords protection to statements made by Ministers as part of parliamentary proceedings, including when answering parliamentary questions (see the Parliamentary Privilege Act 2014). However, the same considerations set out in paragraph 8.83(c) should inform agencies and Ministers when deciding whether and to what extent it is necessary to disclose personal information that may end up becoming part of parliamentary proceedings.
- 8.85 Further guidance can be found on the Office of the Privacy Commissioner website.

Role of the Privacy Commissioner

- 8.86 The Privacy Commissioner can investigate complaints concerning breaches of the privacy principles in the Privacy Act 2020 (and of the rules in any code issued under that Act, such as the Health Information Privacy Code 2020). Such a breach can occur when an individual is denied access to information about them or is wrongly refused the opportunity to correct information about them, or when an individual suffers some form of harm as a result of a breach of a privacy principle, a rule in a code of practice, or an information-matching or information-sharing provision. The Privacy Commissioner can attempt to settle a complaint. If the parties are unable to reach a settlement, the complainant can take a case to the Human Rights Review Tribunal.

- 8.87 The Privacy Commissioner can also inquire into any matter if it appears that the privacy of individuals may be infringed, and can take action to require an agency to comply with the Privacy Act 2020, regardless of whether the non-compliance has been the subject of a complaint.
- 8.88 The Privacy Commissioner's other responsibilities include monitoring proposed legislation to see if it affects the privacy of individuals, and commenting on any privacy problems. The *LDAC Guidelines* give guidance about factors to consider when developing legislative proposals that could affect individual privacy (see paragraph 7.41) including proposed information sharing.
- 8.89 The Office of the Privacy Commissioner should be consulted about all legislative proposals that have implications for personal information or for individual privacy more broadly. The Privacy Commissioner can also report directly to the Minister of Justice or the Prime Minister about legislation or other developments affecting individual privacy.

Ombudsmen Act 1975

- 8.90 Under the Ombudsmen Act 1975, Ombudsmen can investigate conduct by a public service agency or organisation (central or local government) that relates to a matter of administration affecting any person in a personal capacity. They cannot investigate the decisions of Ministers, but can look into the official advice on which Ministers base decisions.
- 8.91 When investigating the actions of an agency, an Ombudsman may consult a Minister concerned with the matter, or a Minister who requests a meeting. An Ombudsman may also require anyone to provide any information that, in the Ombudsman's opinion, relates to the matter under investigation. Any person who is an officer or employee of any agency 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.
- 8.92 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 agency 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.
- 8.93 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, the disclosure of the deliberations of Cabinet or the proceedings of Cabinet or Cabinet committees relating to matters of a secret or confidential nature.

Providing information to select committees

- 8.94 Ministers and officials interact with select committees as part of ministerial accountability to the House. Select committees have the right to request information from Ministers or agencies under the *Standing Orders* (see the section entitled "Powers of Committees" in the chapter on select committees). Ministers and their officials are expected to meet requests from committees to produce documents and to provide information, unless it is not in the public interest to do so.

- 8.95 Occasionally information requested by a select committee may be classified, or there may be a good reason to protect it from public release. While the Official Information Act 1982 specifies interests that may usefully inform a decision by officials not to release information to a committee, the Act itself does not bind or constrain the House and its committees, and any response declining to provide the requested information should not imply that it does.
- 8.96 On learning the reason why particular information needs to be protected, the select committee may choose to waive its request or consider a compromise option, such as a summary of the information requested. Officials should consult the relevant Minister, who is ultimately responsible for the release of information by officials to select committees.
- 8.97 Further guidance on this issue is provided by the Public Service Commission in *Officials and Select Committees – Guidelines*.

Production or discovery of official documents

- 8.98 Official documents, including Cabinet records, may be relevant to legal proceedings or other proceedings, such as public inquiries. If so, such documents may need to be discovered and produced in evidence.
- 8.99 When the discovery or production of official papers is sought for the purposes of legal proceedings, a claim of public-interest immunity may need to be considered. The justification for such a claim can be assessed only on a case-by-case examination of relevant documents. Sometimes there may be a conflict between the demands of the courts for evidence and the need to ensure the security of Cabinet proceedings or confidential agency matters. If there is any doubt, the relevant Minister or agency should seek advice from the Crown Law Office.
- 8.100 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.
- 8.101 Where Cabinet documents dating from a previous administration are required for discovery or production in legal proceedings, the Opposition will need to be consulted, according to the procedure set out in paragraph 8.151.

Requests for parliamentary information

- 8.102 Requests under the Official Information Act 1982 for documents relating to parliamentary proceedings may be refused if releasing the document would amount to a contempt of the House (section 18(c)(ii)). Most documents relating to parliamentary proceedings are made available publicly by the Office of the Clerk as a matter of course, for example, once a select committee has reported to the House. However, some proceedings remain confidential under the *Standing Orders* and the practices of the House, and so releasing them could constitute a contempt. The Office of the Clerk can advise whether this ground for refusal might apply to a particular request.

- 8.103 The *Protocol for the release of information from the parliamentary information, communication and security systems* applies to requests for information held on parliamentary systems, other than Official Information Act 1982 and Privacy Act 2020 requests. Requests for information that is about or relevant to Ministers in their capacity as members of Parliament is covered by the protocol. The protocol essentially prohibits the release of information unless the relevant member consents or the release is authorised by law. The protocol can be found on the Parliament website.

Ministers and public records

- 8.104 The Public Records Act 2005 establishes a regulatory framework for information and records management throughout the public sector. “Public records” for the purposes of the Public Records Act 2005 are records (information that is compiled, recorded, or stored in any form) that are created or received by public offices (including Ministers) in the conduct of their affairs.
- 8.105 Ministers create and receive a wide variety of public records while performing the roles and functions of ministerial office. These records are defined as “Ministers’ papers” under the Act. They include:
- (a) records of portfolio responsibilities and other assignments;
 - (b) Cabinet and Cabinet committee records (Cabinet material);
 - (c) briefings and reports to the Minister, and ministerial correspondence; and
 - (d) agency papers and files.
- 8.106 Ministers also receive and hold records in their non-ministerial capacity; for example, correspondence with constituents, party political records, and private or personal papers. These are not public records and are not covered by the Public Records Act 2005.
- 8.107 The following paragraphs provide guidance on the proper management of public records held by Ministers during their time in office, and guidance on the secure treatment of those records on leaving office. Ministerial Services, Department of Internal Affairs is available to provide additional advice to Ministers and their staff.

Creating and maintaining records

- 8.108 Ministers must create full and accurate records of their ministerial affairs, in accordance with normal, prudent business practice.
- 8.109 “Records” for the purposes of the Public Records Act 2005 include information held in all digital and physical formats, such as emails or text messages sent or received on devices like mobile phones. This includes official information held on personal devices or communication tools (see paragraphs 2.86 – 2.87).
- 8.110 Systems must be put in place to ensure that all information created or received by a Minister in their official capacity is treated as a public record according to the requirements of the Public Records Act 2005. This means that records are organised and maintained in a way that allows them to be accessed for as long as they are needed, and that they are disposed of in a way authorised by the Chief Archivist. In particular, Cabinet material and material classified Confidential or above should be filed separately from other information.

- 8.111 The Chief Archivist issues disposal authorities, which allow public offices to transfer control of or destroy public records in specified circumstances. Disposal authorities can be of general or specific application and are published on Archives New Zealand's website. Ministers may not dispose of, or authorise the disposal of, their public records, except in accordance with general disposal authorities and those applying specifically to Ministers.

Management of records

- 8.112 Ministerial Services provides guidance to Ministers' offices on the proper storage of public records that are held by a Minister and their proper disposal on leaving office or changing portfolios.
- 8.113 Ministers' offices are encouraged to base their filing practices on this guidance, to ensure that when Ministers leave office each category of information can be identified easily. Guidance on leaving office will indicate what material should be returned (such as agency briefings), what material may be accepted for deposit as Ministers' papers, and how to destroy the remaining material securely.

Cabinet and Cabinet committee records

- 8.114 The convention of access to documents of a former administration gives former Ministers ongoing access to all Cabinet material to which they had access while in office (see paragraphs 8.136 – 8.138).
- 8.115 The Cabinet Office facilitates the transfer of an official set of Cabinet records to Archives New Zealand. On leaving office, Ministers should check the requirements of the current disposal schedule with Ministerial Services, including whether it requests the deposit of Cabinet records with extensive annotations that may be of historical significance.
- 8.116 Other personal copies of Cabinet papers should be destroyed, in accordance with the disposal schedule, through a secure document destruction process.

Agency records

- 8.117 All internal agency material should be returned to the originating agency when Ministers leave office, including material classified Confidential or above. No personal copies should be taken. Agency files that concern or comment on individuals should be treated with particular care, and must be returned promptly to the agency concerned.
- 8.118 Former Ministers who wish to have access to internal agency material dating from their time in office should request this under the Official Information Act 1982. It is expected that those handling requests by former Ministers will handle them expeditiously.

Remainder of Ministers' papers

- 8.119 Once the Cabinet and Cabinet committee records and agency material have been addressed, Ministerial Services will advise on the disposal of the remaining Ministers' papers (public records). Any information classified Confidential or above should be returned to the security agencies, or to the author of the document, as appropriate. Some of the material with long-term historical value may be accepted for archiving by the Chief Archivist. The remainder may need to be destroyed securely.

Deposit of Ministers' papers with Archives New Zealand

- 8.120 The deposit of Ministers' papers (public records) with Archives New Zealand is provided for in section 42 of the Public Records Act 2005. Depositing these public records in this way ensures their secure storage, the monitoring of agreed access arrangements, and the provision of research facilities, and allows the Minister ongoing access to the records.
- 8.121 The conditions on which any deposit of Ministers' papers is made are established by agreement between the Minister and the Chief Archivist. Ministerial Services will help draw up the agreement. Unless the Minister agrees otherwise in writing, the papers remain in the ownership and control of the Minister.
- 8.122 When setting conditions of access to Ministers' papers deposited with Archives New Zealand, Ministers should ensure that the access conditions reflect the sensitivity of the information and are no less robust than the conditions would be if the documentation were held by another entity that is subject to the Official Information Act 1982. The Chief Archivist is subject to the Ombudsmen Act 1975 and is therefore obliged to ensure that the conditions of access to Ministers' papers are reasonable.
- 8.123 Ministers who have agreed to allow public access to their papers in accordance with paragraph 8.121 will also be involved in assessing any requests for access to those papers. Further details of the procedure to be followed are set out in paragraphs 8.125 – 8.127.
- 8.124 If a Minister dies without having made arrangements for the disposition of their Ministers' papers, Ministerial Services will discuss with the Minister's family the lodging of any material with Archives New Zealand, and conditions on access to it.

Assessing requests for public access to Ministers' papers

Records deposited by current Ministers

- 8.125 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 agency. For that reason, where a request is received for access to a Minister's papers deposited at Archives New Zealand by a current Minister, the request will be transferred to the relevant Minister for a decision, on the basis that the information remains more closely connected to the functions of the Minister (see section 14(b)(ii) of the Official Information Act 1982).

Ministers' papers deposited by former Ministers

- 8.126 Where Archives New Zealand, or another repository, receives a request for access to a former Minister's papers, access will be allowed only in accordance with the access conditions agreed with the former Minister (see paragraph 8.121). If the former Minister has set access conditions that mirror the process set out in the Official Information Act 1982, the following process will apply.
- (a) Archives New Zealand, or the repository, 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, or the Cabinet Office, will liaise with the relevant agency about granting access to the Minister's papers. The relevant agency will assess the documents, applying the principles set out in the Official Information Act 1982.

- (c) The outcome of the assessment of the documents will be shared with the Secretary of the Cabinet.
 - (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 former Minister will be advised as to whether or not there appears to be good reason for withholding access to any of the documents.
 - (f) The final decision as to whether or not access will be granted to the Minister's papers will rest with the former Minister concerned.
- 8.127 With the agreement of the former Minister, special arrangements may be entered into from time to time to provide researchers with access to Ministers' papers deposited with Archives New Zealand or another repository. The Chief Archivist will liaise with the Secretary of the Cabinet, any relevant agency, the Prime Minister, and the Leader of the Opposition (if necessary) about appropriate access arrangements for researchers.

Deposit of personal records

- 8.128 Records created or received by Ministers in their personal capacity, in their capacity as a member or leader of a political party, or as a member of Parliament are not public records. These papers may be retained by Ministers on leaving office, or deposited with Archives New Zealand or another repository.
- 8.129 Archives New Zealand provides guidance on the protocols and procedures for depositing papers with it. There are no additional factors that Ministers need to take into account when agreeing conditions of access to such records with Archives New Zealand.
- 8.130 Ministerial Services can provide guidance and facilitate discussions with Archives New Zealand.
- 8.131 Papers that Ministers do not wish to retain and that are of no interest to Archives New Zealand or any other repository should be destroyed through a secure document destruction process.

Disclosure and use of official information by former Ministers

- 8.132 Former Ministers should not disclose official information dating from their time in office where that information is not already in the public domain.
- 8.133 Former Ministers may wish to publish memoirs, articles, or other material that relates to their time in office. Former Ministers who are contemplating publication of this kind, should take care to respect the free flow of advice and comment among Ministers and between Ministers and officials, along with the principle of collective responsibility.
- 8.134 The following guidance should be followed when official information is included in publications of this kind.
- (a) Any Cabinet records drawn on for possible publication must be used with care, unless the information they contain has already been made public by authorised means. Disclosure should preferably be checked with the relevant agency (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 the attitudes or opinions of colleagues as to the government business with which they have been concerned without first consulting those colleagues.
 - (c) Comment from officials or others whose duty it has been to tender their advice or opinions should not be released without prior consultation. Any reference should be made only in general terms, without attribution to identifiable people.
 - (d) Before making public assessments or criticisms of those who have served them, or making judgements of competence or suitability, former Ministers should carefully consider the fact that, in most cases, the people concerned will not be in a position to respond.
 - (e) Former Ministers should not disclose the content of any discussion held during an Executive Council meeting. On appointment to office, all Executive Councillors swear or affirm an oath under the Oaths and Declarations Act 1957 that they “will not directly or indirectly reveal such matters as shall be debated in Council and committed to [their] secrecy”.
- 8.135 If former Ministers retain any Ministers’ papers after leaving office and receive requests to disclose any such records, they should contact the Cabinet Office. The Cabinet Office will arrange for the relevant agency to assess the material in terms of the Official Information Act 1982, so that appropriate considerations can be taken into account by the former Minister before a decision is made on the release of the information.

Convention on access to Cabinet records of a previous administration

General

- 8.136 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.
- 8.137 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.
- 8.138 There are two elements to the convention. They provide respectively:
- (a) for incumbent Ministers to access Cabinet records of a previous administration (see paragraphs 8.140 – 8.146); and
 - (b) for former Ministers to access Cabinet records to which they had access when they were Ministers (see paragraphs 8.147 – 8.149).

Documents covered by the convention

- 8.139 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 official information, such as agency briefing papers, is not covered by the convention.

Access to Cabinet records by incumbent Ministers

Cabinet records

- 8.140 Recognising that government is a continuing process and to ensure that decisions can be made in the light of precedent, incumbent Ministers are entitled to consult the Cabinet records of a previous administration on the basis that the confidentiality of the papers is respected (see paragraph 8.150). These Cabinet records may be accessed through the Minister's agency or through the Cabinet Office.
- 8.141 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 8.151).

Agency papers

- 8.142 Agency papers are not covered by the convention on access to Cabinet records. Incumbent Ministers do not, therefore, have an automatic right to copies of agency papers or briefings prepared for a previous Minister.
- 8.143 A Minister may, however, need to gain an understanding of the advice given by the agency to their predecessor, in order to understand fully the nature of an issue. When making a request for information of this kind, a Minister should be cognisant that such information can be politically sensitive.
- 8.144 Accordingly, officials who receive requests from Ministers for agency papers dating from a previous administration should advise their chief executive. The chief executive will, in consultation with the Minister, determine how to meet the Minister's need for information without compromising the political neutrality of the agency or its ability to maintain the confidence of both present and future Ministers. Options may include:
- (a) supplying the material that has been requested; or
 - (b) providing a briefing summarising the advice given to a previous Minister and the decisions taken.
- 8.145 Each request by a Minister for information held by an agency should be individually assessed by the chief executive in relation to the Minister's needs and the sensitivity of the information, the currency of the information and the issue to which it relates, and other associated factors.
- 8.146 As with Cabinet records, information held by an agency is supplied to the Minister on the basis that the confidentiality of the information is respected.

Former Ministers

- 8.147 Former Ministers are allowed access to those Cabinet records to which they would have had access when they were Ministers. Former Ministers should respect the ongoing confidentiality of those documents.
- 8.148 Former Ministers should contact the Cabinet Office if they wish to obtain copies of Cabinet records after leaving office. The Cabinet Office will endeavour to respond promptly to requests from former Ministers, subject to the demands of Cabinet business, which must take precedence. The Cabinet Office is required to inform the Prime Minister's office and the relevant Minister's office when it provides Cabinet records to former Ministers.
- 8.149 If a former Minister wishes to disclose Cabinet records dating from their time in office, they must first check whether there are reasons why the document should not be publicly disclosed (see paragraphs 8.132 – 8.135).

Releasing Cabinet documents of a previous opposition administration

- 8.150 The convention on access to documents of a previous opposition administration requires Ministers to keep the Cabinet documents of a previous administration confidential.
- 8.151 The convention is, however, unenforceable in a legal sense and relevant laws and rules governing the disclosure of information (for example, the Official Information Act 1982, the *Standing Orders*, the High Court Rules 2016) 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 agency receives an Official Information Act 1982 request for Cabinet records dating from a previous administration currently represented in the Opposition, or is considering releasing such documents for any other reason (for example, a select committee request), the Cabinet Office should be advised as soon as possible.
 - (b) The Minister's office or agency should give the Cabinet Office a copy of the request and copies of the papers requested, together with the view of the Minister or agency concerned on whether there is any reason for withholding the papers sought.
 - (c) The Cabinet Office, on behalf of the Prime Minister, will then consult the Leader of the Opposition about the proposed release.
 - (d) The Leader of the Opposition will have an opportunity to express any concerns about the proposed release, in terms of the Official Information Act 1982 or other laws or rules. The Cabinet Office will pass on any such concerns to the relevant Minister or agency, so that they can be taken into account when the Minister or agency decides whether or not to release the information.
 - (e) The Minister or agency that is considering the release should not release the relevant documents until the Cabinet Office has finished consulting the Opposition, unless required to release the documents by law. If necessary, the time limit for responding should be extended on the basis that the consultation necessary to make a decision on the request has yet to be completed.

Further guidance is set out in Cabinet Office circular CO (17) 9 *Access to Information of a Previous Administration*.

Related information

- The *Protective Security Requirements* set out the Government's expectations for managing personnel, physical, and information security. They set out what agencies must consider to ensure that they are managing protective security effectively. They are available at protectivesecurity.govt.nz.
- Guidance on the application of the Official Information Act 1982:
 - A number of guides and case notes issued by the Ombudsman are available on the Ombudsman website, ombudsman.parliament.nz.
 - Information about charging for official information is available on the Ministry of Justice website, www.justice.govt.nz, and the Ombudsman website, ombudsman.parliament.nz.
- Guidance on the application of the Privacy Act 2020:
 - Agency privacy officers and legal advisers provide guidance on the application of the Privacy Act 2020.
 - The Office of the Privacy Commissioner provides advice on the Act for agencies, and is consulted on policy and legislative proposals with privacy implications. The office has guidance and e-learning modules available on its website, privacy.org.nz.
 - The Government Chief Privacy Officer supports government agencies to meet their privacy responsibilities and improve their privacy practices.
 - Chapter 8 of the Legislation Design and Advisory Committee's guidelines (entitled Privacy and dealing with information about people) can be found on its website, ldac.org.nz.
- Information about the Ombudsmen Act 1975 is available from the Ombudsman website, ombudsman.parliament.nz.
- Information about the Public Records Act 2005 is available from the Archives New Zealand website, archives.govt.nz.
- Ministerial Services, Department of Internal Affairs can provide further guidance to Ministers and former Ministers on the disposal and storage of, and access to, Minister's papers.
- The *Protocol for the release of information from the parliamentary information, communication and security systems* prohibits the release of information unless the relevant member consents or the release is authorised by law. The protocol can be accessed at parliament.nz.

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

APPENDICES

AND INDEX

Appendix A

The Treaty of Waitangi/Te Tiriti o Waitangi

The Treaty of Waitangi is regarded as a founding document of government in New Zealand. The Treaty has two texts: one in te reo Māori (Te Tiriti o Waitangi) and one in English. They were signed in 1840 by representatives of the British Crown and approximately 500 Māori chiefs representing many, though not all, of the hapū of New Zealand.

The Treaty is referred to in many statutes, deployed by the courts as an aid to statutory interpretation and is a relevant consideration in decision-making, which can be measured against the principles of the Treaty by the Waitangi Tribunal.

Treaty principles are primarily concerned with the way in which the Crown and Māori behave in their interactions with one another. The courts and the Waitangi Tribunal have emphasised the need for recognition and respect in the Treaty partnership and stress the parties' shared obligation to act reasonably, honourably, and in good faith towards each other.

The role of the public service includes supporting the Crown in its relationships with Māori under the Treaty (see section 14 of the Public Service Act 2020).

As an integral part of New Zealand's constitutional framework, the Treaty's status will continue to evolve along with other constitutional principles and norms. Constitutional, legal, ethical, and procedural issues associated with the Treaty are likely to remain a focus of discussion and be debated in various settings.

The texts of the Treaty (from the Treaty of Waitangi Act 1975 and a translation by Sir Hugh Kawharu) are attached overleaf.

	English version
Preamble	<p>HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.</p>
Article One	<p>Article the First</p> <p>The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.</p>
Article Two	<p>Article the Second</p> <p>Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.</p>
Article Three	<p>Article the Third</p> <p>In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.</p>

	English version
Post script	<p>Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.</p> <p>Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.</p>

	Māori version
Preamble	<p>Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.</p> <p>Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.</p> <p>Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aiane, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.</p>
Article One	<p>Ko te Tuatahi</p> <p>Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o ratou wenua.</p>
Article Two	<p>Ko te Tuarua</p> <p>Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.</p>

	Māori version
Article Three	<p>Ko te Tuatoru</p> <p>Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.</p>
Post script	<p>Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o mātou ingoa o matou tohu.</p> <p>Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.</p> <p>Ko nga Rangatira o te wakaminenga.</p>

	Back translation of Māori text by Sir Hugh Kawharu ¹
Preamble	<p>Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship² and their lands to them and to maintain peace³ and good order considers it just to appoint an administrator⁴ one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands⁵ and also because there are many of her subjects already living on this land and others yet to come. So the Queen desires to establish a government so that no evil will come to Māori and European living in a state of lawlessness. So the Queen has appointed 'me, William Hobson a Captain' in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents⁶ to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.</p>

¹ Sir Hugh Kawharu's translation sets out to show how Māori would have understood the meaning of the text they signed. It was published in the book *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, edited by Michael Belgrave, Merata Kawharu and David Williams (Oxford University Press, 1989).

² "Chieftainship": this concept has to be understood in the context of Māori social and political organisation as at 1840. The accepted approximation today is "trusteeship".

³ "Peace": Māori "Rongo", seemingly a missionary usage (rongo—to hear: that is, hear the "Word"—the "message" of peace and goodwill, and so on).

⁴ Literally "Chief" ("Rangatira") here is of course ambiguous. Clearly, a European could not be a Māori, but the word could well have implied a trustee-like role rather than that of a mere "functionary". Māori speeches at Waitangi in 1840 refer to Hobson being or becoming a "father" for the Māori people. Certainly this attitude has been held towards the person of the Crown down to the present day—hence the continued expectations and commitments entailed in the Treaty.

⁵ "Islands": that is, coastal, not of the Pacific.

⁶ Literally "making": that is, "offering" or "saying"—but not "inviting to concur".

	Back translation of Māori text by Sir Hugh Kawharu ¹
Article One	<p>The first</p> <p>The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government⁷ over their land.</p>
Article Two	<p>The second</p> <p>The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise⁸ of their chieftainship over their lands, villages and all their treasures.⁹ But on the other hand the Chiefs of the Confederation and all the Chiefs will sell¹⁰ land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.</p>
Article Three	<p>The third</p> <p>For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties¹¹ of citizenship as the people of England.</p>
Post script	<p>So we, the Chiefs of the Confederation of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.</p> <p>Was done at Waitangi on the sixth of February in the year of our Lord 1840.</p>

⁷ “Government”: “kawanatanga”. Sir Hugh’s view was that “there could be no possibility of the Māori signatories having any understanding of government in the sense of ‘sovereignty’: ie, any understanding on the basis of experience or cultural precedent”. This view is not universally held. For more discussion of the views and understandings of participants at 1840, see *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry*, particularly chapter 10 (Waitangi Tribunal, 2014).

⁸ “Unqualified exercise” of the chieftainship would emphasise to a chief the Queen’s intention to give them complete control according to their customs. “Tino” has the connotation of “quintessential”.

⁹ “Treasures”: “taonga”. As submissions to the Waitangi Tribunal concerning the Māori language have made clear, “taonga” refers to all dimensions of a tribal group’s estate, material and non-material—heirlooms and wahi tapu (sacred places), ancestral lore and whakapapa (genealogies), and so on.

¹⁰ Māori “hokonga”, literally “sale and purchase”. “Hoko” means to buy or sell.

¹¹ “Rights and duties”: Māori at Waitangi in 1840 refer to Hobson being or becoming a “father” for the Māori people. Certainly, this attitude has been held towards the person of the Crown down to the present day—hence the continued expectations and commitments entailed in the Treaty.

Appendix B

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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Governor-General of New Zealand**

Effects Revocations. NOW, THEREFORE, We do by these presents revoke and determine the said Letters Patent bearing date the 11th day of May 1917, the said Letters Patent bearing date the 18th day of December 1918, the said Instructions, and the said Dormant Commission, but without prejudice to anything lawfully done thereunder; and We do hereby declare that the persons who are members of the body known as the Executive Council of New Zealand immediately before the coming into force of these Our Letters Patent shall be members of Our Executive Council hereby constituted as though they had been appointed thereto under these Our Letters Patent.

AND WE do declare Our will and pleasure as follows:

Office of Governor-General and Commander-in-Chief constituted. I. We do hereby constitute, order, and declare that there shall be, in and over Our Realm of New Zealand, which comprises—

- (a) New Zealand; and
- (b) The self-governing state of the Cook Islands; and
- (c) The self-governing state of Niue; and
- (d) Tokelau; and
- (e) The Ross Dependency,—

a Governor-General and Commander-in-Chief who shall be Our representative in Our Realm of New Zealand, and shall have and may exercise the powers and authorities conferred on him by these Our Letters Patent, but without prejudice to the office, powers, or authorities of any other person who has been or may be appointed to represent Us in any part of Our Realm of New Zealand and to exercise powers and authorities on Our behalf.

Appointment of Governor-General and Commander-in-Chief. II. And We do hereby order and declare that Our Governor-General and Commander-in-Chief (hereinafter called Our Governor-General) shall be appointed by Us, by Commission under the Seal of New Zealand, and shall hold office during Our pleasure.

**Letters Patent Constituting the Office of
Governor-General of New Zealand**

Governor-General's
powers and
authorities.

III. And We do hereby authorise and empower Our Governor-General, except as may be otherwise provided by law,—

- (a) To exercise on Our behalf the executive authority of Our Realm of New Zealand, either directly or through officers subordinate to Our Governor-General; and
- (b) For greater certainty, but not so as to restrict the generality of the foregoing provisions of this clause, to do and execute in like manner all things that belong to the office of Governor-General including the powers and authorities hereinafter conferred by these Our Letters Patent.

Manner in which
Governor-General's
powers and
authorities are to be
executed.

IV. Our Governor-General shall do and execute all the powers and authorities of the Governor-General according to—

- (a) The tenor of these Our Letters Patent and of such Commission as may be issued to Our Governor-General under the Seal of New Zealand; and
- (b) Such laws as are now or shall hereafter be in force in Our Realm of New Zealand or in any part thereof.

Publication of
Governor-General's
Commission.

V. Every person appointed to fill the office of Governor-General shall, before entering on any of the duties of the office, cause the Commission appointing him to be Governor-General to be publicly read, in the presence of the Chief Justice, or some other Judge of the High Court of New Zealand, and of Members of the Executive Council thereof.

**Letters Patent Constituting the Office of
Governor-General of New Zealand**

Oaths to be taken by Governor-General.	<p>VI. Our Governor-General shall, immediately after the public reading of the Commission appointing him, take—</p> <p>(a) The Oath of Allegiance in the form for the time being prescribed by the law of New Zealand; and</p> <p>(b) The Oath for the due execution of the Office of Governor-General in the form following:</p> <p style="padding-left: 40px;">I, [<i>name</i>], 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 [<i>or His</i>] Majesty [<i>specify the name of the reigning Sovereign, as thus: Queen Elizabeth the Second, Queen of New Zealand [or King of New Zealand]</i>], Her [<i>or His</i>] heirs and successors, and the people of the Realm of New Zealand, in accordance with their respective laws and customs. So help me God.</p> <p>which Oaths the Chief Justice or other Judge in whose presence the Commission is read is hereby required to administer.</p>
Constitution of Executive Council.	VII. And We do by these presents constitute an Executive Council to advise Us and Our Governor-General in the Government of Our Realm of New Zealand.
Membership of Executive Council.	VIII. The Executive Council shall consist of those persons who, having been appointed to the Executive Council from among persons eligible for appointment under the Constitution Act 1986, are for the time being Our responsible advisers.

**Letters Patent Constituting the Office of
Governor-General of New Zealand**

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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. | <p>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:</p> <p>(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</p> |

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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.

**Letters Patent Constituting the Office of
Governor-General of New Zealand**

Oaths to be taken by Administrator of the Government.	XIII. The said Chief Justice or next most senior Judge of the New Zealand judiciary shall, on the first occasion on which he is required to act as Administrator of the Government and before entering on any of the duties of the office of Governor-General, take the Oaths hereinbefore directed to be taken by Our Governor-General, which Oaths, with such modifications as are necessary, shall be administered by some other Judge of the High Court of New Zealand, in the presence of not less than two Members of the Executive Council.
Powers and authorities of Governor-General not abridged.	XIV. While Our Administrator of the Government is performing all or any of the functions of the office of Governor-General, the powers and authorities of Our Governor-General shall not be abridged, altered, or in any way affected, otherwise than as We may at any time hereafter think proper to direct.
Governor-General's absence.	Revoked
Ministers to keep Governor-General informed.	XVI. Our Ministers of the Crown in New Zealand shall keep Our Governor-General fully informed concerning the general conduct of the Government of Our said Realm, so far as they are responsible therefor, and shall furnish Our Governor-General with such information as he may request with respect to any particular matter relating to the Government of Our said Realm.
Ministers and others to obey, aid, and assist Governor-General.	XVII. Our Ministers of the Crown and other Officers, civil and military, and all other inhabitants of Our Realm of New Zealand, shall obey, aid, and assist Our Governor-General in the performance of the functions of the office of Governor-General.
Power reserved to Her Majesty to revoke, alter, or amend the present Letters Patent.	XVIII. And We do hereby reserve to Ourselves, Our heirs and successors full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.

**Letters Patent Constituting the Office of
Governor-General of New Zealand**

Present Letters Patent
to have effect as law.

XIX. And We do further declare that these Our Letters Patent shall take effect as part of the law of Our Realm of New Zealand, comprising New Zealand, the self-governing state of the Cook Islands, the self-governing state of Niue, Tokelau, and the Ross Dependency on the 1st day of November 1983.

IN WITNESS WHEREOF We have caused these Our Letters to be made Patent, and for the greater testimony and validity thereof We have caused the Seal of New Zealand to be affixed to these presents, which We have signed with Our Regal Hand.

GIVEN the 28th day of October in the Year of Our Lord One Thousand Nine Hundred and Eighty-three and in the 32nd Year of Our Reign.

By Her Majesty's Command.

[L.S.]

R.D. MULDOON,
Prime Minister of New Zealand.

Issued under the authority of the Regulations Act 1936.

Date of notification in *Gazette*: 31 October 1983

Clause VI(b) was substituted, as from 22 August 2006, by clause I Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219).

Clause VIII was substituted, as from 1 January 1987, by the Letters Patent Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 1987/8).

Clause IX was amended, as from 22 August 2006, by clause II Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219) by adding the words, “except that in a situation or urgency or emergency, members may be present by any method of communication that allows each member to participate effectively during the whole of the meeting”.

**Letters Patent Constituting the Office of
Governor-General of New Zealand**

Clause XII was substituted, as from 22 August 2006, by clause III Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219).

Clause XIII was amended, as from 22 August 2006, by clause IV Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219) by substituting the words “next most senior Judge of the New Zealand judiciary” for the words “President of the Court of Appeal or the Senior Judge for the time being of the Court of Appeal”.

Clause XV was revoked, as from 22 August 2006, by clause V Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand (SR 2006/219).

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