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THE CABINET, THE PRIME MINISTER AND THE CONSTITUTION

*Rt Hon Sir Geoffrey Palmer**

Although the mixed member proportional (MMP) electoral system in New Zealand has changed the context in which Cabinet operates, the Cabinet system has adapted to meet the challenges of diverse parties within government. Techniques developed to deal with coalition and confidence and supply agreements, and changes in management style, have not diminished Cabinet's coordinating and control role to any appreciable degree. The prime minister is the key manager in the process because the prime minister must manage the agreements that keep the government in office. The essential feature of MMP New Zealand is that power has to be shared, and it is the role of the prime minister to decide how and under what conditions. The relative fluidity of New Zealand's constitutional arrangements coupled with their inherently political character means that the prime minister is the most important actor in the New Zealand constitution. It is the prime minister who is the major player within the executive government and who has within his or her range of responsibilities making the constitution work.

I THE CONSTITUTIONAL BACKGROUND TO CABINET

The modalities of the New Zealand Cabinet system are relatively well known. However, in some quarters, Cabinet decision-making is regarded with an air of mystery that it does not deserve; part of the purpose of this essay is demystification. Cabinet is more distinctly organised in New Zealand than in the United Kingdom and not as fluid. It is also easier to research. Its proceedings are much more transparent than those of its British counterpart. New Zealand Cabinet papers can often be obtained under the Official Information Act 1982 not long after decisions have been made and, not infrequently, decisions and Cabinet papers are posted on government websites without

* President, Law Commission; Prime Minister of New Zealand 1989–90. This is a revised version of a paper given to the Third Annual NZCPL Conference on the Primary Functions of Government: The Executive (Wellington, November 2005). I am grateful to a number of people who have read and commented upon a draft of this paper. They are: the Rt Hon Helen Clark; the Hon Margaret Wilson; Secretary of the Cabinet, Diane Morcom; Deputy Secretary of the Cabinet, Rebecca Kitteridge; Professor Matthew Palmer; Lecretia Seales; and Mai Chen. I am grateful to all of them, but the paper contains my views and they are not to be held responsible for them.

application even being made.¹ Nonetheless, Cabinet government in New Zealand is a highly flexible instrument with no two administrations being run in the same manner. It does evolve and mutate over time.² Perhaps the biggest influence in its recent evolution has been the introduction of the mixed member proportional (MMP) electoral system. The changes MMP has wrought will be examined in this paper.

Cabinet government in New Zealand is founded for the most part on constitutional convention, not upon law. Constitutional conventions are recognised norms, practices or customs generally followed.³ Determining with precision whether a constitutional convention exists and what its precise content may be is seldom simple and often the subject of disagreement. Clearly, the most important conventions arise from the democratic nature of the constitution.⁴ Perhaps the best example is the restraint on the exercise of power by the Queen or Governor-General. Many of the legal powers belonging to the sovereign are by convention exercised by the Governor-General according to ministerial advice. The best practical guide to the conduct of government in New Zealand and the applicable constitutional conventions is the *Cabinet Manual 2001*. This document, published by the Cabinet Office and agreed by Cabinet, sets out many of the constitutional

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- 1 See Diane Morcom, Secretary of the Cabinet "Quills, Qubits and the Quest for Quality – Some Reflections on Continuity and Change in the Cabinet Office" (Seminar Paper, Institute of Public Administration New Zealand, Wellington, 20 April 2005) 3.
 - 2 Among the useful literature on this subject are Elizabeth McLeay *The Cabinet and Political Power in New Zealand* (Oxford University Press, Auckland, 1995); Elizabeth McLeay "Cabinet" in Raymond Miller (ed) *New Zealand Government and Politics* (4 ed, Oxford University Press, Melbourne, 2001) 89–105; Geoffrey Palmer and Matthew Palmer *Bridled Power – New Zealand's Constitution and Government* (4 ed, Oxford University Press, Melbourne, 2004) 68–94; Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 150–174; Matthew Palmer "Collective Cabinet Decision-making in New Zealand" in Michael Laver and Kenneth A Shepsle (eds) *Cabinet Ministers and Parliamentary Government* (Cambridge University Press, New York, 1994); Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 699–725; Kenneth John Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1961) 94–136; Marie Shroff "The Role of the Secretary of the Cabinet: The View from the Beehive" (Occasional Paper 5, New Zealand Centre for Public Law, Wellington, 2001); Roderic Alley "The Powers of the Prime Minister" in Hyam Gold (ed) *New Zealand Politics in Perspective* (3 ed, Longman Paul Ltd, Auckland, 1992) 174–193; John Henderson "Prime Minister" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Melbourne, 2001) 106–116.
 - 3 See generally Geoffrey Marshall *Constitutional Conventions – The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1986); *Reference Re Amendment of the Constitution of Canada* (1982) 125 DLR (3d) 1 (Man CA).
 - 4 Rt Hon Sir Kenneth Keith "On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government" in Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 2 [*Cabinet Manual 2001*].

conventions and procedures of Cabinet in New Zealand. Some of the most important conventions, relating to Cabinet government and ministerial responsibility, are most usefully stated there.⁵ Yet the *Cabinet Manual 2001* is not law and it is not necessarily definitive on the content and application of the conventions with which it deals.

Whether the principle of collective responsibility, which is an aspect of wider convention on ministerial responsibility, rises to the level of a constitutional convention may be arguable, although clearly it does occupy a central role in the system of Cabinet government. For example, in 2004, the Hon Tariana Turia MP was dismissed from her ministerial offices outside Cabinet after publicly stating her intention to vote against the foreshore and seabed legislation.⁶ Since collective responsibility will be an important theme of this paper, due to contemporary developments in the doctrine surrounding the formation of the Government in 2005, something should be said about it now. Its essence is simple. Once a Cabinet decision has been taken, all ministers are obliged to support it regardless of their personal views. At base, it is a practical principle best summed up by Benjamin Franklin at the time of the Declaration of Independence on 4 July 1776, when he said: "We must indeed all hang together, or, most assuredly, we shall all hang separately."⁷

Following the principle of collective responsibility avoids confusion as to what the government's policy on an issue is. It brings finality to debate. It helps the public to know that it is the collective Cabinet that is responsible and it is they who should be held to account. It emphasises, helpfully, a whole of government approach to issues. Furthermore, in parliamentary terms, the House must have confidence in the government as a whole. However, as a leading British analyst of constitutional conventions remarked in relation to the unanimity rule: "It may be that the custom of unanimity, like that of cabinet secrecy, is not a duty-imposing constitutional convention, though

5 John McGrath QC said of the *Cabinet Manual*:

In brief, the Manual describes the underlying structures, principles and values of government. Much of its guidance concerns administrative practices to be followed by Ministers and public servants in the government's decision-making process. The description of principles includes the discussion of constitutional conventions of government. However, the Cabinet Office Manual does not itself purport to be final articulation of conventions which form part of our unwritten constitution. It is descriptive rather than prescriptive ... Much of the content of the Manual would be regarded as reflecting usages in relation to government practices – matters of administration rather than constitutional substance.

John McGrath QC "The Crown, the Parliament and the Government" Harkness Henry Lecture (1999) 7 Waikato LR 1, 17–18.

6 Foreshore and Seabed Act 2004.

7 Remark to John Hancock at the signing of the Declaration of Independence, 4 July 1776, in the *Oxford Dictionary of Quotations* (5 ed, Oxford University Press, Oxford, 1999) 323.

undoubtedly a historically observed and politically convenient practice."⁸ He goes on to suggest that perhaps the principle in its entirety is a matter for the Cabinet and prime minister to apply between them as they wish. Such is the position in New Zealand, in my opinion.

Many constitutional conventions are not legally enforceable in the courts and many of them are of a rather slippery character. Sometimes constitutional conventions can come into issue in the courts and could form the basis of a common law rule, but it is best to regard them as principles of political obligation rather than rules of law. Their main purpose is to support the fundamental elements of democracy and accountability. It is not possible by examining the Constitution Act 1986 to secure an understanding of Cabinet. What the Act says about the executive is dealt with in Part II, which provides that a person may be appointed and hold office as a member of the Executive Council or a minister of the Crown only if that person is a member of Parliament. This provision supplies the democratic link between the executive and the people. Only people elected to Parliament can become ministers. Section 7 of the Act establishes that any function, duty or power exercisable by or conferred on any minister of the Crown may be exercised or performed by any member of the Executive Council unless the context otherwise requires. This practical provision is used a great deal when ministers travel abroad or are otherwise unavailable. It is also used extensively in relation to associate ministers, providing them with authority to make decisions and sign out material within the limits of their written delegations. It should be observed at this juncture that there was something of a constitutional flutter in 1997 when the Associate Minister of Health, Neil Kirton, who was not in Cabinet and not of the same party as the Minister of Health, Hon Bill English, would not follow the policy preferences of his principal minister. Kirton was dismissed and properly so.⁹ This event led to a change in the *Cabinet Manual* to make more explicit the fact that an associate minister in the end remains the creature of the principal minister.¹⁰ Finally, there are

8 Marshall, above n 3, 57. The nature of the convention did come before the courts in the United Kingdom, a most unusual occurrence, in *Attorney-General v Jonathan Cape* [1976] QB 752, the case in which the Court refused to issue an injunction against publication of diaries kept by Cabinet Minister Richard Crossman. Lord Widgery CJ did find that collective responsibility was an established feature of the English form of government. At page 770, he said among other things "I find overwhelming evidence that the doctrine of joint responsibility is generally understood and practised and equally strong evidence that it is on occasion ignored." He held, at page 771, that "the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest." However, since the events in the diaries concerned events ten years before, their publication would not inhibit free and open discussion in Cabinet at the time of the case, so no injunction was issued. For further discussion of collective responsibility, see below Part VIII Coalitions and Other Arrangements: Confidence and MMP.

9 Geoffrey Palmer *Constitutional Conversations – Geoffrey Palmer talks to Kim Hill on National Radio 1994–2001* (Victoria University Press, Wellington, 2002) 211–216.

10 *Cabinet Manual 2001*, above n 4, para 2.32 provides: "The control of a portfolio always rests with the 'portfolio' or 'principal Minister'." This is a self-evident constitutional truth in terms of principle and is not capable of being altered by coalition agreements.

two provisions in the Constitution Act 1986 concerning the appointment and functions of parliamentary under-secretaries, who:¹¹

... shall have and may exercise or perform under the direction of the Minister concerned such of the functions, duties, and powers of the Minister of the Crown for the time being holding that office as may from time to time be assigned to the Parliamentary Under-Secretary by that Minister.

Walter Bagehot described the essence of Cabinet government in his classic exposition of the English Constitution, first published in 1867:¹²

The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers. No doubt by the traditional theory, as it exists in all the books, the goodness of our constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation. The connecting link is *the Cabinet*. By that new word we mean a committee of the legislative body selected to be the executive body. The legislature has many committees, but this is its greatest. ... The Cabinet, in a word, is a board of control chosen by the legislature, out of persons whom it trusts and knows, to rule the nation ... A Cabinet is a combining committee – a *hyphen* which joins, a *buckle* which fastens, the legislative part of the State to the executive part of the State. In its origin it belongs to the one, in its functions it belongs to the other.

That description is at the heart of what distinguishes the Westminster system from the United States system of checks and balances and is an indication in itself that Cabinet government produces strong executive government. The doctrine of separation of powers is muted. Indeed, New Zealand has been described before MMP as "an executive paradise"¹³ because of the nearly complete fusion flowing from a Cabinet formed by a single party in a unicameral legislature operating in a unitary state. Of course, more modern analysts have suggested that Bagehot was, by the 1960s, out of date. According to Richard Crossman, the era of Cabinet government had been supplanted by 1963 by prime ministerial government¹⁴ or, as Lord Hailsham so graphically put it, "elective dictatorship."¹⁵

II HOW CABINET WORKS IN NEW ZEALAND

Cabinet makes decisions. Minutes of Cabinet decisions are sent to the responsible minister with a copy for the chief executive of the relevant department. In the case of Cabinet committees, minutes of the decisions go to the relevant minister and public servants who need to know about the

11 Constitution Act 1986, ss 8, 9.

12 Walter Bagehot *The English Constitution* (Fontana, London, 1977) 65–68

13 L Zines *Constitutional Change in the Commonwealth* (Cambridge University Press, Cambridge, 1991) 47.

14 R H S Crossman "Introduction" in Bagehot, above n 12, 1–57.

15 Lord Hailsham *The Dilemma of Democracy* (Collins, London, 1978) 125.

matter. The public service executes those decisions under ministerial supervision. In New Zealand a Cabinet minute or "green" (they are called this because of the coloured paper on which they are printed) is closely scrutinised and faithfully followed.¹⁶

The decisions are distributed to those within the public service who need to have them. The distribution of minutes on a need-to-know basis has been an important feature of the New Zealand practice for many years. The current Secretary of Cabinet in New Zealand, Diane Morcom, has put it like this:¹⁷

Cabinet and Cabinet committee papers and minutes are not given to all Ministers and chief executives. Each paper or minute is distributed only to Ministers who are members of the committee to which the paper was submitted, and to Ministers and chief executives with an interest in the subject matter.

The purpose of the practice is to ensure that those who need to act are informed of decisions but the risk of unauthorised disclosure is minimised. The Cabinet Office in New Zealand is a highly organised, disciplined machine that is nothing if not systematic. There is nothing casual in the administration of Cabinet in New Zealand, and nothing lacking in the fullness or faithfulness with which the decisions are recorded and distributed.

Cabinet itself does not exercise legal powers, although much of the government is run on the basis of Cabinet decisions and no other authority is needed for its actions. Some Cabinet decisions must go before the Executive Council in the form of advice to the Governor-General to make orders in council and regulations.¹⁸ The formal advice will usually come from an individual minister. Others form the basis of advice direct to the Governor-General, for example, some important appointments. The government works through individual ministers for the most part. The Cabinet has no legal powers of its own, although extensive and somewhat indeterminate legal powers are available to the executive government as a whole. Those legal powers can be found in statute, the royal prerogative and the common law. The Executive Council and individual ministers are the ones that exercise the legal powers, not the Cabinet itself, but it needs to be noted that the capacity to

16 The British Labour politician Gerald Kaufman said in 1980: "Cabinet minutes are studied in Government Departments with the reverence generally reserved for sacred texts, and can be triumphantly produced conclusively to settle any arguments." Antony Jay *The Oxford Dictionary of Political Quotations* (Oxford University Press, Oxford, 1996) 202.

17 Morcom, above n 1, 3.

18 The Executive Council was first constituted by Letters Patent in 1840 and the current instrument is the Letters Patent Constituting the Office of Governor-General of New Zealand 1983, SR 1983/225. Its importance lies in the fact that it is the main vehicle by which responsible government is delivered, by tendering advice to the Governor-General that he or she is obliged by constitutional convention to accept. The Clerk of the Executive Council is invariably the same person as the Secretary of the Cabinet. It is possible to convene both Cabinet meetings and Executive Council meetings very rapidly where the need arises.

make delegated legislation is an important aspect of the executive government's functions and powers. The amount of delegated legislation has steadily increased in New Zealand and it was thought that MMP may increase the amount further, as governments sought to avoid going to Parliament for fresh powers. While it is difficult to make a direct correlation between cause and effect in this area, delegated legislation remains a problematic area in New Zealand's constitutional arrangements.¹⁹

The *Cabinet Manual 2001* sets out in great detail how the Cabinet system works. The *Manual* is now in its fourth iteration with a life of over 20 years and it has grown in scope, complexity and sophistication. It is now an indispensable guide to the working of executive government in New Zealand, along with some important supporting documents that give considerable detailed assistance.²⁰ The current version of the *Cabinet Manual* covers 118 pages, with a good index and chapters on the following:

- Governor-General and Executive Council;
- Ministers of the Crown – Appointment, Role and Responsibilities;
- Cabinet Decision Making – Principles and Procedures;
- Elections, Transitions and Government Formation;
- Legislation and the Executive;
- Official Information: Protection, Availability and Disclosure.

The *Cabinet Manual* derives its authority from the Cabinet itself. A decision is taken at the beginning of each new administration to adopt the procedures in the *Manual*.²¹ The provisions are sometimes changed, for example, to provide the "agreeing to disagree" option in respect of collective responsibility when a coalition was formed between the Labour and Alliance parties.²²

Such an orderly and clear set of indicators of how the system works is of great value to the government machine, although in the nature of things not all the rules are followed all the time. The Cabinet Office sees itself as facilitating good decision-making processes, including consultation,

19 See Geoffrey Palmer "Deficiencies in New Zealand Delegated Legislation" (1999) 30 VUWLR 1; Michael Taggart "From 'Parliamentary Powers' to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century" (2005) 55 U Toronto LJ 575.

20 Cabinet Office *Step by Step Guide – Cabinet and Cabinet Committee Processes 2001* (Department of Prime Minister and Cabinet, Wellington, 2001). For legislation there is also the *Legislation Advisory Committee Guidelines – Guidelines on Process and Control of Legislation* (Legislation Advisory Committee, Wellington, May 2001 and 2003 supplement). These guidelines have also been approved by Cabinet.

21 Shroff, above n 2, 12.

22 *Cabinet Manual 2001*, above n 4, para 3.23.

ensuring decision-makers are not caught by surprise, and ensuring ministers have time to read the Cabinet papers upon which they are to deliberate. For example, a minister may not be able to meet the prescribed deadline for Cabinet papers (Thursday, 10am), but if the matter is important and the prime minister's office agrees, and if the minister can supply a paper to key colleagues over the weekend and discuss it with them, then it may be possible to table the paper at the Cabinet meeting on Monday.

The example illustrates that the system must be flexible. Nevertheless, the *Manual* and the manner in which the Cabinet Office administers the system reinforce an important feature of the New Zealand Cabinet system. Process is important. If the proper procedures are followed, the decisions are likely to be better and the government will be able to implement them more efficiently. There needs to be clarity and certainty around important decisions and, in my experience, the methods adopted by the Cabinet Office certainly produce those outcomes. Lord Hunt of Tanworth, a former Secretary of the Cabinet in the United Kingdom, said in 1993 of British Cabinet government: "It has got to be, so far as possible, a democratic and accountable shambles."²³ The New Zealand Cabinet system is far from being a shambles; it is disciplined and highly orderly.

Furthermore, in New Zealand there is a highly developed Cabinet committee system that, prior to the 2005 general election, provided for the following committees:²⁴

- Policy;
- Economic Development;
- Social Development;
- Legislation;
- Government Expenditure and Administration;
- Appointments and Honours;
- External Relations and Defence;
- Domestic and External Security Co-ordination.

The committees' terms of reference, membership and meeting times can be obtained from the government website. It is also possible from the annual reports of the Department of the Prime Minister and Cabinet (DPMC) to find out how much work was done within the system. The table that follows sets it out.

23 Antony Jay (ed) *The Oxford Dictionary of Political Quotations* (Oxford University Press, Oxford, 1996) 185.

24 See <<http://www.dPMC.govt.nz/cabinet/committees>> (last accessed 3 June 2006). For details of the organisation of Cabinet following the formation of the new government see Cabinet Office Circular "Resumption of Cabinet Business" (25 October 2005) CO 05/12.

*Table: Business Statistics for Executive Council, Cabinet and Cabinet Committees*²⁵

Committee	Number of Meetings	Number of agenda items	Average number of items per meeting
Executive Council	43	342	8
Cabinet	44	633	14
Cabinet Policy Committee	34	463	13
Cabinet Economic Development Committee	31	225	7
Cabinet Social Development Committee	30	186	6
Cabinet External Relations and Defence Committee	13	67	5
Cabinet Legislation Committee	32	268	8
Cabinet Appointments and Honours Committee	17	240	14
Cabinet Committee on Government Expenditure and Administration	11	61	5
Cabinet Committee on Domestic and External Security Coordination	2	6	3
Cabinet Business Committee	10	138	13
Subtotal of Cabinet Committee meetings	180	1654	9
Total including Cabinet	224	2287	10

25 Department of the Prime Minister and Cabinet "Annual Report for the year ended 30 June 2005" [2005] AJHR G 48, 59.

The Cabinet Office prepares the summary cover sheets for Cabinet submissions and submissions to Committees. The Annual Report for 2004 shows that 84 per cent of submissions were received by the deadlines laid down for lodging papers. Seventy-nine per cent of submissions were distributed to ministers' offices two days before the meeting. The Office also prepared 2578 minutes for Cabinet and its committees. Ninety-three per cent of all Cabinet minutes were issued within three days of the Cabinet meeting. Ninety-nine per cent of all minutes did not require amendment by the Cabinet Office or committee concerned.

There are no doubt many inferences that can be drawn from these statistics, but the most obvious one is that a great deal of policy work is considered, with many decisions made within a year. It also needs to be remembered that many decisions are taken by ministers within the confines of their portfolios without reference to Cabinet. The statistics also probably mask the flexibility of the system. For example, in the weeks that Parliament is not meeting, a practice has developed for meetings of the Cabinet committees to be cancelled so that ministers can spend more time in their electorates or out of Wellington. Cabinet committees' business is then transacted by the Cabinet Business Committee, which has the same membership as the Cabinet Policy Committee and usually meets on Monday afternoons after Cabinet.

It is also the case that Cabinet may give a Cabinet committee in advance a power of decision where the matter is urgent and cannot wait. On occasions, the full Cabinet can meet at times other than the regular Monday morning meeting time, although this is rare. The usual practice is for decisions on papers considered at a Cabinet committee to be reported to the full Cabinet and the decision of the committee does not become operative until confirmed by the full Cabinet.

Cabinet Office circulars should be mentioned at this juncture. Cabinet Office circulars are issued under the authority of the prime minister and provide guidance on executive government processes. Circulars make a convenient vehicle for communicating a range of matters across government. For example, an important circular in 2004 provided guidance on regulatory impact statements and business compliance cost statements.²⁶ Sometimes circulars are purely administrative, but on other occasions they may communicate quite significant guidance or substantive changes. They are used for issues that need to be communicated to ministers and often chief executives as well. They can be found on the DPMC website.²⁷

26 Cabinet Office Circular "Regulatory Impact Statements and Business Compliance Cost Statements: Update of Guidance" (19/11/04) CO 04/4.

27 See <<http://www.dPMC.govt.nz/cabinet/circulars>> (last accessed 3 June 2006).

III THE CABINET AGENDA

The normal shape of a Cabinet agenda has changed over the years. Cabinet meets about 40 weeks a year and the Rt Hon Jenny Shipley's trial of having it meet only fortnightly did not last long. However, before the 2005 election, the Cabinet agenda was generally along the following lines.

A Reports of Cabinet Committees

First up will usually be the report of the Cabinet Legislation Committee, because that contains items, particularly regulations, that must be approved by the Executive Council meeting, which is usually held in Parliament Buildings on the following afternoon. Only the minutes of the Committee meeting will go to Cabinet, not the regulations themselves, but the Cabinet must approve the actions taken. The same is true for Bills approved by the Cabinet Legislation Committee to be introduced into Parliament. Where those Bills are major or likely to be contentious, however, the full text is submitted to Cabinet.

Next, Cabinet considers the reports of other Cabinet committees. These comprise minuted decisions of each committee, combined in a weekly report. Each weekly report is a separate item on the Cabinet agenda, but in the case of a particularly significant or contentious matter a full committee paper can be put up to Cabinet as a separate item, along with the committee's decision. Sometimes items will be held in front of the Cabinet committee for several weeks if more work from officials is required as a result of discussion. Cabinet committee proceedings may be re-litigated by the Cabinet and alterations are regularly made to committee decisions, whether they have been considered as separate items or as part of a weekly report.

B Cabinet Submissions by Ministers

Cabinet submissions are considered next. These are clustered around topic headings such as economic policy, social policy and appointments. It is usual for big policy items to be thrashed out in a Cabinet committee before coming to the full Cabinet, but there are often reasons why this cannot be done. It may be that the matter is urgent and the prime minister has agreed that the minister should put the paper direct to Cabinet, or the matter may be highly sensitive and need to be held close. Under this part of the agenda, there may also be written reports from ministers on overseas visits they have made as well as papers putting forward proposals for future ministerial travel. This latter category can only be submitted with the prior approval of the prime minister.

C Oral Items

At the conclusion, with the consent of the prime minister, ministers can raise oral items, which sometimes cause debate. Management of the House for the week will be discussed at this juncture along with strategies concerning communications and announcements of decisions. It is at this point that items such as judicial appointments are mentioned, although Cabinet does not decide on them. No votes are taken in Cabinet, the discussion continuing until a consensus is reached as summed up

by the prime minister, who presides. With only very rare exceptions on specific items, the only officials present are the Cabinet Secretary and a deputy. The Cabinet Secretary sits at the prime minister's left hand and the deputy at a separate desk.

Cabinet committees are the place for interaction with officials and the Cabinet committee room (which is separate from the Cabinet room itself) is well designed to facilitate that interaction. At Cabinet committee meetings there is always a senior official present, for example the DPMC Chief Executive, Maarten Wevers, in the case of the Cabinet Policy Committee and, in the case of other committees, an official who is relevant to its work. Cabinet Office staff are present at all Cabinet committee meetings, usually two sitting to the left of the Chair. The attendance of other officials for discussion is at the discretion of the committee. There tends to be a difference between Labour and National governments on this point. National governments have a tendency to invite more officials in to Cabinet committees and to do so more frequently than Labour governments. Public servants want to participate in Cabinet committee meetings since they secure thereby an opportunity to interact with ministers and see the interaction of ministers between themselves. This helps officials learn where the government is coming from and what is motivating it in a way the bare minutes cannot convey. On the other hand, public servants see plenty of ministers in their frequent meetings with them. Many would say, however, that something is lost when there is an absence of officials at Cabinet committees.

IV THE PRIME MINISTER AND CABINET

It is important to outline the role of the prime minister in Cabinet since that is a source of prime ministerial power. There is an inevitable overlap between this section of the paper and the later section on that topic. It is the prime minister who determines the number of ministers, and whether they sit inside or outside Cabinet. The ministerial list announced after the 2005 election comprised 21 Cabinet ministers, with an indication that the Minister for Trade Negotiations, the Hon Jim Sutton, would stand down quite soon when some important trade negotiations concluded. There are six ministers outside Cabinet plus two ministers outside Cabinet from other parties with confidence and supply agreements. Many have argued in recent years that there are too many ministers. That may be true in theoretical terms, but it fails to take into account the exigencies of politics. In my experience, most MPs believe they should be in Cabinet whatever the level of their abilities.

The prime minister chairs the Cabinet. Ultimately, the prime minister is the final arbiter of Cabinet procedure and Cabinet membership. That point was dramatically illustrated when the Rt Hon Winston Peters walked out of Cabinet in 1998, declaring that it could take no decision on the sale of Wellington Airport without him because of the coalition agreement. The Prime Minister, the Rt Hon Jenny Shipley, determined that Cabinet could proceed to take a decision and Cabinet then did so. The quorum provision in the coalition agreement between National and New Zealand First (NZF), which agreed that NZF ministers must be present at Cabinet meetings, was simply a political

overlay. It did not affect the Prime Minister's ability to determine Cabinet procedure – in this case to proceed to take the decision even in the absence of the NZF ministers.²⁸ Mr Peters challenged her right to do that, and in the disagreement that followed, the Prime Minister exercised her ultimate authority by advising the Governor-General to dismiss him as a minister. All that is required for dismissal is for the prime minister to sign an advice sheet to the Governor-General and for the Governor-General to countersign it. Reasons do not have to be given.

It should be noted that Mr Peters was dismissed two days after the Cabinet meeting in question and because of the way in which matters unfolded. The walk-out was only part of a series of events that signified the breakdown of the coalition relationship. In my opinion, however, those events have had an influence on decisions about how later governments should be organised under MMP, particularly on the preference for minority governments. It also illustrates how robust the institution of Cabinet is in New Zealand.

At any time, a prime minister can, in effect, cause Cabinet considerations of items to be deferred, always an important strategy in political management. The power to sum up the discussion is also an important one since there are no votes taken. Usually, even when there are different points of view, it is easy enough to judge where the preponderance of opinion lies. Further, the prime minister can ask for the minutes to be amended in the event that there is ambiguity and can provide authoritative interpretation if there are queries. The prime minister's office works in close proximity to the Cabinet Office and there are frequent consultations between them on the arrangement of Cabinet business. The prime minister must approve the agenda for every Cabinet meeting. Although the rules in the *Cabinet Manual* are real, the effective controller and organiser of Cabinet business is the prime minister, not only through the Cabinet Office but also through the relationship with ministers. There are frequent discussions between ministers and the prime minister as to when submissions may come up to Cabinet and what political fishhooks may be in them and how they should be dealt with. In many administrations in New Zealand, an informal inner Cabinet numbering four or five senior Ministers emerges. These can effectively control Cabinet outcomes.

It should be noted that since Helen Clark has been Prime Minister, the prime minister's chief of staff, Heather Simpson, has had an important liaison role with the Cabinet Office, ministers and the prime minister over Cabinet matters generally and coalition management in particular as well as agreements with other parties in the Parliament. The prime minister's chief of staff is the head of the Prime Minister's Private Office. Within the Private Office are the prime minister's private secretaries, media staff, political advisers and other administrative staff.²⁹ The Office deals with all of the prime minister's scheduling, correspondence and appointments. It is to be distinguished from

28 McGrath, above n 5, 15–16.

29 For the rationale in setting up the Prime Minister's Private Office, see H G Lang and Don Hunn *Review of the Prime Minister's Office and Cabinet Office* (State Services Commission, Wellington, 1989). See also Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 151–174.

the DPMC, which comprises public servants who do not change with a change in the administration as they do in the Private Office. As well, most other ministers have people in their offices who are effectively political advisers. The injection of these elements of political management into the relationship between ministers and the public service has added another layer of checks in the system of inputs to decision-making that must be taken into account. The result has been to add complexity to the process and to increase the time taken to make decisions, but it also means there is less chance of unintended political consequences flowing from the decisions when they are taken. These advisers are important in the negotiations that take place with other parliamentary parties; these are relationships that it is not appropriate for the public service to manage. All of this has added to the difficulties of co-ordination and to the burdens of the Cabinet Office, since members of this office must work closely with the political advisers, but it has not changed the basic character of the New Zealand Cabinet system.

The DPMC includes the Cabinet Office, which operates in a semi-autonomous fashion from the rest of the Department. The Cabinet Office, which includes the Honours Secretariat, comprised a total of 24 people in 2005. The DPMC also includes the Policy Advisory Group (15 people), the Domestic and External Security Group (five people) and the External Assessments Bureau (29 people). There are about 30 staff involved in Government House. The Policy Advisory Group is responsible for providing advice on issues of the day and co-ordinating the advice coming in from different departments. Indeed, the DPMC, along with Treasury and the State Services Commission, is responsible for managing and co-ordinating public sector performance. The DPMC says on its website: "The Department's overall area of responsibility is in helping to provide, at an administrative level, the 'constitutional and institutional glue' that underlies our system of parliamentary democracy."³⁰ The outcomes the DPMC seeks to achieve are to see that:³¹

1. Decision-making by the Prime Minister and Cabinet is well informed and supported.
2. Executive Government is well conducted and continues in accordance with accepted conventions and practices.
3. The Governor-General is well supported.
4. The management of domestic and external security and other risks is well planned, informed and coordinated.

30 Department of the Prime Minister and Cabinet <<http://www.dPMC.govt.nz/dPMC>> (last accessed 4 June 2006).

31 Department of the Prime Minister and Cabinet <<http://www.dPMC.govt.nz/dPMC>> (last accessed 4 June 2006).

V THE PLACE OF CABINET IN NEW ZEALAND

The prime minister allocates portfolios, a powerful instrument of control in Labour governments. Invariably, this is done in close consultation with the deputy prime minister where the prime minister and deputy are of the same party. In the case of National, the prime minister not only allocates portfolios but also selects the members of Cabinet. There is perhaps not as much difference as may appear in this regard between National and Labour, since it is possible in Labour for the leadership to effectively run a ticket in caucus elections for Cabinet and as well to allocate portfolios outside Cabinet to some who may have failed to secure sufficient support in the election for Cabinet.

Despite the public appearance that the prime minister dominates Cabinet, in New Zealand it is still a highly collective body, much more so than the public appreciates. It makes decisions collectively and there is a sense of collegiality and togetherness around a shared purpose. I would assert that the degree of personal domination that has been exerted in the United Kingdom by the administrations of Margaret Thatcher and Tony Blair is less likely in New Zealand because the New Zealand Cabinet system operates in a highly organised and systematic way. Cabinet's character is also greatly influenced by the fact that it is relatively small and collegial in a way that is probably more difficult to achieve in London. There, ministers inhabit offices in their departments, near their civil servants but distant from their ministerial colleagues. The fact that ministers in New Zealand are housed in close proximity to one another in the parliamentary complex has done much to foster the feeling among the members of New Zealand Cabinets that they are a closely-knit group.

Once a week, the Cabinet ministers all attend the Cabinet meeting, beginning with an informal cup of tea together. Later in the week, they will meet in groups at Cabinet committees. After Cabinet, they usually have lunch together in the ministers' dining room. They can easily visit one another in their offices. Often, informal groups of ministers and sometimes officials will gather to talk about issues and how they could be approached. There is continuous personal interaction between ministers in New Zealand. Less of the business is done by formal letters between ministers than in Whitehall and more by face-to-face discussion. As well, ministers are constantly on the phone to one another. For these reasons, Cabinet government in New Zealand has developed as an intimate, interactive dialogue between ministers on a continuing basis. It is a subtle mix of policy determination and political management always conducted against the backdrop of what may happen in Parliament. Cabinet in New Zealand is a relatively informal body and its discussions are confidential; apart from decisions, they are not minuted.

Political enterprises are not like business enterprises. Ministers are not subordinates who take orders from a chief executive officer. They must feel comfortable about what they are doing and if they are not there are plenty of opportunities for discussion with colleagues. Usually, some ministers are unhappy with some of the decisions some of the time but the pressures of collective responsibility are such that if the issue is outside their portfolio areas and not a central issue to them, they will grumble and move on. Governments always appear to the public much more unified on the

outside than they are in fact on the inside. This is the legacy of the doctrine of collective responsibility. Cabinet in New Zealand is a far cry from the expectations of the Duke of Wellington, apparently expressed after his first Cabinet meeting as Prime Minister: "An extraordinary affair. I gave them their orders and they wanted to stay and discuss them."³²

MMP typically produces minority governments. That fact has reinforced the feeling of collective solidarity within the Cabinet, rather than reduced it. There are some fascinating features of Cabinet government in New Zealand under MMP. Despite the weakening of executive power flowing from MMP because a minority government cannot dominate the House of Representatives, as majority governments did under the first-past-the-post (FPP) electoral system, the institution of Cabinet itself may now be stronger even though its capacity to prevail in the House is reduced. The power of the major party caucus is probably less because coalitions and arrangements for confidence and supply with other parties in the House have diffused and dispersed power to a greater extent. The conduct of Cabinet government is much more difficult than it was before because there are more points of view to accommodate and many negotiations to be held at many levels. Power has to be shared more than before. The managing of coalitions and arrangements for confidence and supply has itself added considerable complexity.

To my mind, the strength of the New Zealand Cabinet system is that it has survived all these pressures and retained its essential features and functions as efficiently as before. MMP has forced reconsideration of some basic features of Cabinet government, for example, the modification of the doctrine of collective responsibility by agreeing to disagree, but this does not appear to have weakened the system or stopped the Cabinet system functioning effectively and the work flowing smoothly.

In the final analysis, it is the function of the executive to govern and this has been amply accomplished by the Cabinet system in the MMP environment. One should not underestimate this accomplishment. MMP was the biggest constitutional change made in New Zealand in the 20th century and we are still, after four MMP elections, charting the manner in which it has changed the balance of power between the executive and Parliament and the other consequences it has had for the conduct of government in New Zealand. Overseas observers sometimes say to me what a credit it is to New Zealand that the new system was introduced so smoothly. The remarkable thing about the New Zealand Cabinet in the era of MMP is not how much it has changed, but how little. The context in which Cabinet operates has changed profoundly, yet the essentially practical mechanisms of Cabinet government have continued to develop and have demonstrated they can handle the increased complexity.

32 Antony Jay (ed) *The Oxford Dictionary of Political Quotations* (Oxford University Press, Oxford, 1996) 384.

There appears to be some difference of view about the importance of the institution of Cabinet and its proper place within the New Zealand system of government. Jon Johansson has recently challenged the orthodox view. His position is:³³

Finally, the orthodox view of cabinet government is underpinned by institutional assumptions about political behaviour. In the standard text on cabinet government, political scientist Elizabeth McLeay wrote: "the guiding assumption of this analysis of Cabinet Government is that institutions and structures, their formal rules and procedures and behavioural norms play the major role in shaping political action."

This assumption is challenged in this book, as we will find that an individual actor frequently possessed more freedom to shape the environment than the reverse. The alternative reduced a leader to little more than one of Pavlov's dogs, conditioned to respond to institutional cues. And if the behaviour of the leader didn't conform to the expected, conditioned response, then that behaviour must be considered aberrant and the reinforcing stimulus applied more strongly.

A further, speculative hypothesis is also raised here, namely the idea that cabinet government itself represents a powerful cultural trap, that efforts to transcend the less-desirable features and manifestations of that body are hampered by the all-pervasive position of cabinet government in New Zealand political life.

Reading this book I was struck by how artificial the constructs were upon which it is based. Its account of David Lange's administration bears little resemblance to the government of which I was a member or the person with whom I worked closely. I am left with the view that the theory advanced lacks coherence and is deficient as an explanation for political action or as a method of how to conduct government in a democracy. The theory leads to the idea that a prime minister with an independent base is required to exercise greater leadership and should not be caught in the cultural trap of Cabinet. The institution of Cabinet is a great deal more subtle and flexible than this theory allows. The orthodox theory seems to me quite secure against this attack. Cabinet is, in the end, an intensely practical place where decisions are taken. It is the key to how government is conducted. In the United Kingdom, where the grip of Cabinet has lessened compared to New Zealand and is presumably therefore more to Johansson's liking, I do not discern that things are any better.

VI WHY NEW ZEALAND IS NOT LIKE THE UNITED KINGDOM

A short excursion into recent scholarship in the United Kingdom can cast light on some of the issues in New Zealand. In an interesting chapter in Vernon Bogdanor's *The British Constitution in the 20th Century*, Anthony Seldon examines the changes in the Cabinet system in the United

33 Jon Johansson *Two Titans – Muldoon, Lange and Leadership* (Dunmore Publishing, Wellington, 2005) 33 (footnote omitted).

Kingdom between 1900 and 2000.³⁴ His research shows "a steady transition through a number of distinct stages from Cabinet in 1900 being *the* decision-making body to a highly personalised and fluid system in 2000".³⁵ He says that Cabinet has thus reverted to what it was in the 18th century: "a regular discussion among political friends."³⁶ Seldon's research certainly showed that Cabinet in 1900 was the prime decision-making body. By 1960, the Cabinet was still the prime arbiter of the main political and economic decisions, but there was a tendency already for less of the collective business to be done at formal meetings of Cabinet.³⁷

It was really the administration of Margaret Thatcher that changed things in the United Kingdom. Seldon concludes that by 1980, Cabinet was clearly ceasing to be the "core body in British Government. Decision-taking had passed squarely to the four principal standing committees".³⁸ Increasingly under Margaret Thatcher, decisions were taken by small groups of ministers but these were not Cabinet committees and not serviced by the Cabinet Office. In effect, the Cabinet system was bypassed. Seldon says that Cabinet was the supreme discussion body, even if the decision-taking had passed elsewhere.

Writing in 2003, Seldon found that the administration of Tony Blair continued to a substantial extent the pattern established by Margaret Thatcher. Cabinet met weekly, but meetings lasted little more than an hour and their frequency declined marginally.³⁹ A lot of decisions were taken in bilateral meetings between the Prime Minister and one other minister. Decisions were taken at number 10 Downing Street and then communicated to the Cabinet Office. The role of the Cabinet committees seemed to decline during this period, as a great deal of business was conducted in correspondence between ministers. The full Cabinet would not be aware of the detail of much of the business that was being transacted. The system got progressively looser and no decisions were taken in Cabinet in the year 2000.

34 Anthony Seldon "The Cabinet System" in Vernon Bogdanor (ed) *The British Constitution in the 20th Century* (Oxford University Press, Oxford, 2003) 97. Other writing from the United Kingdom that I have found helpful includes: Rodney Brazier *Constitutional Practice* (3 ed, Oxford University Press, Oxford, 1999) 104 [Brazier *Constitutional Practice*]; Rodney Brazier *Ministers of the Crown* (Clarendon Press, Oxford, 1977); Valentine Herman and James E Alt *Cabinet Studies – A Reader* (MacMillan Press, London, 1975); Sir Ivor Jennings *Cabinet Government* (3 ed, Cambridge University Press, Cambridge, 1959); John P Mackintosh *The British Cabinet* (Stevens & Sons, London, 1977).

35 Seldon, above n 34, 97 (emphasis in the original).

36 Seldon, above n 34, 97.

37 Seldon, above n 34, 121.

38 Seldon, above n 34, 123.

39 Seldon, above n 34, 125.

Seldon concluded that the Cabinet system had changed utterly when compared with its position in 1900.⁴⁰ He traced its development since then through five phases:⁴¹

- Cabinet as the sole decision-making body.
- Cabinet as the principal decision-taking body.
- Cabinet as the principal decision-ratifying body.
- Cabinet as the supreme discussion and information-giving body.
- A personal system of decision-making.

Seldon also provided the following reasons to explain that evolution:⁴² the need to involve expert opinion from outside the body of Cabinet ministers; a need to draft legislation to be put to Parliament; the end of Britain's isolation and its entry into an interdependent world of international diplomacy; increasing involvement of Government in social and economic questions; the emergence of the Treasury as the dominant Whitehall department; personalities; pressure of time; the role of the media; leaking by Cabinet Ministers and their aides; increasing departmental interdependence; and changes to the doctrine of collective responsibility.

It is not intended here to enter into an analysis of cause and effect in the British Cabinet system, but simply to compare what has occurred in the United Kingdom with what has occurred in New Zealand. However, it should be stressed that Seldon's views appear to be well founded. As Professor Rodney Brazier explains in his chapter on Cabinet in *Constitutional Practice*:⁴³

In the previous chapter it was postulated that the Prime Minister's power has increased in relation to the rest of his colleagues. In this chapter it has been explained how that process has been accelerated by the development of ministerial decision-making away from Cabinet as a whole.

While Cabinet committees are important in New Zealand, they have not detracted from Cabinet as they appear to have done in the United Kingdom, because of the manner in which the reporting function works here and the methodical and disciplined way in which the whole of the business is organised. In New Zealand, Cabinet works not only administratively but politically, and it has continued to do so because successive prime ministers have found it of value.

40 Seldon, above n 34, 129.

41 Seldon, above n 34, 129–130.

42 Seldon, above n 34, 131–133.

43 Brazier *Constitutional Practice*, above n 34, 131.

Lord Butler, a former secretary of Cabinet in the United Kingdom, gave a revealing interview to *The Spectator* in 2004.⁴⁴ He said it was not a secret that Cabinet does not make decisions:⁴⁵

I think what tends to happen now is that the government reaches conclusions in rather small groups of people who are not necessarily representative of all the groups of interests in government, and there is insufficient opportunity for other people to debate, dissent and modify.

He went on to say Parliament had insufficient control over the executive. Cabinet has not degenerated in that way in New Zealand and Parliament clearly has more control over the executive. Another British analyst and former senior public servant, Sir Christopher Foster, has argued that both Margaret Thatcher and Tony Blair had effectively sought to replace Cabinet government by prime ministerial government.⁴⁶ He felt Cabinet government needed rebuilding in a way that facilitated civil servants working with ministers to make their work more effective. He points out that in the United Kingdom, there is a long tradition of issues not coming to full Cabinet for discussion, particularly the budget and aspects of defence, foreign and nuclear policy, and that Cabinet solidarity has withered. According to Foster, Tony Blair's method of governing appears to have been through bilateral meetings with ministers.⁴⁷ The failure to minute decisions taken in this way has caused loss of efficiency and misunderstandings compared with the older processes of Cabinet government.

In terms of the British developments, the New Zealand Cabinet has not evolved in anything like the same way. All big decisions go to Cabinet here. New Zealand's evolution has not displaced the central role of Cabinet. In terms of the changes analysed by Seldon, the New Zealand Cabinet is somewhere between being the principal decision-taking body and the principal decision-ratifying body. Cabinet in New Zealand is not a personal system in the way the British model now is, despite the increased power of the prime minister in New Zealand. To some degree, that must result from the method by which Cabinet is organised in New Zealand. The different character that it exhibits compared with its counterpart at Whitehall flows from its collegial nature, the size of the country, the small number of MPs and not being embedded in the European Community. All combine to simplify policy-making.

44 Boris Johnson "How Not to Run a Country" (11 December 2004) *The Spectator* London, 12.

45 Johnson, above n 44, 13. It was perhaps this sort of development that led Nigel Lawson, Chancellor of the Exchequer under Margaret Thatcher, to remark: "When I was a minister I always looked forward to the Cabinet meeting immensely because it was, apart from summer holidays, the only period of real rest I got in what was a very heavy job." Antony Jay (ed) *The Oxford Dictionary of Political Quotations* (Oxford University Press, Oxford, 1996) 219.

46 Christopher Foster "Cabinet Government in the Twentieth Century" (2004) 67 *MLR* 753.

47 Foster, above n 46, 769.

It is also notable in New Zealand that Cabinet decisions get down to a level of detail and specificity that is not found even in Australia. Public servants in New Zealand have less autonomy and so do individual ministers. The mechanisms of Cabinet control are highly developed and constant, because successive prime ministers have valued that feature of the New Zealand system and wanted to preserve it. That does not mean that prime ministers here lack power; they have as much power as their British counterparts.

The prime virtue of the New Zealand Cabinet system is that it allows the prime minister and the administration generally to take a whole of government approach throughout its decision-making. There were significant changes to the methods of government administration stemming from the State Sector Act 1988 and the Public Finance Act 1989 resulting in some suggestions that departments had become "silos" with a great deal of autonomy within the silo. That threat has receded and it is probably due more than anything else to the tight collegiality and systems of New Zealand Cabinet government.⁴⁸

Notwithstanding the importance of the collective in Cabinet, the power of the prime minister is substantial and it stems from a number of sources to which we now turn.

VII THE SOURCES OF PRIME MINISTERIAL POWER

In constitutional terms, the prime minister is the one who advises the Governor-General whom to appoint as ministers and what portfolios to allocate to them.⁴⁹ In other words, he or she has the power to effectively hire and fire ministers. If a minister loses the confidence of the prime minister, the prime minister can advise the dismissal of the minister. That advice must be accepted so long as the prime minister has the confidence of the House of Representatives. Dismissing ministers or standing them down for completion of inquiries about their conduct has become much more common under MMP, because it is impossible to shelter ministers from parliamentary scrutiny and criticism with a big majority as was formerly the case in the days of FPP.

In any event, since the advent of MMP there has been a sharpening of the accountability that has always been part of the doctrine of ministerial responsibility. Consider the list of ministerial casualties that has occurred during Helen Clark's time as Prime Minister. These were either partial, complete or for a period while investigations were conducted: Dover Samuels (allegations of personal misconduct prior to being a minister); Ruth Dyson (driving while under the influence of alcohol); Phillida Bunkle (allegations of irregularities with expense claims); Marian Hobbs (allegations of irregularities with expense claims); Lianne Dalziel (making false statements to the

48 One intriguing question that arises about the nature of the changes to Cabinet in the United Kingdom is what effects they may have had on a whole of government approach there.

49 Many of the matters canvassed here are addressed more fully in Geoffrey Palmer and Matthew Palmer *Bridled Power – New Zealand's Constitution and Government* (4 ed, Oxford University Press, Melbourne, 2004) 52–94.

media); Tariana Turia (indicating she would vote against a government Bill and resign from Parliament); David Benson-Pope (allegations of misconduct as a teacher before being elected to Parliament); John Tamihere (allegations of fraud) and Taito Philip Field (allegations of irregular behaviour with constituents and the making of representations to the Minister of Immigration). There is a strongly emerging trend suggesting that the standards required of ministers have become more demanding under MMP. Where serious allegations are raised, ministers are stood aside until they are investigated. Sometimes, ministers are reinstated where the investigations clear them; sometimes they must serve a period of penance as back benchers; and sometimes it is the end of their ministerial careers.

It is worth stressing that the operation of the doctrine of ministerial responsibility is in the hands of the prime minister. At base, it is a political doctrine to be judged on the basis of political circumstances by the prime minister. Thus, the doctrine of collective and individual ministerial responsibility is an important ingredient of prime ministerial power. The prime minister is both the regulator and applicator of the doctrine so long as the prime minister enjoys the confidence of the House.

Furthermore, the prime minister determines the rankings of ministers and this is more important than it seems because senior ministers tend to have more sway in Cabinet deliberations than junior ones and the public service is more attentive to their wishes. Further, while Cabinet members are seated at an oval Cabinet table, they are seated in opposite pairs in terms of seniority. Thus, the more senior ministers are all at the prime minister's end of the table. Now that the Cabinet room has been refurbished, the acoustics are greatly improved, but when I was a minister it was often hard to hear the oral contributions from the other end of the table.

Another important but often overlooked lever of prime ministerial power is the fact that the prime minister is usually Minister for Ministerial Services, a unit in the Department of Internal Affairs that services ministerial offices. This means that the prime minister has the final say over how many staff a minister has in his or her office and can veto individual appointments if they are unacceptable to the government. Many of the media staff and political advisers in ministerial offices are appointed on contract. These people are approved individually by the prime minister, who also approves their salaries. This is an important instrument of control in avoiding ministerial offices becoming independent fiefdoms with more staff than are required. In some administrations the function is performed by the deputy prime minister, but Helen Clark has always exercised this power since she has been Prime Minister. It is a task that is a great deal more demanding than it might seem from the outside.

In theory, the Governor-General may have some discretion in choosing whom to ask to form a government but that power has been clearly laid upon the elected politicians by pronouncements made at the beginning of MMP by Sir Michael Hardie Boys, then the Governor-General. It has been made plain that it is for the politicians to determine who will form a government and work out arrangements among themselves with minimal involvement from Government House until a

government that can command the confidence of the House of Representatives has been found and its existence publicly demonstrated.⁵⁰ In the unlikely event that negotiations do not produce a result, section 19 of the Constitution Act 1986 provides that after a general election: "Parliament shall meet not later than 6 weeks after the day fixed for the return of the writs for that election." This provides an opportunity to test where the confidence of the House resides.

The prime minister is the Queen's first adviser. It is the prime minister and the public servants accountable to him or her that manage relations with Government House and on occasion, through Government House, have dealings with the palace in London. Mirroring the constitutional position is the fact that the public see the prime minister as the boss of the government or, as the *Cabinet Manual* puts it, "the head of the government."⁵¹ Further, the prime minister is the chief spokesperson for the government. The ability to command the media and put forward the government's position is one of the greatest sources of prime ministerial power. Some public lawyers are now advancing the idea that the creation of legal rights and duties by legislation is no longer the dominant method for governments to achieve their goals.⁵² Modern communications technology and the internet enable the channelling of information cheaply and instantly. The argument is being made that public communications management is itself a regulatory tool available to government and one of increasing importance. Policy-makers harness publicity to achieve their objectives and all units of government these days devote considerable resources to communicating with the public. Governments are prone to use market-based incentive techniques to produce outcomes. A variety of techniques can be used to attempt to persuade and educate by the provision of information, offering guidance and explanations, publicly condemning bad performances and praising good performances.⁵³

These techniques are available to the prime minister as well as to Cabinet generally. The prime minister in New Zealand occupies a "bully pulpit" in the same way as an American president. By conducting a weekly media conference that is bound to be widely reported, messages can be conveyed about the government's preferences and aims in a manner that will on many occasions influence behaviour in New Zealand without the need to take further measures. As a news source, the prime minister is unrivalled. The media continuously seek comment and information from the prime minister's office on every conceivable subject. In no country in the world that I know of is the

50 Rt Hon Sir Michael Hardie Boys (Speech to the annual dinner of the Institute of International Affairs, Wellington, 24 May 1996).

51 *Cabinet Manual 2001*, above n 4, para 2.4.

52 Even where passing a law is contemplated, public announcement of the fact by ministers is regarded as appropriate notice sufficient to justify the passage of retrospective legislation made operative from the date of the announcement rather than the date the Act comes into effect. This appears to be generally accepted practice both in New Zealand and Australia in relation to tax legislation.

53 Karen Yeung "Government by Publicity Management: Sunlight or Spin?" [2005] PL 360.

head of government so accessible to the media. This is certainly true of Helen Clark. Labour prime ministers generally in recent times have conducted weekly media conferences. The tendency is not so strong among National prime ministers, and neither Jim Bolger nor Jenny Shipley had a weekly media conference with such regularity, preferring to make themselves available to the media as they thought appropriate.

Just as the prime minister's media dominance resonates with the public, it resonates as well with the prime minister's colleagues in Cabinet, caucus and the House of Representatives. To some degree, how this affects prime ministerial power in practical terms depends on how popular the government is and what level of support it enjoys in the public opinion polls. No one reads the polls more closely than politicians and they receive regular briefings about them.

An important source of prime ministerial power also stems from the ability to advise the Governor-General to dissolve the House of Representatives and hold a general election. This power is more important in the MMP era of minority governments. Choice of time for an election is important and while there may be political risks in so doing, a prime minister who commands the confidence of the House can advise that an election be held earlier than the three year limit prescribed by statute. It needs to be stressed that the need for the prime minister to enjoy the confidence of the House is a real limit on prime ministerial power, not merely a theoretical one. In the MMP context, votes of confidence have become more important than in the past. Where a prime minister loses a confidence vote and seeks a dissolution, an issue arises whether the Governor-General is obliged to accept that advice. Sir Michael Hardie Boys addressed this issue in one of series of significant speeches on constitutional issues when he said:⁵⁴

A Prime Minister is *legally* entitled to ask for a dissolution and a general election at any time, although there are some *conventional* restraints on that right, too. Normally, the Governor-General will accept the Prime Minister's advice to grant a dissolution, but in certain circumstances, he is entitled to refuse. ... A dissolution may also be refused *if* the Prime Minister has simply lost the support of his cabinet, *or* his party, *or* if an alternative government is available within the existing Parliament. It is in the assessment of these exceptions to the general rule that the hazard lies.

While the prospect of the reserve powers of the Governor-General being exercised in New Zealand is remote, it lurks in the background as a deterrent to undemocratic conduct. The continuous requirement for a prime minister to enjoy the confidence of the House of Representatives has become a more salient issue under MMP than it was previously.

In some ways, it is best to look at the prime minister as the minister for co-ordination and political leadership. Co-ordinating a large and disparate organisation like a government is an

54 Sir Michael Hardie Boys, Governor-General (Public Law Class at College House Christchurch, 10 September 1997) <<http://www.gg.govt.nz/gg/speeches.asp?type=current&ID=255>> (last accessed 4 June 2006) (emphasis in original).

enormous task. The prime instrument of co-ordination is the Cabinet, but the prime minister and his or her department are responsible for co-ordinating the whole machine of government. This has become much more complicated with multi-party governments that are usually minority governments under MMP. The prime minister is not only manager of the government but also the chief political manager of the coalition and of the arrangements with other parties for confidence and supply. The prime minister is also a party leader, who not only speaks for the government but for the caucus as well. This involves a whole range of time-consuming tasks such as attending party functions and conferences, dealing with preparations for elections, helping decide upon issues relating to the election candidates and their position on the party list at the election, plus a host of other issues big and small. Indeed, in order to be the prime minister in New Zealand, it has traditionally been necessary to be elected the leader of a party with a largest representation in Parliament. Any change to that practice, while theoretically possible, may face resistance in terms of public acceptability.⁵⁵

The prime minister is, by custom, also Minister in Charge of the Security Intelligence Service and Minister Responsible for the Government Communications Security Bureau and indeed the minister responsible for the intelligence agencies generally within the government. The Intelligence Co-ordinator is located in the DPMC and reports to the prime minister and the External Assessments Bureau is also part of the DPMC. In terrorist times, these can be important, time consuming and stressful responsibilities.

A further source of prime ministerial power and influence flows from the prime minister's position on the international stage. Where there are meetings of heads of government, it is the prime minister who attends. Helen Clark has frequent interaction with prime ministers and presidents of other nations. She speaks at the United Nations General Assembly and makes official visits to foreign countries whose relationships are important to New Zealand. Her views are greatly sought after by ambassadors from other nations stationed in Wellington and those who visit from Canberra. This role has grown over the years. Whether or not the prime minister is also Foreign Minister (David Lange's first term was the last example of that), the prime minister is deeply and continuously involved in the conduct of New Zealand's foreign policy and international trade policy, and sees the reports from our overseas diplomats every day.

Much of government is about taxation and the appropriation of public monies. These matters are now governed by the Public Finance Act 1989 and are not in any detailed way the responsibility of the prime minister but of the Minister of Finance. Taxing, borrowing and spending must all be authorised by Parliament, but under Westminster systems, the executive government has powers

55 In Japan, after the 1993 election, the Prime Minister was appointed from the Socialist Party and was supported by the Liberal Democrats, who had three times as many seats. In Norway, after the 2001 election, a coalition was formed with the Prime Minister coming from the Christian People's Party, which was the fifth-highest polling party. Whether New Zealand will evolve in these directions remains to be seen.

that prevent the legislature being irresponsible with money. The requirements of the Public Finance Act 1989 concerning fiscal responsibility are important ingredients in maintaining fiscal rectitude by requiring fiscal transparency from the executive. There can be no amendments to Bills in Parliament that require the appropriation of public money unless they are moved by a minister or there has been an earlier recommendation sent by the Governor-General to the House on ministerial advice. The financial veto provisions provided for in Standing Orders require the government's concurrence in Bills, amendments or motions that "would have more than a minor impact on the Government's fiscal aggregates if it became law."⁵⁶

To sum up this section, it appears to me that there are two key powers that the prime minister enjoys in a New Zealand setting, which help explain why he or she is the most important constitutional figure. The prime minister is the one who advises on the appointment and dismissal of ministers and has the capacity to advise the Governor-General to dissolve Parliament and call an election. This capacity for an early annihilation of the Parliament coupled with the capacity to get rid of ministers is what keeps people in line. The incentives flowing from both these powers are considerable – MPs who are ministers generally prefer being in ministerial office to being out of it, and MPs who are not ministers generally prefer to continue to be MPs rather than be exposed more often than is required to the potential of electoral defeat. Of course, there are limits to these prime ministerial powers. The principal one is the need for the prime minister to retain the confidence of the House and of his or her caucus colleagues. Furthermore, in New Zealand, general elections are legally required every three years. These checks are real and not imaginary; so are the vagaries of political opinion that are studied so carefully by the pollsters. Powerful as the prime minister and Cabinet undoubtedly are, they are less powerful than they were before the advent of MMP.

VIII COALITIONS AND OTHER ARRANGEMENTS: CONFIDENCE AND MMP

What MMP has shown over four elections is a strong tendency to produce minority governments. On the one occasion when it did not, the majority coalition government formed by the Rt Hon James Bolger and the Rt Hon Winston Peters after the 1996 general election disintegrated in 1998 after the Rt Hon Jenny Shipley became the Prime Minister and leader of the National Party. In 1996, there was a 74-page coalition agreement setting out detailed policy commitments under which the junior coalition partner, NZF, secured nine out of 26 ministerial portfolios. It took eight and a half weeks to negotiate. It was hardly a propitious start, but over time the political parties and politicians have learned more about the dynamics of MMP and adjusted their behaviour accordingly. The political thinking required is of a different character than the winner-takes-all tendency of FPP. Careful deliberations have to be held on how to share power.

⁵⁶ *Standing Orders of the House of Representatives* (New Zealand House of Representatives, 2005) paras 318–322.

Helen Clark, in the administrations she has formed, has shown a propensity to form minority governments rather than cobble together a majority coalition that would be difficult to manage internally because of the diversity of political outlooks. She has preferred to manage the Cabinet on a collegial basis with people of the same point of view who can then decide when to negotiate, with whom and over what issues. This tendency has, in my view, enhanced the cohesion of Cabinet and has maintained its position as the cockpit of the New Zealand governmental system. The administration she formed in November 1999 was a minority coalition government between Labour and the Alliance. The Alliance secured four ministerial positions in Cabinet and two outside. Yet here again tensions emerged within the junior coalition partner leading to the splitting of the Alliance into two factions in April 2002. The management difficulties that ensued led to an election in July, somewhat earlier than was required by the Electoral Act 1993.

The government Helen Clark formed in 2002 after the general election was a minority coalition with the Anderton group of the Alliance (called the Progressive Coalition Party, with two MPs) with support on confidence and supply from the United Future Party (UF), with eight MPs, led by the Hon Peter Dunne. There was also a co-operation agreement with the Green Party outlining some common policy objectives and consultation procedures. The focus that emerged as the crucial one, both in the administrations of Mrs Shipley and Ms Clark, was to secure majority parliamentary support on confidence and supply. Confidence is assumed or built in with majority governments, although any government must continue to enjoy the confidence of the House of Representatives. Where confidence is lost, the government must resign or seek a general election. The last time this occurred in New Zealand was 1928. The need to retain the confidence of the House has a long parliamentary pedigree and the relevant parliamentary practice is well established and well known within Parliament, even if not outside it. The political point is that, under MMP in New Zealand, it turns out to be easier to run a minority government than a majority coalition – at least, so far.

In the latest edition of his excellent book on parliamentary practice, the Clerk of the House of Representatives, David McGee QC, makes a number of important points about confidence votes.⁵⁷ As he explains it, the government retains the confidence of the House as long as it can avoid defeat on important parliamentary votes, identified as "those that involve a question of confidence."⁵⁸ He also points out that the confidence of the House is a matter of political judgment; it is not an issue of parliamentary procedure upon which the Speaker can rule. Ultimately, he says, "it is a matter for the Governor-General in the exercise of the reserve powers of the office to judge whether a Government possesses the confidence of the House."⁵⁹ However, parliamentary procedure does determine the

57 David McGee *Parliamentary Practice in New Zealand* (3 ed, Dunmore Publishing, Wellington, 2005) 95–99. I am most grateful to Mr McGee for showing me the page proofs of the relevant passages of his work before they were published in December 2005.

58 McGee, above n 57, 95.

59 McGee, above n 57, 96.

circumstances in which a confidence vote can be forced on a government. It should be mentioned that the possibility of the reserve powers being used in a situation like the present, where the numbers may be close in the House, is remote. It will be plain when the government suffers a defeat in the House and it will be plain whether the defeat relates to a matter of confidence. The numbers in the House are the critical determinant. A majority of one is enough.⁶⁰

The occasions in which a confidence vote arises in the New Zealand Parliament are probably not more than six times each year. Confidence votes fall into two categories: those forced on the government by the Opposition and those that the government initiates itself. An issue of confidence in the first category must arise in a parliamentary context that involves the broad performance of the government. If, for example, the government is defeated on its budget proposals contained in the main Appropriation Bill, that means it has lost the confidence of the House. Without the passage of the budget, it will not be possible to carry on the government. Defeats on other measures involving supply, such as Imprest Supply Bills, will indicate a want of confidence. The same is true of the legislation setting the annual tax rates.

While defeats on these measures will indicate a lack of confidence, it is common for the Opposition to move amendments making the confidence issue express rather than implied. Often, amendments are also moved to the second reading of the main Appropriation Bill and there are a number of occasions, such as in the address-in-reply to the speech from the throne or the debate on the prime minister's annual statement, where the Opposition can test confidence by moving amendments. In the second category, the government can itself make any issue that comes to a vote in the House one of confidence simply by the prime minister indicating to the House that it is regarded as such. The government can also move an express confidence motion. In September 1998, after the break-up of the National–NZF coalition, Mrs Shipley sought the leave of the House to move a motion "that this House has confidence in the National-led minority Government." Leave was granted and the motion carried, 62 votes to 58.⁶¹ There is, however, no provision in New Zealand Standing Orders to allow the Opposition to test confidence at any time by putting down a motion of no confidence, as exists at Westminster. It might be suggested that the discretion of the prime minister to declare when a matter is one of confidence is another source of prime ministerial power. There are strong political incentives for parties who may otherwise oppose a measure not to risk precipitating an early election.

What parliamentary practice and the New Zealand experience, both before and after MMP, indicate is that it is not necessary to win every vote in the House in order to be the government. Thus, after a general election, it is the confidence and supply support that is crucial for a minority government. It is these arrangements that can place strains upon the doctrine of collective

60 The second Labour Government from 1957–1960 only had a majority of one.

61 (8 September 1998) 571 NZPD 11806–11841.

responsibility. Government legislation may be defeated, but the government may still enjoy the confidence of the House. Naturally enough, government Bills cannot be introduced unless there exists a majority in favour of their introduction; this necessarily means that each piece of legislation must be negotiated between other parties and the government on each occasion.

The 2005 arrangements provide a further case of the evolution of the New Zealand constitutional arrangements in adjustment to MMP. The results of the general election on 17 September 2005 for those parties that gained seats in the House (19 parties contested the election) were as follows:⁶²

Labour Party	50 seats
National Party	48 seats
New Zealand First Party	7 seats
Green Party	6 seats
Māori Party	4 seats
United Future	3 seats
ACT New Zealand	2 seats
Jim Anderton's Progressive	1 seat

Intricate negotiations lasting about two weeks resulted in the formation of a minority government led by Helen Clark and consisting of a coalition arrangement with Progressive's only MP, the Hon Jim Anderton, coupled with what were called by the Prime Minister "enhanced" confidence and supply agreements with NZF and UF. The enhanced factor was that the leaders of these two parties were allocated ministerial posts, outside Cabinet. The Rt Hon Winston Peters, leader of NZF, became Minister of Foreign Affairs, Minister for Racing, and Associate Minister for Senior Citizens. The Hon Peter Dunne became Minister of Revenue and Associate Minister of Health. In each instance, the detailed policy undertakings backing the confidence and supply agreements were publicly released. It seems clear that both UF and NZF gave their assent to the arrangements on the basis that the Green Party would not secure any ministerial positions. Thus, the Green Party was left in the position that while it had some policy agreements with the government it was not offering similar positive assurances. Rather, in the co-operation agreement it signed, the Green Party undertook "not to oppose confidence or supply for this term of Parliament" and agreed "to work with the government on agreed policy and budget initiatives."⁶³

These arrangements amount to negotiated political bargains, the terms of which are transparent. The agreement with NZF deserves some detailed analysis. It begins with a preamble reciting the fact that there was potentially an equal split of 57 on each side for a National-led or Labour-led government. This situation required NZF to change its position to some extent by offering a positive

62 2005 General Election – Official Result <<http://www.electionresults.govt.nz>> (last accessed 4 June 2006).

63 Rt Hon Helen Clark, Media statement "Government Arrangements Announced" 17 October 2005.

vote on confidence and supply, not merely abstention, so the Party said it was offering such support, but not becoming part of a coalition. In order to honour that position, some unorthodox and unprecedented arrangements were made that impinge upon the principle of collective responsibility. Remember, it would have been possible with a combination of Labour, Progressive, NZF and UF to form a majority coalition government. That would have involved the smaller parties in a closer relationship with the government than their political health may have suggested was wise. MMP, so far in the New Zealand experience, has been tough in exacting electoral retribution from small parties, as the 2005 election itself demonstrated when National secured many votes at their expense. Thus, the device used was to relax the principles of collective responsibility in respect of the two ministers outside Cabinet from parties with confidence and supply agreements. The Prime Minister's media statement stated that: "Collective Responsibility will apply to the areas for which they have portfolio responsibility."⁶⁴ The agreements themselves refer to collective responsibility:⁶⁵

New Zealand First agrees to fully represent the government position and be bound by Cabinet Manual provisions in respect of any areas within the portfolio responsibility of the Leader of New Zealand First and to support all areas which are matters of confidence and supply. ... In other areas "agree to disagree" provisions will be applied as necessary.

The agreement with UF is in substantially similar terms but with an additional feature:⁶⁶

Where there has been full participation in the development of a policy initiative outside any portfolio responsibility held by the Leader of United Future, and that participation has led to an agreed position, it is expected that all parties to this agreement will publicly support the process and outcome.

There are ambiguities within the expression of these arrangements and some of the interpretations placed upon them by some of the players may add to that impression. Time will tell how the arrangements are implemented in practice. If guidance about their practical implementation is required, it is likely that it will be promulgated first by way of a Cabinet Office Circular. In the event that the arrangements prove useful and enduring, they are likely to be reflected in the *Cabinet Manual* next time it is revised.

The new gloss on collective responsibility is that ministers outside Cabinet from parties with confidence and supply agreements are bound by the principles of collective responsibility within their portfolio areas, but not otherwise. Thus, they retain the freedom to criticise, attack and vote against other aspects of government policy in the House of Representatives. That this is novel cannot be denied. Whether it is undesirable is another question. There is no question that ministers outside Cabinet who do not come from parties with confidence and supply agreements remain

64 Clark, above n 63.

65 Labour-led Government "Confidence and Supply Agreement with New Zealand First" (17 October 2005) 2.

66 Labour-led Government "Confidence and Supply Agreement with United Future" (17 October 2005) 3.

bound by the principles of collective responsibility. This has always been rather hard on them because often they have had no role in the Cabinet discussions that lead to the adoption of the policy. But it has to be remembered that the doctrine of collective responsibility is a political doctrine enforced by the prime minister at his or her discretion. The prime minister is the judge of any breach.

In terms of the workings of Cabinet, the agreements mean that, on the policy items they cover, the government will consult as required. All the support parties must be consulted on the broad outline of the legislative programme, key legislative measures, major policy issues and broad budget parameters. There are arrangements laid down as well for designated MPs from each party to have access to relevant ministers. While the precise detail of the consultation and co-operation arrangements varies slightly for each party, it is clear that they will have, at least on some issues, confidential information about Cabinet thinking through the relevant minister and probably access to official advice. It seems plain that NZF and UF and, to a lesser extent, the Green Party, will on some issues some of the time have an important influence on the decisions of Cabinet. They will have a continuing input into its decision-making, although they are not part of it. Such has been the case under the arrangements Helen Clark had with UF and the Greens between 2002 and 2005. Now it has gone a step further with the holding of portfolios outside Cabinet.

How this will be worked through in the membership of Cabinet committees was not clear at the time of writing. The committee memberships had not been announced. What is clear is that the nature of the commitments made in order to secure sufficient support in Parliament to be the government impinges upon the freedom of Cabinet to make decisions. Cabinet decision-making has been made more complex by requiring more consultation and negotiation before decisions are made, yet at the same time the government could have a greater range of choice as to which smaller parties to team up with on particular issues. It becomes a complicated policy game of mix and match. In such a set of arrangements, the dynamics are likely to evolve and develop over time. They will differ from issue to issue. The politics of this situation are likely to be easier to manage than where support parties are obliged to maintain collective responsibility on every issue, a situation that can produce intolerable political strain. What has been done here following the 2005 general election amounts to a modest constitutional innovation that will undoubtedly be watched most carefully by smaller parties in other countries.

The speech from the throne delivered in Parliament by the Governor-General on 8 November 2005 dealt with the novelty of the situation by pointing out that the minority government rested on three layers of agreements. There was a coalition agreement with the Progressive Party, two

confidence and supply agreements with NZF and UF, and a co-operation agreement with the Green Party. The speech from the throne said of the collective responsibility of Mr Peters and Mr Dunne:⁶⁷

They are bound by the conventions of collective responsibility with respect to [their] portfolios, but not otherwise. Of necessity, the longstanding constitutional conventions of the old electoral system are evolving to respond to the challenges of MMP.

The existing statement in the *Cabinet Manual* on agreements to differ is important in this regard. The *Cabinet Manual 2001*, after setting out the basic principle of collective responsibility, states at paras 3.23–3.24:

Coalition governments may decide to establish "agree to disagree" processes, which may allow Ministers 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 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.

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

Some adjustment may need to be made to these provisions to reflect the new situation, although that can be easily accomplished by marking out an exception to reflect the selective application of the doctrine to ministers in the position outlined above. The Cabinet Office in a note to the Prime Minister that has been made public explained the issue in terms of hats. All ministers wear two hats – one as a minister and one as an MP. They operate differently depending on which hat they are wearing. Party leaders have a third hat. Thus, the advice went:⁶⁸

When Mr Peters and Mr Dunne speak about areas of government business outside their portfolios, therefore, they can be seen speaking as political party leaders and MPs rather than as Ministers. When they speak about the issues within their portfolios, however, they speak for the government and as part of the government.

The arrangements that have been reached in 2005 are an extension and development of the agreement to differ that was designed for coalitions. Rather than a coalition, the idea is to have a looser arrangement of support so there is certainty as to who comprises the government, but policy can be iterated and evolve in accordance with the negotiations and consultations conducted issue by issue. No doubt that changes the doctrine of collective responsibility as it has classically been

⁶⁷ Dame Sylvia Cartwright "Speech from the Throne" (State Opening of Parliament, Wellington, 8 November 2005) 16–17.

⁶⁸ Secretary of the Cabinet to the Prime Minister "Constitutional Issues Arising from Confidence and Supply Agreements with New Zealand First and United Future" (21 October 2005) Note.

practised in Westminster systems, but MMP has already changed it in New Zealand and this is a further development of that change. Ultimately, the judgment to be made on it will depend on whether it works.

The arrangements have been criticised in a number of quarters on the ground that, as Professor Jonathan Boston put it, the arrangements between NZF and Labour, and UF and Labour, "have the essential characteristics of 'coalition' agreements."⁶⁹ Boston argues that the new administration is best understood as a four-party majority coalition government with 61 of the 121 seats in the House of Representatives. I do not agree since in my view it is not what the parties to the agreements intended. It is not a Clayton's coalition. The smaller parties wanted to preserve their freedom of political action outside the portfolio and agreed policy areas. Labour agreed to that since it was a course that had political management advantages. The agreements do relate to confidence and supply and do not cover the whole range of government activity as a coalition arrangement would. While the arrangements are novel, they do not amount to a coalition by another name. What has been done appears to me to be a natural progression from the arrangements previously made under MMP and to flow directly from that experience. How these arrangements work in practice will be both interesting to the public and testing to the participants. Only time will tell whether the arrangements will provide an enduring government. Certainly, in my view, they are capable of doing that so long as the participants wish it. From a practical point of view it is not helpful to characterise the arrangements as something they are not, since that will lead to the attribution of consequences that do not follow.⁷⁰

There can be no doubt that the new arrangements change and weaken the doctrine of collective responsibility as it has been traditionally understood. It has been localised in the case of two ministers outside Cabinet who come from NZF and UF. Collective responsibility for those two ministers relates to specific portions of government policy, not the universe of it, but the doctrine has already been weakened anyway. This is not only because of the agree to disagree provisions put into the *Cabinet Manual* at the time of the Labour–Alliance coalition. What the doctrine has meant traditionally is that ministers were collectively involved in making decisions and were therefore bound to remain loyal to them in public, even though they disagreed. The other option was to resign. However, the constant interaction of ministers with the media has changed this in the United Kingdom to some degree. This is particularly the case with junior ministers not members of Cabinet who have not been personally involved in the decision-making. Such ministers do not feel the same sense of restraint. The New Zealand arrangements reached in 2005 reflect the reality of MMP and the election result. Their signal advantage is that they will not impose intolerable political strains on a coalition because there is not one, except with the Hon Jim Anderton. We have a new doctrine of

69 Jonathan Boston "An Unusual Government" (26 October 2005) *The Dominion Post* Wellington B5.

70 I note that one other commentator agrees with my view that the new arrangements are not unconstitutional: Nicola White "Deconstructing Cabinet Collective Responsibility" (2005) 1 *Policy Quarterly* 4, 4.

selective collective responsibility applying to ministers outside Cabinet who come from parties with enhanced agreements for support on confidence and supply. There is no legal obstacle to our constitution evolving in this way and the politics of the situation may well require it.

IX THE PRIME MINISTER AND THE CONSTITUTION

To discuss the issue of the prime minister and the constitution, it is necessary to have some idea of what we mean by the term "constitution" and that is always a challenging task in New Zealand. As I pointed out in an earlier paper, "The New Zealand Constitution in 2005":⁷¹

Despite the apparent simplicity of the New Zealand Constitution, or perhaps because of it, many complexities lurk not far beneath the surface. Even the core is elusive and writing this paper brought to mind Lewis Carroll's delightful nonsense poem "The Hunting of the Snark" in which the Snark is both imaginary and elusive. The New Zealand Constitution in 2005 is neither readily accessible nor easily understood. The temporal element in the title is deliberate. The New Zealand Constitution is flexible, to a large extent uncodified and fluid. The Constitution is both malleable and mysterious. It is an iterative Constitution in a state of constant and often silent evolution. The cumulative effect of decisions by the Executive government, the Parliament and the courts alter features of it every year, if not its fundamental configuration. In a Constitution like New Zealand's law and politics tend to merge into each other – political battles are more influential in determining what the rules are, than court decisions. It should be observed that almost every Constitution inevitably appears as a work in progress.

Such a constitutional situation means the prime minister is more powerful and less constrained than he or she would be in a country with a written or codified constitution that may contain greater definition of the range of executive powers. There are few constitutional rules in New Zealand that cannot be altered relatively easily. Indeed, that point has been amply demonstrated in the previous section of this paper. The political nature of New Zealand's constitution is evident and the prime minister is the most important politician. Therefore, the prime minister is the most important constitutional actor. That proposition is hard to dispute, but what does it mean?

Essentially, it means what was outlined in the previous section. New constitutional innovations can be developed and implemented by the prime minister to meet the circumstances of the situation. While that is not true of every feature of the New Zealand constitution, it is essentially true of Cabinet and Cabinet is the most important part of the entire system of government. Thus, the prime minister remains the most important constitutional figure and MMP with a minority government has not changed that fact. It has brought different pressures to bear on the Cabinet system, as this paper has sought to make clear, yet the primacy of Cabinet, the Cabinet system and the power of the prime minister over it remain. The nature of the way decisions are made has changed – there is more consultation and more negotiation. A system of collaborative government may be evolving. This

71 Geoffrey Palmer "The New Zealand Constitution in 2005" in Jack Hodder and others *New Zealand's Constitutional Arrangements: Where are we Heading?* (New Zealand Law Society, Wellington, 2005) 1, 1.

appears to be precisely in line with what the Royal Commission that recommended the adoption of MMP hoped for.⁷²

The power of the prime minister to innovate even within the limits outlined above is subject to some further qualifications. He or she cannot do anything unlawful, nor contravene the fundamental constitutional conventions, that is to say those that support democracy in its widest sense. After all, we are talking about the "principles of political or constitutional morality which are regarded as binding."⁷³ Furthermore, he or she must retain the confidence of the House.

The effect of MMP on Cabinet government has been to blunt the hard edge of Cabinet decision-making by adding into the mix increased amounts of political policy pluralism. Power has to be shared more than it used to be. There is more representation within the Cabinet decision-making system of diverse policy views, and politicians of different outlook and philosophy have had to work together more. The primacy of Cabinet and its processes remain under MMP but their dominance is reduced and there is room for more flowers to bloom. The prime minister and his or her Cabinet colleagues have to convince more than their own party in order to produce change. Particularly noteworthy compared with the classical Westminster model has been the loss of control over legislative outcomes. Cabinet no longer controls the fate of government Bills, although it remains the most significant actor in the legislative process of Parliament.

I shall now attempt to sum up what the developments discussed in this paper mean in a constitutional sense. First, the centrality of the Cabinet system in New Zealand remains under MMP. There have been changes to the context in which Cabinet operates as a result of MMP but the Cabinet system has adapted to meet the challenges of diverse parties within government. The coordinating and control role of Cabinet in New Zealand has not been diminished to any appreciable degree. Cabinet makes the decisions. What has changed is the style of management and the development of techniques to deal with coalition and confidence and supply agreements. The need to go hunting for support for the introduction and passage of government Bills is a big change compared with FPP.

While MMP has reduced the capacity of the executive to control and dictate to the Parliament, it has to some degree enhanced and added to the powers of the prime minister because the prime minister must manage the agreements that keep the government in office. The power of the prime minister has been increasing incrementally in all Westminster democracies since the second world war as government has become more intricate and multi-faceted. The added complication of managing a minority government has been substantial. It means that the prime minister is the key

72 Royal Commission on the Electoral System *Towards a Better Democracy* (Government Printer, Wellington, 1986) 11–64.

73 Eric Barendt "Constitutional Fundamentals – Fundamental Principles" in David Feldman (ed) *English Public Law* (Oxford University Press, Oxford, 2004) 3, 14.

manager in the process and this, in my view, has added a dimension and weight to the role that it did not have under FPP. The essential feature of MMP New Zealand is that power has to be shared, and it is the role of the prime minister to decide how and under what conditions.⁷⁴

The relative fluidity of New Zealand's constitutional arrangements coupled with their inherently political character means that the prime minister is the most important actor in the New Zealand constitution. It is the prime minister who is the major player within the executive government and who has within his or her range of responsibilities making the constitution work. The prime minister is also a key influence in any changes to it. The judgment made here is not intended to denigrate either the Parliament or the courts and the part they play in our constitutional system, but if in doubt follow the power, remembering always, as Disraeli put it: "all power is a trust ..."⁷⁵

74 John Morley, himself a liberal politician, wrote a book on Walpole in 1889 in which he penned a famous characterisation of the role of prime minister:

Although in Cabinet all its members stand on an equal footing, speak with equal voices and, on the rare occasions when a division is taken, are counted on the fraternal principle of one man, one vote, yet the head of the Cabinet is *primus inter pares* and occupies a position which, so long as it lasts, is one of exceptional and peculiar authority.

Antony Jay (ed) *The Oxford Dictionary of Political Quotations* (Oxford University Press, Oxford, 1996) 266.

75 Antony Jay (ed) *The Oxford Dictionary of Political Quotations* (Oxford University Press, Oxford, 1996) 116.