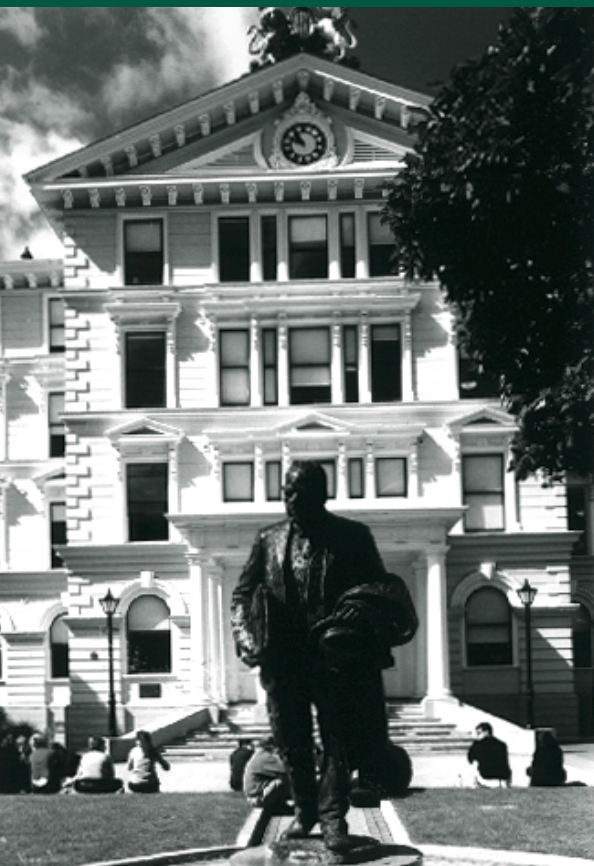


# New Zealand Centre for Public Law

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## The Role of the Secretary of the Cabinet - The View from the Beehive

by Marie Shroff

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To find out more about the Centre please contact the Administrator, The NZ Centre for Public Law, Faculty of Law, Victoria University of Wellington, PO Box 600, Wellington. Contact details are: Phone +64-4-463 6327, fax +64-4-463 6365, email [Claire.Blanchfield@vuw.ac.nz](mailto:Claire.Blanchfield@vuw.ac.nz). Web site: [www.vuw.ac.nz/law](http://www.vuw.ac.nz/law)

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# THE ROLE OF THE SECRETARY OF THE CABINET -THE VIEW FROM THE BEEHIVE

*Marie Shroff*

## **I INTRODUCTION**

I am delighted to have the opportunity today to speak to such a distinguished audience here at the New Zealand Centre for Public Law. The idea of a series on public office holders is, I think, a very good one. And I would like particularly to thank Professor Matthew Palmer for drawing me out of my shell in the Beehive and bringing me across the road. My role is a relatively low profile and behind-the-scenes one – certainly in comparison with some of the others who have spoken in this series. However, the role of the Secretary of the Cabinet, and my other role as Clerk of the Executive Council, are important functions, and I am happy to bring them out for view today.

Being asked to speak about the role of the Secretary of the Cabinet brings to mind various theatrical analogies. Perhaps the Secretary of the Cabinet is a supporting cast member and backstage manager, Cabinet is the stage set, and MMP is a modern adaptation of that old drama, “politics in action.” With that analogy in mind, I intend to talk briefly about the history of the position in New Zealand, the key features of the Cabinet system or the stage set, and describe my two roles as Secretary of the Cabinet and Clerk of the Executive Council.

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\* Secretary of the Cabinet and Clerk of the Executive Council. This address was given to the New Zealand Centre for Public Law, Victoria University of Wellington, 31 July 2001. I would like to acknowledge the support of the staff of the Cabinet Office in carrying out my functions as Secretary of the Cabinet and Clerk of the Executive Council.

Finally, I will offer some short reflections on what has changed and what has remained the same during my 14 years as Cabinet Secretary which might serve to illuminate the role. Obviously the move to MMP will form a key part of my comments.

## **II HISTORY OF THE POSITION**

The first Secretary to Cabinet was appointed with the advent of responsible government in New Zealand in 1856 – when colonial government gave way to Cabinet government. Despite this development, the position was, perhaps ironically, initially held by the head of the Colonial Secretary's Office. William Gisborne – aged 31 – had taken up this position in July 1856. A few months later, he assumed the extra responsibilities of Secretary to Cabinet and to the Premier.<sup>1</sup> In 1863, Gisborne's role as Cabinet Secretary saw him get a pay rise - an extra 100 pounds per annum to a grand total of 600 pounds.<sup>2</sup> In 1892, the role of Cabinet Secretary was formally separated from that of head of the Colonial Secretary's Office.<sup>3</sup> And it appears that at around the turn of the century, the position became identified with the Prime Minister's Office.<sup>4</sup>

Despite long establishment of the position, New Zealand Cabinets nevertheless met without the Secretary or any officials for many years – the only exception being the occasional presence of Parliamentary Counsel when proposed Bills were discussed. The Prime Minister or a senior Minister noted Cabinet's decisions on a Schedule for subsequent recording and distribution by the Cabinet Secretary.

Decisions during those early years tended to be much more about the minutiae of government than they are today. In 1880, when Cabinet in fact met here in the Old Government Buildings, the fourth Secretary to Cabinet, Mr Ebenezer Fox, penned a detailed "luncheon" minute.<sup>5</sup>

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<sup>1</sup> Michael Bassett, *The Mother of All Departments: The History of the Department of Internal Affairs* (Auckland University Press, Auckland, 1997) 31.

<sup>2</sup> Bassett, above, 34 and 275, n 3.

<sup>3</sup> Bassett, above, 88.

<sup>4</sup> Research to date has not established exactly when this occurred.

<sup>5</sup> See Cabinet Office *Cabinet Office Manual* (Cabinet Office, Wellington, 1979) preliminary pages.

The attention of Ministers has been drawn to the inconvenience resulting from the practice which has grown up, of Officers leaving the Buildings daily for luncheon, and the Government Offices being practically deserted in the middle of the day.

Ministers cannot find any authority for this practice, which is in direct contravention of the last order issued on the subject. The inconvenience caused by this proceeding is very serious, and Ministers have decided that it must be stopped.

In consideration of this decision, the official hours of attendance will be terminated at four o'clock instead of half-past four, except on Saturdays, the existing rule as to that day remaining unchanged.

It must therefore be understood that, in future, Officers in the Government Buildings are not, except when special permission is given, to absent themselves from their Offices for luncheon.

It was not until January 1948, over 90 years after the appointment of the first Cabinet Secretary, that the Secretary was actually admitted to the Cabinet room. During the war, Foss Shanahan had assisted the War Cabinet as Assistant Secretary. This was followed by a two-year experimental period in 1948-49 with the presence in the Cabinet Room of the Cabinet Secretary. During this time, Shanahan so effectively controlled access to Prime Minister Peter Fraser and Cabinet that he became known as "Foss the Boss."<sup>6</sup> Nevertheless the experiment of allowing the Cabinet Secretary to be present at Cabinet meetings was regarded as a success. The practice was formally adopted in December 1949, and has been in place ever since.

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<sup>6</sup> Ian McGibbon *The Dictionary of New Zealand Biography* Volume Five, 1941-1960 (Allen and Unwin, Department of Internal Affairs, Wellington, 2000) 468. Foss Shanahan is the subject of the entry in the *Dictionary*

### III KEY FEATURES OF THE CABINET SYSTEM IN NEW ZEALAND

Returning to my metaphor, in a sense the Cabinet system is a drama in which the key actors have clear roles, but also have the freedom to adapt the plot as it develops – perhaps akin to theatre sports. With that in mind, I am now going to make a few remarks about that drama – the Cabinet system - in which I perform my role as Cabinet Secretary.

The essence of Cabinet government is surprisingly elusive. It is a subject of endless dispute and debate. Peter Hennessy, the British author of *Cabinet*, prefaces his attempt to define Cabinet by saying that it is “a subject of endless dispute almost worthy of the arguments on transubstantiation which accompanied the reformation.”<sup>7</sup>

At its simplest, the Cabinet is the most senior committee in the government, a collective forum for Ministers to decide significant issues relating to their functions, powers and responsibilities. JB Ringer encapsulates its main functions neatly in saying “Cabinet is a body ... with enormous power in practical terms. It is the real decision making body of government. Cabinet decides on policy, approves the content of government-sponsored legislation, decides on government expenditure, and coordinates the administration.”<sup>8</sup>

The elusive nature of Cabinet arises from the fact that although it is so powerful, it is informal. Cabinet, as an entity, is not created by legislation, nor by any Letters Patent, nor by any other legal document. It dates from Britain in the 1600s, when the King required a forum to discuss matters of state with his advisers. As democracy evolved, and the power of the Ministers increased, the Sovereign’s participation in decision making waned. Finally, in the 1780s, the King stopped attending Cabinet completely. Ministers, in Cabinet, would collectively decide the issues of the day, and would then advise the King what executive action should be taken. In keeping with its historical evolution and its British roots, the Cabinet in New Zealand has never had legal functions or powers. It takes no formal executive action.

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<sup>7</sup> Peter Hennessy *Cabinet* (Basil Blackwell Ltd, Oxford, 1986) viii.

<sup>8</sup> JB Ringer *An Introduction to New Zealand Government* (Hazard Press Ltd, Christchurch, 1991) 63.

It has no legal relationships with the institutions of government. Instead, the roles and responsibilities of executive government are those of individual Ministers. Cabinet has no direct relationship with the public service – its decisions, in the form of minutes, are sent to Ministers, and Ministers refer them to departments for action as appropriate. It is not Cabinet, but individual Ministers who are accountable to Parliament for ministerial actions and for the actions of departments. Of course, these strict legal relationships do not affect the fact that in terms of public perception and political reality, the concept of “the government” has its clearest embodiment in the collective Cabinet, rather than individual Ministers.

The Executive Council is the equivalent formal body to that of Cabinet, although its membership is broader and includes Ministers outside Cabinet. It is the constitutional link between the Governor-General and the Governor-General’s ministerial advisers. It is legally constituted under the Letters Patent 1983,<sup>9</sup> and carries out formal acts of state. The functions of Cabinet and the Executive Council are therefore complementary. Cabinet, as an informal body, determines policy and makes decisions relating to the operation of government. Executive Council meetings provide a formal forum in which Ministers advise the Governor-General to sign Orders in Council on the basis of Cabinet’s decisions.

Key features of Cabinet decision making include consultation, the confidential nature of Cabinet discussions and collective responsibility. Consultation is about coordination and quality. Consultation is essential to ensure that Ministers are provided with “whole of government” advice. With the proliferation of state agencies, and the complexity of social and other problems, it is often the case that outcomes sought by government will never be addressed by just one department. There has long been a requirement to consult with other Ministers and government agencies affected by a proposal at the earliest possible stage to test advice and reflect all views accurately in the policy submission when it goes before Cabinet. Practice has evolved in this area. In many cases, early caucus and public consultation are now commonplace. Most recently there has been further evolution to accommodate coalition consultation.

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<sup>9</sup> Letters Patent 1983, constituting the Office of Governor General of New Zealand

A second important feature of Cabinet government is *confidentiality*.<sup>10</sup> From the outside, meetings of Cabinet are rather like a scene in a shadow play with the characters backlit against a screen, silently but vehemently arguing and gesturing. Discussion at Cabinet and Cabinet committee meetings is informal and confidential. The actual discussion at meetings is not recorded formally, or contained in the minutes. Confidentiality allows Ministers to discuss all options properly, away from the heat of public debate. It is normally only the Prime Minister who speaks publicly on behalf of Cabinet, usually at the post-Cabinet press conference. Again, practice has evolved in this area. The Official Information Act 1982 and the increasingly open nature of government have made inroads into this principle. Cabinet papers and Cabinet minutes are of course subject to the Official Information Act, and regularly released in response to requests. Increasingly, they are proactively released without an Official Information Act request. But the fundamental principle of confidentiality endures and will, as appropriate, constitute good reason to withhold information about Cabinet discussions.

The third fundamental feature of Cabinet decision-making is the principle of *collective responsibility*.<sup>11</sup> This principle is an essential underpinning of Cabinet government. It too has been the subject of evolution in recent times. I will come back to this evolution later when I discuss particular developments under MMP.

You will notice that I have been deliberately stressing both the fundamental nature of these features, and their evolutionary character. It is this balance between these two characteristics which is of significance. The system is robust, yet flexible. The fundamental principles endure, and the system adapts to respond to political and practical realities, and to accommodate variations in practice.

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<sup>10</sup> Confidentiality is also an element of the principle of collective responsibility. Because of its importance in practice to Cabinet decision-making, I consider it separately here.

<sup>11</sup> Collective responsibility is also regarded as comprising the three elements of confidence, unanimity and confidentiality. See Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, Oxford, 1984) 55-61; Matthew Palmer "Ministerial Responsibility Versus Chief Executive Accountability: Conflict or Complement?" (Paper presented to the Institute for International Research conference on "Analysing and Understanding Crucial Developments in Public Law", Wellington, 4 April 2001) 2-6.



Evolution results from interaction between political events and constitutional principles. One of the key factors leading to evolution is the operation of informal checks and balances. A Minister's colleagues often operate as an informal check and balance. So too does the coalition partner. The public, the opposition and the media also operate to question political events. Often these informal checks and balances will result in reinforcing and supporting constitutional principle. Sometimes they will ultimately lead to evolution in constitutional principle.

So you can see from this summary of the key features of the Cabinet system that the environment itself is a dynamic mixture of legal obligations, political and practical necessities and established conventions.

#### ***IV ROLES OF SECRETARY OF THE CABINET AND CLERK OF THE EXECUTIVE COUNCIL***

This of course brings me to the script for my roles as Secretary of the Cabinet and Clerk of the Executive Council. In this dynamic environment, support from a neutral Cabinet secretariat to underpin the conventions of Cabinet government is essential. My general goal is to ensure continuity of constitutional government, and to provide impartial support to maintain and administer the operations of central government. Commitment to the principles of democracy is imperative – at the end of the day, like other public servants, I need to remember that “they’re elected, and we’re appointed.” In practice, this will often require a delicate balancing of political pressures against the need to preserve constitutional principles and the integrity of government decision making.

In general terms, my two roles involve two broad functions:

- the secretariat function: the provision of impartial secretariat services to Cabinet, and the Executive Council, and the provision of a communication channel between the Governor-General and the executive; and
- the advice function: the provision of advice to the Prime Minister as Chair of Cabinet, and the Governor-General on central government constitutional, policy and administrative issues.

## **A        *The Secretariat Function***

The goal of the secretariat function is to ensure that Ministers have all the information they need, in good time, to make soundly based decisions. The secretariat function is in essence quality assurance. In order to ensure a quality process, certain guidelines are required, and a “referee,” as the Rt Hon Bill Birch<sup>12</sup> once called me, is necessary to ensure compliance with these guidelines. The key question I direct my mind to is whether or not a quality process has been followed on the way to the Cabinet room door.

In terms of the secretariat function, I should emphasise that sitting in Cabinet meetings is just the tip of the iceberg. Ensuring a quality process involves the Cabinet Office staff receiving papers submitted by Ministers for Cabinet and Cabinet committees, checking that they conform to Cabinet requirements, summarising them, compiling the agenda, attending the meeting, preparing a clear and unambiguous record of the decisions taken, and conveying the decisions to those who are to implement them. Each part of this process requires care and judgment.

The quality assurance process has become vastly more complex – the Cabinet Office must check papers to ensure they cover legislative issues, gender equity analysis, human rights issues, business compliance costs, Treaty issues, and that there has been consultation with the coalition consultation Minister – as well as the traditional money and personnel resource checks.

The pace of the system is fast and the volume of material going through the system each week is large. In the year to 30 June 2001, the Office processed 2505 agenda items spread across 276 meetings of Cabinet and its committees. As you can imagine, small forests are sustainably harvested for this process!

To break it down further. Although practice varies from government to government, there are currently nine Cabinet committees. Some focus on a particular policy area – an example here is the Economic Development Committee. Others have a coordinating function such as the Legislation Committee which considers issues associated with the government’s legislation programme, bills, regulations and other House business. Five committees usually meet weekly, and four committees meet fortnightly. It is common for each agenda to include 5-10 papers. The Cabinet Office generally gets the papers 2-3

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<sup>12</sup> Now The Hon Sir William Birch, GNZM.

days in advance, processes them, and then distributes them to Ministers before the meeting.

Almost all proposals are initially considered by a Cabinet committee. This step enables Ministers to give more detailed consideration to the proposal. Departmental officials may also be called in to give more explanation at the committee stage, although not at Cabinet. The Cabinet committee stage of the process is really the key interface between the bureaucratic and political perspectives. Before a matter reaches Cabinet committee, it has been analysed, considered and discussed by officials under direction from the portfolio Minister. However, it is at Cabinet committee level that the political perspective is fully brought to bear. The information developed by officials is presented to Ministers for decision. Ministers bring in the perspective of overall government management and strategy – policy direction of the government as a whole, government priorities, the economic situation, political risk in terms of public reaction and timing, and in an MMP environment the likely support of other parties. Once the issue goes to Cabinet itself, where apart from the Secretary and the Deputy Secretary of the Cabinet, officials are not present, more emphasis is often given to the political perspective and less to the bureaucratic perspective.

Currently, Cabinet itself meets each Monday, usually for half a day. (Practice varies between governments and Prime Ministers.) Cabinet agendas commonly contain about 20 items. The agenda is put together by the Deputy Secretary of the Cabinet on the basis of the papers received from Ministers' offices and items referred from Cabinet committees. Items are not included until she is satisfied that the papers comply with Cabinet's various requirements as set out in the *Cabinet Manual*. The agendas include Executive Council items, significant policy issues, and overseas travel proposals and reports. Moderating the composition of the agenda involves a delicate balancing of factors such as policy and political priority, ministerial seniority, absences of certain Ministers, the need to avoid overload, and of course the quality issues outlined above.

Executive Council usually meets following Cabinet for the purpose of making Orders in Council and approving regulations. As Clerk of the Executive Council, I administer these meetings. The meetings are generally held in the Beehive, and presided over by the Governor-General, if available, or the next most senior member of the Council.

## **B        *The Advice Function***

The second part of my script as Secretary of the Cabinet and Clerk of the Executive Council is to provide advice to the Prime Minister, as Chair of Cabinet, and to the Governor-General on central decision making processes and constitutional procedures. The goal is to ensure the continuity of democratic, constitutional government, and involves dealing on a daily basis with the “living constitution.” It is a world where the grit of politics meets constitutional ideals and produces evolving constitutional conventions. My task is often to manage in a coherent way the political reality and the constitutional ideal.

My advice function is highlighted before, during and immediately after an election. When the government changes, I assist the new Prime Minister to re-establish the processes of government. I also advise an incoming Prime Minister, as required, on the structure and organisation of Cabinet and its committees and the allocation of ministerial portfolios. At the same time, as Clerk of the Executive Council, I provide neutral support to assist the Governor-General in ensuring the orderly and legitimate transfer of power during the government formation process.<sup>13</sup>

It is wearing my Clerk’s costume in the government formation context that I most often venture out from backstage and into the limelight. I am referring here to the ceremonial task of Clerk of the Executive Council in administering the formal ceremonies where the Governor-General appoints Ministers as Executive Councillors. These ceremonial functions are in some ways like the icing on the constitutional cake. They may seem like additional, but largely redundant, garnish – although tasty to those who are partial to a bit of pomp and ceremony! To many they possibly seem arcane and archaic – certainly some of the formal language associated with these ceremonies might give that impression. However, the pomp and ceremony in fact reflects constitutional principle and makes it real for those directly involved and for the public. I have noticed that these ceremonies are solemn and symbolic moments for all concerned. As Ministers

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<sup>13</sup> For further discussion of the government formation process see the Rt Hon Sir Michael Hardie Boys, GNZM, GCMG “Continuity and Change: the 1996 General Election and the Role of the Governor-General” (1997) 5 Waikato L Rev 1.

take the Executive Councillor's oath, their faces go serious - you can see the weight of office visibly settling upon them.

Other ongoing work in the advice area includes:

- aspects of the relationships between the Executive, the Governor-General and Parliament.
- acting as Registrar of Ministers' Interests and Assets, and providing advice to Ministers and the Prime Minister on the ministerial conflict of interest regime.
- support to the Leader of the House in the development and management of the Government's legislation programme.
- administration of the New Zealand Honours system.
- the process for government appointments.
- support to the Governor-General at Government House.

## **V THE CABINET MANUAL**

Before I come to my observations on developments in the past 14 years, I would like to make a few remarks on the *Cabinet Manual*.<sup>14</sup>In many ways, the script for my roles as Cabinet Secretary and Clerk of the Executive Council can be found in the *Cabinet Manual*. The Manual is at the interface between constitutional ideal and political reality. It is where the principles and values discussed above meet the events and practices I am about to describe. Thus, I act as principal advisor on the application of constitutional principles to political events. But, importantly, I also act as editor by monitoring and updating evolution in the constitutional language, which comes about from this interaction between constitutional ideal and political reality.

The Manual is, as its preface states, "the authoritative guide to central government decision making ... (and) a primary source of information, for those outside government, on constitutional and procedural matters."<sup>15</sup>It provides

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<sup>14</sup> For further discussion on the nature of the Manual, see John McGrath QC "The Crown, the Parliament and the Government" (1999) 7 Waikato L Rev 1, 17-19.

<sup>15</sup> Cabinet Office *Cabinet Manual 2001* (Cabinet Office, Wellington, 2001) xv.

enduring, authoritative guidance for executive government principles, procedures and values. Although the Manual is used as guidance by many, it is of particular significance for Ministers. It is sometimes said that there is no job description and no training for the job of a Minister. The Manual, being a combination of job description, code of conduct, and standards to be fulfilled, partly fills this gap. It provides guidance for Ministers on a day-to-day basis on many aspects of their job. It contains information on administrative processes such as matters Ministers should bring to the attention of their colleagues, how Ministers should go about seeking legal advice, and the procedures for overseas travel. And it covers matters with greater constitutional flavour such as how Ministers should operate before, during and after an election, the relationship between Ministers and the public service, and the principle of collective responsibility.

Much of the guidance in the Manual concerns administrative practices to be followed by Ministers and public servants in the government's decision-making processes. I use the word "guidance" advisedly. The *Cabinet Manual* does not rule Cabinet; rather, its authority derives from Cabinet, and the decision taken at the beginning of each new administration to adopt the Manual's procedures. Even after adoption by Cabinet, the guidance in the Manual does not affect Cabinet's ability to regulate or vary its procedure from time to time, or the Prime Minister's right to be the ultimate arbiter of the procedure. The Manual does, however, provide a convenient, transparent and proven basis on which successive governments have chosen to operate. The Manual is a useful tool in maintaining continuity of government. Instead of reinventing the wheel at every change of government, successive administrations have chosen to adopt the processes set out in the Manual, developing those processes where necessary. Indeed, this straightforward process was one of the things which remained the same under MMP. In both 1996 and 1999, the Manual was endorsed at the first meeting of the new coalition governments.

The Manual also contains provisions that articulate elements of the constitution. However, the Manual is not a final articulation of these conventions. It is descriptive rather than prescriptive. Amendments to the provisions dealing with the constitutional conventions may *reflect* and *promulgate* change, but they cannot, in themselves, *effect* change. Clearly the constitutional conventions exist independently of the Manual, although they are authoritatively expressed there.

So, for example, if Cabinet were to have a rush of blood to the head, and change the provisions of the Manual relating to the constitutional powers of the Prime Minister, then in the absence of separate constitutional developments, this will not have the slightest effect.

The key point is that although the Manual has a venerable lineage, it is not set in stone. It is updated from time to time by Cabinet to reflect established changes in both administrative practices, and constitutional developments. It is like a dictionary – authoritative, but essentially recording the current state of the constitutional and administrative language. The Manual may influence the development of that language; people quote from it; they use it to defend or attack the actions and behavior of executive government. However, like any good dictionary, the Manual must change with the times, responding to and reflecting the changes and developments in the political, administrative and constitutional vernacular. By reflecting and promulgating those developments, the Manual gives them the weight of its authority.

## **VI REFLECTIONS ON THE LAST 14 YEARS**

I will now move on to offer some observations on things that have changed and things that have remained the same from the vantage point of my 14 years as Cabinet Secretary. My central point, which I touched on earlier, is that while there has been evolution, the fundamentals have remained the same.

### **A Observations on Developments under MMP**

The first term of MMP (1996-1999) was perhaps more eventful than I had anticipated. Members of Parliament defected from their parties. Coalition alliances shifted. Some Ministers resigned, others were dismissed. We had a change of Prime Minister. We also had the break-up mid-term of the first MMP coalition government, and its replacement by a minority coalition government.

It is fair to say that I have been busy during these first few MMP years. And it is also easy to respond to these events by suggesting that MMP has resulted in constitutional chaos. However, that is not my view. While there has been some political turmoil, nothing has occurred that the system could not handle. MMP has provided challenges for the operation of central government, but those challenges have not been unmanageable. No constitutional (as opposed to

political) crises have occurred.<sup>16</sup> Despite all the political upheavals, the constitution endures with its integrity intact. Change and continuity are essential features of a living organism such as the unwritten New Zealand constitution. In my view, the system has proved itself to be sufficiently flexible to adapt and adjust to the new political landscape.

## **B        *The Caretaker Convention***

The evolution of the caretaker convention is a good example of adherence to fundamental principle and adaptation in response to political events. In recent times three key elections have contributed to the evolution or crystallisation of this convention. In fact the important events in evolution of this convention pre-date MMP.

In 1984, defeated Prime Minister the Rt Hon Sir Robert Muldoon, GCMG, CH refused his successor's advice to devalue the New Zealand currency. However, the Attorney-General in the outgoing government advised Mr Muldoon that not only should a defeated government not undertake any new policy initiatives, but it should also act on the advice of the incoming government on any matter of great constitutional, economic, or other significance that cannot be delayed – even if the outgoing government disagreed with the course of action proposed. This event clarified how the caretaker convention is to apply in a situation where it is clear who will form the next government.

In 1993, there was further evolution as the convention was applied in a situation in which it was not immediately clear on election night who would form the government. In this situation, the incumbent National government refrained from making significant decisions where possible. If urgent decisions were needed, consideration was given to temporary or holding arrangements which did not commit the government in the longer term. Where temporary arrangements were not possible, decisions were taken only after consultation with other party leaders. This curtain raiser was a valuable experience for the long period of caretaker government following the 1996 election where

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<sup>16</sup> For discussion on this issue, see Rt Hon Sir Michael Hardie Boys, GNZM, GCMG, Governor-General "The Constitutional Challenges of MMP: A Magical Demystification Tour" (Speech to Institute of Policy Studies, 1999) 27.



the operation of the convention was consolidated. It enabled us to add to the *Cabinet Manual* authoritatively based guidance on the caretaker convention.

The development of the caretaker convention also illustrates one of the other notable features of the Cabinet system, and that is the way in which informal checks and balances often operate to enforce constitutional principle. In 1984, the incumbent Prime Minister's political colleagues effectively acted as a check in ultimately requiring Mr Muldoon to devalue the currency in accordance with the caretaker convention. In 1993 and particularly in 1996 with the first MMP election, the media played an important role in publicising the caretaker convention, and thus contributing to the stability of government during the transitional period.<sup>17</sup>

### **C Associate Ministers**

A second area of development under MMP is the role of Associate Ministers. This role has been tested since the introduction of MMP. It can of course be useful to appoint Ministers from different parties as associate and principal Ministers within one portfolio, in order to enhance coalition balance. However, this arrangement initially led to a misconception in some quarters during the National/New Zealand First coalition government sworn in in 1996 that where the principal Minister and the Associate Minister were from different parties, this would alter the nature of the relationship between them and put them on an equal footing.

That of course is not the case. The Associate Minister's authority to act in the portfolio comes solely from the principal Minister's letter of delegation. The control of the portfolio therefore always rests with the principal Minister. While coalition government has undoubtedly added some nuances to the relationship between principal and Associate Ministers, it has not affected the legal foundation on which the relationship is based.

The eventual dismissal of Associate Minister the Hon Neil Kirton in August 1997 also shows the interplay between the coalition agreement and constitutional

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<sup>17</sup> For further discussion on the role of the media see Rt Hon Sir Michael Hardie Boys, GNZM, GCMG, Governor-General "Participating in our Modern Democracy" (Speech to the 1999 Wallace Awards Presentation Dinner, 14 July 2000).

law and conventions. Only the Prime Minister has the right to advise the Governor-General to dismiss a Minister. However, the coalition agreement stated that each party leader had the right to decide who would be dismissed from their own party. Therefore the Hon Winston Peters,<sup>18</sup> Deputy Prime Minister and Leader of the New Zealand First Party, decided that Mr Kirton should relinquish his position, and the Prime Minister accordingly advised the Governor-General to dismiss him.

The 2001 edition of the Manual accordingly clarifies the relationship and responsibilities of Ministers and their associates.

#### **D        *The National/New Zealand First Coalition Break-up***

As is well known, during a Cabinet meeting on 12 August 1998 at which the sale of Wellington Airport was being discussed, all of the New Zealand First Ministers attending the meeting walked out.<sup>19</sup> The remaining (National) Ministers proceeded to take the decision to sell the shares, and in doing so they relied on procedural advice from myself and the Solicitor-General.

The narrow issue surrounding these events was the question of quorum. The relevant provision of the 1996 edition of the Manual provided that “A quorum for Cabinet meetings is half the full membership of Cabinet, plus one. The chair of the meeting may vary this if necessary.”<sup>20</sup> On the other hand the coalition agreement also contained a quorum provision and provided that “quorum of Cabinet to be at least one half of each Coalition partner’s appointees to inside Cabinet Ministerial positions.”<sup>21</sup>

The fact that the remaining Ministers had proceeded to take the decision without New Zealand First Ministers suggested to some that the Manual had somehow “trumped” the coalition agreement. This is misguided. The events did clarify that a coalition agreement is in the nature of a political compact rather than a legally enforceable agreement.

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<sup>18</sup> Now the Rt Hon Winston Peters.

<sup>19</sup> For further discussion of this event, see John McGrath QC “The Crown, the Parliament and the Government” 7 (1999) Waikato L Rev 1, 14-19.

<sup>20</sup> Cabinet Office *Cabinet Office Manual* (Cabinet Office, Wellington, 1996) para 3.25.

<sup>21</sup> *The Coalition Agreement* (1996) at clause 7.3(d)(x).

than a legally enforceable agreement. But, importantly, the events also illustrated the point I made above - that Cabinet regulates its own procedure, and ultimately, the final arbiter of Cabinet procedure and Cabinet membership is the Prime Minister, so long as she has the confidence of the House.

Nevertheless, reflecting its evolutionary character, the recent 2001 revision of the Manual now provides that in a coalition government (unless otherwise agreed between the parties) there should be a representative from each coalition party at the Cabinet or Cabinet committee meeting.<sup>22</sup> Again, the Manual is not reflecting any fundamental change, but like a dictionary is recording the current state of constitutional and administrative language.

### **E        *Collective Responsibility***

The introduction of MMP has increased pressure on collective responsibility because there are incentives for smaller parties to let their supporters know when they have fought and lost on a particular issue in Cabinet. This issue is common to all countries with coalition governments.

The principle of collective responsibility underpins the system of Cabinet government. It reflects democratic principle: the House expresses its confidence in the collective whole of government, rather than in individual Ministers. Similarly, the Governor-General and the public service need to know that they are acting on the advice or instructions of “the government”, ie a group with a democratic mandate. They cannot be expected to act on the advice or instructions of perhaps a faction within government, which may or may not have majority support in respect of the issue at hand. Ongoing, public dispute within the government as to whether particular policy initiatives have majority support may raise questions in the Governor-General’s mind as to whether the government retains the confidence of the House. This will be particularly so where the government shows a trend of losing bills because of lack of support by government Members.

What the principle of collective responsibility has traditionally meant in its most visible sense is that all Ministers are obliged to support, at least publicly, all the resolutions of the Cabinet, irrespective of their personal views or involvement

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<sup>22</sup> Cabinet Office *Cabinet Manual 2001* (Cabinet Office, Wellington, 2001) para 3.63.

in the relevant meetings. At the end of the day, it is for the Prime Minister to enforce compliance with collective responsibility, because she or he has the power to advise the dismissal of Ministers. In deciding how to respond to a breach of collective responsibility, the Prime Minister will make a judgment as to whether disciplining the Minister will be more damaging for the government than tolerating the behaviour (in either the short or long term). The exercise of that judgment is the Prime Minister's prerogative. But just because some Prime Ministers have sometimes allowed a certain amount of (usually short-term) latitude does not detract from the fact the collective responsibility is a basic feature of Cabinet government in New Zealand. Nevertheless, it is generally agreed that the Prime Minister's right to waive collective responsibility will not cause a constitutional crisis although it may be politically imprudent or tactically risky.

Collective responsibility is not just about Ministers not publicly disagreeing with Cabinet decisions once made. The discipline of collective responsibility permeates the operation of the system of executive government as a whole and the job of the Prime Minister in particular. In the interests of government stability and legitimacy generally, some form of unitary government is both desirable and necessary.

As any political commentator can tell us, even a single party majority Cabinet can have difficulties with collective responsibility, because Cabinet Ministers are generally strong-minded individuals. However, in a coalition environment, there can be additional pressures on collective decision-making, connected for example with the need for "branding," as well as more fundamental differences of policy. There is a perception by some that the doctrine of collective responsibility stifles a junior coalition partner and prevents it from maintaining a distinctive brand within a coalition.

It is worth noting that all of the proportional representation countries in Europe have maintained a strong tradition of collective decision-making. As noted by Jonathan Boston, this is hardly surprising: "After all, there are powerful political incentives for a government to present a united face to the country, and

equally strong incentives for ministers to defend the government's record when it is under opposition attack."<sup>23</sup>

Nevertheless, there remains a challenge, in the MMP environment, for those seeking stable coalition governments, to find a balance between the overall need for unitary government (via collective responsibility) and the needs of smaller coalition partners to retain their distinct identities. There are a number of options, in terms of political management, by which the concerns of smaller parties can be, and have been, addressed. Coalition management processes will vary from coalition to coalition but might include agreed goals, a culture of "no surprises," coalition consultation Ministers, management by political advisers, ad hoc meetings of Ministers, a coalition management committee, and regular meetings between party leaders. These tools can all help to ensure that issues do not come to Cabinet while the parties are still seriously divided over them.

Other options to assist a smaller party in maintaining its identity include allocating portfolios to the smaller party that enable it to showcase policies that are at the heart of its political philosophy. This tool of coalition management has been used by both the previous National/New Zealand First coalition and the current Labour/Alliance coalition. Additionally, there is no reason why specific legislative proposals cannot be identified as originating from particular parties. This too has been utilised by both coalitions. It may also be possible to explore greater use of free votes and conscience votes in relation to legislation.

Collective responsibility and unitary government came under some fairly significant pressure at various stages during the National/New Zealand First government. I have already mentioned Mr Kirton. The final reason given for Mr Kirton's eventual dismissal from the Government was that he had defied his party leader by talking to the media about a sensitive issue. Towards the end of the National-led administration, Hon Tau Henare publicly stated his opposition to Cabinet's rejection of his proposal for appointment of Treaty of Waitangi Fisheries Commissioners. However, despite stating his disappointment with the decision, Mr Henare said he was not going to "spit the dummy" over it.<sup>24</sup>

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<sup>23</sup> Jonathon Boston, Stephen Levine, Elizabeth McLeay, and Nigel Roberts *New Zealand Under MMP: A New Politics?* (Auckland University Press, Auckland, 1996) 131-132.

<sup>24</sup> Jonathan Milne "Henare Takes Cabinet Loss on the Chin" (21 September 1999) *The Dominion* Wellington 1.

The Prime Minister exercised her judgment and determined that resignation was not required in that particular case. However, Hon Tuariki Delamere's individual ministerial decision outside the collective Cabinet context on an immigration matter resulted in his dismissal from the immigration portfolio (although he remained as a Minister in the Government).

The development of the "agree to disagree" mechanism in the Labour/Alliance coalition agreement is a response to the desire for small party branding of its policies. The Labour/Alliance mechanism provides for a relaxation of the unanimity principle, on rare occasions, within a constrained, transparent and carefully regulated context. Indeed, if Cabinet *agrees* to disagree, then the differentiation is arguably contained within the overall bounds of Cabinet collective responsibility, as the issues on which the parties may agree to disagree must themselves be collectively mandated.

Reflecting this evolution, the *Cabinet Manual* now expressly provides:<sup>25</sup>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, Ministers must implement the resulting decision or legislation, regardless of their position throughout the decision making process.

This is, it should be noted, a permissive provision which can be activated or lie dormant as circumstances require.

The mechanism has to date been used only once in relation to the negotiation last year of an Agreement with Singapore on a Closer Economic Partnership. The Alliance publicly expressed its disagreement with the Singapore CEP, and voted against it in Parliament.<sup>26</sup>The world was not turned upside down. Rather, the process achieved its goals. The Alliance recorded its disagreement.

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<sup>25</sup> Cabinet Office *Cabinet Manual 2001* (Cabinet Office, Wellington, 2001) para 3.23.

<sup>26</sup> See "Consideration of Report of Foreign Affairs, Defence and Trade Committee" (7 November 2000) 588 NZPD 6357; "First Reading New Zealand/Singapore Closer Economic Partnership Bill" (15 December 2000) 588 NZPD 6618; "Second Reading New Zealand/Singapore Closer Economic Partnership Bill" (7 December 2000) 589 NZPD 7265; "Third Reading New Zealand/Singapore Closer Economic Partnership Bill" (13 December 2000) 589 NZPD 7393.

That disagreement was publicised in the media, enabling the Alliance to demonstrate its firm policy position on international trade.<sup>27</sup> The opposition challenged the stability of the government, and that challenge was met. The government retained the confidence of the House. The process enabled both “sufficient wiggle room”<sup>28</sup> for the Alliance and the continued effective functioning of the coalition as a whole.

I do not see the mechanism as an erosion of collective responsibility, although it certainly marks an evolution. It is even possible that collective responsibility will be strengthened as a result of the mechanism, because dissent by individual Ministers outside the authorised process is not envisaged. Further developments in this area are not of course precluded. However, in my view, they should be approached cautiously. In particular, frequent party differentiation within the government may result in a perception that the government is fundamentally at conflict with itself if it cannot compromise or reach consensus on important issues.

#### **F Other Reflections on 14 years in Office**

So far I have mostly been discussing developments since our first MMP election in 1996. However, across the entire 14 years of my time as Cabinet Secretary there have been other key developments. These developments also echo the point I hope I have already made clear - the significance of both continuity and change. In particular, change often serves to reinforce fundamental principles. I will briefly mention three further examples of this.

First, during my time in the position, the changes brought about by the Official Information Act 1982 and the increasingly open culture of government have been far-reaching. One pertinent example of this is the availability of the *Cabinet Manual*. It was previously a “secret” document, and until 1991 had a restricted circulation within departments. It is now available on the Cabinet Office website.<sup>29</sup> Information technology will hasten the trend to openness.

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<sup>27</sup> Jim Anderton “Why Alliance rejects Singapore trade deal” (13 September 2001) *The New Zealand Herald* Auckland A13.

<sup>28</sup> Chen Palmer & Partners “Title” (12 April 2001) *Wellington Watch*.

<sup>29</sup> The Cabinet Office <<http://www.dpmc.govt.nz/cabinet/index.html>>.

The increasingly open culture of government serves to develop and strengthen the fundamental principles of the democratic system.

Second, it seems to me that the voice of smaller interest groups is heard more clearly now at the Cabinet table and elsewhere within the power structure, than it has ever been heard before. Parliament and caucuses are more powerful players in the drama. This change began even before MMP. The result is that democracy can perhaps be said to be more meaningful now than ever before.

Third, to return to the secretariat and advice functions I outlined at the beginning. The secretariat function remains an enduring one. While there have been changes to take account of the electronic age and coalition governments, the goal of ensuring a quality process for Ministers to make soundly-based decisions remains the same. The advice function has increased significantly in terms of time and complexity but the principles applied remain the same. The key elements of impartiality, and commitment to the principles of democracy are just as important today as they were 14 years ago.

## **VII FUTURE EVOLUTION**

Before I conclude, and in line with the robust yet flexible nature of the system, it is perhaps permissible to indulge in a little bit of crystal ball gazing. As I hope I have stressed throughout, the constant balancing between continuity and change is one of the key aspects of the New Zealand constitution. Clearly, future evolution is likely.

Professor Palmer has in fact flagged one possible future development.<sup>30</sup> He notes that all of the four Ministers who have resigned under the Clark administration have done so when impropriety has only been alleged rather than actually shown. As Professor Palmer notes, it could be argued that this represents the evolution of the New Zealand convention of ministerial responsibility towards resignation being required when there is a prima facie case of impropriety rather than when actual impropriety is demonstrated. This practical development also has parallels with developments in the United Kingdom. Whether it will in the future crystallize into a convention remains to be seen.

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<sup>30</sup> Matthew Palmer "Ministerial Responsibility Versus Chief Executive Accountability: Conflict or Complement?" (Institute for International Research conference on "Analysing and Understanding Crucial Developments in Public Law", Wellington, 4 April 2001) 8-9.



## **VIII CONCLUSION**

At this point it is usual to sum up and make some conclusions. So to return to the theatrical metaphor I began with, the drama of politics is a longer-running soap and thriller than “Coronation Street” and “The Mousetrap” combined. I can assure you that I am not bored in my job - the ever-changing interplay of personalities, politics and philosophies has an enduring fascination. There have certainly been a lot of changes. On the other hand, the old adage “the more things change, the more they stay the same” has a certain ring of truth to it. The healthy tension between continuity of fundamental principles and evolutionary adaptation remains. And the key task I have of balancing constitutional principle with political imperative remains as delicate as always.