

IPANZ Presentation: NZ Cabinet Manual, 31 August 2017

My thanks to IPANZ for inviting me to speak today; and thank you all for wanting to spend your lunch break hearing about what I consider to be one of New Zealand's greatest contributions to the international literature on public sector governance – the Cabinet Manual.

I thought I would start by talking a little about what the Cabinet Manual is and why we have one.

I'll then talk briefly about how we went about reviewing it, and then focus on some of the key new material.

I'd like to finish by focusing on some material that's particularly relevant as we approach the forthcoming general election.

I'm hoping we'll have time for plenty of questions at the end.

One of the greatest strengths of New Zealand's democracy is its system of Cabinet government.

It's a system that ensures decisions are taken by informed Ministers working together to achieve collective goals.

Cabinet is not a creature of legislation, but rather one of convention.

The *Cabinet Manual* sets out the basis on which successive governments have chosen to operate and is the authoritative guide to central government decision-making in New Zealand, for Ministers, their offices, and all those working within government.

The authority of the *Cabinet Manual* derives from its adoption by Cabinet at the beginning of each new administration.

For nearly 40 years the *Cabinet Manual* has captured and recorded Cabinet's practices and procedures. Its content reflects the stable and underlying traditions and conventions of democratic government in New Zealand.

The principles in the *Manual* represent all that is best about our system of executive government: robust decision-making processes, respect for the law, integrity, effectiveness and efficiency, openness, and accountability.

The *Manual* has been described as providing clarity in moments of political flux - it sets out clear descriptions of the key constitutional conventions observed in New Zealand, and describes the underlying structures, principles and values of government.

Its accessibility means it also provides clarity about those matters for members of the public and the media.

Here in New Zealand we are long-used to the idea of a publicly accessible guidebook to good governance, backed up by further, more detailed, and again publicly available information on Cabinet and Cabinet committee processes.

And we are also used to the strong expectation that that guidance will be valued, treated with respect, and adhered to.

There is a long-standing recognition in New Zealand that good process is a worthy goal in its own right – contributing to good policy, respect for the institutions of government and, in the end, good outcomes for the people of New Zealand.

The *Cabinet Manual* was first published in 1979. Its enduring nature ensures the continuity of government systems across successive administrations.

Importantly, however, while the *Manual* has a venerable lineage it is not set in stone.

One of its key strengths is that it is updated from time to time, and responds to and reflects changes and developments in political, administrative, and constitutional arrangements and language.

It has often been said that while amendments to the *Manual* may reflect and promulgate change, they do not in themselves effect change.

Change is effected in a range of other ways – for example by new legislation, or Cabinet minutes, or by judicial decision.

But in reflecting and promulgating those developments, the *Manual* lends them the weight of its authority.

The *Manual* was last updated in 2008.

The content of the 2017 edition of the *Cabinet Manual* represents an orderly and continuous development of the conventions and procedures of Cabinet government.

The Cabinet Office commenced this latest review of the *Cabinet Manual* in 2016.

All government departments and Ministers' offices were invited to provide comments on the current Manual, and to make suggestions for changes they considered necessary.

The text was also updated to reflect legislative developments since 2008, and to incorporate guidance issued by Cabinet minutes or Cabinet Office circulars.

The revised text also includes guidance on some matters about which the Cabinet Office has provided advice since 2008.

Other agencies were consulted on particular chapters of the *Manual*, including the Parliamentary Counsel Office, Office of the Clerk of the House of Representatives, the Legislation Design and Advisory Committee, the Office of the Privacy Commissioner, the Office of the Ombudsmen, the Department of Internal Affairs, and the Parliamentary Service.

The revised text was reviewed by an interdepartmental group comprising senior representatives of the Department of the Prime Minister and Cabinet, the State Services Commission, the Treasury, the Crown Law Office, and the Ministry of Justice.

One of the privileges of being involved with this project was the opportunity to work with Sir Kenneth Keith as he reviewed and revised his introductory essay to the Cabinet Manual, "On the Constitution of New Zealand", which is widely acknowledged as an authoritative summary of our constitutional arrangements.

The text of the revised *Manual* was provided for comment to a ministerial reference group.

This was an important step in the process, as it gave Ministers an opportunity to test the changes we were suggesting, and to suggest some additional matters for inclusion.

The final step was for Cabinet to consider and approve the text.

This final step is critical - this is, after all, Cabinet's manual.

This was a key part of the process, as Cabinet must be satisfied that the guidance in the *Manual* is well-founded, and is clear in terms of its implications.

This project has involved a thorough review and update of the Cabinet Manual, rather than a fundamental rewrite of its pages.

Much of the content of the Manual required little amendment, as you would expect in a guide that ensures continuity between administrations.

But there is still a surprising amount of change – sections have been updated to reflect developments in legislation or Standing Orders, new guidance included to cover subjects that are often raised with the Cabinet Office – and on which we regularly provide advice, and other changes made to sharpen, clarify or expand existing guidance.

What then has changed in the current edition?

Some guidance, such as that concerning the relationship between Ministers and public servants, and the characteristics of coalition and support party government arrangements, has been clarified and expanded.

Other guidance has been updated to reflect important contextual changes such as changes to the Standing Orders of the House of Representatives, the enactment of the Inquiries Act 2013, and the introduction of CabNet.

The *Cabinet Manual* also encompasses guidance on matters not previously included, but on which the Cabinet Office regularly provides advice.

Some examples of this can be found in chapter 2, which includes guidance about ministerial conduct and conflicts of interest.

New sections have been added in this chapter about ministerial interactions with representatives from non-government or commercial organisations, and about the use of information by former Ministers.

In a democracy, everyone has the right to make representations to Ministers on matters that concern them.

Ministers receive a large number of requests for meetings with people and organisations seeking either to influence government policy, or to position themselves for providing services.

The *Cabinet Manual* now notes that it is a valid and appropriate aspect of a Minister's role to engage with representatives of commercial and non-governmental organisations, but that care should be taken to avoid creating a perception that representatives from one group enjoy an unfair advantage with the government.

The *Manual* also now notes that former Ministers must be careful not to use any confidential or commercially sensitive information from their time in office for the advantage of themselves or their family, until such time as that information is publicly available.

Ministers are already aware that they must be careful in this respect, but capturing it in the *Manual* acts as an aide memoire for ministers when leaving office.

The *Manual* also documents the relationship between Ministers and the public servants who support their work.

The new edition reinforces the duty of officials to provide free and frank advice, and the corresponding duty of Ministers to consider that advice.

Officials should provide honest and impartial advice that includes all relevant information and acknowledges any key information gaps, assumptions, risks, or connections to other matters.

Quality advice of this standard allows Ministers to take decisions based on the best available evidence and an appreciation of all the options and issues.

Another area that has been expanded is guidance for departments on consultation in the policy development process.

In particular, consultation with Maori, the general public, and with stakeholder groups, is emphasised.

The *Manual* also now points out the importance of considering possible impacts of policy proposals on existing Treaty settlements.

Since the last edition of the *Manual*, the House has made a number of changes to its Standing Orders, and the executive has also updated some policy and processes around the development of bills and related matters.

The revised *Manual* reflects this, with new or updated guidance on revision bills, impact analysis, the drafting process, and also on parliamentary scrutiny of the executive.

In chapter 8, the *Manual* reflects the strengthening of the government's expectations around the proactive release of Cabinet material.

You will all be aware of the ongoing move to a more open and responsive state sector, which includes a focus on the accessibility of government information.

The *Manual* reinforces the principles of the Official Information Act, that government material should generally be available unless it should be protected in the public interest or for reasons of personal privacy.

While much information is released in response to requests under the Official Information Act, the government recognises that much information should be released proactively.

This includes Cabinet material on significant policy matters, once those decisions have been taken.

An important aspect of transparency of decision-making is allowing citizens to see how decisions have been reached.

The text of the revised *Manual* has been amended to reflect this expectation.

It's a good example of how the *Manual* follows, rather than leads, accepted practice, but in doing so can consolidate and clarify those practices, and carry them forward.

You'll be pleased to know the Cabinet Office is walking the talk on this – the Cabinet paper that put the revised *Cabinet Manual* to Cabinet for approval has been proactively released, and is available on the DPMC website.

Attached to the paper is a revision-tracked version of the *Manual*, so if you are interested in examining in detail the changes that were made, that is the easiest way to do it.

Finally, I thought it might be interesting to focus on one of the key chapters of the *Manual*, chapter 6.

This chapter sets out the rules of engagement in forming governments, including the roles of the different participants, the conventions around advising the Governor-General to call an election, and the process to be followed.

The strength of our democracy rests on people understanding and fulfilling their roles as new governments are formed.

It may surprise some of you to know that not all countries using the Westminster system have such clear and public guidance on government formation process as we do.

The guidance set out in the *Cabinet Manual* makes it clear how we approach this, which is particularly important under our MMP electoral system.

Chapter 6 includes guidance about the pre-election period, details the operation of the caretaker convention following an election, explains how governments are formed, and how the public service supports the incoming government.

In New Zealand, governments continue to govern right up to the day of the election.

After polling day however the incumbent government moves to operating in accordance with the convention on caretaker government until a new government is formed and Ministers have been sworn in.

During the caretaker period, Ministers continue to hold full executive authority and Cabinet and Executive Council will continue to meet.

Ministers are entitled to receive the same level of support they normally receive from departments and from agencies for which they are responsible, including being advised and getting information for the purposes of administering government business within their portfolios.

There are two arms to the caretaker convention:

Where it is not clear who will form the next government:

- the normal business of government, and the day to day administration of departments and other agencies in the state sector may continue as usual;
- decisions taken and specific policy determined before the start of the caretaker period may usually be implemented;

- decisions on significant issues, new policy or changes to existing policy, and issues with long-term implications should be deferred if possible. If deferral is not possible, then short-term solutions should be sought. If this is not feasible, then decisions should be made after consultation with other parties.

Where it is clear who will form the new government, but they have not yet taken office, the outgoing government should undertake no new policy initiatives, and should act on the advice of the incoming government on any significant constitutional, economic or other issue that cannot be delayed until the new government formally takes office – even if the outgoing government disagrees with the course of action proposed.

How then is a new government formed during the period of caretaker government?

Under MMP, it is likely (but not inevitable) that following a general election two or more parties will negotiate to form a new government.

In order to govern, one or more parties needs to show they will have a majority in the House of Representatives – that they have “the confidence of the House”.

At the end of those negotiations, political parties need to make their intentions clear through public announcements and, preferably, written agreements.

The Governor-General relies on those announcements and agreements to ascertain where the confidence of the House lies, to appoint a government.

It is not the Governor-General’s role to form the government or to participate in any negotiations.

Even if the government formation talks result in a government that is very similar in character to the preceding government, New Zealand practice is for Ministers to resign, followed by a full swearing in ceremony at Government House.

This ceremony demonstrates that the Governor-General is satisfied that the Prime Minister commands majority support. It also marks the end of the caretaker period.

Of course once a government is formed, it needs agreement about how it is going to operate.

That agreement is centred on the conventions captured in the Cabinet Manual.

One of the key conventions is that of collective responsibility.

What is collective responsibility?

As the Manual itself says, collective responsibility underpins the whole system of Cabinet government.

This reflects the democratic principle that the House of Representatives expresses its confidence in the government as a whole, and that ministerial advice provided to the Governor-General represents official government policy.

It has been interesting to see how collective responsibility has evolved under MMP.

I am aware that this is one area which has, over the years, provoked much debate in public administration circles.

It's good debate; it shows we care deeply about the principles underpinning our constitutional conventions.

Previous revisions of the Manual have captured innovations such as 'agree to disagree' provisions and limits on collective responsibility for Ministers from parties who are part of confidence and supply agreements rather than in a coalition.

'Agree to disagree' arrangements usually operate within a coalition.

They mean that generally all Ministers are bound by collective responsibility, but may be allowed to maintain a different party position publicly, although they will still be expected to implement any final decision regardless of their position during the decision-making process.

Ministers outside Cabinet from parliamentary parties supporting the government may be bound by collective responsibility only with respect to their portfolio areas, including any specific delegated responsibilities.

This is likely to be agreed as part of any support negotiations during the government formation process.

As I close, I would like to return to something that struck a chord with me when I read about it many years ago – two different approaches to ethics, summed up as compliance-based versus integrity-based ethics.

In a paper prepared many years ago, the State Services Commission described the difference as follows:

“At one end of the scale is the *integrity-based approach* to ethics management. This approach is consistent with a focus on results. While there are clear rules against illegal behaviour, and sanctions applied when those are breached, the focus is the actions or effects that should be achieved, rather than the behaviour that should be avoided. This suggests an emphasis on:

- the definition of overall aspirational 'values' for the public sector (the OECD calls this the 'high road');
- *what* is achieved rather than *how* it was achieved (that is, a focus on ends rather than means); and
- encouraging good behaviour rather than policing errors and punishing bad behaviour.

At the other end of the scale is an approach to ethics that is *compliance-based*. This focuses on strict adherence to administrative procedures and rules (often detailed in legislation), which define what public servants should do and how. The OECD calls this the 'low road' approach: setting minimum standards beyond which behaviour should not fall. The emphasis is on policing actions and catching wrongdoing, reinforcing the tendency to manage by rules because they provide a base-line for identifying error”.

To my mind, what the authors of the Cabinet Manual have sought to do over many years now is ensure it reflects, as much as possible, an integrity-based approach. Much of it is an exhortation to appropriate behaviour.

As I said at the launch of the 2017 edition, the Cabinet Manual is a taonga – a treasure - of government in New Zealand.

But it retains that status because it's useful.

It's not a taonga to be kept safely in a glass case, untouched, and only observed with a sense of reverence.

Its value comes from the fact that it is read, argued over, quoted, and continually under review.

My hope is that this and future generations of public servants and Ministers continue to do just that.

Thanks for your time today.