



Intended for	All Ministers All Chief Executives Chiefs of Staff All Senior Private Secretaries Speaker of the House of Representatives Chief Parliamentary Counsel Controller and Auditor-General Chief Ombudsman Official Secretary, Government House
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Constitutional Procedures after the Election

Introduction

- 1 In January this year the Cabinet Office issued guidance on government decision making in the pre-election period.¹ That guidance reiterates that the government has the right to govern as usual until the election. As in previous election years, the government has chosen to exercise restraint in respect of significant appointments and government advertising.
- 2 This circular provides guidance on the constitutional procedures that will apply *after* the general election. It includes key dates, a summary of the transition process between administrations, and references to other guidance material.
- 3 All Ministers, Ministers' offices, and government agencies are expected to follow these guidelines.
- 4 For the purposes of this circular, "government agencies" means agencies in the state sector, including public service departments, other state services, agencies in the wider state sector (see [paragraphs 3.3-3.5](#) of the Cabinet Manual for a complete definition of the state sector), and other agencies within Ministers' portfolios that do not form part of the state sector.

¹ [Government Decisions and Actions in the Pre-election Period](#), Cabinet Office Circular CO (20) 1.

Key dates

5 The key dates in the immediate post-election period are as follows:

17 October 2020	Polling day.
6 November 2020	Declaration of official results.
12 November 2020	The day fixed for the return of the writ: formal announcement of successful constituency candidates. The return of the writ is followed by a declaration of the successful list MPs. The return of the writ must be postponed until the completion of any recount, and may be postponed in anticipation of any application for a recount.
14 November 2020	Ministers who are not returned as MPs must leave office by this date.
24 December 2020	Parliament must meet by this day. The opening of Parliament involves the Commission Opening (day 1) and the State Opening (day 2), including the Speech from the Throne. This date is a nominal date only. The actual first meeting day will be decided following the formation of the government.

6 Other dates, such as the appointment ceremony for Ministers, the first meeting of the new Parliament, and the full resumption of government business, will not be known until after the election. This information will be provided as soon as it is available.

The caretaker convention

- 7 After polling day, the Prime Minister is likely to indicate that the incumbent government will operate in accordance with the caretaker convention until the political situation is resolved and the new administration has been sworn in (see [paragraphs 6.21 to 6.40](#) of the Cabinet Manual about decision making during periods of caretaker government and the role of departments in that process).
- 8 During the caretaker period, Ministers continue to hold full executive authority, and are entitled to receive the same level of support that they normally receive from the departments and agencies for which they are responsible, including being advised and getting information for the purposes of administering government business within their portfolios.
- 9 Ministers should, however, ensure that any requests that they make for advice or information from their officials are for the purposes of their portfolio responsibilities and not for party political purposes (including negotiations to form a government).
- 10 In summary, there are two arms to the caretaker convention:

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

- 10.1.1 the normal business of government, and the day to day administration of departments and other agencies in the State sector may continue as usual;

- 10.1.2 decisions taken and specific policy determined before the start of the caretaker period may usually be implemented;
- 10.1.3 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, short-term solutions should be sought. If this is not feasible, decisions should be made after consultation with other parties.

No hard and fast rules are possible. The practical consequences of this restraint may vary according to the political context. Ministers may need to take into account various considerations, both on whether it is appropriate or necessary to proceed on a matter, and how it should be handled.

- 10.2 Where it is clear who will form the new government, but they have not yet taken office, the government continues in caretaker mode until Ministers are formally appointed. 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. Situations of this kind are likely to be relatively short-lived, as a swift transition between administrations is enabled by New Zealand’s constitutional arrangements, including section 6(2)(a) of the Constitution Act 1986.

Decision making in the period immediately after the election

- 11 Cabinet and individual Ministers may be constrained in their decision making during this period in accordance with the caretaker convention. Further information will be provided at that time on practical arrangements for Cabinet decision making after the election.

Ministers who are not returned as members of Parliament

- 12 Current Ministers continue with their existing responsibilities after the election, until new Ministerial appointments are made or their responsibilities are reassigned. Ministers who are not returned as MPs may continue in office as caretaker Ministers for a period, but must leave office no later than 28 days after polling day (that is, by 14 November 2020), under [section 6\(2\)\(b\) of the Constitution Act 1986](#). The Cabinet Office will arrange for Ministers in this situation to submit their resignations to the Prime Minister and the Governor-General, if required.

The government formation period

- 13 It is possible that following the general election, two or more parties will negotiate to form a new government.

Guidance on support from State sector agencies

- 14 While inter-party negotiations to form a government are the business of politicians, negotiating parties may seek access to public service agencies for information and analysis on issues that might form part of any coalition, support or other agreement. The process for seeking such information or analysis is set out in [Schedule 3](#) of the Public Service Act 2020.

- 15 The Public Service Commissioner manages any involvement by officials in the government formation process. Political parties involved in negotiations to form a government must make a request for information to the Commissioner directly.²
- 16 The Commissioner sets standards for public service agencies to follow when processing a request made for access to information or analysis during this period, which are available on the website of the Public Service Commission. All public service agencies must comply with those standards, unless otherwise agreed by the Commissioner.³ It is expected that all agencies in the State sector observe the guidance, including by referring any requests received from political parties involved in negotiations to form a government to the Public Service Commissioner for the coordination of a response.

The role of the Governor-General

- 17 By convention, the Governor-General's role in the government formation process is to ascertain where the confidence of the House of Representatives lies, based on the political parties' public statements, so that a government can be appointed. It is not the Governor-General's role to form the government or to participate in any negotiations (although the Governor-General may wish to talk to party leaders if the talks have no clear outcome).
- 18 The Governor-General will, by convention, abide by the outcome of the government formation process in appointing a government. The Governor-General will also accept the political decision as to which individual will lead the government as Prime Minister.
- 19 During the government formation process, the Clerk of the Executive Council provides official, impartial support to the Governor-General, including liaising with party leaders as required on the Governor-General's behalf.

Appointment of new government and allocation of portfolios

- 20 Once the outcome of any government formation process is known, the timing and arrangements for the transition from one administration to the next depend on a number of practical matters, including the allocation of portfolios. Portfolio responsibilities will not formally change until the current Ministers have resigned and the new Ministers have been appointed by the Governor-General.
- 21 In practice there is usually a period of some days between the formation of a new government and the new ministry taking office. Current Ministers continue in office, in a caretaker capacity, until new appointments are made (subject to [section 6\(2\)\(b\) of the Constitution Act](#) – see paragraph 12 above).
- 22 It is the practice for a full appointment ceremony to be held when a government is formed after an election, even when the composition of the government has not changed greatly. The ceremony formally marks the formation and commencement of a new administration, and marks the end of the caretaker period.
- 23 Once the new ministry is ready to be sworn in, the incumbent Prime Minister will tender the resignation of incumbent administration, effective at the time of the appointment of a successor administration. The new ministry will be sworn into office and the Governor-General will sign the warrants appointing Ministers to particular portfolios.

² Public Service Act 2020, schedule 3, clause 17(3).

³ Public Service Act 2020, schedule 3, clause 20.

- 24 Portfolio responsibilities may change after the election, either as a result of a reshuffle or a change of government. Agencies should not assume, therefore, that an existing Minister will retain a certain portfolio or that a party spokesperson for a certain portfolio will be appointed as the Minister for that portfolio.

Briefing the incoming government

- 25 Each new Minister will receive a Briefing for the Incoming Minister (BIM) in respect of each of his or her portfolios. The portfolio or lead Minister will, except in exceptional circumstances, authorise the department to provide copies to any Associate Ministers. The briefing process is likely to include formal documents as well as meetings and other communications, happening over a number of weeks.
- 26 Agencies in the wider State sector and agencies within Ministers' portfolios that do not form part of the State sector would normally brief the incoming government through the relevant department. If an agency considers it appropriate to brief a Minister separately, it is expected that the agency will comply with the rules that apply to departments concerning the timing, content, and release of BIMs. If a separate briefing is provided, the agency should provide a copy of it to the relevant department.

Content

- 27 Guidance on the content of BIMs is set out in [paragraphs 3.16 to 3.21](#) of the Cabinet Manual, and in [Chapter 6](#) of the Public Service Commission's guidance *He Ārahitanga Pōtitanga Whānui General Election Guidance*.
- 28 The written briefing should be tailored to the needs of the new Minister, and prepared in similar presentation and style to other departmental advice to the Minister. The level of detail included in this initial briefing will vary depending on whether the Minister concerned has had any prior involvement with the portfolio, and whether there has been a change of government. The purpose is to give a new Minister sufficient information to meet their initial requirements, but is not intended to be a detailed analysis of the portfolio or of policy issues.

Timing

- 29 BIMs are usually provided to new Ministers following their appointment (that is, after the appointment ceremony). The incumbent Prime Minister may, however, wish to authorise the provision of BIMs to incoming Ministers once portfolio allocations have been announced through the Ministerial List. The Secretary of the Cabinet will inform chief executives of any such authorisation from the Prime Minister.
- 30 Departments and agencies must inform the incumbent Minister and the Public Service Commissioner before providing BIMs in such cases. The incumbent Minister continues to hold full executive authority until the incoming Minister has been appointed.
- 31 If government formation negotiations have concluded and there is to be a change of government, but portfolio allocations have not yet been announced, chief executives may, *in cases of great urgency*, provide advice to the incoming government through the Prime Minister-designate. This advice may be given only after the express consent of the incumbent Prime Minister has been obtained and a process has been agreed with the Public Service Commissioner.

Release of BIMs

- 32 While BIMs are subject to the [Official Information Act 1982](#), there is no presumption of public release. Whether a BIM is released publicly is a matter for the Minister, not the department or agency, to decide (see [paragraphs 3.19](#) of the Cabinet Manual).

Distribution of circular and further guidance

- 33 The Public Service Commissioner will provide copies of this circular to agencies in the State sector, including non-Public Service departments, statutory Crown entities, Crown entity companies, organisations listed in [Schedule 4](#) and companies listed in [Schedule 4A](#) of the Public Finance Act 1989, the Reserve Bank of New Zealand, tertiary education institutions, State Owned Enterprises, and the Offices of Parliament.
- 34 Public Service chief executives should forward copies of this circular to the heads of other agencies within their Ministers' portfolios that do not form part of the State sector.
- 35 Further information on constitutional procedures after the election is available as follows:
- 35.1 The [Department of the Prime Minister and Cabinet website](#), including:
- 35.1.1 *Elections, Transitions, and Government Formation*, [Chapter 6](#) of the Cabinet Manual;
- 35.1.2 *Briefing for Incoming Ministers*, [paragraphs 3.16 to 3.21](#) of the Cabinet Manual;
- 35.1.3 *Government Decisions and Actions in the Pre-election Period*, Cabinet Office circular CO (20) 1;
- 35.1.4 [Management of Parliamentary Business after the Dissolution of Parliament](#), Cabinet Office Circular CO (20) 4.
- 35.2 The website of the [Public Service Commission](#), including [He Ārahitanga Pōtitanga Whānui | General Election Guidance](#).
- 36 Following the election, the Cabinet Office will issue [circulars](#) on the practical requirements for decision making in the post-election period.

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