

# Chapter 5 - Government

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## Chapter 5

### Government

#### At a glance

Responsibility for governing the country sits with the executive (the “Government”) rather than the Parliament or the House of Representatives. It is the Government that has direct control and day-to-day decision-making authority over the State’s civil and military resources. A Government is appointed by the Governor-General following a general election. This chapter explains how a Government is formed and the ways in which it must maintain the support and confidence of the House. It also discusses the responsibilities of certain roles within the Government, such as Ministers of the Crown, Parliamentary Under-Secretaries, the Leader of the House, and the Attorney-General. For information about members and parties, see Chapters 3 and 4.

#### 5.1 Responsible government and its development in New Zealand

“Responsible government” is a key feature of the Westminster democratic model, in which the Sovereign reigns “but the Government rules so long as it has the support of the House of Representatives”.<sup>[1]</sup> Responsible government is characterised by the interrelationship between the executive and the legislature. The people who form the Government, including its leader, must be members of the House of Representatives.<sup>[2]</sup> A Government is responsible or accountable to the House for its policies and performance, and its continued existence depends on it enjoying the House’s confidence. While in office, members of the Government, or “Ministers”, act as the Sovereign’s responsible advisors, with the Sovereign—or their representative in New Zealand, the Governor-General—exercising executive authority on the advice of members of the Executive Council.

When the House first met in 1854, executive authority within the colony was heavily vested in the person who held the role of Governor, a British appointee. The Governor’s advisers—those who carried out his wishes or “ministered” to him—were not members of Parliament but people who owed their positions to their standing and personal relationships with the Governor. Having Executive Council members appointed by the Governor in this way, rather than members being drawn from the ranks of elected representatives, severely limited the House’s control and influence over the Government. The House’s ultimate means of such control—withdrawing its support for the Government—could have no effect when other factors determined the Government’s composition.

Most of the early parliamentarians tried to achieve for New Zealand a “responsible” form of government—that is, one in which Ministers were answerable to, and subject to the full control of, the House for their official actions—in addition to the form of government already conferred on the colony in which representatives of voters were

elected to make decisions on their behalf. In 1856, after the Imperial Government indicated that it had no objection to the establishment of responsible government in New Zealand,<sup>[3]</sup> the Governor agreed that Ministers should be chosen from among members of Parliament who could rely on the support of a majority of members of the House.<sup>[4]</sup> In this way, responsible government was achieved.<sup>[5]</sup> The fundamental principle expressed then, that members of the executive are members of Parliament who command majority support, extends to the appointment of Ministers today.

## 5.2 Forming a Government

### 5.2.1 Determining governing arrangements

By constitutional convention, the appointment of a Prime Minister, the leader of a Government, follows the outcome of an electoral process.<sup>[6]</sup> The Governor-General appoints a Prime Minister after ascertaining where the confidence of the House of Representatives lies; this does not require formal consultation with the House, nor confirmation by it.<sup>[7]</sup> In the event of a general election result in which one party obtains a majority of seats in the House of Representatives, the Governor-General will appoint the leader of that party as Prime Minister and ask them to form a Government. This outcome is unusual—in the years since MMP was introduced, only the 2020 election has produced a single-party majority Government. More often, in circumstances in which no one party commands a majority of seats in the House of Representatives, negotiations between parties will occur to establish governing arrangements. Once these arrangements are settled and parties have made public statements setting them out, the Governor-General will appoint a Prime Minister and Government. Government formation is therefore a political process which the Governor-General abides by.<sup>[8]</sup>

There is a range of ways in which a Government may be formed that involve the support of more than one political party, including:

- coalition—two or more parties enter into a formal governing arrangement and share ministerial portfolios
- support arrangement—the governing party or parties rely on another party (or parties) to support the Government when the House votes on matters of confidence (such as the annual Budget).

Different combinations of these arrangements occur. For example, a coalition of parties may form a “minority Government” that depends upon commitments from other parties to maintain the House’s confidence. Each election produces a different outcome, and the variety of Government formations that have occurred since 1996 demonstrate the ability of the MMP system to adapt to a range of electoral results.<sup>[9]</sup> Administrations therefore have consisted of the party or parties in Government, in some cases regarded as forming a coalition, with one or more support agreements with other parties in the House. Some or all parties in the arrangement may have Ministers in Government, and a coalition between parties may involve their sharing of more senior ministerial positions in Cabinet (see 5.3.1).

Arrangements between political parties to govern will be supported by formal documents such as coalition agreements or support agreements (which are sometimes known as “confidence and supply agreements”). An agreement generally sets out the political arrangements for forming and operating a coalition or support arrangement. It does not confer any legal rights or obligations; it operates purely at a political level. One view of such an agreement is that it is a political manifesto as to how the partners in Government will act.<sup>[10]</sup> An agreement may have considerable implications for Government business because of its bearing on Government structure, policy, and decision making. As such, Ministers may be asked parliamentary questions about these agreements, and even informal, unpublished material between parties, provided there is a connection to official Government business.<sup>[11]</sup> An agreement has also been the subject of a ministerial statement when a dispute arose between the partners.<sup>[12]</sup>

Although such agreements between political parties are not legal documents, Cabinet may approve all or part of their contents and use a Cabinet Office circular to provide guidance to Ministers, their staff, and officials on the operation of an agreement.<sup>[13]</sup> An agreement may also become part of Government policy at a ministerial or departmental level;<sup>[14]</sup> if it does, it may gain legal significance because its provisions take on the status of official governmental procedures. Parties must specifically inform the Speaker once they have formed a coalition.<sup>[15]</sup>

## 5.2.2 Government and collective responsibility

“Collective responsibility” is another feature of responsible government. While individual Ministers are accountable to the House for matters within their portfolios, the House places its confidence in the Government as a whole rather than in individual Ministers; and when Ministers answer questions, they represent the Government’s agreed position rather than their own perspective on a matter. In practice, once Cabinet has taken a decision, all Ministers are bound to support it, except in limited circumstances.<sup>[16]</sup> These circumstances reflect the need for parties within governing arrangements to, at times, express political positions that differ from official Government policy. Cabinet’s collective responsibility arrangements have evolved to take this into account. Ministers in coalition parties may use “agree to disagree” processes, which allow them to maintain distinct party positions on issues or policies during the decision-making process.<sup>[17]</sup>

Ministers from parties supporting the Government are bound by collective responsibility only in relation to their particular portfolios. When addressing matters outside their portfolios, they speak as members of Parliament, party leaders, or spokespeople.<sup>[18]</sup> Agreements between parties may set out how departures from collective responsibility will be managed.<sup>[19]</sup>

## 5.3 Ministers of the Crown

Ministers of the Crown carry out the day-to-day work of governing the country. The Prime Minister forms a Government by choosing members to hold office as Ministers and advising the Governor-General to appoint them to these offices. In a coalition or support arrangement, Ministers from two or more parties may hold portfolios. Most Ministers have multiple portfolios, meaning they are likely to be responsible for one or more public sector organisations. However, not all portfolios carry responsibility for a Government department or other public agency.

By convention, Ministers are individually responsible to the House for their policies, their own performance, public spending, and the performance of entities within their portfolios.<sup>[20]</sup> This is a political accountability and it is not limited to matters over which the Minister has legal control.<sup>[21]</sup> In Parliament, this responsibility takes its most obvious form as written and oral questions to Ministers (see 21.10). These questions can relate to any public affairs with which the Minister is officially connected.<sup>[22]</sup> This extends far beyond matters over which the Minister has legal control to matters that, through accepting office, the Minister assumes a political responsibility to answer for.<sup>[23]</sup>

Ministers can act interchangeably for each other in most circumstances, meaning that the business of Government can continue if a Minister is unwell, overseas, or otherwise unavailable.<sup>[24]</sup> Ministerial accountability to the House is similarly continuous, with any Minister being able to, for example, answer an oral question or move a motion on behalf of an absent Minister.

Ministers are entitled to the honorific “Honourable” (Hon) while they are in office. They lose this title when they stop being a Minister, although the Governor-General, under delegated authority from the Sovereign and on the advice of the Prime Minister, may confer the title on former Ministers for the rest of their lives. Prime Ministers automatically receive the title “Right Honourable” (Rt Hon) for life.

### 5.3.1 Executive Council and Cabinet

Ministers are first appointed to the Executive Council before receiving their ministerial warrants.<sup>[25]</sup> The Executive Council is the body that gives formal advice to, and is presided over by, the Governor-General. The making of Orders in Council—which are a type of secondary legislation through which a Government implements decisions that require the force of law—is the most frequent activity at meetings of Executive Council.<sup>[26]</sup> Other activities include making key appointments, such as public sector chief executives, and actioning administrative decisions, such as establishing commissions of inquiry.<sup>[27]</sup>

Most Ministers are also members of the Cabinet, a body that the Prime Minister chairs and that meets separately from the Executive Council. Cabinet is the central decision-making body of Government. It has few, if any, legal powers of its own. Rather, Cabinet makes significant political, policy, and administrative decisions, which are then implemented by those who hold the legal authority to action them; that is individual Ministers, the Governor-General, or the Governor-General in Council.<sup>[28]</sup>

Some members of Parliament may be Ministers but not members of the Cabinet. The Prime Minister decides whether or not a Minister should be a member of the Cabinet, though each party may have its own rules on how to make these decisions (for example, by caucus electing the members of Cabinet).<sup>[29]</sup> A coalition will usually involve the sharing of Cabinet positions, whereas support arrangements most frequently involve members of the support parties, if they have any ministerial positions, being appointed as Ministers outside Cabinet.<sup>[30]</sup>

Ministers are also members of Cabinet committees, and can be appointed to them whether or not they are Cabinet Ministers. These subject area committees enable detailed discussion of particular issues before decisions taken by a committee are referred to Cabinet. Cabinet considers reports of committees which outline what a committee has resolved should happen. Cabinet has the final say on whether to confirm or vary committee decisions.<sup>[31]</sup>

### 5.3.2 Resignation and dismissal of Prime Minister and Ministers

A Prime Minister may vacate office during a parliamentary term for a number of reasons, including resignation, incapacity, or because they have lost the leadership of their parliamentary party. By convention, the Governor-General will abide by the outcome of the political process that follows before appointing a new leader of the Government.<sup>[32]</sup>

A Minister may be dismissed or choose to resign. In both circumstances, the Prime Minister advises the Governor-General to accept the resignation or revoke the Minister's appointment to the Executive Council and the ministerial portfolios they held. The Prime Minister is not legally required to provide a reason for the Minister's removal from office.<sup>[33]</sup>

Following a general election, all Ministers from a Government will resign when a new Government is ready to be appointed. This happens even when the composition of the new Government does not change or only minimally differs, and marks the transition from one administration to another.<sup>[34]</sup>

The Governor-General's reserve powers include the power to dismiss a Prime Minister. However, this power has never been used in New Zealand and would be exercised only in exceptional circumstances.

### 5.3.3 Continuation in office after general election

By law, only a member of Parliament may be appointed or hold office as a Minister of the Crown or as a member of the Executive Council.<sup>[35]</sup> A similar provision applies to Parliamentary Under-Secretaries (see 5.4).<sup>[36]</sup> Incumbent members of Parliament stop being members at the close of polling day at a general election.<sup>[37]</sup> Members of the next Parliament (even those who are re-elected) do not come into office until either:<sup>[38]</sup>

- the day after the return of the writ (in the case of electorate members), or
- the day after the Electoral Commission forwards a return of those elected to the Clerk of the House (in the case of party list members).

This would mean there would be a period after a general election when no Ministers could be appointed, if the requirement for Ministers to be members of Parliament existed in isolation. However, the Constitution Act 1986 provides for certain exemptions from this requirement following a general election, in order to facilitate the smooth transition between Governments and to ensure that the Governor-General is never left without responsible Ministers to advise them.<sup>[39]</sup> The first exemption allows serving Ministers to continue in office for 28 days after they cease to be members of Parliament, at which point they vacate office if not re-elected.<sup>[40]</sup> Secondly, people who were candidates at a general election can be appointed to office as Ministers (but not as Parliamentary Under-Secretaries) even though they are not yet members of Parliament. However, such appointees automatically stop being Ministers if they have not become members of Parliament within 40 days of their appointment.<sup>[41]</sup>

These provisions ensure that Ministers are in place (potentially in a caretaker capacity) at all times, no matter how long electoral and Government formation processes take. If a Minister has had to vacate office before the conclusion of the Government formation process because the 28-day period has expired, the Prime Minister can ask another Minister to act in their place.<sup>[42]</sup>

## 5.4 Parliamentary Under-Secretaries

Since 1936, legislation has provided for the Governor-General, on the advice of the Prime Minister, to appoint members as Parliamentary Under-Secretaries to help particular Ministers in their departmental and parliamentary work. A Minister can delegate any of their ministerial functions, duties, and powers to their Parliamentary Under-Secretary.<sup>[43]</sup>

A Parliamentary Under-Secretary is a member of executive Government. They are therefore expected to adhere to the same standards of conduct as Ministers, and are bound by the principle of collective responsibility (subject to the same exceptions as apply to coalition or support party Ministers—see 5.2.2).<sup>[44]</sup> Official information held by a Parliamentary Under-Secretary is subject to the Official Information Act 1982.<sup>[45]</sup>

However, a Parliamentary Under-Secretary is not a member of the Executive Council, so they cannot act for Ministers generally. Any powers, roles, and responsibilities they have derive only from the Minister who has delegated them specifically. In parliamentary terms, a Parliamentary Under-Secretary occupies a space between ministerial and non-ministerial members of Parliament. They cannot take charge of a Government bill nor move a Government motion, although, unlike a Minister, they may be the member in charge of a member's bill (see 18.5.1). However, the Standing Orders allow a Parliamentary Under-Secretary to answer an oral question on behalf of an absent Minister.<sup>[46]</sup>

The formula for calculating the proportional allocation of oral questions based on party membership in the House excludes both Ministers and Parliamentary Under-Secretaries.<sup>[47]</sup> Similarly, an under-secretary's indication of support for a member's bill does not count towards the 61 non-executive member threshold required for a bill to bypass the members' bills ballot and be introduced to the House (see 36.5.5).<sup>[48]</sup>

## 5.5 Leader of the House

The Prime Minister is the leader of the Government in every sphere. Through most of Parliament's history they also played the role of a floor-leader in the House, deciding on the programme of Government business and parliamentary tactics.<sup>[49]</sup> However, since 1978, another senior Minister has been given particular responsibility for

Government business in the House: the Leader of the House. Because Government business takes priority in the House, the Leader of the House initiates many procedural matters. In particular, they:

- decide on the order in which the House will address Government business
- deliver the weekly (in sitting weeks) Business Statement, which indicates upcoming business to the House (see 23.10.2)
- notify the Clerk of the introduction of Government bills and the presentation of parliamentary papers (see 36.4.2 and 50.4.3)
- are primarily responsible for the timing of the Government's legislative programme
- attend meetings of the Business Committee to set out the Government's intentions for the business to be conducted and propose the House's sitting programme.

The Leader of the House or the Leader's nominee is a member of the Parliamentary Service Commission.<sup>[50]</sup>

## 5.6 Attorney-General

The Attorney-General is the Minister of the Crown principally responsible for providing legal advice to the Government. When acting in this role as the Government's senior law officer, the Attorney-General acts independently and is not bound by the collective responsibility of Ministers for Cabinet decisions.<sup>[51]</sup> The Attorney-General is the Minister responsible for the Crown Law Office and the Parliamentary Counsel Office—the Solicitor-General and Chief Parliamentary Counsel are the respective chief executives of these agencies.

The Attorney-General is responsible for reporting to the House on provisions in bills that appear to be inconsistent with the rights and freedoms set out in the New Zealand Bill of Rights Act 1990.<sup>[52]</sup> They must do so when a Government bill is introduced, or as soon as practicable for other types of bill.<sup>[53]</sup> After the House passes a bill, the Attorney-General certifies to the Governor-General that the bill contains nothing that would require withholding the Royal assent (see Chapter 39). When a senior court or the Human Rights Review Tribunal declares that an Act is inconsistent with rights and freedoms in the New Zealand Bill of Rights Act 1990, the Attorney-General must notify the House of that declaration of inconsistency (see 50.3.1).<sup>[54]</sup> The Attorney-General also usually chairs the Privileges Committee.

## 5.7 Confidence of the House

A Government remains in office because it has the "confidence" of the House. This is the continuing basis of responsible government. The confidence of the House underpins any Government's right to hold office; constitutionally, the only way it can hold office without that confidence is in a caretaker capacity. If a Government were to lose the confidence of the House, the Prime Minister would be required to advise the Governor-General of the Government's resignation, although it might need to continue in a caretaker capacity until the appointment of a new administration.<sup>[55]</sup>

The way to test whether the House still has confidence in the Government is by a vote in the House itself—a confidence vote. This can be a vote on an important issue that either expressly (see 5.8.1) or implicitly (see 5.8.2) involves a question of confidence in the Government. Strictly speaking, confidence is a negative (and somewhat circular) concept. A Government keeps the confidence of the House for as long as it can avoid defeat on those important parliamentary votes. If a Government is defeated on such a vote, a new political settlement must be reached, which might involve:

- holding a general election, with the defeated Government acting in a caretaker capacity until a new Government can be appointed in light of the election results
- making new coalition or support arrangements to form a Government that can obtain the House's confidence.

In any case, if a new Government takes office, that new Government continues only for as long as it keeps the confidence of the House.

The need for the Government to have the confidence of the House is not specific to a party system of government. It has existed in New Zealand politics since responsible government began in 1856, long before distinct parties were established in Parliament. After New Zealand developed a party system, government became more stable because once a Government could be elected with a majority, it was unlikely to lose that majority other than at a general election. The last time a Government was defeated on a confidence vote, and so was obliged to resign, was in 1928.<sup>[56]</sup> However, since New Zealand adopted proportional representation in 1996, making it unusual for a single party to win an outright majority of seats at a general election, attention has refocused on the need for each Government to retain the confidence of the House.

In practice, if a Government is facing a confidence vote that it expects to lose, it is unlikely to wait for the vote to occur (as the Government did in 1928) before taking action to reach a new political settlement. So even if a Government has not formally lost a confidence vote, the situation may force it to recognise that defeat is inevitable and to act on the basis that the vote has occurred, which may mean it resigns or seeks new coalition partners, new political agreements with other parties, or a new mandate at an election.

### 5.7.1 Definition of confidence vote

Whether the House has confidence in a Government is a matter of political judgment. It is not a matter of parliamentary procedure on which the Speaker can rule. Ultimately, it is for the Governor-General to ascertain whether a Government possesses the confidence of the House.

Testing the House's confidence in the Government requires the moving of a motion that addresses the issue of the Government's survival in office. That motion is then voted on. It is not enough that the motion raises an important issue: that might lead the Government to treat the motion as a question of confidence, but does not inherently make it so.

A confidence vote must, by definition, be a party vote, with the party whips working to ensure a turnout of members to support or oppose the Government. Conscience votes, in which members are left to make up their own minds on an issue free of party discipline (see 4.4.1 and 20.6), cannot involve questions of confidence. Neither do most party votes. Governments may lose party votes on significant issues or proposals without needing to resign or call a general election. For example:

- In 1983, the Government (a single-party majority Government) suffered a defeat on a major aspect of a bill on industrial law reform.<sup>[57]</sup>
- In 1998, a Government bill was defeated on its second reading.<sup>[58]</sup>
- In 2001, the title of a Government bill was amended even though the Government voted against the amendment.<sup>[59]</sup>
- In 2013, the House passed a member's bill, even though the main Government party voted against it.<sup>[60]</sup>

In each of these instances, the defeat did not indicate the Government had lost the confidence of the House in a constitutional sense but only that it did not have a majority of support in regards to a particular issue. Under MMP, Governments have worked with their support parties to gain support for legislative proposals. If it appears

a Government does not have the support it needs, it may delay measures or discuss changes and reach a compromise before moving on to put the matter to the vote.

All the same, although a defeat on an important issue is not a resigning matter in itself, it could lead the Government to test its support in the House by moving a motion intended to uphold its decision not to see the defeat as a defeat on a vote of confidence. Alternatively, a Government could resign or seek the dissolution of Parliament after such a defeat in the House—even though the vote was not acknowledged as a matter of confidence before it occurred. In this case, the Government would need to persuade the Governor-General that dissolution was warranted.

Parliamentary rules provide for the circumstances in which the Opposition can force a vote of confidence (see 5.8.1). There are only a limited number of occasions in each calendar year when the House's confidence in a Government is tested. These confidence votes follow wide-ranging debates in which the Government's entire performance can be scrutinised. The debate on the Prime Minister's statement is a notable example, where the Prime Minister begins the parliamentary year (except when this is shortly after a general election) by presenting a statement outlining the Government's intentions for the year and moving a motion in support of it. This is usually phrased as a motion for the House to express confidence in the Government,<sup>[61]</sup> but would be regarded as a confidence motion even if this was not explicit, because the Prime Minister's statement ranges over the Government's broad policy and legislative programme (see 23.3). More focused debates, such as an urgent debate, do not provide an opportunity to raise a question of confidence.<sup>[62]</sup>

However, the Government itself can choose at any time to put its survival on the line by declaring any vote, no matter how narrow its focus, to be a vote of confidence (see 5.9). This does not widen the scope of the debate but it does indicate how strongly the Government is committed to winning that particular vote and what the political consequences of its defeat would be. Members then cast their votes on the motion knowing the possible consequence if the Government is defeated.

## 5.8 Votes of confidence not initiated by Government

In some limited circumstances, the Government may face a vote of confidence over which it has no choice. This may involve either an express vote in the House, or a vote on supply or the annual rate of taxation—which implies a vote of confidence.

### 5.8.1 Express votes of confidence

Unlike Parliaments in some other countries, the House of Representatives has no tradition in which the Opposition moves a motion of no confidence in the Government and the Government then finds time to debate the motion—though this has occurred on rare occasions.<sup>[63]</sup> More usually, an Opposition member seeks a vote of no confidence in the Government by proposing an amendment to another motion before the House. Because amendments relate to the motion they seek to amend, the Opposition may only move such a broad amendment to a motion that itself allows debate to be open-ended.

Only a few debates each year have a scope so wide that a motion or an amendment declaring that the Government has lost the confidence of the House is in order.

The Standing Orders provide for any amendment relating to “public affairs” to be moved on the second reading of an Imprest Supply bill or Budget bill—these amendments do not need to be strictly relevant to the original motion.<sup>[64]</sup> A member, traditionally the Leader of the Opposition, may move that additional words be added to the Address in Reply motion (which starts the first debate of each Parliament) setting out matters on which the

Opposition will hold the Government to account.<sup>[65]</sup> Therefore, on the debate on the Prime Minister's statement, the Address in Reply debate, the Budget debate, and any Imprest Supply debate, members can and often do move amendments expressly raising questions of confidence.

### 5.8.2 Implied votes of confidence

It is fundamental that, in order to survive, a Government must be able to obtain supply—that is, the authority of Parliament to spend money. Agreements between parties often link the terms “confidence” and “supply” in relation to support on votes in the House.

During a debate that covers the whole field of government activity (for example, the Budget debate), a denial of supply will automatically raise the question of the House's confidence in the Government. On the other hand, votes on an individual Minister's Estimates of expenditure do not automatically raise questions of confidence as they are narrowly based questions.<sup>[66]</sup>

Unlike an express vote of confidence, which comes from the Opposition (see 5.8.1), implied votes of confidence always start with the Government. The Government cannot avoid asking the House for supply, because if it did so it would abdicate its responsibility as a Government. So the acts of passing the Budget and granting imprest supply (interim spending authority) inevitably raise questions of confidence. Even if the Opposition does not move an amendment by expressly raising a question of confidence, any vote at the end of the second and third readings of bills granting supply is a vote that tests the confidence of the House in the Government.

Another practice is to see the provisions of a tax bill setting the annual tax rates as inherently raising questions of confidence.<sup>[67]</sup> The constitutional importance of the annual taxing provision is reflected in the practice of treating it as a matter to be debated separately in the committee of the whole House.<sup>[68]</sup> Other provisions of tax bills are not inherently confidence matters.<sup>[69]</sup>

Where the House is voting on either of these issues of supply or annual rates of taxation, if a Government fails to secure parliamentary support to grant or impose them, the vote demonstrates a loss of confidence in the Government.

## 5.9 Votes of confidence that occur through Government declaration

Even if it faces no express or implied question of confidence, the Government may choose to make an issue a question of confidence under various circumstances:

- It may declare that it will treat a vote on any issue before the House as a matter of confidence in itself with the result that, if it is defeated, it will resign or seek an election. In 1929, for example, the acting Prime Minister chose to interpret Opposition criticism of the Government's failure to raise public service salaries as a question of confidence.<sup>[70]</sup> The House voted on the motion in the knowledge that the Government was treating it as a question of confidence.
- After the loss of a vote, a Government may decide that the defeat involved a question of confidence and act accordingly. In 1891, the Government treated its defeat on the vote on the election of the Speaker as an indication that it did not have a majority in the House and it resigned.<sup>[71]</sup>
- The Government may itself take the initiative in proposing a question of confidence. For example, in 1942 and in 1998, following reconstructions of the Government, the Government initiated and moved motions seeking positive expressions of confidence in itself. In each case, the House supported the motions and the Government continued in office.<sup>[72]</sup>

In each of these circumstances, the Prime Minister decides on behalf of the whole Government whether a matter is to be treated as a vote of confidence; it is not a matter for an individual Minister to decide.<sup>[73]</sup>

### 5.9.1 Basis for declaring question of confidence

There is no procedural reason for a Government to declare an issue to be a question of confidence. It has no political reason to do so either, as long as its parliamentary majority is secure. However, a Government might declare a matter to be a question of confidence if it is unsure whether all its members will support it on the issue before the House. If the Government introduces a question of confidence—that is, whether the Government can survive in office—members who vote against the Government know that they risk bringing it down and so are more likely to support it. For this reason, in 1897 the Government treated a motion critical of the Premier as a motion of no confidence. Several members who might otherwise have voted for the motion felt obliged to support the Government in these circumstances, and the motion was defeated by six votes.<sup>[74]</sup>

On the other hand, a Government may choose not to declare a matter to be a question of confidence because it does not wish to risk losing office unnecessarily. These are matters for political judgment. A Prime Minister can always be challenged over whether to treat a particular vote as a question of confidence<sup>[75]</sup> or over the general circumstances in which the Government will regard votes as confidence votes.<sup>[76]</sup>

## 5.10 Caretaker conventions

A Government becomes a caretaker Government after a general election (before a new Government is formed), or if it loses the confidence of the House.<sup>[77]</sup> During this time, its conduct is subject to certain constitutional conventions and restraints. These conventions were first expressed in the period following the defeat of the Government at the 1984 election.<sup>[78]</sup> Since then, the *Cabinet Manual* has set out the detail of the expectations, principles, and procedures of caretaker Government.<sup>[79]</sup>

### 5.10.1 After general election or loss of confidence

Following a general election, if it is clear who the new Government will be, the caretaker Government should not embark on any new policy initiatives and is expected to act on the advice of the incoming Government on significant matters for which decisions cannot be delayed until the formal transfer of power. (This occurred, for instance, in 1984 when the new Government wished to devalue the currency.)

If the election outcome is uncertain—or if, during the term of a Parliament, a Government loses the confidence of the House and continues to hold office until a new Government takes office or the House's confidence in it is re-established—the Government holds office in a caretaker capacity.

In this context, a caretaker Government has executive authority and carries on the normal business of governing, but it should avoid actions that limit or bind an incoming Government. It is expected, for example, not to make significant policy decisions—especially any with long-term implications—by initiating new proposals or by changing existing policy. It should defer all such decisions if possible. If that is not possible, the caretaker Government may make temporary or holding arrangements. If temporary arrangements are not possible, the caretaker Government should consult with the other parties represented in Parliament to find out whether a proposed course of action has the support of a majority of the House.<sup>[80]</sup>

### 5.10.2 Pre-election period

Different considerations apply in the immediate pre-election period. Unlike in Australia,<sup>[81]</sup> for example, a New Zealand Government is not bound by the caretaker convention during that period, unless the election has resulted from the Government losing the confidence of the House.<sup>[82]</sup> Nevertheless, Governments have chosen to

restrict their actions to some extent for approximately three months before an election is due or from the date an election is announced if this is within three months of the election date. For example, Governments have deferred making significant appointments and limited Government advertising.<sup>[83]</sup> There is a particularly strong case for restraint to be exercised once the Parliament has been dissolved, as the Government then can no longer be accountable to the House until it meets after the general election.

<sup>[1]</sup> Cabinet Office *Cabinet Manual 2023* at 3.

<sup>[2]</sup> Constitution Act 1986, s 6(1).

<sup>[3]</sup> “Letter From The Officer Administering the Government of New Zealand” (1 June 1855) 11 *New Zealand Gazette* 51 at 57. The letter was sent from Britain in 1854 and arrived in the next year.

<sup>[4]</sup> (15 April 1856) B NZPD 3.

<sup>[5]</sup> See Philip A Joseph Joseph on Constitutional and Administrative Law (5th ed, Thomson Reuters New Zealand Ltd, Wellington, 2021) at ch 6, for the steps leading to responsible government.

<sup>[6]</sup> Cabinet Office *Cabinet Manual 2023* at [2.2].

<sup>[7]</sup> Cabinet Office *Cabinet Manual 2023* at [6.44].

<sup>[8]</sup> Cabinet Office *Cabinet Manual 2023* at [6.42]–[6.45].

<sup>[9]</sup> For example, despite winning 10 fewer seats than the National Party at the 2017 general election, the Labour Party was able to govern as a result of a coalition agreement with the New Zealand First Party and a confidence and supply agreement with the Green Party.

<sup>[10]</sup> *South Taranaki Energy Users Association Inc v South Taranaki District Council* HC New Plymouth CP5/97, 26 August 1997 at 70.

<sup>[11]</sup> (13 September 2000) 587 NZPD 5483 Hunt; (29 November 2017) 725 NZPD 505 Mallard. For further discussion of ministerial accountability and governing arrangements, see 21.10.3.

<sup>[12]</sup> (13 August 1998) 570 NZPD 11318–11324.

<sup>[13]</sup> Cabinet Office *Cabinet Manual 2023* at [3.98] and [5.16].

<sup>[14]</sup> See, for example, *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at [28] (coalition agreement to be taken into account in approving fishing permits).

<sup>[15]</sup> SO 36(2).

<sup>[16]</sup> Cabinet Office *Cabinet Manual 2023* at [5.24]–[5.25].

<sup>[17]</sup> Cabinet Office *Cabinet Manual 2023* at [5.27]–[5.28].

<sup>[18]</sup> Cabinet Office *Cabinet Manual 2023* at [5.29].

<sup>[19]</sup> See, for example, *New Zealand Labour Party and New Zealand First Coalition agreement between the New Zealand Labour Party and the New Zealand First Party (52nd Parliament)* (24 October 2017) at 1–2.

<sup>[20]</sup> Cabinet Office *Cabinet Manual 2023* at [2.22(h)].

- [21]** Public Finance (State Sector Management) Bill (99–2) (commentary, 6 September 2004) at 23 ([2002–2005] 13 AJHR I.22C at 253).
- [22]** SO 388(a).
- [23]** (11 July 1990) 509 NZPD 2705–2706 Burke.
- [24]** Constitution Act 1996, s 7; Cabinet Office *Cabinet Manual 2023* at [2.21].
- [25]** Cabinet Office *Cabinet Manual 2023* at [2.17].
- [26]** See 41.1.2.
- [27]** Cabinet Office *Cabinet Manual 2023* at [1.21]–[1.23] and [1.38].
- [28]** Cabinet Office *Cabinet Manual 2023* at [5.3].
- [29]** See, for example, Margaret Hayward *Diary of the Kirk Years* (Cape Catley Ltd, Queen Charlotte Sound, and AH and AW Reed, Wellington, 1981) at 96–99 for a description of the election of Cabinet in 1972.
- [30]** See, for example, Rt Hon John Key, Hon Tariana Turia, and Te Ururoa Flavell *2014 Relationship Accord and Confidence and Supply Agreement with the Maori Party: 'Te Tatau ki te Paerangi'—A doorway to our horizons* (5 October 2014) at 3; New Zealand Labour Party and Green Party of Aotearoa New Zealand *Cooperation Agreement 53rd Parliament* (1 November 2020) at 2.
- [31]** Cabinet Office *Cabinet Manual 2023* at [5.8]–[5.9].
- [32]** Cabinet Office *Cabinet Manual 2023* at [6.55]–[6.56]; incumbent Prime Ministers resigned in 2016 (Rt Hon John Key) and 2023 (Rt Hon Jacinda Ardern). On both occasions, the party they led elected a new leader who was then appointed Prime Minister (Rt Hon Bill English and Rt Hon Chris Hipkins).
- [33]** Cabinet Office *Cabinet Manual 2023* at [2.18]–[2.19].
- [34]** Cabinet Office *Cabinet Manual 2023* at [2.20].
- [35]** Constitution Act 1986, s 6(1).
- [36]** Constitution Act 1986, s 8(1).
- [37]** Electoral Act 1993, s 54(1)(b) and 54(2)(b). For more information on elections, see Chapter 2.
- [38]** Electoral Act 1993, s 54(1)(a) and (2)(a).
- [39]** Cabinet Office *Cabinet Manual 2023* at 3.
- [40]** Constitution Act 1986, s 6(2).
- [41]** Constitution Act 1986, s 6(2)(a).
- [42]** Cabinet Office *Cabinet Manual 2023* at [6.49].
- [43]** Constitution Act 1986, s 9(1).
- [44]** Cabinet Office *Cabinet Manual 2023* at [2.48]–[2.51] and [2.53]–[2.54].

- [45]** Official Information Act 1982, s 2, definition of **Minister of the Crown**.
- [46]** SO 395(2).
- [47]** SO 391(2).
- [48]** SO 288(5).
- [49]** Though in 1931 when the National Coalition Government formed, a separate Leader of the House was apparently appointed—see Michael Bassett *Coates of Kaipara* (Auckland University Press, Auckland, 1995) at 169.
- [50]** Parliamentary Service Act 2000, s 15(1)(b).
- [51]** Cabinet Office *Cabinet Manual 2023* at [4.2]–[4.5].
- [52]** New Zealand Bill of Rights Act 1990, s 7.
- [53]** SO 269(2). For more information about reporting under the New Zealand Bill of Rights Act 1990, see 35.5.
- [54]** New Zealand Bill of Rights Act 1990, s 7A(2); Human Rights Act 1993, s 92WA(2); (23 August 2022) [2020–2023] 1 JHR 558, rule 3.
- [55]** Cabinet Office *Cabinet Manual 2023* at [6.60]–[6.61].
- [56]** The ministry of Rt Hon Gordon Coates resigned after an amendment was agreed to that added words to the Address in Reply, expressing no confidence in the Government ((7 December 1928) 220 NZPD 75–76).
- [57]** (9 December 1983) 455 NZPD 4775 (Industrial Law Reform Bill).
- [58]** (2 April 1998) 567 NZPD 8195 (Local Government Amendment Bill (No 5)).
- [59]** (13 December 2000) 589 NZPD 7360 (Apprenticeship Training Bill).
- [60]** (17 April 2013) 689 NZPD 9481 (Holidays (Full Recognition of Waitangi Day and ANZAC Day) Amendment Bill).
- [61]** For example, (8 February 2022) [2020–2023] 1 JHR 341.
- [62]** (28 July 1998) 570 NZPD 10782 Kidd.
- [63]** (15 October 1931) 230 NZPD 297; (23 July 1946) 273 NZPD 601. See David Natzler and Mark Hutton (eds) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (25th ed, LexisNexis, London, 2019) at [18.44] for an example of how confidence motions are treated in another Parliament.
- [64]** SOs 339(3) and 342(3).
- [65]** See, for example, (8 November 2017) 725 NZPD 53 and (26 November 2020) 749 NZPD 45.
- [66]** See KJ Scott *The New Zealand Constitution* (Oxford University Press, Oxford, 1962) at 56–57, for defeats on Estimates.
- [67]** (17 November 1998) 573 NZPD 13199–13200; (1 December 2004) 622 NZPD 17369 (Taxation (Annual Rates, Venture Capital and Miscellaneous Provisions) Bill).

- [68] SO 352; Standing Orders Committee *Review of Standing Orders* (27 September 2011) [2008–2011] 3 AJHR I.18B at 50.
- [69] (17 November 1998) 573 NZPD 13199–13200.
- [70] Michael Bassett Coates of Kaipara (Auckland University Press, Auckland, 1995) at 157–158.
- [71] Michael Bassett *Three Party Politics in New Zealand 1911–1931* (Historical Publications, Auckland, 1982) at 2.
- [72] Michael Bassett *Coates of Kaipara* (Auckland University Press, Auckland, 1995) at 267; (8 September 1998) 571 NZPD 11806–11841.
- [73] See “Williamson backs down over shipping bill view” *The Dominion* (29 June 1994).
- [74] David Hamer *The New Zealand Liberals: The Years of Power, 1891–1912* (Auckland University Press, Auckland, 1988) at 210.
- [75] See, for example, (1 December 1998) 574 NZPD 13704 (Accident Insurance Bill); (1 March 2001) 590 NZPD 8062 (Electoral (Integrity) Amendment Bill).
- [76] (8 September 1998) 571 NZPD 11795.
- [77] Cabinet Office *Cabinet Manual 2023* at [6.21].
- [78] Hon JK McLay, Deputy Prime Minister and Attorney-General (media release, 17 July 1984).
- [79] Cabinet Office *Cabinet Manual 2023* at [6.21]–[6.40].
- [80] Cabinet Office *Cabinet Manual 2023* at [6.25]–[6.26].
- [81] In Australia, a caretaker convention operates from the time when Parliament is dissolved until the election results are clear. In this period, Governments are required to avoid implementing major policy initiatives, making important appointments, or entering into major contracts or undertakings. See Department of the Prime Minister and Cabinet *Cabinet Handbook* (15th ed, Commonwealth of Australia, Canberra, 2022) at [122]–[127].
- [82] Cabinet Office *Cabinet Manual 2023* at [6.9].
- [83] Cabinet Office *Cabinet Manual 2023* at [6.10].
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