

## 5 The Government, Cabinet and the Prime Minister

Articles 2, 3  
and 16–26

This chapter seeks to explain the key institutions of the Government itself and how they relate to one another, before setting out our proposals for recognising and improving those institutions and the framework in which they operate. The proposed changes include:

- Constitution Aotearoa more clearly sets out the structures and powers of Government and the limits on that, including the roles and function of the Prime Minister:
- the Cabinet is limited to 20 members, with up to five other ministers outside Cabinet. The post of Under-Secretary has been abolished:
- the publication of a Cabinet Manual is required every six years:
- the House of Representatives will elect the Prime Minister:
- the Prime Minister’s ancient powers of advising on proroguing or dissolving the House will be abolished:
- the Prime Minister will not be able to be Finance Minister and the Attorney-General must be a lawyer:
- the State will be given all powers of government—legislative, executive and judicial. The executive power is exercised by the Government. The Government comprises Cabinet, ministers and the public service.

### **Government power**

Cabinet is the decision-making branch of government, tasked with the job of actually governing the nation. It sits at the pinnacle of political power in New Zealand and wields a great deal of public power on a day-to-day basis. The Government is made up of a number of key institutions, including the Cabinet, ministers outside of Cabinet, the departments and ministries of the public service. There exists also the broader state sector beyond. We also have a myriad of Crown entities that are funded to a greater or lesser extent from the public purse and

are independent for some purposes but not for others.

It is important to understand the Government and how it works. It is the branch of the State that people are most likely to come into contact with on a regular basis, for example, when applying for a benefit or securing a passport.

### **Cabinet—What is it? How does it work?**

Cabinet drives a big machine sometimes called the Executive Government.<sup>1</sup> Cabinet is the cockpit of the New Zealand Government from which the whole Government machine receives its instructions. In short, Cabinet governs.

Cabinet meets weekly for most of the year.<sup>2</sup> It is made up of most but not all ministers and chaired by the Prime Minister. At each meeting it considers Cabinet papers that come from ministers—usually concerning what Bills to introduce to Parliament, what regulations to pass, or other matters of Government policy—and takes decisions upon them collectively. Cabinet makes thousands of decisions each year. The public service executes these decisions under ministerial supervision. The Cabinet Office is a highly organised and systematic machine which helps to facilitate this process, among other functions. It is a semi-autonomous part of the Department of Prime Minister and Cabinet.

Cabinet also has committees which provide a forum for more detailed consideration and discussion of issues before they are referred to Cabinet. Each administration has a different structure for its committees and the membership varies from

1 State Sector Act 1988, Crown Entities Act 2004, State-Owned Enterprises Act 1986, Crown Research Institutes Act 1992, New Zealand Public Health and Disability Act 2000 and Education Act 1989.

2 This chapter is a compressed and simplified account of how Cabinet works. For more on the issues see Geoffrey Palmer “The Cabinet, the Prime Minister and the Constitution” (2006) 4 NZJPIL 1; and Geoffrey Palmer *New Zealand’s Constitution in Crisis—Reforming our Political System* (John McIndoe, Dunedin, 1992). The full complexity of New Zealand’s constitutional law and practice can be seen in the 1,500-page book by Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014). See also Elizabeth McLeay *The Cabinet and Political Power in New Zealand* (Oxford University Press, Auckland, 1995).

time to time. The structure of the committee system depends on what the Government of the day sees as its priorities. For example, in 2016 the Cabinet Committees were as follows:<sup>3</sup>

- Strategy
- Economic Development and Infrastructure
- Social Policy
- Treaty of Waitangi Negotiations
- External Relations and Defence
- State Sector reform and Expenditure Control
- Cabinet Legislation
- Appointments and Honours
- Cabinet Business Committee
- National Security.

The committee meetings facilitate ministers and public servants having a discussion about policy advice and decisions before they are taken. A great deal of business is transacted at Cabinet committee meetings and later endorsed by the full Cabinet. In the year ended 30 June 2015, Cabinet Committees met on 121 occasions and the previous year it was 184 occasions. The total number of agenda items for both Cabinet and its committees was 1,374 and the previous year 2,060.<sup>4</sup> Public servants, under the supervision of ministers, usually write the papers. The level of activity is very high within the New Zealand Cabinet system.

The committee system also allows for advisers and officials to attend the meetings to assist ministers if required. In full Cabinet meetings, only those members who are part of Cabinet are able to attend. This is to ensure confidentiality and to allow ministers to have free and frank discussion in determining their collective view that will bind them all. For this reason, Cabinet minutes (distributed on a restricted basis) only record decisions, not the discussion leading up to them. Essentially, what goes on

<sup>3</sup> For details see the website of the Department of Prime Minister and Cabinet “Cabinet Committees” <<http://www.dpmc.govt.nz/cabinet/committees>>.

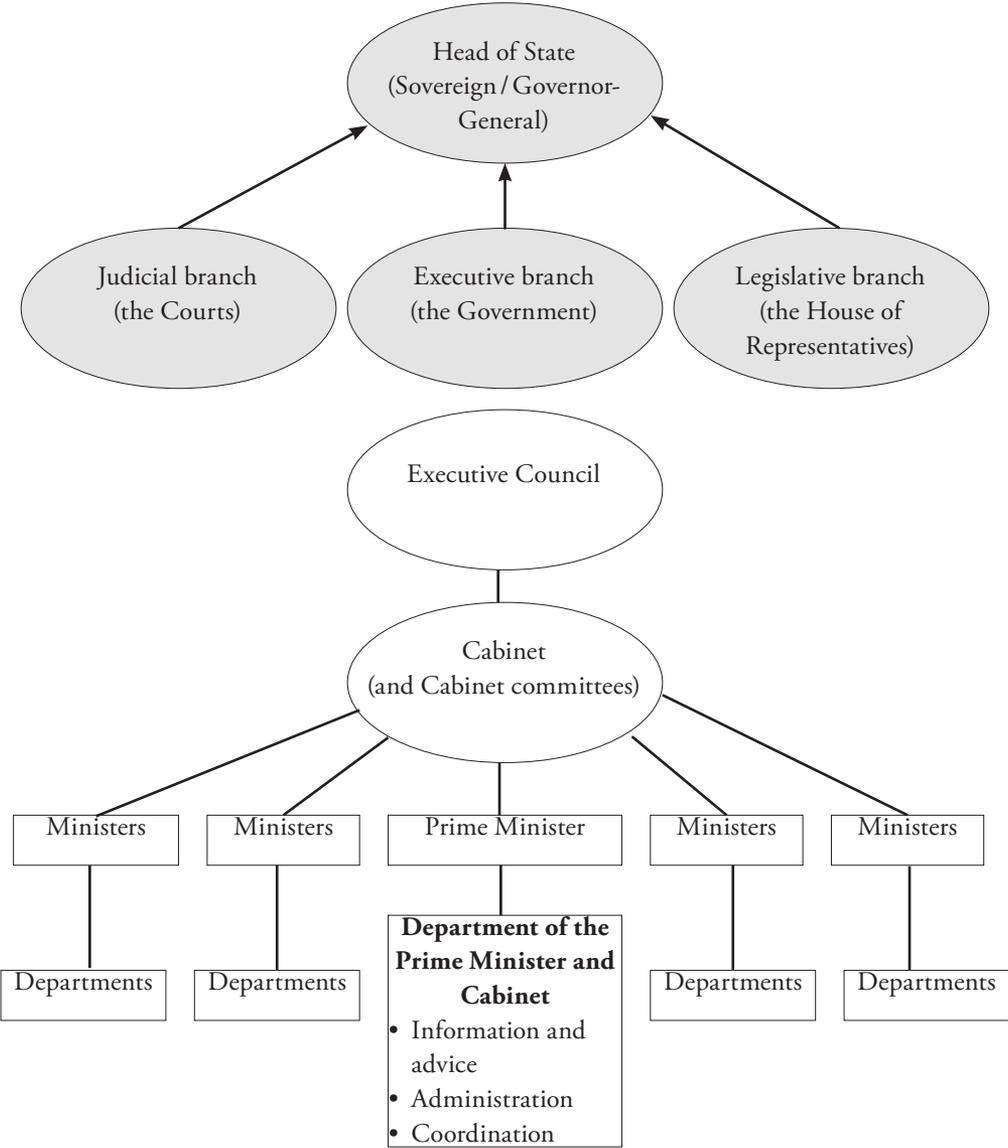
<sup>4</sup> See the Cabinet Office Statistics in *Annual for the year ended 30 June 2015* (Department of the Prime Minister and Cabinet, October 12 2015) at 87.

in Cabinet stays in Cabinet. Votes are not usually taken but the Prime Minister sums up the consensus reached. Once decisions have been made, however, they must be unanimously supported outside of Cabinet by all ministers involved, no matter how much an individual minister may disagree with a policy. This preserves the idea of collective responsibility and ensures that a unified front is presented to other political parties, to the House of Representatives and to the public.

Since the advent of MMP and even before, a constitutional habit developed which allows the appointment of some ministers who sit outside of Cabinet. These ministers are generally junior ministers with minor portfolios, or members of other political parties who negotiated for a ministerial portfolio as part of a confidence and supply agreement. Ministers outside of Cabinet do not regularly attend Cabinet meetings, contribute to Cabinet discussions or make decisions on Cabinet matters unless they are directly related to the portfolio held by the minister. In most other matters, ministers outside of Cabinet who are members of a different political party will be able to publicly disagree with Cabinet decisions by putting on their “other hat” and commenting in their role as member of another political party in the House. The Prime Minister determines how many ministers there will be who do not sit in Cabinet. In 2016 there are 20 Cabinet ministers and seven ministers outside Cabinet, two of whom come from two different parties with confidence and supply agreements with the Government. Another party supplied a parliamentary under-secretary. All the full Cabinet ministers are members of the National Party.

As will have become evident, Cabinet Government in New Zealand is highly flexible. The Cabinet Manual 2008, though overdue for revision, sets out in great detail how the Cabinet system works. The Manual derives its authority from Cabinet itself. A decision is taken at the beginning of each new administration to adopt the procedures in the Manual. The Cabinet Office keeps a close watch on the processes used to ensure good decision-making, including consultation and ensuring ministers have time to read the Cabinet papers upon which they are to deliberate.

# The decision-making machinery of the Government



Adapted from diagram under “Outcomes” in “Statement of Intent for the Year Ending 30 June 2005” (2005) Department of the Prime Minister and Cabinet [https://www.dPMC.govt.nz/dPMC/publications/soi\\_2004/outcomes](https://www.dPMC.govt.nz/dPMC/publications/soi_2004/outcomes)

Cabinet in New Zealand ultimately comprises a subtle mix of policy determination and political management, always conducted against the backdrop of what may happen in the House of Representatives.

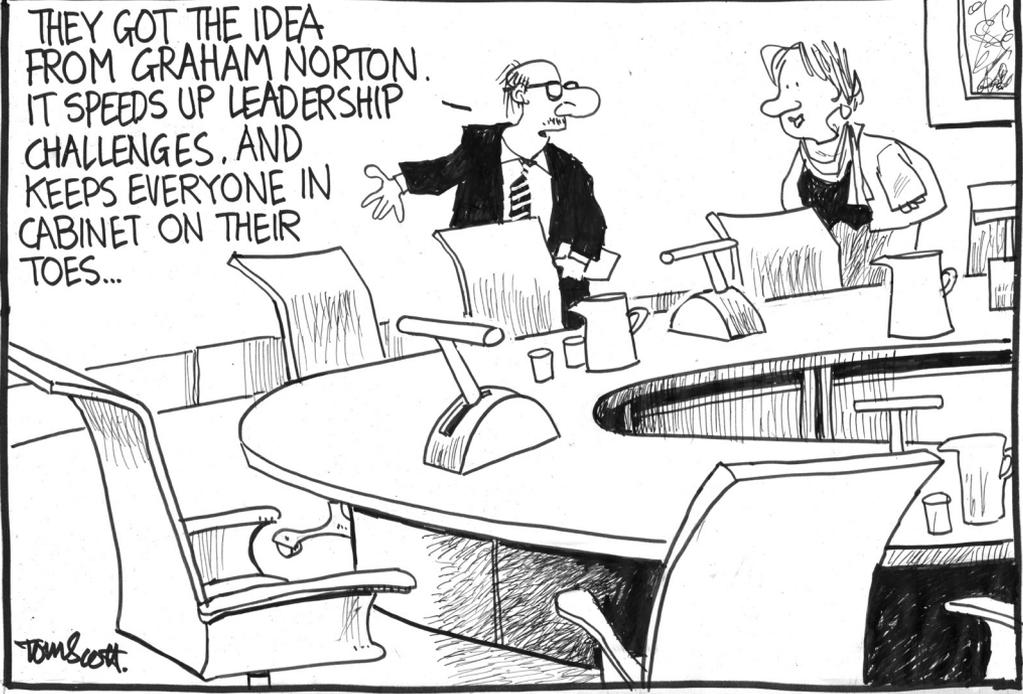
### **The Prime Minister**

The Prime Minister is the head of the Government and performs a range of functions and exercises a number of powers. The Prime Minister has an important role in maintaining and coordinating the Government by overseeing general policy direction, as well as a separate leadership role within his or her own political party and caucus. To assume and remain in office the Prime Minister must enjoy the confidence of the House of Representatives. In practical terms that means he or she must be able to ensure that the Cabinet can command sufficient votes in the House of Representatives to secure money with which to run the Government and carry out its programmes. It does not mean that the Government has to win every vote on every issue or piece of legislation.

The Prime Minister usually is (but is technically not required to be) the leader of the largest political party in the House of Representatives. Leaders of political parties are elected by a variety of methods, depending upon the rules of the particular political party. But a big factor concerning whom to choose, will be the views of the party's parliamentary caucus. The Prime Minister elect, since the introduction of the MMP system of electing MPs, usually seeks to negotiate confidence and supply agreements with one or two of the smaller parties. In 2016 there are seven political parties represented in the House. These political arrangements ensure the provision of stable government.

It is the Prime Minister who determines the number of ministers and parliamentary under-secretaries and the portfolios those ministers and under-secretaries occupy and whether they sit within or outside of Cabinet. It is the Prime Minister who determines whether a minister should resign. The Prime Minister, using the power to advise the Governor-General, effectively has the power to hire and fire ministers. It is the Prime Minister who chairs Cabinet and decides the Cabinet agenda and its procedures.

THEY GOT THE IDEA  
FROM GRAHAM NORTON.  
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CABINET ON THEIR  
TOES...



Tom Scott.

The Prime Minister can dominate the Cabinet to a greater or lesser degree depending upon the incumbent's style of operation. Leadership styles vary. Cabinet in New Zealand is a highly collective body with a sense of collegiality and togetherness around a shared purpose. The remarkable thing about Cabinet Government in New Zealand in the era of MMP, under which there have now been seven general elections, is not how much it has changed but how little. The effects of MMP have weakened the Executive and increased the power of the House of Representatives by making it more likely that the Government will have to negotiate arrangements for confidence and supply with other parties in order to achieve a majority and form a government. However, the challenge to executive power offered by MMP has been largely seen off. Cabinet and the Executive have resumed the strong position they have usually occupied in New Zealand.

The principal cause of Government ascendancy is the small size of the House of Representatives compared to the size of the Government. There is now a Cabinet of 20 members, seven ministers outside (including two from support parties) and at present an under-secretary. Add to these two whips, whose main function is to maintain party discipline within the parliamentary party. On most occasions this yields what is sometimes called in the United Kingdom a "payroll vote" of 25 per cent of the House that greatly helps the Government to secure a majority for its measures in what is a small house. In the current Parliament, National MPs who are not in the Government do not conceive holding the Government to account as their purpose, at least not in public. The same is true of the two major parties once they form part of the government. They support the Government. So the ability of the Government to get its own way on most issues most of the time is established, given that the Government will likely have majority support from its party members in the House in most situations. As the Australians say, the first rule of politics is to learn how to count.

There are two key powers that the Prime Minister enjoys in a New Zealand setting, which help explain why he or she is the most important constitutional figure. The Prime Minister is

currently the one who advises on the appointment and dismissal of ministers and has the capacity to advise the Governor-General to dissolve Parliament and call an early election. This capacity for an early annihilation of Parliament, coupled with the capacity to get rid of ministers, is what keeps people in line. The incentives flowing from both these powers are considerable—MPs who are ministers generally prefer being in ministerial office to being out of it, and MPs who are not ministers generally prefer to continue to be MPs rather than be exposed more often than is required to the potential of electoral defeat.

The Prime Minister in New Zealand is in a strong position to influence public opinion. He or she can command attention in the media by announcing policy or defending government policies. By conducting a weekly media conference that is bound to be widely reported, messages can be conveyed about the Government's preferences and aims in a manner that will on occasion influence behaviour in New Zealand without the need to take further measures. The Prime Minister is unrivalled as a news source. The media continuously seek comment and information from the Prime Minister's office on every conceivable subject. In few countries in the world is the Prime Minister so accessible to the media.

Further, a raft of journalists are employed as communications people in ministerial offices. They can have the effect of ensuring that the arguments against what is being announced are often hard to come by. The crisis in the business model of the media brought about by the digital revolution has made matters worse. Communications between those who make the decisions and the public is more difficult now than once it was. The news media now publishes less news about politics and government than it used to do.

### **Ministers and ministerial responsibility**

To be a Cabinet minister or a minister outside Cabinet, you are obliged to follow Cabinet decisions, even if you disagree with them. Otherwise you must resign. This doctrine of collective responsibility is based on an important reality. It is well summed up by the aphorism coined by Benjamin Franklin in 1776 in

America: “we must indeed all hang together, or, most assuredly, we shall all hang separately”.<sup>5</sup> The Cabinet Manual 2008 states the constitutional convention this way:<sup>6</sup>

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, in acting on ministerial advice, needs to be confident that individual Ministers represent official government policy. In all areas of their work, therefore, Ministers represent and implement government policy.

The advent of MMP placed a new gloss on collective responsibility. Ministers outside Cabinet from support parties may be bound by collective responsibility only in relation to their particular portfolios; they therefore retain the right to vote against the Government on many policies outside of those portfolios.

Since collective responsibility is in essence a fiction—suggesting a unanimity which does not actually exist and everyone knows it—leaks and unattributed comments can destroy its effect in substance if not in form. But even in its attenuated form the doctrine does assist in controlling the dominant party and the House itself, because every MP who is a member of the Executive must vote for the decision of Cabinet in the party caucus.

Ministerial responsibility is an important ingredient of the existing mechanisms of accountability and responsibility of the Cabinet to the House of Representatives. Both collective responsibility and individual ministerial responsibility are constitutional conventions or customs. They have no formal legal status. Individual ministerial responsibility is put in the Cabinet Manual in this way:<sup>7</sup>

5 Remark to John Hancock at the signing of the Declaration of Independence 4 July 1776 in Elizabeth Knowles (ed) *Oxford Dictionary of Quotations* (7rd ed, online ed, Oxford University Press, 2009).

6 Cabinet Office *Cabinet Manual 2008* at [5.22].

7 At [3.21].

Ministers are accountable to the House for ensuring that the departments for which they are responsible carry out their functions properly and efficiently. On occasion, a Minister may be required to account for the actions of a department when errors are made, even when the Minister had no knowledge of, or involvement in, those actions. The question of subsequent action in relation to individual public servants may be a matter for the State Services Commissioner (in the case of chief executives), or for chief executives if any action to be taken involves members of their staff.

In reality ministers do not relish taking responsibility for things that go wrong. They often try to avoid accountability and frequently structures are established that mask the fact that ministers are pulling the strings behind the scenes. For example, efforts made over the years to try to distance the Government from being responsible for the health system have not worked, despite the structures erected. The public continues to hold the Government responsible. It was Robert Semple, a minister in the First Labour Government, who said that though he was responsible as minister in charge of the department for mistakes made by the Ministry of Works in the construction of two tunnels, he was not to blame.<sup>8</sup> Ministers do not like being blamed and will go to great lengths to construct arguments as to why they should not be.

### **The Executive Council**

While Cabinet is technically the centre of Government in New Zealand, Cabinet itself does not exercise legal powers. In reality, the Cabinet does not have any formal legal basis; it exists purely as a convention, a widely accepted method of decision-making in Government. Because of this, Cabinet does not have true legal authority to make decisions. Despite this, however, much of the Government is run on the basis of Cabinet decisions and often no other authority is needed for action to be taken on its decisions. But some Cabinet decisions do have to be taken to the Executive Council to be given legal effect by the Governor-General through the making of orders in council or regulations.

8 (12 October 1944) 267 NZPD 43.

The Executive Council, made up of ministers and typically presided over by the Governor-General, meets more than 30 times most years to make instruments into law.

The legal powers enabling the Executive Council to make decisions derive from statute, the royal prerogative or the common law. The Executive Council and individual ministers are the ones who exercise the legal powers, not the Cabinet itself.

### **Other bodies in the Executive**

As explained above, the Executive is made up of a number of key institutions including a myriad of Crown entities that are funded to a greater or lesser extent from the public purse and are independent for some purposes but not for others. New Zealand has a large range of “public” institutions, other than Government ministries and departments. For example, the accident compensation system is run by a Crown entity, the Accident Compensation Corporation. We have also polytechnics, universities and research institutes; commercial organisations owned by the government; district health boards; school boards of trustees and many others. Many of these are subject to some form of direction, control and power of appointment from the centre of Government, namely Cabinet. New Zealand has an enormous number of these quasi-autonomous national governmental organisations (quangos), known collectively as quangoland.

### **Proposed changes**

We do not wish to fundamentally alter the nature of Cabinet Government in New Zealand. It is an efficient and effective way of making decisions. Nor do we wish to downgrade the importance of the Prime Minister. What we wish to do is to place some framework around the Executive Government, so it is contained within limits and cannot thoughtlessly morph into something else.

It is important that the Constitution should state the fundamental rules of the system and they not be left completely to constitutional convention and the Cabinet Manual. Cabinet Government in New Zealand is founded for the most part on

constitutional convention, not upon law. We have attempted to write the most important conventions and understandings in the Constitution and give them legal standing. The Constitution should set out the structures and powers of Government so everyone can see them, understand them, and hold the Government accountable for them.

Articles 2, 3  
and 16

The Constitution begins by stating that the State has all powers of government: legislative, executive and judicial. The executive power will be exercised by the Government. The Government comprises Cabinet, ministers and the public service.

The Government acts through Cabinet, which has the general direction and control of the Executive Government through the appropriate minister or public servant. The Cabinet is collectively responsible to the House of Representatives.

Article 24

The Cabinet will be limited to a maximum of 20 members. Up to five ministers outside Cabinet can be appointed. We propose to abolish the post of under-secretary, which in constitutional terms is an unsatisfactory hybrid between an MP on the one hand and a minister on the other. At the time of writing the activities of this office are not even covered by the Official Information Act. The limits on Cabinet membership proposed in Constitution Aotearoa are a reflection of our view that the size of the Executive has been swollen for political reasons concerned with control—ministerial portfolios are being split up in order to tempt other parties when negotiating confidence and supply agreements. More than 25 ministers cannot be justified by the amount of work involved.

Article 25

The proposed Constitution also requires the publication of a Cabinet Manual every six years so the processes and procedures of the Cabinet and its Committees are transparent and available to the public and the participants in the system itself.

Article 17

The Executive Council is established in the Constitution much as it is now, though of course the new Head of State will preside at its meetings, rather than the Governor-General.

Article 18

The office of Prime Minister is formally established by the Constitution, and the roles and function of the position are clearly set out. One of the limitations of the role included in

Constitution Aotearoa is the idea that the Prime Minister cannot also be the Minister of Finance. The reason for this is that the concentration of power in one individual is just too great.

The House of Representatives will elect the Prime Minister, and the Speaker will have the responsibility of informing the Head of State of the outcome so that the Prime Minister can be formally appointed. A fixed four-year term will reduce the control that the Government, and in particular the Prime Minister, can exert over the House of Representatives by threats of early elections. The Prime Minister will also be unable to exercise control over when the House meets by using the ancient powers of proroguing or dissolving the House. Those powers are abolished. **Article 18**

These changes will help to allow the public to judge who is responsible for what. They will assist the House in holding ministers to account. They should sharpen up the system generally. There will be greater clarity upon who has what powers and who is responsible. It should be noted that while these changes will be in the law, it is not likely that a great deal of litigation will focus around the Cabinet any more than it does at present under the established law relating to judicial review of ministerial decisions. **Article 28**

It is perhaps important to note that the royal prerogative is abolished in the Constitution. So the powers exercised by Government must be within the Constitution or the statute law of the State. Governments should not be permitted to make up sources of power as they go along. Government has to be conducted under the law. If the law needs to be changed Parliament should legislate. However, we do recognise the need for some degree of flexibility in the operation of Government—it is impossible to predict everything that the Government may be called upon to do in the future. Because of this, the Constitution vests Government with the executive powers of the State conferred by the Constitution or Act of Parliament. These legal powers will be exercised by the Government on behalf of the State. This will ensure that the Executive has the power to enter into contracts and manage its responsibilities. **Article 13**

**Article 3**

**Articles 22  
and 107**

The Constitution also provides that the Attorney-General must be a minister and provides that the person appointed must be a lawyer, to safeguard the values of the rule of law within the system. The Attorney-General is the minister responsible for the legal system and its integrity. He or she is also responsible for providing legal advice to the ministers as the First Law Officer, assisted by the Solicitor-General. It is not appropriate for a non-lawyer to carry out these responsibilities, despite the fact that the Hon Dr Michael Cullen has successfully done so in recent times.

**Conclusion**

Under the proposed Constitution, Cabinet will remain the engine room of Government. The Prime Minister will be its undisputed head. The responsibility of the Government to Parliament will be sharpened. Who is responsible for what will be clear. The Constitution will demonstrate in realistic terms the responsibilities and duties of the Government and not rely on conventions designed to tame the royal power so the system appears to be democratic, when in legal terms it is not. Let us get rid of fictions and state the rules the way they are in fact. Then everyone can easily find out what the rules are and they cannot be easily altered for the convenience of the moment.