

1. The Sovereign and Her Representatives

The Constitution Act 1986

Part 1: The Sovereign – Locates G-G in NZ statute.

- S 2: Sovereign = head of state with G-G as her representative.

Part 2: The Executive

- S 6: Parliamentary Ministry.
- S 7: Member of the EC can exercise other minister's duties.

Part 3: Legislature

- S 14: Parliament = House + Sovereign.
- S 15: Parliament = full law making power.

Part 4: Judiciary

- S 23 + 24 = Security of tenure and salary.

The Cast of Characters:

When the Queen dies: (Royal Succession Act also)

- S 4 Const. Act: Regency S 5: Successor

Sovereign power can be exercised by:

- Monarch - G-G - Administration.

Palmer + Palmer: NZ's Constitution and Govt.

- G-G office constituted by the Letters Patent issued by the Queen (prerogative instrument).
- G-G appointed on advice for 5 years.

Functions of the Queen + GG:

Three main functions:

Ceremony: e.g Commander-in-Chief of armed forces.

Symbolism: Sir Denis Blundell: Most important function – embody the values of the nation.

Constitutional: e.g appointing/dismissing ministers; summoning, dissolving, proroguing parliament; royal assent.

- G-G presides over EC.
- EC – formal body advising the G-G ss7 and 8 of 1983 Letters.
- Walter Bagehot: G-G's 3 rights: to warn, to be consulted, to encourage.

Royal Titles Act 1974: Changes to Queen of NZ. Legitimises role.

Letters Patent 1983:

- S 2: Appointment of G-G by Queen for as long as they please.
- S 3: G-G power to act on behalf of Queen.
- S 16 + 17: Ministers to inform G-G and help them.

Dame Sylvia Cartwright "The Role of the G-G"

Guiding principles of office:

- Non-political nature.
- Upholding democratic traditions
- Focus of the office to act in a unifying way.

Letters Patent 1983:

2 objects: repatriate and update the office:

Constitutional change in NZ = incremental, gradual and pragmatic response.

3 trends over time:

- Diminution of the executive powers of the G-G
- Transfer + consolidation of powers of government within NZ.
- The office of the G-G as a distinctly NZ institution.

Sources of Powers:

- Statute and Royal Prerogative.

Maurice Sunkin "Prerogative"

Special powers from before the establishment of the modern parliamentary system exercised on behalf of the Crown either by the monarch or by government ministers.

- No prerogative powers can be established - can be abolished or placed on statutory footing.
- The Exec accountable to parliament for decisions under prerogative powers + may be subject to judicial review.

Philip Joseph – Constitutional and Administrative Law in NZ

Three heads of the RP:

- Sovereign's personal prerogatives
- Rights, powers, privileges or immunities of the Crown.
- We are interested in: Political prerogatives.

Who, or what, is the Crown?

ACC v Stafford [2018] NZHC

- Affirmed Town Industries.
- Prof. Hogg, Monaghan + Wright: Crown = Executive.
- M v Home Office: Crown = exec + monarch.

Town Investments Ltd v Dep. Of the Environment [1978] HL

- Executive acts of government done by ministers in the name of the Monarch or under official designation are acts done by the Crown.

Lord Simon of Glaisdale:

- Ministers are emanations of the Crown.
- The Crown is one and indivisible (Day J)
- Crown = corporation aggregate (overlaid by acting on advice).

A-G v Chapman [2011] NZSC

Elias CJ dissenting:

- NZBORA – Crown = 3 branches, o/wise against rule of law.
- NB sometimes Crown is split e.g Entick.

Majority held it was just the exec.

Govt. response - LawCom review of Crown Proceedings Act

Shouldn't extend Crown liability because:

- Unequal treatment of govt. justified. + fiscal issues.
- Int'l obligations that detriment private citizens.

2. Responsible Government

Cab Man and Const. Conventions

The Queen reigns but the govt rules so long as it has the support of the House of Representatives.

Highlights most important constitutional conventions re responsible govt.:

- G-G always acts on advice.
- Must always be a ministry to advise.
- Ministry must retain support of the House (6.58); and
- A ministry w/o confidence acts in a caretaker capacity.

Jenning's Test:

1. What are the precedents?
 2. Did the actors believe they were bound by a rule?
 3. Is there a const. reason for the rule?
- Conventions modify and restrain legal power, and are politically enforceable (Matthew Palmer).

Rebecca Kitteridge "The Cabinet Manual: Evolution w Time"

- "Authoritative guide to central government decision-making" – John McGrath QC.
- Structure, principles and values of govt.
- Descriptive not prescriptive – not a legal document.
- Reflects and responds to change → does not effect it.

Andrew Geddis "Parl. Govt. In NZ: Lines of Continuity & Moments of Change

Preferred govt model: single party or coalition minority + 'enhanced' confidence and supply.

This is good because of its flexibility:

- Political buffer, no party has veto, different options of support.

Confidence of the House

Confidence = accepted as being able to sit on the Treasury benches, House expresses support for collective, G-G knows that the position is that of a legitimate government.

Tested through confidence votes.

David McGee – Parliamentary Practice in NZ

- Matter of political judgement - must be a party vote.

Only a few occasions when the rules of debate allow wide-ranging debate so as to question the performance of the government.

Votes of Confidence arising independently of the will of govt:

Express votes of Confidence: Amendment to other motions, moved by opposition.

- PM's statement - Budget - Imprest Supply Bill

Implied Votes: Emanate from the govt.

- Denial of supply or annual tax rates bills.

Votes of Confidence arising from the declaration of govt:

Govt. can declare any vote to be a matter of confidence: before or after the fact

- Matter of PM to decide on behalf of the govt.

Caretaker Convention – Governing Thru Transition

Outgoing govt. has lost their democratic mandate, but a G-G needs a ministry to advise her, so the caretaker convention arises.

Alison Quentin-Baxter + Janet McLean: This Realm of NZ

MP Jim McLay's Two Principles:

- Undertake no new policy initiatives.
- Act on the advice of incoming govt. on issues of constitutional, economic or other significance that cannot be delayed, even if outgoing govt. disagrees. (6.29(b))

Constitution now permits MP's to be sworn in before writ return (s6(2)).

Cabinet Manual

6.60: Mid-term loss of confidence = PM advising ministry resignation.

6.22: Caretaker Conv. After election or lost confidence vote.

6.25 (d): Unclear outcome:

- Differ/temporary holding agreement OR ascertain what action has confidence of the House (not just acquiescence).

6.29: Clear outcome: McClay's principles.

Appointing and Ending Govts – Role of G-G

Role more pronounced under MMP.

- Palmer + Palmer: Political and independent judgement.

Philip Joseph – Const. and Administrative Law in NZ

Situations involving independent judgement (exercised w/o advice):

- Appoint and dismiss PM.
- Refuse request for or force a dissolution.

These powers are concerned with the formation or dissolution of government.

Michael Hardie-Boys

Core principles:

1. Formation of govt.= political decision – must be by politicians.
2. G-G has to ascertain support of the House.
3. Parties must make clear public announcements.
4. Incumbent PM remains under caretaker convention.

Meet 6 weeks after return of the writs - Speech from the Throne.

Sir Jerry Mateparae "G-G Speech to Press Gallery Dinner"

QUANTITY: must be able to show confidence of the House.

CLARITY: communicate negotiations - public knows what gov't. has been formed: Clear and public statements (helped by Clerk of EC).
The process is outlined in **Cabinet Manual Paras. 6.41-6.47.**

Refusing the Power to Dissolve Parl.

Cabinet Manual – 6.63: G-G will act on advice to call early election if the government and PM have confidence/support of the House.

- Affirmed by Joseph.

Philip Joseph – Constitutional and Administrative Law in NZ

Byng-King Controversy: G-G Byng refused PM's request for dissolution even though he had confidence – didn't corroborate evidence.

Right to refuse dissolution when:

- Coalition or support party withdraws.
- PM is unable to form gov't. after election and does not test confidence with a vote first.
- PM is replaced (caretaker convention).
- Motion of no confidence before the House.

G-G can appoint another PM/party to gov't.

Refusing assent?

Philip Joseph – Constitutional and Administrative Law in NZ

2 situations:

- Unlawful legislation
- Irreparably damage representative democracy.

Palmer + Palmer: will cause more of a constitutional crisis.

What about when gov't. does not support a private member's bill?

Proper to Refuse: Ekins and Laws

- Gov't. entitled to govern if it has confidence.
- G-G by convention acts on gov't. advice.

Not Proper: Poole

- Acting on advice trumped by not withholding assent because of parliamentary supremacy – link 2 electorate.

E.g. **Standing Order 326:** "more than minor... gov't's fiscal aggregates".

3. Cabinet Government

Cabinet Manual

2.2: PM appointed by G-G based on election and negotiations.

2.3: PM head of gov't. but no statutory outline.

2.4: PM principle advisor to Sovereign.

PM:

Key Constitutional Roles:

- Has some sole rights e.g. appointing, dismissing MP's.
- Head of Cabinet – coordinates portfolios etc.
- Security + Intelligence + sometimes other portfolios.

MINISTERS:

Key Constitutional Roles:

- Attend Cabinet + Committees – Bound by CMR and IMR
- Exercise statutory functions & powers re departments.

Marie Schroff

JB Ringer: real decision making body of government.

- No formal, executive action.

Key Cabinet Features:

- Consultation (5.14) - Confidentiality (5.23) - Collec. Resp. (5.24)

Role of Secretary of Cabinet + Clerk of EC:

- Secretariat function e.g. process committee papers.
- Advice function: Provide advice to PM + GG, elections.

Cabinet Manual

5.3: All significant exec decisions discussed by Cabinet.

5.4: Final cabinet decisions rest w PM.

Collective Ministerial Responsibility

Professor Marshall: 3 Elements:

- Confidence - Unanimity (5.25) - Confidentiality (5.23)
- 1) Full force for ministers in a single-party government.
 - 2) Coalition parties may establish 'agree to disagree' provisions (5.27)
 - a) A process for public differentiation only for party positions
 - b) Ministers still must implement the resulting decisions.
 - 3) "Selective Application" for ministers outside Cabinet in a party giving enhanced confidence and supply. (5.34)
 - a) Matters re portfolios or matters of confidence.
 - 4) PM to decide what to do ab it – ingredient of PM control.

OIA 1982: Info available (s5) unless good reason not to (s9) e.g. protect CMR.

Constitutional Reason: G-G must only have 1 set of advice.

Political: Exec run Parl, PM control, united caucus + gov't.

Pressures under MMP:

- Small parties want to stand out.
- Difficult to enforce conventions on support parties.

Accountability Relationships:

Public Service → Minister → House and Cabinet → House → Electorate.

Individual Ministerial Responsibility (3.27)

Minister must resign if loses confidence of Cabinet, as expressed by the PM.

Minister responsible to parl. For departments.

- Explanatory - Amendatory - Culpability.

Explanatory + Amendatory: thru q's – legal limits on responsibility.

Culpability: vague re impropriety, just portfolio, alleged, vicarious.

E.g. Cave Creek: Bolger did not think Marshall needed 2 resign, Cf tv guy

Standards of Ministerial Conduct (Cabinet Manual)

2.55: Ministerial, personal and political capacity.

Conflicts of Interest:

2.63: Pecuniary/non-pecuniary, direct/indirect.

2.74: Conflict process:

- Declaration (no ministerial responsibility), not receiving papers.
- Transferring responsibility to dep/other Minister (responsibility).
- Divestments/blind trusts/ resignation from organisation.

2.78-2.79: Can speak 4 constituent if no ministerial responsibility.

E.g. Shane Jones + Manea, Maurice Williamson + Police.

4. Public Service

Reformed in 1984:

1. Fragmentation of the state: devolution to arms-length bodies, SOE's
2. Restructuring: less ministerial control, CE role, disaggregation.

Extension of minister: acting in name and accordance w wishes.

Governed by **SSA 1988** and **PFA 1989**.

3.7: Minister Decides direction and priorities of dep: answerable 2 Parl.

3.9: Officials support Minister/gov't. of the Day.

3 Elements: Loyalty, Neutrality, Anonymity.

Tensions: CE responsibilities and OIA, Anonymity (e.g. Christine Rankin) and ministerial attack.

5. The State Sector

Janet McLean "New Public Management: NZ Style"

Large departments disaggregated into:

- Policy, service delivery and monitoring agencies.
- Arms-length agencies.

Conventional view of Exec: When the delegate acts, it is as if the Minister acts.

Rival Understanding: Departments at arms' length and agents for the minister.

- Crown = the entity which gov't. assets vested, exercises ownership thru the state sector.

State Services Commission – A Guide to NZ's State Services.

Public Service: departments + agencies, Sched 1. Of SSA 1998.

State Services: operate as instruments of Exec, most Crown entities +, PFA.

State Sector: financial performance reported under the PFA.

Crown Entity Categories:

1. *Statutory Entities*
 - Agents
 - Autonomous CE
 - Independent CE
2. *Crown Entity Companies*
3. *Crown Entity Subsidiaries*
4. *School Boards of Trustees*
5. *Tertiary Education Institutions.*

Commissioner of Inland Revenue v MCNZ [1997] NZCA – Keith J

- No control over matters by ministers.
- Not subject to reporting or auditing requirements.
- Affirmed *Town* – not Exec.

Prof. Hogg: Agent of Crown determined by "nature and degree of control."

Lab Tests Akl Ltd v Auckland DHB [2009] NZCA - Arnold + Ellen France JJ:

Mercury Energy (PC): court rarely intervene in public contracting decisions.

- Imposing Public Law obligations onto board would prevent them from negotiating in a prudent matter.
- No required statutory procedure, shouldn't import more.

ACC v Stafford [2018] HC – Collins J

On the back of *Proprietors of Wakatu v A-G [2017] SC.*

- Ministers assert control over ACC board – set directions.
- Following *Ririnui v Landcorp Farming Ltd:* SOE's enough ministerial input for land to be used for Māori claim.
- Minister can issue under s 103 of CEA, ACC must 'give effect'.

6. The Judiciary

Constitutive (law-making)/interstitial (exercised w/in statutory parameters).

Judicial Independence:

Sir Robin Cooke: Principle beyond legislative reach.

- Security of tenure: only misbehaviour and incapacity.
 - o "incapable of performing duties of office" – Joseph.
 - o *Wilson v A-G*, kind of precedent.
- Salary: not exposed to political pressure.
 - o Sir Frances Bell – exigencies of national economy.
- Institutional independence.
 - o Adequate resourcing and admin support.
 - o **Beijing Principles of Independence of the Judiciary**
 - o Tipping: Mutual cooperation, not partnership.

Impartiality: ultimate value of adjudication.

Valente v the Queen: Canadian SC held both principles fundamental.

Also **Extralegal Protections:** conventions and judicial circumspection.

Misc. Rules e.g. not challenging assignment of judge, some immunities.

Appointments and Complaints Process:

A-G's judicial appointments unit:

Long list → Short list. S-G investigates with A-G final call.

Judicial Complaints Commissioner and Conduct Panel Act 2004:

- Commissioner processes all complaints. Does one of 4:
 - o Dismiss
 - o No further action
 - o Refer to head of bench
 - o Tell A-G to start Panel.
- A-G can dismiss w speech and approval of the House.

