Deconstructing Cabinet Collective Responsibility

Nicola White

New Zealand politics is getting very post-modern. In artistic terms, the new government arrangements are decidedly cubist – all the key elements are there, but it's just not put together in the way you expect. Does it matter? Is the nation going to learn to like Picasso, or at least to live with it?

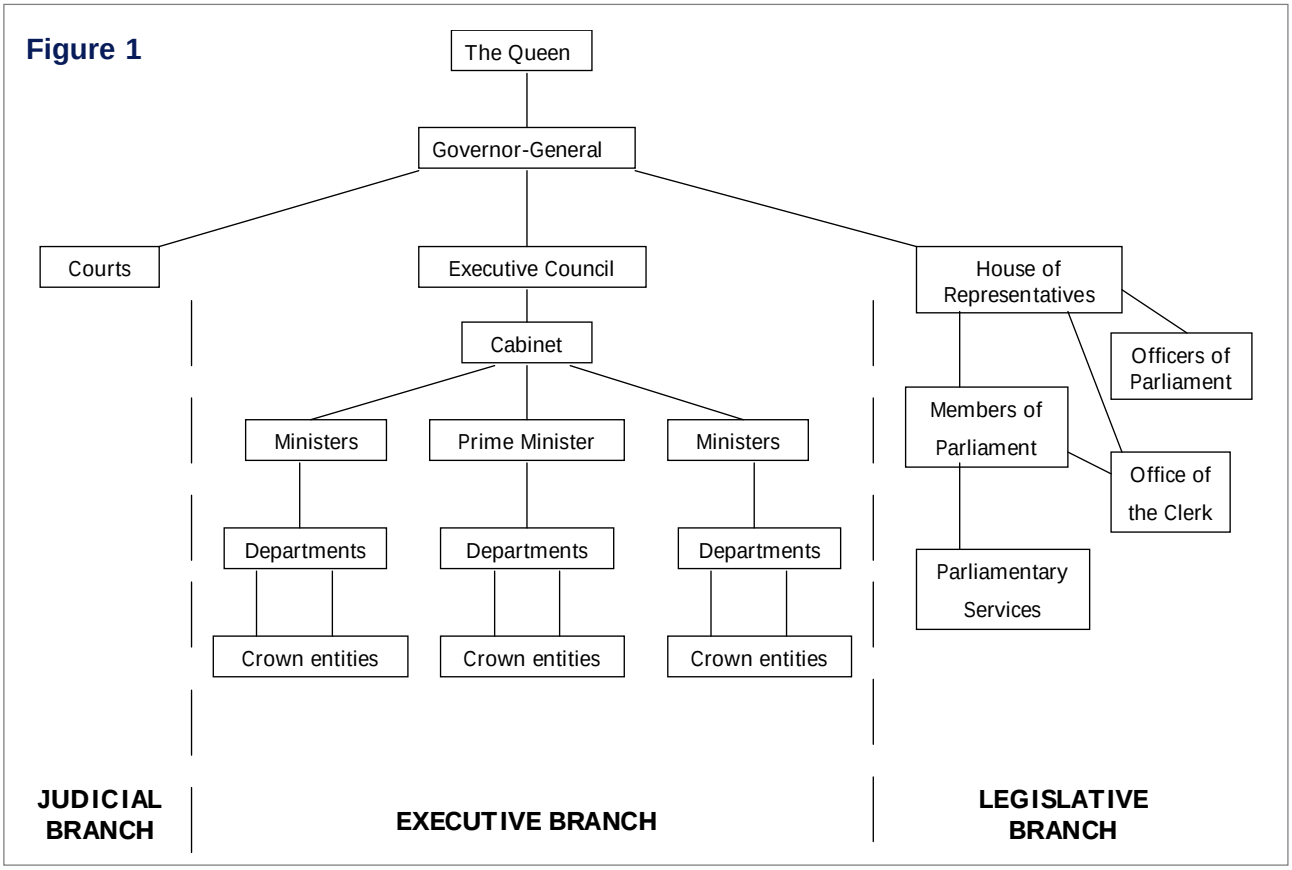
The past

To look first at the status quo until now, I have used the diagramme in Figure 1 to teach constitutional and governmental structure in recent years. The key feature is the separation of powers beneath the sovereign into three branches of government: the judiciary, the executive and the legislature.

At the core of the system are the twin concepts of representative and responsible government. That is, those who are supported by at least a simple majority of the elected Parliament are entitled to be appointed to executive office, where they will advise on and control the use of the sovereign authority of the state. And those holding executive office must regularly and systematically account back to the Parliament for the way in which that authority is used, and the business of government is conducted. That democratic constraint on the exercise of sovereign power is the result of many centuries of constitutional evolution and, at times, battle.

In the New Zealand system, therefore, Ministers heading the executive are also Members of Parliament (MPs) –

Figure 1



they derive their democratic mandate by having the support of the elected House of Representatives, and must account back to it for the way in which they are managing public funds and public power. To date, therefore, the following have always been able to be used as rough synonyms: being a member of the executive, being a member of the government, and being a Minister.

Ministers always hold two warrants: one as a Minister, and one as a member of the Executive Council. The Executive Council is the formal body that advises the head of state or her representative and it is the legal actor for many executive government actions. But sitting behind it is the effective decision making body for the executive – Cabinet. It is important that the Executive Council presents unified advice to the Governor-General, and so Cabinet and its committees provide the forum for deciding what that collective advice will be.

Equally, it has always been seen as critical for the executive to present a united front to Parliament, and to the public. This discipline can be explained both in arid constitutional terms (as in the previous paragraph), or as a matter of brute political survival. Benjamin Franklin captured the point most succinctly at the Declaration of Independence in 1776: "Yes, we must, indeed, all hang together or, most assuredly, we shall all hang separately". (Quoted in Palmer and Palmer, 2004, p.87). Again, it is the Cabinet decision making system that brings individual Ministers together and binds them into a collective decision making process, as Figure 1 illustrates.

Cabinet itself has no legal status or formal power – it is an administrative or politically defined body and its processes constantly adapt to suit the current needs of government. Yet it is at the heart of the modern system of representative and responsible government in Westminster democracies. Bagehot described Cabinet in 1945 as "a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state" (quoted in Palmer and Palmer, 2004, p.76).

The discipline at the core of the Cabinet system is the convention of Cabinet collective responsibility. Conventions are not law: no court would ever take a role in enforcing compliance with collective responsibility. A convention is a political or administrative rule about the exercise of public power that is recognised and followed by all the relevant actors.

As the Cabinet's own summary of its rules, the *Cabinet Manual* is the most authoritative source of guidance on this convention. It is worth reproducing the full text of the discussion of collective responsibility in the current (2001) edition:

3.20 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.

3.21 Acceptance of ministerial office requires acceptance of collective responsibility. Issues are often debated vigorously within the confidential setting of Cabinet meetings, although consensus is usually reached and votes are rarely taken. Once Cabinet makes a decision, then (except as provided in paragraph 3.23) Ministers must support it, regardless of their personal views and whether or not they were at the meeting concerned.

3.22 In a coalition government, Ministers are expected to show careful judgement when referring to party policy that differs from government policy. Subject to paragraph 3.23, a Minister's support and responsibility for the collective government position must always be clear.

3.23 Coalition governments may decide to establish "agree to disagree" processes, which may allow Ministers to maintain, in public, different party positions on particular issues or policies. Once the final outcome of any "agree to disagree" issue or policy has been determined (either at the Cabinet level or through some other agreed process), Ministers must implement the resulting decision or legislation, regardless of their position throughout the decision making process.

3.24 "Agree to disagree" processes may only be used in relation to different party positions. Any public dissociation from Cabinet decisions by individual Ministers outside the agreed processes is unacceptable.

The last three paragraphs were introduced into the *Cabinet Manual* as a result of the formation of the Labour-Alliance coalition government in 1999. The development of this agree to disagree process has been a significant evolution of the convention to take account of mixed member proportional representation (MMP), and the political needs of the parties in coalition governments to maintain distinct public profiles within the umbrella of a collective government. The previous *Cabinet Office Manual* of 1996 simply stated that "Ministers whose opposition to a Cabinet decision is such that they wish to publicly dissociate themselves from it must first resign from the Cabinet." (paragraph 3.5)

The point that clearly emerges is that, although it has long been recognised as a constitutional convention, Cabinet collective responsibility in effect is a tool for political discipline. It is not a core constitutional principle in itself. It is a discipline that makes it easier for a group of individuals to demonstrate that they have the numbers, or the mandate, to continue to hold executive office, and it is a self-protective political shield that enables the government to withstand the constant onslaught of arrows that a parliamentary opposition fires, looking for weakness. It gives political discipline and efficiency, and accordingly it gives political strength. But it is ultimately a means to an end, not an end in itself.

The convention has already been evolving for some time. Constitutional textbooks talk of three traditional elements: confidence (of the House), unanimity and confidentiality. The full version of Cabinet confidentiality has been eroding for some time, with the advent of open government. Academic conferences now regularly discuss whether this strand is still relevant at all.

The requirement of public unanimity has never been absolute; its enforcement has always been a matter of political judgment by Prime Ministers according to circumstance.

The introduction of the agree to disagree provisions extended that reality from implicit flexibility about the application of this political discipline to individuals, to explicit flexibility about how it operates between political parties in a multi-party coalition environment.

The present

So what has changed now? The new government, formed in October 2005, is built on four separate agreements between political parties, and each one includes undertakings that are significant for the basic operation of Cabinet, collective responsibility, government processes, and the relationship between the executive and the legislature. In other words, they develop some reasonably fundamental parts of our constitutional system.

Labour and the Progressive Party: a coalition agreement

New Zealand is now well used to coalition agreements. They are agreements between two political parties who agree to form a coalition government together. That is, both parties are inside the executive, and work together within the disciplines of the Cabinet system.

Predecessors to this coalition developed the agree to disagree provisions of the *Cabinet Manual*. This latest agreement builds on the experience of the last six years of coalition and includes a clear signal that we should expect further evolution of the discipline of Cabinet collective responsibility, as follows:

> Both parties recognise the need for parties to be able to maintain distinctive political identities in government and in Parliament. This applies particularly to the smaller party and during this term of Parliament we will further develop processes for:
>
> - Ensuring appropriate credit for and recognition of the policy achievements of the smaller party; and
> - The expression of different views publicly and in Parliament.

This acknowledgement, of the need to keep working on ways to manage the need for parties to maintain separate public political identities alongside the system of Cabinet government, in some ways sets the scene for the other three agreements.

Labour and the Greens: a cooperation agreement

The Greens have agreed not to oppose the government on confidence and supply in order to provide stability. In return they are to be consulted on

a wide range of topics and to have substantial involvement in a number of policy topics as well as input into the budget process. That in itself is not exceptional. But the way in which the Greens will participate on what are termed "level 1" topics does arguably break new ground. In particular:

- Once the initial scope of the work has been agreed with the Minister, the agreed Green Party representative on that topic will have direct access to officials and will be able to request reports from officials;
- The Green Party representative will report regularly to the Minister on progress, which implies that the Minister will, at least to some extent, be delegating day to day control to the Green representative;
- Although any Cabinet committee papers will be presented at the committee by the Minister, the Green Party representative will be able to attend and take part in the discussion; and
- The Green Party representative will be "a designated spokesperson" in the area – it is possible that this could mean that the person is able to speak on behalf of the government on the topic, although political reality suggests that it is more likely that the Green Party comments will be firmly branded as separate, but will sit seamlessly alongside government's public utterances.

Arising from this agreement we therefore have officials working directly to a non-Ministerial (and non-government) MP, albeit under the broad auspices of a Minister, and non-government MPs being able to participate in core government decision making processes. The practice of substantial collaboration with non-government parties had already developed a long way in the previous Parliament (particularly with United Future and Green MPs), but this agreement foreshadows a further deepening of those relationships, with more substantial blurring of the line between executive government and parliamentary roles.

Labour and NZ First, Labour and United Future: Confidence and supply agreements

We have had confidence and supply agreements before. They have made clear that the support party will stay outside government, but will back the government on votes of confidence. In exchange there is a reasonable measure of consultation and cooperation with the support party on the development of key policy matters, including aspects of the budget. But these two agreements break new ground.

The opening sections of both agreements suggest that the parties are not regarded as being part of the "coalition government". Both parties agree to provide confidence and supply for the term of this Parliament to a "Labour-led government". There are provisions establishing that there will be a substantial measure of consultation and cooperation with each supporting party on a wide range of matters. And there is agreement that the support parties will, by and large, vote with the government on procedural motions in the House. So far, so good.

But both agreements go on to give the leader of each supporting party a ministerial position. They also apply the *Cabinet Manual* provisions on collective responsibility to the Minister, but only in relation to the portfolio area. "In other areas 'agree to disagree' provisions will be applied as necessary".

So we now have two Ministers, who do not describe themselves as part of the "coalition government", and who are apparently only partially bound by collective responsibility. In media comment, the leaders of the Labour and NZ First parties have indicated that the NZ First Minister does not intend to attend Cabinet or committee meetings: other Ministers will present papers from that portfolio on his behalf. The Ministerial List now has a new category of "Ministers Outside Cabinet from other Parties with Confidence and Supply Agreements."

In the days immediately after the agreements were signed, there was some suggestion that these two Ministers were not in government at all: some NZ First members even described themselves as being an opposition party. That particular debate was relatively quickly resolved, however, with the Prime Minister's public confirmation that holding a ministerial warrant did mean that a person was part of the executive government.

The fact that the agreements say that the parties are not part of the "coalition government" leaves a semantic debate only about whether there is any difference between executive government and the coalition government. There is no difference in constitutional and legal terms (witness section 7 of the Constitution Act, which makes clear that

in the eyes of the law all Ministers are interchangeable). But as ever in this field, the formal law is only part of the story. There is clearly a difference in terms of the nature and closeness of the political relationships, and we can see these linguistic refinements as a genuine attempt to find language to reflect that. (A less charitable view would be that these contortions are no more than a political fig leaf for those concerned about reconciling their current ministerial positions with pre-election promises.)

What does it all mean?

What it means is that I need to redo my teaching diagramme, to take account of the fact that we have MPs who aren't Ministers directing policy and attending Cabinet committees, and Ministers who are somewhat coy about their governmental status and apparently will not attend Cabinet or committee meetings.

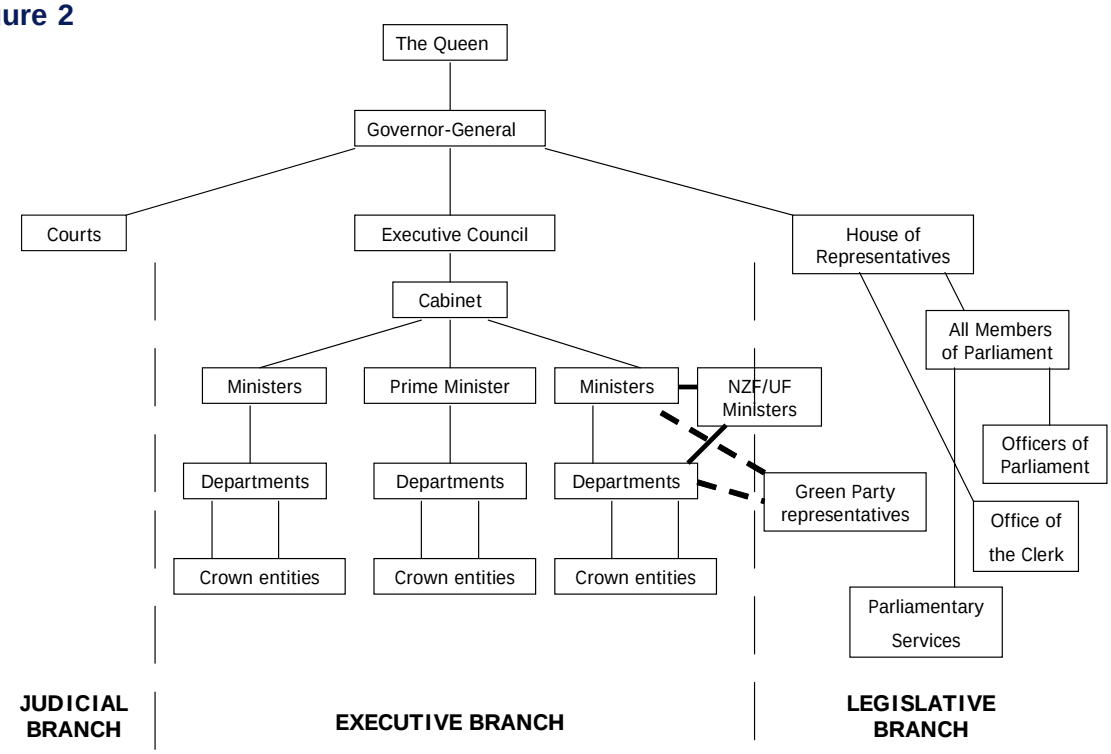
Figure 2 is my first attempt to represent the constitutionally more complex world that the new government arrangements have introduced. The key changes are some new lines (indicated in bold) that hover around and even cross the divide between the executive and the legislature.

For NZ First and United Future, those new lines are solid, as they represent the definite reporting and accountability lines that follow inevitably from holding a ministerial warrant. Officials do report to these Ministers, and their activities do ultimately feed back into collective decision making, even if the mechanisms for achieving that end may be different.

For the Greens, the lines are dotted. They are not formal accountability lines, but are more in the nature of new lines of communication and working relationships. The formal lines still go from officials to the relevant Minister, and through to Cabinet.

Whether any of these new lines are important may depend on whether you are a purist or a pragmatist, and whether you focus more on form or function. From a purist point of view, you can pick your adjective to describe what has now been created: unorthodox, weird – some opposition MPs have even suggested that it is a "constitutional outrage". For this camp, it is a black and white world and a Minister is either in or out of government, with no shades of grey.

Figure 2



For the pragmatists among us, however, the question is of course how it works in practice. We have a long tradition in New Zealand, and in the New Zealand public service in particular, of making things work no matter how strange they look at first sight. And as noted, in practice it was rapidly clarified that the two Ministers are in government, but that they are participating on different and more distant terms than other Ministers. The success of the arrangements will depend on the working relationships that develop, and how closely in practice the 'second tier' Ministers get woven into the executive.

The important question in practice is whether all of these people – Labour / Progressive Ministers, NZ First and United Future Ministers, and Green Party spokespeople – can develop ways of working together sufficiently closely for government business to be carried out. If they do, it will almost certainly require lots of time, and lots of talking. But it could work. To bring some current (but dubious) fashion into Bagehot's famous metaphor, it may be that rather than the firm clasp of the Cabinet buckle binding the legislature and the executive together, they would be joined by something that looks more like a macramé belt.

On the other hand, if the individuals concerned do not develop close and effective working relationships, and choose instead to demonstrate regularly and publicly that there are significant points of difference between the various political parties, then the situation may prove too unstable to endure for long.

The key is the agree to disagree process, combined with the language of "good faith" and "no surprises" that peppers the political agreements. The point, of course, is that the parties have to **agree** to disagree. Over the past six years of coalition government, this procedure has meant that all issues have been well worked through in discussion first. If there was to be public differentiation, that was well understood by all concerned and the steps that each would take were clearly signalled in advance. The process was also used sparingly. In that way, the stability of the overall government, and its ability to work collectively, was not jeopardised by the occasional issue where the parties were not able to support the same position in public.

This refinement to Cabinet collective responsibility has been shown to work, at least on an issue by issue basis. It is much too early to say how it will be used by NZ First and United Future, but one interpretation of the agreements and comments so far (including statements in the Speech from the Throne) is that there is an expectation that it will be available in a much more blanket way, potentially across entire sections of government activity. If so, that would provide much more of a challenge to the political discipline that arises from the convention of collective responsibility, and so would also increase the challenge to the cohesion and stability of the government. Even if such a broad application is contemplated now, in practice the parties may relatively rapidly pull back to a more sparing use if there is a sense that political stability is being threatened.

So are the changes good, bad, or neutral?

It is possible to argue that these new developments are simply some further steps along the same path of gradual change that New Zealand has been following over the last decade, both in relation to the nature of discipline of Cabinet collective responsibility, and the relationship between the legislature and the executive. These include:

- The development of the agree to disagree process within the convention of collective responsibility;
- The changing nature of party discipline, as evidenced by the growing strength and independence of select committees no longer dominated by the chain of majority government and Cabinet control of the governing party caucus;
- The growing use of collaborative relationships with other parties as part of the management of minority government and the practice of building of support for particular initiatives wherever possible across Parliament, irrespective of the general government / opposition divide;
- The development of new roles, such as parliamentary private secretaries, who are non-executive ministerial assistants, drawn from the Parliament (but so far within the government caucus); and
- The occasional but increasing practice of officials working with non-Ministerial MPs on legislation (albeit so far with government MPs and under close Ministerial supervision).

It is notable that in some respects, New Zealand was 'more Westminster than Westminster' in the way it operated Cabinet government by the second half of last century. The combination of a single chamber Parliament and a very tight system of party discipline, or 'whipping' of the party caucuses, meant that the Cabinet was able to exert very strong control over the system as a whole. For many years the relationship between the Cabinet and the Parliament, mediated through the caucuses, was tightly authoritative (hence the prevalence of phrases such as "elective dictatorship" and "unbridled power").

These days, the relationships are much more about discussion and persuasion than dictates from on high. This development brings us closer to the working reality of the United Kingdom Parliament, where there has always been a much higher incidence of open debate and disagreement, and where governments have had to work harder to build sufficient support for controversial reforms, even within their own caucuses.

Minority government has seen the evolution of the practice of building support for reforms on an issue by issue basis. Different groups form around different policies. The relationship between the executive and Parliament therefore has somewhat less of a tribal 'them and us' flavour – this morning's 'them' could be part of 'us' in a meeting after lunch. And isn't that what MMP was meant to be about? There was always the suggestion that proportionality, and the likelihood of more smaller parties in Parliament, might result in the adoption of more consistent, consultative and broadly supported policies. (See for example, the Report of the Royal Commission on the Electoral System, 1986, paragraph 2.182.)

It is important not to overstate this phenomenon – politics is still a blood sport – but defining the teams for any individual contest has certainly become more complex.

In summary, these changes to the way in which parliamentary and executive relationships operate, and as a consequence to the way in which Cabinet operates, need to be assessed as part of the ebb and flow of these relationships over decades and even centuries. They do not threaten the basic principles of representative and responsible government that are at the heart of our democracy. Whether they are able to be reconciled with the political disciplines needed to make democracy function relatively smoothly remains to be seen. But that is a political challenge, not a constitutional problem.

It is likely to be a significant political challenge, too. Such loosely based governing coalitions are highly unusual internationally, which suggests that they are not the first choice for many political and governmental leaders.

What does it mean for the conduct of government business?

More problematic may be the forensic detail of the governmental, public service and parliamentary processes that sit underneath these high level constitutional and political relationships. There are a thousand detailed rules, procedures, understandings and systems that let the bureaucracy function. Many of those are built on assumptions about how those big picture political relationships are structured. Accordingly, some of them may need to be revisited in light of the new government arrangements. Here I simply mention three examples.

First, it is standard practice for officials to consult widely across the government as they develop advice for Cabinet on a particular policy topic. Most issues have implications for several government agencies, and the strong expectation is that all relevant perspectives will have been brought together in a single piece of advice for the central and collective decision making body of Cabinet. Alongside that process for developing the Cabinet paper is the expectation that each agency will brief their own Minister on their perspective, and their contribution to the issue, as the paper comes to Cabinet.

Thus information flows within government are not just vertical – up and down between officials and their own Ministers – they are also horizontal, across government agencies and around the Cabinet table. If someone is effectively a Minister for some purposes and not for others (i.e. for their own portfolio only), do officials brief them on the agency's contributions on other issues? Or will they keep secrets from their own Minister, if the Minister is not involved in the particular policy? The pull of these processes is likely to mean that over time the NZ First and United Future Ministers will become more and more closely bound into the broad range of government business, by 1000 tiny threads across 1000 different issues.

Second, it has always been clear that public servants serve the government of the day. They provide advice to and are directed by Ministers. Public service dealings with other MPs, whether from government or opposition caucuses, have always been strictly controlled. Meetings occur only at the direction of the Minister and usually in the presence of his or her office staff, in order to keep the relationships clear. Meetings are in general briefings to provide information – any negotiation or brokering of policy agreements across party lines is the preserve of Ministers and ministerial advisers, not the job of a public servant. The closer involvement of Green MPs with government processes and the development of government policy seems likely to require some revision of these rules. No doubt the basic principle will be maintained, but the protocols that protect public service neutrality and lines of accountability may need to adapt to accommodate new working relationships.

Third, and building on the previous point, the Official Information Act (OIA) sets out grounds for withholding information in order to protect government decision making processes. These are written in broad terms, in order to give flexibility over time, but even so it is possible that they may not have sufficient flexibility to cope with officials working to non-Ministerial MPs. This will be an issue in relation to:

- section 9(2)(f)(iv), which enables information to be withheld "to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials"; and
- section 9(2)(g)(i), which enables information to be withheld "to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any Department or organisation in the course of their duty".

If the constitutional conventions are manifestly evolving, will the established understandings of the scope of the OIA provisions evolve also?

No doubt there will be answers to these and the many other procedural questions that will arise. Administrative systems are always flexible, and adapt. But it will take time to discover where old systems don't fit new relationships, and to work out new protocols and systems that continue to protect core values while accommodating new needs. As ever, we will learn by doing.

Conclusion

In the last Parliament, the Constitutional Arrangements Committee was established to describe New Zealand's constitutional development and to consider processes for future reform. The Committee's report records that it encountered an early problem in compiling such a description. In the absence of a written constitution,

> the primary difficulty was deciding what was and was not a significant event in New Zealand's *constitutional* development. There were many events that were clearly socially and politically significant … But were these events constitutional? (paragraph 20)
>
> Although the characterisation of New Zealand's constitutional history did not come easily to us, we rapidly agreed on the characteristic qualities of New Zealand's approach to constitutional change throughout its modern history. We adopted the tag of "pragmatic evolution". By this we mean New Zealanders' instinct to fix things when they need fixing, when they can fix them, without necessarily relating them to any grand philosophical scheme. (paragraph 26)

The agreements that enabled the new government to form are certainly pragmatic. Whether they endure, and become another step in New Zealand's constitutional development, is up to the individuals in the current Parliament. If it turns out that these new arrangements truly are a modern artistic masterpiece, who will claim to have painted it?

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Nicola White is a Senior Research Fellow at the IPS