



Cabinet Office

CO (11) 05

Circular

22 September 2011

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

Introduction

- 1 On 6 April 2011, guidance on decision making in the pre-election period was issued (see [CO \(11\) 2](#)). That guidance makes it clear that the caretaker convention does not apply in the pre-election period, and that (with the exception of significant appointments and government advertising) the government can continue operating as usual, including taking policy decisions, until the election.
- 2 This circular provides guidance on the constitutional procedures that apply after the general election. It includes key dates, a summary of the stages of the transition process between administrations, and references to other guidance material.
- 3 All Ministers, Ministers' offices, and government agencies are expected to follow these guidelines. For the purposes of this circular, "government agencies" means agencies in the state sector, including public service departments, other state services, agencies in the wider state sector (see [paragraphs 3.2-3.4](#) of the Cabinet Manual for a complete definition of the state sector), and other agencies within Ministers' portfolios that do not form part of the state sector.

Coverage

- 4 The State Services Commissioner will provide copies of this circular to agencies in the state sector, including non-Public Service departments, statutory Crown entities, Crown entity companies, organisations listed in the 4th Schedule of the Public Finance Act 1989, the Reserve Bank, tertiary education institutions, State Owned Enterprises, and the offices of Parliament. Public service chief executives should forward copies of this circular to the heads of other agencies within their Ministers' portfolios that do not form part of the state sector.

Key dates

- 5 Key dates in the immediate post-election period:
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|-------------------------|---|
| 26 November 2011 | Polling day. |
| 15 December 2011 | Day fixed for return of the writ: formal announcement of successful constituency candidates. Return of the writ is followed by declaration of the successful list members of Parliament. The return of the writ must be postponed until completion of any recount, and may be postponed in anticipation of any application for a recount. |
| 24 December 2011 | Ministers who are not returned as members of Parliament must leave office by this date. |
| 27 January 2012 | Parliament must meet by this day. The opening of Parliament involves the Commission Opening (day 1) and State Opening (day 2) including the Speech from the Throne. This date is a nominal date only. The actual first meeting day will be decided following the formation of the government. |
- 6 Other dates, such as the appointment ceremony for Ministers, the first meeting of the new Parliament, and the full resumption of government business, will not be known until after the election. This information will be provided as soon as it is available.

The caretaker convention

- 7 After polling day, the Prime Minister is likely to indicate that the incumbent government will operate in accordance with the convention on caretaker government until the political situation is resolved and Ministers have been sworn in.
- 8 During the caretaker period, Ministers continue to hold full executive authority. They are entitled to receive the same level of support they normally receive from departments and from agencies for which they are responsible, including being advised and getting information for the purposes of administering government business within their portfolios. Ministers should ensure that any requests they make for advice or information from their officials is for the purposes of their portfolio responsibilities and not for party political purposes (including negotiations to form a government).
- 9 Detailed information about decision making during periods of caretaker government, and the role of departments in that process are set out in the Cabinet Manual at [paragraphs 6.19-6.35](#). In summary, there are two arms to the caretaker convention:
- 10 Where it is not clear who will form the next government:
- 10.1 the normal business of government, and the day to day administration of departments and other agencies in the state sector may continue as usual;
 - 10.2 decisions taken and specific policy determined before the start of the caretaker period may usually be implemented;

- 10.3 decisions on significant issues, new policy or changes to existing policy, and issues with long-term implications should be deferred if possible. If deferral is not possible, then short-term solutions should be sought. If this is not feasible, then decisions should be made after consultation with other parties.

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

- 11 Where it is clear who will form the new government¹, but they have not yet taken office, the outgoing government should undertake no new policy initiatives, and should act on the advice of the incoming government on any significant constitutional, economic or other issue that cannot be delayed until the new government formally takes office – even if the outgoing government disagrees with the course of action proposed. Situations of this kind are likely to be relatively short-lived, as the [Constitution Act 1986](#) enables a swift transition between administrations.

Decision making in the period immediately after the election

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

Ministers who are not returned as members of Parliament

- 14 Current Ministers continue with their existing responsibilities after the election, until new ministerial appointments are made or their responsibilities are reassigned. Ministers who are not returned as members of Parliament may continue in office as caretaker Ministers for a period, but must leave office 28 days after polling day (Saturday, 24 December), under [section 6 of the Constitution Act 1986](#). The Cabinet Office will arrange for Ministers in this situation to submit their resignations to the Prime Minister and the Governor-General, if required.

The government formation period

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

Guidance on support from the state sector

- 16 Inter-party negotiations to form a government are the business of politicians, but negotiating parties may seek access to the state sector for information and analysis on issues that might form part of any coalition agreement.

¹ A party (or group of parties) must be able to demonstrate to the satisfaction of the Governor-General, through public statements, that it is able to command the confidence of the House of Representatives and therefore has a mandate to govern the country. See [paragraphs 18-19 below](#).

- 17 The State Services Commissioner (the Commissioner) manages any involvement by officials in the government formation process. The Commissioner has issued guidance in relation to this process, entitled “[Negotiations Between Political Parties to Form a Government: Guidelines on Support from the State Sector](#)”. It is expected that all agencies in the state sector will follow the process set out in the guidelines. Only the Prime Minister may authorise access by a political party to state sector agencies. The Commissioner is the contact point and facilitator between political parties and State sector agencies. If government agencies receive direct requests for information or assistance from political parties (including parties represented in the government), they should refer them to the Commissioner and notify the relevant department. Ministers must refer such requests to the Prime Minister.

The role of the Governor-General

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

Appointment of new government and allocation of portfolios

- 20 Once the outcome of any government formation process is known, the timing and arrangements for the transition from one administration to the next depend on a number of practical matters, including the allocation of portfolios. Portfolio responsibilities will not formally change until the current Ministers have resigned and the new Ministers have been appointed by the Governor-General.
- 21 In practice there is usually a period of some days between the formation of a new government and the new ministry taking office. Current Ministers continue in office, in a caretaker capacity, until new appointments are made (subject to [section 6 of the Constitution Act](#)).
- 22 It is the practice for a full appointment ceremony to be held when a government is formed after an election, even when the composition of the government has not changed greatly. The ceremony formally marks the formation and commencement of a new administration, and marks the end of the caretaker period.
- 23 Once the new ministry is ready to be sworn in, the Cabinet Office will arrange for all Ministers to submit their resignations to the Prime Minister and the Governor-General. The new ministry will be sworn into office and the Governor-General will sign the warrants appointing Ministers to particular portfolios.
- 24 Portfolio responsibilities may change after the election, either as a result of a reshuffle or a change of government. Agencies should not assume, therefore, that an existing Minister will retain a certain portfolio or that a party spokesperson for a certain portfolio will be appointed as the Minister for that portfolio.

Briefing an incoming government

- 25 In terms of the **timing** of briefing the incoming government, the following guidance should be considered:
- 25.1 If portfolio allocations have not yet been announced, chief executives of government agencies may, in cases of great urgency, provide advice to the incoming government, through the Prime Minister-designate, only after the express consent of the incumbent Prime Minister has been obtained and a process has been agreed with the State Services Commissioner. Chief executives may of course continue to brief the incumbent Minister on any current issues needing attention in the period before portfolios are announced.
- 25.2 With the knowledge of the incumbent Minister and the State Services Commissioner, and where appropriate the Prime Minister, chief executives of government agencies may, if necessary, brief new Ministers on their portfolio responsibilities between the announcement of portfolios and the formal appointment of the new Ministers.
- 26 Guidance on the **content** of briefings for incoming Ministers is set out in [paragraphs 3.10-3.15](#) of the Cabinet Manual, and in the Commissioner’s “Guidance on the preparation of briefings for incoming Ministers” in [Appendix 5](#) of the “Guidance for the 2011 Election Period”. While the briefing will be subject to the [Official Information Act 1982](#), there is no presumption of public release. Whether a briefing is released publicly is a matter for the Minister, not the department or agency, to decide (see [paragraph 3.13](#) of the Cabinet Manual).
- 27 Agencies in the wider state sector and agencies within Ministers’ portfolios that do not form part of the state sector would normally brief the incoming government through the relevant department. If an agency considers it appropriate to brief its Minister separately, it is expected that the agency will comply with the same rules that apply to departments concerning the timing, content, and release of briefings for incoming Ministers. If a separate briefing is provided, the agency should provide a copy of it to the relevant department.

Further guidance

- 28 Following the election, the Cabinet Office will issue further [circulars](#) on the practical requirements for decision making in the post-election period.
- 29 Further information is available as follows:
- 29.1 [Cabinet Office website](#). This includes:
- 29.1.1 “Elections, Transitions, and Government Formation”, [Chapter 6](#), Cabinet Manual;
- 29.1.2 “Briefing for Incoming Ministers”, [paras 3.10-3.15](#), Cabinet Manual;
- 29.1.3 “[Government Decisions and Actions in the Pre-Election Period](#)”, Cabinet Office circular (CO (11) 2);
- 29.1.4 “[Management of Parliamentary Business after the dissolution of Parliament](#)”, Cabinet Office circular (CO (11) 04).

29.2 [SSC website](#). This includes:

- 29.2.1 [State Servants, Political Parties, and Elections: Guidance for the 2011 Election Period](#);
- 29.2.2 “Guidance on the preparation of briefings for incoming Ministers” in [Appendix 5](#) of the Guidance for the 2011 Election Period
- 29.2.3 [General Election 2011: Questions and Answers for State Servants](#)(240kb PDF);
- 29.2.4 [General Election 2011: Factsheet for State Servants](#)(239kb PDF);
- 29.2.5 [Negotiations between Political Parties to Form a Government: Guidelines on Support from the State Sector](#).

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