

2023 Briefing for the Incoming Attorney-General

24 November 2023



MINISTRY OF
JUSTICE
Tabu o te Ture

Te Kāwanatanga o Aotearoa
New Zealand Government

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Introduction

This briefing provides an overview of:

- your functions in relation to the New Zealand Bill of Rights Act 1990 and judicial and statutory appointments in the Justice portfolio
- the Ministry of Justice's functions and duties.

This briefing complements advice from the Crown Law Office on your other roles and functions as Senior Law Officer of the Crown.

You will also receive a Briefing to Incoming Justice Sector Ministers prepared by the leaders of the six core justice sector agencies, who together make up the Justice Sector Leadership Board. That briefing outlines the areas where justice sector agencies need to work together to achieve shared outcomes in the criminal justice system.

Your role and responsibilities

The Attorney-General is the Crown's Senior Law Officer, and plays a key role in maintaining New Zealand's constitutional and justice institutions. The Attorney-General has principal responsibility for the government's administration of the law. This function is exercised in conjunction with the Solicitor-General, who is the Junior Law Officer.

As the Attorney-General, you are the link between the judiciary and the executive government. You will recommend the appointment of judges. You also have an important role in defending the judiciary by answering improper or unfair public criticism and discouraging ministerial colleagues from criticising judges and their decisions.

You also maintain an overview of key aspects of the rule of law, including ensuring the government is exercising its authority in accordance with the law. The Attorney-General must notify Cabinet of any proposals or government actions that do not comply with existing law, and propose a remedy. This complements the role of the Minister of Justice in relation to constitutional policy matters.

Further information on your role and responsibilities as Senior Law Officer of the Crown is set out in the briefing provided to you by the Crown Law Office. The Ministry of Justice supports you in relation to two specific aspects of your role, which are the focus of this briefing:

- your responsibility for reporting on the consistency of Bills with the New Zealand Bill of Rights Act 1990
- your responsibility for the appointment of most judges and certain other statutory appointments within the Justice portfolio.

For all the matters discussed in this briefing, officials in the Ministry of Justice work closely with the Crown Law Office.

Key relationships

You have key relationships with other members of the executive and the judiciary.

You work closely with the Minister of Justice. The Minister of Justice is responsible for constitutional policy matters, including maintaining the fitness of our constitutional laws and promoting respect for constitutional principles. They must be consulted on policy matters that have constitutional implications, including those affecting the rule of law as a core constitutional principle. The Minister of Justice also:

- has overall responsibility for the justice system and joint responsibility for the policy and law that provides how the courts and tribunals operate
- makes some quasi-judicial appointments, such as for tribunals.

Your role also involves working with other justice sector ministers to support the achievement of collective justice sector outcomes. The other justice sector ministers have been the

Ministers of Justice, Police and Corrections, Minister for Courts, Minister for Children (as the minister responsible for youth justice policy), and the Minister responsible for the Serious Fraud Office. The group of Justice Sector Ministers is supported by a Justice Sector Leadership Board, which comprises the heads of the six core justice sector agencies (Ministry of Justice, New Zealand Police, Department of Corrections, Crown Law, Serious Fraud Office, and Oranga Tamariki) and is chaired by the Secretary for Justice.

You hold the primary relationship with the Chief Justice, the Rt Hon Dame Helen Winkelmann GNZM, who is the head of the judiciary, and with the Heads of Bench (the senior judges who head their respective courts). The Chief Justice would typically also meet periodically with the Minister of Justice and the Minister for Courts. In addition, given the Chief Justice's role as the head of the judicial branch of government, it would be appropriate that she meets with an incoming Prime Minister early in a new term.

New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 affirms, protects and promotes human rights and fundamental freedoms in New Zealand. It also affirms New Zealand's commitment to the International Covenant on Civil and Political Rights, one of the core international human rights treaties.

Each Government Bill is assessed for consistency with the Bill of Rights Act before it is introduced to the House (members' Bills are assessed as soon as possible after introduction). If a Bill has no effect on rights in the Bill of Rights Act or infringes those rights only to the extent that can be demonstrably justified in a free and democratic society, it will be consistent with the Bill of Rights Act. If you consider a Bill appears to be inconsistent with the Bill of Rights Act, you must report the inconsistency to the House. A Bill can still be enacted if it is inconsistent with the Bill of Rights Act.

Assessing Bill of Rights consistency has a range of benefits. It enables ministers to be alerted early about matters that may pose problems from a Bill of Rights perspective, and to consider how those problems can be addressed. This helps smooth the passage of Bills through the legislative process and may mitigate the risk of future legal challenge on Bill of Rights grounds. It also:

- encourages officials to find ways to avoid Bill of Rights inconsistency in policy proposals and legislative drafting where possible
- ensures that any proposed limits on fundamental rights are identified and that any justification for limiting rights is set out clearly.

The reporting function strengthens the legislative process by ensuring that select committees and Parliament are well informed about the human rights implications of draft legislation.

Reporting on the consistency of draft legislation with the Bill of Rights Act

When a Bill is introduced

Section 7 of the Bill of Rights Act requires the Attorney-General to advise the House of Representatives if any provision in a Bill appears to be inconsistent with any of the rights and freedoms affirmed in that Act.

If a Bill appears inconsistent with the Bill of Rights Act, the Attorney-General must advise the House:

- when the Bill is introduced, if it is a Government Bill, or
- as soon as practicable after the Bill is introduced, if it is a members', private or local Bill.

Officials review all Bills (except appropriation Bills) and advise the Attorney-General whether they appear consistent with the Bill of Rights Act. The Ministry of Justice does this for most Bills. The Crown Law Office reviews Bills developed by the Ministry of Justice.

Where the Attorney-General agrees that a Bill is inconsistent with the Bill of Rights Act, a separate report of inconsistency (section 7 report) is prepared for tabling in the House.

The CabGuide requires all final versions of Government Bills to be with the Ministry of Justice or the Crown Law Office at least two weeks before the relevant Cabinet committee meeting, which is usually the Cabinet Legislation Committee. This allows time for advice on Bill of Rights consistency to be provided to and considered by the Attorney-General before the meeting.

Reports of inconsistency (section 7 reports) at select committee

If a Bill appears to be inconsistent with the Bill of Rights Act, the section 7 report is automatically referred to the select committee considering the Bill.

Select committees generally ask the Attorney-General or officials to appear and speak to the section 7 report. The committee's report to the House about the Bill will note the issues raised in the section 7 report.

Post-introduction amendments to Bills

Bills are frequently amended during the legislative process, sometimes substantially. There is no statutory requirement for the Attorney-General to assess or report on whether post-introduction amendments appear to be consistent with the Bill of Rights Act. Previous Attorneys-General have provided their views to select committee on post-introduction amendments on a case-by-case basis. Select committees may request advice from the Attorney-General, but it is a matter of discretion for the Attorney-General whether to provide the advice.

The Review of Standing Orders 2023 recommended changing Standing Orders to expressly recognise that the Attorney-General may report to the House on whether post-introduction amendments or proposed amendments to Bills are consistent with the Bill of Rights Act. This change to Standing Orders was adopted by the House.

This change does not create any new requirement to assess or report on post-introduction amendments for Bill of Rights consistency. The Attorney-General already has the discretion to present a paper to the House about whether amendments to Bills are consistent with the Bill of Rights Act. Changing Standing Orders in this way simply makes that discretion explicit.

The Review did not recommend that the Attorney-General review every amendment to a Bill, as that would add considerable compliance costs. The Review agreed there may be value in reviewing amendments for Bill of Rights consistency when:

- the Bill being amended was subject to a section 7 report at introduction. The only current Bill to which this applies is the Ram Raid Offending and Related Measures Amendment Bill (subject to the reinstatement of business motion in the House)
- the Bill was introduced with the expectation of requiring substantial amendment during the legislative process
- a proposed amendment has clear Bill of Rights Act implications.

There is a choice about how to approach the assessment of amendments to Bills and whether and how the approach is formalised – for example, whether to develop and promulgate guidelines about when amendments will generally be assessed for consistency with the Bill of Rights Act. The Review of Standing Orders noted the then Attorney-General's intention to consider whether there is a role for additional guidance in this area.

We will advise you on these matters in due course. Any increase in post-introduction assessment of Bills would have resource implications that would need to be worked through.

Declarations of inconsistency

A declaration of inconsistency is a formal statement by a court or tribunal that an Act is inconsistent with a plaintiff's fundamental human rights protected by the Bill of Rights Act. It does not change the law or affect the validity of the legislation in question.

If a senior court makes a declaration of inconsistency, the Attorney-General is legally required to notify the House of that declaration. This requirement was introduced in 2022.¹

¹ This obligation arises under section 7A of the Bill of Rights Act. The Attorney-General must also notify the House where the Human Rights Review Tribunal, or a senior court on appeal from the Tribunal, declares an enactment to be inconsistent with the right to be free from discrimination (section 19 of the Bill of Rights Act) under the Human Rights Act 1993.

To date this process has been used once, following the Supreme Court's declaration of inconsistency in *Make it 16 Incorporated v Attorney-General* [2022] NZSC 134. We will advise you on this process if any further declarations of inconsistency are made.

Privilege and publication of Bill of Rights Act advice since 2003

Since 2003, officials' legal advice on Bill of Rights Act consistency has been published on the Ministry of Justice website as soon as practicable after a Bill is introduced.

Officials seek the Attorney-General's approval to publish each piece of advice. The Attorney-General has the right to maintain legal professional privilege in respect of any Bill of Rights Act advice.

The Attorney-General retains legal professional privilege in respect of:

- unpublished advice written before January 2003
- unpublished advice written after January 2003 on Bills where the Attorney-General has tabled a section 7 report in the House of Representatives. In those cases, the section 7 report is published rather than the advice.

Legal advice on Bill of Rights Act consistency is not subject to the Official Information Act 1982, as the Attorney-General acting in their Law Officer capacity is outside the scope of the Official Information Act. Attorneys-General have considered requests to release such advice on a case-by-case basis.

Appointments

The Appointments and Specialist Functions Unit (the Appointments Unit) is part of the Ministry of Justice's Office of Legal Counsel. The Appointments Unit (which hosts the Attorney-General's independent Judicial Appointments Unit) supports the Attorney-General and the Minister of Justice by administering the appointments process for a range of judicial appointments.

The Appointments Unit supports the process for the appointment of District Court judges and acting judges. Appointments to the Senior Courts are supported by the Crown Law Office.

The Appointments Unit supports the processes for the appointment of Family Court Associates, community magistrates, acting community magistrates, and justices of the peace.

The support provided includes general advice including resource implications, report writing for assessment panels, drafting Cabinet materials and formal appointment documentation.

The Ministry supports you in relation to the following appointments:

- District Court judges
- Coroners, including relief and associate coroners

- Employment Court judges
- Environment Court judges and Commissioners
- Family Court Associates – this is a new role for which the first round of appointments is underway – we will update you on this as soon as practicable
- Chair of the Immigration and Protection Tribunal
- Issuing Officers, who consider applications for search warrants and production orders under the Search and Surveillance Act 2012
- Judges of the Court Martial
- Judicial Conduct Commissioner and Deputy Commissioner
- Legislation Design and Advisory Committee members
- New Zealand Parole Board Chairperson, panel convenors, and lay members.

The Ministry also administers appropriations that fund salaries and allowances for judges, coroners and community magistrates, but the level of these payments is determined by the independent Remuneration Authority. Some terms and conditions for judicial officers are set by you, in consultation with the relevant head of bench and the Secretary for Justice.

Upcoming matters

Upcoming briefings seeking your decision

Topic	Description of advice	Likely timing
Family Court Associates	Update on candidate interviews and decision sought on preferred candidates	December 2023
Coroners' Terms and Conditions	Seeking decisions on amendments to the terms and conditions	January 2024

Introducing the Ministry of Justice – Te Tāhū o te Ture

The Ministry of Justice supports the Minister of Justice, the Minister for Courts and the Attorney-General to carry out their responsibilities. It also delivers a range of court and justice services to New Zealanders.

The Ministry operates in 58 towns and cities throughout New Zealand, with over 4,700 staff. Most of our people support court-based operations.

The Ministry's purpose is to strengthen people's trust in the law of New Zealand. This guides everything we do and is supported by seven strategic priorities.

Two of these priorities weave across the whole of our strategy:

- Improve justice outcomes for Māori
- Build a Ministry where all our people thrive.

The other five priorities are:

- Bring the strength of communities into courts and tribunals
- Reduce the harm experienced by victims and their whānau
- Steward our policy and regulatory systems
- Improve access and experiences for participants in courts and tribunals
- Play a leading role to deliver an integrated sector-wide response.

Providing a range of justice services

Our key operational role is to support the judiciary, and the courts and tribunals. We provide registry and administrative services necessary to support the judicial administration of the court system and independent judicial decision-making. Administrative support includes providing core infrastructure, like property and information and communications technology, as well as court security, transcription services and staff to work in court registries. We support 27 tribunals and authorities. We also:

- administer the legal aid system, helping people who can't afford a lawyer to get legal advice and representation. We processed 80,488 legal aid applications in 2022/23
- operate an independent criminal law practice, the Public Defence Service – New Zealand's largest criminal law practice with over 150 criminal defence lawyers in 10 offices across New Zealand

- collect unpaid infringements lodged in court, court fines and reparations, with over \$172 million collected in fines in 2022/23
- carry out criminal conviction history checks – 596,826 criminal conviction history checks were processed in 2022/23
- contract with approximately 145 third-party providers to deliver a variety of programmes and services, which can include supporting directions given by the judiciary or allow people to resolve their matters without needing to come to court
- provide funding for community law centres, which provide free legal services and law-related education to New Zealanders. 40,042 clients were assisted with legal advice, assistance, and representation by Community Law Centres in 2022/23.

Working with the Justice Sector Leadership Board

Justice Sector Ministers and the Justice Sector Leadership Board are supported by cross-sector functions including the Justice Sector Directorate, a small team hosted within but functionally separate from the Ministry of Justice.

You will receive further information about the Justice Sector Leadership Board and its work in the Briefing to Incoming Justice Sector Ministers.

Key contacts



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