

Briefing for Incoming Minister

December 2023



INTRODUCTION TO THE LAW COMMISSION

1. This briefing provides the Minister with information about Te Aka Matua o te Ture | Law Commission (the Commission), the Minister's role in relation to it and matters for the Minister's early attention and to note.
2. The Commission would welcome a meeting with the Minister to discuss how the Commission's future work programme, expertise and capacity aligns with the Government's priorities.

BACKGROUND

3. The Commission is New Zealand's statutory law reform agency. Its key value to the Government is its ability to provide law reform advice on issues that may be difficult for departments to address because they are very complex, involve multiple sectors or would benefit from independent review. Due to the Commission's extensive research, analysis and consultation processes, its independence, and the high calibre of Commissioners and staff, the Commission has a longstanding reputation for producing high quality, credible and implementable law reform advice on a lean budget.
4. The Commission is an Independent Crown Entity operating under the Law Commission Act 1985 (the Act). Its key function is to make recommendations for the reform and development of the law of New Zealand. A Cabinet Office circular sets out the process for you to follow when setting the Commission's work programme and preparing the government's response to its reports.¹

Who we are

5. Under the Act, the Commission must have between 3 and 6 Commissioners. Currently, the Commission is operating with the minimum of 3 Commissioners (their biographies and terms of appointment are in the Appendix). The Commissioners are the board for the purposes of the Crown Entities Act 2004 and the President of the Commission holds the office of Chief Executive.
6. The Commission has a small team of legal and policy advisers (approximately 16.5 FTE) and corporate support staff (4.8 FTE).

Our publications

7. Commission reports have underpinned many substantial reforms of the law – most recently, for example, the Incorporated Societies Act 2022, the Sexual Violence Legislation Act 2021, the Privacy Act 2020, and the Trusts Act 2019.
8. In 2023, the Commission published a comprehensive study paper on the interaction between tikanga and the common law and legislation. In 2022, it published two final reports – one on class actions and litigation funding and one on the legal arrangements for surrogacy. It also published a study paper on the legal framework for emergencies.

¹ CO (09) 1 Law Commission: Processes for Setting the Work Programme and Government Response to Reports.

Our funding

9. The Commission is funded by an annual appropriation of \$4.205 million. A significant proportion of expenditure relates to rent and personnel. Remuneration of Commissioners is set by the Remuneration Authority and consumes 26% of the appropriation.
10. Baseline funding has been static since 2013 (apart from a small increase from 2023/24). It was originally set to be sufficient to fund four Commissioners and associated staff. Over the intervening years, costs have risen, and it has been necessary to reduce the level of operations. The Commission is currently spending historical reserves. On current projections, baseline funding and historical reserves will become insufficient to support the three-Commissioner model (the statutory minimum) in the 2025/26 financial year.

CURRENT WORK PROGRAMME

11. The Commission currently has five projects on its work programme, of which the following four are in progress:
 - **Third review of the Evidence Act** – led by the Commission's President, Amokura Kawharu.
This report will be delivered to the Minister in February 2024.
 - **Adult decision-making capacity** – led by Commissioner Geof Shirtcliffe.
This report is expected to be delivered to the Minister in December 2024.
 - **Preventive detention and post-sentence orders** – led by Principal Adviser John-Luke Day (the Commissioner responsible is Amokura Kawharu).
This report is expected to be delivered to the Minister in December 2024.
 - **Anti-discrimination protections for people who are transgender, non-binary or have innate variations of sex characteristics** – led by Commissioner Claudia Geiringer.
This report is expected to be delivered to the Minister by mid-2025.
12. The fifth project on its work programme relates to legal responses to hate, covering both hate speech and hate crime. It has not been commenced.

MINISTER'S RESPONSIBILITIES RELATING TO THE COMMISSION

13. As Minister Responsible for the Law Commission, the Minister has responsibilities under the Act relating to setting the Commission's work programme, appointing Commissioners and presenting the Commission's reports to Parliament. When the Commission publishes a report relating to the justice sector, the Minister has additional responsibilities as the Minister of Justice. We describe these responsibilities below.

Referrals of new projects

14. Each year the Minister will typically refer one or more new projects to be commenced when existing projects are finished. Projects are normally multi-year and are staggered so they generally do not start or finish at the same time.

15. Cabinet has directed that proposed projects should meet one or more of the following criteria:²
 - involve issues that span the interests of a number of government agencies and professional groups;
 - require substantial, long term commitment or fundamental review;
 - involve extensive public or professional consultation;
 - need to be done independently of central government agencies because of the existence of vested interests, or a significant difference of views;
 - require independent consideration in order to promote informed public debate on future policy direction;
 - involve technical law reform of what is often called “lawyer’s law” that would be likely otherwise to escape attention.
16. Ministers are asked when proposing new projects to comment on how they align with government priorities and to confirm that departmental resources will be made available to support the Commission’s work and to advise the Government on its response to the Commission’s final report.
17. In addition, there are other considerations for the referral of new projects to the Commission:
 - **Cross-sector range of projects**
A range of projects ensures the benefits of law reform are spread across sectors and the resources required for implementation do not all need to come from one department. For several years, Commission projects have almost exclusively related only to the justice sector.
 - **Timing of projects**
The Commission needs to carefully align the commencement and other stages of a project with available resources. This is particularly tricky in a small organisation. For planning and reporting purposes, the Cabinet Office circular requires that the Commission’s annual work programme is confirmed before the start of the financial year, i.e. 1 July each year.
18. In 2023, the Ministry of Justice, in consultation with the Commission, commenced a review of the process for determining the Commission’s work programme. An objective of the review is to improve coordination between the Ministry and the Commission in relation to the work programme. A likely outcome of the review would be a revision of the Cabinet Office Circular CO (09) 1. The Commission would welcome the opportunity to continue to work with the Ministry on that review.

Make recommendations for the appointment of Commissioners

19. Commissioners are appointed by the Governor-General on the Minister’s recommendation.³ Unless there is increased funding for a fourth Commissioner, or an unexpected departure of

² CO (09) 1 Law Commission: Processes for Setting the Work Programme and Government Response to Reports, para 8.

³ Section 28, Crown Entities Act 2004.

a current Commissioner, a new appointment is not required until May 2025 (when the current President's term expires).

20. Commissioners are generally senior members of the legal profession who come to the Commission from leadership roles within academia, legal practice or the judiciary. It is important for the integrity of the Commission's work and processes that Commissioners have strong reputations and a spread of expertise in a range of areas of the law and New Zealand society. Appointments for the role of the President of the Commission are particularly important due to the outward-facing nature of that role and the significant influence of that person on the culture of the organisation. Given the Commission's small size, it is also important that Commissioners are able to develop strong professional relationships with each other and staff.

Respond to reports

21. The Minister must present all Law Commission reports to Parliament as soon as practicable after receipt of them.⁴
22. When a report relates to the justice sector, the Minister (acting as the Minister of Justice) must seek Cabinet agreement on how to respond to the Commission's recommendations.⁵ If Cabinet accepts the Commission's recommendations, no formal government response is required although one is often made in practice. If Cabinet rejects the recommendations, the government must present a formal response to the House within 120 working days of the presentation of the report.⁶

MATTERS FOR EARLY ATTENTION

23. There is one matter that will require the Minister's attention in early 2024 and one other matter for the Minister's consideration.

Future work programme

24. In early 2024, the Commission will begin discussions with the Ministry of Justice about the future work programme. In addition to the Government's priorities, those discussions will consider the Commission's capacity and current expertise.
25. The Commission will have capacity to begin two projects in late 2024. These will be determined through the process under the Cabinet Office circular, which will include advice to you from the Ministry of Justice.
26. As mentioned, the Commission currently has the project relating to hate speech and hate crime sitting on its work programme but not yet commenced. If that project remains a government priority, the Commission will need one further project confirmed before 1 July 2024. We are aware that the Coalition Agreement between the New Zealand National Party and New Zealand First envisages that the Commission should not commence work on hate speech. We anticipate that, when the Commission's work programme for 2024/25 is settled,

⁴ Section 16(2), Law Commission Act 1985.

⁵ CO (09) 1 Law Commission: Processes for Setting the Work Programme and Government Response to Reports, at 13.

⁶ CO (09) 1 Law Commission: Processes for Setting the Work Programme and Government Response to Reports, at 16.

the Minister will confirm whether the hate crime aspect of this project will remain or be replaced by a new project.

Implementation of recently completed reports.

27. Three recent reports provide opportunities for the Minister to make quick progress on reform in the justice sector.⁷

Class actions and litigation funding

28. In this 2022 report the Commission recommended the creation of a statutory class actions regime including a new Class Actions Act as the key source of class actions law. The report found that group litigation has significant benefits, particularly in terms of access to justice and efficiency, but that the current procedural rules are inadequate, leading to uncertainty, additional cost, and delay.
29. The Commission also examined litigation funding. The report recommended reforms to clarify the permissibility of litigation funding and manage concerns about the provision of funding in both class actions and ordinary litigation. Its recommendations on litigation funding complemented the proposals for class actions. The report included several draft statutory provisions for class actions legislation covering key recommendations on class actions procedures and the provision of litigation funding.
30. The Commission understands that the Ministry of Justice has done further policy work to understand the operational implications of the Commission's recommendations and has discussed drafting matters with the Legislation Design and Advisory Committee.

Relationships Property law and Succession law

31. In 2016, the Commission commenced a major review of family property law. This resulted in the following two reports:⁸
- In 2019, a review of the Property (Relationships) Act 1976, which concerns how property owned by either or both partners is divided when they separate.
 - In 2021, which concerns a review of succession law about the rights to a person's property on death.
32. The Commission concluded that significant aspects of the law are not fit for purpose. In some cases, they no longer reflect contemporary public attitudes and expectations. In others, the law is old (some of succession law is 70 years old), unclear and leaves too much discretion in the hands of judges. Complexity and the lack of predictable outcomes lead to unnecessary litigation and costs. The Commission made a number of recommendations to address these issues.

⁷ There are also other, older reports for which implementation work remains outstanding. We are available to support Ministers in this, as required.

⁸ Te Aka Matua o te Ture | Law Commission *Review of the Property (Relationships) Act 1976 – Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019); Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana / Review of succession law: rights to a person's property on death* (NZLC R145, 2021).

MATTERS TO NOTE – BILLS BEFORE THE HOUSE

33. There were two members' bills before the House at the end of the previous Parliament that related to past or current Commission projects. Early in the current Parliament, decisions about the reinstatement of parliamentary business will include whether these bills are reinstated.

Improving Arrangements for Surrogacy Bill

34. This member's bill, sponsored in the previous Parliament by Tāmati Coffey, was introduced in September 2021.⁹ It is intended to simplify surrogacy arrangements, ensure completeness of information recorded on birth certificates and provide a mechanism for the enforcement of surrogacy arrangements.
35. Prior to that, in 2020, the Government had asked the Commission to conduct a review of surrogacy. The Commission published its report in May 2022 around the same time the member's bill had its first reading and was referred to the Health Select Committee.¹⁰ The Commission concluded there was a pressing need for reform of the law and made 63 recommendations for a new framework for determining legal parenthood in surrogacy arrangements and otherwise improving surrogacy law and practice.
36. The Health Committee was granted an extension for its report to enable it to consider how it would incorporate the Commission's recommendations into the bill. In May 2023, the government adopted the bill as a government bill and, in June and August, the Committee instructed Parliamentary Counsel to redraft the bill, incorporating amendments that reflected the Commission's recommendations.

Human Rights (Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics) Amendment Bill

37. This bill, sponsored in the previous Parliament by Dr Elizabeth Kerekere MP, was introduced in August 2023.¹¹ It is intended to clarify the extent to which people in New Zealand are protected from discrimination based on their gender identity, gender expression or sex characteristics.
38. This bill covers similar issues to those currently being examined in the Commission's project on anti-discrimination protections for people who are transgender, non-binary or have innate variations of sex characteristics. We understand the Bill is now being sponsored by Debbie Ngarewa-Packer MP.

⁹ [Improving Arrangements for Surrogacy Bill](#).

¹⁰ Te Aka Matua o te Ture | Law Commission *Te Kōpū Whāngai: He Arotake | Review of Surrogacy* (NZLC R146, 2022).

¹¹ [Human Rights \(\(Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics\) Amendment Bill](#).

Commissioner Biographies



Dr Amokura Kawharu (Ngāpuhi,
Ngāti Whātua)

Amokura has practised commercial law in Auckland and Sydney and worked in academia – specialising in commercial and investment arbitration, property law and international economic regulation. She is the co-author (with Sir David Williams KC) of New Zealand's leading treatise on arbitration law. Amokura is a Barrister of the High Court of New Zealand, a Fellow of the Arbitrators' and Mediators' Institute of New Zealand (FAMINZ) and a Fellow of the Royal Society of New Zealand (FRSNZ). She has a BA/LLB (Hons) from Auckland University, an LLM from the University of Cambridge and a PhD from Te Herenga Waka | Victoria University of Wellington.

Term: May 2020-2025



Geof Shirtcliffe

Geof Shirtcliffe was for 22 years a partner in the Wellington office of Chapman Tripp, where he specialised in corporate transactions, securities offerings and corporate governance. Geof also advised a number of governments and regulatory bodies on commercial law reform matters. Prior to becoming a lawyer, he worked in finance.

Geof is a past president of the Law and Economics Association of New Zealand. For two years he taught the Business Associations course at Te Herenga Waka | Victoria University of Wellington. He has a BA (Hons) and LLB (Hons) from Te Herenga Waka | Victoria University of Wellington and an MA from University of London.

Geof is a Barrister and Solicitor of the High Court of New Zealand and the Deputy President of the Commission.

Term: October 2021 -2026



Professor Claudia Geiringer

Claudia Geiringer holds the Chair in Public Law at Victoria University of Wellington Faculty of Law (on leave while she serves her term on the Commission). She is a Barrister of the High Court of New Zealand and a Fellow of the Royal Society of New Zealand (FRSNZ). She is a former Crown Counsel at the Crown Law Office and a former Acting Special Counsel for the Victorian Government Solicitor's Office (in Australia). Claudia has a BA(Hons) in history from Otago University, a LLB from Victoria University of Wellington and a LLM from Columbia University where she was a Fulbright scholar, Ethel Benjamin Scholar and Human Rights fellow. Her areas of practice and scholarship have spanned constitutional law, human rights law, electoral law and the laws of Parliament, immigration law and citizenship law.

Term: May 2022-2027



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Information about the commission and its work is available from the Commission's website at www.lawcom.govt.nz
