

**Hon Andrew Little**  
Minister of Justice

**Proactive release – Contempt of Court Bill: Approval for Government Supplementary Order Paper**

Date of issue: 29 August 2019

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1	<b>Contempt of Court Bill: Approval for Government Supplementary Order Paper</b> <i>Cabinet paper</i>	Paragraph 28 and part of 30(1) have been withheld in accordance with the following section of the OIA: <ul style="list-style-type: none"><li>section 9(2)(h) to maintain legal professional privilege.</li></ul>
2	<b>Supplementary Order Paper</b>	The final SOP tabled on 6 August is publicly available from <a href="http://www.legislation.govt.nz">www.legislation.govt.nz</a> . The Bill as reported from the committee of the whole House incorporates the SOP and is also publicly available at <a href="http://www.legislation.govt.nz">www.legislation.govt.nz</a> .
3a	<b>Contempt of Court Bill: Supplementary Order Paper</b> <i>LEG Minute,</i> LEG meeting of 30/07/2019	Released in full.
3b	<b>Contempt of Court Bill: Supplementary Order Paper</b> <i>CAB Minute,</i> CAB meeting of 05/08/2019	Released in full.
3c	<b>Contempt of Court Bill: Supplementary Order Paper</b> <i>LEG Minute,</i> LEG meeting of 06/08/2019	Part of paragraph 1 has been withheld in accordance with the following section of the OIA: section 9(2)(h) to maintain legal professional privilege.

In Confidence

Office of the Minister of Justice  
Cabinet Legislation Committee

## **Contempt of Court Bill: Approval for Government Supplementary Order Paper**

### **Proposal**

- 1 I seek approval to table a Government Supplementary Order Paper (SOP) to:
  - 1.1 re-insert an offence prohibiting the publication of false statements about a Judge or a court (which was removed by the Justice Committee) into the Contempt of Court Bill ("the Bill"); and
  - 1.2 implement Cabinet's decision to retain that offence in the Bill but with a narrower formulation and a lower maximum penalty [CAB-18-MIN-0590, SWC-18-MIN-0169 refers].

### **Background**

- 2 Contempt of court covers a range of actions that risk undermining the administration of justice and public confidence in the justice system. In 2017 the Law Commission completed a review of the law of contempt. The Law Commission recommended substantially codifying contempt of court to clarify the law, make it more accessible and modernise it to accommodate developments in the digital age.
- 3 The draft Bill, which was appended to the Law Commission's report, was introduced as a Member's Bill in the name of Hon Christopher Finlayson on 22 March 2018 and referred to the Justice Committee for consideration. On 18 June 2018 Cabinet agreed to adopt the Bill as a Government Bill and add it to the Government's 2018 Legislation Programme [CAB-18-MIN-0278, SWC-18-MIN-0070].
- 4 In December 2018 Cabinet agreed substantive policy changes to the Bill [CAB-18-MIN-0590, SWC-18-MIN-0169 refers]. Cabinet's decisions were incorporated into the Departmental Report on the Bill and presented to the Justice Committee. The Committee incorporated all but one of the Government's recommended changes to the Bill as reported back on 5 April 2019.
- 5 I am proposing to table a Government SOP to give effect to the Cabinet policy decision to retain but modify the offence prohibiting the publication of false statements about a Judge or a court. The Justice Committee rejected the Government's recommendation on this provision and instead removed the offence from the Bill.
- 6 The Bill as reported back completed its second reading on 18 June 2019.

**Policy**

- 7 The common law includes a contempt known as ‘scandalising the court’ which comprises attacks upon the integrity and impartiality of the judiciary that are serious enough to create a real risk of undermining public confidence in the administration of justice. The Bill as introduced proposed replacing ‘scandalising’ with an offence of making allegations or accusations against judges and the courts that pose a real risk to public confidence in the independence, integrity and impartiality of the judiciary. The defendant would have a defence if they could prove the allegations or accusations they made are true or not materially different from the truth.
- 8 The offence was the most contentious aspect of the Bill. Submitters expressed concern about the impact of the offence on freedom of expression, including the risk it would stifle legitimate criticism of judges and the courts and have a chilling effect on academics, lawyers and others who wish to comment on the courts. Submitters also considered the offence may itself undermine public confidence in the courts by providing the courts with special protections not afforded to others.
- 9 While I acknowledge these concerns, I consider the offence should be modified to address them rather than be removed from the Bill entirely, as the Justice Committee has recommended.
- 10 The offence has an important role to play in protecting the rule of law. Members of the judiciary currently experience unwarranted attacks and abuse. These include websites, blogs and social media entries containing offensive material about judges; websites containing false and extreme criticisms of judges; and picketing with placards outside judges’ homes. Leaving this behaviour unchecked risks undermining public confidence in the courts and the administration of justice.
- 11 Civil remedies available under the law for dealing with such behaviour (defamation, trespass, harassment and harmful digital communications) are inadequate for this purpose because judges must initiate action personally. More importantly, neither these remedies nor any existing criminal offences address the essential purpose of maintaining public confidence in the judiciary as an institution.
- 12 A statutory offence also provides an important backstop to assist the Attorney-General and Solicitor-General in their constitutional function of defending the judiciary and upholding the rule of law. Both law officers strongly support retention of the offence in a modified form.
- 13 In November 2018 I recommended to Cabinet that the offence in the Bill be retained but improved to target more expressly the behaviour of concern and reducing the maximum penalty. Also, instead of requiring a defendant to prove that an allegation or accusation was true, I recommended that the falsity of a statement should instead be an element of the offence to be proved by the prosecution beyond reasonable doubt.
- 14 Cabinet accepted those recommendations and agreed to retain and modify the offence so that:
- 14.1 the offence criminalises false statements of fact about a judge or a court that the person knew, or ought reasonably to have known, could undermine public confidence in the independence, integrity, impartiality or authority of the judiciary or a court, and there is a real risk the statement could do so;

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14.2 the maximum penalty for the offence is reduced from less than 2 years imprisonment (the Bill's highest maximum penalty) to up to 6 months imprisonment (which aligns with the Bill's other maximum penalties).

- 15 The SOP I now seek leave to table amends the Bill to insert new clause 24A which gives effect to Cabinet's decision. It also includes, as a consequential amendment, the re-insertion of a related procedural provision. New clause 24B provides that the Solicitor-General's consent is required for prosecution of the offence and that the charge is transferred to and tried in the High Court. This provision was previously included in the Bill as introduced but was removed by the Justice Committee when the offence was removed.

### Impact analysis

- 16 As the Bill was a Member's Bill when introduced, regulatory impact analysis on the Bill was not undertaken prior to introduction. A Regulatory Impact Statement (RIS) was prepared and submitted to Cabinet in 2018 when the proposals for substantive policy changes to the Bill (including the one contained in the SOP) were considered [CAB-18-MIN-0590, SWC-18-MIN-0169 refers]. The Ministry of Justice's Regulatory Impact Analysis Quality Assurance Panel considered that the information and analysis summarised in the RIS met the QA criteria.

### Compliance

- 17 The SOP complies with:
- 17.1 the principles of the Treaty of Waitangi;
  - 17.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993; (The Ministry of Justice assessed the consistency of the Bill with the New Zealand Bill of Rights Act 1990 prior to the Bill's introduction. The Ministry's advice to the Attorney-General was that the Bill engaged several rights under the Act (ss 14 (freedom of expression), 22 (liberty of the person) and 25 (minimum standards of criminal procedure)) but appeared to be consistent with those rights. The amended version of the offence included in the SOP gives a higher value to freedom of expression than the Bill as introduced.)
  - 17.3 the disclosure statement requirements; (The Bill was a member's Bill when introduced so a disclosure statement was not required. A disclosure statement has not been prepared for the amendment in the SOP because it will not materially change the Bill as introduced.)
  - 17.4 the principles and guidelines set out in the Privacy Act 1993;
  - 17.5 relevant international standards and obligations.

*The Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee*

- 18 The Legislation Design and Advisory External Subcommittee (LDAC) made a submission to the Justice Committee suggesting that the offence of making untrue allegations against judges and the courts may not comply with the Guidelines. Firstly, because the clause unduly restrains freedom of expression, which is inconsistent with the principle of legality, and secondly because the criminal law, the Harmful Digital Communications Act 2015

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and the common law of defamation already adequately cover the behaviour covered by the offence, so the provision is unnecessary to achieve the policy objective.

- 19 While it is true that general remedies are available under the law for dealing with abusive allegations these do not address the essential element of maintaining public confidence in the judiciary as an institution. I therefore consider the provision is necessary to achieve the policy objective of upholding confidence in the administration of justice. The substantial amendments which Cabinet agreed to make to the offence place a higher value on freedom of expression than the Bill as introduced, addressing LDAC's other concern.

### Consultation

- 20 The Crown Law Office, Police, Department of Corrections, the Department of Prime Minister and Cabinet (PAG) and the Law Commission were consulted on this paper and proposed SOP. The Crown Law Office, Police, Department of Corrections, Department of Internal Affairs, the Ministry of Business, Innovation and Employment, Inland Revenue Department, the Treasury, Law Commission and the Department of Prime Minister and Cabinet (PAG) were consulted on the policy changes agreed by Cabinet in December 2018.

### Binding on the Crown

- 21 The Bill is binding on the Crown. The SOP will not change this.

### Creating new agencies or amending law relating to existing agencies.

- 22 The SOP does not create new agencies or amend the law relating to existing agencies.

### Allocation of decision making powers

- 23 The SOP does not affect the allocation of decision-making powers between the executive, the courts, and tribunals.

### Associated regulations

- 24 Regulations are not needed to bring the SOP into operation; although amendments will need to be made to the High Court Rules 2016 and the District Court Rules 2016 within one year of the Bill's enactment to bring other unrelated provisions in the Bill into operation. An Order in Council may also be required to bring the Bill into force.

### Other instruments

- 25 The SOP does not include any provisions empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments (or both).

### Definition of Minister/department

- 26 The SOP does not contain a definition of Minister, department (or equivalent government agency), or chief executive of a department (or equivalent position).

## Commencement of legislation

- 27 The SOP when incorporated into the Bill will come into effect on the same date as the Bill, which will be the earlier of a date specified by Order in Council; or one year after the date on which it receives Royal assent. The delayed commencement date is to allow up to 12 months for necessary amendments to be made to the High Court Rules 2016 and the District Court Rules 2016.

## Parliamentary stages

- 28 s9(2)(h)

## Proactive Release

- 29 I propose to proactively release this paper in full within 30 business days after the SOP is tabled.

## Recommendations

- 30 The Minister of Justice recommends that the Committee:

- 1 **note** that the proposed Government SOP amends the Contempt of Court Bill s9(2)(h)

- 2 **note** that the SOP implements Cabinet's decision of December 2018 to retain an offence in the Contempt of Court Bill which is committed when:

2.1 a person makes a false statement about a Judge or court; and

2.2 when they know or ought reasonably to have known that the statement could undermine public confidence in the independence, integrity, impartiality or authority of the judiciary or a court; and

2.3 there is a real risk the statement could undermine public confidence in the independence, integrity, impartiality or authority of the judiciary or a court;

- 3 **note** that the Justice Committee rejected the Government's recommendation to retain and amend the above offence and instead removed the offence from the Bill;

- 4 **approve** the SOP for tabling, subject to the final approval of the government caucus and sufficient support in the House of Representatives.

Authorised for lodgement

Hon Andrew Little  
Minister of Justice



# Cabinet Legislation Committee

## Minute of Decision

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### Contempt of Court Bill: Supplementary Order Paper

**Portfolio**                      **Justice**

On 30 July 2019, the Cabinet Legislation Committee:

- 1        **noted** the paper under LEG-19-SUB-0108 seeking approval to release a Government Supplementary Order Paper to re-insert an offence prohibiting the publication of false statements about a Judge or a court into the Contempt of Court Bill;
- 2        **invited** the Minister of Justice to give further consideration to the policy.

Vivien Meek  
Committee Secretary

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**Present:**

Hon Chris Hipkins (Chair)  
Hon Stuart Nash  
Hon Iain Lees-Galloway  
Hon Damien O'Connor  
Hon Tracey Martin  
Hon Eugenie Sage  
Michael Wood MP (Senior Government Whip)

**Officials present from:**

Officials Committee for LEG

**Hard-copy distribution:**

Minister of Justice





# Cabinet

## Minute of Decision

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### Contempt of Court Bill: Supplementary Order Paper

**Portfolio**                      **Justice**

On 5 August 2019, following reference from the Cabinet Legislation Committee (LEG), Cabinet:

- 1        **referred** the submission *Contempt of Court Bill: Supplementary Order Paper* [LEG-19-SUB-0108] back to LEG for consideration at its meeting on 6 August 2019;
- 2        **authorised** LEG to have Power to Act at its meeting on 6 August 2019 to take decisions on the submission.

Martin Bell  
for Secretary of the Cabinet

*Secretary's Note: This minute replaces LEG-19-MIN-0108.*

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Prime Minister  
Deputy Prime Minister  
Minister of Justice





# Cabinet Legislation Committee

## Minute of Decision

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### Contempt of Court Bill: Supplementary Order Paper

Portfolio Justice

On 6 August 2019, the Cabinet Legislation Committee, having been authorised by Cabinet to have Power to Act [CAB-19-MIN-0377.01]:

- 1 **noted** that the proposed Government SOP amends the Contempt of Court Bill s9(2)(h) [REDACTED]
- 2 **noted** that the SOP implements Cabinet's decision of December 2018 to retain an offence in the Contempt of Court Bill which is committed when:
  - 2.1 a person makes a false statement about a Judge or court;
  - 2.2 when they know or ought reasonably to have known that the statement could undermine public confidence in the independence, integrity, impartiality or authority of the judiciary or a court;
  - 2.3 there is a real risk the statement could undermine public confidence in the independence, integrity, impartiality or authority of the judiciary or a court;
- 3 **noted** that the Justice Committee rejected the government's recommendation to retain and amend the above offence and instead removed the offence from the Bill;
- 4 **approved** the SOP [PCO 20837-1/1.2] for release, subject to the final approval of the government caucuses and sufficient support in the House of Representatives.

Vivien Meek  
Committee Secretary

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**Present:**

Rt Hon Winston Peters  
Hon Andrew Little  
Hon David Parker  
Hon Iain Lees-Galloway (Chair)  
Hon Kris Faafoi  
Hon Tracey Martin  
Hon Julie Ann Genter (part item)  
Hon Eugenie Sage  
Michael Wood MP (Senior Government Whip)

**Officials present from:**

Office of the prime Minister  
Officials Committee for LEG

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Minister of Justice

RELEASED BY THE MINISTER OF JUSTICE