

Hon Kris Faafoi
Minister of Justice

Proactive release of documents relating to the Government Response to Officers of Parliament Committee

Date of issue: 22 February 2021

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

No.	Document	Comments
1.	Government Response to the Report of the Officers of Parliament Committee on the Petition of Martin Thomas Harold Matthews Cabinet paper <i>Office of the Minister of Justice</i> 7 December 2020	Released in full.
2.	Government Response to Officers of Parliament Committee Cabinet Minute: CAB-20-MIN-0506 <i>Cabinet Office</i> 7 December 2020	Released in full.
3.	Government Response to the Report of the Officers of Parliament Committee on the Petition of Martin Thomas Harold Matthews <i>Office of the Minister of Justice</i> Presented 9 December 2020	The Government response was presented to Parliament on 9 December 2020. It is also publicly available from the Parliament website: https://www.parliament.nz .

Chair
Cabinet

Government Response to the Report of the Officers of Parliament Committee on the Petition of Martin Thomas Harold Matthews

Proposal

- 1 I seek approval of the Government's response to the Officer of Parliament Committee's report on the Petition of Martin Thomas Harold Matthews and 14 others: *Review Officers of Parliament Committee treatment of Martin Matthews*.

Executive summary

- 2 The role of an Officer of Parliament is to provide a check on the arbitrary use of power by the Executive. The three such roles currently in New Zealand are the Auditor-General, the Ombudsman, and the Parliamentary Commissioner for the Environment. Officers of Parliament are directly accountable to the House for the discharge of their functions.
- 3 The Officers of Parliament Committee's ("the Committee's") report on the Petition of Martin Thomas Harold Matthews and 14 others: *Review Officers of Parliament Committee treatment of Martin Matthews* (the Petition) was tabled in the House on 26 June 2020. Mr Matthews resigned from the position of Auditor-General in 2017.
- 4 The Committee's report:
 - recommended that the Government agree to review the empowering provisions for Officers of Parliament; and
 - suggested that a future Officers of Parliament Committee considering the removal of an Officer of Parliament consider the process to be followed by the House in seeking the removal of an Officer of Parliament, to ensure natural justice obligations are met.
- 5 I propose the Government response agree that the Ministry of Justice lead a review into the empowering provisions for Officers of Parliament, which will also consider the procedure for the removal or suspension of an Officer of Parliament. I also propose that outdated terminology in the Public Audit Act 2001 relating to the use of the term "disability" as one of the grounds for removing an Auditor-General should be amended as soon as possible and brought into line with the terminology used in the statutes governing the other two Officers of Parliament.
- 6 Under Standing Orders, the Government response to the Committee's report is due to be tabled on 9 December 2020.

Background to Petition

The resignation of Martin Matthews as Controller and Auditor-General in 2017

- 7 On 24 May 2017, the Committee of the 51st Parliament initiated a briefing on the Controller and Auditor-General, Martin Matthews. This followed concerns raised in the public and media about Mr Matthews' suitability to hold the role, due to a major fraud case at the Ministry of Transport while he was its Chief Executive. In light of this public commentary, Mr Matthews asked the Committee to conduct a review to determine his suitability to hold the role.
- 8 The Committee appointed Sir Maarten Wevers as an independent adviser to conduct the review. The Committee reported back to the House on 3 August 2017. Its report noted that Mr Matthews had tendered his resignation in writing to the Speaker of the House on 2 August 2017, with immediate effect, which brought its review to an end.

In 2019 Mr Matthew's petitioned Parliament to review the approach taken in the 2017 review of his position as Controller and Auditor-General

- 9 On 11 December 2019, the Petition of Martin Thomas Harold Matthews and 14 others: *Review Officers of Parliament Committee treatment of Martin Matthews* (the Petition) was presented to the House. The Petition requested that Parliament review its actions, and those of the Officers of Parliament Committee of the 51st Parliament, leading up to Mr Matthew's resignation on 2 August 2017.
- 10 The Petition sought that, as part of its review, Parliament consider whether any changes to the law or the Standing Orders or practices of the House relating to the removal of Officers of Parliament are necessary, to ensure that such Officers are afforded appropriate protections in the offices they hold.

The report of the Officers of Parliament Committee on the Petition

- 11 On 26 June 2020, the Officers of Parliament Committee of the 52nd Parliament tabled its report on the Petition. The Committee's report noted that it:

"does not think that the evidence supported a re-litigation of the decisions of the previous committee, and as such are unable to support Mr Matthews' request for an apology, reimbursement, compensation or damages."

- 12 The Committee recommended changes to the process be considered for the future. It made one recommendation to Government, as follows:

"that the Government review the empowering legislation for all Officers of Parliament."

Any review should consider the exact terminology of the empowering legislation. For example, the meaning of the term "disability" has evolved since it was included and defined as a prohibited ground for discrimination in section 21 of the Human Rights Act 1993. It may be that alternative wording is

preferable to better describe the grounds on which an Officer of Parliament should be suspended or removed from office."

- 13 The Committee also commented that:

"if a future Officers of Parliament Committee is considering circumstances that could lead to the committee recommending the suspension or removal of an Officer of Parliament...[the Committee] should decide exactly what steps it will take to ensure it meets its natural justice obligations as well as engaging the help of an independent expert to provide advice on process.

This would ensure the steps to be followed are agreed at the start, understood by all parties involved, and the decision-making responsibilities remain with the appropriate bodies in the committee and the House."

Legislative and Parliamentary provisions relating to Officers of Parliament

- 14 Officers of Parliament play an important constitutional role. They have a statutory duty to act impartially in the performance of their duties. They are appointed by the Governor-General on recommendation from the House of Representatives; the House acts on recommendation from the Officers of Parliament Committee. The empowering provisions for each role, including the removal grounds, have remained largely unchanged since the role of each Officer was created.
- 15 In November 2002, the then Officers of Parliament Committee presented a Report to the House setting out the "Procedures for the Appointment of an Officer of Parliament". No such Procedure has been presented for the removal or suspension from office of an Officer of Parliament.

The terminology used to describe the grounds for removal or suspension from office was amended in 2001

- 16 Officers of Parliament can only be removed or suspended from office on an address from the House of Representatives to the Governor-General. The terminology used to describe the grounds upon which the Governor-General could remove or suspend an Officer of Parliament was exactly the same for all Officers of Parliament from 1977, following the enactment of the Public Finance Act 1977.
- 17 The terminology diverged slightly for the Office of the Auditor General in 2001. This occurred after the enactment of the Public Audit Act 2001 and the Human Rights Amendment Act 2001. This divergence does not appear to have been intentional; it seems to have arisen from an overlap in timing between the passing of the two Acts in 2001.
- The Public Audit Act 2001 amended the terminology of the grounds of 'disability' to "disability affecting the performance of duty" for the Auditor General. This Act was enacted in April 2001.
 - The Human Rights Amendment Act 2001 was enacted in December 2001. This Act amended the terminology in the provisions dealing with the

removal and suspension from office in the Ombudsmen Act 1975 and the Environment Act 1986 from 'disability' to 'inability to perform the functions of the office'¹ but did not update the equivalent provision in the Public Audit Act 2001.

Government response to the Officers of Parliament Committee report

- 18 I propose that the Government response agree to the Committee's recommendation to review the empowering legislation of all Officers of Parliament. This review should consider whether the empowering legislation should be amended to uphold the independence of each Officer, and the suitability of the grounds for their removal or suspension from office in the modern-day context.
- 19 This review would be added to the Ministry of Justice's policy work programme. The priority and timing of this work will be determined against the other priorities on its work programme for the next three years.
- 20 The review will take some time to complete. In the interim there may be an opportunity before a broader review to deal with the specific recommendation made by the Committee to update the terminology of "disability." A simple amendment could be made to the Public Audit Act 2001 to align this with the wording of the equivalent provision in the Ombudsmen Act 1975 and the Environment Act 1986. As noted at paragraph 17, the current difference in wording is not intentional.
- 21 I propose the Government response also signal that this specific change in terminology, which is relatively narrow, may be progressed sooner if an appropriate legislative vehicle arises. The Ministry of Justice will work with the Treasury to progress this amendment in the next suitable legislative vehicle

Establishing a process for the House to recommend the suspension or removal of an Officer of Parliament

- 22 The Committee also suggested that any future Officers of Parliament Committee that is considering circumstances that could lead to it recommending the suspension or removal of an Officer of Parliament should decide from the outset exactly what steps it will take.
- 23 Although this comment was not directed to the Government, I propose that the Government response note that the Ministry of Justice's review will also consider the procedure for the removal or suspension of an Officer of Parliament.
- 24 Given the unique constitutional status of Officers of Parliament, I consider it appropriate for the House to remain the ultimate decision-maker in matters related to the appointment or removal of an Officer of Parliament. To this end, the Ministry's review would not look to prescribe the process the House must embark on. That is a matter properly for Parliament. How and when the

¹ This was part of a generic amendment across over 90 enactments to update the language of 'disability' and to focus on the situation that the removal provision was intended to address (being the 'inability of the appointee to perform the role').

House choses to exercise its decision-making power will be for it to determine.

- 25 The Ministry's review can, however, usefully consider whether there would be merit in developing a formal process for the removal or suspension of an Officer of Parliament, and any constitutional implications of establishing a formal removal process. For example, the review will need to work through whether, and what aspects of, a procedural framework might sit best in legislation or Standing Orders, and any implications of the former approach in respect of judicial jurisdiction. The Ministry would need to work with the Office of the Clerk on these matters.

Timing of the government response

- 26 The Government response must be presented to the House by 9 December 2020.

Consultation

- 27 The Treasury, the Ministry for the Environment, Te Kawa Mataaho Public Service Commission, Crown Law Office and the Office of the Clerk of the House of Representatives have been consulted on this paper. The Policy Advisory Group in the Department of the Prime Minister has been informed.

Comment from the Office of the Clerk

- 28 The Office of the Clerk considers the procedure for the removal or suspension of an Officer of Parliament should be determined by the House itself. The Office does not consider it appropriate for the Executive to lead a review that considers the procedures that the House, as this risks trespassing on the House's exclusive cognisance in these matters.
- 29 As noted above, the review would not look to prescribe the process the House must embark on. However, as all the Officers of Parliament positions are created by statute, the Executive has an obligation to ensure that the statute remains fit for purpose, and continues to uphold the mana of these important constitutional positions. Justice officials would work alongside the Office of the Clerk to ensure that any review recommendations take into account comity and the unique constitutional status of the House.

Human Rights

- 30 There are no human rights implications arising directly from this paper. However, the Committee's recommendation to review the empowering provisions of Officers of Parliament may have human rights implications, that will be considered as part of this future work.

Financial implications

- 31 There are no financial implications arising from the proposals in this paper.

Communications

- 32 I am responsible for presenting the Government response in the House. I do not plan to issue a media release.

Proactive Release

- 33 I intend to proactively release this Cabinet paper and related Minutes, on the Ministry of Justice website, subject to any redactions justified in accordance with the Official Information Act 1982.

Recommendations

- 34 The Minister of Justice recommends that Cabinet:
1. note that on 26 June 2020 the Officers of Parliament Committee presented its report to the House entitled Petition of Martin Thomas Harold Matthews and 14 others: Review Officers of Parliament Committee treatment of Martin Matthews.
 2. note that the select committee recommended that the Government review the empowering legislation for all Officers of Parliament, and that any review should consider the exact terminology of the empowering legislation;
 3. agree that the Government response should:
 - 3.1 agree that a review of the empowering provisions for Officers of Parliament will be added to the Ministry of Justice's policy work programme
 - 3.2 agree that the terminology in the Public Audit Act 2001 of "disability affecting the performance of duty" should be amended as soon as possible, to align with the wording of the equivalent provision in the Ombudsmen Act 1975 and the Environment Act 1986
 - 3.3 note that the Ministry of Justice's review will also consider the procedure for the removal or suspension of an Officer of Parliament;
 4. approve the Government response to the Committee's report, attached to this paper as Appendix 1;
 5. note that the Government response must be presented to the House by 9 December 2020;

6. invite the Minister of Justice to present the attached Government response to the House in accordance with Standing Order 256.

Authorised for lodgement

Hon Kris Faafoi

Appendix 1: Government Response to the Report of the Officers of Parliament Committee on the Petition of Martin Thomas Harold Matthews.

RELEASED BY THE MINISTER OF JUSTICE



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Government Response to Officers of Parliament Committee

Portfolio **Justice**

On 7 December 2020, Cabinet:

- 1 **noted** that on 26 June 2020, the Officers of Parliament Committee (the Committee) presented its report to the House entitled Petition of Martin Thomas Harold Matthews and 14 others: Review Officers of Parliament Committee treatment of Martin Matthews;
- 2 **noted** that the Committee recommended that the government review the empowering legislation for all Officers of Parliament, and that any review should consider the exact terminology of the empowering legislation;
- 3 **agreed** that the government response should:
 - 3.1 agree that a review of the empowering provisions for Officers of Parliament be added to the Ministry of Justice's policy work programme;
 - 3.2 agree that the terminology in the Public Audit Act 2001 of "disability affecting the performance of duty" should be amended as soon as possible, to align with the wording of the equivalent provision in the Ombudsmen Act 1975 and the Environment Act 1986;
 - 3.3 note that the Ministry of Justice's review will also consider the procedure for the removal or suspension of an Officer of Parliament;
- 4 **approved** the government response to the Committee's report, attached to the submission under CAB-20-SUB-0506;
- 5 **noted** that the government response must be presented to the House by 9 December 2020;
- 6 **invited** the Minister of Justice to present the government response to the House in accordance with Standing Order 256.

Michael Webster
Secretary of the Cabinet

**Government Response to
Report of the Officers of Parliament Committee
on
Petition of Martin Thomas Harold Matthews and 14 others: Review
Officers of Parliament Committee treatment of Martin Matthews**

Presented to the House of Representatives

In accordance with Standing Order 256

Government response to Report of the Officers of Parliament Committee on the Petition of Martin Thomas Harold Matthews

Introduction

- 1 The Government has carefully considered the Officer of Parliament Committee's Report *Petition of Martin Thomas Harold Matthews and 14 others: Review Officers of Parliament Committee treatment of Martin Matthews*, tabled on 26 June 2020.
- 2 The Government responds to the report in accordance with Standing Order 256.

Recommendation and government response

- 3 **Recommendation:** The Officers of Parliament Committee ("the Committee") recommended that the Government "review the empowering legislation for all Officers of Parliament".

- 4 The Committee further stated:

Any review should consider the exact terminology of the empowering legislation." For example, the meaning of the term "disability" has evolved since it was included and defined as a prohibited ground for discrimination in section 21 of the Human Rights Act 1993. It may be that alternative wording is preferable to better describe the grounds on which an Officer of Parliament should be suspended or removed from office.

- 5 **Response:** The Government acknowledges the constitutional importance of the roles of the Officers of Parliament. The Government agrees to review the empowering legislation of all Officers of Parliament. The review will be carried out by the Ministry of Justice and will consider whether the grounds for removal from office are appropriate for the modern-day context.

The terminology of 'disability' may be updated ahead of a broader review

- 6 The Government notes the inconsistent terminology in the Public Audit Act 2001 of "*disability affecting the performance of duty*" compared with the equivalent provisions in the Ombudsmen Act 1975 and Environment Act 1986 (relating to the Parliamentary Commissioner for the Environment). These latter Acts were amended in 2001 to refer to an incumbent's "*inability to perform the functions of the office*".

- 7 The changes to the Ombudsmen Act 1975 and the Environment Act 1986 were part of generic amendments to several acts made by the Human Rights Amendment Act 2001 and were not carried across to the Public Audit Act 2001. There is no policy reason for this difference in drafting.

- 8 The Government will look to amend this provision in the Public Audit Act 2001 to align with the wording of the equivalent provision in the Ombudsmen Act

1975 and the Environment Act 1986, should an appropriate legislative vehicle arise ahead of the completion of the broader review.

Establishing a process for the House to recommend the suspension or removal of an Officer of Parliament

9 The Committee's response to the Petition also stated:

"if a future Officers of Parliament Committee is considering circumstances that could lead to the committee recommending the suspension or removal of an Officer of Parliament...[the Committee] should decide exactly what steps it will take to ensure it meets its natural justice obligations as well as engaging the help of an independent expert to provide advice on process.

This would ensure the steps to be followed are agreed at the start, understood by all parties involved, and the decision-making responsibilities remain with the appropriate bodies in the committee and the House.

10 Although this comment was not directed to the Government, the Government agrees that it is appropriate for the House to be the ultimate decision-maker in matters related to the appointment or removal of an Officer of Parliament. The Government also agrees with the importance of ensuring that any process considering the removal of an Officer of Parliament is clearly set out and agreed at the start and meets natural justice expectations.

11 For this reason, the Ministry of Justice's review will also consider the procedure for the removal or suspension of an Officer of Parliament, and whether there is merit in developing a formal process for removal or suspension of an Officer of Parliament.

12 The Ministry's review will work with appropriate parties to address any constitutional implications of establishing a formal removal process. For example, the review would need to work through whether such a procedural framework would sit best in legislation, or in Standing Orders. However, it is not the Government's expectation that the review would look to prescribe any processes the House must embark on, as that is a matter properly for Parliament. How and when the House chooses to exercise its decision-making power will be for it to determine.

Conclusion

13 The Government welcomes the Officers of Parliament Committee's report and recommendation. A review of the empowering legislation for all Officers of Parliament, including the procedures for removing an Officer of Parliament, will be added to the Ministry of Justice's policy work programme and will be progressed as priorities allow.