

**Hon Aupito William Sio**  
Minister for Courts

**Proactive release – Remuneration Authority Legislation Bill**

Date of issue: 11 October 2021

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>Transferring Judicial Officers to the Remuneration Authority</b> <i>Cabinet paper</i> Office of the Minister for Courts <i>Lodged: 23 September 2021</i>	Released in full
1a	<b>Remuneration Authority Legislation Bill</b>	The copy of the bill provided to Ministers with this paper has been withheld in accordance with section 61 of the Legislation Act 2012 and section 9(2)(h) of the Official Information Act 1982 to maintain legal professional privilege. The bill is publicly available from <a href="http://www.legislation.govt.nz">www.legislation.govt.nz</a> .
1b	<b>Departmental Disclosure Statement</b>	This document has been withheld because it is publicly available at <a href="http://www.legislation.govt.nz/disclosure">www.legislation.govt.nz/disclosure</a> .
2	<b>Transferring Judicial Officers to the Remuneration Authority</b> <i>Cabinet Social Wellbeing Committee minute</i> Cabinet Office <i>Meeting date: 29 September 2021</i>	Released in full
3	<b>Setting Remuneration for Judicial and Statutory Officers</b> <i>MartinJenkins Report</i> <i>Date: September 2018</i>	Release in full

## IN CONFIDENCE

**In Confidence**

Office of the Minister for Courts

Cabinet Social Wellbeing Committee

**Transferring Judicial Officers to the Remuneration Authority****Proposal**

- 1 This paper seeks
  - 1.1 agreement to transfer responsibility for determining the remuneration of Disputes Tribunal Referees and Tenancy Tribunal Adjudicators from the Cabinet Fees Framework to the Remuneration Authority; and
  - 1.2 approval to introduce the attached Remuneration Authority Legislation Bill (the Bill) that will implement the above proposal and the 2019 Cabinet decisions to transfer responsibility for setting the remuneration of four groups of officers from the Cabinet Fees Framework to the Remuneration Authority [APH-19-MIN-0294; CAB 19-MIN-0657 refers].

**Relation to government priorities**

- 2 This is an operational adjustment that requires Cabinet approval.

**Executive Summary**

- 3 The Remuneration Authority determines remuneration for judicial and statutory officers that need to have, and to be seen to have, independence from Government. The Remuneration Authority Legislation Bill transfers responsibility for setting remuneration for certain judicial and statutory officers from the Cabinet Fees Framework to the Remuneration Authority as agreed by Cabinet in December 2019 [APH-19-MIN-0294; CAB 19-MIN-0657 refers].
- 4 In addition, two additional groups of officers have been included in the Bill at my direction and require Cabinet approval. These are Disputes Tribunal Referees and Tenancy Tribunal Adjudicators. I consider the same principle of requiring greater independence from Government now applies to these officers.
- 5 The Bill establishes new Permanent Legislative Authorities (PLAs) to fund the remuneration of the officers whose remuneration will be determined by the Remuneration Authority following enactment.<sup>1</sup>

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<sup>1</sup> A PLA is created when an Act authorises payments to be made from public money without a specific appropriation.

## Background

### *Remuneration Authority determines remuneration when independence is required*

- 6 The Remuneration Authority is the independent statutory body that determines remuneration for judicial and statutory officers that need to have, and to be seen to have, independence from Government. For example, the Authority determines the remuneration of judges because judges need to be, and need to be seen to be, impartial, independent from Government, and free from political interference in their decision-making. The Government must implement the Authority's decisions. This contributes to public trust and confidence in the judicial system.
- 7 The Cabinet Fees Framework classifies judicial and statutory officers into four broad categories and prescribes a range of fees for each category. The responsible Minister makes the final decision on the fee to be paid to each type of officer within that fee range.

### *Cabinet has agreed to transfer some positions to the Remuneration Authority*

- 8 The remuneration of judicial and statutory officers is determined under both the Cabinet Fees Framework and the Remuneration Authority. In 2018, an independent reviewer, MartinJenkins, undertook a principles-based review to determine whether the Cabinet Fees Framework or the Remuneration Authority is the most appropriate mechanism for setting the remuneration of judicial and statutory officers administered by the Ministry of Justice. They concluded that the principal difference between the Remuneration Authority and the Cabinet Fees Framework is the degree of independence from Government of remuneration decisions. The Remuneration Authority is independent of Government whereas Government controls the Cabinet Fees Framework.
- 9 MartinJenkins concluded that the Remuneration Authority should determine the remuneration of judicial officers and of statutory officers with judicial responsibilities because they need to have, and to be seen to have, greater independence from Government. The remuneration of the other judicial and statutory officers covered by their review should continue to be determined under the Cabinet Fees Framework because they require a lesser degree of independence from Government.
- 10 In December 2019, Cabinet agreed to transfer responsibility for setting remuneration for the following officers from the Cabinet Fees Framework to the Remuneration Authority:
  - 10.1 Community Magistrates of the District Court;
  - 10.2 Environment Commissioners and Deputy Environment Commissioners of the Environment Court;
  - 10.3 Chairperson and Deputy Chairpersons of the Human Rights Review Tribunal; and

10.4 Deputy Chairpersons and Members of the Immigration and Protection Tribunal.<sup>2</sup> [APH-19-MIN-0294; CAB 19-MIN-0657 refers]

**Analysis**

- 11 I consider the same principle of requiring greater independence from Government now applies to Disputes Tribunal Referees and Tenancy Tribunal Adjudicators. The jurisdiction of these officers has increased in terms of monetary thresholds, scope and/or legal complexity since the MartinJenkins review. I am satisfied that the other tribunals administered by the Ministry of Justice do not require this degree of independence from Government and that the remuneration of their members should remain under the Cabinet Fees Framework.

*I propose to transfer Disputes Tribunal Referees to the Remuneration Authority*

- 12 The Disputes Tribunal considers disputes based on contract, quasi contract or tort involving destruction, loss, damage or injury to property and the recovery of property of up to \$30,000. Referees are required to have appropriate qualifications such as legal, mediation or arbitration qualifications or training as well as the personal attributes, knowledge, and experience needed for the role. Most Referees are legally qualified. Referees are required to try to mediate a settlement first. Where this is not possible, the Referee makes an order that is binding on the parties.
- 13 The tribunal is a division of the District Court. It considers most of the substantive cases in the District Court civil jurisdiction. Since 2019, the tribunal's monetary threshold has doubled from \$15,000 to \$30,000, case volumes have increased by 13% and the legal complexity of disputes has increased, with claims and counterclaims, often both for close to \$30,000.

*I also propose to transfer Tenancy Tribunal Adjudicators to the Remuneration Authority*

- 14 The Tenancy Tribunal hears disputes between landlords (including Kāinga-Ora) and tenants of residential properties, and disputes relating to Unit Title developments such as apartment buildings. Tenancy Tribunal Adjudicators are required to either be legally qualified or to have the knowledge or experience needed for the role.
- 15 The Residential Tenancies Amendment Act 2020 and the Residential Tenancies (Healthy Homes Standards) Regulations 2019 have significantly expanded the tribunal's role and responsibilities. For example, the monetary threshold of the Tenancy Tribunal for residential tenancy disputes has been doubled from \$50,000 to \$100,000. The tribunal can now impose pecuniary penalties of up to \$50,000 on landlords if it upholds applications from the Chief Executive of the Ministry of Business, Innovation and Employment regarding non-compliance with statutory requirements.

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<sup>2</sup> The Chairperson of the Immigration and Protection Tribunal is required to be a District Court Judge and consequently, their remuneration is already set by the Remuneration Authority.

**Cabinet has agreed to transfer the following officers to the Remuneration Authority**

*Community Magistrates and Environment Commissioners are judicial decision-makers*

- 16 MartinJenkins concluded that Community Magistrates, Environment Commissioners and Deputy Environment Commissioners are judicial decision-makers.
- 17 Community Magistrates sit in the District Court and hear matters that would otherwise come before a District Court Judge. Community Magistrates are required to have the personal qualities, experience, and skills needed to deal with lower level criminal matters.
- 18 The Environment Court largely deals with appeals about the contents of regional and district plans and appeals arising out of applications for resource consents. Commissioners are appointed for their knowledge and experience in matters coming before the court. They hear matters and make decisions either as a panel, with an Environment Court Judge, or alone.

*Human Rights Review Tribunal jurisdiction is comparable to that of a judge*

- 19 The Human Rights Review Tribunal hears claims relating to breaches of the Human Rights Act 1993, the Privacy Act 2020 and the Health and Disability Commissioner Act 1994.
- 20 MartinJenkins concluded that the Human Rights Review Tribunal jurisdiction is comparable to that of a judge because the tribunal has the power to declare legislation to be inconsistent with the New Zealand Bill of Rights Act 1990. Only the legally qualified members of the tribunal have the knowledge and expertise to make such declarations. The Bill transfers responsibility for determining the remuneration of the Chairperson and Deputy Chairpersons, who are required to be legally qualified, to the Authority.

*Immigration and Protection Tribunal hears appeals against Ministerial decisions*

- 21 The Immigration and Protection Tribunal hears appeals against decisions of the Minister of Immigration or Immigration New Zealand on residence class visas, deportation (including appeals on humanitarian grounds) and claims to be recognised as a refugee or protected person. The tribunal is required to be chaired by a District Court Judge and the members are required to be legally qualified.
- 22 Greater independence from Government is required because the Minister of Immigration can be a party to appeals. As the tribunal chair is a District Court Judge, their remuneration is already set by the Remuneration Authority. The Bill transfers responsibility for determining the remuneration of the other tribunal members to the Authority.

*The Bill establishes new Permanent Legislative Authorities*

- 23 A Permanent Legislative Authority (PLA) is created when an Act authorises payments to be made from public money without a further appropriation.
- 24 Approval is sought to establish a PLA in the Disputes Tribunal Act 1988 and Residential Tenancies Act 1986 to fund the remuneration of Referees and Adjudicators respectively including the Principal Disputes Referee, the Principal Tenancy Adjudicator and the Deputy Principal Tenancy Adjudicator.<sup>3</sup> Establishing PLAs reflect these positions as needing to be seen as independent and free from Government influence. Setting their remuneration independently of Government is part of ensuring these positions are, and are seen to be, free from Government influence.
- 25 The Remuneration Authority Legislation Bill also establishes new PLAs to fund the remuneration of the other officers whose remuneration will be determined by the Remuneration Authority following enactment. However, a new PLA is not required to fund Community Magistrates because they are already funded through a PLA in the District Court Act 2016.

**Financial Implications**

- 26 The remuneration of the officers that will be transferred under the Bill are currently being charged against the Vote Courts, non-departmental other expense appropriation *Tribunal Related Fees and Expenses*. At present, there are about 63 Principal and Disputes Referees with current remuneration of about \$3.600 million and about 31 Principal and Tenancy Tribunal Adjudicators with current remuneration of about \$2.100 million.
- 27 At implementation, following commencement of the Act, the Tribunal Related Fees and Expenses appropriation will be reduced by the remuneration value of the officers transferred by the Bill and five new PLAs established with the corresponding amount. This means that at implementation there will be a nil impact on fiscal indicators and allowances.
- 28 The financial implications of making the Remuneration Authority responsible for determining the remuneration of the officers in the Bill will not be known until determinations have been made by the Authority so it is not possible to model or predict what any increases could be. The Authority takes into account a range of factors when determining remuneration including, the requirements of the position, the conditions of service, the need to recruit and retain competent people, relativity with levels of remuneration received elsewhere and fairness to the person whose remuneration is being set and to the taxpayer. The Authority could determine that their remuneration remains the same as under the Cabinet Fees Framework (their remuneration cannot be reduced following a transfer).

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<sup>3</sup> The remuneration of the Principal Disputes Referee, Principal Tenancy Adjudicator and Deputy Principal Tenancy Adjudicator is already the responsibility of the Remuneration Authority. Their remuneration is currently funded through an appropriation.

- 29 However, remuneration set by the Remuneration Authority is typically higher than the fees set under the Cabinet Fees Framework for comparable positions and members are often eligible for Kiwisaver subsidies. Should the Authority determine that a remuneration increase is appropriate for any of the transferred positions, the additional cost would be met from the new PLAs. To the extent future remuneration increases are likely to be greater under the proposed new arrangement, the overall impact of this policy will negatively impact the Government's fiscal position over time, relative to the status quo.

### **Legislative Implications**

- 30 The Remuneration Authority Legislation Bill has priority four (to be referred to a Select Committee in 2021) on the 2021 Legislative Programme. The Bill will bind the Crown.

### **Compliance**

- 31 The Bill complies with each of the following:
- 31.1 the principles of the Treaty of Waitangi;
  - 31.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
  - 31.3 the disclosure statement requirements (a disclosure statement has been prepared and is attached to the paper);
  - 31.4 the principles and guidelines set out in the Privacy Act 2020;
  - 31.5 relevant international standards and obligations; and
  - 31.6 the Legislation Guidelines (2018 edition) maintained by the Legislation Design and Advisory Committee.

### **Binding on the Crown**

- 32 The seven Acts being amended are binding on the Crown. The Bill will not change this.

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

- 33 The Bill does not create a new agency or amend the legislation relating to any existing agency.

### **Allocation of decision-making powers**

- 34 The Bill does not change the allocation of decision-making powers between the executive, the courts, and tribunals.

### **Associated regulations**

- 35 Regulatory changes will not be needed.

### Other instruments

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

### Definition of Minister/department

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

### Commencement of legislation

- 38 The Bill will come into force on the first day of the month following Royal assent. This will facilitate the administration of the new Permanent Legislative Authorities.

*I seek approval to change the commencement date if necessary*

- 39 I seek approval to change the commencement date to the beginning of the next financial year if the Bill appears likely to pass during the last quarter of the financial year. This is necessary to comply with the Budget Moratorium and to ensure the Estimates documents remain accurate.

### Parliamentary stages

- 40 The Remuneration Authority Legislation Bill is an omnibus bill that will be introduced under Standing Order 267(a). It amends the Remuneration Authority Act 1977 and the six Acts, under which the affected officers are appointed, to implement the policy of transferring responsibility for determining their remuneration from the Cabinet Fees Framework to the Remuneration Authority.
- 41 The Bill holds a category four (to be referred to select committee in 2021) priority on the 2021 Legislation Programme.
- 42 I propose to introduce the Bill into the House on the first available date after Cabinet approval.
- 43 I propose to refer the Bill to the Justice Committee.
- 44 I seek approval to resolve any minor and technical issues, and to make consequential amendments identified during the parliamentary stages of the Bill.



## Impact Analysis

### *Regulatory Impact Statement*

- 45 Treasury's Regulatory Impact Analysis team has determined that the proposal to transfer responsibility over remuneration of Disputes Tribunal Referees and Tenancy Tribunal Adjudicators from the Cabinet Fees Framework to the Remuneration Authority is exempt from the requirement to provide a Regulatory Impact Statement on the grounds that it has no or only minor impacts on businesses, individuals, and not-for-profit entities.

### *Climate Implications of Policy Assessment*

- 46 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

## Population Implications

- 47 The proposals in this paper will have no direct population implications.

## Human Rights

- 48 The Bill and the proposal to transfer Referees and Adjudicators to the Remuneration Authority are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

## Consultation

- 49 The following agencies were consulted on the proposals and the draft Bill: Crown Law, Ministries of Business, Innovation and Employment, Environment, and Housing and Urban Development, Parliamentary Counsel Office, Te Kawa Mataaho Public Services Commission and The Treasury.
- 50 The Remuneration Authority has been briefed and supports the rationale for the transfer of the proposed officers.
- 51 Disputes Tribunal Referees and Tenancy Tribunal Adjudicators will be advised of Cabinet's decision. The other officers have already been advised of the earlier Cabinet decision.

## Communications

- 52 No publicity is planned. The Ministry will notify the relevant agencies and officers.

## Proactive Release

- 53 I propose to proactively release this paper with appropriate redactions, within 30 business days of the decision.

## Recommendations

- 54 The Minister for Courts recommends that the Committee:
- 1 **note** the Remuneration Authority is responsible for determining the remuneration of judicial and statutory officers that need to have, and need to be seen to have, independence from Government;
  - 2 **agree** that responsibility for determining the remuneration of Disputes Tribunal Referees and Tenancy Tribunal Adjudicators be transferred from the Cabinet Fees Framework to the Remuneration Authority to recognise their need for greater independence from Government;
  - 3 **agree** to include in the relevant legislation the authorisation to establish Permanent Legislative Authorities (PLAs) for the remuneration of these officers;
  - 4 **note** that use of a PLA reinforces the independence of these officers from government;
  - 5 **agree** to recommendations 2 and 3 being implemented through the Remuneration Authority Legislation Bill (the Bill);
  - 6 **note** that the Bill holds a category four (to be referred to select committee in 2021) priority on the 2021 Legislation Programme;
  - 7 **note** that the Bill also implements earlier Cabinet decisions to transfer responsibility for setting the remuneration of the following other officers from the Cabinet Fees Framework to the Remuneration Authority:
    - 7.1 Community Magistrates of the District Court;
    - 7.2 Environment Commissioners and Deputy Environment Commissioners of the Environment Court;
    - 7.3 Chairperson and Deputy Chairpersons of the Human Rights Review Tribunal; and
    - 7.4 Deputy Chairpersons and Members of the Immigration and Protection Tribunal [APH-19-MIN-0294; CAB 19-MIN-0657 refers];
  - 8 **note** that the Bill also establishes new PLAs to fund the remuneration of the officers (except Community Magistrates) listed in recommendation 7;
  - 9 **note** that on implementation existing funding held in the Vote Courts: non-departmental other expense appropriation *Tribunal Related Fees and Expenses* appropriation will be transferred to the relevant PLA;
  - 10 **note** this initial transfer of funding to the new PLAs will be fiscally neutral but future determinations from the Authority may have an impact;

- 11 **note** that when the Remuneration Authority issues a determination for these officers the change will be included in the next baseline update for joint Ministers to note;
- 12 **authorise** the Minister for Courts to change the commencement date to the beginning of the next financial year to comply with the Budget Moratorium if the Bill appears likely to pass during the last quarter of the financial year;
- 13 **authorise** the Minister for Courts to resolve any minor and technical issues, and to make any consequential amendments identified during the parliamentary stages of the Bill;
- 14 **approve** the Remuneration Authority Legislation Bill for introduction;
- 15 **agree** that the Bill be introduced to the House on the first available date after Cabinet approval;
- 16 **agree** that the government propose that the Bill be:
  - 16.1 referred to the Justice Committee for consideration;
  - 16.2 enacted by September 2022.

Authorised for lodgement

Hon Aupito William Sio

Minister for Courts



# Cabinet Social Wellbeing Committee

## 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.*

### Remuneration Authority Legislation Bill: Policy Decisions and Approval for Introduction

Portfolio                      Courts

On 29 September 2021, the Cabinet Social Wellbeing Committee:

- 1        **noted** that the Remuneration Authority is responsible for determining the remuneration of judicial and statutory officers that need to have, and need to be seen to have, independence from government;
- 2        **agreed** that responsibility for determining the remuneration of Disputes Tribunal Referees and Tenancy Tribunal Adjudicators be transferred from the Cabinet Fees Framework to the Remuneration Authority to recognise their need for greater independence from government;
- 3        **agreed** to include, in the relevant legislation, the authorisation to establish Permanent Legislative Authorities (PLAs) for the remuneration of the officers referred to in paragraph 2 above;
- 4        **noted** that use of a PLA reinforces the independence of such officers from government;
- 5        **agreed** that the decisions in paragraphs 2 and 3 above be implemented through the Remuneration Authority Legislation Bill (the Bill);
- 6        **noted** that the Bill holds a category four priority on the 2021 Legislation Programme (to be referred to select committee in 2021);
- 7        **noted** that the Bill also implements earlier Cabinet decisions to transfer responsibility for setting the remuneration of the following other officers from the Cabinet Fees Framework to the Remuneration Authority:
  - 7.1      Community Magistrates of the District Court;
  - 7.2      Environment Commissioners and Deputy Environment Commissioners of the Environment Court;
  - 7.3      Chairperson and Deputy Chairpersons of the Human Rights Review Tribunal; and
  - 7.4      Deputy Chairpersons and Members of the Immigration and Protection Tribunal;

[APH-19-MIN-0294]

- 8 **noted** that the Bill also establishes new PLAs to fund the remuneration of the officers (except Community Magistrates) listed in paragraph 7 above;
- 9 **noted** that, on implementation, existing funding held in the Vote Courts: non-departmental other expense appropriation *Tribunal Related Fees and Expenses* appropriation will be transferred to the relevant PLA;
- 10 **noted** that the initial transfer of funding to the new PLAs will be fiscally neutral but future determinations from the Remuneration Authority may have an impact;
- 11 **noted** that, when the Remuneration Authority issues a determination for these officers, the change will be included in the next baseline update for joint Ministers to note;
- 12 **authorised** the Minister for Courts to change the commencement date of the Bill to the beginning of the next financial year, if the Bill appears likely to pass during the last quarter of the financial year, in order to comply with the Budget Moratorium;
- 13 **authorised** the Minister for Courts to resolve any minor and technical issues, and to make any consequential amendments identified during the parliamentary stages of the Bill;
- 14 **approved** the Remuneration Authority Legislation Bill [PCO 22600/13.0] for introduction;
- 15 **agreed** that the Bill be introduced to the House on the first available date after Cabinet approval;
- 16 **agreed** that the government propose that the Bill be:
- 16.1 referred to the Justice Committee for consideration;
- 16.2 enacted by September 2022.

Rachel Clarke  
Committee Secretary

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**Present:**

Hon Dr Megan Woods  
Hon Carmel Sepuloni (Chair)  
Hon Andrew Little  
Hon Damien O'Connor  
Hon Kris Faafoi  
Hon Peeni Henare  
Hon Willie Jackson  
Hon Jan Tinetti  
Hon Dr Ayesha Verrall  
Hon Meka Whaitiri  
Hon Priyanca Radhakrishnan

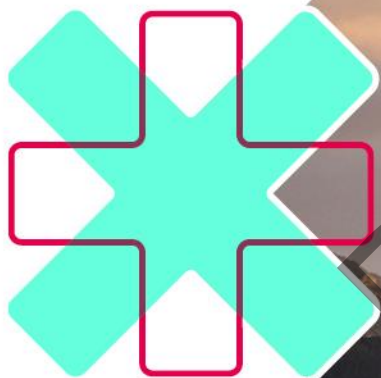
**Officials present from:**

Office of the Prime Minister  
Office of the SWC Chair  
Officials Committee for SWC

# SETTING REMUNERATION FOR JUDICIAL AND STATUTORY OFFICERS

Final Report

September 2018



Proactively Released

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# PREFACE

This report has been prepared for the Ministry of Justice by Robyn Ward, Nick Carlaw and Doug Martin from MartinJenkins (Martin, Jenkins & Associates Limited).

MartinJenkins advises clients in the public, private and not-for-profit sectors. Our work in the public sector spans a wide range of central and local government agencies. We provide advice and support to clients in the following areas:

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We have not been required, or sought, to independently verify the accuracy of information provided to us. Accordingly, we express no opinion on the reliability, accuracy, or completeness of the information provided to us and upon which we have relied.

The statements and opinions expressed herein have been made in good faith, and on the basis that all information relied upon is true and accurate in all material respects, and not misleading by reason of omission or otherwise. We reserve the right, but will be under no obligation, to review or amend this Report if any additional information, which was in existence on the date of this Report, was not brought to our attention, or subsequently comes to light.



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# THIS WORK

## Purpose and scope of this review

The purpose of this review is to consider whether it would be appropriate for the remuneration of a range of judicial and statutory officers to be determined by the Remuneration Authority.

The review covers the 32 groups of officers that were in scope for the most recent biennial fees review, and Technical Advisers to the District and High Courts under the Harmful Digital Communications Act 2015 (who were not in scope for the last fees review). Appendix 1 lists the positions that are in scope, as well as positions in bodies administered by the Ministry of Justice that are not in scope.

The scope of this review is restricted to the mechanism for setting remuneration and does not include the terms of appointment for judicial and statutory officers.

The review does not cover the remuneration of any Judge who is appointed to positions included in this document, or who can act in these positions by virtue of their position as a Judge.

## Overview of the review process

There are two phases to this review. This report marks the completion of the first phase.

### Phase 1

The purpose of the first phase was to develop criteria for assessing whether the Cabinet Fees Framework or the Remuneration Authority is the more

appropriate mechanism for setting remuneration, and to make an initial assessment in respect of this for each of the groups in scope for the most recent fees review.

The first phase involved targeted interviews with representatives from the key agencies that are involved in appointing and setting remuneration for the officers in scope or that administer relevant legislation, including:

- the Ministry of Justice
- the Remuneration Authority
- the State Services Commission
- the Ministry for Business, Innovation and Employment.

The findings of this first phase were also informed by a review of relevant legislation, Cabinet Officer Circulars, records of previous decisions, other relevant information held by the Ministry, and publicly available research and information. The review also drew on the reviewers' knowledge of the bodies in scope, developed over the course of successive fees reviews.

### Phase 2

The second phase of the review will use this initial assessment as the basis for any potential recommendations to transfer positions to the Remuneration Authority. The next steps are described in the last section of this report, on page 21.



## How did this work come about?

The Ministry of Justice is responsible for appointing and setting fees for a range of judicial and statutory officers. The Ministry determines the fees using the guidance provided in the Cabinet Fees Framework (CFF), which specifies a range within which fees should be set, dependent on the characteristics of the position.

Since 2004, the Ministry has undertaken biennial reviews to ensure that, as far as possible, judicial and statutory officers covered by the CFF are appropriately remunerated. The most recent review was completed in January 2018.

Successive reviews have received submissions from a number of groups that the CFF is not the appropriate mechanism for setting fees for their members and that remuneration for their members should instead be set by the Remuneration Authority.

In support of their views those groups have pointed to:

- **previous decisions by Cabinet to move positions to the Authority**
  - Environment Commissioners and the Chair of the Human Rights Review Tribunal
- **constitutional issues**
  - the judicial nature of positions means it is not constitutionally sound for Executive to set remuneration
  - some positions operate in a jurisdiction that is comparable to Judges – for example where a tribunal is part of the District Court; where an officer is operating in the criminal jurisdiction
  - certain officers (the Human Rights Review Tribunal) have the power to declare legislation to be inconsistent with the New Zealand Bill of Rights Act 1990.

- **practical challenges in applying the CFF due to the nature of these positions**

- there are a number full-time positions, where daily fees have to be annualised; this leads to misunderstandings around salary versus fees, and expectations around leave (annual, sick, statutory holidays) that cannot be met under the CFF
- the CFF constrains fee levels, leading to inequity in relation to comparator positions (legal aid lawyers for example) that could potentially impact on the ability to attract, retain and adequately compensate highly experienced professionals
- there is no ability to differentiate fees for members – for example, when a member has additional responsibilities but is not a Chair or Deputy Chair
- there are restrictive terms and conditions of appointment – for example, expense limits, payment for travel, no allowance for training.

These practical challenges are the source of much of the frustration expressed by the officers in the reviews, and the Ministry acknowledges that the CFF can be difficult to apply to some of these positions.

The State Services Commission (SSC) has nearly completed a review of the CFF. The Ministry have made submissions to SSC as part of this review, highlighting areas where the nature of the work of these positions is not easily accommodated by the framework.

While previous fees reviews have recommended to the Ministry of Justice that it implement transfers where Cabinet approval had previously been provided but not actioned, an assessment of the appropriate framework for setting remuneration has been out of scope in those fee reviews.



## What question are we answering?

In light of the consistent feedback from judicial and statutory officers and recommendations arising from the biennial fees reviews, the Ministry has decided to undertake an assessment of the appropriate mechanism for setting remuneration for judicial and statutory officers. The review seeks to answer the question:

***Which of the Cabinet Fees Framework or the Remuneration Authority is the most appropriate mechanism for setting remuneration for judicial and statutory officers?***

The original intention was to look more closely at those officers for whom a decision to transfer remuneration setting to the Authority had already been indicated – that is, for Environment Commissioners and the Chair of the Human Rights Review Tribunal (APH Min (07) 5/9 refers). However, this was expanded to take a more comprehensive look at all those judicial and statutory officers whose remuneration the Ministry advises on in accordance with the Cabinet Fees Framework.

The Ministry considered a principles-based approach to determining whether any of the officers should be moved to the Authority was most appropriate, rather than a 'light touch' approach limited to implementing previous decisions. That is, the Ministry is asking: If there are reasons that Environment Commissioners and the Chair of the Human Rights Review Tribunal should move, are there reasons that other officers should move too?

## What questions are we not answering?

There are related questions that are not addressed by this work.

The nature of terms of appointment (for example, leave provisions, expenses and reimbursements) for judicial and statutory officers are not within scope for this review. Regardless of any recommendations for remuneration to be set by the Authority, the Ministry of Justice as the administering agency would continue to agree terms of appointment with each judicial or statutory officer, in line with any legislative requirements.

The review does not assess what the impact of any transfers might be on the total amount of fees paid.

At the moment, fees for these officers are set by the Minister for Courts and come from non-departmental appropriations within Vote Courts.<sup>1</sup> Should any positions move to the Authority, these would become subject to a Permanent Legislative Authority, and each position would have its own determination.

Any transfers would require a change to the scope of appropriations, but the amount of any overall increase or decrease cannot be determined at this stage.

## How have we approached this work?

We have taken a principles-based approach to assessing whether any of the judicial and statutory officers in scope should have their fees set through a determination by the Remuneration Authority.

We have spoken with a number of people in key agencies, including the Ministry, SSC, MBIE and the Authority itself, but there is limited documentation or institutional knowledge relating to the policy rationale for including different categories of positions under either the CFF or the Authority.

<sup>1</sup> Community Magistrates fees are the exception to this, currently with their own PLA within Vote Courts.



Looking at current legislation and published guidance, it could be concluded that most of these positions should remain under the CFF.

Forty-four of the 51 positions in scope have establishing legislation that refers to using either the Fees and Travelling Allowances Act 1951 or a 'government fees framework' to set fees. The Ministry's own published guidance for the establishment of new tribunals notes that the CFF will generally apply to statutory tribunals (though it does note that the Authority may apply in some instances for full-time, high-profile positions).

However, there are a number of inconsistencies across the bodies we are looking at as to which position sits under which mechanism. This indicates a lack of a strong rationale or guiding principle for the original decisions about how to set remuneration for those positions.

For example, the Chairs of a number of tribunals but not others are under the Remuneration Authority, despite the Chairs performing similar functions. Equally, we have not found the policy rationale for why some tribunal heads, but not other positions in the tribunal, are under the Authority. For example, remuneration of the Principal Disputes Referee is set by the Authority, but Referees are remunerated under the CFF.

The Cabinet paper that recommended transferring the Environment Commissioners and the Chair of the Human Rights Review Tribunal to the Authority cited a number of factors raised in early fees reviews in support of the transfer, including the judicial nature of the roles and the full-time workload.

While these factors were all considered as we thought about the more appropriate remuneration mechanism, a principles-based approach requires us to step back and think more carefully about **what should be**, rather than only **what is**, and then to apply the conclusion consistently to all the positions in scope.

## Stages in our approach to this review

There were three key stages in our approach to answering the question, *Which of the Cabinet Fees Framework or the Remuneration Authority is the most appropriate mechanism for setting remuneration for judicial and statutory officers?*

### Understanding the rationale for each remuneration mechanism

- 1 What is the purpose and function of the Remuneration Authority?
- 2 What is the purpose and function of the Cabinet Fees Framework?

### Developing guiding principles

- 3 What are the important points of difference between the two mechanisms?
- 4 How does this translate into principles to apply to thinking about whether a position is more appropriately remunerated under the Authority or the CFF?

### Applying the principles to the positions in scope

- 5 In relation to the judicial and statutory officers in scope, what conclusion would you reach applying these principles about which mechanism is more appropriate?



# UNDERSTANDING THE RATIONALE FOR EACH REMUNERATION MECHANISM

## The Remuneration Authority

### What is the purpose and coverage of the Authority?

The Remuneration Authority, formerly the Higher Salaries Commission, is responsible for determining the remuneration of the Governor-General, Ministers, Members of Parliament, Judges, members of local authorities, and community boards. The Authority also determines the remuneration for a range of statutory positions where there needs to be, and there needs to be seen to be, a high degree of independence in the exercise of their roles.<sup>2</sup>

The Authority's establishing legislation does not contain a specific purpose statement. However, it is widely understood today, including by the Authority itself, that the Authority exists to provide an independent mechanism for setting remuneration for positions that themselves require independence to carry out their functions, or where there is political sensitivity in setting remuneration. The evolution of its functions tells a compelling story about how the purpose of this body has changed over time.

When originally established in 1977, the Higher Salaries Commission was responsible for determining salaries and allowance for:

- members of the House of Representatives
- the most senior executive officer in a range of corporations and other public bodies in which the Crown had an interest

- heads of all the universities and the University Grants Committee
- the most senior administrative and technical officers in local authorities
- positions with salaries higher than the upper limit provided by the State Services Conditions of Employment Act 1977
- a range of specified statutory officers
- medical practitioners (including those still studying) employed by Hospital Boards
- teachers in universities.

The Commission was also required to consider and make recommendations to the relevant Minister regarding salary and allowances for Judges.

The positions included under the original Higher Salaries Commission Act 1977 at this time did indeed reflect those positions within the state sector with 'higher salaries', as well as members of the legislature, and members of the judiciary. It is interesting to note that the Commission was only required to make recommendations to the Executive in relation to remuneration for the judiciary under the original Act, not to make a determination.

The history of amendments to this Act (since renamed the Remuneration Authority Act 1977) show a move away from determining remuneration for wider state sector organisations and towards a more focused set of positions. While there have been incremental changes over time, a key change came with the reforms enacted by the State Sector Act 1988. This

<sup>2</sup> CO (11) 7





brought the remuneration of public sector Chief Executives under either the State Services Commission or the relevant Board, to align with responsibilities for setting and monitoring performance expectations for those positions.

Today, the Remuneration Authority is no longer responsible for employed positions in the state sector or in universities or hospitals. All of the schedules relating to corporations or public bodies, universities and local authorities have been repealed.

The Authority now determines remuneration for members of Parliament and members of the judiciary, elected members of local authorities, and for those in Crown Entities requiring the highest level of independence from the Executive. Schedule 4 of the Remuneration Authority Act, with its range of independent statutory positions, has evolved and grown. As described in the Cabinet Office Circular explaining the role of the Authority, Schedule 4 positions are those

*‘whose roles require them to perform quasi judicial roles, or to exercise, and be seen to exercise, a high degree of independence.’<sup>3</sup>*

Examples of positions under Schedule 4 include Officers of Parliament, members of the Human Rights Commission and the Director of Human Rights Proceedings, the Solicitor-General, and members of the Waitangi Tribunal. The heads of a number of tribunals are also included under Schedule 4 – for example, the Principal Disputes Referee, the Principal Tenancy Adjudicator (and deputy), and the chair of the Weathertight Homes Tribunal. A full list of officers currently in Schedule 4 is included in Appendix 2.

<sup>3</sup> CO (11) 7

## How are decisions made and how is remuneration funded?

The Remuneration Authority Act 1977 sets a number of criteria for the Authority to consider in determining remuneration,<sup>4</sup> including:

- requirements of the position (job sizing)
- relativity to the market
- fairness to those whose remuneration is being set, and to the taxpayer
- other conditions of service (that is, the terms of appointment)
- ability to recruit and retain
- prevailing adverse economic conditions.

The Authority makes determinations in relation to each position it is responsible for, and these must be implemented.

The salaries or fees for these positions are funded through Permanent Legislative Authorities.

## What does this say about the role of the Authority?

Looking at the characteristics of positions that now sit with the Authority, and the process by which decisions are made, shows that the Authority is now firmly a constitutional instrument, an independent body that determines remuneration for:

- those who need to have, and to be seen to have, independence from the Executive
- elected officials, in both central and local government, where there are political sensitivities to setting remuneration.

<sup>4</sup> The exception to this is remuneration for MPs. A formula for changes to MPs remuneration is specified in the Act



# The Cabinet Fees Framework

## What is the purpose and coverage of the CFF?

The CFF is a framework for determining or reassessing the fees paid to a range of statutory or other bodies and committees in which the Crown has an interest. It is set out in the Cabinet Officer Circular CO (12) 6.

The CFF was introduced with a clear purpose:

- to provide a consistent approach to the way remuneration is set across all of these bodies
- to contain expenditure of public funds within reasonable limits
- to provide flexibility to determine fees within clear criteria.

The CFF has been updated a number of times since it was first introduced, but there haven't been any substantive changes in the purpose of the framework.

The types of bodies or positions covered by the CFF include:

- Boards of most Crown Entities (including Tertiary Education Institutions and District Health Boards)
- Trust Boards
- Bodies and Committees set up to advise departments, Crown Entities and Ministers
- Royal Commissions and Commissions of Inquiry
- Statutory Tribunals and Authorities
- Individuals appointed as statutory bodies not covered by the Remuneration Authority
- Subsidiary bodies of statutory entities.

## How are decisions made and how is remuneration funded?

The CFF has a scoring mechanism for each body and sets fee ranges for bodies that come under the different scores. The approach is slightly different depending on the type of body, but in essence it is intended to reflect the complexity of the body's work and the impact of any decisions it makes.

In setting actual fees, the following criteria have to be considered:

- the complexity of the functions and the expertise required
- recruitment and retention issues
- the extent to which an individual member needs to insure against personal liability
- the potential risk to reputation
- the degree to which the role is in the public eye
- affordability
- period since the fees were last reviewed.

Under the CFF those criteria must also be 'balanced by an element of public service and community commitment, the personal contribution and recognition of the intangible benefits to the member'.

The CFF is explicit that fees need to reflect a discount for the element of public service involved.

Fees are set by responsible Ministers, on the recommendation of the relevant department. Where fees are proposed outside the parameters of the framework, these must be agreed by the Minister for State Services, and may need to be considered by the Appointments and Honours Cabinet Committee and by Cabinet.



Funding for these fees comes from non-departmental appropriations, and any increases must be met within baseline unless otherwise agreed.

## What does this say about the role of the CFF?

There are a mixture of bodies whose remuneration is set under the CFF, including some that arguably require some degree of independence from the Executive (such as Royal Commissions).

However, most of the characteristics of the CFF place it firmly as an instrument of the Executive. The framework itself is developed by the Executive and can be amended by it, and decisions regarding remuneration are made by the Executive. It is explicit in its purpose about providing a lever for the Executive to contain expenditure of public funds.

## Review of CFF

The State Services Commission is currently reviewing the CFF. While this review is not yet complete, we understand there is not likely to be any substantive changes to the purpose of the CFF or to any other aspects of the framework that would impact the principles developed here.

## Summary of key aspects of the remuneration mechanisms

The following table summarises and compares key aspects of the different remuneration mechanisms described in this section.

**Table 1: Comparison of key aspects of the CFF and the Remuneration Authority**

	Cabinet Fees Framework	Remuneration Authority
Key purpose	<ul style="list-style-type: none"> <li>Consistency</li> <li>Contain costs</li> <li>Flexibility within range</li> </ul>	Independently set remuneration for positions requiring independence from Executive and where there are political sensitivities
Coverage	<ul style="list-style-type: none"> <li>Most Crown Entities</li> <li>Trust Boards</li> <li>Advisory bodies and Committees</li> <li>Royal Commissions and Commissions of Inquiry</li> <li>Statutory Tribunals and Authorities</li> <li>Statutory bodies not covered by the Remuneration Authority</li> <li>Subsidiary bodies of statutory entities</li> </ul>	<ul style="list-style-type: none"> <li>MPs</li> <li>Judges</li> <li>Local authorities (elected)</li> <li>Independent Crown Entities</li> <li>Specified statutory officers (Schedule 4)</li> </ul>
Criteria considered	<ul style="list-style-type: none"> <li>Complexity and expertise required</li> <li>Recruitment and retention</li> <li>Affordability</li> <li>Public service and community commitment 'discount'</li> <li>Risk to reputation</li> <li>Public profile</li> </ul>	<ul style="list-style-type: none"> <li>Requirements of the position (job sizing)</li> <li>Recruitment and retention</li> <li>Fairness to those whose remuneration is being set, and to the taxpayer</li> <li>Prevailing adverse economic conditions</li> <li>Relativity in the market</li> <li>Other conditions of service</li> </ul>
Decision-maker	Responsible Ministers, Minister for State Services and Cabinet	Remuneration Authority
Funding	Non-departmental appropriations. Fees must be met in baseline unless otherwise agreed	Permanent Legislative Authority



# DEVELOPING GUIDING PRINCIPLES

## Where does our comparison lead us?

Looking at the CFF and the Authority side-by-side shows that the key point of difference between the two is the notion of independence.

The purpose, coverage and decision-making processes of the Remuneration Authority indicate that it is a constitutional instrument – it provides independent decisions about the remuneration of positions that require independence to carry out their functions, and of positions where setting remuneration involves some political sensitivity.

While there are some grey areas in the coverage of the CFF, its purpose and its decision-making processes show that it is an instrument of the Executive – it is a framework developed by the Executive to provide consistency in fees across a range of bodies for which the Crown sets fees, to provide a lever for the Executive to manage and contain costs, and with the Executive as decision-maker.

On this basis, we have looked at two primary principles you would apply to thinking about the more appropriate mechanism for setting remuneration for any given position:

- 1 **Providing independence from the Executive** (the Authority)
- 2 **Ensuring the Executive is able to manage costs in accordance with Government priorities** (the CFF)

We have accordingly framed two options for the Ministry to consider, one giving a heavier weighting to independence, the other giving a heavier weighting to the ability to manage costs (see the next section of this report).

## What have we not used to guide our assessment?

When we started this work we considered a wide range of potential criteria for thinking about the more appropriate mechanism for setting remuneration for these judicial and statutory officers. Many of these were derived from areas of concern raised in the course of fees reviews, including some that have been put forward as supporting reasons for recommending the transfer of Environment Commissioners and the Chair of the Human Rights Review Tribunal in the past (APH Min (07) 5/9 refers). Examples include:

- full-time versus part-time positions
- complexity – for example, breadth of jurisdiction
- case value
- decisions made alone or as a group
- tribunal volumes.

However, after careful consideration we have determined that that these factors do not inform a principled approach to thinking about why a position should be under one mechanism or the other. We have concluded that they instead consist of:

- factors that make the CFF challenging to apply – for example, the CFF is not designed for positions with full-time workloads
- factors that define and may differentiate the work of the different officers – for example, the particular legislation the officers deal with, whether they make decisions alone or as a group, the value of cases that can be heard, and the volume of cases being heard.



## Principle: Providing independence

### Why is independence important?

The concept of independence in relation to judicial decision-making is a cornerstone of our constitution, and underpins public trust and confidence in our judicial system.

New Zealand does not have a constitution that is written down in one place, like most other countries. Our constitution is made up of a number of key statutes and documents, including Te Tiriti o Waitangi and the New Zealand Bill of Rights Act 1990, decisions of the courts, and practices and conventions. It is underpinned by important principles, including the rule of law and separation of powers.<sup>5</sup>

These principles, among other things, establish that everyone is subject to the law, including the government, and that there should be an independent, impartial judiciary to interpret legislation and develop the common law.

Impartiality and independence, and more importantly, perceived impartiality and independence, are key to public trust and confidence in our system. Judicial bodies need to be seen to be impartial in dealing with the matters before them, and to be independent from the Executive and the Legislature, and free from political interference in decision-making.

This independence includes ensuring that there is independence from the Executive in terms of:

- appointment
- tenure
- financial security.

Most relevant to this work, if a judicial body is perceived to be dependent on the Executive for financial security, this can erode public confidence.

### How do we determine if a position requires independence?

We are tasked with looking at a range of positions that cover officers in courts, tribunals and authorities and the corrections disciplinary system.

The need for independence of Judges in our court system is well established in our constitution. Tribunals sit somewhere between the Judiciary and the Executive, and while there are calls for them to be independent, the independence of our tribunals is not established in practice in New Zealand.<sup>6</sup>

*'The constitution of a modern democracy governed by the rule of law must ... guarantee the independence of judicial decision-makers, ... all those making decisions of a judicial character, whether they are judges (or jurors or magistrates) or not.'*<sup>7</sup>

The idea that it is the independence of judicial decision-makers that is critical – rather than of 'the judiciary' – has been central to the development of our

<sup>5</sup> Legislation Design and Advisory Committee, *Legislation Guidelines*, 2018 edition. Available at [www.ldac.org.nz](http://www.ldac.org.nz)

<sup>6</sup> New Zealand Law Commission, *Tribunals in New Zealand*, Issues Paper No 6, 2008  
Pamela O'Connor, *Tribunal Independence* (The Australasian Institute of Judicial Administration Incorporated, Melbourne, 2013)

<sup>7</sup> Tom Bingham, *The Rule of Law* (Penguin Books, London, 2011) at p 91.



assessment under the principle of independence for all the different bodies we must consider.

There are a number of factors that could be applied to thinking about why the range of judicial and statutory officers in scope for this review might require independence from the Executive:

- where they carry out work that would otherwise be heard by a court
- where they review and make determinations on decisions of the Executive
- where some characteristics of these positions may imply independence – for example, being appointed by the Governor-General; or being given tenure within a fixed term; or other members of the body being Judges or having their remuneration set by the Authority.

Those factors do indeed apply to many of the positions we are looking at. However, we consider that, while those factors are relevant, the defining criterion is whether the position has the power to make judicial decisions. That is:

*Does the position have the authority to hear and decide cases and make binding decisions (on the parties)?<sup>8</sup>*

## Principle: Ability to manage costs

### Why is the ability to manage costs important?

The Government of the day is tasked with managing public finances, subject to the scrutiny of the Opposition and citizens more generally. The ability to

decide the amount of spend in any given area is a key lever that enables the Executive to prioritise investment across the whole of the public spend.

Within our public financial management system there are areas where the Executive has more or less control over the amount of spend. As discussed above, the Remuneration Authority makes determinations independently of the Executive, the Authority's determinations must be implemented, and money must be appropriated for this accordingly. Under the CFF, the Executive can choose not to implement recommendations for any reason, and it can choose to prioritise spend (or indeed savings) in other areas it sees as more critical. Moving positions to the Authority would remove the Executive's ability to manage the level of fees being set for these judicial and statutory officers.

There are a number of reasons why, in relation to fees for judicial and statutory officers, the Executive may prioritise the principle of ensuring their ability to manage costs. These include their ability to implement policy priorities, and their ability to respond nimbly to changes in the national and international economic context (for example, the GFC).

The ability to manage costs in relation to policy priorities is particularly topical right now. The current Government is committed to addressing pay levels across the public service, focusing on paying women equally, lifting pay for those at the bottom end, and flattening the rate of growth at the top end.

The recent announcements that performance pay will be removed for public service Chief Executives<sup>9</sup> sends a strong signal to the labour market about the Government's expectations in relation to pay. The Government has also sent signals by constraining increases in pay for MPs themselves. These increases are determined by a formula in the Remuneration Authority Act

<sup>8</sup> This draws on the definition of judicial power in Black's Law Dictionary.

<sup>9</sup> <https://www.beehive.govt.nz/release/performance-pay-chief-executives-ended>



1977, but the Government has announced its intention to pass urgent legislation to enable them to freeze MPs' pay and to reassess the current formula set in the legislation.<sup>10</sup>

In this context, ensuring the Executive has the ability to manage the level of fees being set for these judicial and statutory officers is another way the Government can send signals of its expectations in relation to pay to the labour market.

Transferring positions to the Remuneration Authority does not necessarily mean they would be paid any more or less, but it does remove the ability of the Executive to set those levels.

There is often an assumption that a position would have higher fees set under the Authority than under the CFF – this is probably in part because of the Authority's genesis, as the Higher Salaries Commission, and in part because there have been higher increases for the judiciary, in the past, than has been the case for judicial and statutory officers whose fees are set by Ministers and Cabinet. Fee levels and increases for those statutory officers under Schedule 4 are not publicly available, so we do not know what level of increases have been determined for those positions.

We do not know at this stage what the effect of transferring these positions would be on the overall spend on fees. Each position would have an individual determination, and the Authority is required to consider a range of criteria similar to those in the CFF in setting fees for Schedule 4 bodies.<sup>11</sup>

<sup>10</sup> <https://www.beehive.govt.nz/release/mp-pay-frozen-and-fairer-system-increases-developed>

<sup>11</sup> As noted above, the formula for MPs' remuneration is different.





# APPLYING THE PRINCIPLES TO THE POSITIONS IN SCOPE

In this section we apply the two guiding principles – providing independence from the Executive and the ability of the Executive to manage costs – to assessing whether the CFF or the Remuneration Authority is the more appropriate mechanism for setting remuneration for each position in scope.

These are framed as options, as the conclusion about which mechanism is more appropriate for most positions depends on which principle is given priority by decision-makers.

## Option 1: Providing independence

Under the scenario where the need for independence is given greatest weight, the majority of judicial and statutory officers in scope would be transferred to the Authority.

We have applied the criterion of judicial decision-making to assess which positions would more appropriately have their fees determined by the Authority, and which should remain under the CFF. As a result of that assessment, we have identified three groups of officers:

- 1 those that would transfer to the Remuneration Authority **under any option** – these are positions that have particular requirements for independence
- 2 those that would transfer to the Authority **under this option** – these are positions with judicial decision-making power
- 3 those that would remain under the CFF **under this option** – these are positions with no judicial decision-making power.

## Positions that would transfer to the Authority under any option

### Judicial decision-makers in courts

The notion that decisions made in our court system need to be independent from any interference by the Executive is well established in our constitution.

There are a small number of officers in scope who make decisions in general or specialist courts in New Zealand and who we believe should have their remuneration determined by the Authority under any option.

#### Community Magistrates

Community Magistrates sit in the District Court and hear matters that would otherwise come before a District Court Judge. They have protected tenure, holding office until resignation, retirement or removal. They are appointed by the Governor-General and their remuneration is determined by Order in Council. Their remuneration is provided through a Permanent Legislative Authority in Vote Courts.

#### Environment Commissioners

Environment Commissioners sit in the Environment Court, hearing matters and making decisions either as a panel, with Environment Court Judges, or alone. They are appointed by the Governor-General on the recommendation of the Attorney-General.





## Dispute Referees

Dispute Referees hear and decide matters before the Disputes Tribunal. They are appointed by the Governor-General for a three-year term. The Tribunal is unique in that it has been established as a division of the District Court (see section 4 of the Disputes Tribunal Act 1988).

## Positions with constitutional powers

### Chair and members of the Human Rights Review Tribunal

The Chair and members of the Human Rights Review Tribunal meet the test of judicial decision-making that we apply more generally here, but we consider that the Tribunal's additional powers make this a special case in the context of tribunals.

Under the Human Rights Act 1993, the Human Rights Review Tribunal has the power to declare legislation inconsistent with the New Zealand Bill of Rights Act 1990.<sup>12</sup> It is the only authority expressly given this power, though the High Court and Court of Appeal have recently claimed this power. It is clear at the very least that, in relation to this aspect, the powers of the Tribunal exceed those of the District Court.

## Committees appointed by Parliament

### Chair and members of the Abortion Supervisory Committee

Under the Contraception, Sterilisation and Abortion Act 1977, the committee is responsible for reviewing all of New Zealand's abortion law provisions, and the operation and effect of those provisions. This includes the licensing of institutions to perform abortions and the appointment of certifying consultants to consider cases for abortion.

<sup>12</sup> Human Rights Act 1993, section 92J.

The committee consists of three members, including two registered medical practitioners. One member is appointed as chairperson. Members are appointed by the Governor-General on the recommendation of the House of Representatives.

## Positions that would transfer to the Authority under this option

The following positions make judicial decisions, either on their own or as a member of a panel of decision-makers. Where they decide as part of a panel, we consider the position has judicial decision-making powers where they have a genuine ability to influence the outcome of a hearing.

Some of the officers we are looking at have mixed functions, and some of those functions don't require independence – for example, licensing authority. We have included any position here that has judicial-decision making as one of its functions, even if it has other functions.

**Table 2: Positions that would transfer to the Authority under the principle of providing independence**

Body	Positions	Brief description
<b>Judicial decision-makers in tribunals and authorities</b>		
Accident Compensation Appeal Authority <sup>13</sup>	Authority	Hears appeals from decisions of ACC under the Accident Compensation Act 1982.
Alcohol Regulatory and Licensing Authority	Members	Hears appeals from District Licensing Committee decisions and enforcement applications.

<sup>13</sup> The Accident Compensation Appeal Authority would be repealed under the Accident Compensation Amendment Bill currently in select committee stage.



Body	Positions	Brief description
Copyright Tribunal	Chair and Members	Hears applications regarding infringements and licensing scheme disputes.
Customs Appeal Authority	Authority	Hears appeals against assessments, decisions, rulings, determinations and directions of the New Zealand Customs Service.
Immigration Advisers Complaints and Disciplinary Tribunal	Chair	Hears complaints against licensed immigration advisers, and appeals against Immigration Advisers Authority decisions.
Immigration and Protection Tribunal	Deputy chair and Members	Hears appeals of decisions in relation immigration status and applications in relation to the continuance or cancellation of refugee status.
Land Valuation Tribunal	Members	Hears objections to land valuations and titles.
Lawyers and Conveyancers Disciplinary Tribunal	Chair, Deputy Chair and Lay Members	Hears disciplinary charges against members of the legal and conveyancing professions, appeals in relation to decisions in relation to issuing practicing certificates, and applications regarding suspension, striking off, revocation of orders, and restoration of practitioners to the roll or register.
Legal Aid Tribunal	Chair and members	Reviews and makes findings on decisions of the Legal Services Commissioner in relation to legal aid grants.
Legal Aid Review Authority	Chair	Reviews and makes findings on decisions of the Secretary of Justice about legal aid provider approvals.

Body	Positions	Brief description
Legal Complaints Review Officer (LCRO)	LCRO and Deputy LCRO	Reviews and makes findings on decisions of the standards committees of the NZ Law Society and NZ Society of Conveyancers.
Private Security Personnel Licensing Authority	Chair and Deputy Chair	Hears complaints against licensees.
Real Estate Agents Disciplinary Tribunal	Chair, Deputy Chair and lay members	Hears charges against licenses laid by the Complaints Assessment Committee of the Real Estate Agents Authority, appeals against decisions made by the committee, and reviews decisions made by the registrar of the authority.
Secondhand Dealers and Pawnbrokers Licensing Authority	Chair	Hears objections and police complaints against licence and certificate holders.
Social Security Appeal Authority	Chair and members	Hears appeals against decisions made by MSD under various acts relating to social security provisions.
Student Allowance Appeal Authority	Chair	Hears appeals from students on decisions made by the Ministry of Social Development on their student.
Taxation Review Authority	Authority	The Authority hears objections to assessments of tax or duty, or decisions or determinations of the Commissioner of Inland Revenue.
Tenancy Tribunal	Adjudicator	Adjudicators hear disputes between landlords and tenants.
Trans-Tasman Occupations Tribunal	Chair and Members	Reviews and makes findings on decisions of local registration authorities.
Weathertight Homes Tribunal	Members	Members hear claims relating to leaky homes.



Body	Positions	Brief description
<b>Other judicial decision-makers</b>		
Visiting Justices <sup>14</sup>	Visiting Justices	Part of the Corrections disciplinary system. Can examine the treatment and conduct of prison inmates and have the authority to inquire into abuses or alleged abuses in prisons by way of a hearing. Can hear appeals against Corrections disciplinary decisions.

## Positions that would remain under the CFF under this option

There are a number of other positions in scope that contribute to the work of courts, tribunals and authorities, but that do not have the authority to make judicial decisions. We do not consider that these positions need to have their remuneration determined by the Remuneration Authority; they could stay under the CFF.

**Table 3: Positions that would remain under the CFF under the principle of providing independence**

Body	Positions	Brief description
<b>Statutory officers contributing to work of courts</b>		
High Court	Additional members <ul style="list-style-type: none"> <li>• Commerce</li> <li>• Human Rights</li> <li>• Land Valuation</li> </ul>	The decisions of the court in all of the following refer to majority, but that majority must include a Judge (or majority of Judges). As such, we consider that these High Court Additional members do not have a genuine decision-making role.
Māori Land Court Rules Committee	Members	The function of the Rules Committee is to review rules of the court, and make recommendations for changes. Members do not play any judicial decision-making role.
Taiapure Māori Fisheries Tribunal	Assessors	The Tribunal comprises a Judge of the Māori Land Court who may be assisted by an assessor. Assessors do not have any decision-making authority.
District or High Court	Technical Advisors	The District Court or the High Court may appoint a technical adviser to assist it in considering and determining an application for an order under the Harmful Digital Communications Act 2015. The Judge alone determines the application or appeal.

<sup>14</sup> Section 200 of the Corrections Act 2004 determines that fees paid to Visiting Justices (excluding District Court Judges) should be prescribed by the Governor-General, by Order in Council. If Visiting Justices were to be moved to the Remuneration Authority, the Authority should determine the fees for the position itself, and any person appointed would be remunerated at the same level

(excluding District Court Judges). Currently, Visiting Justices who are Justices of the Peace are remunerated at lower levels than their colleagues who are barristers or solicitors of the High Court, despite performing the same role.



Body	Positions	Brief description
<b>Statutory officers in tribunals and authorities</b>		
Abortion Supervisory Committee	Advisory and technical committee members	Committees that may be established by the Abortion Supervisory Committee to provide it with advice
	Specialist Advisers	Advisory role only
	Certifying Consultants	Medical practitioners who can determine whether to authorise an abortion
Motor Vehicle Disputes Tribunal	Assessors	Assessors form part of the Tribunal but do not have any decision-making authority. Adjudicators, who perform this function, already have their remuneration determined by the Authority.
<b>Other positions</b>		
Criminal Justice Assistance Reimbursement Scheme	Assessors	<p>The Scheme exists to compensate people who have suffered destruction or loss of property, or lost earnings as a direct result of helping police with a criminal case that is punishable by imprisonment.</p> <p>Claims are be considered by independent assessors who advise the Secretary of Justice. They are not statutory officers (the scheme is a ministerial directive) and do not have decision-making powers.</p>

Body	Positions	Brief description
Judicial Complaints Lay Observer <sup>15</sup>	Judicial Complaints Lay Observer	<p>Part of the voluntary judicial complaints process (as opposed to the statutory process led by the Judicial Conduct Commissioner).</p> <p>Has the power to review complaints against Judges, the way they are processed, any response from the Judge and any other matters that may be relevant.</p> <p>If the Judicial Complaints Lay Observer considers that a decision by the Head of Bench not to pursue the complaint should be reviewed, he or she may request that the Head of Bench reconsider the complaint.</p>

<sup>15</sup> The Judicial Complaints Lay Observer is currently remunerated by the Ministry of Justice in accordance with the CFF. However, we have not been able to find any establishing legislation for this position or how it was intended to be remunerated.



## Option 2: Ability to manage costs

Applying the principle of ensuring the ability of the Executive to manage costs in accordance with Government priorities does not require the same level of analysis as the principle of independence. If the ability to manage costs was given greater weight by decision makers, it would follow that all positions would have their remuneration set in accordance with the CFF, with a small number of exceptions.

As explained above, we consider there are a small number of officers who should transfer to the Remuneration Authority under any option (see page 13). These are officers that are:

- judicial decision-makers in courts
  - Community Magistrates
  - Environment Commissioners
  - Disputes referees
- positions with constitutional powers
  - Chair and members of the Human Rights Review Tribunal
- committees appointed by Parliament
  - Abortion Supervisory Committee Chair and members.

## Comparison of assessment under each principle

The following table summarises which remuneration mechanism has been assessed as more appropriate for the judicial and statutory officers in scope, depending on which principle is prioritised. That is, this depends on whether the determining principle is:

- 1 providing independence from the Executive, or
- 2 ensuring the Executive is able to manage costs in accordance with Government priorities.

Reflecting the results of the assessments, positions fall into one of three categories:

- those that would transfer to the Authority under both options – judicial decision-makers in courts and positions with constitutional powers
- those that would remain under the CFF under both options – statutory and other positions with no judicial decision-making powers
- those where the prioritisation of one principle or the other determines which remuneration mechanism should apply – all other positions.

Please note that this assessment is based on the principles as defined for this work, and is based on desk-research and our prior understanding of the positions in scope. No consultation with the officers in scope has been undertaken as part of Phase 1.



**Table 4: Comparison of results of assessment under each principle**

Body	Positions	Determining Principle	
		Independence	Managing costs
Judicial decision-makers in courts and positions with constitutional powers			
Community Magistrates	Community Magistrates	Remuneration Authority	Remuneration Authority
Disputes Tribunal	Referees	Remuneration Authority	Remuneration Authority
Environment Court	Commissioners and Deputy Commissioners	Remuneration Authority	Remuneration Authority
Human Rights Review Tribunal	Chair	Remuneration Authority	Remuneration Authority
Abortion Supervisory Committee	Chair and Members	Remuneration Authority	Remuneration Authority
Judicial decision-makers			
Accident Compensation Appeal Authority	Authority	Remuneration Authority	CFF
Alcohol Regulatory and Licensing Authority	Members	Remuneration Authority	CFF
Copyright Tribunal	Chair and Members	Remuneration Authority	CFF
Customs Appeal Authority	Authority	Remuneration Authority	CFF
Immigration Advisers Complaints and Disciplinary Tribunal	Chair	Remuneration Authority	CFF
Immigration and Protection Tribunal	Deputy chair and Members	Remuneration Authority	CFF
Land Valuation Tribunal	Members	Remuneration Authority	CFF

Body	Positions	Determining Principle	
		Independence	Managing costs
Lawyers and Conveyancers Disciplinary Tribunal	Chair, Deputy Chair and Lay Members	Remuneration Authority	CFF
Legal Aid Tribunal	Chair and members	Remuneration Authority	CFF
Legal Aid Review Authority	Chair	Remuneration Authority	CFF
Legal Complaints Review Officer (LCRO)	LCRO and Deputy LCRO	Remuneration Authority	CFF
Private Security Personnel Licensing Authority	Chair and Deputy Chair	Remuneration Authority	CFF
Real Estate Agents Disciplinary Tribunal	Chair, Deputy Chair and lay members	Remuneration Authority	CFF
Secondhand Dealers and Pawnbrokers Licensing Authority	Chair	Remuneration Authority	CFF
Social Security Appeal Authority	Chair and members	Remuneration Authority	CFF
Student Allowance Appeal Authority	Chair	Remuneration Authority	CFF
Taxation Review Authority	Authority	Remuneration Authority	CFF
Tenancy Tribunal	Adjudicator	Remuneration Authority	CFF
Trans-Tasman Occupations Tribunal	Chair and Members	Remuneration Authority	CFF
Weathertight Homes Tribunal	Members	Remuneration Authority	CFF



Body	Positions	Determining Principle	
		Independence	Managing costs
Visiting Justices	Justices of the Peace	Remuneration Authority	Order in Council <sup>16</sup>
<b>Statutory and other positions that are not judicial decision-makers</b>			
High Court	Additional members	CFF	CFF
	• Commerce		
	• Human Rights		
	• Land Valuation		
Māori Land Court Rules Committee	Members	CFF	CFF
Taiapure Māori Fisheries Tribunal	Assessors	CFF	CFF
Abortion Supervisory Committee	Advisory and technical committee members	CFF	CFF
	Specialist Advisers	CFF	CFF
	Certifying Consultants	CFF	CFF
Motor Vehicle Disputes Tribunal	Assessors	CFF	CFF
Criminal Justice Assistance Reimbursement Scheme	Assessors	CFF	CFF
Judicial Complaints Lay Observer	Judicial Complaints Lay Observer	CFF	CFF

<sup>16</sup> See footnote 14 on page 16 for further information.



# NEXT STEPS

This report marks the conclusion of the first phase of this work.

## Phase 2

The approach to the next phase of this work will need to be developed in consultation with key internal Ministry of Justice stakeholders, and is likely to evolve depending on Ministers' preferences. In particular, there will need to be a decision about whether it is more appropriate to inform or consult on the proposals.

At a high level, the next steps are likely to include:

- 1 Consultation with key stakeholders within the Ministry of Justice on the options in this report, and refinement of these options
- 2 A briefing to the Minister of Courts and other relevant Ministers, including the Minister for State Services, outlining the options for transferring positions to the Remuneration Authority, and seeking a decision on the preferred option:
  - a The development of this briefing would include consultation with key agencies, including the State Services Commission, the Authority, MBIE (which administers the Authority's legislation), and other administering agencies.

*If the preferred option includes a decision to transfer any positions to the Authority, the next steps may include:*

- 3 Consultation with the officers in scope on the proposal
- 4 Further development and refinement of the proposal, based on the outcomes of the consultation

- 5 A briefing to the Minister of Courts and other relevant Ministers on the outcomes of the consultation, seeking their agreement to recommendations to transfer specific officers to the Authority.

*If there is agreement to the recommendations to transfer any positions to the Authority, the next steps would include:*

- 6 A Cabinet paper seeking agreement to transfer specific officers to the Remuneration Authority
  - a This would set out the rationale for transfers, feedback from the officers concerned, and the legislative changes required (depending on decisions, changes would be required to the establishing legislation of officers, and to the Authority's legislation – while this may equate to a large number of different Acts, the substantive changes are not likely to be complex).





# APPENDIX 1: POSITIONS IN AND OUT OF SCOPE OF THIS REVIEW

## Positions in scope

### Tribunals

Body	Officers
Abortion Supervisory Committee	Chair and members Certifying consultants Specialist advisers Sub-committees chairs and members
Accident Compensation Appeal Authority	Chair
Alcohol Regulatory and Licensing Authority	Members
Copyright Tribunal	Chair and members
Criminal Justice Assistance Reimbursement Scheme	Assessor
Customs Appeal Authority	Chair
Disputes Tribunal	Referees
Human Rights Review Tribunal	Chair and members
Immigration Advisers Complaints and Disciplinary Tribunal	Chair and members
Immigration and Protection Tribunal	Deputy chair and members
Land Valuation Tribunal	Members
Lawyers and Conveyancers Disciplinary Tribunal	Chair, deputy chair and lay members

Body	Officers
Legal Aid Tribunal	Chair and members
Legal Aid Review Authority	Member
Legal Complaints Review Officer	Legal complaints review officer and deputy legal complaints review officer
Motor Vehicle Disputes Tribunal	Assessors
Private Security Personnel Licensing Authority	Members
Real Estate Agents Disciplinary Tribunal	Chair and members
Secondhand Dealers and Pawnbrokers Licensing Authority	Chair
Social Security Appeal Authority	Chair, deputy chair and members
Student Allowance Appeal Authority	Chair
Taxation Review Authority	Chairs
Tenancy Tribunal	Adjudicators
Trans-Tasman Occupations Tribunal	Chair and members
Weathertight Homes Tribunal	Members



## Specialist courts

Court	Officers covered
Environment Court	Environment Commissioners and Deputy Commissioners

## Māori Land Court

Body	Officers covered
Māori Land Court Rules Committee	Members (non-public servant only)
Taiapure Māori Fisheries Tribunal	Assessors

## District Court

Officers	Officers covered
Community magistrates	All
Technical Advisors (under Harmful Digital Communications Act 2015)	All – may also be appointed by the High Court

## High Court

Officers	Officers covered
High Court Additional Members	For commerce, human rights and land valuation purposes

## Office of Legal Counsel

Officers	Officers covered
Judicial Complaints Lay Observer	Judicial Complaints Lay Observer

## Corrections disciplinary system

Officers	Officers covered
Visiting Justices	All Visiting Justices who are not Judges

## Positions out of scope

Body	Rationale
Victims Special Claims Tribunal	A Tribunal is constituted by a District Court Judge sitting alone
Waitangi Tribunal	Tribunal members have their remuneration determined by the Remuneration Authority



## APPENDIX 2: SCHEDULE 4 OFFICERS

Schedule 4 of the Remuneration Authority Act 1977 sets out those Officers whose remuneration is to be determined by the Authority.

The following officers are listed under Schedule 4 as at 28 September 2017).

- The adjudicator of the Motor Vehicle Disputes Tribunal appointed under section 83 of the Motor Vehicle Sales Act 2003
- The chair of the tribunal under the Weathertight Homes Resolution Services Act 2006
- The Chief of Air Force
- The Chief of Army
- The Chief Censor of Film and Literature and the Deputy Chief Censor of Film and Literature
- The Chief Community Magistrate
- The Chief of Defence Force
- The Chief of the Employment Relations Authority and other members of the Employment Relations Authority (being the members who hold office under section 166 of the Employment Relations Act 2000)
- The Chief of Navy
- The Chief Parliamentary Counsel
- The Children's Commissioner
- The Clerk of the House of Representatives and the Deputy Clerk of the House of Representatives
- The Commissioner of Police and the Deputy Commissioner of Police
- The Commissioners of Intelligence Warrants
- The Controller and Auditor-General and the Deputy Controller and Auditor-General
- General Manager of the Parliamentary Service
- The Health and Disability Commissioner
- The Inspector-General of Intelligence and Security and the Deputy Inspector-General of Intelligence and Security
- Māori Trustee
- The members and alternate members of the Human Rights Commission and the Director of Human Rights Proceedings or his or her alternate
- The members and associate members of the Commerce Commission
- The members and associate members of the Financial Markets Authority
- The members of Drug Free Sport New Zealand
- The members of the Electoral Commission
- The members of the External Reporting Board
- The members of the Independent Police Conduct Authority
- The members of the Law Commission
- The members of the Sports Tribunal of New Zealand
- The members of the Takeovers Panel
- The members of the Transport Accident Investigation Commission



- The members of the Waitangi Tribunal
- The Mental Health Commissioner and the Deputy Health and Disability Commissioners
- The Ombudsmen (including the Chief Ombudsman)
- The Parliamentary Commissioner for the Environment
- The Principal Disputes Referee
- The Principal Tenancy Adjudicator and the Deputy Principal Tenancy Adjudicator
- The Privacy Commissioner and the Deputy Privacy Commissioner
- The Registrar of the Court Martial
- The Registrar of the Summary Appeal Court of New Zealand
- The Retirement Commissioner
- The Solicitor-General
- The State Services Commissioner and other Commissioners of the State Services Commission

