

DEPARTMENT OF HUMAN SERVICES

Adoption of Chapter 17-801

Hawaii Administrative Rules

May 19, 2020

1. Chapter 17-801, Hawaii Administrative Rules, entitled "Background Checks" is adopted to read as follows:

"HAWAII ADMINISTRATIVE RULES

TITLE 17

DEPARTMENT OF HUMAN SERVICES

SUBTITLE 6

BENEFIT, EMPLOYMENT AND SUPPORT SERVICES DIVISION

CHAPTER 801

BACKGROUND CHECKS

§17-801-1	Purpose
§17-801-2	Definitions
§17-801-3	Confidentiality
§17-801-4	Background checks
§17-801-5	Suitability
§17-801-6	Notification to the person and child care facility

Historical Note: This chapter is based substantially upon sections of these chapters 17-891.1, 17-892.1,

§17-801-1

17-895, and 17-896, Hawaii Administrative Rules. [Eff 6/18/87; am and comp 12/10/88; am and comp 12/19/02; am 2/24/17]

**§17-801-1 Purpose.** The purpose of this chapter is to establish the rules governing the administration and implementation of the child care block grant authorized under 42 U.S.C. §9858 and 42 U.S.C. §618 regarding requirements for background checks for the department's child care programs. [Eff ] (Auth: HRS §346-14) (Imp: HRS §346-14, 45 C.F.R. §98.1)

**§17-801-2 Definitions.** For the purpose of this chapter:

"Adult abuse perpetrator check" means a search to determine whether an individual is known to the department as a perpetrator of abuse as defined in section 346-222, Hawaii Revised Statutes (HRS), by means of a search of the individual's name and birth date in the department's adult protective services file.

"Applicant" means the person who applied for licensure of a group child care center, group child care home, or registration of their family child care home, and for group homes and family homes includes this person's spouse.

"Background checks" means a criminal history record check which includes a Federal Bureau of Investigation fingerprint check, the state criminal record registry or database check, state sex offender registry check and national sex offender public website check, state child abuse and neglect registry check, adult abuse perpetrator registry check, employment history check, and other information obtained by the department regarding the person's ability or suitability to provide child care.

"Caregiver" means any individual who is responsible for the physical well-being, health, safety, supervision, and guidance of children in a child care facility or exempt child care facility.

"Child" means any person who has not reached the age of eighteen years.

"Child care" means those situations in which a person, child care provider, child care facility, or exempt child care facility has agreed to assume the responsibility for the child's supervision, apart from and in the absence of the parent, guardian, or caretaker for any part of a twenty-four-hour day. Child care may be provided out of the child's home in out-of-home relative care, in the child's home by relatives or non-relatives, in a child care facility or an exempt child care facility.

"Child care center" or "group child care center" means a place maintained by any individual, organization, or agency for the purpose of providing child care. The term child care center shall include child care nurseries, nursery school groups, preschools, child play groups, parent cooperatives, drop in child care centers, group child care homes, or other similar units operating under any name.

"Child care facility" means a place maintained by any individual, organization, or agency for the purpose of providing care for children with or without charging a fee at any time. It includes a family child care home, group child care home, and group child care center.

"Department" means the department of human services or its designee.

"Exempt care" means child care which is exempt from licensure or registration by the department under HRS §346-152.

"Exempt child care facility" means a place that child care is conducted which is legally-exempt in accordance with section 346-152, HRS, and includes exempt center-based providers pursuant to chapter 17-800.

"Family child care home," "family child care," or "FCC" means any private residence at which care is

provided at any given time to six or fewer children, as defined in section 346-151, HRS.

"Group child care center" means a facility, other than a private home, at which care is provided, as defined in HRS §346-151. The term may include nurseries; infant and toddler centers for children ages six weeks to thirty-six months, preschools; parent cooperatives; drop-in child care centers; before-school and after-school programs; holiday, intersession and summer care for eligible school age children; or other similar care settings that are established to provide group care to a child for any part of a twenty-four hour day and is license-exempt or licensed by the department.

"Group Child Care Home or "GCH" means child care provided by an individual in a facility that may be an extended or modified family child care home which provides care to no more than twelve children during any part of a twenty-four hour day. GCHs are licensed under the rules for group child care centers.

"License" means a certificate of approval issued by the state department of human services authorizing the operation of a group child care center or group child care home.

"New hire" means an applicant or prospective employee of a child care facility or exempt child care facility who is seeking to operate or be employed in a child care facility or exempt child care facility for the first time in the state of Hawaii.

"Person" means any individual with unsupervised access to children in care, caregiver, adult household member, applicant, provider, substitute, volunteer, new hire, rehire, temporary hire, or staff member in a child care facility or exempt child care facility.

"Provider" means an individual 18 years or older, caregiver, child care facility, exempt child care facility, agency, or organization, exempt care providers, and staff members, who provide child care to children in the absence of the child's caretaker.

"Registration" means a certificate of approval

issued by the state department of human services authorizing the operation of a family child care home.

"Rehire" means an applicant or prospective employee of a child care facility or exempt child care facility who is seeking to operate or be employed in a child care facility or exempt child care facility following separation from employment of one hundred eighty consecutive days or more and who has been out of state during this break in employment.

"Rules" means the rules developed by the department of human services to set minimum standards of care and safety for the protection of children in child care.

"Staff member" means administrative, child care, office, maintenance, employees, and volunteers of a child care facility or exempt child care facility.

"Substitute" means a person who serves as a replacement caregiver for no more than ten consecutive working days in the same position when another caregiver is absent on an emergency or unplanned basis.

"Supervision" means to be within sight or hearing distance of the children to ensure the safety and protection of the children.

"Temporary hire" means a person who serves as a replacement when another caregiver is absent on a planned basis.

"Volunteer" means a person working or offering services to a child care facility or exempt child care facility without remuneration, except for reimbursable personal expenses allowed by the caregivers. [Eff

] (Auth: HRS §346-14) (Imp: HRS §346-151)

**§17-801-3 Confidentiality.** Requirements for confidentiality shall be as provided in chapter 17-601. [Eff ] (Auth: HRS §§346-10 and 346-14; 45 C.F.R. §205.50) (Imp: HRS §346-10; 45 C.F.R. §§205.50, 1391.3)

**§17-801-4 Background checks.** (a) Background checks conducted by the department shall include:

- (1) A criminal history record check, including:
  - (A) A Federal Bureau of Investigation fingerprint check; and
  - (B) A state criminal record registry or database check with the use of fingerprints in the state where the person resides;
- (2) Search of the state sex offender registry and national sex offender registries;
- (3) A state child abuse and neglect registry check;
- (4) An adult abuse perpetrator registry check;
- (5) An employment history check; and
- (6) Any other information obtained by the department regarding the person's ability or suitability to provide child care.

(b) All persons in a licensed or registered child care facility, or exempt child care facility shall be subject to background checks.

(c) A person subject to background checks shall provide consent to the department to conduct the background checks, prior to operating, working on-site at, or within five working days of living in a child care facility or exempt child care facility, and annually thereafter no later than the anniversary date of the most recent consent to conduct background checks. The consent shall be given upon forms supplied by the department.

(d) A person subject to background checks shall submit to the department a signed disclosure statement, under penalty of law, that indicates the person's background history that may affect the person's ability and suitability, under this chapter.

[Eff: \_\_\_\_\_] (Auth: HRS §346-14, 346-162, 346-172) (Imp: HRS §§346-152.5, 346-154)

**§17-801-5 Suitability.** (a) Results of the background checks shall be reviewed as part of the department's determination of whether a person is suitable as defined in subsection (d) to provide child care.

(b) Each person subject to background checks shall be determined to be suitable by the department to operate, be employed, work in, or live in a child care facility or exempt child care facility, except when a person may be provisionally cleared to work:

- (1) A person may start working on a provisional basis when the requirements in section 17-801-4 (a)(1) are completed and the department does not receive results or other information that the person may pose a risk to children in care or is not suitable to provide care; and
- (2) A person who has been provisionally cleared pursuant to paragraph (1) shall be continuously supervised by another person who has been determined suitable to provide care based upon the results of the background checks described in section 17-801-4(a); provided that paragraphs (1) and (2) do not apply to applicants, registrants, or licensees of family child care homes or group child care homes or their household members.

(c) An applicant, caregiver, staff member, employee, rehired employee, substitute or volunteer who has stopped providing care, stopped residing in a child care home, or left the State for a period of one hundred eighty consecutive days or more, is required to complete background checks again in accordance with section 17-801-4(a), and may be allowed to meet the conditions in subsection (b).

(d) A person is not suitable to provide child care for children if the person:

- (1) Refuses to provide consent to the background checks;
- (2) Makes a materially false statement or omission in disclosing any prior background

history that may affect the person's ability and suitability;

- (3) Is registered or is required to be registered, on a state sex offender registry or repository or the national sex offender registry;
- (4) Is identified on another state's registry or database as the perpetrator of child abuse, neglect, harm, or threatened harm;
- (5) Within a five-year period starting from the date that the child abuse case record was closed, the person has been confirmed by the department as the perpetrator of threatened harm as defined in section 587A-4, HRS. In situations when a finding of threatened harm occurred more than five years from the date that the child abuse case record was closed, a person's suitability shall be based on paragraph (8);
- (6) Is confirmed at any time as the perpetrator of harm against a child as defined in section 587A-4, HRS;
- (7) Is confirmed at any time as the perpetrator of abuse of a vulnerable adult as defined in section 346-222, HRS; or
- (8) Is found by the department, for any other reason that has not been identified in this chapter, to not be of reputable and responsible character or may pose a risk to the health, safety, or well-being of the children in care. Factors that shall be considered by the department include but are not limited to:
  - (i) The nature of the incident;
  - (ii) When the incident occurred;
  - (iii) Patterns of behavior the department determines resulted in or could have resulted in injury to self or others;
  - (iv) Any other relevant information received and deemed credible by the department; and
  - (v) Evidence of rehabilitation.

(e) In instances where a person is the subject of an on-going or pending criminal, child welfare, or department investigation, the person shall be excluded from the premises and the department's determination of whether the person is suitable as defined in subsection (d) cannot be completed until the investigation is closed or any related legal proceeding is completed.

(f) A person shall not provide licensed or registered child care, or exempt child care for a child whose family receives a subsidy from the department pursuant to chapters 17-798.3 and 17-799, if the person has been convicted of an offense listed in Exhibit I, dated January 1, 2020, attached at the end of this chapter.

(g) A person shall not provide licensed or registered child care, or exempt child care for a child whose family receives a subsidy from the department pursuant to chapters 17-798.3 and 17-799, if the person has been convicted within the past five years of the time of the background check of an offense listed in Exhibit II, dated January 1, 2020, attached to the end of this chapter.

(h) The person may file a written request for an administrative appeal to appeal the decision by the department:

- (1) In accordance with the provisions set forth in chapters 17-891.2, 17-892.2, 17-895.1, 17-896.1, for applicants, licensees, or registrants; or
- (2) In accordance with the provisions set forth in chapter 17-602.1, for all other persons not specified in subparagraph (A);

provided that the filing of a request for an administrative appeal does not permit the person to continue to provide child care for children under this chapter, pending the decision of the administrative appeal hearing officer. [Eff ]  
(Auth: HRS §346-14, 346-162, 346-172) (Imp: HRS §346-151, 346-152.5, 346-154)

**§17-801-6 Notification to the person, child care facility, and exempt child care facility.** (a) The department shall provide written notice to a person determined by the department to be not suitable under this chapter or excluded from the premises under this chapter. The written notification shall state the reason for the department's determination.

(b) The department shall request in writing that a provider terminate employment or residence of any person not suitable pursuant to this chapter.

- (1) The request shall be in writing and shall state the reason for the department's determination that the person is not suitable to provide child care;
- (2) When an applicant, registrant, licensee, or provider does not terminate employment or residence as requested by the department, the applicant, registrant, licensee, or provider shall notify the department in writing no later than seven working days after receipt of the request and shall state the reasons for the decision; and
- (3) A license, registration, application, or listing may be denied, suspended, or revoked if the person's employment or residence is not terminated.

(c) In instances described in section 17-801-5(e), the department shall request in writing that a provider exclude the person from the premises until the department has completed a determination whether the person is suitable to provide care pursuant to this chapter.

- (1) The request shall be in writing and shall state the reason for the person's exclusion from the premises;
- (2) When an applicant, registrant, licensee, or provider does not exclude the person from the premises as requested by the department, the applicant, registrant, licensee, or provider shall notify the department in writing within seven working days after

receipt of the request and shall state the reasons for the decision; and

- (3) A license, registration, application, or listing may be denied, suspended, or revoked if the person is not excluded from the premises.

(d) A person who is determined not suitable to provide care under this chapter may contest the results of background checks as follows:

- (1) The person requests an informal review by the department for the limited purpose of contesting the accuracy or completeness of the information contained in the person's records that formed the basis for the decision:

- (A) The person shall provide a written statement to the department specifying the information and the reason why the person believes the background check information is inaccurate or incomplete;

- (B) The department shall attempt to verify the accuracy of the information challenged by the person, including making an effort to locate any missing disposition information related to the disqualifying record:

- (i) If the department locates any missing or corrected information, the department shall review the new or corrected information and issue a written notice to the person with the suitability determination by the department; or
- (ii) If the department cannot locate any missing or corrected information, the department shall issue a written notice that indicates the department's efforts to verify the accuracy of the information challenged, and refer

- the person to the agency or program that produced or maintains the record the person believes to be inaccurate or incomplete, so that the person can have the record corrected or completed; and
- (C) After the person has successfully had the records corrected or completed by the agency or program that produced or maintains the record, the person may request for another background check to be completed by the department in accordance with this chapter.
- (2) The person shall have the right to obtain a copy of the person's criminal history records that were obtained through a fingerprint-based check under this section, according to Title 28 CFR Part 16, and for other records, the department, upon request, shall provide information to the person on how to obtain further information of the person's reports.
- (3) The person may file a written request for an administrative appeal to appeal the decision by the department:
- (A) In accordance with the provisions set forth in chapters 17-891.2, 17-892.2, 17-895.1, 17-896.1, for applicants, licensees, or registrants; or
  - (B) In accordance with the provisions set forth in chapter 17-602.1, for all other persons not specified in subparagraph (A);
- provided that the filing of a request for an administrative appeal does not permit the person to continue to provide child care for children under this chapter, pending the decision of the administrative appeal hearing officer." [Eff ]
- (Auth: HRS §§346-14 and 346-152.5) (Imp: HRS §346-14; 42 U.S.C. §§2002, 2005, 2014, 9858f)

### **Prohibiting Crimes Convicted Offenses – Indefinite**

Hawaii Revised Statutes sections listed below and any criminal offense against a child involving violence, even those not listed in this Exhibit I or Exhibit II.

707-701 Murder in the first degree

707-701.5 Murder in the second degree

707-702 Manslaughter

707-702.5 Negligent homicide in the first degree

707-703 Negligent homicide in the second degree

707-705 Negligent injury in the first degree

707-710 Assault in the first degree

707-711 Assault in the second degree

707-712 Assault in the third degree, when the victim is a minor

707-712.5 Assault against a law enforcement officer in the first degree

707-712.7 Assault against an emergency worker

707-713 Reckless endangering in the first degree

707-714 Reckless endangering in the second degree

707-714.5 Criminally negligent storage of a firearm

707-716 Terroristic threatening in the first

707-720 Kidnapping

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**Prohibiting Crimes Convicted Offenses – Indefinite (cont'd)**

- 707-721 Unlawful imprisonment in the first degree
- 707-726 Custodial interference in the first degree
- 707-727 Custodial interference in the second degree-felony
- 707-730 Sexual assault in the first degree
- 707-731 Sexual assault in the second degree
- 707-732 Sexual assault in the third degree
- 707-733 Sexual assault in the fourth degree
- 707-733.6 Continuous sexual assault of a minor under the age of fourteen years
- 707-741 Incest
- 707-750 Promoting child abuse in the first degree
- 707-751 Promoting child abuse in the second degree
- 707-752 Promoting child abuse in the third degree
- 707-756 Electronic enticement of a child in the first degree
- 707-757 Electronic enticement of a child in the second degree
- 707-759 Indecent electronic display to a child
- 707-765 Extortion in the first degree
- 707-766 Extortion in the second degree
- 707-768 Firearms, explosives, and dangerous weapons
- 707-781 Labor trafficking in the first degree

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**Prohibiting Crimes Convicted Offenses – Indefinite (cont'd)**

707-782 Labor trafficking in the second degree

707-786 Nonpayment of wages

707-787 Unlawful conduct with respect to documents

708-810 Burglary in the first degree

708-812.55 Unauthorized entry in a dwelling in the first degree

708-812.6 Unauthorized entry in a dwelling in the second degree

708-816.5 Entry upon the premises of a facility utilized as a sex, child, or spouse abuse shelter; penalty

708-820 Criminal property damage in the first degree

708-821 Criminal property damage in the second degree

708-839.6 Identity theft in the first degree

708-840 Robbery in the first degree

708-841 Robbery in the second degree

708-842 Robbery; "in the course of committing a theft"

708-893 Use of a computer in the commission of a separate crime

708-8251 Arson in the first degree

708-8252 Arson in the second degree

708-8253 Arson in the third degree

709-902 Abandonment of a child

709-903.5 Endangering the welfare of a minor in the first degree

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## **Prohibiting Crimes Convicted Offenses – Indefinite (cont'd)**

709-904 Endangering the welfare of a minor in the second degree

709-904.5 Compensation by an adult of juveniles for crimes

709-906 Abuse of family or household members, if the conviction is a felony or when the victim is a minor

711-1106.4 Aggravated harassment by stalking

711-1110.9 Violation of privacy in the first degree

711-1111 Violation of privacy in the second degree

712-1202 Sex trafficking

712-1203 Promoting prostitution

712-1209.1 Solicitation of a minor for prostitution

712-1215 Promoting pornography for minors

712-1215.5 Promoting minor-produced sexual images in the first degree

712-1218 Failure to maintain age verification records of sexual performers

712-1218.5 Failure to maintain age verification records of sexually exploited individuals

712-1219 Failure to affix information disclosing location of age verification records of sexual performers

712-1219.5 Disseminating visual depiction of sexual conduct without affixed information disclosing location of age verification records of sexual performers

712-1240.5 Manufacturing a controlled substance with a child present

712-1249.7 Promoting a controlled substance through a minor

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## **Prohibiting Crimes Convicted Offenses – Five Year Period**

Hawaii Revised Statute sections:

707-714 Reckless endangering in the second degree

707-717 Terroristic threatening in the second degree

707-722 Unlawful imprisonment in the second degree

707-734 Indecent exposure

708-803 Habitual property crime

708-811 Burglary in the second

708-813(b) Criminal trespass in the first degree, when in possession of a fire arm

708-817 Burglary of a dwelling during an emergency period

708-818 Burglary of a building during an emergency period

708-822 Criminal property damage in the third degree

708-830.5 Theft in the first degree

708-831 Theft in the second degree

708-835.5 Theft of livestock

708-835.6 Telemarketing fraud

708-835.7 Theft of copper

708-835.9 Theft of urn

708-836 Unauthorized control of propelled vehicle

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**Prohibiting Crimes Convicted Offenses – Five Year Period (cont'd)**

708-836.5 Unauthorized entry into motor vehicle in the first degree

708-839.5 Unauthorized possession of confidential personal information

708-839.7 Identity theft in the second degree

708-839.8 Identity theft in the third degree

708-851 Forgery in the first degree

708-852 Forgery in the second degree

708-854 Criminal possession of a forgery device

708-858 Suppressing a testamentary or recordable instrument

708-871.5 False labeling of Hawaii-grown coffee

708-875 Trademark counterfeiting

708-891 Computer fraud in the first degree

708-891.5 Computer fraud in the second degree

708-891.6 Computer fraud in the third degree

708-892 Computer damage in the first degree

708-892.5 Computer damage in the second degree

708-892.6 Computer damage in the third degree

708-895.5 Unauthorized computer access in the first degree

708-895.6 Unauthorized computer access in the second degree

708-895.7 Unauthorized computer access in the third degree

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**Prohibiting Crimes Convicted Offenses – Five Year Period (cont'd)**

- 708-8100 Fraudulent use of a credit card
- 708-8100.5 Fraudulent encoding of a credit card
- 708-8102 Theft, forgery, etc., of credit cards
- 708-8103 Credit card fraud by a provider of goods or services
- 708-8104 Possession of unauthorized credit card machinery or incomplete cards
- 708-8200 Cable television service fraud in the first degree
- 708-8202 Telecommunication service fraud in the first degree
- 708-8254 Arson in the fourth degree
- 708-8301 Habitual unlicensed contracting activity
- 708-8303 Unlicensed contractor fraud in the first degree
- 708-8304 Unlicensed contractor fraud in the second degree
- 708A-3 Money laundering
- 709-900 Illegally marrying
- 709-901 Concealing the corpse of an infant
- 709-905 Endangering the welfare of an incompetent person
- 711-1103 Riot
- 711-1106.5 Harassment by stalking
- 711-1106.6 Harassment by impersonation
- 711-1108 Abuse of a corpse

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**Prohibiting Crimes Convicted Offenses – Five Year Period (cont'd)**

711-1108.5 Cruelty to animals in the first degree

711-1109 Cruelty to animals in the second degree, if the conviction is a felony

711-1109.3 Cruelty to animals by fighting dogs in the first degree

711-1109.35 Cruelty to animals by fighting dogs in the second degree

711-1109.4 Causing injury or death to a service dog or law enforcement animal

711-1112 Interference with the operator of a public transit vehicle

712-1200 Prostitution

712-1206 Loitering for the purpose of engaging in or advancing prostitution

712-1207 Street solicitation of prostitution; designated areas

712-1208 Promoting travel for prostitution

712-1209 Solicitation of prostitution near schools or public parks

712-1209.5 Habitual solicitation of prostitution

712-1211 Displaying indecent matter

712-1214 Promoting pornography

712-1215.6 Promoting minor-produced sexual images in the second degree

712-1217 Open lewdness

712-1221 Promoting gambling in the first degree

712-1222.5 Promoting gambling aboard ships

712-1224 Possession of gambling records in the first degree

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**Prohibiting Crimes Convicted Offenses – Five Year Period (cont'd)**

- 712-1240.7 Methamphetamine trafficking
- 712-1241 Promoting a dangerous drug in the first degree
- 712-1242 Promoting a dangerous drug in the second degree
- 712-1243 Promoting a dangerous drug in the third degree
- 712-1244 Promoting a harmful drug in the first degree
- 712-1245 Promoting a harmful drug in the second degree
- 712-1246 Promoting a harmful drug in the third degree
- 712-1246.5 Promoting a harmful drug in the fourth degree
- 712-1247 Promoting a detrimental drug in the first degree
- 712-1248 Promoting a detrimental drug in the second degree
- 712-1249 Promoting a detrimental drug in the third degree
- 712-1249.4 Commercial promotion of marijuana in the first degree
- 712-1249.5 Commercial promotion of marijuana in the second degree
- 712-1249.6 Promoting a controlled substance in, on, or near schools, school vehicles, public parks, or public housing projects or complexes
- 712-1250 Promoting intoxicating compounds
- 712-1250.5 Promoting intoxicating liquor to a person under the age of twenty-one
- 712-1257 Prohibited cigarette sales of less than twenty-one, felony
- 712-1258 Tobacco products and electronic smoking devices; persons under twenty-one years of age

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2. The adoption of chapter 17-801, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in the Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on May 19, 2020 and filed with the Office of the Lieutenant Governor.

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PANKAJ BHANOT  
Director of Human Services

APPROVED AS TO FORM:

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Deputy Attorney General