A REVIEW OF THE ROLE AND FUNCTIONS OF THE SOLICITOR-GENERAL AND THE CROWN LAW OFFICE

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24 February 2012

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PREFACE

We have been tasked with a comprehensive review of the role of the Solicitor-General and the Crown Law Office which supports the Solicitor-General and the Attorney-General in their Law Officer roles.

The contributions of those who generously made themselves available during our interview process or who provided us with written comments are gratefully acknowledged. Everyone we interviewed had given the issues considerable thought and their insights and views have been most helpful. We especially acknowledge the important contribution made by the Solicitor-General and the Crown Law Office (including its Management Board); also the contribution of the Reference Group.

We are particularly indebted to Karen Adair, Ann Aspey and Tania Warburton for their work on this review as a secretariat comprising officials from the State Services Commission as well as a Crown Counsel from the Crown Law Office. We also appreciate the administrative support of Tanya McRoberts, Sarah Murphy, Judith Prosser and Angela Vidal (for producing the cover photograph). It was a pleasure to work with them all.

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EXECUTIVE SUMMARY

1. The role of the Solicitor-General (and the Crown Law Office which supports both the Solicitor-General and Attorney-General in their Law Officer functions) is critical within the New Zealand constitutional framework. The Solicitor-General holds a number of important roles: chief legal advisor; chief legal advocate; Chief Executive of the Crown Law Office; responsibility for the prosecution of indictable crime; and has many other statutory duties and functions. Not surprisingly, in an increasingly complex legal environment, the question arises as to whether one person can continue to discharge so many high-level multiple roles efficiently and effectively.

2. This review seeks to answer that question, examining the scope and focus of the Solicitor-General's role, including possible separation of functions; what, if any, changes should be made to the Crown Law Office's operating model; and its role in improving the quality of the Crown's legal advice and management of legal roles, including potentially centralising employment of all government legal advisors. The review takes into account both the government's expectation of improved services at lower cost and recommendations from the recent PIF and Prosecution Reviews.

3. Our review identifies and discusses seven key issues, summarised as follows with associated recommendations:

4. ***Should the Solicitor-General remain as Chief Executive?*** The Solicitor-General should remain Chief Executive of the Crown Law Office. Compelling reasons exist why structural separation is not recommended. Indeed, separation risks weakening the critical role of the Solicitor-General, increasing, rather than decreasing, Crown legal risk. Advantages of separation can be achieved in ways other than a radical structural split ie by the permanent appointment of a Deputy Chief Executive/Chief Operating Officer, sitting between the Solicitor-General and Deputy Solicitors-General to signal taking delegated responsibility for the organisational management of the Crown Law Office. Appropriate delegations, together with an early consequential reassessment of the organisational structure, reporting lines and business planning of corporate functions are required.

5. ***Should the advice and advocacy roles be split*?** This option is not recommended. Advice informs advocacy and vice versa, while practical and cost considerations dictate that the role remain fused. More important is which of the advisory or advocacy roles should have primary importance. While it is comparatively easy to contract in advocacy skills from outside, or from within the senior ranks of the Crown Law Office, it is far more difficult to contract in for the "trusted advisor" role, which many interviewees emphasised as the most important of the Solicitor-General's responsibilities. Moreover, proactive, rather than reactive, advice is important in identifying and managing potential Crown legal risk. Our view is that the advisory role is the more important, with the Solicitor-General appearing in court to represent the Crown only in key cases.

6. While the Crown Law Office should retain its monopoly in Category 1 work, the Solicitor-General/Crown Law Office should be more open to briefing external

lawyers, especially where that is a department's (or a Minister's) preference. The necessary transparency of, and formality to, decisions to appoint external counsel/advisors can be achieved by an appropriate protocol or statement of policy to be shared with departments; also at a general level of principle in revised Cabinet Directions. The Solicitor-General/Crown Law would continue to have appropriate involvement in such matters in order to fulfil the role of Junior Law Officer by ensuring a whole of government approach where needed. A panel of external lawyers for this purpose is not recommended.

7. ***How should the Solicitor-General fulfil the prosecutorial role following the recent Prosecution, and, to a lesser extent, PIF Reviews*?** A separate department of public prosecutions (based on overseas models) is not warranted. However, a virtual prosecution group within the Crown Law Office is recommended, including all staff involved in the conduct and oversight of public prosecutions. Such a structure should ensure a more coordinated approach both to the conduct of appeals and the effective provision – by oversight – of a national prosecution service. Given the importance of the oversight role, it is recommended that the Deputy Solicitor-General (Criminal) take on the additional title of Director of Public Prosecutions to send a signal that this oversight role – including the need to remain within fiscal constraints – is a key responsibility. This group needs to prioritise both short and long term objectives to ensure full implementation of the recommendations of the PIF and Prosecution Reviews (although, in relation to the latter, in accordance with Ministerial directions).

8. ***Should legal advisors be employed by a centralised government law firm rather than departmental chief executives?*** Such an option is not recommended. It is important that departments continue to retain their own in-house legal advisors, gaining the benefit of specialist advice; being within "line of sight"; and able to advise within the department's overall strategic objectives. A government law firm would involve significant additional administration and financial costs. The advantages associated with a centrally employed government law firm can, however, be achieved by the proposed Government Legal Services (GLS) programme. Overall, GLS has (importantly) the ability to enhance legal capability within the government; better identify and manage Crown legal risk; and improve delivery of legal services, including enhanced consistency and cost efficiencies. A discrete GLS unit could be funded at an estimated cost of approximately $750,000 to $1 million per annum, minor compared with the potentially significant improvements in delivery of legal services and cost efficiencies that could be achieved. Central funding is recommended.

9. ***What of the Solicitor-General's other functions? Should, in particular, the Crown Law Office continue its role in the BORA vetting process; should the Solicitor-General continue to be responsible for the management of the process of recommending judicial appointments to the High Court and above?*** On the former, the recommendation is that the status quo prevail, although with greater two way consultation between the Crown Law Office and Ministry of Justice in ensuring high quality and consistent Bill of Rights Act (BORA) reports. On the latter, the associated workload is not significant enough to warrant change. While the general consensus is that the appointment process has delivered good outcomes in terms of

high calibre appointees, there is a need for more formality and transparency in that process. The Law Commission has this issue under review.

10. ***Future role of the Solicitor-General: are changes required to the operation of the Crown Law Office?*** The present inconsistency, whereby part of the Solicitor-General's role (legal professional) is at pleasure and part (Chief Executive) is for a fixed term, needs resolution. A statutory appointment for a fixed term is recommended, acknowledging the critical importance of the office and protecting it from any inappropriate political influence (even if unlikely). Some operational or behavioural changes for Crown Law are recommended in areas including client management; peer review; compilation of data to identify and better manage Crown legal risk; and the need for second order organisational design, as a result of the three recent reviews. Greater transparency of Crown Law policies is also recommended.

11. ***Should the present Cabinet Directions continue?*** A particular operational issue arising is whether the Category 1 and 2 division as outlined in the 1993 Cabinet Directions is still appropriate. It is recommended that the Category 1 and 2 division remain. It is important that core constitutional work originating in departments is referred (at least initially) to the Crown Law Office, but some change of emphasis is required. Draft revised Directions confined to core departments are provided for discussion purposes.

12. We consider many of our recommendations,[1] as well as the recommendations of the recent PIF and Prosecution Reviews, should be implemented as a matter of some urgency in the interests of managing government legal risk; costs and other efficiencies; and staff morale.

13. Consolidated recommendations made in this report are listed as follows:

[1] We acknowledge that some of our recommendations relate to operational matters which are the statutory responsibility of the Solicitor-General.

CONSOLIDATED RECOMMENDATIONS

Preliminary observations on some recurring concepts and themes *Refer section 6, page 13*	• Adoption of a model similar to that in Australia requiring departments seeking legal advice to inform, and consult with, the department administering the legislation and to confirm that in their briefs to the Crown Law Office (or to external lawyers).
	• A continuing educative role for the Crown Law Office in helping the state sector understand the concept of whole of government and the sector's relationships with, and the roles of, the Law Officers and the Crown Law Office within the constitutional context.
	• Publication of a model litigant guideline similar to Australian policies.
	• Greater transparency of Crown Law Office policies, including general instructions on briefing and working with the Crown Law Office.

Chief Executive role of the Solicitor-General *Refer section 7, page 17*	• No structural separation of the professional legal and chief executive roles of the Solicitor-General, but rather an operational separation of the management role.
	• The permanent appointment of a Deputy Chief Executive/Chief Operating Officer, responsible for all matters relating to the operational management of the Crown Law Office.
	• The Deputy Chief Executive should sit between the Solicitor-General and the Deputy Solicitors-General in the organisation chart reporting directly to the Solicitor-General/Chief Executive.
	• An early assessment of the organisational structure, reporting lines and business planning of the corporate functions of the Crown Law Office.
	• An investigation of the desirability (or otherwise) of client and (anonymous) staff surveys, the establishment of an Audit and Risk Committee and the addressing of business planning issues.

Legal advice and advocacy roles of the Solicitor-General *Refer section 8, page 22*	• No separation of the advice and advocacy roles of the Solicitor-General.
	• Consideration be given as to whether the advisory or advocacy role should have primacy. Our view is that the advisory role should take precedence.
	• The Solicitor-General/Crown Law be more open to briefing external lawyers, especially where that is a department's (or a Minister's) preference.
	• The transparency of, and formality to, decisions to appoint external counsel/advisors be achieved by a protocol or statement of policy as to when external lawyers will be briefed.
	• No appointment of a formal panel of counsel.
	• Where practicable, external briefing be spread more widely than Crown Solicitors, former Crown Counsel and Wellington-based lawyers.

Prosecutions *Refer section 9, page 28*	• No establishment of a separate department of public prosecutions based on overseas models.
	• The establishment of a dedicated prosecutions group (ie an expanded Criminal Law Group) within the Crown Law Office comprising all staff involved in the conduct or oversight of prosecutions and appeals, ie lawyers, business analysts, financial and support staff.
	• Removal of the Human Rights/BORA team from the Criminal Law Group.
	• The Deputy Solicitor-General (Criminal)/Director of Public Prosecutions and the Crown Law Criminal Law Group operate as a discrete unit with adequate analysis and financial resources to undertake their important oversight role.
	• Prioritisation of short and long term objectives to implement the many recommendations of the Prosecution and PIF Reviews, including, importantly, supervision of the Crown Solicitor network.

	• Adoption of a protocol for FMA prosecutions, similar to the Memorandum of Understanding in Australia between ASIC and the Commonwealth Director of Public Prosecutions.

Government Legal Services *Refer section 10, page 35*	• No establishment of a centrally employed government law firm comprising all public service lawyers.
	• Establishment of a standalone Government Legal Services (GLS) unit within, but independent of, the Crown Law Office.
	• Urgent consideration be given to centralised funding of approximately $750,000-$1 million for the GLS for 2012/13 and beyond (since the Crown Law Office is not funded for this purpose).
	• An agenda for the GLS work programme include: (i) government lawyer induction programmes; (ii) sharing of legal precedents and resources; (iii) establishment of an intranet as an online platform for resource sharing and collaboration; (iv) recruitment and the development of standard core competencies for government lawyers; and (v) a coordinated approach to training with immediate emphasis on the requisite training for departmental prosecutors.
	• Any impediments within the public service and legal professional frameworks to departments contracting in, or sharing, resources should be addressed urgently.
	• Appointment by the Attorney-General of a Governance Board chair, which should not be the Solicitor-General, in consultation with stakeholders, including the Solicitor-General.
	• The GLS Board report to the Solicitor-General three times a year so that the Junior Law Officer is kept fully informed and can provide professional support.
	• The development of terms of reference to give transparency and guidance to the GLS work.

Other functions *Refer section 11, page 42*	• No material change to the Crown Law Office role in relation to BORA reports.
	• Greater two way consultation between the Ministry of Justice and the Crown Law Office in relation to BORA issues.
	• Preparation of guidelines to assist departments for instructing on BORA issues and a template for BORA reports prepared by the Crown Law Office and the Ministry of Justice.
	• The Solicitor-General remain responsible for management of the process for recommending judicial appointments to the higher courts.
	• Greater formality and transparency in the High Court judicial appointment process, a matter already under review by the Law Commission.
	• A lessening of the substantial burden imposed by vexatious litigation on the courts and all parties (including the Solicitor-General/Crown Law Office), also under review by the Law Commission.
	• Referral to the Ministry of Economic Development of a Patents Act issue regarding the roles of the Solicitor-General in notifying and advising the Attorney-General on the possibility and advisability of intervening.
	• A review of the appropriateness of some minor statutory roles of the Solicitor-General with a view to removal.
	• The Solicitor-General/Crown Law Office's policy role be a limited role.

Solicitor-General – future role; and Crown Law Office – operational changes *Refer section 12, page 50*	• The Solicitor-General's appointment be pursuant to statute with the appointment provisions contained in the Constitution Act 1986.
	• The Solicitor-General be appointed for a fixed term and according to the following provisions: (i) appointed by the Governor-General on the recommendation of the Attorney-General; (ii) holds office for a period which may not exceed five years, as specified in the instrument by which the Solicitor-General is appointed; (iii) eligible for reappointment; (iv) may resign by written notice to the Attorney-General; (v) may at any time be removed or suspended from office by the Governor-General for inability to perform the functions of the office, bankruptcy, neglect of duty, or misconduct proved to the satisfaction of the Governor-General; and (vi) remuneration and allowances to be determined by the Remuneration Authority but terms and conditions of appointment to be determined by the Attorney-General.
	• Only the Chief Executive functions of the Solicitor-General to be subject to performance review by the State Services Commissioner.
	• No change to the current practice of departments bearing the cost of relevant advice and proceedings.
	• The Crown Law Office is urged to: (i) enhance its communication with chief legal advisors and other key departmental figures in relation to the delivery of Crown legal services; (ii) provide clear and regular communication to the relevant department on progress of matters; (iii) ensure that price and timetable estimates are provided; and (iv) ensure timely completion of litigation plans.
	• A reconsideration of the peer review process be undertaken when the Crown Law Office is refreshing its vision, purpose and strategic direction, as recommended in the PIF Review and publication of any such policy in due course.

	• A second order organisational re-design of the Crown Law Office encompassing the recommendations of recent reviews.
	• The compilation, and recording, of all relevant litigation file data by the Crown Law Office.
	• The drafting and external publication of a settlement guideline to give transparency to Crown Law's approach to settlements.
	• In the longer term, reconsideration by the Solicitor-General of the merits of a modest Crown Law Auckland office.

Cabinet Directions for the Conduct of Crown Legal business 1993 *Refer section 13, page 59*	• Retention of the Category 1 and 2 classifications of the Cabinet Directions for the Conduct of Crown Legal business 1993, with some change of emphasis.
	• Adoption of revised Cabinet Directions to apply to Ministers and departments only (a first draft for discussion purposes is attached in Appendix 7).
	• The Crown Law Office should focus primarily on maintaining and enhancing the high quality of its constitutionally important Category 1 work.
	• The Crown Law Office should compile data relating to its Category 2 work.
	• More frequent consideration by the Solicitor-General of engaging external counsel especially when requested by a department (or Minister).
	• Greater clarity and guidance to be provided in the Cabinet Manual on waiver of privilege and related issues, including interface with the Official Information Act 1982.
	• A reporting obligation for departments to advise the Solicitor-General of any significant matter in which they are involved, where the Crown Law Office is not acting.

1. INTRODUCTION

1.1 In 1986[2] a review considered whether or not one person could successfully fill the demanding role of Solicitor-General.

1.2 The Solicitor-General, as the Junior Law Officer, is the principal legal advisor and counsel for the Crown; undertakes the independent Law Officer functions of the Crown; is responsible for the conduct of appeals from criminal trials on indictment; supervises indictable prosecutions; undertakes many statutory functions; and is Chief Executive of the Crown Law Office (which supports the Solicitor-General and the Attorney-General in their Law Officer roles).

1.3 Over time, the responsibilities of the Law Officers and the size of the Crown Law Office (or Crown Law) have expanded to meet the increasing demand for legal services across government. More recently, the legal environment in which the Solicitor-General and Crown Law operate has undergone significant change, including the establishment of the Supreme Court (replacing Privy Council appeals); extensive legislative change (especially in the criminal justice system); potential changes to the Crown prosecution services; initiation of the Government Legal Services (GLS) work programme; fiscal pressures; and the need to improve justice sector performance.

1.4 In late October 2011, the Attorney-General, the Hon Christopher Finlayson, appointed the Reviewers to consider the role and functions of the Solicitor-General and the Crown Law Office: how these could be discharged most effectively and efficiently, while also reflecting the constitutional context of the role and the organisational support required.

1.5 A copy of the Terms of Reference is attached at Appendix 1. In particular this review considers:

- the scope and focus of the Solicitor-General's role, including the potential separation of any functions;
- what, if any, changes should be made to the operating model of the Crown Law Office;
- the role of the Crown Law Office in improving the quality of legal advice and the management of legal risk across government, including whether legal advisors working in government departments should be employed centrally rather than by the chief executives of the relevant departments; and
- where change is recommended, how account is taken of the government's expectation of improved services at lower cost.

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2 State Services Commission *Review of Government Legal Services* (August 1986).

1.6 The Terms of Reference also required us to consider the:

- Performance Improvement Framework Review (PIF Review), which the Crown Law Office accepts and intends to implement;
- Review of the Public Prosecution Services (Prosecution Review), which the Crown Law Office intends to implement in accordance with Ministerial direction;
- review of the Crown Solicitor regulations (still in progress);[3]
- GLS work programme; and
- review of the State Sector Act 1988 (still in progress).[4]

The nature of the review

1.7 In conducting the review, we undertook extensive interviews with, among others, the Attorney-General; a number of other Ministers, members of the judiciary, former Solicitors-General, chief executives and chief legal advisors of government departments and agencies, practitioners and Crown Solicitors; representatives of the New Zealand Law Society and the New Zealand Bar Association; as well as the Solicitor-General, Deputy Solicitors-General and some Crown Law staff (about 70 interviewees in all). We received some written submissions and also considered international models plus relevant local and international literature.

1.8 During the course of our review we had the benefit of access to a Reference Group comprising Chief Executives of the Ministry of Justice, Inland Revenue Department and Ministry of Economic Development, as well as representatives from the Crown Law Office, State Services Commission and the Treasury. This group helped us to test our recommendations and thinking at various points during the process, which has been most helpful.

1.9 It is important to note that we conducted a review, not an investigation or inquiry. For the most part, we gathered information and considered the views of informed participants. We explored issues and options in what we hoped was a collegial way, designed to identify optimum realistic solutions and not to prove or disprove their views, nor change their minds. Rather, our primary focus – but reflecting the important constitutional context – has been to consider pragmatically the issues arising (as reflected in the Terms of Reference) and what changes can be made to assist one person (the Solicitor-General) to discharge effectively a multitude of roles in an increasingly complex legal environment.

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3 We are informed by the Crown Law Office that some minor amendments to these regulations are proposed in the immediate term. Our understanding is that these amendments are not relevant to our review. A more detailed review of the regulations is planned for later in the year.

4 As our review is still in progress, we have not been able to consider what implications, if any, it may have for our review. But as best as we understand, the review is not likely to have any direct bearing on our recommendations.

2. ISSUES

2.1 Within the Terms of Reference, we have identified seven key issues, addressed as follows:

(a) ***Chief Executive role:*** Given the multiple functions of the role, should the Solicitor-General remain the Chief Executive of the Crown Law Office? If so, what operational support is needed to ensure the different roles are successfully carried out? What are the alternatives to separating structurally, or partially reallocating, the Chief Executive component of the current role?

(b) ***Splitting advice from advocacy:*** Should the Solicitor-General continue to retain responsibility for the important dual roles of the government's principal legal advisor and chief advocate? If so, should the priority and balance of each be adjusted and how would this affect the Crown Law Office? Alternatively, given the increasingly complex legal environment in which the Solicitor-General operates, should the advice and advocacy roles be structurally separated and, if so, what are the implications for the government? Determining the optimal way to manage the Crown's legal risk is of prime importance here.

(c) ***Prosecutions:*** How best should public prosecutions be managed following the recent Prosecution Review? What are the implications of establishing a separate public prosecutions department based on overseas models? Alternatively, should the Solicitor-General remain responsible for Crown prosecutions, but with adjustments made to the current model to give effect to the findings and recommendations of the Prosecution and PIF Reviews?

(d) ***Central Government law firm:*** Should legal advisors working in government departments be employed centrally by a government law firm rather than by their departmental chief executives? Would this improve the quality of legal advice and the management of legal risk across government? Alternatively, are there other ways to achieve these objectives, particularly via the GLS programme?

(e) ***Other functions including Bill of Rights Act and management of recommendations for judicial appointments:*** Should the Crown Law Office retain its current role in the Bill of Rights Act vetting process, writing the BORA reports for the Ministry of Justice pre-Introduction Bills, with the Ministry of Justice responsible for all other BORA reports? Should the Solicitor-General continue to be responsible for the management of the process for recommendations for judicial appointments to the higher courts?

(f) ***Future role of the Solicitor-General and Crown Law Office operational changes:*** What other changes, if any, should be made to the role of the Solicitor-General (particularly in regard to the nature and tenure of the appointment) and to the operating model of the Crown Law Office?

(g) ***Category 1/2:*** Is the current Category 1 and 2 division as outlined in the *Cabinet Directions for the Conduct of Crown Legal Business 1993* still appropriate and precisely to whom should the Directions apply? Are adjustments needed to reflect better the management of Crown legal risk? What is the Crown Law Office's role in undertaking Category 2 work and where should its priorities lie?

2.2 We also discuss briefly other important roles in regard to areas such as vexatious litigants, grants of immunity from prosecution, stays of prosecution and charities supervision. For various reasons, we do not consider substantive recommendations necessary in these areas.

3. RELATED INQUIRIES

3.1 The recent related PIF and Prosecution Reviews provide the context in which our review has been undertaken. Both reported favourably on the quality of the Crown Law Office's core legal work, but had concerns as to wider performance and operations. A brief summary of these earlier reviews, including their key recommendations, follows.

Performance Improvement Framework Review – Formal Review of the Crown Law Office, October 2011

3.2 In October 2011, the State Services Commission, the Treasury and the Department of Prime Minister and Cabinet released the PIF Review.[5] In making their recommendations, the PIF reviewers considered two overriding questions in relation to the Crown Law Office ie how well it is:

- delivering on government priorities and its core business; and
- positioned, in terms of organisational capability, to deliver both now and into the future.

3.3 The PIF Review found that in the conduct of criminal appeals, legal advice and representation of the Crown, as well as in the execution of the Junior Law Officer functions, the Crown Law Office is performing well. However, it noted a number of changes in recent years resulting in a more complex legal environment in which the Crown Law Office is required to operate and which presents challenges accordingly. In order to ensure it can deliver efficiently and effectively in its core business areas, as well as address key strategic risks, a number of recommendations were made.

3.4 Recommendations fall into the following broad areas: delivery of government priorities; core business; and organisational management. Primarily the PIF Review suggests opportunities for improved performance as follows:

(a) refreshing the vision, purpose and strategic direction of Crown Law, including clarifying core functions;

(b) enhancing organisational leadership and management capability of the agency by implementing a Deputy Chief Executive role and focusing the Management Board on strategy and collective leadership;

(c) proactively managing the current appropriation for the Crown Solicitor network to keep within baseline and to improve effectiveness;

(d) taking collective responsibility for the improvement of justice sector performance and enhancing the policy and business analytical capability of Crown Law to provide for effective justice sector input;

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[5] That review process applies a common framework to give insights into a government department's performance. It provides individual agency information, as well as identifying issues to be addressed at sector or system level. The framework provides for consideration of results, in terms of both effectiveness and efficiency, and organisational management factors.

(e) strengthening the sophistication, implementation and evaluation of the Client Relationship Management (CRM) programme to enhance responsiveness to client needs;

(f) agreeing a Human Resources Strategy and Annual Plan connecting Crown Law's vision, purpose and business strategy, including conducting a culture/staff engagement survey and addressing remuneration transparency and career progression;

(g) driving towards more effective utilisation of the information technology platform and efficiencies to enhance productivity and efficient delivery of services; and

(h) recruiting business analyst capability to assist in the management of appropriations and improve financial management to identify efficiency gains and support improved performance across the business.

3.5 As will be apparent, many of the issues identified in the PIF Review are directly relevant to our review of the roles and functions of the Solicitor-General and Crown Law Office. Both structural and operational changes are required for the implementation of these recommendations.

3.6 It is pleasing to note that the Crown Law Office is willing to act on the recommendations. Importantly, the Crown Law Office has seen that review as an opportunity to refocus its vision, purpose and strategic direction. It has already started addressing many of the issues in order to improve its organisational performance. That includes the recent short term appointment of a Deputy Chief Executive to assist the Solicitor-General to focus on key roles and give greater oversight of the delivery of organisational management; also the engagement of some business and policy analyst capability. Whether internal resources are sufficient to give the Deputy Chief Executive the ability to implement many of the changes is addressed in section 7.

3.7 Detailed recommendations from the PIF Review are outlined in Appendix 2.

Review of the Public Prosecution Services, dated September 2011

3.8 In November 2011 the Ministry of Justice released the Prosecution Review, which considered whether public prosecutions, while maintaining the quality of delivery, could operate within the bounds of likely annual costs. Overall, the Review found that the role and responsibilities of the Crown Law Office for criminal prosecutions required greater clarification and strengthening. Changes are needed to ensure that the Solicitor-General can effectively discharge his/her responsibilities for the oversight of all criminal prosecutions.

3.9 Recommendations fall into the following broad areas: delivery of greater oversight and reporting on all prosecutions; better financial management of Crown Solicitor prosecutions; and the amendment of Prosecution Guidelines. Key recommendations are to:

(a) clarify the relationship between the Solicitor-General and Crown Solicitors, possibly by reasserting the agency model which previously existed, and by the Solicitor-General playing a more direct role in monitoring Crown Solicitor prosecutions;

(b) split the Vote Attorney-General Appropriation Three into the conduct, and supervision, of indictable prosecutions;

(c) consider ways to provide more options for purchasing and conducting prosecution services in the summary jurisdiction, particularly for non-police enforcement agencies, and to encourage cooperation between agencies generally on prosecution related matters;

(d) review Prosecution Guidelines (particularly to reflect cost and independent decision-making principles by prosecutors) and to monitor compliance with such guidelines;

(e) ensure that policy decisions affecting the prosecution system – particularly in terms of costs – are referred to Crown Law; and

(f) report regularly on the conduct of prosecutions, including prosecution related data to the Solicitor-General, and an annual report by the Solicitor-General to the Attorney-General on the conduct of public prosecutions.

3.10 Plainly, the Prosecution Review, as well as the Criminal Procedures Act 2011 (CP Act), will expand the Solicitor-General's responsibilities for public prosecutions and result in significant change also to Crown Law's operations. Such expansion is directly relevant to our review of the roles and functions of the Solicitor-General and Crown Law Office. Detailed recommendations from the Prosecution Review are outlined in Appendix 3.

4. ROLE OF THE LAW OFFICERS AND THE CROWN LAW OFFICE

4.1 An understanding of the roles of the Law Officers (ie the Attorney-General and Solicitor-General) and the Crown Law Office is necessary to our review and a brief description follows. The roles do not appear to be well understood within the state sector, a factor we consider needs addressing.

The Attorney-General

4.2 The Attorney-General is a Minister of the Crown, the Senior Law Officer[6] and the principal legal advisor to the government, with overall responsibility for the conduct of all legal proceedings involving the Crown. In exercising the Law Officer role, the Attorney-General seeks to ensure that first, the operations of executive government are conducted lawfully and constitutionally; and secondly, the government is not prevented, through the use of the legal process, from lawfully implementing its chosen policies.

4.3 As the Senior Law Officer, the Attorney-General exercises powers, functions and duties related to the proper administration of justice and the public interest, such as protector of charities and representing the public interest in proceedings. The Attorney-General is a member of various bodies, including the Rules Committee and the New Zealand Council of Law Reporting, and advises the Governor-General on appointments to the courts, as well as exercising a number of powers, duties and functions under particular statutes.

4.4 The Attorney-General also has some responsibility for the government's role in the administration of criminal justice. Broadly, this involves responsibility for the prosecution of serious crime, the power to stay any prosecution and the power to give immunity from prosecution.

4.5 Both Law Officers have the constitutional role of representing the Crown in the courts and of providing legal advice to the government. However, in practice, those responsibilities are usually performed by lawyers within the public sector, including the Crown Law Office. Day to day instructions are usually provided by departments or other agencies (or Ministers) under the implied authority of the Attorney-General. Nevertheless, the constitutional responsibility of the Attorney-General remains. The Attorney-General asserts the right to obtain copies of all legal advice (from whatever source) provided to the Crown and to instruct all lawyers acting for the Crown.[7]

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6 For a comprehensive outline of the roles of the Law Officers and Crown Law Office see: Cabinet Office, *Cabinet Manual 2008* at 48-57, John McGrath QC, "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR at 197, Crown Law Office, *Briefing for the Incoming Attorney-General* (2008) and Matthew Palmer, "The Law Officers and Departmental Lawyers" [2011] NZLJ 333.

7 B Selway QC, "The Duties of Lawyers Acting for Government" (1999) 10 PLR 114, at 118. See also Cabinet Office, Ibid at [4.65].

The Solicitor-General

4.6 In practice, it is the Solicitor-General, as the Junior Law Officer, who exercises many of the Law Officer functions.[8] Holding office under an appointment from the Governor-General (pursuant to the prerogative rather than statutory power), the Solicitor-General has a significant number of roles, including:

- Chief Executive of the Crown Law Office;
- Chief legal advisor to the government (subject to any views expressed by the Attorney-General), including providing constitutional advice to the government and the Governor-General;
- the government's chief advocate in the courts;
- responsibility for the prosecution of indictable crime; and
- exercising delegations from the Attorney-General and responsibility for a number of statutory duties and functions, independent of the Attorney-General's statutory roles.

4.7 In recent times, the demands on the Solicitor-General have expanded, especially in the roles of Chief Executive and the government's chief legal advisor; and soon with increased supervision of prosecutions. The Solicitor-General is required to think strategically about the legal issues facing the government as well as the legal consequences of policy reform, and to manage the whole of government legal risk.

The Crown Law Office

4.8 The Crown Law Office is a government department, supporting the Law Officers in the performance of their roles and providing legal advice and representation to the government in matters affecting the Crown. The Management Board of Crown Law comprises the Solicitor-General; three Deputy Solicitors-General (Public Law, Constitutional and Criminal); a Practice Manager; and, very recently, a Deputy Chief Executive (seconded to the Crown Law Office). As a government department, but also bearing some features of a law firm and an in-house legal department, the Crown Law model faces unique challenges.

4.9 As at June 2011, the Crown Law Office employed 107 legal counsel and 96 support and corporate staff, totalling 203 employees (188 fulltime equivalents (FTEs)).[9] This included secretarial and word processing support, staff media, staff historians, administrative assistants, legal executives,[10] E Lit Supervisors and student assistants,[11] librarians, IT support, records, human resources, finance, receptionists

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8 Constitution Act 1986 s 9A.

9 See Crown Law *Annual Report for the Year Ended 30 June 2011*(2011) at 24. The figures include part-time employees. The Crown Law Office is capped at 200 FTEs.

10 Legal executives provide litigation support to legal counsel, including assisting with discovery and preparation of all court documents such as affidavits, briefs of evidence and bundles of documents and authorities.

11 E lit is the team which provides for electronic discovery and evidence in court.

and facilities personnel.[12] Since then, the Deputy Chief Executive role has been established and two new positions (business and policy analysts) added to support the Deputy Chief Executive.

4.10 We observe that the number of Crown Law employees has grown significantly since 2000, up from 127 employees (with 64 legal counsel) (126 FTEs) to 188 (with 107 legal counsel) (188 FTEs).[13] The expanded office has resulted in greater managerial demands on the Solicitor-General and the Management Board. Our observation is that the number of support staff is high, compared with private sector law firms, particularly when functions such as marketing and tendering are not required at the Crown Law Office. However, this observation needs to be balanced against the support required to fulfil its reporting requirements as a government department.

4.11 The *Cabinet Directions for the Conduct of Crown Law Business 1993* provide for two categories of legal work: Category 1 must be referred to the Solicitor-General (who may allocate the work to Crown Law or instruct private counsel) and Category 2 (which need not be referred, but can be). Essentially, Category 1 work relates to litigation, constitutional, tax and criminal law. A more detailed analysis of these Directions is set out in section 13.

4.12 The relevant statistics for the past five years for new instructions for advice, litigation and the filing of criminal appeals (provided to us by the Crown Law Office) are set out below:

	2006/ 2007	2007/ 2008	2008/ 2009	2009/ 2010	2010/ 2011
New advice	454	333	468	378	494
Litigation	723	441	607	530	548[14]
Criminal appeals	441	379	450	538	524

4.13 We make two observations. First, for the year ending June 2000 (when the office comprised 126 FTEs), the consolidated figure for new advice and litigation totalled

12 The composition of the support and corporate staff reflects Crown Law's dual responsibilities as both a litigation practice and a government department, with a number of compliance requirements (eg the Public Records Act 2005 and Justice Sector compliance).

13 In 2011 the Crown Law Office has a significantly higher number of part time employees as part of the state sector's encouragement of flexible working arrangements.

14 The figure of 372 shown in the latest Annual Report is wrong and to be corrected to 548. These litigation figures do not include Treaty of Waitangi matters not currently being progressed by claimants.

1068 matters (excluding Treaty of Waitangi matters). Ten years later (when the office comprised 188 FTEs), the consolidated figure for new advice and litigation totalled 1042 matters (excluding Treaty of Waitangi matters).[15]

4.14 It is acknowledged that in an increasingly complex legal environment, advice and litigation have become more time consuming. The demands of court requirements, such as written briefs, written submissions (even for interlocutory matters), chronologies and bundles of documents, have added substantially to the time involved in representing litigants, including the Crown. Despite this escalation, it is somewhat surprising that FTE numbers should have risen by as much as 50 % in the last 10 years, while during the same period, consolidated advice and litigation figures have not materially changed. (Over the past five years FTE numbers rose by 20% (157 cf 188)).

4.15 Secondly, statistics for the past five years show few consistent trends. Instructions for advice have fluctuated; litigation instructions appear to be declining; and filing of criminal appeals has risen. The reasons for this are not apparent. However, plainly, the Crown Law Office needs to understand trends and what implications these may have for its future operation.

4.16 To achieve Crown Law's outcomes, Vote Attorney-General comprises four appropriations. Three are funded directly by Crown revenue: for 2011/2012, the conduct of criminal appeals ($3.329 million); the supervision and conduct of Crown prosecutions ($36.742 million); and the exercise of the Law Officer functions ($2.948 million). The fourth is funded through government departments: legal advice and representation ($22.9 million).[16] However, Supplementary Appropriations were agreed for Crown prosecutions and Law Officer functions of $10.699 and $0.24 million respectively. Revenue from fees has been reasonably constant: for 2008/2009, $20.4 million; 2009/2010, $22.9 million; and 2010/2011, $22.9 million.

4.17 Overall, in order to fulfil their roles, both Law Officers must be aware proactively, rather than reactively, of the legal issues facing the government; must monitor and supervise the provision of legal services to the government; and have the ability to interact across government. Central to this review is the need to ensure that the Solicitor-General, as the Junior Law Officer, has both the time and resources to fulfil this most important role. We fully endorse the current Solicitor-General's observation to us that "the Crown Law Office is at its best when it is able to manage the Crown's risk".

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15 In 2000 the Crown Law Office did not provide separate figures for advice and litigation; nor account for criminal appeals filed.

16 Crown Law Office, Annual Report for the Year Ended 30 June 2011 (2011) at 6 and 52.

5. OVERSEAS MODELS

5.1 We have researched overseas models (the United Kingdom, Australia, Canada and the United States) over the course of this review and in formulating our recommendations. We have found these models particularly useful, in considering whether the current advice and advocacy roles of the Solicitor-General should be split, and to inform our thinking in relation to the future development of the GLS programme.

5.2 The models examined reflect the legal systems that have evolved in those particular countries. While there are similarities, there are also fundamental differences. In particular, the UK and the US separate the advice and advocacy roles. The UK briefs out advocacy to panels of counsel, while in the US, the Solicitor-General is responsible for advocacy on behalf of the US Government in the Supreme Court and any appellate court.

5.3 The chief legal advisory role is fulfilled by the Attorneys-General in the US and the UK (with a supporting Attorney-General's Office or equivalent). A separate Treasury Solicitor's Department in the UK provides litigation and legal advisory services to government departments. Unlike New Zealand, these countries do not have a fused legal profession. Here the Crown Law Office is similar to both the Treasury Solicitor's Department and the Attorney-General's Office (in the UK context). Some overseas-based interviewees spoke of the strength they saw in New Zealand's Solicitor-General combining the advice and advocacy roles in the one appointment.

5.4 For reasons discussed later, the structural separation of roles eg between the Solicitor-General and the Director of Public Prosecutions, and the existence of a separate Attorney-General's department, is not considered suitable for New Zealand.

5.5 Australia and the UK have seen the need in recent years for a much greater degree of coordination for government lawyers, akin to current moves in New Zealand to provide such coordination under the GLS programme. This is discussed further in section 10.

5.6 Other aspects of international models have helpfully informed this review, particularly in regard to the creation of a virtual Department of Public Prosecutions within the Crown Law Office; the continued need for tied work; the enforcement of financial markets legislation; and issues relating to the appointment and tenure of the Solicitor-General.

5.7 For a more detailed summary of overseas models, see Appendix 4.

6. PRELIMINARY OBSERVATIONS ON SOME RECURRING CONCEPTS AND THEMES

6.1 Before considering the key issues identified earlier, we make some brief preliminary observations on some key concepts or themes relevant to our review.

The concept of whole of government

6.2 This concept is usually expressed in terms of management of Crown (or government) risk, particularly legal, including the fact that the Crown must act consistently.[17] More evidently, the Crown should not be involved publicly on both sides of a dispute or proceeding except where there are Crown agencies with clearly different statutory mandates.[18]

6.3 Management of whole of government risk is often advanced as the reason for the Crown Law Office monopoly on Category 1 work. In principle that is correct although other factors play a part. While supporting the monopoly on this ground, one interviewee also observed that most of its constitutional legal advice (and it is significant) was now done in-house. Furthermore, a large element of Crown risk relates to commercial or reputational issues managed by departments and agencies without the involvement of the Solicitor-General, the Crown Law Office or indeed, any lawyers at all. As many departments point out, in the first instance it is for them to recognise and manage legal and other risks; to decide when to use in-house or external legal advisors (including Crown Law); and to be accountable for the consequences.[19]

6.4 It is important, however, for departments and agencies to recognise that their actions and decisions can have important implications for other parts of the Crown. Where legal issues involve wider government legal risk, management by the Law Officers is clearly appropriate: hence our later recommendation that the Category 1 monopoly be preserved (section 13), though with a material change of emphasis.

6.5 What we do not accept, however, is any suggestion that the whole of government concept is understood only by a select few. On the contrary, it is understood and applied by Crown Solicitors (in both their criminal and civil law roles) and by other external service providers, as has been demonstrated by many over the years. Every Solicitor-General in recent times[20] has been an external appointment, each of whom has grasped the concept quickly with the support of the office. Also, the development of relevant law affecting whole of government risk can occur outside

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17 See a helpful speech by Christopher Finlayson, the Attorney-General to the Government Legal Conference, (15 April 2010) explaining the importance of the whole of government concept and, in particular, that there is only "one Crown" and "not warring fiefdoms but one team".

18 For example, the New Zealand Transport Agency may be a legitimate objector to the location of a prison or school (promoted by the Department of Corrections or Ministry of Education) if there are adverse traffic or road safety implications.

19 See, for example, State Sector Act 1998, s 32.

20 At least, after Solicitor-General Neazor.

the purview of the Crown Law Office eg the leading cases on commercial procurement processes by public bodies did not involve the Crown Law Office.[21]

6.6 Continuing frustration has been expressed at the fact a department (or Crown entity) can seek, and be given, advice critical to the ongoing interpretation and application of a statute administered by another department without its involvement. This is, in our view, an undesirable practice. Responsible departments should at least be kept informed as part of the management of whole of government legal risk. Cost savings can also result since the responsible department for the legislation may already have advice (external or internal) on the same subject matter.

6.7 There are two options. The first, ostensibly the current practice, is for the Crown Law Office to inform the relevant department of the request for advice and for the instructing department to accept Crown Law's obligation to do so. The second, and preferable, option is adoption of a model similar to that in Australia. This model would require departments seeking legal advice to inform, and consult with, the department administering the legislation, and to confirm that in their briefs to the Crown Law Office (or to other external lawyers). [22]

6.8 Overall, we take the view that Crown Law is best placed to manage Crown legal risk, but the point has been strongly made that it is not necessarily best equipped to manage commercial, reputational and ongoing business relationship risks. Also, at times, departments should be entitled to use external lawyers for Category 1 work, notwithstanding that whole of government issues may be involved (see sections 8 and 13). Our later recommendations seek to achieve an appropriate balance of these (sometimes competing) considerations.

Who is the client?

6.9 The Solicitor-General (and the Crown Law Office) are the Crown's lawyers. Although departments regard themselves as "clients", looking to the Solicitor-General/Crown Law Office for advice and representation (and paying accordingly), difficulties arise in applying the conventional client-solicitor relationships found in the private sector.

6.10 First, due to the whole of government approach considered above, at times the "client" (at least in practical terms) is not merely the department, but the Crown as a whole. Secondly, as the Law Officers who instruct the Crown Law Office on behalf of the departments, the Attorney-General and the Solicitor-General are also "clients", who, in turn, determine what legal advice the Crown accepts.

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21 *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, [2005] 2 NZLR 433; *Oynx Group Ltd v Auckland City Council* (2003) 11 TCLR 40; *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZR 776 (CA) (although in relation to the *Diagnostic Medlab* case, the Solicitor-General was to intervene if the Supreme Court gave leave to appeal, which it did not).

22 See the Commonwealth of Australia Legal Service Directions 2005 for FMA agencies (ie Financial Management and Accountability Act agencies (essentially government departments and agencies)) which provide that if an agency wishes to obtain legal advice on the interpretation of legislation administered by another agency, then it must provide that other agency with: a reasonable opportunity to consult on the proposal to seek advice; a copy of the request for the advice; a reasonable opportunity to consult on the matter prior to advice being finalised; and a copy of the advice: Legal Services Directions 2005 (Cth), cl 10.1.

6.11 Consequently, it is not surprising that complexities, even tensions, can arise when decisions made by the Law Officers on a whole of government approach (eg whether to settle or appeal) result, in effect, in the Solicitor-General acting as client, instructing solicitor and counsel. That may be inevitable, even desirable, but it does call for careful management. It also requires a continuing educative role by the Crown Law Office in helping the state sector understand the relationships with, and roles of, the Law Officers and the Crown Law Office within the constitutional context.[23]

Being a model litigant

6.12 It is generally accepted that the government and its lawyers should behave as "model litigants", which means observing notions of fair play and not to win at all costs, but rather ensuring that justice is done. In Australia, such principles have been formally adopted in model litigant policies.[24] New Zealand has not formally followed suit, but it is expected that all Crown Counsel, Crown Solicitors, departmental lawyers and external lawyers when conducting litigation on behalf of the Crown, will strive to act as model litigants.

6.13 Notwithstanding, some interviewees were of the view that the Crown Law Office does not always adhere to this model. One quoted a perception that sometimes the office is "driven too much by the wish to win", a practice inconsistent with model litigant principles. The Crown Law Office rejects this criticism. Nevertheless, Crown Law needs to be aware that this is a view held by some, rightly or wrongly, and that there is a need for Crown Counsel at all times to act as model litigants.

6.14 Furthermore, some interviewees (including a senior member of the bench) expressed similar concerns about some junior counsel acting on behalf of Crown Solicitors, who are sometimes "over zealous", have "unrealistic sentencing expectations" and burden the court with "excessive evidence and submissions". This culture of "proceed at all costs and win at all costs" is quite contrary to model litigant principles and carries obvious cost implications. Such concerns heighten the need for greater monitoring and oversight of Crown Solicitors by the Solicitor-General and Deputy Solicitor-General (Criminal).

A requirement for transparency

6.15 The Crown Law Office has many (some excellent) internal policies eg for the conduct of litigation, settlements and external briefings, none of which, however, is available externally (to the appropriate extent).[25] Our observation is that Crown Law's clients – the departments, particularly chief legal advisors, as well as other third parties – would be assisted by greater transparency of Crown Law policies, including general instructions on briefing and working with the Crown Law Office.[26] In various sections of our review, we recommend publication of certain Crown Law

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23 For a helpful article on this issue see Matthew Palmer, Deputy Solicitor-General's article: fn 6.

24 For example see Legal Services Directions 2005 (Cth) Appendix B; see also Law Officer (Model Litigant) Guidelines 2010 (No 1)(ACT).

25 An exception is the *Protocols between the Solicitor-General and the Commissioner of Inland Revenue*, July 2009: http://www.crownlaw.govt.nz.

26 See as a parallel example the Parliamentary Counsel Office *Working with the PCO*, 3rd ed.

processes. Consistent with responsibilities for the maintenance of proper standards in litigation, we particularly recommend that the Crown Law Office draft and publish on behalf of the Attorney-General, a model litigant guideline similar to Australian policies.

6.16 Publication of Crown Law Office policies and processes is generally recommended in the interests of transparency, unless such publication would prejudice the Crown. The risks are minimal, while potential benefits in both cost savings and reputation are significant. Such published policies and processes should be drafted in consultation with relevant stakeholders.

Recommendations — preliminary observations on some recurring concepts and themes:

6.17 We recommend:

- Adoption of a model similar to that in Australia requiring departments seeking legal advice to inform, and consult with, the department administering the legislation and to confirm that in their briefs to the Crown Law Office (or to external lawyers).
- A continuing educative role for the Crown Law Office in helping the state sector understand the concept of whole of government and the sector's relationships with, and the roles of, the Law Officers and the Crown Law Office within the constitutional context.
- Publication of a model litigant guideline similar to Australian policies.
- Greater transparency of Crown Law Office policies, including general instructions on briefing and working with the Crown Law Office.

7. CHIEF EXECUTIVE ROLE OF THE SOLICITOR-GENERAL

The issue

7.1 The PIF Review of the Crown Law Office noted[27] that, "unlike most government departments, the Chief Executive of Crown Law and other members of the senior management team are heavily involved working 'in the business' as well as 'on the business'". This has implications for the amount of time and attention that can be given to organisational leadership and management matters. The report went on to say, "Many stakeholders suggest that this raises a fundamental structural issue: should the Solicitor-General and Chief Executive role remain combined?"

7.2 Our review has considered whether the role of Solicitor-General and Chief Executive of the Crown Law Office should be separated out and if so, whether structurally or operationally. The distinction lies in whether the role should be confined formally to professional legal, rather than management, responsibilities; or, alternatively, whether the Solicitor-General remains accountable as Chief Executive, but with most of the day to day management and administration delegated to a Deputy Chief Executive or Chief Operating Officer.

7.3 A structural separation of the Solicitor-General's roles is not recommended. Most interviewees opposed any structural split and we consider there are compelling reasons for not doing so.

7.4 First, a structural separation could weaken the critical role of the Solicitor-General and increase, rather than decrease, legal risk to government. Notably, offshore interviewees spoke of the strength of the New Zealand system in fusing both roles in one. We concur with this view.

7.5 Secondly, it is important that the Solicitor-General remain Chief Executive to ensure access to the public service network of chief executives. As one former Solicitor-General emphasised, having access to this forum gave "valuable insight" into, and an ability to "check in" with, developments in other parts of the public service, allowing early identification of potential legal risks. Another felt the Chief Executive role gave the Solicitor-General "authority" and the ability to keep a "finger on the pulse". Our observation is that such networking is invaluable in allowing the Solicitor-General to be proactive in identifying and managing government legal risk.

7.6 Thirdly, difficult definitional and accountability issues may arise if the role were split. Whose view would prevail if, say, the Solicitor-General and Chief Executive took different views on the deployment of Crown Law Office legal resources?

7.7 Fourthly, a structural split would be contrary to the policy underlying the State Sector Act 1988 and other state sector appointments with statutory independent functions eg the Commissioner of Police, State Services Commissioner, Auditor-

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27 PIF Review at 29.

General and the Director of Government Communications Security Bureau (where professional and chief executive roles are similarly combined).

7.8 The advantages of role separation can be achieved in ways other than a radical structural split as discussed below. The challenge is to free up the Solicitor-General to perform his/her other key roles.

Appointment of a Deputy Chief Executive

7.9 In our view, an operational (rather than structural) separation of the professional legal, and management, roles would support the PIF recommendation for establishment of a Deputy Chief Executive role. Such an appointment would enable the Solicitor-General to focus on key legal roles and professional leadership, while a Deputy Chief Executive could focus on organisational leadership and management. At the same time it would ensure that one person – the Solicitor-General – remains accountable to the Attorney-General, Parliament and the public for both roles.

7.10 The Solicitor-General has recently arranged for the secondment of a Deputy Chief Executive to the Crown Law Office for 18 months. In our view, the establishment of a permanent role of Deputy Chief Executive or Chief Operating Officer is a priority.

7.11 To keep the general strategy for the Crown Law Office running from an organisational management perspective, the appointee needs to have excellent public service management skills and knowledge of the machinery of government. Are legal qualifications necessary? Some interviewees considered the role needs a lawyer in order to obtain "buy-in" from the Crown Law Office professional staff. Others emphasised the business aspect of the role, which would require management, rather than legal, skills.

7.12 The point was also made that "if one wants a shift in performance then one needs to have someone who can bring in different skills and avoid a homogeneity of thinking". We do not consider legal qualifications necessary (it is, after all, a management role) although an understanding of the business of being a lawyer and its associated pressures would be an advantage.

Responsibilities of the Deputy Chief Executive

7.13 Responsibilities of the current Deputy Chief Executive include the development of Crown Law's strategic direction and planning as well as state sector management capability. The role is also responsible for ensuring that the Crown Law Office meets its obligations under the Justice Sector Sustainability Programme, and for managing relationships with key stakeholders, including central agencies and the Crown Solicitors. However, key corporate functions such as finance, planning and reporting, and information management, are currently the responsibility of the Practice Manager, who reports directly to the Solicitor-General.

7.14 Careful consideration is required as to the precise job description for the Deputy Chief Executive. We recommend that the role be expanded to include not only strategic and relationship management functions, but also responsibility for managing all corporate functions (which is typically the role of a deputy chief

executive (or chief operating officer)). The Deputy Chief Executive would therefore also become the Crown Law Office's Chief Operating Officer, to be reflected in the title of Deputy Chief Executive/Chief Operating Officer.

7.15 Such unification of roles is appropriate, given the relatively small size of the office and the need to reduce the leadership and administrative load of the Solicitor-General. In addition, given the challenges faced by the office in areas such as financial sustainability and the management of client relationships, it is essential for strategic and corporate functions to be aligned under a single senior leader.

7.16 The proposed title for the position is cumbersome and ultimately perhaps not of great significance. The term Chief Operating Officer accurately describes the role. However, as the appointee should be part of the forum of Deputy Chief Executives, it makes sense to use a title widely accepted in the state sector. The equivalent position in the Ministry of Justice has both titles.

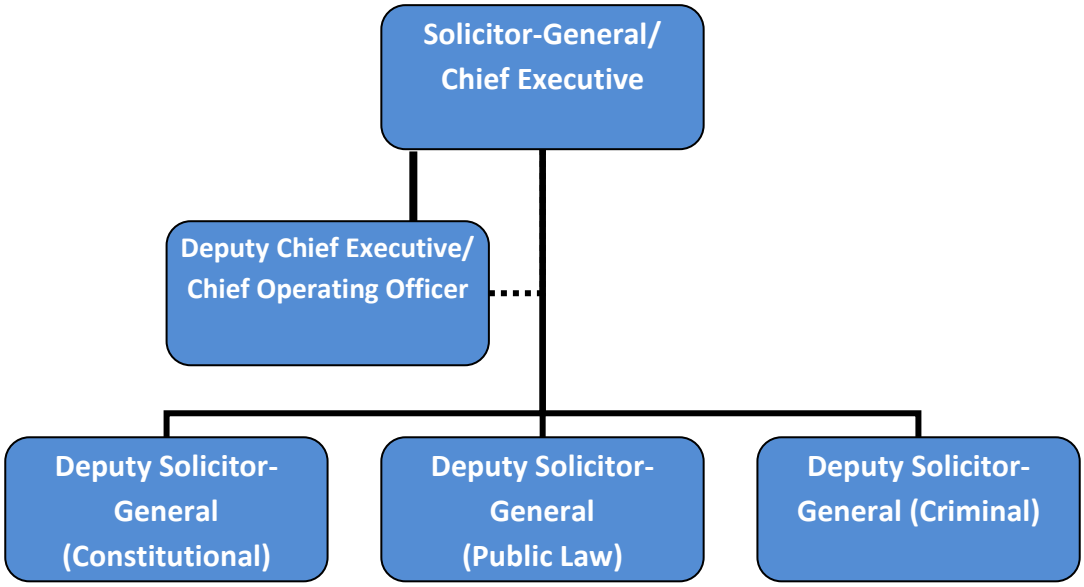
7.17 In our view, key responsibilities of the Deputy Chief Executive/Chief Operating Officer should be:

- strategic and business planning;
- justice sector and central agency interface at an equivalent level;
- financial management and sustainability;
- human resources and organisational development;
- organisational planning and reporting;
- business and policy analysis;
- information technology and management;
- management of client relationships, in particular the Client Relationship Management programme; and
- ensuring systems are well designed and managed.

7.18 Consideration needs to be given to appropriate delegations. As one department's Chief Operating Officer observed, a deputy chief executive must be able to execute day to day responsibilities without "second-guessing" from the Chief Executive. In the present context, plainly the Solicitor-General, ultimately accountable as Chief Executive, needs to be consulted on significant management issues and to have a right of veto. At the same time, however, the Deputy Chief Executive/Chief Operating Officer needs to have the mandate (as the above observer aptly noted) to "make the job real" and "get on and execute what needs to be done". Formal delegation of specific managerial responsibilities will thus be needed.

7.19 Given the importance of the role, we consider that the Deputy Chief Executive/Chief Operating Officer should sit between the Solicitor-General and Deputy Solicitors-

General to signal that the position is taking responsibility for the organisational management of the Crown Law Office.[28] The Deputy Solicitors-General would continue to report to the Solicitor-General on their professional responsibilities. However, in relation to management matters, the Deputy Solicitors-General would generally deal directly with the Deputy Chief Executive/Chief Operating Officer, as illustrated below:



7.20 The support of, and mandate from, the Solicitor-General is critical to the success of the Deputy Chief Executive/Chief Operating Officer role to ensure respect for the person ultimately responsible for the office's management. All those in the Crown Law Office should be in no doubt that the Deputy Chief Executive/Chief Operating Officer has a decision-making role. An excellent working relationship between the Solicitor-General and Deputy Chief Executive/Chief Operating Officer will be essential for the successful operational separation of the roles and should be part of the KPIs for both roles.

7.21 We recognise the organisational implications for the expanded deputy role. It will not simply be a matter of changing reporting lines. Therefore, we recommend that the Deputy Chief Executive/Chief Operating Officer take an early look at the organisational structure, reporting lines and business planning of the corporate function of the Crown Law Office. He/she should also bear in mind our other recommendations regarding the establishment of a dedicated prosecutions group (section 9) and the hosting of the GLS (section 10).

7.22 We expect the Deputy Chief Executive/Chief Operating Officer would investigate the desirability (or otherwise) of client, and (anonymous) staff, surveys, the establishment of an Audit and Risk Committee, and the addressing of business planning issues.

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28 In the Ministry of Justice, the Deputy Chief Executive/Chief Operating Officer role sits between the Secretary and Deputy Secretaries.

7.23 We note that the current Deputy Chief Executive role is filled by a secondment from another agency. The choice of appointee for this permanent role in the longer term is a matter for the Solicitor-General.

Recommendations — the Chief Executive role of the Solicitor-General

7.24 We recommend:

- No structural separation of the professional legal and chief executive roles of the Solicitor-General, but rather an operational separation of the management role.
- The permanent appointment of a Deputy Chief Executive/Chief Operating Officer, responsible for all matters relating to the operational management of the Crown Law Office.
- The Deputy Chief Executive should sit between the Solicitor-General and the Deputy Solicitors-General in the organisation chart reporting directly to the Solicitor-General/Chief Executive.
- An early assessment of the organisational structure, reporting lines and business planning of the corporate functions of the Crown Law Office.
- An investigation of the desirability (or otherwise) of client and (anonymous) staff surveys, the establishment of an Audit and Risk Committee and the addressing of business planning issues.

8. LEGAL ADVICE AND ADVOCACY ROLES OF THE SOLICITOR-GENERAL

Should the functions of legal advice and advocacy be separated out?

8.1 Our Terms of Reference specifically required us to consider the merits of separating out the Solicitor-General's advice and advocacy roles. In both the US and the UK, these roles are performed by different providers. In the UK, the Treasury Solicitor's Department and the Attorney-General's Office provide legal advice to the government. Appearance work, however, is briefed out to external counsel appointed to panels for both civil and criminal advocacy. In the US, the Solicitor-General's primary role is to represent the government in the Supreme Court. Advice is provided by the Office of Legal Counsel.[29]

8.2 Interviewees were almost unanimous that the two roles should not be split. Plainly, advice informs advocacy and vice versa and it is therefore important that the Solicitor-General continues to discharge both roles, particularly in a fused profession such as ours. To quote one former Solicitor-General, "the advisory role of the Solicitor-General requires a deep understanding of the Court of Appeal and Supreme Court and how they operate. Insight from the experience of being an advocate facing an appellate court is extremely useful sitting alongside the advisory role."

8.3 There are also obvious practical and cost considerations. First, unlike the UK and the US, New Zealand is small, with a fused profession and seemingly no compelling reason for separate agencies (or separate positions within the Crown Law Office) to provide advice and advocacy.

8.4 Secondly, complex definitional and accountability issues would arise. It can be difficult to draw the line between what constitutes "advice" and "imminent litigation". Advice may well be given to assist in negotiating or mediating resolution of a dispute but if such attempts fail, the matter becomes "litigation". The question then arises whether this was "imminent" litigation from a much earlier point. Protocols would be required as to the timing of files to be transferred from advisors to advocates. Thirdly, issues would arise as to which cases a chief advocate and his/her team would undertake as opposed to those managed by advocates within the Crown Law Office.

8.5 Finally, separation of the roles could make recruitment and retention difficult, given that many Crown Counsel are attracted to the position by the opportunity for court appearances. As a general observation, the Crown Law Office is fortunate in having a team of dedicated and experienced lawyers to provide advice to, and appear for, the Crown.

8.6 Overall, a number of interviewees noted the risk that such a separation could "diminish the overall authority" of the Solicitor-General, whose role is critical in terms of our constitutional framework and who must at all times be seen as the Crown's most authoritative legal advisor. Splitting the advocacy and advisory roles

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29 See further section 5 of our review and Appendix 4.

may risk a loss of credibility in the position. Specifically, whose view would prevail in a difference of opinion between the Crown's primary "advisor" and the "advocate"? Would the Solicitor-General's advice have the same authority, should the incumbent ultimately not be responsible for defending that advice in court? Would each separately report to, and advise, the Attorney-General?

8.7 For these reasons we strongly recommend against separation of the advice and advocacy roles. Indeed, in our view, the fused role is important in achieving the optimal management of Crown legal risk.

What is the appropriate balance between the advisory and advocacy roles for the Solicitor-General?

8.8 More important, however, is which of the advisory or advocacy roles, if either, should have primacy in terms of the day to day responsibilities of the Solicitor-General. Appointees will undoubtedly have their own preferences. Some have limited court appearances to the most significant cases (no more than two or three a year); others have appeared more regularly (eight to 10 a year).

8.9 More frequent recent appearances are, in part, the result of the replacement of the Privy Council by our Supreme Court. This has meant that more matters have been heard in the highest court, including more applications for leave to appeal (which have to be pursued or resisted with diligence) and are often followed by a substantive hearing.[30] The Supreme Court also has a more extensive criminal workload (which necessarily involves the Crown) than did the Privy Council. That is unlikely to change; the real question is whether so many cases now require the personal attention of the Solicitor-General.

8.10 The difference between conducting two or three, as against eight or 10, cases may initially seem minor, but becomes significant in terms of time. Eight cases are likely to involve the Solicitor-General in eight to 12 weeks of preparation and hearing time. This will include adherence to court timetables that cannot be adjusted to accommodate other pressures on the Solicitor-General.

8.11 While interviewees reported very good access to the present Solicitor-General when required, nonetheless they overwhelmingly preferred the Solicitor-General to spend more time on advice and managing Crown legal risk, and less on advocacy. Moreover, many emphasised the importance of proactive – rather than reactive – advice ie thinking ahead and identifying and managing such risk. In the words of one interviewee, it is imperative that the Solicitor-General has the time to be "frontier thinking". If managed well, this has the advantage of avoiding subsequent litigation, with obvious cost and reputational consequences for the Crown and better management of the whole of government risk. It is in part for this very reason that our review has already recommended against structural separation of the Solicitor-General/Chief Executive roles.

8.12 We recommend that careful consideration be given to the precise skills needed in a Solicitor-General. Where should the balance lie – is it primarily an advisory or

30 In 2010, 90 of the 136 cases before the Supreme Court involved the Crown. In 30 of these 90 cases, leave to appeal was granted.

advocacy role? Given the importance of maintaining the fused advice and advocacy roles, litigation experience is a must, but it is, as always, a matter of emphasis.

8.13 Some potential candidates may be attracted to the advisory role, preferring to appear in court on only the most important occasions. Others will be drawn to the advocacy role and want to appear reasonably regularly in the Supreme Court; sometimes also in the Court of Appeal and even in the High Court in the most significant cases. However, the obvious downsides of more regular appearances are potential unavailability when advice is urgently required and less time to devote to identifying and managing potential Crown legal risk.

8.14 Ultimately, it is a matter for the Attorney-General as to the qualities sought in the Junior Law Officer. However, our view, reinforced by the many interviews we conducted, is that the advisory role should take priority. While it is comparatively easy to contract in advocacy skills from the outside (or from within the senior ranks of the Crown Law Office), it is far more difficult to contract in for the "trusted advisor" role which so many interviewees emphasised as the most important of the Solicitor-General's roles. However, plainly, the Solicitor-General should continue to take a lead role as counsel for the Crown in key cases, if only to signal their significance to the Crown. We were told that in the UK one Attorney-General achieved a degree of balance between the roles by opening important cases to signal their importance, but then taking no further active part in the matter.

8.15 We observe that not only does a proactive approach require the Solicitor-General to have sufficient time to identify and discuss potential risk with particular departments, but it also calls for chief executives and chief legal advisors to be receptive to such an approach. In the course of our review, we detected resistance on occasions from some chief legal advisors to a proactive approach. Several interviewees said that "patch protection" is a concern.

8.16 However, this ignores the importance of managing the whole of government risk. Furthermore, while chief legal advisors have to manage their budgets, and are directly accountable to and report to their chief executives, they also have a responsibility to take into account whole of government considerations. There is clearly a need to ensure this is well understood and this should be a specific objective of the GLS in the immediate term (discussed in section 10).

8.17 Charging should not be an impediment to a proactive approach. Early identification and management of Crown legal risk is part of the Solicitor-General's role. Delegation of day to day managerial responsibilities to the Deputy Chief Executive/Chief Operating Officer should free up time for such tasks. Should a matter require substantive investigation and/or advice, normal charging principles would apply at that point.

External briefing

8.18 The briefing of external counsel by the Solicitor-General/Crown Law Office is usually limited to major litigation (where the complexity of a case warrants senior counsel, as in recent tax cases), or matters in which the Crown Law Office lacks

capacity or internal expertise (eg defamation and intellectual property). [31] Such briefing as currently occurs is principally to the Auckland Crown Solicitor (relating to tax litigation) and former Crown Counsel now at the bar. Far more occasionally, external advisors may be appointed (eg maritime law advice sought recently in relation to the *Rena* matter).

8.19 A number of departments expressed frustration that the Solicitor-General/Crown Law Office did not brief external lawyers more often, especially when external briefing was the department's preferred choice. Despite a degree of consultation, their perception is that the Solicitor-General, as the final arbiter of the appointment of external counsel, is reluctant to allow such briefings unless Crown Law lacks resource or capacity. This is seen as diminishing the views of the chief executive and/or chief legal advisor, given that they manage the financial side of the department and in some cases may be able to obtain more appropriate and cost-effective legal services elsewhere.

8.20 The Solicitor-General and the Crown Law Office take a different view, reporting a willingness to brief external lawyers where appropriate, with any reluctance put down to a matter of "perception". Moreover, good reason exists, they say, not to appoint external lawyers in some cases, given the risk of greater susceptibility to departmental direction, so putting at risk the whole of government approach. We have already noted that this concern can be overplayed. Both departments and external lawyers have the capacity to understand the whole of government approach where required.

8.21 Despite the differing views, it is uncontroversial that the Crown should always have the most appropriate advice and assistance on a particular matter. With the increasing specialisation of the law, and the importance of a particular matter to a department or Minister, it will often be sensible to make greater use of external lawyers. This is especially so in highly specialised fields or when a departmental matter may have been handled by external lawyers for some time, such that it makes sense for their continuing involvement. Or, where it is appropriate for the department to be represented in court by a senior advocate (in the absence of the Solicitor-General or a Deputy Solicitor-General), such that a senior member of the independent bar should be briefed.

8.22 In many of these cases the Crown Law Office would still be involved, whether as instructing solicitor or junior to a senior counsel where litigation is involved. However, there will be other matters which can be managed effectively by external lawyers working closely with the department's chief legal advisor, with minimal input from Crown Law. In such cases, all that may be required of the Crown Law Office is to maintain a watching brief. Whatever the precise role, the Solicitor-General must continue to have appropriate involvement in order to fulfil the role of the Junior Law Officer in ensuring a whole of government approach where needed.

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[31] We are informed by the Crown Law Office that in 2009/2010 the total external briefing expenditure was $267,000 with $97,000 for Crown Solicitors; $39,000 for former Crown Law staff; and $131,000 to other external providers. In 2010/2011 the relevant figures are total external briefing expenditure of $443,000 with $151,000 for Crown Solicitors; $138,000 for former Crown Law staff; and $153,000 to other external providers.

This will also ensure ultimate management by the Law Officers of the Crown's legal risk.

8.23 Against that background, we recommend first, that the Solicitor-General/Crown Law Office be more open to briefing external lawyers for both advice and litigation where that is the department's preference.[32] Client choice is an important consideration and the decision to brief external lawyers should not be confined to cases where Crown Law lacks capacity and expertise. The All of Government External Legal Service Contract will presumably apply (although the bar is exempt).

8.24 Secondly, the necessary transparency of, and formality to, decisions to appoint external counsel/advisors could be achieved by a protocol or statement of policy to be shared with departments[33] as to when external lawyers will be briefed. These matters should also be covered at a general level of principle in revised Cabinet Directions (see section 13). The litigation plan to be discussed and agreed between the Crown Law Office and the department (see section 12) could also specifically address this. In relation to advice, the Federal Australian 2005 Directions include a template application for briefing external counsel (although more specifically relating to a fee application) which could be adopted for the New Zealand context.

8.25 This protocol should make it clear that the appointment of external lawyers will be a matter for consultation between the Solicitor-General/Crown Law Office and the relevant department; the department's views and preferences will be an important consideration; and all efforts will be made to agree on the appointment of external lawyers or otherwise. In the event that agreement cannot be reached, the question may need to be referred by the relevant Minister to the Attorney-General. Where the Solicitor-General refuses a request for external lawyers, reasons for that decision should be provided, if only to ensure good client relations.

8.26 The briefing of external lawyers should mean reduced, rather than increased, Crown Law involvement in terms of time, resources and costs on a particular file. Overall, the greater use of external counsel could, over time**,** mean a reduction in the size of the office, but that possibility should not impede the external briefing process.

Is a panel required for counsel?

8.27 Is there merit in the formal appointment of a panel of external counsel to be drawn on for briefing in appropriate cases, as in the UK model? We recommend against such a panel.

8.28 First, it is near impossible to identify in advance who might be appropriate for appointment, in view of the increasing specialisation of the law. Secondly, a panel could simply limit the pool of available counsel. Thirdly, there is a risk of adding an unnecessary layer of formality and costs. A panel would have to be refreshed from time to time and expanded or contracted, thus raising natural justice issues, unless appointments were to be of no great significance. It would also be inappropriate to

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32 Such a policy is not dissimilar to the Canadian model where a decision to brief outside is made by a Justice Department manager in consultation with the relevant department: see Appendix 4 at [11].

33 Crown Law External Briefing Guidelines are currently for internal purposes only.

expect panel members to refrain from acting against the Crown generally, in anticipation that the Crown may want to instruct them on a specific matter.

8.29 Finally, while in many cases Wellington based counsel will be more convenient for the department and the Crown Law Office, it is important that Crown work is not perceived as Wellington centric (a view expressed by a number of interviewees outside the capital). This is especially so if litigation takes place outside Wellington. It is therefore important where practicable to spread the work more widely, including legal advice.

Recommendations — legal advice and advocacy roles of the Solicitor-General

8.30 We recommend:

- No separation of the advice and advocacy roles of the Solicitor-General.
- Consideration be given as to whether the advisory or advocacy role should have primacy. Our view is that the advisory role should take precedence.
- The Solicitor-General/Crown Law be more open to briefing external lawyers, especially where that is a department's (or a Minister's) preference.
- The transparency of, and formality to, decisions to appoint external counsel/advisors be achieved by a protocol or statement of policy as to when external lawyers will be briefed.
- No appointment of a formal panel of external counsel.
- Where practicable, external briefing be spread more widely than Crown Solicitors, former Crown Counsel and Wellington-based lawyers.

9. PROSECUTIONS

Background

9.1 The Solicitor-General's responsibilities as the Junior Law Officer include oversight of all indictable prosecutions; Crown representation in criminal appeals; and a number of specific statutory duties in relation to administration of the criminal justice system. Moreover, as from early to mid 2013[34], the Solicitor-General will also be responsible for oversight of all "public prosecutions" (the old "summary" and "indictable" terminology being replaced by four categories of offences), including departmental prosecutions.[35] Oversight of these "public prosecutions" will considerably expand the Solicitor-General's oversight role, both in the range of prosecutions as well as the agencies managing them.

9.2 The Prosecution Review (and, to a lesser extent, the PIF Review) has comprehensively examined the Solicitor-General/Crown Law Office's roles within the prosecution service. There is no need for this review to cover the same ground. It is sufficient to note that both reviews considered the conduct of Crown prosecutions and criminal appeals is consistently performed to a high professional standard and, moreover, with reasonable efficiency.[36]

9.3 Departmental prosecutions, however, were considered more "patchy"[37]. Some departmental prosecutors perform to a high standard. However, a senior member of the bench has (more bluntly) described other departmental prosecutors as "incompetent"; and the Solicitor-General is aware of judicial concerns about the variable quality of departmental prosecutors.

9.4 Importantly in the context of our review, both the Prosecution and PIF Reviews reported, however, a "distinct lack of oversight" of the prosecution service as a whole with "few mechanisms in place to allow the Solicitor-General to perform this role in practice".[38] In particular, and rather surprisingly, negligible data exists in relation to costs across the whole of the prosecution service.[39]

9.5 It is against that background, and in particular the urgent need for a greater oversight role, that we have considered the future role of the Solicitor-General and the Crown Law Office in relation to public prosecutions.

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34 The Criminal Procedure Act 2011 (CP Act) comes into force in two stages: stage one from 5 March 2012; stage 2 from early-mid 2013, including the Solicitor-General's oversight responsibilities for public prosecutions.

35 Pursuant to the CP Act, s 185.

36 PIF Review at 7 and Prosecution Review at 9.

37 Prosecution Review at 9.

38 Prosecution Review at 9.

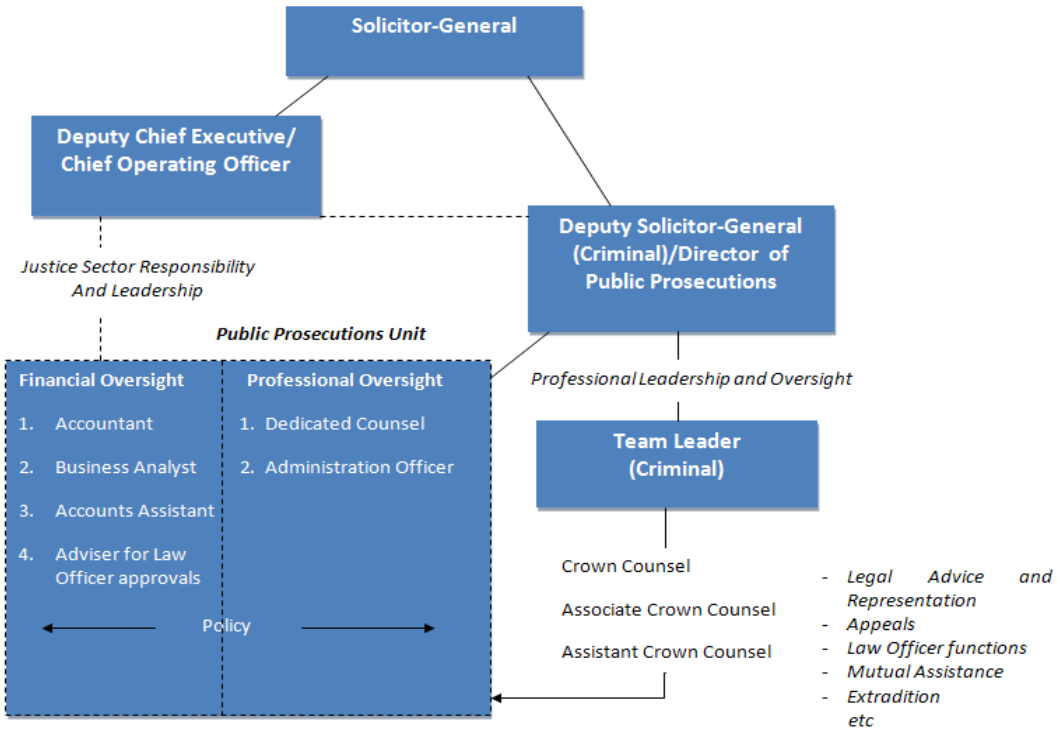
39 Prosecution Review at 9.

A separate department of public prosecutions?

9.6 As with the Prosecution Review, we do not recommend the establishment of a separate public prosecutions department based on overseas models (as discussed in section 5 and Appendix 4). Reasons for and against are discussed in that review.[40] For present purposes we simply note that such a development would be contrary to the evolution of the Crown Solicitor network and the Police Prosecution Service which, as the Prosecution Review observed, are "highly efficient" and "low cost". Substantial financial costs would also be incurred in establishing such a department, unwarranted in the present financial climate.

A virtual prosecutions group within the Crown Law Office

9.7 However, we do recommend the creation of a dedicated prosecutions group or team within the Crown Law Office – almost a virtual DPP. This group would include all staff involved either in the conduct, or oversight, of prosecutions and appeals ie lawyers, business analysts, financial and support staff. The Human Rights/BORA team – currently part of the Criminal Law Group – would be removed from this new Criminal Law Group, which would be structured as below:



9.8 Such a structure would, in our view, ensure a more coordinated approach to each of the important criminal law roles of the Solicitor-General/Crown Law Office ie:

(a) the conduct of appeals – both accused and Crown appeals from criminal trials on indictment; and

40 Prosecution Review at 43-46.

(b) the provision of a national Crown prosecution service undertaking criminal trials on indictment and appeals to the High Court; supervising the Crown Solicitor network and departmental prosecutors; and providing advice on criminal law matters to all government departments and the Crown Solicitors.

9.9 We have suggested that the team include financial staff, in view of the Prosecution and PIF Review recommendations for much improved financial management of public prosecutions. The Vote Attorney-General Appropriation Three of approximately $48 million is by far the most significant for the Crown Law Office and the most difficult to administer effectively. However, we acknowledge it may be possible for the prosecutions group to share some financial management capability located elsewhere in the Crown Law Office. At the very least, however, close collaboration between the two groups would be required to ensure a seamless approach; and, moreover, that the approach moves from an "accounts payable" to an "accounts management" function.

9.10 Consideration should be given to the standardisation of the account management functions (and even wider financial related functions) of the Crown Law Office and all Crown Solicitors. Significant cost savings may be achieved as a result. We understand that preparatory work on such an option is already under way.

9.11 Given the importance of the oversight role, we also recommend that the Deputy Solicitor-General (Criminal) take on the additional title of Director of Public Prosecutions to send a signal that this is a key responsibility ie the direction and supervision of all prosecutions in terms of the accountability to the Solicitor-General. This would also be consistent with another of the Prosecution Review's key recommendations (with which we agree), that the Vote Attorney-General Appropriation Three be split in two ie conduct and supervision.

Key objectives of the group

9.12 Clearly, there will be a need for this new group to prioritise its short and long term objectives, in order to implement the many recommendations of the Prosecution and PIF Reviews. These have already been set out in section 3 but for present purposes can be broadly categorised as follows:

(a) ***Review of the Crown Solicitor network, including clarification of the relationship between the Crown Law Office and the Crown Solicitor network:*** Our review reinforces the Prosecution Review recommendation that the previous agency relationship be reasserted – that the notion that Crown Solicitors should be "independent" from the Crown Law Office is misconceived[41]. The warrant system should also be supplemented by fixed contractual terms (including finite terms) rather than relying on the Regulations.[42]

41 Ibid at 72-73.

42 Ibid at [433.1].

(b) ***Improved overall supervision of the Crown Solicitor network, including its financial management with a view to achieving cost reductions and improvements in delivery:*** We would also add possible specialisation by particular Crown Solicitors across more than one region and the possibility of more than one Crown Solicitor firm per region ie not continuing to operate as perpetual regional monopolies.[43]

(c) ***Review and amendment of Prosecution Guidelines as appropriate***: In particular, we strongly endorse the Prosecution Review recommendation that these guidelines should include cost as relevant to the assessment of public interest.[44]

(d) ***Collection and reporting of all relevant prosecution related data from all central government prosecution agencies (Crown Solicitor, Police Prosecution Service and other enforcement agencies):*** Plainly, the collection of such data – and ensuring that Crown Law is set up so as to monitor this – is of paramount importance in controlling costs.[45] Moreover, in controlling costs, the Crown Law Office needs to have adequate resources to deal with inputs and requests from well resourced Crown Solicitor finance teams.

(e) ***Improved efficiency and delivery of departmental prosecution***: This includes obvious cost efficiencies by encouraging some departments to brief out their summary prosecutions eg the possible briefing of Department of Corrections and Ministry of Education prosecutions to the Police Prosecution Service.[46] Our review reinforces the need, for both quality and costs reasons, to limit prosecution work to a smaller number of experienced prosecutors. Departmental lawyers must be properly trained to take on prosecutorial functions. The GLS has an important role in this (see paragraph 10.11). Interviewees were complimentary of the Police Prosecution Service training programmes and the high standard of Police prosecutions where conducted by a trained prosecutor. This would suggest that the Police Prosecution Service could sensibly undertake many departmental prosecutions. The Police would need to be compensated for providing these services. This should not be an issue (see paragraph 10.12). The Ministry of Social Development, for example, is keen to use Police prosecutors in smaller towns for its departmental prosecutions (being more cost effective than employing Crown Solicitors). On the other hand, one Crown entity, with significant complex prosecutions to manage, uses preferred Crown Solicitors nationwide, irrespective of their location, and finds that this works well.

9.13 It must be acknowledged that with this expanded oversight role the Prosecution Group will require new, or expanded, capabilities, particularly in terms of financial management, business analysis and strategic leadership and planning. How these capabilities are added, and funded, needs to be addressed urgently by the Deputy

43 Ibid at [547.3] and [576.3].

44 Ibid at [706].

45 Ibid at [721] and [722].

46 Ibid at [723].

Solicitor-General (Criminal) in conjunction with the Deputy Chief Executive/Chief Operating Officer.

Financial Markets Authority Prosecutions

9.14 The Financial Markets Authority (FMA) is tasked with the enforcement of financial markets legislation, with the power to bring criminal and civil proceedings. Civil proceedings for penalties or compensation are taken, and funded, by the FMA. Some criminal proceedings can be taken summarily by the FMA. Indictable proceedings (although the terminology will change in due course), however, are subject to prosecution in the normal way ie in the name of the Crown and funded (beyond a certain point) by the Crown. As a result, the prosecution will be conducted by a Crown Solicitor or any other lawyer employed or instructed by the Solicitor-General or Crown Solicitor to conduct that prosecution.

9.15 The FMA expressed strong concerns about the present regime, in particular the fact that once charges are laid, effectively it loses control of the prosecution to the Crown Solicitor with little say in representation, or the conduct of the proceeding. Disparity in the treatment of indictable proceedings, it says, affects its ability to perform its enforcement functions by adding cost, and limits the choices it makes in regard to the conduct of such cases. While indictable proceedings are taken in the name of the Crown, importantly the regulatory and reputational risk accompanying such proceedings still lies with the FMA. Criminal enforcement is considered an important part of its regulatory functions.

9.16 The FMA also identifies other practical concerns. In the course of a complex investigation, the agency may well brief external lawyers to provide advice. Those lawyers become thoroughly familiar with the file. Yet, at the point that criminal charges are laid, the matter must then be handed over to a Crown Solicitor. Further FMA costs (and other inefficiencies) result, especially with the running of parallel civil and criminal cases with different counsel.

9.17 The FMA contrasts this with the equivalent Australian Securities and Investment Commission (ASIC) prosecutions. Like the FMA, ASIC can bring criminal or civil proceedings. Civil proceedings are the responsibility of ASIC; criminal proceedings for offences against the Commonwealth legislation are the responsibility of the Commonwealth Director of Public Prosecutions (CDPP). However, a Memorandum of Understanding (MOU) between ASIC and CDPP[47] sets out a helpful framework recognising "the need for the fullest collaboration and cooperation between the two organisations to discharge their respective functions in relation to the investigation and prosecution of corporate and financial services wrongdoing". ASIC agrees to consult CDPP when contemplating civil penalty proceedings (allowing CDPP to determine whether criminal charges should be laid), while CDPP, in turn, consults with ASIC on decisions regarding criminal proceedings.

9.18 An important feature of the MOU is that CDPP agrees to consult ASIC on the choice of counsel for criminal proceedings and will "as far as possible give weight to

47 Memorandum of Understanding (1 March 2006) setting out "principles to facilitate the working relationship between the two agencies".

ASIC's views". We are informed that in practice ASIC consults early with CDPP on the choice of legal advisors for a case, ensuring continuity, where appropriate, from investigation through to criminal or civil proceedings, with obvious cost efficiencies. ASIC retains, and pays for, external counsel.

9.19 The end result is that ASIC has a high degree of influence in CDPP's formal decision making responsibility in bringing criminal proceedings. Close consultation and cooperation between the agencies exists in a process summarised as follows:

(a) ASIC conducts investigation;

(b) Early consultation with CDPP on counsel (during investigation);

(c) ASIC briefs agreed counsel (CDPP or external);

(d) ASIC instructs and funds external counsel;

(e) Brief conveyed to CDPP if civil penalty or criminal proceedings are contemplated;

(f) ASIC and CDPP consult on choice of proceeding; and

(g) CDPP takes decision whether to prosecute and provides draft charges to ASIC for review.

9.20 The FMA advocates adoption of this model, including (importantly) responsibility for funding such prosecutions. Alternatively, at the very least, the FMA considers it should have, like the Serious Fraud Office, a statutory panel of lawyers entitled to conduct indictable prosecutions.[48] However, the Australian model is strongly its first preference. With an increase in what could be described as regulatory crime (eg price fixing is about to be criminalised) comes a need to address whether or not these somewhat specialised prosecutions – like those of the FMA – should be subject to the standard criminal prosecution regime. We have considerable sympathy for the FMA's concerns and are attracted to the Australian model, which provides a good balance between the competing considerations

9.21 On the one hand, adoption of a similar model would ensure continued Solicitor-General oversight through retention of the discretion regarding filing of indictments and ongoing oversight of the proceedings. Indeed, in some respects this model allows for greater Solicitor-General/Crown Law Office involvement than the present regime – where the file effectively is handed over to a Crown Solicitor with little oversight from Crown Law. On the other hand, it would provide the FMA with a greater degree of flexibility in the choice of counsel appropriate to the needs of each case; avoid potential duplication (in time and cost) where parallel criminal and civil

48 The Serious Fraud Prosecutors Panel is established by s 48 of the Serious Fraud Office Act 1990, which requires the SFO to use panel members for all its proceedings relating to serious or complex fraud, including the conduct of all indictable prosecutions. Panel members, appointed by the Solicitor-General after consultation with the Director of the SFO, are all senior lawyers, including some Crown Solicitors. No issue has been raised with us about the SFO model which, unlike the FMA or Commerce Commission, does not bring parallel criminal and civil proceedings. The Prosecution Review did, however, suggest expanding the Panel to all agencies prosecuting financial crime: at [632.2].

proceedings are taken; and enable greater FMA involvement in criminal proceedings in circumstances where the regulatory and reputational risk will lie with the agency.

9.22 Such a model would also mean that the FMA would be responsible for funding – in whole or in part – the costs of FMA criminal proceedings from its litigation fund. That may be an added advantage, particularly at a time when there is a pressing need for the Crown Law Office to ensure that prosecution costs are controlled within the Vote Attorney-General Appropriation Three.

9.23 We consider there to be obvious merit in the FMA proposal. The Australian model is proven and works well. We recommend adoption of a similar MOU or protocol in the New Zealand context; also potentially for other types of criminal regulatory prosecutions. The Commerce Commission, for example, has similar concerns to those of the FMA. Such a protocol would build on the excellent start made by the Crown Law Office in trying to coordinate FMA and Serious Fraud Office investigations/prosecutions. This would include the allocation of resources within the Crown Solicitor network and consultation on appointments of senior prosecutors and senior counsel capable of leading these prosecutions. Consideration should be given to the inclusion of some, or all, Crown Solicitors – some are experienced prosecutors of financial crime – in any such protocol.

Recommendations — Prosecutions

9.24 We recommend:

• No establishment of a separate department of public prosecutions based on overseas models.
• The establishment of a dedicated prosecutions group (ie an expanded Criminal Law Group) within the Crown Law Office comprising all staff involved in the conduct or oversight of prosecutions and appeals ie lawyers, business analysts, financial and support staff.
• Removal of the Human Rights/BORA team from the Criminal Law Group.
• The Deputy Solicitor-General (Criminal)/Director of Public Prosecutions and the Crown Law Criminal Law Group operate as a discrete unit with adequate analysis and financial resources to undertake their important oversight role.
• Prioritisation of short and long term objectives to implement the many recommendations of the Prosecution and PIF Reviews, including, importantly, supervision of the Crown Solicitor network.
• Adoption of a protocol for FMA prosecutions, similar to the Memorandum of Understanding in Australia between ASIC and the Commonwealth Director of Public Prosecutions.

10. GOVERNMENT LEGAL SERVICES

The issue

10.1 Our Terms of Reference required consideration of the establishment of a centrally employed government law firm comprising all public service lawyers.[49] Our review does not favour this option.

10.2 First, there can be little doubt that it is important for government departments to retain their own in-house legal advisors with the benefit of:

(a) specialised advice – ie the in-house lawyer will have a unique understanding, and depth of knowledge, of the department's subject area and operations;

(b) being within "line of sight" – ie available at short notice to provide the department, particularly the chief executive, with urgent and tailored advice; and

(c) advice within the overall strategic objectives of the particular department – ie in the words of one chief legal advisor, providing a "team, trust and testing" approach, which, moreover, takes into account important affordability considerations.

10.3 Secondly, a government law firm would involve significant additional administration and financial costs. Further, chief executives and chief legal advisors would be resistant to such a development with the risk of lack of "buy in" to the concept. The failure of such a firm would result in severe consequences in terms of managing Crown legal risk.

10.4 Finally, and most significantly, the advantages of a centrally employed government law firm (such as greater coordination and sharing of resources) can be achieved in other ways, such as through the proposed Government Legal Services (GLS). We are firmly of the view that the establishment, governance and funding of the GLS should be strongly supported by the government, and particularly the Attorney-General.

10.5 Overall, the GLS has the ability (importantly) to enhance the legal capability within government; to better identify and manage legal risk; to improve delivery of legal services, including enhanced consistency and cost efficiencies; and generally to promote the government lawyer as a career choice, attracting quality candidates into the state sector as a result.

10.6 Against this background our review recommends that government establish, fund and promote GLS as a discrete operating unit as a matter of priority. The proposed GLS structure, agenda and funding are discussed below (following brief mention of overseas models).

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49 There are approximately 750 lawyers in the state sector practising as such ie holding practising certificates. Many other lawyers work within the state sector, but in other areas eg policy.

Overseas models for Government Legal Services

United Kingdom

10.7 Located within the UK Treasury Solicitor's Department, the UK GLS has been operating for some 25 years. The GLS Secretariat[50] is funded from Parliament as part of the Treasury Solicitor's vote. Subscription arrangements have been considered but resisted due to administration costs, the difficulties of finding a fair way of setting subscription rates and of ensuring that the Secretariat can act independently of any department for the wider benefit of the whole of government GLS objectives.

Australian Commonwealth Government

10.8 The Australian Government is pursuing reforms to enhance the management and delivery of legal services across the Commonwealth. Key elements include enhancing support for informed purchasing of legal services by government and supporting the professionalism of government in-house legal practices. A government legal network will provide a forum for information sharing by Commonwealth government lawyers and give practice managers and senior lawyers an opportunity to maintain and improve the quality of work undertaken by in-house legal practices. This network is resourced by the Office of Legal Services Coordination, an existing unit centrally funded within the Australian Government Attorney-General's Department.

NSW State Government

10.9 In 2010 a Review of Legal Services Expenditure in NSW found that fundamental reform of the government's legal system was not required as many agencies have effective in-house legal teams and efficient processes to procure legal services. The review recommendations, reflected in the Legal Services Blueprint 2011, focus rather on better procurement practices; increased support for in-house legal teams; development of improved monitoring of legal services across government; and increased central coordination of such services. Still in a formative stage, the NSW initiative is resourced by the Legal Services Coordination unit, located and centrally funded within the NSW State Department of Attorney-General and Justice.

GLS – a short description and key objectives

10.10 The Crown Law Office is the government agency with overall responsibility for the delivery of the GLS programme. This programme is focused on capability development and efficiency opportunities comprising two main work areas:

(a) the procurement of external legal services for government departments (led by the Ministry of Economic Development) and the re-negotiation of legal information supply contracts (coordinated by GLS on behalf of several departments); and

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50 Operating as an independent unit within the Treasury Solicitor's Department.

(b) the enhancement of capability and delivery of legal services within the state sector, including rationalisation in the sharing of legal resources across government.

10.11 As to the latter objective, the agenda for the work programme, and supplemented by our own observations, would include the following components:

(a) ***Government lawyer induction programmes***: Such programmes are considered key to ensuring that all state sector lawyers understand the state sector environment; what it means to be a lawyer in that sector; the need to understand the whole of government approach with ultimate accountability to the Attorney-General; how best to deliver legal services and add value to departments; and how best to instruct and work with external lawyers, including the Crown Law Office. The latter point warrants particular comment. It is clear from interviewees that Crown Law briefings by departments vary greatly, yet the manner of instruction can contribute significantly to the final outcome. Costs will obviously be reduced if the Crown Law Office is briefed well ie the advice sought is clearly articulated; the appropriate factual context provided; all key documents included at the outset; any wider implications are noted; plus a chronology of events (where relevant) and any initial legal research provided.

Moreover, we consider it important that newly appointed chief executives (and other senior executives) also participate in induction programmes. These would be designed to ensure a full understanding of the whole of government approach to the identification and management of Crown legal risk and to achieve a more consistent approach across government departments with effective use of in-house counsel. Interviews show that the practice varies – some chief legal advisors are involved in important issues from the outset, while others feel they are not consulted until problems arise.

(b) ***Sharing of legal precedents and resources***: Clearly, significant efficiency benefits can arise if legal precedents (documents and opinions) are shared. Access to such information allows government lawyers to reduce duplication of advice and resources. While there will be legal privilege and confidentiality issues to work through, overall we consider that such sharing would achieve greater consistency and robustness of legal advice across departments, as well as cost savings. At the very least, a directory of in-house counsel specialties will be useful.

(c) ***Establishment of an intranet as an online platform for resource sharing and collaboration***: Following on from (b) above, establishment of an intranet should result in significantly greater collaboration among state sector lawyers currently facing a vast variety of types of government legal work, plus the difficulty of accessing up to date information. The ability to identify "centres

of legal expertise" in different fields should lead to improved professional support and learning.[51]

(d) ***Recruitment and the development of standard core competencies for government lawyers***: A common approach to the recruitment of government lawyers with coordinated representation on interview panels would enhance consistency and result in shared core performance measures. It could also reduce recruitment agency costs.

(e) ***A coordinated approach to training:*** A centralised GLS could offer coordinated, specialised training programmes for government lawyers, focused on priority areas. For example, a departmental solicitor should be required to complete a prosecutor's course before being allowed to conduct departmental prosecutions. Such training would go some way towards addressing concerns over the variable quality of departmental prosecutors (see paragraph 9.3). Encouraging secondment would also broaden the range of opportunities within the government legal career. Both measures would help support career progression for those wishing to specialise in government-related legal work. The need for the upskilling of departmental prosecutors is acute. As already noted, interviewees spoke highly of the standard of those Police prosecutors who have received special training. It may well be that the Police training can be adapted for other departments: overall supervision of prosecutorial services will, of course, remain with the Solicitor-General.

10.12 Contracting in, or sharing, resources between departments could mean one department charging another. Some interviewees raised concerns as to whether this was possible within the public service and legal professional frameworks. If any such impediments exist, we recommend these be addressed urgently. The ability of one department to contract in, or share, resources with another department has the potential for significant cost savings.

10.13 It is expected that direct savings and general cost efficiencies will be generated in the following ways:

(a) a reduction in external (in particular legal) expenditure by government departments including through the re-negotiation of a single legal information supply agreement; and

(b) enhanced access to, and leverage from, existing legal capability; reduced duplication of advice and resources; greater consistency and robustness of advice across departments; more effective collaboration and professional support; greater efficiencies in learning and development initiatives; and enhanced ability to meet the demands of more for less.

10.14 We are strongly of the view that the GLS is a means by which the quality of legal advice and the management of Crown legal risk could be greatly enhanced. The

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[51] For example, the Ministry of Foreign Affairs informed us that it has moved from centralisation of public international law expertise to recognising that expertise on specific conventions may well reside in other specialist departments, such as Customs or the Ministry of Agriculture and Fisheries.

simultaneous benefits, in terms of a more cost effective delivery of legal services and an improved career structure and status, would promote the government lawyer as a career of choice (thereby enhancing quality).

Funding the GLS

10.15 This review acknowledges the importance of funding the GLS within the parameters of the current fiscal situation. The PIF Review recognised that the current need to find sufficient voluntary contributions to fund the GLS presents an ongoing risk. It recommended that the Crown Law Office, in collaboration with participating departments, should optimise the programme strategy to deliver tangible benefits in the near term.

10.16 Establishment GLS funding through voluntary government department contributions, underwritten by the Crown Law Office, ends in July 2012. Centralised funding, similar to overseas models, is recommended on a permanent basis (or, less desirably, a short-term pilot, perhaps two years). Given the important whole of government focus of the GLS, we do not favour the approach of funding through departmental subscriptions. We observe that the UK specifically rejected departmental funding in favour of centralised funding for this very reason (paragraph 10.7).

10.17 Not all departments would benefit from the GLS to the same extent and such funding may raise definitional issues with a more internal focus, as opposed to achieving improved delivery of legal services and cost reduction benefits for the Crown as a whole. Moreover, centralised funding would closely signal the importance of the programme as a permanent feature of the state sector legal environment, working towards managing Crown legal risk as well as delivering efficiencies and cost savings. Greater certainty of funding would also allow the GLS to proceed with its agenda of improving the delivery of government legal services.

10.18 An annual operational budget for the GLS has been estimated by the present Director of the GLS programme at $750,000 to $1 million, based on four full-time equivalent positions of director; knowledge and website manager; professional development and programme manager; and administrative/executive assistant. This figure assumes that the GLS resource, while an independent unit, will be hosted in a government department and include salaries, a contribution to corporate overheads, assets and depreciation. The Crown Law Office is the most logical location for the GLS unit, but Crown Law does not currently have any ongoing funding for this purpose.

10.19 At our request, efficiency savings from the two work areas have been estimated by the present Director at close to $4 million, as set out in more detail at Appendix 5. Moreover, the enhancement of legal capability and the delivery of legal services that the GLS is designed to achieve should reduce the government's legal risk (particularly in litigation) with potentially significant long term cost reductions.

10.20 We recommend that a decision on the future funding of GLS be taken as a matter of priority (in the next Budget round), in order to give certainty to this programme, which will greatly enhance the value obtained by the government from its overall spend on legal services.

Governance of GLS

10.21 The Governance Board administering the GLS project is currently chaired by the Solicitor-General. While Crown Law board representation is important, we consider there to be benefits in the Solicitor-General not being the chair. We recommend that the Attorney-General appoint the chair of the Board in consultation with stakeholders, including the Solicitor-General.

10.22 First, there can be little doubt that for the GLS to succeed, the Governance Board, particularly its chair, will need to provide strong leadership, which is likely to be time consuming. The Solicitor-General already has many roles and we consider it would not be an effective use of time to take on yet another. Moreover, the skills required for the chair of a governance board are not necessarily the skills of a legal advisor and advocate.

10.23 Secondly, given the slow start of the GLS, in part due to a perceived "Crown Law takeover", an independent chair would avoid the risk of perpetuating such concerns. Better "buy-in" may be achieved as a result. Thirdly, an independent chair could offer alternative insights into the delivery of government legal services, as confirmed by a number of interviewees.

10.24 Even outside the role of chair, the Solicitor-General would still play an important part by providing encouragement of, and support for, the GLS from the very top as the Junior Law Officer of the Crown. Indeed, it would be important also to have similar Attorney-General support as the Senior Law Officer of the Crown.

10.25 We recommend that the Board report to the Solicitor-General, say, three times a year, so that the Junior Law Officer is kept fully informed of GLS development and can provide professional support accordingly. Moreover, such a role for the Solicitor-General would reinforce the important point that the Law Officers are at the apex of the government's legal services and all public service lawyers are ultimately accountable to the Attorney-General.

10.26 We note interesting parallels between the development of the GLS in New Zealand and similar initiatives in Australia (where Terms of Reference have been developed) and the UK. As our GLS becomes more permanent, we recommend the development of similar Terms of Reference to give transparency and guidance to its work. Such Terms of Reference could include the desired mix of skills and representation for the Board.

Recommendations — Government Legal Services

10.27 We recommend:

- No establishment of a centrally employed government law firm comprising all public service lawyers.

- Establishment of a standalone Government Legal Services (GLS) unit within, but independent of, the Crown Law Office.

- Urgent consideration be given to centralised funding of approximately $750,000-$1 million for the GLS for 2012/13 and beyond (since the Crown Law Office is not funded for this purpose).

- An agenda for the GLS work programme include:
  (i) government lawyer induction programmes;
  (ii) sharing of legal precedents and resources;
  (iii) establishment of an intranet as an online platform for resource sharing and collaboration;
  (iv) recruitment and the development of standard core competencies for government lawyers; and
  (v) a coordinated approach to training with an immediate emphasis on the requisite training for departmental prosecutors.

- Any impediments within the public service and legal professional frameworks to departments contracting in, or sharing, resources should be addressed urgently.

- Appointment by the Attorney-General of a Governance Board chair, which should not be the Solicitor-General, in consultation with stakeholders, including the Solicitor-General.

- The GLS Board report to the Solicitor-General three times a year so that the Junior Law Officer is kept fully informed and can provide professional support.

- The development of terms of reference to give transparency and guidance to the GLS work.

11. OTHER FUNCTIONS

11.1 In this section we consider the various other functions which fall to the Solicitor-General/Crown Law Office and whether or not any changes are required.

New Zealand Bill of Rights Act (BORA): vetting of proposed legislation

The issue

11.2 The issue arises as to whether Crown Law's BORA functions should be undertaken elsewhere to reduce demand on the office without compromising quality or efficiency. We recommend no change, although in the wider context, consideration should be given to specific roles within the Parliamentary system to cover current gaps in this area.

Background

11.3 Under s 7 of BORA, the Attorney-General must bring to the attention of the House any provision of a Bill that appears inconsistent with any of the BORA rights and freedoms. In the case of Government Bills, this must be done on Introduction. A mandatory gap of at least three sitting days exists between Introduction and First Reading,[52] compared with none in 1990, when BORA was enacted. That gives time, unless urgency is taken on Introduction, for interested members of the public and Members of Parliament to read and digest the Attorney-General's report, published under the authority of Standing Orders. This function is important. One senior barrister noted that while the quality varies, such reports are "important to build a culture of constitutional respect".

11.4 BORA reports have a particular, and important, status. As the current Attorney-General recently noted in a BORA report that he authored:[53]

> Section 7 reports are not designed to be politically convenient or appease the executive. The Attorney-General has a law officer duty to report to Parliament on legislative provisions which may be inconsistent with the New Zealand Bill of Rights Act 1990.

11.5 The Attorney-General is entitled to write his/her own reports[54] and has done so on occasions. Usually, however, BORA reports are prepared in the Ministry of Justice, with the exception of reports on Bills promoted through that Ministry, which are written in the Crown Law Office.

11.6 While, in theory, the Ministry of Justice and the Crown Law Office are to be involved at "the earliest possible stage"[55], in practice, Bills are often fine-tuned up to the point of Introduction with final last-minute checking. Emergency situations, such

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52 Standing Orders of the House of Representatives 2011, SO 281.

53 Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Prisoners' and Victims' Claims (Redirecting Prisoner Compensation) Amendment Bill at [5].

54 The Attorney-General has ultimate authority over BORA reports.

55 Cabinet Office, *Cabinet Manual 2008* at [7.62].

as the Christchurch earthquake or political imperatives such as the Video Camera Surveillance (Temporary Measures) Bill, may mean that a Bill with significant BORA implications is prepared and passed at short notice.

11.7 The Ministry of Justice must consult the Crown Law Office if it intends to report an apparent breach of BORA principles. Also, the Crown Law Human Rights team is sometimes consulted by departments promoting Bills for an indication of BORA implications of a particular policy, a practice which should be encouraged.

Status quo should prevail

11.8 It may seem inefficient for both the Ministry of Justice and the Crown Law Office to analyse Bills for BORA issues, especially since the Human Rights Commission also comments on the same issues in its submissions to Select Committees and may take a different view.[56] However, this is not necessarily so. BORA is a fast developing area of domestic and international law and it can be beneficial for views to be tested (in particular between the Crown Law Office and the Ministry) before reports are finalised. The Ministry is "protected" from disgruntled policy proponents through Crown Law Office checks of proposed negative reports before release.

11.9 We are of the view that, where time allows, two way consultations should be the norm. With its specialist legal expertise and first-hand experience of the courts' approach to BORA issues – especially in the criminal law context – the Crown Law Office offers a valuable litigation strategy perspective. Equally useful is the skill of the Ministry of Justice in negotiating BORA issues in the context of wider government policy, and in reporting to international agencies on New Zealand's compliance record.

11.10 We have considered the efficiency of writing all BORA reports in the Crown Law Office and do not favour this option for the following reasons:

(a) the BORA report writing resource (or part thereof) within the Ministry would have to move to the Crown Law Office, which would simply shift, rather than reduce, costs;

(b) it could mean the potential loss of the Ministry's understanding of wider government policy (including international) considerations, which can be relevant to legal advice given; and

(c) the subsequent reduction in the testing of views would be a setback in this important area of law in which opinion and judgement calls are more prevalent than black letter statutory interpretations.

11.11 Similar arguments apply to the converse proposition that BORA reports be written by the Ministry of Justice (plus the obvious issue of who would report on Ministry of Justice Bills). Crown Law inefficiency is not an issue in this area,[57] suggesting that

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56 The Human Rights Commission makes submissions on Bills even though its Act (Human Rights Act 1993 (s 5(2)(k)) requires it to report to the Prime Minister, not Parliament, on the implications of proposed legislation and policy.

57 The total hours spent on BORA report writing at Crown Law amounts to less than 1.5 FTEs out of a Human Rights/BORA team of about 12 FTEs. Elsewhere, we recommend that this team be moved out of the Criminal Law Group (see paragraph 9.7).

if the task moved, so would the resource and cost: on the other hand, the current situation does contain checks and balances.

11.12 Comments have been made on the inconsistency and varying quality of BORA reports, although we are mindful that this is a fast evolving area of the law, both here and internationally. On balance, we take the view that quality is most likely to improve if the Crown Law Office and the Ministry of Justice collaboratively engage in constructive cross scrutiny, rather than concentration of the function in a single entity. Eventually, the source of a BORA report should be identified solely by its letterhead or signature, rather than by content or style.

Parliamentary scrutiny

11.13 As a further option, BORA analysis could be undertaken by a properly serviced, specialist Select Committee, with the advantage of including analysis of amendments recommended by Select Committees and by Supplementary Order Papers. The disadvantages, however, would be a major shift of resources from the Ministry and probably the Crown Law Office to service such a committee (with potential wastage given the uneven spread of demand). Also, later delivery of BORA reports would affect members of the public wishing to refer to them in submissions (although this could be overcome by retaining pre-Introduction BORA reports).

11.14 It has been suggested that BORA reports should only identify whether there is a prima facie breach (s 7), leaving whether or not it is justifiable (s 5) to be debated separately (in the House, by the public generally or in submissions), which would reduce the work involved in BORA reports.[58] More direct Parliamentary scrutiny of Bills from a BORA perspective has also been suggested, but formal processes were recently rejected.[59] An alternative might be a less hurried Parliamentary scrutiny after legislation is passed, either on an own motion basis by a Select Committee, or in response to public complaint.[60] Further comment from us is inappropriate, since this review is confined to the impact of BORA report obligations on the workload of the Solicitor-General and the Crown Law Office.

A guideline on BORA issues for departments

11.15 There is now a significant jurisprudence in the BORA area. We consider that the Ministry and Crown Law should produce guidelines to assist departments, which could also contain an outline for instructing on BORA issues and a template for the BORA reports of both agencies. Such guidelines would also help achieve greater consistency in reports.

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58 Most recently Sian Elias, Chief Justice of New Zealand "Fundamentals: a constitutional conversation" (Harkness Henry lecture 2011, University of Waikato, 12 September 2011) at 17-18.

59 See the Standing Orders Committee "Review of Standing Orders" [2011] AJHR I.18B at 37, which recommended BORA reports for "substantive" SOPs and urged Select Committees to consider BORA issues in Bills and in amendments they recommend.

60 The obvious precedent is the Regulations Review Committee (Standing Orders of the House of Representatives 2011, SO [314-316]). Clearly, disallowance would not be appropriate but a negative report could be influential.

Other points

11.16 The review was advised of other human rights law matters, outside the Terms of Reference, but which, if addressed, could well result in considerable efficiencies. Of most significance was the duplication of effort and cost caused by appeals from Human Rights Tribunal decisions being heard de novo (rather than on appeal) by the High Court before potentially progressing through the appellate system. We have not considered this further (being outside our Terms of Reference).

Management of the judicial appointments process

11.17 One of the Solicitor-General's many functions is the administration of judicial appointments to the higher courts (High Court, Court of Appeal and Supreme Court).[61] The Solicitor-General is involved in the appointment process in two respects. First, he/she is consulted by the Attorney-General regarding proposed appointments; secondly, his/her staff provide the necessary administrative support for the appointments.

11.18 Opinions on this aspect of the role varied strongly. Some interviewees considered that as the government's chief advocate, the Solicitor-General's management of the appointment of those before whom he/she appears may create a perception of inappropriateness. Perception issues also arise from the fact that in recent times all Solicitors-General, and from time to time some Crown Counsel and Crown Solicitors, are appointed to the higher courts.

11.19 The Judicial Appointments Unit, located in the Ministry of Justice, but responsible to the Attorney-General currently manages District Court judicial appointments, so why should appointments to the higher benches be managed differently? This Unit receives expressions of interest (including nominations) on judicial appointments to the District Court and suitable processes are in place to ensure the highest degree of confidentiality and security.

11.20 Others strongly supported the status quo for several reasons. First, higher court appointments (being courts of review) differ from those of the District Court, making it appropriate for the appointment process (and the relevant files) to be managed by the Solicitor-General. Secondly, some interviewees expressed the view that potential appointees may not be receptive to a Ministry of Justice based appointment process (though it is possible these interviewees do not realise that the Unit is accountable to the Attorney-General). Thirdly, and most importantly, the associated workload is not significant enough to warrant removal of this function from the role, and the process is managed within Crown Law's baseline funding.

11.21 On balance, and given the relatively small number of appointments to the higher courts, we see no particular reason to change the status quo, at least at this time. Accordingly, we recommend that the Solicitor-General remain responsible for administering judicial appointments to these courts. The process accords with the

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61 Other appointments include Queen's/Senior Counsel, lay members of the High Court, additional members of the High Court under the Land Valuation Proceedings Act and the Council of Legal Education.

Law Officer function, that of principal responsibility in government for the relationship of the executive with the judiciary.

11.22 Although there was general consensus that the present process had delivered good outcomes in terms of the high calibre of appointees, many interviewees commented on the lack of formality and transparency to the appointment process. It is our view that a transparent appointment process is fundamental to confidence in the judicial system and protects the integrity of the appointment process. Briefings to the Incoming Minister from the Crown Law Office (2008 and 2011)[62] describe a desirable process, including periodic advertising for expressions of interest (to which we would add nominations, as is done for the highest courts in Australia).

11.23 Transparency and related issues in the appointment process are currently under consideration by the Law Commission in its review of the Judicature Act 1908. Accordingly, we make no further comment.

Additional functions

11.24 We also make the following observations on other Solicitor-General functions.

Vexatious litigants

11.25 Access to the Courts is a fundamental tenet of a free and democratic society, recognised at common law and in the New Zealand Bill of Rights Act 1990.[63] However, under s 88B of the Judicature Act 1908, the Attorney-General can apply to the High Court for orders prohibiting a person who has persistently and without reasonable grounds instituted vexatious legal proceedings, from initiating civil proceedings without the leave of the court. In practice, it is the Solicitor-General who makes the application, after careful and extensive consideration of the circumstances of the case. As has been noted by the Court of Appeal,[64] the handful of applications made over the years reflects an appropriately conservative approach by successive Attorneys-General, given the constitutional importance of the right of access to the courts.

11.26 Few applications are made under s 88B, and there is no significant increase in the number of requests for applications. However, it appears that a similar number of potentially vexatious litigants are involved in much more litigation, such that s 88B applications are time consuming. For example, one recent successful application (which involved the initial assessment, collecting and collating the various proceedings, making the application to the High Court, subsequent appeal to the Court of Appeal and application for leave to appeal to the Supreme Court) took more than 580 hours over five years to complete, swamped by a plethora of paperwork and unmeritorious interlocutory applications advanced by the respondent litigant.[65]

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62 See http://www.crownlaw.govt.nz/

63 New Zealand Bill of Rights Act 1990, s 27.

64 *Brogden* v *Attorney-General* [2001] NZAR 809 at [20].

65 Vexatious litigant issues for 2010/2011 involved costs of $81,836 (469 hours).

11.27 Vexatious litigation need not necessarily involve the Crown as a defendant but most cases do. It is sufficient to note that interested interviewees were unanimous that "something must be done" to rectify the current system, which is expensive in terms of both money and resources. Costs are not confined to Crown Law. We have been told that more than $300,000 of public money has been spent on legal costs outside the Crown dealing with one potential vexatious litigant, without resolution so far.

11.28 Section 88B is currently under consideration by the Law Commission in its review of the Judicature Act 1908. We consider such a review timely, to reduce the substantial burden imposed by vexatious litigation on the Courts and parties involved, including the Solicitor-General/Crown Law Office (and so freeing up time and resources for other functions). We understand that Crown Law will respond fully to the Law Commission's issues paper when published. It is not appropriate for us to comment further, other than to note that plainly, some reform is required. While reform may lead to a short term increase in cost and resources (while new legislation is tested in the courts), longer term savings should follow.

Intervener applications

11.29 The Solicitor-General and the Crown Law Office intervene in a handful of cases each year. Some interviewees questioned the need to intervene, or at least, if intervention was appropriate, whether extensive submissions and/or appearance in person were warranted. Intervention costs are significant.[66] Plainly, it is important for the Solicitor-General/Crown Law Office to intervene in some cases. We simply suggest, in the present fiscal climate, that they do so cost effectively.

Grants of immunity from prosecution, stays of prosecution, and charities supervision

11.30 The Solicitor-General performs these functions under delegation. None is a major commitment,[67] although the matters are significant for the individuals involved, and in the first two cases at least, for the wider society. In the case of charities supervision, and possibly the others, the role of the Attorney-General is established at common law and any negation or variation would have to be by statute.[68] More importantly, any changes would only shift, rather than reduce or eliminate, costs: each role has to be performed somewhere. The Solicitor-General acting as delegate of the Attorney-General is the obvious choice.

Statutory roles

11.31 The Solicitor-General has, by statute, many other specific roles. However, it is questionable whether some statutory provisions serve any current useful purpose. For example, s 14 of the Building Societies Act 1975 requires that the rules of these societies may be referred to the Solicitor-General by the Registrar to ensure compliance. Given the resources available to the Registrar, should this be necessary? Nor is it clear to us why the "Revising Barrister" under the Friendly Societies and

66 For 2010/ 2011 intervener costs were $261,918 (1,234 hours); costs and hours were more significant for the 2009/2010 year: $421,295 (2,231 hours).

67 Immunity from prosecution: 142 hours; stays of prosecution: 32.6 hours; charities: 1150 hours.

68 Charitable Trusts Act 1957, ss 35 and 58 codify the power to examine charities.

Credit Unions Act 1982 must be the Solicitor-General or a Crown Counsel. Some spent statutory provisions could also be repealed.[69]

11.32 Accordingly, we consider a review of these statutory provisions may be timely. In Appendix 6, we list the Acts in which reference is made to the Solicitor-General, to assist in any such review. However, we comment specifically on one issue below.

Revocation of patents

11.33 The New Zealand Law Society Intellectual Property Law Committee has recommended to us the review of the role and function of the Solicitor-General under s 76(2) of the Patents Act 1953 and cl 159 of the Patents Bill (awaiting a second reading). Under both the existing law and the Bill, parties seeking to revoke a patent must give notice of their intention to so do within 21 days of a hearing. The Attorney-General is given the power to intervene in the public interest in any such proceeding. The role of the Solicitor-General is to notify and advise the Attorney-General of the possibility, and advisability, of intervening. We are told that the Attorney-General has rarely, if ever, exercised the power to intervene. Moreover, parties do not in general serve the requisite notice. There is no sanction under either the existing legislation or the Bill if notice is not served.

11.34 The New Zealand Institute of Patent Attorneys Inc has raised the same issue. Moreover, it observed that no other country makes such a requirement or intends to implement it. The Institute further raises the possibility that the expanded scope for challenging patents under the proposed legislation could result in adding unnecessarily to the already demanding role of the Solicitor-General.

11.35 The New Zealand Law Society Committee has recommended an investigation into what, if any, the role of the Solicitor-General should be under the new legislation (particularly given the expanded opportunities for challenge by third parties). The Institute goes one step further in recommending that cl 159 of the Bill be removed from the scope of the Solicitor-General's functions.

11.36 Any continuing justification for this provision is a matter best addressed by the Ministry of Economic Development (the sponsoring Ministry of the Bill) and the Solicitor-General. However, we do observe that the requisite notices are not presently being served and, more importantly, no other country has such a requirement.

The role of the Solicitor-General/Crown Law Office in policy development

11.37 An issue arises as to the extent to which the Solicitor-General and the Crown Law Office should have a policy role. The Prosecution Review considered that both have "an important policy role".[70] Of particular concern was the need for Crown Law to play an active role in prosecution policy, to ensure that the fiscal ramifications of any future prosecution-related reforms are taken into account before implementation and

69 For example the Chateau Companies Act 1977, s 20.

70 Prosecution Review at [446].

that these do not simply shift costs from one Vote to another.[71] All entities within the justice sector, including the Crown Law Office, must be mindful of the impact of policy changes on costs. Moreover, Crown Law has a particular role in informing policy makers of the consequences of operational policies on both the prosecution and civil justice systems.

11.38 However, in our view, the role of Crown Law in prosecution policy should be limited to this function. The formulation of policy is primarily the responsibility of the Ministry of Justice. As expressed by a number of interviewees, such involvement would be inappropriate for the Crown Law Office, when its role is primarily to provide legal advice and appear for the Crown. Necessarily, the Solicitor-General/Crown Law Office must be "detached" from the formulation of policy leading to legislation on which they may be asked to advise.

Recommendations — other functions

11.39 We recommend:

- No material change to the Crown Law Office role in relation to BORA reports.
- Greater two way consultation between the Ministry of Justice and the Crown Law Office in relation to BORA issues.
- Preparation of guidelines to assist departments for instructing on BORA issues and a template for BORA reports prepared by the Crown Law Office and the Ministry of Justice.
- The Solicitor-General remain responsible for management of the process for recommending judicial appointments to the higher courts.
- Greater formality and transparency in the High Court judicial appointment process, a matter already under review by the Law Commission.
- A lessening of the substantial burden imposed by vexatious litigation on the courts and all parties (including the Solicitor-General/Crown Law Office), also under review by the Law Commission.
- Referral to the Ministry of Economic Development of a Patents Act issue regarding the roles of the Solicitor-General in notifying and advising the Attorney-General on the possibility and advisability of intervening.
- A review of the appropriateness of some minor statutory roles of the Solicitor-General with a view to removal.
- The Solicitor-General/Crown Law Office's policy role be a limited role.

71 Ibid at [450].

12. SOLICITOR-GENERAL – FUTURE ROLE; AND CROWN LAW OFFICE – OPERATIONAL CHANGES

12.1 In earlier sections we have recommended that the Solicitor-General remains accountable as Chief Executive of the Crown Law Office; also that the Solicitor-General remains responsible for the conduct of appeals and supervision of public prosecutions. However, we have further recommended that day to day responsibility for the management of the Crown Law Office is delegated to the Deputy Chief Executive/Chief Operating Officer; and that prosecutorial roles are delegated to a virtual prosecutions group within the Crown Law Office headed by the Deputy Solicitor-General (Criminal)/Director of Public Prosecutions.

12.2 Of the Solicitor-General's important dual responsibilities as advisor and advocate, we have recommended that advice should be the primary role. We have also made a number of recommendations relating to the incumbent's other functions and the need for a limited, but nonetheless important, role in the GLS programme.

12.3 Against that background, we set out recommendations in relation to the Solicitor-General's future role – in particular relating to appointment, tenure and issues of performance review – as well as recommending some operational changes to the Crown Law Office model. Some of these operational changes will require a change in culture.

Tenure and appointment of the Solicitor-General

12.4 Issues arise as to the nature and tenure of the appointment of the Solicitor-General in relation to both professional and chief executive responsibilities. The Solicitor-General is a Crown prerogative appointment, holding office during the pleasure of the Governor-General.[72] This is in contrast to most other officeholders who are appointed by statute for fixed terms, with the possibility of reappointment.

12.5 Under s 44(2)(a) of the State Sector Act 1988, the Solicitor-General is also the Chief Executive of the Crown Law Office as recorded in a five year contract with the State Services Commissioner. However, along with other officeholders such as the Police Commissioner, the Solicitor-General is excluded from provisions in the Act relating to appointment, reappointment, conditions of employment (including a fixed term), removal from office and review of performance .[73]

12.6 There is a need to reconcile the present inconsistency whereby part of the Solicitor-General role is at pleasure, and part for a fixed five year term. However, views have varied – quite strongly among interviewees – as to whether the combined role is appropriately one at pleasure or for a fixed statutory term. It is also acknowledged that the discrepancy does not appear to have given rise to any difficulties in practice, it being widely accepted that the holder of the office of Solicitor-General enjoys independence. Justice McGrath, during his time in the office, felt no need for a statutory basis for the position suggesting that "legislation is rather an overrated

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72 At pleasure means no fixed term.

73 State Sector Act 1988, s 44(1)(a).

mechanism for securing independence... Far more important is the public standing of the office and the qualities of those who hold it."[74]

12.7 Internationally, the Solicitor-General is either appointed at pleasure or for a statutory fixed term (see section 5 and Appendix 4). In New Zealand it is clear that the current trend is towards statutory appointments on a fixed term basis (eg the current Legislation Bill before the House changing the position in relation to the Chief Parliamentary Counsel).

12.8 We have carefully considered the options. The constitutional position of the Solicitor-General and the need to act scrupulously independently in carrying out the Junior Law Officer role provide the context in which the options should be considered. In our view, those options are to:

(a) maintain the status quo: we do not support this option since it leaves the inconsistency between the roles unresolved;

(b) clarify that the Solicitor-General remains as a perogative appointment without a fixed term or statutory basis: although no issue has arisen in practice to date, it is our view that this does not reflect the current trend nor provide sufficient protection to the role; or

(c) codify the Solicitor-General's appointment in statute either at pleasure or for a fixed term.

12.9 We are inclined to the view that the Solicitor-General be appointed pursuant to statute, recognising the importance of the role and the need to protect the office from inappropriate political influence (even if unlikely). Comparison can be drawn with the Auditor-General (appointed for a term but can only be removed by an address from the House of Representatives),[75] the Chief Parliamentary Counsel (about to be appointed for a fixed term) and the Police Commissioner (appointed at pleasure but for a term not exceeding five years).

12.10 The more critical issue is whether the statute provides that the Solicitor-General is appointed at pleasure or for a fixed term. We have considered the Legislation Bill currently before the House in relation to the Chief Parliamentary Counsel,[76] which changes that position from one expressly stated to be "during the pleasure of the Governor-General" to a fixed term. We consider similar provisions could apply to the Solicitor-General, as follows:

(a) appointed by the Governor-General on the recommendation of the Attorney-General;

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74 J McGrath QC above fn 6, at 214.

75 The term is seven years with no reappointment.

76 Although the Chief Parliamentary Counsel is not, like the Solicitor-General, a public service chief executive, there is a parallel nonetheless between the roles.

(b) holds office for a period which may not exceed five years,[77] as specified in the instrument by which the Solicitor-General is appointed;

(c) eligible for reappointment;

(d) may resign by written notice to the Attorney-General;

(e) may at any time be removed or suspended from office by the Governor-General for inability to perform the functions of the office, bankruptcy, neglect of duty, or misconduct proved to the satisfaction of the Governor-General; and

(f) remuneration and allowances to be determined by the Remuneration Authority but terms and conditions of appointment to be determined by the Attorney-General.[78]

12.11 In line with the Select Committee recommendations on the Legislation Bill, we do not consider it necessary to provide for the State Services Commissioner to be responsible for managing the appointment of the Solicitor-General. This provides greater flexibility in the process. It does not preclude the government from seeking assistance from the State Services Commissioner if it so desired or employing another process entirely.

12.12 In our view, a separate statute is not necessary and the Crown Law Office does not require one (as noted in the Legislation Advisory Committee guidelines, departmental statutes should be avoided). Rather, given the important constitutional significance of the role, we recommend that the appointment provisions be included within the Constitution Act, which already makes reference to the Solicitor-General in relation to his/her ability to perform any function or duty imposed, or to exercise any power conferred, on the Attorney-General.

12.13 Clear consensus among interviewees confirmed that the chief executive role of the Solicitor-General should be subject to performance review by the State Services Commissioner, as are other state services chief executives. We do not consider it appropriate, however, for the Solicitor-General's independent legal functions to be similarly reviewed. The position should be in keeping with that of the Commissioner of Police[79] and the Chief of Defence Forces,[80] whose chief executive functions only are subject to performance review.

12.14 In particular, measuring performance in terms of success in the court room is not appropriate. As noted by the US Supreme Court, the role of the Law Officer is not that of an ordinary party to a controversy, but one of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. The interest in a criminal prosecution is not that it must win a case but that justice is done.[81] This

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77 An alternative is for up to seven years as proposed for Chief Parliamentary Counsel (on the ground that it necessarily exceeds two Parliamentary terms). However, we consider five years to be preferable and consistent with other public service chief executive appointments.

78 Again, in line with the proposals for the Chief Parliamentary Counsel, see the Legislation Bill 2010, cl 63 and 66.

79 Policing Act 2008, s 100.

80 Defence Amendment Bill 2011, cl 25B.

81 *Berger* v *United States*, 295 US78, at 88 (1935).

does not, however, preclude the Attorney-General and Solicitor-General from discussing performance related issues, given the significance of the role.

Crown Law core work – should there be any change?

12.15 A key issue is the nature of the work undertaken by Crown Law, more particularly whether certain "categories" of (in the New Zealand context) or "core" (as referred to in some overseas contexts: see Appendix 4) work should be directed to the Crown Law Office. Such is the importance of this aspect, we address it separately in section 13.

Charging for services

12.16 Crown Law charges for its services for some Category 1 and 2 work. In accordance with wider government policy on charging, rates are closer to estimated cost recovery than those charged by private sector firms. Such charges generate approximately $23 million annually, a valuable incentive to seek more work at a time when appropriations are more difficult to obtain. Several departments told us that should the Crown Law Office be charging commercial rates, it would be uncompetitive. The following points were raised.

12.17 First, some departments consider they pay for more authors per file and round table discussions than if instructing private firms. Crown Law is perceived, at times, to provide a "counsel of perfection", or excessive analysis, when all the department may want is practical and cost effective legal advice. We cannot verify the accuracy (or otherwise) of the perception, but there is no doubt from our interviews that such a perception exists.

12.18 Secondly, peer review is perceived as being universal (regardless of the complexity of topic and the seniority of first author). While perhaps laudable, this can cause delays and would not be standard practice in the private sector. The "value add" of a universal practice, should it exist, is questionable: the Crown Law Office tells us it is not universal practice, in which case the office needs to dispel the perception. (As to peer review more generally, see paragraphs 12.24-12.25).

12.19 Thirdly, departments pay for the whole of government perspective, which in some cases is of little value to them, while adding to costs and delay. That could be regarded as the price of being a government department. But in some situations eg where a department considers a matter should not be appealed but Crown Law believes it should because of a whole of government perspective, it may be argued that a different cost approach should apply.

12.20 Understandably, departments resent having to meet the cost, especially if the appeal fails. We did consider whether cases litigated solely due to a whole of government perspective (even against the specific wishes of the department) might be better funded from a specific appropriation for this purpose. But perverse incentives could arise, with departments choosing not to pursue appeals so that associated costs could be met by such a fund. In a commercial context a subsidiary may be told to contest, or waive, a point in the interests of the wider corporate group. We do not

recommend a change in current practice ie departments should continue to bear the costs of appeals, even where whole of government considerations are predominant.

Client management

12.21 As is often the case with private sector service providers, complaints about price (including those noted above) are more often about client relations or file management. Our review has confirmed the PIF Review recommendation that the Crown Law Office strengthen its CRM (client relationship management) programme to enhance responsiveness to client needs. In that context, we urge the Crown Law Office to put more effort into:

(a) ***Communication with chief legal advisors and other key departmental figures in relation to the delivery of Crown legal services:*** Many interviewees emphasised that while Crown Law provides excellent technical service, it falls short in the area of timely and regular communication. Invitations to visit departmental offices made to those below the Solicitor-General/Deputy Solicitor-General level should be taken up (some interviewees noted these are often declined). Secondments to, and from, client departments should be pursued.

(b) ***Clear and regular communication to the relevant department on progress of matters***: This is especially so where a whole of government perspective is identified; as one department put it, "We are not blind to the whole of government approach, but we want to know and understand what this means for our particular matter." Communication is also important in relation to the timing, and not just the cost, of advice – departments need to know likely demands on their resources, such as providing evidence and witnesses.

(c) ***Ensuring that price and timetable estimates are provided:*** Departments should routinely request price estimates (including updated estimates) and advise Crown Law of any time constraints. But even if not sought at the time of referral, cost and time estimates should be given nonetheless as a matter of routine practice. Any basic legal file management system can handle this.

(d) ***Timely completion of litigation plans:*** These plans should be completed on time in all cases and shared with the department, which will help to lower costs, improve management, eliminate misunderstandings and achieve better team work between the Crown Law Office and departments.[82] Agreement on plans should also help facilitate a collaborative approach to the litigation between lawyer and client. The same plan concept could apply to extensive or long-running advice outside litigation.

12.22 If Crown Law is targeting a reputation as the provider of choice, even for those with no choice, it must aspire to be a "model service provider", as well as representing the Crown to the standard of a "model litigant".

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82 Crown Law Office *Annual Report for the year ending 30 June 2011* notes at 36 that only 31% of litigation plans were completed on time.

12.23 We emphasise that while many departments report very good relationships with the Crown Law Office, others do not. Crown Law is entitled to take the view that in some cases we were told of historical failings, rather than current practices, and generally interviewees observed marked improvements in client management in more recent times. Nevertheless, comments made are consistent with those in the PIF Review, and there is a case for Crown Law devoting more resources to ensuring that the best practice evident in some client relationships becomes the actual practice for all. The permanent appointment of a Deputy Chief Executive/Chief Operating Officer should assist here, particularly with the PIF Review recommendation that the CRM programme be enhanced.[83]

Peer review

12.24 As already noted, a formal peer review process is a feature of Crown Law Office practice although, if Crown Law data is accurate, these reviews are only done in some cases and the additional time and costs are not significant. The Crown Law Office considers this formal peer review process to be a key performance measure. It is also fair to record that most departments have in-house counsel, and if they cannot resolve an issue so difficult that it must be referred to the Crown Law Office, then peer review may be justified. Several interviewees, however, commented on the rather "old fashioned" approach of the Crown Law Office and the formal peer review process may be part of that perception.

12.25 Undoubtedly, advice drafted by an Assistant or Associate Crown Counsel should be reviewed by a senior member of the office. Such testing of views at the senior level is highly valuable. Also, a form of peer review can still be used as a key performance measure. The question is more whether this is better done informally, as in private law firms, where advice is finalised and signed by the supervising partner. One PIF Review recommendation calls for the Crown Law Office to refresh its vision, purpose and strategic direction and Crown Law informs us that this is under way. We suggest a reconsideration of the present peer review policy and practice in that process. There is a current peer review policy and once reviewed it should be published.

Second order organisational design

12.26 As already observed, the Crown Law Office has considerably expanded in recent times, now employing over 100 legal counsel. We consider it timely for the Solicitor-General and Deputy Chief Executive/Chief Operating Officer to undertake a second order organisational redesign of the Crown Law Office, encompassing the recommendations of all three reviews. Greater use of external briefing, and possibly less Category 2 work (see paragraph 13.24), could also mean a longer term reduction in the size of the office. Other modern practices such as staff engagement surveys should be considered, as recommended by the PIF Review.[84]

12.27 Although we recommend an internal organisational review in due course, there seems little need to review or change human resources policies, such has been the

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83 PIF Review at [47].

84 Ibid at [40].

success of the current Solicitor-General's policy in making the Crown Law Office a very desirable place for all staff to work.[85] As a result, the Solicitor-General and the Crown Law Office can now helpfully focus more on external, rather than internal, considerations, particularly around client management.

Compilation of data – identifying Crown legal risk

12.28 The Crown Law Office does not currently compile consolidated data relating to its litigation ie wins/losses; settlements; damages awards (if any); costs (both to the department for the conduct of litigation as well as to the opposing party where awarded). Plainly such data would be helpful in identifying and managing Crown legal risk – what are the trends; are some cases regularly being lost in which case settlements may be desirable; or do regular losses (or settlements) identify problems with government policy, departmental processes or the quality of in-house legal advice?

12.29 One department referred us to its own compilation of data – with some assistance from the Crown Law Office – listing all litigation files, dates of filing and hearings; outcomes; appeals (if any); financial costs, including damages; costs of litigation and costs awards. Even a cursory look at that data immediately identifies noticeable trends which can assist with the management of legal risk.

12.30 We recommend that the Solicitor-General/Crown Law Office similarly compile and record all relevant litigation file data, preferably backdated to January 2011 to capture immediate data for analytical purposes. It would seem reasonably simple to prepare a template for such data to be completed by Crown Law staff at the end of each hearing. We suggest also recording whether any settlement offer was made (so outcomes can be assessed in that context) as well as actual settlements reached.

12.31 Analysis of such data should enable the Solicitor-General/Crown Law Office to inform departments how best to manage Crown legal risk. Our recommendation is similar to those of the PIF and Prosecution Reviews in relation to the urgent need to collect and analyse prosecution data.

Settlements

12.32 A few interviewees commented on a perceived unwillingness, or inability, by the Crown Law Office to be more open to settlement of disputes involving the Crown, including the use of alternative dispute resolution processes. There is an insistence, it is said, on taking matters to a hearing even if it is reasonably obvious that this is likely to result in a loss with cost consequences for the Crown. Crown Law disputes this, stating that settlements are considered where appropriate. There will be cases where a Minister or department may insist on the matter being litigated, or times when, for particular reasons – eg the need to test a particular point of principle or establish a precedent – the matter needs to be determined by the courts, even if a loss to the Crown is predictable.

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85 Such steps arose out of Dr Collins QC Solicitor-General, paper "Developing Crown Law into the Government Centre of Excellence for the Delivery of Legal Services", November 2006.

12.33 We cannot confirm any unjustified reluctance on the part of the Crown Law Office to settle cases. Internal guidelines suggest the office is cognisant of the need to settle where appropriate. We acknowledge also that in some cases it will be a Minister, or department, which may have strategic reasons not to settle, even if it is plain the Crown will not succeed in the litigation. An external peer review process could assist in assessing whether to litigate or settle. That may give an alternative perspective to the Crown Law view on the prospects and merits or otherwise of settlement and ensure all options are adequately addressed in the Crown's best interests.

12.34 Another option (suggested by a former Crown Law Counsel familiar with the relevant context) is the possible publication of a settlement guideline to give transparency to the office's approaches to settlement. Although such a guideline can only identify in broad terms relevant considerations, it should assist in ensuring settlement is considered where appropriate and in dispelling any perceived unwillingness by Crown Law to settle where prospects of success are weak. Such a guideline may even assist Ministers or departments in explaining to the public why a matter may have been settled for good reasons eg to avoid a loss and significant (direct and indirect) costs; or why litigation is pursued even if a loss is anticipated.

An Auckland office?

12.35 A number of interviewees offered their perceptions of a rather Wellington centric Crown Law Office. Several raised the possibility of a modest Auckland office. A former Auckland Crown Law Office was closed for fiscal reasons and a recent proposal considered by the Management Board to reopen an office was abandoned on the same grounds. We recommend that the option of an Auckland office be subject to ongoing review.

12.36 An office in Auckland would help counteract the Wellington centric perception and, importantly, reinforce the Crown Law Office as the government's legal services provider throughout the country. The inclusion of Auckland-based counsel should broaden the pool of potential Crown lawyers and, with increasing work in Auckland – the Court of Appeal criminal appeals are now held there – help reduce some costs.[86] Crown Law currently has one Crown Counsel permanently based in Auckland who conducts most of the criminal appeals heard in that city.

Recommendations — Solicitor-General – Future Role; and Crown Law Office – Operational Changes

12.37 We recommend:

- The Solicitor-General's appointment be pursuant to statute with the appointment provisions contained in the Constitution Act 1986.

[86] Within the Crown Law Office there is a concern also that too many minor matters have to be handled by the local Crown Solicitor because the office is not "sufficiently well connected to the Auckland legal scene". An Auckland base would assist in such minor work being handled in-house.

- The Solicitor-General be appointed for a fixed term and according to the following provisions:
  (i) appointed by the Governor-General on the recommendation of the Attorney-General;
  (ii) holds office for a period which may not exceed five years, as specified in the instrument by which the Solicitor-General is appointed;
  (iii) eligible for reappointment;
  (iv) may resign by written notice to the Attorney-General;
  (v) may at any time be removed or suspended from office by the Governor-General for inability to perform the functions of the office, bankruptcy, neglect of duty, or misconduct proved to the satisfaction of the Governor-General; and
  (vi) remuneration and allowances to be determined by the Remuneration Authority but terms and conditions of appointment to be determined by the Attorney-General.

- Only the Chief Executive functions of the Solicitor-General to be subject to performance review by the State Services Commissioner.

- No change to the current practice of departments bearing the cost of relevant advice and proceedings.

- The Crown Law Office is urged to:
  (i) enhance its communication with chief legal advisors and other key departmental figures in relation to the delivery of Crown legal services;
  (ii) provide clear and regular communication to the relevant department on progress of matters;
  (iii) ensure that price and timetable estimates are provided; and
  (iv) ensure timely completion of litigation plans.

- A reconsideration of the peer review process be undertaken when Crown Law is refreshing its vision, purpose and strategic direction, as recommended in the PIF Review and publication of any such policy in due course.

- A second order organisational redesign of the Crown Law Office encompassing the recommendations of the three recent reviews.

- The compilation, and recording, of all relevant litigation file data by the Crown Law Office.

- The drafting and external publication of a settlement guideline to give transparency to Crown Law's approach to settlements.

- In the longer term, reconsideration by the Solicitor-General of the merits of a modest Auckland Crown Law Office.

13. CABINET DIRECTIONS FOR THE CONDUCT OF CROWN LEGAL BUSINESS 1993

The issue

13.1 The issue arises as to whether the current Category 1 and 2 guidelines as outlined in the *Cabinet Directions for the Conduct of Crown Legal Business 1993* (the Directions)[87] are still appropriate, specifically:

(a) whether Category 1 work should continue to be reserved for the Crown Law Office;

(b) if so, should all five current work categories remain so reserved;

(c) precisely to whom the Directions should apply; and

(d) where should Crown Law Office priorities lie in undertaking Category 2 work?

Background

13.2 The Crown Law Office provides legal advice and representation to the Crown in accordance with the Directions as follows:

(a) Category 1 legal services must be referred to the Solicitor-General, who may allocate the work to Crown Law or instruct private counsel; and

(b) Category 2 legal work may be allocated by departments and government agencies to Crown Law, Crown Solicitors or lawyers in private practice, but the Solicitor-General retains the right to direct the manner in which such work is to be carried out.

13.3 Category 1 work includes:

(a) representation or advice in relation to actual or imminent litigation to which the government or agency is or may become a party;

(b) legal services involving the lawfulness of the exercise of government powers;

(c) constitutional questions including Treaty of Waitangi issues;

(d) issues relating to the enforcement of criminal law; and

(e) legal issues relating to the protection of the revenue.

13.4 Category 1 work is reserved on the basis of "Crown Law's expertise, its independence from other Departments, its freedom from conflicts of interest, the need for coordination and consistency of advice in these areas, and the Attorney-

87 Cabinet Office, *Cabinet Manual 2008*, at Appendix C, "Cabinet Directions for the Conduct of Crown Legal Business 1993".

General's constitutional responsibility for ensuring government is conducted in accordance with the law."[88]

13.5 Category 2 legal services comprise all other departmental work, including most commercial transactions and employment work, and all work (including Category 1) for agencies not subject to ministerial direction or control. As a matter of practice, employment matters involving litigation are treated as Category 2 work with employment advice and representation obtained from the Crown Law Office or elsewhere at the discretion of the department or agency.

13.6 The Directions reflect the constitutional roles of the Attorney-General and Solicitor-General as the principal legal advisors and advocates of the Crown and the role of the Crown Law Office in supporting the Law Officers. The Directions are included in the Cabinet Manual and are critical to managing legal risk across government, although their contributions are not always appreciated, as explained by a former Solicitor-General, Justice McGrath:[89]

> Part of the Solicitor-General's responsibility is to resolve conflicting views of the law within government. Ministers like contestable policy advice but definitive legal advice. In this area the Solicitor-General's role is that of a proxy for the Courts. Ministers may seek the Solicitor-General's view (or a Crown Law Office view) if a decision is likely to be tested in the Courts. If a Court later concludes that the Solicitor-General's opinion was wrong, it is the Solicitor-General rather than the government who will be most open to criticism. The advantages of the system for decision-makers wishing to act according to the law are obvious, although it is not unknown for the disgruntled to try to by-pass it.

13.7 Since the enactment of the Directions, there have been major changes in the way government operates, such as the increase in, and formal categorisation of, Crown entities, with direction of such entities subject to a process outlined in the Crown Entities Act 2004. There has also been significant change within the legal profession, with private sector boutique firms specialising in public law and large law firms all employing public law specialists. Restricting all Category 1 work to the Crown Law Office may mean a loss to the Crown of specialist expertise and experience outside the state sector. Significant changes to criminal procedure are also imminent.

Convention for Category 1 work

13.8 While not expressed as such in the Directions, the principal convention that a Crown Law Office opinion must be followed is widely accepted. Any department not wishing to abide by that convention must discuss the matter with the Solicitor-General. Such consistency of Crown Law Office input is important in the management of Crown legal risk, especially in matters of critical advice and litigation strategy, in which the Junior Law Officer (and occasionally the Senior Law Officer) must have the final say on behalf of the Crown. The Crown Law Office also

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88 Memorandum from the Attorney-General to the Cabinet State Sector Committee, Revision of Cabinet Rules for the Conduct of Crown Legal Business, 1993 at [7].

89 J McGrath QC above fn 6, at 206.

plays a key role in resolving any difference of legal opinion between departments, and even Ministers.

13.9 A strict rule can, however, drive perverse behaviour. The fact that, once obtained, Crown Law advice must be followed, may lead to a reluctance to seek such advice, where departments are uncertain of the outcome. In-house or private sector alternatives might be sought instead. A number of interviewees also expressed the view that legal risk is but one aspect of total risk management and, while legal advice will influence decision making, it may not always be decisive. That is true for all entities, including the Crown. But there will be certain matters where Ministers and departments, as part of the Crown, must act in accordance with legal advice reflecting the special position of the Crown in our constitutional framework.

13.10 We consider that the solution lies in a more precise definition of the scope and application of the Directions, to take account of governmental changes since their implementation. In this context, a detailed analysis of the Directions has been undertaken and a suggested revision is attached as Appendix 7. This is for discussion purposes only and plainly consultation with various stakeholders is required. Revised Directions will be critical to the ongoing work of Crown Law and its influence on the law and government generally. Such Directions will clarify when Crown Law advice must be followed, and when it can be weighed against other risk and Crown interest factors.

Should Category 1 work generally continue to be directed to the Crown Law Office?

13.11 The need for Category 1 work to remain with the Crown Law Office is generally accepted, with high praise noted for the quality of Crown Law Office advice to, and representation of, departments. We consider minority comments suggesting Crown Law Office concentration on Category 1 to the complete exclusion of Category 2, as going too far. The occasional interviewee expressed the more radical view that the Crown Law Office should not have a "monopoly", or even a priority, for Category 1 work.

13.12 We agree it is important for the government's core legal business (ie Category 1 work) to remain with the Crown Law Office. This is consistent with a continuing governmental commitment to maintain the traditional responsibility of the Law Officers for management of the government's core legal business.[90] Accordingly, we do not see any need to revisit the Category 1 and 2 definitions of the Directions, subject to some refinements. It is also consistent with overseas models. The Crown Law Office should focus primarily on maintaining and enhancing the high quality of its constitutionally important Category 1 work.

13.13 We draw attention to two particular refinements. First, as noted in section 8, we recommend that the Solicitor-General engage external counsel more often, particularly when that is the client's preference. Such a decision would require a collaborative approach.

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90 J McGrath QC above fn 6, at 213.

13.14 The second is the notion (emphasised in interviews and in relevant literature) that the Crown Law Office "controls" core Category 1 work.[91] While the reasons set out in the 1993 paper for a monopoly on this work remain valid (see paragraph 13.4 above), we consider all that is required of the Solicitor-General/Crown Law Office in terms of description is appropriate "oversight" and "management". It was clear from our interviews that the word "control" carries negative implications for departments (and perhaps also for Ministers), in suggesting they have little input in the conduct of their legal business. We also consider that the alternative terms "oversight" and "management" are more consistent with the policy of a more collaborative approach between departments.

Categories 1(a) and (e)

13.15 Although the need for Category 1 work to be directed to the Crown Law Office was generally recognised, specific issues were raised as to whether Categories 1(a) – advice and representation in relation to actual or imminent litigation – and 1(e) – protection of the revenue – should remain subject to the Directions.

Actual or imminent litigation

13.16 The main concern is that many departments will have invested time and money with other legal advisors, already familiar with a particular matter, and be reluctant to hand the file over to the Crown Law Office. On the other hand, a department may not fully appreciate the implications of actual or imminent litigation. Early resolution of a particular matter may not involve whole of government issues, but once litigation is actual or imminent, precedent issues may well arise in the public domain. The Solicitor-General and the Crown Law Office have noted in some cases a departmental preference for external advisors, suggesting they are more malleable to departmental objectives. However, this can be addressed in other ways (see section 8).

13.17 Plainly, difficulties will arise when a department's interests do not adequately take into account, or even conflict with, whole of government considerations. In our view, departments must continue to refer actual or imminent litigation – at least initially – to the Crown Law Office. However, as already discussed in section 8, more flexibility is required so as to allow external lawyers to be briefed where appropriate to mitigate the concerns noted above, as well as a more general concern as to the width of this particular category of work.[92]

Protection of the revenue

13.18 Legal issues relating to the protection of the revenue have led to vigorous discussions between the Solicitor-General/Crown Law Office and the Inland Revenue Department over the handling of tax matters, particularly tax litigation. More recently, a written protocol has enabled the parties to resolve differences in revenue related matters.

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91 Strictly speaking, it is the Law Officers – not the Crown Law Office – who "control" government legal business.

92 A concern expressed by Treasury in 1993: see above fn 88, at [32].

13.19 Some legal and accounting practitioners take the view that the Crown Law Office has no role in the protection of the revenue, whether in relation to actual or imminent litigation or tax advice. However, we reaffirm the importance of referring actual or imminent litigation (including tax) to the Crown Law Office as outlined above. Also, while allowing for the substantial number of Category 1(e) advice rulings handled in-house by the Inland Revenue Department, outside advice is sometimes required, in which case, in our view, it is appropriate that it be initially sought from the Solicitor-General/Crown Law Office.

13.20 The protocol deals with that issue in detail and we see no need to change it. Importantly, the Commissioner of Inland Revenue has acknowledged, in the constitutional context, the need for Category 1(e) work to remain within the Directions. This is provided, however, that flexibility is retained to allow briefings of external advisors where appropriate.

Should there be any additional Category 1 work?

13.21 We do not see any need for additions to Category 1, bearing in mind that Category 1(a) (actual or imminent litigation) is sufficiently wide to catch litigation relating to developing areas of the law eg public/private partnerships and procurement. Although with some of these developing areas external legal advice and/or representation may be appropriate especially where involving complex corporate legal issues. The present Category 1 is also broadly consistent with categories of tied work overseas (see Appendix 4). This is apart from the fact that litigation is not "core" work in some of these models – but that reflects more the fact that neither the UK nor Australian professions are fused, as with the New Zealand profession.

Category 2 Work

13.22 At present, Category 2 is defined as all requirements for legal services not included in Category 1. As is evident from the discussion above, Category 2 work has two elements ie:

(a) non-Category 1 matters for Ministers and departments; and

(b) all work for non-department entities.

How much Category 2 work should Crown Law handle?

13.23 The PIF Review observed the lack of strategy regarding Category 2 work, although this is now under review by the Solicitor-General/Crown Law Office.[93] No data as to the precise amount of Category 2 work done by the Crown Law Office is currently available. We consider that the Crown Law Office should be compiling this data.

13.24 We agree with the majority opinion expressed in interviews that Crown Law should "stick to its knitting". As already noted, we would not prohibit the Crown Law Office from undertaking Category 2 work but recommend that it limit Category 2 work only to those areas closely interrelated with Category 1 work. Moreover, the

93 PIF review at [23].

Crown Law Office should not, in our view, actively be seeking Category 2 work and any undertaken should largely be confined to departmental work, due to the risk of conflicts of interest. Undertaking Category 2 work for Crown entities could compromise the ability to act for departments on the same issue. For example, if a university or polytechnic is contemplating litigation with the Ministry of Education, and the Crown Law Office accepted its instructions, that would compromise Crown Law's duty to accept the Ministry's instructions. That is not compatible with the management of Crown legal risk.

Waiver of privilege and related issues

13.25 Paragraph 14 of the Directions provides that a Crown Law Office opinion is the property of the Crown and in the charge of the person to whom it is addressed. It further provides that, subject to informing the Attorney-General, the Solicitor-General and Crown Law will not disclose the contents of any opinion to any third party (thereby waiving privilege) without the addressee's specific authority.

13.26 Paragraph 4.67 in the Cabinet Manual specifies that where a Minister or department considers it necessary to release legal advice or refer to the content of that advice, the matter must first be referred to the Crown Law Office. The Crown Law Office must, in turn, refer the matter to the Attorney-General for approval.

13.27 Regardless of any inconsistency between the two provisions, greater clarity is required on these issues. Moreover, information relating to the waiver of privilege (including the risks of inadvertent waiver) in legal advice, including its relevance to both Category 1 and Category 2 opinions, should be detailed in the one place. That policy should be determined by the Cabinet Office and Crown Law, with input from the Attorney-General. We consider that Ministers and departments would be assisted by clear and authoritative guidance on issues of privilege and the interface with the Official Information Act.

13.28 Our view is that the Cabinet Manual is the more appropriate place to provide such guidance to departments, especially for chief executives and chief legal advisors, on privilege and related issues. For these reasons we have not included within the revised Directions the existing paragraph 14 of the 1993 Directions. We suggest that those revising the Cabinet Manual provisions might also consult with the Ombudsmen, in view of Official Information Act 1982 implications on privilege in legal advice and the process specified by that legislation for information requests.

Application of the Cabinet Directions

13.29 Many interviewees referred to the lack of clarity in the application of the Directions. The Directions apply to all Ministers and departments and "any agency of the government subject to Ministerial direction or control". It is relevant, however, to note that these Directions were written prior to the enactment of the Crown Entities Act 2004. Crown entities range from Crown agents to autonomous and independent Crown entities, including Crown Research Institutes and more than 200 Crown entity subsidiaries. All are subject to varying levels of Ministerial direction or control through the Act.

13.30 State-owned enterprises have not been considered subject to "Ministerial direction and control" and are therefore not bound by the Directions, even though their only shareholders are Ministers. We agree with that approach[94] and recommend that Crown entities should similarly not be bound by the Directions. Crown entities differ from government departments and their inclusion could risk a dilution of Crown Law's focus on departmental work, as well as give rise to possible conflict issues. Consequently, we consider Crown entities should continue to remain free to engage their counsel of choice, which can, however, include the Crown Law Office where no conflict arises.

13.31 However, if it were considered that some Crown entities – perhaps Crown agents subject to a greater degree of Ministerial control or direction – should be included, consideration should be given to inclusion for some Category 1 work only eg Categories 1(b) (issues relating to the lawfulness of exercise of government powers) and 1(c) (constitutional and Treaty of Waitangi issues).

13.32 There seems no compelling reason why all actual or imminent litigation involving Crown entities should be referred to Crown Law (Category 1(a)). Indeed, Crown Law representation may be inappropriate if other parties involved include a government department. Where there is no conflict, a Crown entity could still refer the matter to Crown Law, but by choice rather than compulsion, with the advantage of putting competitive pressure on Crown Law to continue to strive for excellence in its core work and so attract more.

13.33 Given the uncertainty arising from the present wording of the Directions (applying to "agencies subject to Ministerial control and direction"), it is recommended that a revised version make it absolutely clear as to precisely to whom they apply. As well as Ministers of the Crown and the 32 departments listed in Schedule 1 of the State Sector Act 1988, the Directions should continue to apply to the New Zealand Defence Force, New Zealand Police and New Zealand Security Intelligence Service. (They would also apply to Crown agencies involved in indictable prosecutions.)[95]

13.34 By definition, these inclusions determine the entities excluded ie state owned enterprises and Crown entities which are not required to, but can, should they so wish, choose to use Crown Law for advice or representation. Where the Crown Law Office is engaged by such entities by choice, our view is that advice should proceed on the basis that it is no more binding than that of any other legal advice to a client. We would hope such advice would be given due regard, but strict observance is not compulsory.

13.35 However, in the case of Ministers and departments, Crown Law Office advice on both Category 1 and Category 2 Matters should be binding, in recognition of the fact that such advice is the authoritative view of the Law Officers. As is the present convention, any Minister or department not wishing to abide by that advice must discuss the matter with one or both Law Officers.

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94 We observe that state owned enterprises take actions against each other when their respective boards consider that appropriate.

95 Although this need not be stated explicitly: see the definition of "prosecutor" in the Crimes Act 1961, s 2(1) and the CPA, ss 10 and 187.

Attorney General to be informed of significant advice/litigation not involving the Crown Law Office

13.36 While state owned enterprises and Crown entities should not be subject to the Directions, nonetheless litigation and key advice may sometimes involve potentially significant whole of government issues or more generally be of considerable governmental interest. We expect that through the general "no surprises" policy, the relevant Ministers will be informed, who, in turn, will inform the Attorney-General, if appropriate.

13.37 However, we recommend a direct reporting obligation for departments to advise the Solicitor-General of any significant matter in which they are involved, where the Crown Law Office is not acting. This will allow the Solicitor-General to decide (in terms of the Cabinet Directions) whether there is special reason to intervene. Such reporting will also ensure that the Solicitor-General, and thereby the Attorney-General, is properly informed of all significant legal matters and that the desired coordination and consistency of advice is achieved.

Other points regarding the Directions

13.38 We should note that the draft revised Directions do not include some existing provisions eg those relating to obligations for chief executives in seeking legal advice (paragraph 6(a) and (d) as these would seem better placed elsewhere eg the Cabinet Manual). Further, if the Directions were to apply to some, or all, Crown entities, the relevant directions process in the Crown Entities Act 2004 would need to be followed.[96]

Recommendations — Cabinet Directions for the Conduct of Crown Legal Business 1993

13.39 We recommend:

- Retention of the Category 1 and 2 classifications of the Cabinet Directions for the Conduct of Crown Legal business 1993, with some change of emphasis.
- Adoption of revised Cabinet Directions to apply to Ministers and departments only (a first draft for discussion purposes is attached in Appendix 7).
- Crown Law should focus primarily on maintaining and enhancing the high quality of its constitutionally important Category 1 work.
- The Crown Law Office should compile data relating to its Category 2 work.
- More frequent consideration by the Solicitor-General of engaging external counsel especially when requested by a department (or Minister).

[96] See the Crown Entities Act 2004, ss 103-115.

- Greater clarity and guidance to be provided in the Cabinet Manual on waiver of privilege and related issues, including interface with the Official Information Act 1982.

- A reporting obligation for departments to advise the Solicitor-General of any significant matter in which they are involved, where the Crown Law Office is not acting.

14. CONCLUSION

14.1 This review, as noted at the outset, has endeavoured to consider pragmatically the issues arising (as reflected in the Terms of Reference) in regard to potential changes to assist one person (the Solicitor-General) to fulfil effectively a multitude of important roles. Significant structural change is not recommended. However, should our recommendations, which fall short of structural separation (eg in relation to the Solicitor-General's chief executive and public prosecutorial roles), not meet desired objectives, more radical reform may be the next step. Nevertheless, with close and collaborative cooperation among the Solicitor-General, Deputy Chief Executive/Chief Operating Officer and Deputy Solicitor-General (Criminal)/Director of Public Prosecutions, we are confident that structural change with its associated risks can be avoided.

Miriam R Dean CNZM QC **David J Cochrane**

24 February 2012

APPENDIX 1

Review of the Role and Functions of the Solicitor-General and Crown Law Office

Terms of Reference

August 2011

Introduction

1 In 1986 and again in 2006 and 2011, the question has been asked whether one person can successfully fill the demanding role of Solicitor-General. The Solicitor-General is principal legal advisor and principal counsel for the Crown, undertakes the independent law officer functions of the Crown, is the supervisor of indictable offences, and is chief executive of a government department, the Crown Law Office.

2 The Attorney-General has requested a comprehensive review of the role and functions of the Solicitor-General and the Crown Law Office.

Purpose

3 The review will consider all aspects of the role and functions of the Solicitor-General and determine how these can be discharged most effectively and efficiently, reflecting the constitutional context, and including the organisational support required for the role and functions.

Scope

4 The review will consider all relevant material, seek advice, and report to the Attorney-General its findings and recommendations on the following matters:

a. What the scope and focus of the Solicitor-General's role ought to be, including whether any existing functions (such as the principal legal advisor and principal counsel roles) should be separated structurally or operationally

b. What changes, if any, should be made to the operating model of the Crown Law Office

c. The role of the Crown Law Office in improving the quality of legal advice and the management of legal risk across government. This includes consideration of the option that legal advisors working in government departments be employed centrally rather than by the chief executive of the relevant department.

d. Changes recommended by this review should take account of the government's expectation of improved services at lower cost.

5 In formulating its views the review will need to consider decisions or results from other reviews and initiatives:

a. Performance Improvement Framework (PIF) Review for Crown Law Office

b. Review of New Zealand's Public Prosecution Services

c. Review of the Crown Solicitors Regulations

d. The Government Legal Services (GLS) work programme

e. Review of the State Sector Act 1988.

Approach and Timing

6. The review will be undertaken by two independent reviewers. While it is intended that the two reviewers will work collaboratively, one reviewer will take the lead role.

7. A reference group of senior officials to support the reviewers will be convened and chaired by the Secretary of Justice.

8. The independent reviewers will provide a report to the Attorney-General by 29 February 2012.

9. The review will be conducted in two phases between October 2011 and February 2012, to allow for consideration of decisions from the Review of New Zealand's Public Prosecution Services.

Research and interview phase	October 2011
Develop a draft report for consultation with Central Agencies and Crown Law Office	By mid February 2012
Final report to Attorney-General	By end February 2012

Roles & Responsibilities

10. The Review will be undertaken by persons with a deep understanding of the constitutional context of the role and functions of the Solicitor-General, and how this is supported by the functions of the Crown Law Office.

11. The reviewers will be supported by a secretariat with officials from the State Services Commission, Treasury, and Crown Law.

APPENDIX 2

KEY RECOMMENDATIONS FROM THE PERFORMANCE IMPROVEMENT FRAMEWORK REVIEW, OCTOBER 2011

The table below summarises key recommendations from the Performance Improvement Framework (PIF) Review by Paula Rebstock and Peter Doolan.

Theme	PIF Performance Rating	Recommendations
Government Priority		
Leading the GLS	Needing Development	• Optimise the programme strategy to deliver tangible benefits in the near term. • Confirm funding for the programme.
Delivery of Core Business		
Supervision and conduct of Crown prosecutions	Effectiveness: Needing Development Efficiency: Weak	• Transitional measures to provide appropriate supervision and financial control of the Crown Solicitor network.
Conduct of criminal appeals	Effectiveness: Strong Efficiency: Well Placed	• Analysis of information to test opportunities for efficiency gains.
Legal advice to and representation of the Crown	Effectiveness: Well Placed Efficiency: Needing Development	• Identify and evaluate the risks attached to broadening the focus of Crown Law from its public/administrative law base. • Provide greater transparency around defining the role of Crown Law, with buy-in from key stakeholders. • Develop a robust method that will separately track the cost and performance of Category 2 work. • Systemic review of overall performance of Crown Law (as distinct from individuals) arising from the Client Relationship Management programme. • Use available information or systems to improve efficiency and effectiveness or to benchmark performance robustly.
Exercise of Principal Law Officer	Effectiveness: Strong Efficiency: Well	• Demonstrate that Crown Law is actively managing risks around volume and nature of work fluctuations in this area (supported by robust

functions	Placed	information and output measures). • Provide greater clarity internally and externally about the distinction between the Law Officer functions and Crown Law's other functions.
Organisational Management: Part 1 - Leadership, Direction and Delivery		
Vision, strategy and Purpose	Needing Development	• Refresh the Crown Law vision, strategy and purpose.
Leadership and governance	Weak	• Refocus the Management Board to focus on strategy rather than operational matters. • Demonstrate collective ownership of agency challenges, risks and opportunities and organisational leadership.
Culture and values	Well Placed	• Use staff culture, values and behaviours to drive strategic direction.
Structure, roles and responsibilities	Needing Development	• Establish a Deputy Chief Executive role to focus on organisational leadership. • Consider production of an Annual Plan. • Address the issue around corporate service functions being seen as disconnected from the rest of the organisation to drive productivity improvements.
Review	Needing Development	• Institute a culture of ongoing review, evaluation and improvement across the business.
Organisational Management: Part 2 - External Relationships		
Engagement with Ministers	Well Placed	• Put in place relationship management strategies to deal with the fact that Crown Law interacts with some Ministers on an infrequent basis yet must be able to recognise the wider portfolio interests of those Ministers.
Sector contribution	Needing Development	• Look at ways to increase Crown Law's input into justice sector policy through further strategic policy capacity and business analysis skills.
Collaboration and partnerships with	Needing Development	• Formulate a considered strategy in relation to Crown Law undertaking Category 2 work. • Make improvements to the Client Relationship

stakeholders		Management Programme to enhance its effectiveness. • Develop performance indicators for measuring the efficiency of delivery of services by Crown Solicitors. • Develop a performance measurement framework for the warrant holders. • Develop processes for efficient collation of data about the prosecution services.
Organisational Management: Part 3 - People Development		
Leadership and workforce development	Needing Development	• Link the approach to workforce development to Crown Law's strategic organisation objectives. • Address capability and capacity gaps in corporate strategy and support; and business analysis. • Develop the collective leadership capability of the agency.
Management of people and performance	Well Placed	• Continue to monitor the effectiveness of the 'As and When' performance measurement system. • Have Team Leaders produce annual work plans to feed into the Annual Plan. • Align individual objectives of team members with those of the team and agency. • Develop a more transparent process for linking performance reviews to remuneration. • Put in place clearer expectations and accountability around the management of poor performance.
Engagement with staff	Needing Development	• Address issues around the lack of clarity regarding career progression. • Address issues around the lack of transparency regarding remuneration bands and what competency levels are required to progress from one to the other. • Undertake a comprehensive staff engagement survey and use it to inform a human resources strategy.

Organisational Management: Part 4 - Financial and Resource Management		
Information management	Well Placed	• Strategic planning for ICT (information communication and technology) needs to link to the agency Strategic Plan. • Develop strategies to increase the uptake and utilisation of the ICT platform and systems. • Better utilise the existing resource in the Finance Team to ensure the practice management system delivers its potential. Look at the need for additional resources.
Efficiency	Needing Development	• Allocate additional resources to analyse Crown Law's core business, produce robust data and more sophisticated reporting. • Focus on productivity gains from a more effective use of its investment in the IT platform. • Benchmark against legal industry metrics (adjusted for an in-house public sector legal team). Develop strategies to align with these metrics. • Recruit additional business analysis capability to inform decisions regarding the implementation cost of reforms; and identify efficiency gains in the conduct and supervision of Crown prosecutions.
Financial management	Weak	• Increase capability in forecasting/budgeting of the Crown Solicitors' network so that it operates within baseline in 2012/13. • Work closely with the Crown Solicitor network to implement strategies for more accurate forecasting, budgeting and ongoing reporting against forecasts.
Risk management	Needing Development	• Enhance existing risk management and mitigation by assessing tolerance of individual risks. • Management Board to focus on risks to Crown Law's key purpose and strategic direction. • Identify and mitigate the strategic threats to the business. • Widen the brief to consider broader legal risks facing the Crown with appropriate stakeholder engagement.

APPENDIX 3

KEY RECOMMENDATIONS FROM THE REVIEW OF PUBLIC PROSECUTION SERVICES, SEPTEMBER 2011

The table below summarises key recommendations from the Review of Public Prosecution Services by John Spencer.

Theme	Recommendation
Clarify the relationship between the Solicitor-General and Crown Solicitors	• Reassert the previous agency relationship. • Supplement the warrant system with contracts. • Establish formal mechanisms for managing the operational prosecution policies of Crown Solicitors. • Allow for the Solicitor-General to play a more direct role in monitoring and controlling the cost of indictable prosecutions.
Split the Vote: Attorney-General Appropriation Three into two - ie conduct and supervision.	• Split the appropriation into conduct and supervision to assist in rectifying the current imbalance between spending and management.
A transparent and realistic billing system to pay Crown Solicitors with more proactive management by the Crown Law Office.	• Introduce a more transparent and realistic billing system in combination with more proactive financial management by Crown Law. • This new system should be introduced in three stages: o Stage 1 - improve proactive management and information collection; o Stage 2 - consider lifting the freeze on the Charge Out Rate; o Stage 3 - create a new billing system for Crown Solicitors, if appropriate, including a defined set of high cost, complex and public interest cases managed through a separate funding stream within Crown Law and briefed out to a broader set of prosecutors.
Consider options for purchasing and conducting prosecution services and encouraging cooperation.	• Consider more options for purchasing and conducting prosecution services in the summary jurisdiction, particularly for non-Police enforcement agencies. • Encourage greater co-operation between enforcement agencies on prosecution-related matters eg facilitating secondments, shared training, canvassing support for adoption of a formal Prosecution Memorandum of Understanding applicable to all enforcement agencies akin

	to the Prosecutors' Convention in the UK.
The Law Officers to consider amending the Prosecution Guidelines.	• Explicitly refer to the cost of prosecutions as relevant to an assessment of public interest. • Articulate the principles relating to the need for independent decision-making by prosecutors and the need for structures to be in place to separate prosecutors and investigators. • Include summary jurisdiction prosecutions within these Guidelines (or draft separate Guidelines for these).
Compliance with the Prosecution Guidelines.	• Compliance should be mandatory for all enforcement agencies with prosecution functions – achieve via a change to the Cabinet Directions and perhaps in the long term via legislation.
Monitoring and Costs.	• Monitor compliance with the Prosecution Guidelines through self-reporting or periodic audits of prosecution decisions and policies. • Regularly monitor the rate of complaints about prosecution decisions being made to the Courts, IPCA, Ombudsmen and NZLS. • Obtain regular feedback from the judiciary on the court performance of departmental prosecutors and provide it to relevant agencies. • Assist the Police and Crown Solicitors to draft charging policies relating to the two main areas of divergent practice - violent and historic sexual offending that will apply universally. • Set up a formal mechanism to ensure all decision-makers are aware of the impact of their policy changes on the costs of the prosecution system, ensuring that all policy decisions affecting the prosecution system are referred to the Crown Law Office. • Record the time spent on appeals accurately and use the time recording data to maintain the Criminal Law Group's level of efficiency. • Provide general guidance as to the way enforcement agencies should present their prosecution-related data to the Solicitor-General.

Reporting to the Solicitor-General by enforcement agencies.	• Regular reporting by enforcement agencies to include: ○ volume of prosecutions; ○ rates of withdrawal and amendment of charges and reasons for them; ○ the structures in place to promote independent decision making; ○ staff information including training, qualifications and any specific performance-related issues; ○ an estimate of the over-all cost of the agency's prosecutions.
In-house prosecutors.	• Non-Police enforcement agencies employing in-house prosecutors should financially justify the use of these prosecutors to the Solicitor-General, if they wish to retain them for court work. • Resources should be shared to promote better training and staff development.
Annual reporting to the Attorney-General	• The Solicitor-General to provide an annual report to the Attorney-General on the conduct of all public prosecutions, including a summary of the reports from enforcement agencies as well as information held by the Crown Law Office internally concerning indictable prosecutions. The report should identify the cost of the indictable prosecutions originally initiated by each enforcement agency.

For a complete summary of the Prosecution Review's findings and options see pp 123–128.

APPENDIX 4

OVERSEAS MODELS

1. We have considered overseas models in formulating our recommendations and include brief summaries as follows.

England and Wales

2. By convention the Attorney-General and Solicitor-General are both members of one of the Houses of Parliament. The Attorney-General is the Crown's chief legal advisor (although the Crown is mainly represented by the First Treasury Counsel) and oversees the government's in-house legal advisors as Minister responsible for the Treasury Solicitor's Department. The incumbent is also responsible for supervising the Crown's Prosecution Service, Serious Fraud Office, Revenue and Customs protection and the Armed Forces prosecution services, as well as guardian of the public interest – ie making decisions as to the bringing or terminating of civil proceedings and charity matters.

3. The Solicitor-General is not a Minister of the Crown but assists in the discharging of functions as Deputy Attorney-General. The Attorney-General's Office provides legal and strategy policy advice and support to the Attorney-General and Solicitor-General. Unlike New Zealand, the UK does not have a fused legal profession. Advocacy is briefed out to panels of counsel, both civil and criminal. Panel appointees are from the bar.

4. The Treasury Solicitor heads the Treasury Solicitor's Department, providing litigation and legal advisory services to government departments and other publicly funded bodies. The litigation and employment teams within the department operate on full cost recovery. Most advisory work is charged on a capitation basis, with litigation on an hourly basis.[1] The Treasury Solicitor's Department also manages private sector legal advice on behalf of other departments.[2] Departments can use private legal firms but the Attorney-General has issued guidelines on the type of work that must be done by government lawyers, ie:[3]

   (a) national security or other sensitive implications;

   (b) major policy or constitutional issues;

   (c) government to government or other international, non-commercial work;

   (d) long term interests of more than one department; or

   (e) Cabinet Office coordination.

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1 Treasury Solicitor's Department *Business Plan 2011-12* (2011) at 11.

2 Treasury Solicitor's Department *Law at the Heart of Government* at 3 and Attorney General's Office *Annual Review 2008-2009* (2009) at 15.

3 Anthony Blunn & Sibylle Krieger *Report of the Review of Commonwealth Legal Services Procurement* (2009) at 80.

5. The Treasury Solicitor also heads the Government Legal Service (GLS) which provides centralised services like recruitment, training and development and a legal information online network.

6. The Crown Prosecution Service is an independent authority prosecuting criminal cases investigated by the police in England and Wales.

Canada

7. The role of the Canadian Attorney-General is similar to the New Zealand model[4]. The Attorney-General is responsible for advising the heads of government departments on all matters of law and for conducting all litigation for any federal department or agency of the Crown in respect of any subject within the authority or jurisdiction of Canada[5].

8. In order to fulfil those functions, the Attorney-General is supported by the Department of Justice. The Department provides policy advice in relation to the administration of justice; legal advisory, litigation and legislative services to government departments and agencies; and support to the Minister in advising Cabinet on all legal matters.[6]

9. In terms of the management of the government's legal risk, client departments and agencies have "shared accountability" for the government's use of legal services. This is achieved through annual joint Department of Justice and client department planning and prioritising sessions for the provision of legal services and a shared understanding of the volume of legal work and the impact on legal risks. In addition, senior departmental officials regularly interact with their colleagues in client departments and in central agencies, and make adjustments from time to time to maintain the focus on government priorities.[7]

10. As with the Crown Law Office, the Department of Justice has a Net Vote Authority allowing the collection of revenue from other government departments and agencies for the provision of legal advisory, litigation and legislative services and to re-spend revenue collected.[8]

11. Contracts for legal services may be entered into only by or under the authority of the Minister of Justice (Attorney-General).[9] Private sector law practitioners can undertake government legal work only if registered as "legal agents" and assessed by Justice Department officials. Decisions on outsourcing to a legal agent are made by the relevant Justice Department manager, in consultation with the client department or agency.[10]

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4 Department of Justice Act R.S.C., 1985 C.J-2, s 2(2): the Minister of Justice is *ex officio* Attorney-General of Canada and holds office during pleasure. Section 4 provides that the Minister is the official legal advisor to the Governor-General and must ensure the administration of public affairs is in accordance with law; have superintendence of all matters connected with the administration of justice in Canada; advise the Crown on all matters of law and on the legislative Acts and proceedings of each provincial legislature; and consider and report on the consistency of any bills introduced into the House with the Charter.

There is no Solicitor-General equivalent. However, the Act provides for a Deputy Minister and two Associate Deputy Ministers of Justice (who have the rank of a deputy head of a department).

5 Unlike the New Zealand Cabinet Directions, there is no ambiguity in the Canadian legislation. Department of Justice Act R.S.C., 1985 C.J-2, s 5.

6 Department of Justice, *Report on Plans and Priorities 2011-2012* at 4.

7 Ibid at 17-18.

8 Ibid at 10.

9 Government Contracts Regulations. SOR/87-402, Reg 4.

10 Department of Justice Canada *Agent Affairs Program* www.justice.gc.ca.

12. The Attorney-General is also responsible for the Public Prosecution Service, which is led by the Director of Public Prosecutions and reports to Parliament through the Attorney-General.

United States

13. The Attorney-General is the chief legal advisor to the President and the Executive; head of the Department of Justice (the Department); and chief law enforcement officer of the US Government. The Assistant Attorney-General in charge of the Office of Legal Counsel provides authoritative legal advice to the President and all Executive Branch agencies; drafts the legal opinions of the Attorney-General; and provides written opinions and oral advice to the Executive Branch and offices within the Department. The advice covers all constitutional questions and the Office also reviews pending legislation for constitutional issues.

14. The Solicitor-General represents the US government in the Supreme Court and has responsibility for authorising all appeals on behalf of the government. The Solicitor-General is nominated by the President and confirmed by the US Senate. As a political appointment, the Solicitor-General usually leaves office on a change of President.

Australia

15. There are nine Solicitors-General in Australia.[11] No longer Members of Parliament, most are Solicitors-General with their own offices, separate from the Crown/State/Government Solicitors' Offices; except for ACT where the Chief Solicitor also serves as Solicitor-General. They are generally instructed by the Crown/State/Government Solicitors to represent the state/territory/the Commonwealth in litigation. Oversight of criminal prosecutions is carried out by Directors of Prosecutions and advice is given by Crown/State/Government Solicitors or Solicitors-General in conjunction with them.

Commonwealth of Australia

16. The Attorney-General is the first Law Officer of the Crown. The Solicitor-General, appointed for a term, acts as counsel for the Crown and provides legal advice to the Attorney-General. [12] The Attorney-General's Department provides support to the first Law Officer and is primarily a legal policy agency, although it does provide some legal services to other agencies. It also has responsibility for issuing guidelines to government agencies on the procurement of legal services.[13] Government agencies are generally responsible for determining their own need for legal services and for procuring, managing and delivering those services, subject to the Legal Services Directions 2005.

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11 Dr David Collins QC, Solicitor-General , "*The Role of The Solicitor-General in Contemporary New Zealand*" (Bond University Symposium, April 2011) at [52]-[54].

12 Law Officers Act 1964 (Cth), ss 6 & 12.

13 Blunn and Krieger, above n3, at 74.

17. The Australian Government Solicitor (AGS) is a government business enterprise operating on a commercial basis, with two shareholder ministers, the Attorney-General and the Minister for Finance and Deregulation. It acts for Australian government agencies and entities in which the government has an interest.[14]

18. Under the Legal Services Directions 2005,[15] some work categories are tied to the AGS, including:

    (a) constitutional law issues;

    (b) national security issues;

    (c) legal advice to be considered by Cabinet or relied on in preparing a Cabinet submission or memorandum; and

    (d) legal advice on a legislative proposal to be considered for adoption by government or on draft legislation for introduction into Parliament.

19. All other government legal work is contestable. Two recent reports have queried whether the deregulation of the Australian Commonwealth legal services has impacted on the ability of the Attorney-General to perform the Law Officer role.[16]

Victoria

20. In Victoria, legal services are divided into core and non-core work (similar to our *Cabinet Directions*).[17] The Victoria Government Solicitor's Office (VGSO), a government department, carries out all core work, including: [18]

    (a) All matters relating to the royal prerogative of mercy; matters where there is no obvious contradictor; providing legal services to Royal Commissions and Boards of Inquiry; and representation of judicial officers.

    (b) All matters (unless the issues are incidental, self-evident or involve well-settled precedents) involving the State's constitutional powers and privileges and the Commonwealth constitution; the Governor; the relationship between the State and other governments; charitable law, relator actions and vexatious litigants; administrative challenges to a Minister's exercise of a discretion; representation for Ministers and Crown employees; allegations by the state of contempt of court; native title; Charter of Human Rights and Responsibilities Act 2006; and the Hague Convention on Civil Aspects of International Child Abduction.

    (c) All matters which, due to the unusual nature of the case or the best interests of the State, require central and authoritative legal management for resolution of disputes between departments or agencies of the State; composition, jurisdiction and rules of quasi-judicial bodies; litigation involving more than one department; the Equal Opportunity Act; administrative challenges to the exercise

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14 Australian Government Solicitor *Annual Report 2009-2010* (2010) at 6.

15 Legal Services Directions 2005 (Cth) at 19.

16 See Blunn & Krieger above n3 at [89]-[109] and Sean Parnell, "Attorney-General's Office 'virtually' powerless due to outsourcing" *The Australian* (Australia, 1 March 2010).

17 Blunn & Krieger, above n 3, at 83.

18 See "Exclusive Legal Services List" in the *Victorian Government procurement*, www.vgpb.vic.gov.au.

of a discretion by a departmental head or staff member; Crown copyright and interpretation of legislation.

21. Non-core work may be done by in-house-lawyers, VGSO; panel firms, the private bar; and the non panel firms (through an exemption process).[19]

Australian Capital Territory (ACT)

22. The Attorney-General is first Law Officer, chief legal representative of the Crown and principal legal advisor.[20] The Law Officer Act 2011 recently established the role of Solicitor-General, appointed for a term, no longer than seven years, also combining the Office of the Chief Solicitor. [21] At the request of the Attorney-General, the Solicitor-General provides advice on matters of significance to the government and also appears as counsel in certain significant cases (similar to the New Zealand model).

23. The ACT Government's legal services are centralised through the ACT Government Solicitor (ACTGS) providing all legal services to ACT government agencies. Legal services may only be outsourced by an agency in consultation with the ACTGS and with the agreement of the Solicitor-General, to ensure consistency and quality of advice on a whole of government basis, the avoidance of duplication and to protect the interests of the Territory as a whole.[22]

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19 Blunn and Krieger, above n 3, at 83.

20 Law Officers Act 2011 (ACT), s 6.

21 Ibid ss16-17. The Solicitor-General can be eligible for reappointment.

22 ACT Government Solicitor website www.actgs.act.gov.au.

APPENDIX 5

ESTIMATE OF GLS FINANCIAL BENEFITS BY PROGRAMME DIRECTOR OF THE GLS

1. The table below estimates the financial benefits anticipated to accrue from the GLS initiatives. This assessment has been arrived at on a whole of government basis rather than by individual department analysis. Qualitative improvements will drive ongoing improvements in the quality and consistency of legal capability and advice and greater efficiencies in delivering that advice. Financial and efficiency gains will also result. The reduction in duplication and effort, rationalisation of training resources and delivery, reduced re-work and improved legal risk management all logically point to positive downstream financial outcomes.

2. The following comments explain the basis of the figures in the table below**.**

Efficiency work stream

3. The estimated savings ($1.65 million per annum for departments) generated from the external legal services RFP, led by the Ministry of Economic Development (MED), has been based on MED's calculation of the current external legal expenditure by public service departments of $22 million per annum. MED's estimated percentage of savings, resulting from the establishment of a law firm panel with an agreed price structure, is somewhere in the range of 5% to 10%. A mid-range figure of 7.5% has been used.

4. The current expenditure for the purchase of legal information research resources across the departments is about $10 million per annum. A cluster of seven departments is currently negotiating a single supply arrangement with each of the two main suppliers; Thomson Reuters (Brookers) and Lexis Nexis. However, partly as a result of the negotiation process, for the seven agencies involved, there has already been a cost reduction in the current year through the annual renewal process. In addition the annual review percentage has typically been reduced from 4.5% to not more than 3%. The estimated savings of $250,000 are considered to be a minimum and will increase upon wider involvement of other departments. However, it is noted that negotiations are still continuing and it is likely that such savings will not be realised until the 2012/13 year.

Capability work stream

5. The estimated savings (of $2 million per annum) generated from the Capability Development work stream are based on the following:

   (a) Savings from reduction in duplication and effort, rationalisation of training resources and delivery, enhanced quality and consistency of legal advice and improved legal risk management.

   (b) An estimated 670 lawyer full time equivalents (FTE's) in government departments in legal advice positions (including lawyer prosecutors). Parliamentary Counsel are excluded from the figures here and a deduction has been made to acknowledge that some lawyers in the database are not in legal roles.

(c) An estimated 5% improvement in productivity as a result of new effectiveness and efficiency initiatives (as listed above) – about one hour per lawyer per week @ 670 lawyers for 40 weeks; releasing 26,800 hours enabling quicker turn-around times; earlier involvement in departmental initiatives and projects; more proactive legal risk prevention and management; and increased insourcing of currently outsourced legal work.

(d) A conservative estimate of current in-house legal advice hours across the core Crown agencies of 530,000 hours (790 legal advice hours per annum x 670 FTE's). The annual legal advice hours figure applied is about 60% of a minimum law firm lawyer billable hours figure (1,300 hours per annum). This figure recognises the differences in role and functions between the law firm lawyer and the in-house lawyer. Note that the figure of 790 hours is an average and some government lawyers, for example those at Crown Law, will be much more aligned to private sector lawyers in time recording practices:

(e) An average market value billable rate of $250 per hours-

6. This financial benefits analysis does not include:

(a) benefits from an expansion of the GLS services beyond the core public service to Crown entities and state owned enterprises;

(b) benefits from the development of further GLS services such as:

(i) development of a Chief Legal Advisor's leadership programme;

(ii) in-house legal practice management initiatives;

(iii) informed purchaser initiatives supporting and implementing best practice in the instructing of the external panel of law firms.

February 2012

GLS Estimated Financial Benefits		
Theme	**$'s (estimated savings)**	**Anticipated efficiency / effectiveness gains**
Efficiency work stream projects: External legal services RFP Re-negotiation of legal information supply contracts	 $1,650,000 $250,000	• Reduction in external legal fees • Improved access to on-line legal information • Further potential for greater savings upon expansion of the 'cluster' arrangement to all departments • Enhanced transparency of pricing model allowing greater control over and certainty of cost.
Capability work stream initiatives: Rationalisation / sharing of training programmes and resources A cross sector approach to learning and development for lawyers Sharing of legal precedents and resources Development of standard core competencies for government lawyers Government lawyer induction programme Recruitment and career path progression planning Establishment of the GLS intranet as an online platform for resource sharing, collaboration by government lawyers Identifying and accessing centres of legal expertise	$2,000,000	• Enhanced access to and leverage from existing legal capability • Reduced duplication of advice and resources • Greater consistency and robustness of advice across departments • More effective collaboration and professional support • Greater efficiencies in learning & development initiatives • Increased leverage from existing legal capacity (e.g. a 5% efficiency gain results in 26,800 hours) • Enhanced ability to meet the demands of more for less
Total	**$3,900,000**	

APPENDIX 6

STATUTORY PROVISIONS IN WHICH REFERENCE IS MADE TO THE SOLICITOR-GENERAL

1. Armed Forces Discipline Act 1971
2. Building Societies Act 1975
3. Chateau Companies Act 1977
4. Constitution Act 1986
5. Cook Islands Act 1915
6. Coroners Act 2006
7. Corporations (Investigation and Management Act) 1989
8. Crimes Act 1961
9. Criminal Procedure (Mentally Impaired Persons) Act 2003
10. Criminal Procedure Act 2011
11. Crown Proceedings Act 1950
12. District Courts Act 1947
13. Education Act 1989
14. Evidence Act 2006
15. Friendly Societies and Credit Unions Act 1982
16. Goods and Services Tax Act 1985
17. Government Superannuation Fund Act 1956
18. Health and Safety in Employment Act 1992
19. High Court Rules
20. Insolvency (Cross-border) Act 2006
21. International Crimes and International Criminal Court Act 2000
22. International War Crimes Tribunals Act 1995
23. Judicature Act 1908
24. Marine and Coastal Area (Tauktai Moana) Act 2011
25. New Zealand Council of Law Reporting Act 1938
26. New Zealand Public Health and Disability Act 2000
27. New Zealand Intelligence Service Act 1969
28. Patents Act 1953
29. Protected Disclosures Act 2000
30. Public Service Investment Society Management Act (No 2) 1979
31. Remuneration Authority Act 1977
32. Sentencing Act 2002
33. Sentencing Council Act 2007
34. Serious Fraud Office Act 1990
35. State Sector Act 1998
36. Summary Proceedings Act 1957
37. Summary Proceedings Amendment Act (No 2) 2008
38. Trustees Companies Management Act 1975

APPENDIX 7

DRAFT REVISED DIRECTIONS

Cabinet Directions for the Conduct of Crown Legal Business 2012

These Directions are the Cabinet Directions for the Conduct of Crown Legal Business 2012.[1]

Interpretation

1. In these Directions:

"**Category 1 Matters**" are matters requiring legal services relating to the Crown, through a Minister or department, comprising:

(a) representation or advice in relation to actual or imminent litigation to which the Minister or department is, or may become, a party;

(b) questions of the lawfulness of Government conduct;

(c) constitutional questions including Treaty of Waitangi issues;

(d) issues relating to enforcement of the criminal law; including prosecutions; and

(e) issues relating to the protection of the revenue

Category 1 matters do not include:

(f) advice on employment law or representation in the Employment Authority or Employment Court to which paragraph (d) does not apply; nor

(g) any specific matter that the Attorney-General directs is not to be treated as a Category 1 Matter.

"**Category 2 Matters**" are matters requiring legal services relating to the Crown, through a Minister or department, that are not Category 1 Matters.

"**department**" means a department listed in Schedule 1 of the State Sector Act 1988, the New Zealand Defence Force, the New Zealand Police and the New Zealand Security Intelligence Service.

Application

2. These Directions apply to all Ministers and departments.

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[1] For the avoidance of doubt, these Directions are not directions to Crown entities under s 107 of the Crown Entities Act 2004 and do not apply to them.

Instructions to Crown Law on Category 1 Matters

3. All requests by Ministers or departments for legal advice or representation on any Category 1 Matter not being handled wholly by the department's own legal staff must be initiated by instructions to the Attorney-General or the Solicitor-General in a format specified by the Solicitor-General.[2]

Involvement of private sector lawyers in Category 1 Matters

4. Where a Minister or department wishes to have a Category 1 Matter actioned in whole or in part by specified lawyers in private practice (including Crown Solicitors):

   (a) the brief to the Solicitor-General must clearly state the reasons for that request;

   (b) if the Solicitor-General does not intend to agree to the request, there must be consultation between the Solicitor-General and the Minister or department and reasons given for any refusal;

   (c) where lawyers in private practice are to be instructed, the Solicitor-General may impose conditions on the relevant department, including reporting requirements, and if appropriate in the particular case, a requirement for Crown Law Office involvement as instructing solicitors or as one of the counsel; and

   (d) where agreement cannot be reached on the engagement of lawyers in private practice, or related conditions, the decision of the Solicitor-General prevails except where the relevant Minister refers the matter to the Attorney-General for resolution.

Solicitor-General's intervention in Category 1 Matters

5. Where lawyers in private practice (including Crown Solicitors) are instructed on a Category 1 Matter, the Solicitor-General may intervene to direct the manner in which the legal services are to be provided if there has been a material change of circumstances since the private sector lawyers were instructed.

Category 2 Matters

6. Departments and Ministers may obtain legal services on Category 2 Matters from any appropriate legal services provider subject to compliance with the All of Government External Legal Services Contract (where applicable).

7. Departments must ensure that the Attorney-General or the Solicitor-General is informed of all significant Category 2 Matters in which the Crown Law Office is not acting.

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2 See "Instructing the Law Officers and Crown Law" **[yet to be written by Crown Law, with involvement from stakeholders].**

Solicitor-General's intervention in Category 2 Matters

8. Where the Solicitor-General is satisfied that there is a material whole of government legal risk or other specific reason why a Category 2 Matter should not be handled by particular lawyers in private practice (including a Crown Solicitor) the Solicitor-General may intervene, at any time, to direct the manner in which legal services are to be provided.

Effect of Crown Law advice

9. Advice on Category 1 Matters and Category 2 Matters provided by the Crown Law Office must not be departed from by departments or Ministers who request the advice unless the agreement of the Solicitor-General or Attorney-General is first obtained. Where any other department or Minister intends to depart from any such advice the Solicitor-General or Attorney-General must be informed.

Proceedings requiring Solicitor-General's approval

10. No department may initiate any appeal from the decision of a court or tribunal, or any application for judicial review, without the approval of the Solicitor-General, which may be general or specific.[3] This does not apply to any appeal to the Employment Court in relation to an employment matter.

Costs generally

11. The Crown Law Office must charge departments for advice and representation on Category 1 Matters and Category 2 Matters (with the exception of matters covered by the Law Officer appropriation) on a cost recovery basis at rates approved by the Attorney-General.

12. Charges for advice or representation provided at the direction of Cabinet, a Cabinet Committee, or a Minister are the responsibility of the relevant department(s).

13. The Crown Law Office may limit, reduce or waive its fees in any case where it considers it appropriate to do so.

Disputes

14. If, after appropriate consultation, there is a dispute as to whether a matter is a Category 1 Matter, or on any other matter arising under these Directions, the decision of the Solicitor-General prevails; except that a Minister may refer the dispute to the Attorney-General for resolution.

Exceptions

15. Any department may instruct a Crown Solicitor (or the Police Prosecution Service)[4] in respect of a summary prosecution, or the taking of depositions for

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3 Attention is drawn to s 390 of the Crimes Act 1961 in respect of appeals against conviction or sentence.

4 **See recommendations of the Prosecution Review at [631.5]; also our review at [9.12(e)].]**

an indictable prosecution **[wording to be updated in light of Criminal Procedure Act 2011 when in force].**

16. Departmental prosecutors may appear on summary prosecutions and employment matters up to the Employment Court level. Appearances on other matters require general or specific approval of the Solicitor-General[5]. **[Add requirement to comply with Prosecution Guidelines when revised and reissued[6] and our recommendation that departmental prosecutors should receive specific training before they can act.]**

17. The Solicitor-General may grant general or specific exemptions from the requirements of clauses 3 and 4.[7]

Differences between departments

18. Where advice is sought from the Crown Law Office on a difference of opinion or interpretation between departments:

    (a) each department must advise the Crown Law Office of its views, and its comments on the views of other department(s);

    (b) advice must be given to the departments jointly; and

    (c) costs must be shared equally unless the departments agree otherwise.

Employees as defendants

19. If a chief executive or employee of a department is a defendant in a criminal or civil action arising out of, or in the course of, his or her employment:

    (a) the Solicitor-General is entitled to decide that the Crown will take over the conduct of the case; and

    (b) the costs of the defence are those of the Crown (and may be charged to the department).

Privilege and related issues

20. For guidance on privilege and related issues, see paragraphs **[ ]** of the Cabinet Manual.[8]

Revocation

21. The Cabinet Directions for the Conduct of Crown Legal Business 1993 are revoked.

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5 For appearances on criminal matters, attention is drawn to ss 10 and 187 of the Criminal Procedure Act 2011 and regulations to be made under s187; see for now the definition of "prosecutor" in section 2(1) of the Crimes Act 1961.

6 **See recommendations of the Prosecution Review at [412.2]**.

7 Whether by exemption or convention it is invariable practice that Ministry of Social Development solicitors appear in the Family Court representing the interests of children.

8 [**Revised paragraphs to be drafted: see our review at [13.25] – [13.28]**].