**FW Guest Memorial Lecture**
**University of Otago Faculty of Law**
**5 September 2018**

# Dogsbody, Dude, Defender of the Rule of Law – The Solicitor-General

**Una Jagose QC**

E ngā mana, e ngā reo, e rau rangatira mā
Tēnā, koutou katoa
E ngā mate, haere, haere, haere atu rā
E ngā iwi i huihui nei, tēnā koutou
E ngā manuhiri, nau mai haere mai ki tēnei hui
Tēnā koutou, tēnā koutou, tēnā koutou katoa

Thanks to the Law School for inviting me to speak to you today. It's a pleasure to be here and an honour to be invited. It's a great pleasure to be back at Otago Law School this evening, in a role I never even thought about, let alone imagined I would hold, when I studied law here.

Recently, I was excited to see a question asked on social media: "Who or what is the Solicitor-General?" The response was a bit confronting: "The Attorney-General's dogsbody in quite an official and dignified sense" and "some government dude".

It is naïve of me to want to get to a position where that same question is responded to with a real sense that the Solicitor-General is one of the core parts of our constitutional framework that ensures government is conducted according to law? But that *is* what I want to achieve. And perhaps it is fair enough that people do not know what the Solicitor-General does; after all, what relevance does this ancient throwback to times when the sovereign needed counsel to appear for them in courts have to modern New Zealand?

There is no one place that sets out what the Solicitor-General's role is. We know from s 9A of the Constitution Act 1986 that the junior law officer, the Solicitor-General, may perform any function or duty or exercise any power conferred on the senior law officer, the Attorney-General. And the Solicitor-General is conferred the role of chief executive of the Crown Law Office by the State Sector Act 1988.[1] That Act acknowledges (but is not the source of) the Solicitor-General's "independent and constitutional functions".[2]

So this evening I want to talk about the law officers of the Crown – the Attorney-General and Solicitor-General; why those roles are critical to ensuring that our democratic system of government is conducted according to law; and why they are a fundamental part of our constitution.

In our democratic system of government, the Attorney-General and the Solicitor-General are charged with ensuring government is conducted according to law; the Cabinet Manual reflects that "particular responsibility for maintaining the rule of law".[3] They have the "constitutional responsibility for determining the Crown's view of what the law is, and ensuring that the Crown's litigation is properly conducted".[4]

There are a number of tensions inherent in the roles, and I will talk about how I see those tensions and how they are managed.

In this way, the Solicitor-General is – unlike any other public servant to Minister relationship – the deputy to the Attorney-General. While any Minister may lawfully exercise a power conferred on another,[5] the Attorney-General's law officer functions are not delegable to another member of the Executive, ensuring that they remain independent from the Executive government. The Solicitor-General is appointed under the royal prerogative, holds office at pleasure of Her Majesty[6]

[1] State Sector Act 1988, s 44(2)(a).
[2] Section 44(1A)(b).
[3] Cabinet Office *Cabinet Manual 2017* at [4.3].
[4] Cabinet Office Circular "Cabinet Directions for the Conduct of Crown Legal Business" (30 March 2016) CO 16/2 at [2].
[5] Constitution Act 1986, s 7.
[6] Letters Patent Constituting the Office of Governor-General of New Zealand, art 10.

and – in the exercise of those "independent and constitutional functions" – is not subject to oversight or performance review by the State Services Commissioner.[7]

I will talk to you this evening about how I view my role, about what I think is important in order to serve the Crown and the rule of law and, as chief executive of a public service department, also to act in the spirit of public service. (Can I just briefly acknowledge the first Solicitor-General of New Zealand, the first superintendent of Otago and later Mayor of Dunedin, John Hyde Harris. He was New Zealand's Solicitor-General from 1867 to 1868 and the only one to be also a member of the executive (as a member of the second Stafford Ministry) when the role was a political one.[8])

I've been New Zealand's 17th Solicitor-General for some two and a half years now. I feel as strongly as ever both the privilege and the burden of the role I hold. I hope I always will have these dual feelings: of burden and of privilege. Because that will mean that I will not fall into the trap of complacency or arrogance about the role I play, rather retain a focus on the integrity of the law and our justice institutions and on the long-term legal interest and obligations of the Crown.

These concepts – the rule of law, integrity of our justice institutions, the long-term interests and obligations of the Crown, and conducting democratic government according to law – have become more than something I learned about at law school and are now important values that guide me in my job.

But not everything comes in a highfalutin constitutional package. I am also a busy jobbing lawyer and chief executive. A significant part of my role is to assist successive governments achieve their policy ends – lawfully, of course, and with an eye always to the Crown's long-term obligations and interests. So this evening I want to talk, I hope, in a practical way about my job, so you can see how this critical constitutional role works and how *this* Solicitor-General sees the way of overcoming the challenges in the role with a commitment to public service.

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[7] State Sector Act, s 44(1A)(b).

[8] John McGrath "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197 at 199–200 and Guy Scholefield *New Zealand Parliamentary Record, 1840–1949* (3rd ed, Wellington, 1950) at 33 and 58.

## *I The Rule of Law*

We live in a democratic society, governed according to law. There is no one place that states what it means to be governed "according to law". And, as is well known, we have no single written constitution. In fact, much is written and contained in important statutes whose subject matter is constitutional – the Constitution Act and the New Zealand Bill of Rights Act 1990, for example.[9] We say our constitution is "unwritten" because the three branches of government (the Executive, the Legislature and the judiciary) each have power that emanates not from a constitution but from a scattered array of sources: the common law, and constitutional conventions and principles; all of which are frequently reflected in legislative instruments.

The Senior Courts Act 2016 – as did its predecessor, the Supreme Court Act 2003 – provides a statutory purpose in s 3. Subsection (1) sets out that, among other things, the Act is to continue the higher courts and their functions,[10] consolidate the Judicature Act 1908 and Supreme Court Act[11] and provide for other related matters.[12] All well and good. But it's the next subsection that's of interest:

> (2) Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

"New Zealand's continuing commitment to the rule of law" – just what is that? Does it just relate to the stuff of the Senior Courts Act, or is it wider? There is nothing in the Act to define this critical constitutional principle or say where it can be found (note that its legislative reference is to it *continuing* – it is recognised, but it was not born here). Speaking of the similarly worded s 1(a) of the Constitutional Reform Act 2005 (UK), which provides nothing in the Act adversely affects "the existing constitutional principle of the rule of law", Lord Bingham

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[9] Matthew Palmer has identified 80 elements of our constitution, 45 of which are Acts of Parliament: Matthew SR Palmer "What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders" (2006) 17 PLR 133.
[10] Senior Courts Act 2016, s 3(1)(b).
[11] Section 3(1)(a).
[12] Section 3(1)(c).

doubted that the rule of law was not defined because it was such a well-understood and clear concept.[13] Respectfully, I agree – in fact the reverse is true; so many people reference the rule of law, but invariably it can mean different things to different people and at different times! Drawing on Lord Bingham's scholarship in this area again, he notes in his *Cambridge Law Journal* article the wealth of academic criticism that the phrase is so overused as to have become meaningless. Amongst them, my favourite:[14]

> Jeremy Waldron, commenting on *Bush* v. *Gore*, in which the rule of law was invoked on both sides, recognised a widespread impression that utterance of those magic words meant little more than "Hooray for our side!".

New Zealand's "continuing commitment to the rule of law" has to be more than a rallying cry for some vague notion; it cannot be – calling on Lord Bingham again – "the jurisprudential equivalent of motherhood and apple pie".[15]

At its core, the rule of law is a concept that all people – that is, everyone, including the State (or the Crown, if you like[16]) and all its actors – are bound by. Under this system, all people are entitled to the benefit of laws that are openly made, applied prospectively, publicly accessible and enforced by an independent judiciary.

To claim true commitment to the rule of law, governments must ensure – indeed welcome – a transparent and accessible system of checks and balances; must make sure the constitutional framework we live in is open, clear, understood and voluntarily *complied with*; and must protect the independence of the judiciary and those office holders who oversee government action. And while there are exceptions to each aspect of the rule of law I have just mentioned (in some situations, retrospective legislation might be fair and judicial determination of

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[13] Lord Bingham "The Rule of Law" (2007) 66(1) CLJ 67.
[14] At 68 (footnotes omitted), citing Jeremy Waldron ''Is the Rule of Law an Essentially Contested Concept (in Florida)?'' in Richard Bellamy (ed) *The Rule of Law and the Separation of Powers* (Ashgate Publishing, Aldershot, 2005) 117 at 119.
[15] Bingham, above n 13, at 69.
[16] The Crown is another concept with an array of meanings – heavily dependent on context: *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [78].

issues in private might be OK), the point is that we have to be able to explain why departure from fundamental norms, or values, is justified.

Our democratic system of government gains legitimacy from its commitment to the rule of law. But without a sound understanding of the rule of law, of the frameworks by which the branches of government operate and of the independence (and the dependencies) between them, citizens can develop an unhealthy, if not dangerous, cynicism about our democratic institutions (Executive government, the courts and the Legislature) that can weaken the very fabric of the vibrant, modern democratic society that I want for Aotearoa and New Zealanders.

As the Chief Justice Elias has said, speaking extrajudicially – both here in Dunedin in 2015[17] and a few weeks ago while delivering the Sir John Graham lecture in Auckland[18] – if it's "only judges and lawyers [who] believe in the rule of law as an element of our constitution, then we are in trouble".

I believe that a critical function of the modern Solicitor-General is to help both governments and society maintain an understanding of our constitutional frameworks. That is because our system of government tends to legitimise successive governments under constitutional conventions and principles.

Sir John McGrath QC, former Solicitor-General and Supreme Court judge, has described conventions as "apply[ing] the cladding of constitutional values to the basic legal framework"[19] – so *how* the law and powers are exercised in our democracy is guided by conventions.

A system based on conventions can be fragile, and we have to be alert to ensure something as important as the rule of law is a meaningful and strong part of the

[17] Sian Elias, Chief Justice of New Zealand "Judgery and the Rule of Law" (speech to Faculty of Law, Otago University, Dunedin, 7 October 2015) at 2, available at <www.courtsofnz.govt.nz/publications/speeches-and-papers>.
[18] Sian Elias, Chief Justice of New Zealand "Towards Justice: Reflections on the System and Society" (Sir John Graham Lecture 2018, The Heritage, Auckland, 10 August 2018).
[19] John McGrath "The Harkness Henry Lecture: The Crown, The Parliament and The Government" (1999) 7 Waikato L Review 1 at 3.

way we are governed and is not lost or weakened through misunderstood or ignored constitutional principles.

I want to make sure that New Zealanders do not think cynically that the Solicitor-General is simply another lawyer "for hire". I want them to be able to see the conventions, constitutional principles and the accountability frameworks as strong and meaningful so that successive governments are seen as legitimate.

Across the globe, we can see quite clearly, right now, the rule of law being challenged, misunderstood,[20] ignored (but also, we do see it held up and victorious too!) and at risk. In our system of a non-unified and unwritten constitution, complacency about conventions and principles – "constitutional *values*" – risks us sleepwalking into a society where governing according to law becomes a thing of the past. This doesn't have to be a sinister move. Misunderstanding the delicate fabric of our constitution risks mistakenly changing important aspects of our constitution forever. And once gone, it will be very difficult to reinstate the system.

But before you think I have gotten completely carried away, I repeat that these high constitutional issues do not arise every day. In my experience, governments in New Zealand do not want to avoid lawful constraints, they do not want to trample over rights and freedoms and they want to achieve their policy goals lawfully. The critical thing is in knowing where the accountabilities lie and what frameworks and conventions we rely on for the continuation of that happy state of governing in a democracy committed to the rule of law. A good understanding of the law officers' roles is something every New Zealander should have in order to hold governments to account. So congratulations for coming out tonight!

## *II The Law Officers of the Crown*

[20] The United Kingdom *Daily Mail* carried a half page photo of the three judges who determined that the Government could not commence the Brexit process by invoking art 50 of the Treaty on European Union 1757 UNTS 30615 (opened for signature 7 February 1992, entered into force 1 November 1993) without Parliament legislating. The headline described the judges as "Enemies of the people" and "out of touch" and said that they had defied "Brexit voters" and could trigger a "constitutional crisis": James Slack "Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis" *Daily Mail* (online ed, London, 4 November 2016).

You might know the role of the Solicitor-General is one of the many concepts we inherited from the United Kingdom legal system in our country's early years. You can trace this concept right back into the 13th century office of the King's Solicitor, developed to assist the King's Attorney represent the monarch's interests in court.[21]

Rules issued by the Government about how it will conduct the Crown's legal business in New Zealand have been in place in one form or another since 1932.[22] The common features of the rules are that successive governments confirm the law officers' constitutional responsibilities and affirm governments' commitment to be bound to them. The current version (issued in 2016) makes this plain:[23]

> The Law Officers, the Attorney-General and the Solicitor-General, have constitutional responsibility for determining the Crown's view of what the law is, and ensuring that the Crown's litigation is properly conducted.

That is, at its most basic, what my role entails: subject always to the senior law officer, the Solicitor-General's role is advisory (to come to an independent, authoritative (as within the Crown) view of the law), advocacy (both as to how the Crown should conduct itself in court and representing the Crown in court) and thirdly a responsibility for public prosecutions. I will come to each of these shortly.

So in New Zealand (but not always so in other jurisdictions), the senior law officer is (and has been since 1875) a politician and the junior law officer, a public servant. You might think there is scope for the critical constitutional function – determining the proper view of the law for the Crown to take – to be undermined or swayed by political interests or by wanting to ensure one stays in favour with the appointing government for job continuity.

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[21] Neil Walker "The Antinomies of the Law Officers" in Maurice Sunkin and Sebastian Payne (eds) *The Nature of the Crown: A Legal and Political Analysis* (Oxford University Press, Oxford, 1999) 135 at 136. Sir John McGrath sets out the historical background to the roles of New Zealand's Solicitor-General and Attorney-General: McGrath, above n 8, at 198–202.

[22] "The Cabinet Rules for the Conduct of Business referred to the Law Officers of the Crown" (21 June 1932).

[23] Cabinet Office Circular, above n 4, at [2].

And yet New Zealand has a constitutional structure that has endured over 140 years in which integrity of the law, the public interest and the Crown's long-term legal duties and obligations have been prominent in the workings of the law officers without very much prescription at all around the roles. We have not codified the law officers' roles. Much is done, as I have said, as in other aspects of New Zealand's constitution, by conventions, by a keen appreciation of principles and by the personal integrity of office holders.

The Attorney-General is the Hon David Parker. He is currently also the Minister for Economic Development, for the Environment and for Trade and Export Growth. He's the Associate Minister of Finance too. Holding dual roles within the ministry has long been a feature of New Zealand's Attorney-General – he or she is both the senior law officer and a policy portfolios holder.

Here we see even more sharply the potential for conflict or tension between the roles. How is this to be managed? Again, mostly, it is by conventions and by understanding the constitutional role of the law officers and how they contribute to the successive governments' authority to govern, according to law. But we are assisted in that by statute: as noted above s 9A of the Constitution Act provides that the Solicitor-General may perform any function or duty imposed on, or exercise any power conferred on, the Attorney-General. The reverse does not hold, however. The Attorney-General cannot exercise functions imposed on the Solicitor-General – where Parliament has required the Solicitor-General to exercise a function, the Attorney-General cannot exercise that function (this arrangement recognises the independence of the Solicitor-General).

So with very little prescription for more than a century, the Crown's law officers have assisted New Zealand's system of government operate according to law. The former Solicitor-General (and former Supreme Court judge) his Honour Sir John McGrath called this approach "sharing of law officer power".[24] And the relationship between the two law officers is critically important. It's not formalised; it just works. That's been my experience to date – both in my roles working for the Government all my working life and from the hot seat I now occupy. Successive

[24] McGrath, above n 8.

Attorneys-General and Solicitors-General work together to make it work, keenly aware of the need to avoid that conflict (or even perception of it), to ensure the independent workings of the law officers for the ongoing integrity of the Office and for the authority of successive governments to govern.

There are advantages, I think, in having an Attorney-General in Cabinet that outweigh any disadvantage of the risk, or perception, of a loss of independence. These advantages include seeding into the heart of the Government the conventions and principles on which the system operates, ensuring on a day-to-day basis the necessary courtesy as between the branches of government, understanding of implications of court decisions, and identifying need for additional legal input to ensure governments continue to govern according to law.

That the Attorney-General is also a politician works particularly well because of the established independence of the Solicitor-General.

Independence is critical when exercising law officer functions. But that is not to say the law officers should be distant or unconnected to the Government – in fact, as I will come to, the fact that I am also the chief executive of a government department is another advantage I see in ensuring effective law officer functioning. Independence comes from being free from the influence of any particular political or policy view; the Solicitor-General must be free to bring her independent opinion to bear and must be protected from any forces to the contrary.

Being embedded into the system of government itself does not detract from that independence. Both law officers are so embedded, and in my view that means there is no avoiding the oversight and influence of the Solicitor-General and Attorney-General. Not, I should hasten to add, that I have seen any suggestion that New Zealand's governments want to avoid the law or shirk their legal obligations. But the embedding of the law officers into the system is a virtue of our system that should not be overlooked. Most other jurisdictions do it differently, with a different mix of politicians holding one or both law officers' roles in some countries, and in others the role being briefed to the private bar. For example, other than in the Australian Capital Territory, Australia's Solicitors-General – both

federal and state – are private practitioners at the independent bar who are instructed from within the Government. I can – and do – "stick my nose into" other agencies' work and legal advice stream if I need to, in order to ensure the Government's legal obligations and risks are properly attended to. That would not be as readily possible from the private bar, which is used to operating on (and indeed is often obliged to operate on) instruction.

Sir John McGrath's influential and seminal work "Principles for Sharing Law Officer Power", already mentioned, begins by quoting Sir Ivor Richardson QC (when he launched Alex Frame's book on Sir John Salmond, *Salmond: Southern Jurist*[25]):[26]

> … the Solicitor-General of the day operates at the border of law and government in a society where traditionally the State has been very influential in social and economic development and inevitably there is a need to balance individual and community interests …

Operating at "the border of law and government" is such an ordinary description of what I consider to be the most extraordinary legal job in the public service and perhaps in the country. I say that with considerable bias – I have never worked in the private sector, never in a law firm or a corporate body. I have only ever worked in government departments.

It's a role I say is both ordinary and special: it's ordinary in that like many others I am a jobbing lawyer – giving advice and appearing in the courts. I am also – again, like many others – a public servant. And both those roles come with rules and obligations of conduct and performance common to many. Like all government departments, we are subject to oversight: by Parliamentary select committees and by the Ombudsman,[27] Privacy Commissioner[28] and Auditor-General.[29]

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[25] Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995).
[26] Ivor Richardson (address at the launch of Alex France's *Salmond: Southern Jurist*, 16 August 1995) as cited in McGrath, above n 8, at 197.
[27] Ombudsmen Act 1975.
[28] Privacy Act 1993.
[29] Public Audit Act 2001.

But the role of Solicitor-General is special too, as I have just outlined. I don't want to be seen as big-headed – to be emphasising this evening that the Solicitor-General (and, therefore, my Office) has a particular and significant constitutional function in the operation of the Government. And no matter which way you look at it, the Solicitor-General has an enormous responsibility for a large number of people (my Office and other lawyers in the Government) and for playing a significant role in maintaining the institution that is conducting our democratic government according to the rule of law.

This is a heady mix, I reckon – of duty and aspiration – and is probably what encouraged Sir Ivor Richardson to say that the role of the Solicitor-General is "potentially the most interesting and influential job a New Zealand lawyer can have".[30]

So, what do I really do?

First, in my advisory capacity, I am the most senior lawyer public servant. I am the principal legal advisor to the Government – any government. My role will continue for this Government and the next, whatever administration is elected – unlike the United States' Solicitor-General who, while not a politician, is an appointment so closely aligned to the president that he or she is considered political and stands or falls with the president. That's one of the very special aspects of being a public servant. Our function – whether legal, policy or operational – is to be neutral, assisting successive governments achieve their policy goals. And for us lawyers, this function includes advising them and representing their interests in court so that their policy goals can be achieved. It doesn't matter – it *must not* matter – if we personally agree or not with what the Government is wanting to achieve. The public servant is neutral in terms of politics in their work.

But of course, as I have outlined, the Solicitor-General also has a greater burden – a loyalty to the rule of law and to the Crown's long-term legal interests. This is why it's important to have independence from governments so that, when the

[30] Richardson, above n 26, as cited in McGrath, above n 8, at 197, n 1.

chips are down, the Solicitor-General is recognised as having the role of saying authoritatively what the Crown's view of the law is (or what the Crown should argue in court). That is subject only to the Attorney-General's power to really call the shots. But, given the Attorney-General is a politician, the function of "calling it" for the Crown side often falls to the Solicitor-General.

For this reason, the Solicitor-General's appointment is made under the royal prerogative, not an employment contract.[31] It's a role held "at pleasure" of the Governor-General – ensuring independence from the government of the day and avoiding any risk of having to please any government in order to hang on to your job. Another aspect of this inbuilt protection of the independent ability to advise fearlessly (which can be unpopular) is that the Solicitor-General's salary is determined by the independent Remuneration Authority.[32]

(The Solicitor-General of Oliver Cromwell's English Commonwealth, John Cook, was fearless. He led for the prosecution in the trial of King of Charles I in 1649 and was rewarded with execution for high treason after the Restoration. To my knowledge, he was the only Solicitor-General to be hanged, drawn and quartered.)

In the past, there was no performance measurement of the Solicitor-General by the State Services Commission, as there is for all other public sector CEOs, but these days the Commissioner does have a role in reviewing the performance of the chief executive functions of the Solicitor-General.[33]

### *III Who is My Client?*

It's quite easy to say, when you are asked at a party or similar gathering, what does Crown Law do, to say, "We're the Crown's law firm." People get that. We all know that lawyers are a necessary part of life to help you get stuff done, avoid trouble, protect your interests etc. Lawyers act for, or represent, their clients in order to (at least try to) get them what they want. But as I tell my colleagues

[31] Letters Patent Constituting the Office of Governor-General of New Zealand, art 10.
[32] Remuneration Authority Act 1977, s 12B(6).
[33] State Sector Act, ss 43 and 44(1A)(a).

when I speak at induction sessions of new recruits to the Office, that response misses our real purpose.

There's a tension to be managed here – along with my colleagues, who support me in this critical constitutional role, we serve the Crown and the rule of law. So who then are our clients and how do they feature in the equation, in the balancing of the Crown and the rule of law? If our client is a concept (the rule of law), we risk becoming arrogant providers of boutique legal service, without the hassle of client service obligations and the strictures of timeliness and value for money. But the modern Crown Law Office lawyer acts very much like a traditional lawyer with clients, and like many other lawyers, we bill for much of our advice and representation work in six minute units. I am proud of my colleagues and my Office, and we serve our clients well – we understand that client service is a critical part of having credibility as lawyers – even though the head of the Office, the Solicitor-General, finally determines the meaning of the law the Crown will adopt. To be effective and credible, to be *influential*, as we must be to discharge my constitutional responsibilities, excellent client service remains vital.

But we are not in a traditional client and solicitor relationship in which we are instructed on what the client wants to achieve in an instant case or policy development and then work to that instruction.[34] This is part of the burden. The Crown's collective and long-term interests sometimes require that we take a view that does not reflect the instructing department's view or desire (or as I have said, we stick our noses in whether we are "instructed" or not). I have to say that it doesn't happen terribly often, but when it does, it offers enormous difficulty in relationships between colleagues and can put pressure on the independent law officer. But the tension is inevitable – indeed, I say it's a virtue that our system of government has this built-in tension and an accepted way of resolving it (the law officers, if the dispute is about the meaning of the law). So we have to be open about that tension and talk about how we will resolve these issues when they arise. The Crown's house – as Executive government – has many objectives, competing risk tolerances and different outcomes pursued. The Executive must

[34] *Accent Management Ltd v Commissioner of Inland Revenue* [2013] NZCA 155, [2013] 3 NZLR 374 at [24] – 52]; and *Du Claire v Palmer* [2012] NZHC 934 at [112]–[115].

govern according to law and must also be seen to act lawfully. The Crown also prosecutes and brings offenders to justice, in a system that values the defendant's right to a fair trial[35] and other aspects of natural justice. In pursuit of all of this, of course, tensions arise – sometimes significant, other times the day-to-day garden variety tension that I just mentioned that seems inimical to a collaborative and collective method of lawyering that I value and promote.

Unlike all other government agencies, at Crown Law, we do not pursue particular policy or operational outcomes – we pursue the Crown's commitment to the rule of law, and at times, we deliver advice that is unpopular or seen to be obstructive to achieving policy or operational outcomes. So we cannot shy away from the tensions that emerge; we have to face them: constructively, with integrity and in a way that continues the principle of service to the Crown, the public and the rule of law.

The answer is never, "I am the Solicitor-General [or we are Crown Law] and therefore know the answer." Law is highly contestable – most of you will have worked that out by now? But within the indivisible Crown, we can only have one final view of the law. I cannot hope to have the influence I need to have in order to discharge my role by being arrogant about being right merely because the answer emanates from me or my Office. There are times, of course, when it is necessary for me to say, "That cannot be done" (or, at least, "It cannot be done in that way."). In some ways, it is in the advisory function that the real challenge for independence and obedience to the rule of law comes – if a matter arises in litigation or is challenged, there is another independent body, the court, to determine authoritatively what the law is. But, like that old expression, the real measure of a person's character is how she behaves when no one is looking, the real measure of the Solicitor-General's independence and influence is found when there is no external challenge, but she holds the line against a certain decision or approach anyway – and maintains enough influence with the Executive to hold sway.

[35] New Zealand Bill of Rights Act 1990, s 25.

The Solicitor-General's role, and that of the Office, has been cemented in place in modern terms in the "Cabinet Directions for the Conduct of Crown Legal Business" that I've already mentioned.[36] These set out that when Ministers and other government decision makers need legal advice on a range of core Crown related issues, they must come to the Solicitor-General. These issues include interpretation of statutory powers,[37] Tiriti o Waitangi matters,[38] criminal law,[39] protection of the revenue[40] and all litigation involving Ministers of the Crown or other public agency decision makers.[41] I get to oversee all that, and my Office – or lawyers we engage from outside the Office – are to do that work.

I have often said to my colleagues who are my clients that the set up we have here can make us the worst type of lawyer; our clients have to come to us (in core Crown matters), and we don't have to do what they want! And here is another part of the burden about how we act and how we deliver our legal services – it might sound like a terrific freedom to a lawyer, but it's a real constraint. It is a test of our value and of our real influence – that we are collegial and client-centred despite the monopoly-like nature of our workstream.

There is nothing as silly as thinking that my Office and I are influential simply because of who we are – we appreciate that our influence and leadership will not come because of the constitutional role, nor the Cabinet directions that give effect to that role by saying some Crown legal work must come to my Office. Success and delivering valuable services are not just about what we do but how we do it. I place people firmly at the centre of getting work done, and I need all Crown lawyers to do that too. If the work gets done, even if the result is objectively "good", but there is a scorched earth of relationships and people behind us, we will have failed. My personal values mean that I have real respect for people I am working with, and *how* I behave is as important as *what* I do. That mode of working means that those times when we are in dispute within the Crown whānau as to the right thing to do and the best meaning of the law, I am able to use those

[36] Cabinet Office Circular, above n 4.
[37] At [9.1].
[38] At [9.1.3.1].
[39] At [9.1.2].
[40] At [9.1.1].
[41] At [9.2].

strong personal relationships to find solutions and outcomes that – even if not agreed to by all – are sustainable because of the process of how we got there.

The Solicitor-General is also the Government's senior advocate in the courts. There are times when the courts expect to hear from the Solicitor-General and times when the Crown will want to put its most senior lawyer before the court to argue its points.

Under our constitutional arrangements, the Attorney-General is responsible through Parliament to the citizens of New Zealand for prosecutions carried out by or on behalf of the Crown. In practice, however, the prosecution process is superintended by the Solicitor-General, who, pursuant to s 9A of the Constitution Act, shares all the relevant powers vested in the office of the Attorney-General. These arrangements are now codified in s 185 of the Criminal Procedure Act 2011, which sets out the Solicitor-General's responsibility for oversight of public prosecutions.

Crown prosecutions are mainly conducted by Crown Solicitors – private practitioners appointed to prosecute under a warrant issued by the Governor-General.[42] Lawyers throughout the country – 16 of them – are appointed Crown Solicitors on warrant (there are 16 Crown Solicitors and 17 warrants – this is a good trivia question – because one Crown Solicitor currently holds both the Napier and Gisborne warrants). They conduct Crown prosecutions according to law – of course – but also under the *Prosecution Guidelines* issued by the Solicitor-General, which state:[43]

> The purpose of these Guidelines is to ensure that the principles and practices as to prosecutions in New Zealand are underpinned by core prosecution values. These values aim to achieve consistency and common standards in key decisions and trial practices.

[42] Criminal Procedure Act 2011, s 5 definition of "Crown solicitor".
[43] Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013) at [1.1].

Public Prosecutions are conducted within many agencies, for example IRD, Police, Ministry for Primary Industries, Ministry of Social Development – and many others – have a specific function for prosecuting regulatory offences.[44]

(Crown prosecutions are proceedings for high end serious crimes, "category 4 offences" if you know the area;[45] proceedings for certain offences listed in the schedule to the Crown Prosecution Regulations 2013;[46] proceedings where a defendant elects trial by jury;[47] proceedings transferred to the High Court;[48] or proceedings that the Solicitor-General (for whatever reason, "having regard to the particular features of the proceeding") says are appropriate to be a Crown prosecution.[49])

There's an old saying: "The Crown enjoys no victories and suffers no defeats." While we might say that these days to cheer ourselves up when we are on the losing end of litigation, it references the Crown's particular role as prosecutor – the overarching duty of a prosecutor is to act in a manner that is fundamentally fair; fairness of process is critical. Crown prosecutors must perform their obligations in a detached and objective manner, impartially and without delay.[50] They must protect the right to a fair trial. Their role is not to strive for a conviction. While they represent the Crown, it's not the same as representing a party in litigation. Representing the Crown in a prosecution requires attending to the Crown's interests and obligations in a fair criminal trial process and preserving the integrity of the criminal justice system. Crown prosecutors must present the Crown case independently (of any agency from which the matter arose)[51] and dispassionately.

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[44] The *Guidelines* apply to public prosecutions conducted by government agencies: at [2.1]. These are defined at 3 as:

> All departments listed in Schedule 1, State Sector Act 1988 and Crown entities as defined in the Crown Entities Act 2004 who have the ability to commence and conduct prosecutions, and the New Zealand Police.

[45] Crown Prosecution Regulations 2013, reg 4(1)(a). See Criminal Procedure Act, sch 1.
[46] Regulation 4(1)(b).
[47] Regulation 4(1)(c).
[48] Regulation 4(1)(d).
[49] Regulation 4(1)(e).
[50] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.12.
[51] Criminal Procedure Act, s 193.

In the criminal sphere, the Solicitor-General has some particular functions – deciding whether to appeal (our Office conducts most criminal appeals),[52] deciding whether to approve a plea arrangement where the original charge was murder (for example, if a defendant would plead to a lesser charge such as manslaughter)[53] and deciding whether to stay a proceeding.[54]

There are also a number of statutory functions throughout the statute book – from overseeing criminal prosecutions[55] and conducting criminal appeals,[56] to ordering second inquests (on any new facts after the coroner decided not to open an inquiry into a death),[57] to being a person to whom a whistleblower may disclose information under the Protected Disclosures Act 2000,[58] to supervising the Director of Military Prosecutions.[59]

Last, but definitely not least – and this is not a traditional law officer function but has been the junior law officer's role in New Zealand since 1875[60] – I am also the chief executive of a public sector government department, the Crown Law Office and professional head of over 800 lawyers in central government.[61] In this role, I am a leader of people – and of a whole lot of lawyers, many of whom I do not employ. So I have a huge responsibility to them (for their development as lawyers and their satisfaction day-to-day, especially those in Crown Law).

Since I took on this role in 2016, we've been asking, "What is the Crown Law that New Zealand needs?" Our role as public servants means that we must consider the benefit to New Zealand and New Zealanders of having Crown Law and ask, "Why are we here?"

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[52] Cabinet Office Circular, above n 4, at [29]; and Criminal Procedure Act, s 246(2). See Crown Law, above n 43, at [26].
[53] Crown Law, above n 43, at [18.9].
[54] Criminal Procedure Act, s 176; and Constitution Act, s 9A. See Crown Law, above n 43, at [25].
[55] Criminal Procedure Act, pt 5 sub-pt 2.
[56] Section 322.
[57] Coroners Act 2006, s 97.
[58] Protected Disclosures Act 2000, s 3(1) definition of "appropriate authority", para (a)(viii) and s 9.
[59] Armed Forces Discipline Act 1971, s 101K.
[60] WS Reid, Assistant Law Officer in the Crown Law Office, an independent department since 1873, was appointed Solicitor-General in 1875: PA Cornford "Crown Law Office – Early History [1964] NZLJ 423 at 424.
[61] Government Legal Network "About the Network" (2014) <www.gln.govt.nz>.

We think that the answer to that lies in three outcomes that we have put at the front of Crown Law's new strategic direction: "demonstrably better government decisions", "improved criminal justice" and "strengthened influence of the rule of law".[62] I reckon that's why we have a Crown Law Office – and what makes us a very special part of the government system.

As I've said, nowhere else in countries to which we compare ourselves is the Government's department of lawyers headed by the junior law officer (except the Australian Capital Territory). Perhaps the tensions of all of the roles I have mentioned in one office holder have seemed too great to manage. But for myself, I like the way it is set up here. I am able to be involved at many stages in legal matters because either our Office or lawyers in the Government are dealing with them. Unlike, say, in Australia, where the Solicitor-General sits at the independent bar and exercises their role from there, I do not need to be briefed by in-house lawyers. Lawyers all through the system have unparalleled access to the Solicitor-General, and in turn, the Solicitor-General has a unique view of the issues, the risks and the opportunities facing successive governments, the Crown and how those matters might play out in the courts. Like his Honour Justice David Collins, who was Solicitor-General between 2006 and 2012 and who wrote on this topic,[63] I think that structure offers more benefits than a bifurcated model (which might either split out advisory from advocacy or split out law officer functions from administrative head or chief executive functions).

As head of Crown Law and professional head of all lawyers in the Government, I see terrific advantage in effective law officer functions for the benefit of New Zealand and New Zealanders, now and into the future. My vision is to harness the collective value to successive governments from employing so many lawyers and deliver real and ongoing value to the Crown in the stewardship of its long-term interests. Easy to say and not so easy to achieve. What do I mean?

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[62] Crown Law *Statement of Intent: 2018–2022* (E33 SOI, 2018) at 4 and 7–9.
[63] David Collins "The Role of Solicitor-General in Contemporary New Zealand" in Gabrielle Appleby, Patrick Keyzer and John M Williams (eds) *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing, Surrey, 2014) 171.

First of all, the Crown employs over 850 lawyers within its departments, or over 1,200 if you count Crown entities (that is, entities like ACC or the Tertiary Education Commission that are not core government departments but still deliver for the Government).[64]

So, over 850 or 1,200 in-house government lawyers – that's a big in-house capability by any standard. Is the Crown getting the best value out of that investment – and liability? The Government spends about $214 million on its in-house lawyers. So when the Government asks me – what if we banked that money instead and spent it on law firms and the private bar, thus avoiding the ongoing cost and liability (leave, holidays, etc) of the employment relationship – what do I say?

The answer lies in understanding our value proposition. The usual proposition applies for in-house legal: we know the context in which we are working, the business and other risks. We understand what the Government is trying to achieve – and we can assist them to get there. The same downside applies too – the in-house lawyer can get tunnel vision and lose sight of the wider context. That's where collective leadership and networked thinking as the Government's uber-legal team comes into play. This is the pool I want to draw on to deliver system value to the Government and the Crown. My colleagues in agencies have the context of the agency and what it's there to achieve; collectively, the Government's lawyers have good understanding of the context that the Government is operating in. We at Crown Law can provide a unique insight into the direction the law is going (we have both a system view and a court view) as well as spotting likely pitfalls (the litigator's "nose", developed through experience – there is nothing like appearing before the courts to get a good appreciation for how something might fly, or fail, at that last hurdle!). We are also well placed to identify wider principles that might be relevant, such as Treaty principles, the rule of law and natural justice. And our colleagues in the private sector, in firms and at the bar have significant expertise and resources we can draw on.

[64] Government Legal Network, above n 61.

At Crown Law, I stand at the centre of the system, and through our Office we have – and can offer – a unique whole picture view. That is incredibly valuable. And we carry the burden of ensuring that the Crown's long-term interests are taken into account and that governments govern according to law.

The future of lawyering lies in a very different approach to the traditional one-stop shop approach to advice or representation. More and more, we are seeing what's being called "unbundling" of legal services to ensure the most efficient, best use of differing skill sets. To me, delivering best value to governments from its cohort of lawyers is about collaborative lawyering at a significant level and not the transactional, traditional solicitor and client relationship. My role is certainly not one of a traditional solicitor, as I've said. That's too transactional for me and risks my role being seen as an option or a means to an end rather than, through my constitutional function, a significant contributor to the solution or end point. By harnessing our expertise, our understanding of context and consequence throughout the legal network, and by working in a truly collaborative way together, we will deliver the best legal service for governments committed to law.

We cannot rest on our constitutional role to be influential – we have to find ways to show we are credible and influential lawyers who decision makers want brought in early to matters and decision processes. But, if we are not brought in early, we need to be agile and adaptable: to move quickly and authoritatively through an issue, understand our constitutional function and exercise that fearlessly (but sensibly!).

All of the lawyers in the Government's networks, including the Crown Solicitor Network and public prosecution lawyers, are critical enablers of my vision. I cannot do it alone, nor can my Office do it alone. I see my role as a driving force to Crown Law, being a significant contributor through collective leadership of the government legal community to the Crown's long-term legal interests being protected, legal risks being managed and integrity of the law being upheld.

I'm really proud to be a public servant in New Zealand. And I'm enormously proud to be the Solicitor-General. As I have said throughout, being Solicitor-General is both an amazing privilege and a considerable burden. I'm happy to undertake it.

I hope I discharge the function well – but others will judge that, not me. Till then I will do my best, driven by strong values of service to the Crown, obedience to the rule of law and service to the public.

No reira
Rau rangitira mā
Tenei taku mihi atu ki a koutou
Tēna koutou, tēna koutou, tēna tātou katoa