

Crown Law Office

Briefing paper for the Attorney-General

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Foreword

Purpose of briefing

This briefing has been prepared by the Solicitor-General, as the junior law officer of the Crown, to explain how the Solicitor-General and the Crown Law Office are currently conducting the Crown's legal business.

The briefing is intended to form the basis for discussion with the Attorney-General as to how the Attorney wishes the Solicitor-General to discharge the Attorney-General's functions in government. In particular it is intended to ascertain if the Attorney's view on the roles of the Solicitor-General and the Crown Law Office coincides with present practice.

Themes

The principal theme emerging from this briefing is the importance of the role of the Attorney-General in ensuring an understanding and acceptance within the government of the community of the values encapsulated in the phrase "the rule of law".

A key role for the Solicitor-General and the Crown Law Office is to provide support for the Attorney-General in the performance of this role. The briefing establishes a basis for discussion with the Attorney as to the best way in which the Solicitor-General and the Crown Law Office can provide this support.

J J McGrath
Solicitor-General

Attorney-General

INTRODUCTION

1. The Attorney-General has two roles in Government. The first is that of a Minister of the Crown with ministerial responsibility for the Crown Law Office, the Serious Fraud Office and the Parliamentary Counsel Office¹. Traditionally in New Zealand the Attorney-General also has policy portfolio responsibilities not connected with those of the Attorney-General. The second role is that of the senior Law Officer of the Crown with principal responsibility for the government's administration of the law. The latter function is exercised, together with the Solicitor-General, who is the junior Law Officer. The Attorney thus has a unique role that combines duties of independence with the political partisanship that is otherwise properly associated with other Ministerial office.
2. The fundamental responsibility of the Attorney-General, when acting in that capacity, is to act in the public interest. The management of the inevitable conflicts of interest that arise is facilitated in New Zealand by the fact that the Solicitor-General is a non political law officer, who is available to advise and assist on and, where appropriate, to discharge law officer functions. The Solicitor-General is generally authorised by statute to exercise the functions of the Attorney-General, thereby clearly isolating, when that is considered desirable, law officer decision-making from the appearance of political influences.²
3. In exercising that constitutional role the Attorney-General, as a Minister and member of the Cabinet, seeks to ensure that:
 - 3.1 the operations of executive Government are conducted lawfully and constitutionally; and
 - 3.2 the Government is not prevented through abuse of the legal process from lawfully implementing its chosen policies.
4. These constitutional responsibilities are reflected in the functions of the Crown Law Office. Sometimes they are referred to as "the Attorney-General's values".

¹ Responsibility for the Parliamentary Counsel Office arises under the Statutes Drafting and Compilation Act 1920. That Office, strictly, is not a government department.

² The Constitution Act 1986 was amended in 1999 to add provisions recognising the office of the Solicitor-General and the ability of the Solicitor-General to exercise the powers of the Attorney-General (s 9A). Those provisions succeed similar provisions in the now-repealed Acts Interpretation Act 1924 and in the Finance Act 1952 (No 2).

ROLE AND FUNCTIONS

History of the office

5. The Office of Attorney-General was one of the British constitutional institutions adopted in New Zealand. In early colonial New Zealand the Attorney-General was one of the three permanent officials of the Executive Council (the others being the Colonial Secretary and the Colonial Treasurer). Although legislative authority has existed at various times for the office, there is presently no statutory basis establishing it. The fact of the appointment is recognised in New Zealand courts. The office holder, by virtue of the appointment, assumes responsibilities conferred by statute and common law. The various facets of the role are dealt with in turn.

Principal Legal Adviser

6. The Attorney-General is the principal legal adviser to the Government, in that capacity having similar responsibilities of any legal adviser towards a client. The Attorney-General is also usually a member of the Cabinet. In Cabinet and Cabinet Committee meetings, the Attorney-General's role includes giving legal advice and encouraging Ministerial colleagues to seek appropriate legal advice in the course of government decision-making.
7. The Attorney-General has overall responsibility for the conduct of all legal proceedings involving the Crown, and can be expected to keep his or her fellow Ministers generally informed of the initiation and progress and outcome of such proceedings against or by the Government.

Representation in the Courts

8. The Attorney-General is the principal plaintiff or defendant of the Government in the courts.³ Judicial review proceedings usually name the relevant Minister of the Crown or other decision maker involved. Generally proceedings involving Ministers and Departments will be handled by the Crown Law Office for the Attorney-General and governmental interests directly affected (although the Solicitor-General will brief particular matters to outside counsel in appropriate circumstances). All proceedings are served on the Crown Law Office, and the Solicitor-General or Crown Counsel allocated responsibility will act in the usual way. The Attorney-General has occasionally appeared personally as counsel for the Crown in the past including appearances before the Court of Appeal and the Privy Council. There are however some risks in doing so in criminal proceedings. The Attorney-General has also appeared before the International Court of Justice.

Principal Law Officer of the Crown

9. As a Law Officer, the Attorney-General has, and with the Solicitor-General exercises, powers, functions and duties related to the proper administration of justice and the public interest. The Attorney-General's functions with respect to the Criminal Justice system are discussed separately below.

³ See the Crown Proceedings Act 1950.

Protector of Charities

10. The Attorney-General's responsibilities in this area, outlined in the Charitable Trusts Act 1957, are exercised by the Solicitor-General or by delegation to a Deputy Solicitor-General.⁴ There are two main aspects to these protective responsibilities: first, the notion that charitable purposes need protection as vested interests by an officer acting in the public interest as there may be no beneficiaries to enforce them; and second, the need for charitable bodies to be scrutinised in the public interest.
11. The Solicitor-General, on behalf of the Attorney-General, reports or approves schemes to vary charitable trusts; may appear as a party to charity proceedings and act for the beneficial interest to enforce charitable purposes; monitors and, at request, may advise persons and select committees on legislation involving charitable trusts; and in the public interest investigates the management and administration of charitable trusts.
12. It is timely to consider whether the investigation function should remain with the Crown Law Office or whether it is more appropriately that of another Department. The work requires a level of accountancy and commercial expertise suggesting it may more appropriately be handled by the Ministry of Commerce. A separate report will be prepared on this issue.

The Public Interest

13. The Attorney-General through the Solicitor-General traditionally lends assistance to citizens seeking to enforce the law in circumstances where there is no individual right to initiate proceedings. The relaxed requirements of legal standing mean these proceedings are now uncommon. Relator proceedings were however authorised this year in relation to a dispute over entitlements to Telecom's phone cards. The proceedings were eventually settled. The Attorney-General also has a responsibility to ensure that lawful avenues of redress are not abused by vexatious litigants. In a number of instances the Attorney-General's permission is needed in order to prosecute and his or her consent required before civil proceedings can progress.
14. The Attorney-General can also intervene in the public interest in proceedings to which the Attorney-General is not already a party. A recent example of this occurring was in the case involving Liam Williams-Holloway where news media organisations challenged an order of the Family Court restricting publication of material with respect to the search for Liam and his parents.⁵
15. The Attorney-General can represent the public interest in the administration of justice and, where appropriate, take legal action to see that the law is observed and justice is done in both criminal and civil proceedings. An illustration of this role with respect to civil proceedings is the case of *Attorney-General v Maori Land Court* [1999] 1 NZLR 689 (Court of Appeal). An application for judicial review was brought with respect to the jurisdiction of the Maori Land Court to deal with land owned by a local authority.

⁴ The Constitution Act 1986 was amended in 1999 by insertion of s 9C to allow the Solicitor-General to delegate functions to a Deputy Solicitor-General.

⁵ *NPANZ v Family Court* [1999] 2 NZLR 344.

The case raised issues of general importance about the scope of the Maori Land Court's jurisdiction over General Land or Crown Land.

Miscellaneous Statutory Functions

16. There are a considerable number of powers, duties and functions conferred or imposed on the Attorney-General under particular statutes. A list of these powers is **attached** as an appendix. These can be elaborated on, if you wish.
17. In terms of Regulation 3 of the Queen's Counsel Regulations, the appointment of Queen's Counsel is made by the Governor-General on the recommendation of the Attorney-General and with the concurrence of the Chief Justice. The Practice Note setting out procedures governing the appointment process is **attached** as an appendix. You will see that the Practice Note provides that applications for appointment must be with the Solicitor-General no later than 28 February in any year.

Representation on Bodies

18. The Attorney-General is a member of various bodies, including the High Court Rules Committee charged with responsibility for developing the High Court Rules. The Attorney-General is also a member of the Council for Law Reporting which has responsibility for the publishing of the New Zealand Law Reports. In all cases the Solicitor-General is also a member and can undertake the task of representation in the Attorney-General's absence, either personally or by delegation. It is appreciated that ministerial commitments preclude any more than occasional attendance by the Attorney-General at such meetings. However active participation in the deliberations of the Rules Committee could at some stage be desirable on specific issues of high policy especially if the Government and judiciary are likely to have different views.

Independence

19. In exercising the powers, functions and duties as a Law Officer, the Attorney-General (and the Solicitor-General) is expected to disregard any political interest or partisan advantage/disadvantage to the Government or opposition parties. However the public interest on any given issue cannot be determined in isolation from practical realities and may require that political factors be considered along with others. The crucial point is that in advising and making decisions, both law officers must not make decisions with the aim of securing any political or other Governmental advantage.

Relationship with the Judiciary

20. The Attorney-General carries the principal responsibility in government for the relationship of the executive government with the judiciary. The Attorney-General also has responsibility for the appointment of members of the judiciary, namely the Court of Appeal, High Court, and District Court judges. The Constitution Amendment Bill would allow for the Attorney-General to be the recommending Minister for all appointments except the Chief Justice and Judges of the Maori Land Court.
21. The recent changes to the process of appointments for High Court judges are briefly discussed below.

22. The Attorney-General by convention in New Zealand also has a particular responsibility for protecting the judiciary from improper and unfair criticism, for example, by answering attacks on their decisions and by actively discouraging other Ministers from engaging in improper attacks or criticism.
23. Also important to the effective functioning of the judiciary is that people who act in a manner that interferes with the administration of justice in particular cases are made accountable. It is the Law Officers' responsibility (in practice undertaken by the Solicitor-General) to bring proceedings for contempt of court in such cases. The most common instance is pre-trial media publicity of a kind that tends to prejudice a specific criminal trial before a jury.

Appointments to High Court

24. As you will be aware, a new process is in place for the making of appointments to the High Court. The detail of the process is set out in a brochure prepared by the Judicial Appointments Unit, a copy of which is **attached** as an appendix. The key new features of the process are as follows:
- 24.1 regular publication of advertisements calling for expressions of interests for those interested in appointment to the High Court;
 - 24.2 requirement that all prospective candidates for appointment complete a formal expression of interest;
 - 24.3 more formalised consultation process which includes a formal opportunity for those consulted to nominate prospective candidates.
25. We need to discuss any changes the Attorney-General desires to be made to the process shortly. Another matter which now needs to be addressed is the appointments process for Masters.

Judicial complaints

26. Immediately prior to his retirement, the previous Chief Justice obtained the agreement of the Heads of Bench to a more formalised system for dealing with judicial complaints.
27. The system provides for complaints about the conduct of a judge to be directed to the relevant head of bench. The head of bench has an obligation to facilitate consideration of the complaint by the relevant judge. Where it is concluded that there is no basis for the complaint, the complainant has the opportunity to refer the matter to a lay observer. The lay observer can recommend that the head of bench facilitate a reconsideration of a complaint.
28. This system does not go as far as other models adopted elsewhere, for example, that adopted in Canada. Further, there has been limited opportunity for considering the appropriateness and utility of this process to date.

Constitution Amendment Bill

29. You will be aware of the Constitution Amendment Bill which is one of the Bills carried over by the previous Parliament. The Bill would apply the removal procedures applicable for High Court Judges to a much broader range of judicial officers. The Bill would also extend the judicial immunity applicable to High Court Judges to that same range of judicial officers.

Terms and conditions

30. The Ministry of Justice is undertaking work on aspects of the terms and conditions of both Masters and District Court Judges.

Future of appeals to Privy Council

31. As you will recall, proposals for the abolition of appeals to the Privy Council in 1995 proceeded to the stage of a Bill being introduced which has been carried forward but has not proceeded to the stage of a Select Committee hearing. A considerable amount of work has been done on this matter and is available to you should you wish to pursue the issue.

The Attorney-General and Parliament

32. As a Minister, the Attorney-General must answer to Parliament for the actions of the agencies under the Attorney's ministerial control (Crown Law, Serious Fraud and Parliamentary Counsel Offices), and for the exercise of law officer powers.
33. The Attorney-General also has special responsibilities to Parliament in relation to legislation. These underscore the independence with which the duties of the Attorney-General must be exercised.
- In terms of s 7 of the New Zealand Bill of Rights Act 1990, the Attorney-General reports to the House of Representatives any provision in a bill introduced to Parliament that is inconsistent with the Bill of Rights.⁶
 - The Attorney may also approve the giving of legal advice by the Crown Law Office to Parliamentary select committees if they seek legal assistance. Recent occasions on which this has occurred include the provision of advice by the Solicitor-General to the Finance and Expenditure Committee in its inquiry into the Inland Revenue Department. The main role of the Office is however to advise the Government and the provision of advice to select committees accordingly should be in limited circumstances.

⁶ For all bills apart from those for which the Minister of Justice has responsibility, the Attorney is advised on this matter by the Ministry of Justice reflecting the view that in its preliminary stages the Bill of Rights vetting process raises policy matters. To avoid any perception of a conflict of interests, bills promoted by the Minister of Justice are vetted by the Crown Law Office which then advises the Attorney-General. The Crown Law Office will also advise in any case where an adverse report to the Attorney is contemplated.

- By convention the Attorney-General is also Chair of Parliament's Privileges Committee.

Attorney-General's functions in relation to the criminal justice system

Introduction

34. The Attorney-General traditionally heads the justice system. The supervision of criminal prosecutions is one of the areas in which the Attorney-General (with the Solicitor-General) exercises powers, functions and duties relating to the proper administration of justice in the public interest.
35. Prosecution is a key part of the administration of justice. Prosecutions must be carried out independently from the exercise of executive power. The public interest requires the interests of society to be upheld in a principled way. There is a need for the supervision of the exercise of prosecutorial discretion especially since prosecution decision-making is not other than in extreme cases subject to judicial review.
36. By tradition, successive Attorney-Generals have preferred not to become directly involved in the areas of prosecution or Law Officer decisions by the Solicitor-General in relation to criminal proceedings. The reason for this convention is to prevent the administration of criminal law becoming a matter of political decision-making. The Solicitor-General is of course accountable to the Attorney-General for the overall supervision of criminal prosecutions.

Division of responsibilities

37. It has accordingly been usual for the Solicitor-General rather than the Attorney-General to exercise the following Law Officer functions and powers:
 - 37.1 The Solicitor-General usually exercises the statutory powers in the criminal law process to approve those prosecutions which require the consent of the Attorney-General, to decide whether to enter stays of prosecutions precluding them from proceeding, to grant any witness or other person immunity from prosecution, and to deal with requests from other countries for extradition and mutual criminal assistance.
 - 37.2 The Crown has a right of appeal against inadequate sentences imposed against defendants under s 382(2) of the Crimes Act 1961 and s 115A of the Summary Proceedings Act 1957. This is a function that under the legislation can be exercised only by the Solicitor-General. This maintains consistency and integrity in the process.
 - 37.3 The Solicitor-General is also made directly responsible by statute for the representation of the Crown's interests before the courts when convicted persons appeal against their convictions or sentences.
38. The Solicitor-General, through Crown Counsel from the Criminal Team within the Crown Law Office, usually represents the Crown on criminal appeals to the Court of

Appeal. Crown Solicitors and counsel in their firms are sometimes briefed to undertake this work on instructions from the Crown Law Office.

39. The present system ensures that these appeals are conducted by counsel with particular expertise in appellate advocacy who can bring greater objectivity to the appellate argument not having personally prosecuted at the trials. Where the complexity of a matter warrants it prosecuting counsel will be briefed as to the appeal. However counsel within the Crown Law Office who regularly conduct these appeals also develop a depth of understanding of the principles of criminal law, evidence and criminal procedure, which is of invaluable assistance to the court.
40. Almost all of the Attorney-General's functions, duties, and powers can be exercised or performed by the Solicitor-General. Constitutional responsibilities mean this applies only to the Law Officer and not to Ministerial functions. The exercise of power is an original exercise, not a delegation by the Attorney-General. There are also some powers which can be exercised only by the Attorney-General. The reclassification of special patients under the Criminal Justice Act 1985 is one of these. Equally there are some functions which are specially vested by statute in the Solicitor-General. These include the power to appeal what is considered to be inadequate sentences imposed on defendants referred to above and powers under the Coroners Act 1988 to authorise an inquest into deaths occurring outside New Zealand and to authorise fresh inquests.

Crown Solicitors

Role and Relationship

41. Criminal proceedings in New Zealand are initiated by the Police. The Police also prosecute summary offences and act independently in deciding to conduct both investigation and prosecution. If a matter in the summary jurisdiction is complex or difficult a Crown Solicitor may be instructed to carry out the summary prosecution by the Police. Crown Solicitors are legal practitioners (generally in private practice) whose main responsibility is to conduct the prosecution of jury trials in the High and District Courts for the Crown. Their focus in this work is presenting the case in court on the basis of the evidence that the Police have gathered for the committal process. They do not act for defendants or accused. They have expertise in the criminal law and experience in interpreting the particular professional and ethical obligations of fairness required of a prosecutor. The role also involves providing independent advice to the Police on matters associated with the prosecutions and may involve advice and legal representation on Government department prosecutions. Crown Solicitors also have partners and employees who conduct some of the prosecutions described above for the Crown Solicitor.
42. The Police also initiate indictable matters and take responsibility for their progress to committal for trial. However, once a person has been committed for trial in an indictable matter the responsibility ceases to be that of the Police and becomes that of the Crown Solicitor. Their independence from the Police in the discharge of their functions is one of the protections of the citizen.
43. There are currently 17 Crown Solicitor warrants for different centres in New Zealand all issued by the Governor-General:

- 43.1 15 are held by private practitioners in law firms; and
- 43.2 two are held by the Deputy Solicitor-General (Criminal) and are administered in the Crown Law Office.
44. The Solicitor-General makes recommendations for the appointment for Crown Solicitors and, wherever necessary, termination of their warrants. In essence the Crown Solicitor operates under a delegated authority from the Law Officer function.
45. Crown Solicitors report to the Solicitor-General on the conduct of the criminal prosecutions they undertake for the Crown. The current *Solicitor-General's Prosecution Guidelines* for the conduct of prosecutions are attached as an appendix. Those guidelines are currently being revised to ensure they remain a sufficient basis for the conduct of prosecutions.⁷
46. The day to day supervision and management of Crown Solicitor prosecutions is carried out through the Deputy Solicitor-General (Criminal) on behalf of the Solicitor-General as set out below.
- 46.1 The Crown Solicitors are required to follow the *Solicitor-General's Prosecution Guidelines* in the conduct of their prosecutions. On some specific matters, e.g. the acceptance of a guilty plea to manslaughter during the course of a murder trial, Crown Solicitors are obliged to refer the question to the Crown Law Office for decision.
- 46.2 The Crown Solicitors are obliged to refer to the Crown Law Office law officer matters arising in any of their prosecutions. Some legislation also requires the Crown Solicitors to approach the Solicitor-General on matters relating to their prosecutions.
- 46.3 The Solicitor-General requires all Crown Solicitors to operate a Crown prosecution panel consisting of one or more local practitioners outside of the Crown Solicitor's firm who are periodically briefed to conduct indictable prosecutions on behalf of the Crown Solicitor.
- 46.4 The Crown Law Office administers the payment of Crown Solicitors' fees pursuant to the Crown Solicitor Regulations 1994. The Office has devised protocols for Crown Solicitors for charging and approvals required under those Regulations. As well, the Office has developed financial management guidelines for the payment to Crown Solicitors for their prosecutions.
47. Government Departments can conduct in house their prosecutions in the summary jurisdiction. Such prosecutions arise out of legislation which regulates fisheries, agriculture, indecent publications, and the like. In complex cases Crown Solicitors may be instructed to conduct such prosecutions. If such a prosecution involves the committal of a person for trial by jury, the trial is conducted by or on the instructions of a Crown Solicitor.

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The Law Commission is due to report shortly on a number of aspects of the prosecution system, including consideration of the state's involvement in the prosecution function.

Crown Solicitor Performance Review

48. The Crown Law Office engages on a process of rolling review of all Crown Solicitors who operate from private law firms. This performance review process is carried out on a consultative basis with both the Crown Solicitor involved and other parties in the criminal justice system. The review is carried out by the Deputy Solicitor-General (Criminal) and an independent reviewer.
49. The review is undertaken according to a structured process designed to obtain information about the conduct and quality of prosecutions conducted by Crown Solicitor, his partners and staff. It is also designed to assist the Crown Solicitor to improve performance, if necessary, and to provide an opportunity for the Crown Solicitors to develop their practice in ways that encourage excellence in the carrying out of their obligations.
50. The intention of the review process over time is to provide better accountability, consistency and quality over the Crown Solicitor network in the delivery of the Crown prosecution function.
51. The review process also provides information on criminal justice issues which have wider application. If the issues are important, the Crown Law Office can then take up these issues with the appropriate authorities.

Serious Fraud Office Prosecutions

52. Under the Serious Fraud Office Act 1990 the Serious Fraud Office was set up to detect, investigate and prosecute cases of serious and complex fraud. In deciding to investigate and prosecute, the Director acts and operates independently. When the Director has determined that a prosecution should commence the actual prosecution is carried out by senior barristers in private practice.
53. The Solicitor-General, in consultation with the Director of the Serious Fraud Office, appoints these barristers to a prosecution panel. The Director determines which member of the panel should prosecute any particular case. The panel members are independent of the Serious Fraud Office and the intention is that they bring an objective approach to the prosecution. Indictments are laid in the name of the Solicitor-General, although the prosecution continues to be managed by the Serious Fraud Office. Serious Fraud Office prosecutions on indictment are supervised by Crown Law Office in much the same way as those of the Crown Solicitors.
54. In conducting a Serious Fraud Office prosecution on indictment these panel members are required to follow Crown Law Office protocols in their conduct of the prosecution. This involves regular reporting to the Deputy Solicitor-General (Criminal).
55. The prosecutions are billed to Crown Law Office pursuant to Crown Solicitor Regulations 1994. There is an exception operating for these prosecutions relating to preparation time allowed because of their complexity and nature.

Criminal Procedure

56. The complexity of the criminal procedure legislation and low priority of measures for procedural reform has been the subject of expressions of concern from the courts for some time. In *R v Webber and Iese* (CA 379/98; 18 December 1998) the Court of Appeal recorded its “continuing strong concern that unnecessarily complex and confusing procedural provisions of the criminal legislation are causing difficulties for those engaged in the busy work of the criminal courts. We recommend very early legislative consideration.”
57. This observation mirrors oral comments regularly received by Crown Counsel appearing in the Court. Recently, the Court began another judgment in the following terms:
- “Once again on appeal against sentence imposed by a District Court Judge for serious offences has been derailed by the unnecessary confusion caused by the complex provisions divided between the District Courts Act 1947 and its schedules, the Summary Proceedings Act 1957 and its schedules and the Crimes Act 1961 We call attention once again to the need to set out the law in an accessible form (*R v Binnie*, CA 261/99; 6 September 1999).”
58. Similar issues were also raised orally in *R v Blaikie*, CA 386/99; 22 September 1999 which concerned bail appeal provisions. The issue generally can be seen not so much as one of reform but more of restructuring and consolidating the legislation in an accessible form which is internally consistent. This is a matter requiring urgent attention from the incoming Minister of Justice.

SOLICITOR-GENERAL

Introduction

59. Holding office under an appointment (under prerogative rather than statutory power) from the Governor-General, the Solicitor-General is:
- Chief Executive of the Crown Law Office.
 - Chief legal advisor to the Government, subject to any views expressed by the Attorney-General.
 - The government’s chief advocate in the courts.
 - Responsible for the conduct of the prosecution of indictable crime.
 - Responsible for the provision of constitutional advice to the Government and to the Governor-General.
 - Has a number of statutory duties and functions, in particular in relation to the administration of criminal justice.

Roles and Functions

60. Importantly, the office of the Solicitor-General is a non-political one.

Chief Executive

61. As the head of an office which is a department of Government, the Solicitor-General has the responsibilities of a chief executive under the State Sector Act 1988. In practice, with the authority of successive Attorneys-General many of the departmental management functions are delegated to the Practice Manager of the Crown Law Office. This reflects the reality that the Solicitor-General's responsibilities as the Government's chief legal adviser and advocate take up the substantial available time. Unlike most other chief executives, the Solicitor-General is not appointed under the State Sector Act 1988. That Act indeed recognises the Solicitor-General's independent status in Government. In terms of s 44 of that Act, the Solicitor-General (in common with the State Services Commissioner, the Commissioner of Police and the Controller and Auditor-General), is not subject to the formal accountabilities facing other chief executives in the public service.

Chief legal advisor and advocate

62. Subject only to the prior position of the Attorney-General, the Solicitor-General is the Government's chief legal adviser and its chief advocate in the courts. The Solicitor-General appears in court as counsel for the Government. Such appearances are in cases seen as of particular significance and are usually at appellate level. The role also involves the Solicitor-General personally giving legal advice to Ministers, Departments and agencies of Government covering the full spectrum of functions of Government. The Solicitor-General's advice is generally treated as definitive on legal questions coming before the Government. This enables the Government to take positions against a certain legal background. If a court later concludes the Solicitor-General's advice was wrong it is the Solicitor-General rather than the Government that is then open to criticism. The Solicitor-General also exercises a number of specific functions within the Crown's prosecution process as discussed above.

63. The Solicitor-General has a responsibility to give legal and constitutional advice to the Governor-General, a function which emphasises the Solicitor-General's non-political and constitutional role in government and ultimate responsibility to the Crown.

Division of Responsibilities

64. Sometimes questions arise of who should exercise responsibilities which generally might fall to the Solicitor-General but which due to special circumstances might more appropriately be referred to the Attorney-General. For some years the practice has been for the Solicitor-General to exercise all Attorney-General functions unless there is a matter of particular public importance which appears to involve issues of political importance. Such matters are referred to the Attorney-General for consideration of whether the Attorney wishes to act personally. The termination of prosecutions in the *Rainbow Warrior* case in November 1991 (following a decision not to seek extradition from Switzerland of a person to face charges in New Zealand) is an example of exercise

of power to terminate prosecutions by the Attorney-General. That course was followed as the reasons for the decision involved questions of international politics and trade rather than criminal law administration. In any case of difference as to who should exercise powers, the view of the Attorney-General prevails as the law officer with political authority. On many issues the two law officers of the Crown will work together and the Attorney-General always has available to him or her the advice of the Solicitor-General and the Crown Law Office. Cases where the respective views of the Attorney-General and Solicitor-General have differed have been rare. Even when acting independently it is the Solicitor-General's duty to keep the Attorney-General informed of significant decisions that are taken.

65. In the past the Solicitor-General might ask the Attorney-General to act in matters involving a personal conflict of interest. The recent conferral of the power of delegation will allow conflicts to be managed in this way.

CROWN LAW OFFICE

Role and Functions

66. The Crown Law Office is a department of the public service with specialist responsibilities for providing legal advice and representation to the Government in matters affecting the Crown, and in particular, Government departments and Ministers. In common with many other departments there is no statutory basis for the establishment of the Office. Although categorised as a department under the State Sector Act 1988, it has no general responsibility for policy formulation or legislation. Occasionally however, the Government has preferred, because of particular circumstances, to have the Office take on a particular project. This most often occurs with respect to issues of a constitutional nature. The Solicitor-General, for example, in his role as constitutional advisor to government in 1995 provided a report for government on the question of removal of appeals to the Privy Council. Similar input has been sought by Attorneys-General in relation to the judicial appointments process for the Court of Appeal and High Court.
67. In practice the Office operates and provides services to Ministers, departments and Government agencies in a similar way that a firm of barristers and solicitors does for its clients. In essence it is the Government's law firm. Its two primary aims reflect the role of the Attorney-General and those aims have been encapsulated, for planning purposes within the Office, in the following statement of strategic intent: "As lawyers to the New Zealand Government, our objective is to ensure that Government achieves its objectives within the framework of the law, and to provide advice and representation to clients in areas where Government interests and significant issues of public sector governance arise."
68. It is the function of the Crown Law Office to support the office of the Attorney-General and the Solicitor-General in his role. In particular, the Office is responsible for:
- 68.1 the provision of legal advice and representation services to Ministers of the Crown, Government departments and agencies;

- 68.2 supporting and assisting the Attorney-General and the Solicitor-General in the performance of their statutory and other functions as Law Officers of the Crown;
- 68.3 administering the Crown Solicitors Regulations 1994;
- 68.4 assisting the Solicitor-General with the conduct of criminal appeals;
- 68.5 assisting the Solicitor-General in the supervision, direction and performance of Crown prosecutions.

Cabinet Directions

- 69. The Office's relationship with Ministers and Government Departments are the subject of the Cabinet Directions for the Conduct of Crown Legal Business approved by Cabinet in May 1993. A copy of the Cabinet Directions is **attached** as an appendix. The essential features of the Cabinet Directions are retention of the overall responsibility for and control by the Attorney-General and Solicitor-General, of the legal representation of and legal advice to Ministers and the executive Government. Within that framework of underlying control, chief executives of departments are given flexibility for choice of legal services in particular areas. Broadly the scheme is as set out below.
 - 69.1 The legal services required by Government are divided into two categories: Category 1 comprises legal services that relate to core functions of Government, for example, constitutional law and legal issues relating to the protection of the revenue. Category 2 comprises other legal services which are not special to Government, but rather common to those required by any large industrial or commercial concern, for example, conveyancing and employment laws.
 - 69.2 In the case of Category 1 legal services, departments must discharge their duty to obtain competent legal advice either from sources within the Department or by referring matters to the Solicitor-General. The Solicitor-General briefs out other cases to private lawyers where in his view specialist expertise or particular skills not immediately available in the Office are required.
 - 69.3 In the case of work falling into Category 2, departments may engage the services of the Crown Law Office or those of private lawyers. Where departments choose to engage private lawyers the chief executive is under a duty to ensure the lawyers engaged have an appropriate level of expertise for the work, have no conflicts of interest and that the lawyers are adequately supervised by the department. The flexibility in Category 2 work reflects the fact that it is part of mainstream private sector legal services, and will often be more effectively and efficiently performed by selected lawyers in private practice.
- 70. The Crown Law Office has had to expand considerably over the last ten years to meet the increasing demands of government for its legal services. Further expansion is not envisaged by the Solicitor-General. The Office is now well placed to provide high quality, client-focused, legal services. Additional demands can be met by ensuring

appropriate flexibility within the organisational structure and by maintaining the Office's primary focus on those areas of its core business in which the Office has a high level of expertise. The three areas of core business are constitutional law and governance⁸, Crown prosecutions and Criminal appeals⁹, and Governmental Public Law¹⁰.

71. The advantages of the Crown Law Office's present structure as a stand-alone government department include its resultant independence. Its independence from other departments allows it to resist any tendency to be "captured" by the views or philosophies of any one of them. The Office, likewise, is free from conflicts of interest.
72. Responsibility for policy matters coming within the Office's core business, such as constitutional and criminal law, rests primarily with the Ministry of Justice. The division of responsibility between the advice and representation functions of the Crown Law Office and the policy responsibilities of the Ministry has the advantage of ensuring independent legal advice and representation. The Crown Law Office, with its broader responsibilities to the Attorney-General, can also ensure a wider governmental perspective is brought to bear on its advice and representation.
73. The present arrangements ensure that there is both expertise and consistency in the legal advice given to the Government. In this sense, the Office can exercise a co-ordinating role in the provision of government legal services. It is also highly desirable that the Government's approach in litigation is consistent with legal advice given.
74. The present system for the provision of legal services across government, involving a devolved system of lawyers in government departments employed by departmental chief executives coupled with an independent Crown Law Office, in the end is most likely to ensure respect for legal values. In this regard, the Office clearly has an important role to play in ensuring there is an understanding of the values underlying the Attorney-General's role across the public service and in ensuring those values are reflected in the policy development process. The standing and effectiveness of the Office in this work is firmly linked to the role of the Solicitor-General as head of the Office and of course is supported by the fact that the Attorney-General retains the right to intervene.

Management and Administration

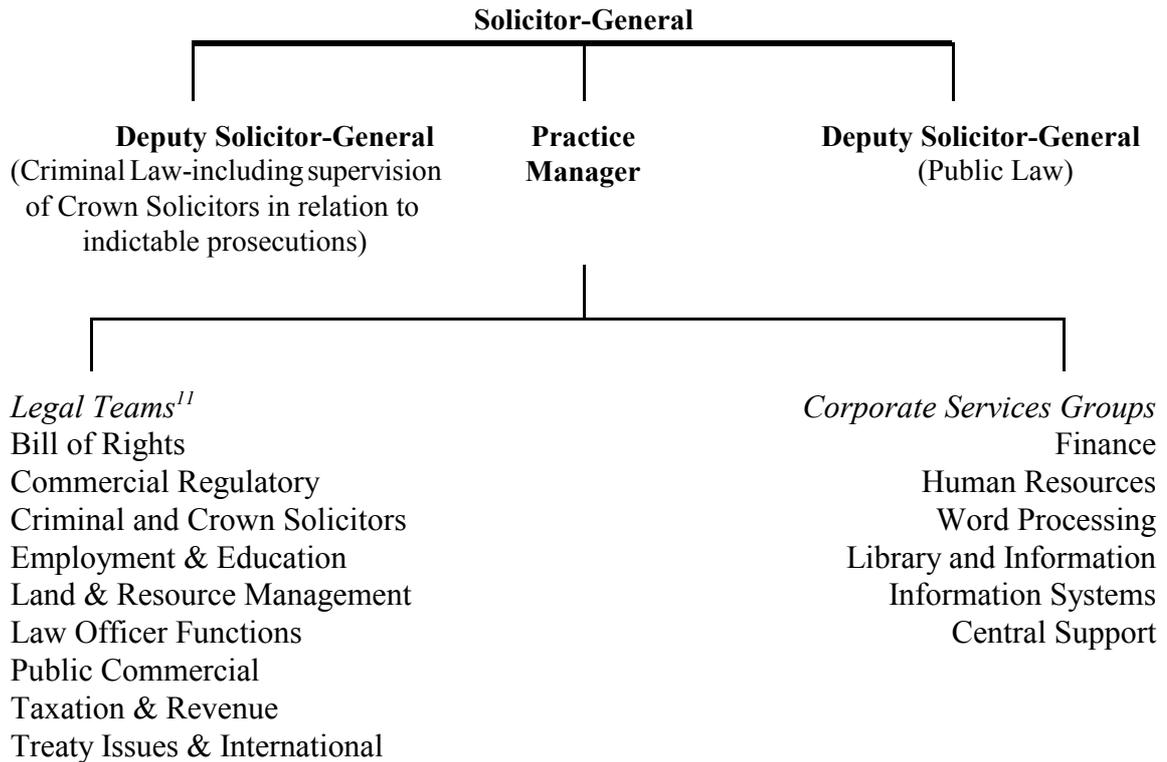
75. The Crown Law Office is structured into nine client servicing legal teams and a corporate services group as shown by the following organisation chart:

⁸ Representation and advice on the application of and compliance with constitutional statutes and other instruments such as the Treaty of Waitangi, constitutional conventions, and other constitutional principles, and representation and advice on the protection of the Revenue.

⁹ Contributing to the lawful and fair administration of the criminal justice system through an excellent and principled prosecution system based on the Crown Solicitor network; providing advice and assistance to those responsible for the conduct of Crown prosecutions; and conduct of criminal appeals.

¹⁰ Representation and advice on public law issues affecting the definition, exercise, and control of government power and other significant issues of public sector governance.

Organisation Chart (24 November 1999)



Senior Management Group

76. The Senior Management Group of the Crown Law Office comprises:

John McGrath QC	Solicitor-General
Nicola Crutchley	Deputy Solicitor-General, and Team Leader of Criminal & Crown Solicitors Team
Ellen France	Deputy Solicitor-General, and Team Leader of Law Officer Team
Robin Turner	Practice Manager

Other Legal Team Leaders

Helen Aikman	Crown Counsel, Commercial Regulatory
James Coleman	Crown Counsel, Taxation
Karen Clark	Crown Counsel, Public Commercial
Peter Gunn	Crown Counsel, Employment and Education
Virginia Hardy	Crown Counsel, Treaty Issues and International Law
Michael Hodgen	Crown Counsel, Bill of Rights
Malcolm Parker	Crown Counsel, Land and Resource Management

Human Resource Management

77. The number of employees presently permanently employed are as follows¹²:

¹¹ *Staffing Structure within Legal Teams*: Team Leaders, Crown Counsel, Assistant Crown Counsel, Legal Executives/Litigation Support and Secretarial Support.

¹² The number of legal support staff are increased from time to time by temporary staff in order to manage peaks in the volume of work undertaken by the Office.

24 November 1999

Solicitor-General, Deputy Solicitors-General and Practice Manager	4
Crown Counsel	43
Assistant Crown Counsel	17
Legal Support	9
Secretarial/Word Processing	29
Corporate Services Group	22
Total number of employees	<u>124</u>

NB: Within this total there are part-time and job share arrangements

NB: cf as at June 1995 - total staff of 86 comprising 43 legal and 43 support

Expenditure and Appropriations

78. The actual expenditure and the appropriations voted for Vote: Attorney-General for the year ended 30 June 1999 were as follows:

(Figures are GST inclusive where applicable)

	<i>Actual Expenditure 1999 \$000</i>	<i>Appropriation Voted¹ 1999 \$000</i>
Appropriations for classes of outputs		
Output class 1 ¹³ - Legal advice and representation	12,623	12,805
Output class 2 ¹⁴ - Supervision and conduct of Crown Prosecutions	20,497	20,835
Output class 3 ¹⁵ - Conduct of Criminal appeals	919	1,136
Output class 4 ¹⁶ - The exercise of principal law officer functions	712	726
Appropriations for other expenses		
Leave entitlements		20
TOTAL APPROPRIATIONS	<u>34,751</u>	<u>35,522</u>

I. This includes adjustments made in the Supplementary Estimates.

¹³ To provide legal advice and representation with special emphasis on constitutional and other public law areas, taxation and criminal law for Ministers of the Crown, central government departments and Crown agencies.

¹⁴ To direct and administer the work of Crown Solicitors in criminal trials on indictment, and appeals against convictions and sentencing arising out of summary prosecutions.

¹⁵ To determine whether Crown appeals against sentence are lodged and to appear or arrange representation at the hearing of appeals whether brought by the Crown or by offenders following trials on indictment.

¹⁶ To provide legal and administrative services to the Attorney-General and the Solicitor-General to assist them in the exercise of their Principal Law Officer functions. The functions include monitoring of enforcement and application of the law, supervision of charities, representation of the public interest, relator proceedings, and the exercise of a variety of powers, duties and authorities arising from various statutory requirements and constitutional conventions.

