

**PRINCIPLES FOR SHARING LAW OFFICER POWER:
THE ROLE OF THE NEW ZEALAND SOLICITOR-GENERAL**

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I. INTRODUCTION

In New Zealand, “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”.¹ This recent observation by one who has observed the office for many years succinctly encapsulates the present position of the Solicitor-General in modern New Zealand government.

At the commencement of responsible government, in common with most other countries of the common law tradition, New Zealand inherited the concept of Law Officers of the Crown. In England their original duty was to appear for the sovereign in the Courts, but by 1840 this was growing into a wider governmental responsibility for the administration of justice. For many centuries there had been appointed under the Crown prerogative both an Attorney-General and a Solicitor-General for these purposes.²

The offices had evolved in England as political offices, in the sense that they were held by Members of Parliament who were appointed as members of the government in office and who relinquished their positions as the government or their own political fortunes changed. This basically remains the English model. The tradition, however, is that the Law Officers act in that capacity independently of political considerations. Nevertheless, there is increasing concern over the tension between holding political office and discharging a duty to act independently of political considerations.³

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1 Rt Hon Sir Ivor Richardson, address at the launch, on 16 August 1995, of Alex Frame’s *Salmond: Southern Jurist* (1995). Sir Ivor, in the same address, observed that the position was “potentially the most interesting and influential job a New Zealand lawyer can have”.

2 The origin of the office of Attorney-General is discussed in the Crown Law Office’s monograph, *Crown Law Practice in New Zealand* (1961).

3 For example, see Lord Steyn, “The Weakest and Least Dangerous Department of Government” (1997) Public Law 84, 91-92.

Other countries in the common law system have adopted the English model but modified it, seeking to achieve the elusive balance between recognising the legitimacy of governmental power in a democratic system, and providing constitutional controls to prevent abuse. This paper discusses the New Zealand model and focuses on the role of the Solicitor-General, the junior of the two Law Officers of the Crown.

II. ORIGINS OF THE OFFICE IN NEW ZEALAND

A. Political Independence

It is an established constitutional practice in New Zealand that the office of Solicitor-General is non-political, in the sense that it is not held by a Minister of the Crown or other Member of the House of Representatives. Rather, the Solicitor-General is an official of the government, although it is well recognised that the duties exercised as a Law Officer often require independence from the direction of the government of the day. The immediate contrast is, of course, with the position of the senior Law Officer, the Attorney-General.⁴ The Attorney-General in New Zealand is a Member of Parliament and a Minister who, almost invariably, is a member of Cabinet holding other policy portfolios in addition to Law Officer responsibilities.

The office emerged in this form in New Zealand when W S Reid was appointed Solicitor-General on 31 March 1875.⁵ On New Zealand's establishment as a separate colony, the Attorney-General was one of three appointed officials who, together with the Governor, comprised the Executive Council. With the arrival of responsible government in 1856, the Attorney-General's position became one held in conjunction with political office. The successive Attorneys-General holding office between 1856 and 1865 were all Ministers.⁶

4 As to the contemporary nature of that office, see Rt Hon Paul East QC, "The Role of the Attorney-General" in P Joseph (ed), *Essays on the Constitution* (1995) 184; M Chen and Sir Geoffrey Palmer, *Public Law in New Zealand* (1993) 14-15 ("The Role of the Attorney-General"). For a personal view, see Rt Hon Geoffrey Palmer, "New Zealand Office of the Attorney-General" (1987) *Commonwealth Law Bulletin* 248.

5 *New Zealand Gazette* (1875) 221. For the history of the Crown Law Office, see *supra* n 2.

6 Anon, "The Attorney-Generalship" (1929) 4 *NZLJ* 352.

B. "Experimental Measures"

The first initiative in New Zealand to separate the Law Officer role from membership of the Ministry holding office concerned the appointment of James Prendergast as Attorney-General in October 1865. That appointment coincided with the resignation of Weld as Premier and the formation of the first administration of Stafford. Prendergast was appointed as Attorney-General but not to the Executive Council.⁷ Unlike his predecessors since 1856, he was not a Minister. At the time of his appointment Prendergast had established himself as a leading barrister in Dunedin and Crown Solicitor for Otago.⁸ In 1865 he had become a member of the Legislative Council. However, it seems that his appointment to the Upper House was with a view to an appointment to a new position as Solicitor-General in Weld's administration rather than the demonstration of a political inclination. Weld, however, resigned before such an appointment was made.⁹

The following year, legislation established a non-political basis for the Attorney-General's role. The Attorney-General's Act 1866 made the Attorney-General ineligible for membership of either House in the General Assembly or of the Executive Council.¹⁰ The legislation gave the Attorney-General tenure in office during good behaviour.¹¹ It put the Law Officer's role on a non-political footing.

James Prendergast was Attorney-General when the 1866 Act came into force and can be considered to be the first politically independent Law Officer. He resigned his seat in the Legislative Council and was reappointed to the new statutory office.¹²

On 26 October 1867, Hon J H Harris, a member of the Stafford Ministry and of the Legislative Council, was appointed Solicitor-General. This was the

7 *New Zealand Gazette*, 31 October 1865, 319.

8 *The Dictionary of New Zealand Biography (1769-1869)* (1990), vol 1, 354.

9 (1865-1875) *Colonial Law Journal* 24-26 (J Macassey ed)

10 Section 5.

11 Section 3.

12 Appendix to *Journals of House of Representatives* (1870) Vol II D 32.

first appointment to the office of Solicitor-General in New Zealand. At that time, it can be said that New Zealand had a political Solicitor-General and a politically independent Attorney-General.

This experiment, however, did not last. Harris held his office for only six months, until 13 May 1868.¹³ He was not replaced. On 31 March 1875, following the appointment of Prendergast as Chief Justice, the government accepted his resignation as Attorney-General, and on the same day W S Reid was appointed Solicitor-General.¹⁴ Reid had been “Assistant Law Officer” in the Crown Law Office, an independent government department since 1873.¹⁵ Reid’s appointment was as an official. Ever since his appointment, the Solicitor-General has been the head of the Crown Law Office. The earlier appointment of Harris was to a political office, which seems akin to, and was superseded in 1870 by, that of the Minister of Justice.¹⁶ Accordingly, Reid’s appointment is generally recognised as signalling the origin of the office of Solicitor-General in New Zealand in its modern form.

The appointment of a non-political Solicitor-General coincided with the Attorney-General’s position returning to one of political office. Clearly the two events were linked.¹⁷

The Attorney-General’s Act 1876 permitted, but did not require, the Attorney-General to be a member of the Executive Council or a member of either House of the General Assembly.¹⁸ Tenure in the office was at pleasure.¹⁹ The debates in both Houses reflected sharp differences over the policy of the Act. Ministers supporting the legislation believed it was

13 G H Scholefield (ed), *New Zealand Parliamentary Record, 1840-1949* (1950) 33.

14 *New Zealand Gazette* (1875) 221.

15 Cornford, “Crown Law Office – Early History” [1964] NZLJ 423.

16 See (1870) 7 NZPD 2-4

17 On Prendergast’s elevation in 1875, no appointment was made of a successor until the following year, after legislation enabling a political leader to hold office was passed.

The Solicitor-General acted as required in the exercise of Law Officer powers. See Anon, “The Crown Law Office” (1878) 3 NZ Jur (NS) 36.

18 Attorney-General’s Act 1876, s 3.

19 Attorney-General’s Act 1876, s 4.

desirable that the government should have in the Assembly a member who could mount on its behalf a legal argument in the course of Parliamentary debate and other business. Opponents countered that the arguments of a political Attorney-General would be shaped to suit the government's political interest.

In the final speech in the Legislative Council defending the Bill, the principal government speaker, Dr Pollen, pointed out:

There would still be a Solicitor-General and a permanent officer to whom the House of Assembly could have recourse in the future as they had had in the past; and supposing for a moment that a political Attorney-General would venture to imperil his reputation as a professional man by giving a biased and misleading opinion for political purposes, there would always be behind him an officer to whom the Assembly could have recourse, and who would be beyond the suspicion of party bias.²⁰

J L J Edwards, the leading writer on the role of the Law Officers of the Crown under Westminster government, described the ten year period concluding with the 1876 Act as one in which New Zealand had "embarked on a series of experimental measures born out of the doubts that swirled around the proper role expected of the Law Officers of the Crown and the appropriate constitutional arrangements that should exist to ensure the fulfilment of their independent functions".²¹

The regime in place at the end of 1876 has proved durable in New Zealand. Ever since, all persons appointed Attorney-General have been Ministers.²² The politically independent nature of the office of Solicitor-General is equally well established. Reid served in office for twenty-five years and each of his eleven successors have, like him, served as non-political Law Officers. The Solicitor-General's appointment is one made under the Crown prerogative; there has never been any legislation regulating the appointment of Solicitor-General.

20 (1876) 23 NZPD 254 (Legislative Council).

21 J L J Edwards, *The Attorney-General, Politics and the Public Interest* (1984) 389.

22 The legislative basis for the appointment was repealed by the Civil List Act 1908. See also Haughey, "The Legal Work of the Crown" [1957] NZLJ 203.

C. A Challenge to the Office

At first the appointment of the Solicitor-General, as a lawyer who was an official of government rather than one who held a political office, was controversial. Indeed, the power of the Governor, on advice, to make such a prerogative appointment was challenged in the course of proceedings in the Supreme Court.²³ Williams J held that, despite the absence of a statutory basis for the office of Solicitor-General, and the existence of such a basis for the position of Attorney-General, the appointment of Mr Reid in 1875 had been validly made. He was not concerned that the Solicitor-General was not a member of the legislature. The office had existed in Britain long before representative government.²⁴ Williams J also indicated that the duties of the persons appointed would no doubt be similar to those generally recognised in England as those of the Solicitor-General. This decision judicially acknowledged the office of Solicitor-General in New Zealand, as we now know it. In doing so, the Court recognised that in a small developing country the executive needed to adapt certain long standing English traditions.

The office of Solicitor-General in New Zealand remains a prerogative appointment. There has been no attempt to provide a statutory basis for it. However, extensive statutory powers have since been conferred on the Solicitor-General, either directly on the holder of the office, or through a succession of provisions empowering the Solicitor-General to exercise the powers of the Attorney-General.

III. THE FUNCTIONS OF THE LAW OFFICERS

A. A Durable Constitutional Structure

By 1876, there was in place what has turned out to be a very durable constitutional structure. Although legislation relating to the office of Attorney-General has long been repealed, every person who, since 1876, has served as Attorney-General has been both a Minister and a member of the legislature. W S Reid retired in 1900, and the eleven lawyers who have held office as Solicitor-General since have, like him, done so as an official of the government.

It is beyond the scope of this paper to trace the development of the role of the Solicitor-General and the Crown Law Office during the twentieth century. Suffice it to say that there is general agreement that the periods of their

23 *Solicitor-General v Dunedin City Corp* [1875] 1 NZ Jur (NS) 1.

24 *Ibid.*, 14.

greatest influence in government coincided with the tenure of J W Salmond QC (1910–1920) and H R C Wild QC (1956–1966). What is significant for present purposes, though, is that in 1998 the Attorney-General remains a Law Officer who concurrently holds political office while the Solicitor-General is appointed singularly as a public servant. It is in that context that I now attempt a description of the respective responsibilities of the two Law Officers in contemporary government.

B. The Attorney-General's Functions

The Attorney-General is concurrently a Minister with political responsibilities and the senior Law Officer of the Crown with principal responsibility for the government's administration of the law. As a Law Officer, the Attorney-General is the principal legal adviser to the government and is responsible for seeing that government is conducted according to the law. The Attorney-General also carries the principal responsibility in government for the relationship of the executive government with the judiciary. It is to be remembered this is a relationship with a separate branch of government. The Attorney-General has responsibility for the appointment of members of the senior judiciary, notably the judges of the Court of Appeal and the High Court judges, but not the Chief Justice, who is appointed on the Prime Minister's recommendation. Convention requires that the Attorney-General maintain an appointment process that is free from partisan political influence and which incorporates appropriate consultation.²⁵ The Attorney-General also has a particular responsibility as a Minister for protecting the judiciary from improper and unfair public criticism, for example, by answering attacks on their decisions and by discouraging other Ministers from engaging in improper attacks or criticism. In New Zealand these conventions are strong, which is not invariably the case elsewhere.²⁶

The statutory pattern is to place responsibility for the government's role in the administration of criminal justice on the Attorney-General. This includes responsibility for prosecution of serious crime,²⁷ the power to terminate any

25 For the practice developed by Rt Hon Paul East QC, Attorney-General, see "A Judicial Commission" [1995] NZLJ 189.

26 For some observations on the position in Australia, see Sir Gerard Brennan, "The State of the Judicature" (1998) 72 ALJ 33, 41-42.

27 See, for example, Crimes Act 1961, s 345.

prosecution,²⁸ and the power to give any witness at a trial immunity from prosecution.²⁹ However, the Solicitor-General, appointed as a non-political Law Officer, is also given statutory power to exercise all these functions. By convention, and in order to make it plain that criminal justice is, in New Zealand, administered free from political direction or influence, successive Attorneys-General have increasingly left this area to the Solicitor-General. Indeed, as will be discussed later, Parliament has now precluded the Attorney-General from being involved in some decisions relating to criminal justice such as appeals against sentences considered to be unduly lenient.

In government litigation beyond the criminal justice process, the Attorney-General has two roles. The first is in a representative capacity. The Attorney-General is either plaintiff or defendant on behalf of the government in its civil litigation.³⁰ Moreover, the Attorney-General has a separate responsibility to represent the public interest on behalf of the general community by enforcing the law as an end in itself. In that capacity, the Attorney-General must act independently of the political interests or preferences of the government of the day and is a guardian of the public interest. This role may be controversial, as it sometimes is when the Attorney-General takes the view that a statutory body is acting on an incorrect perception of the law and issues proceedings to have its decisions set aside by the High Court. The Attorney-General may seek the views of other Cabinet Ministers but in the end the Attorney-General must decide such matters as a Law Officer rather than as a Cabinet Minister.³¹

As a Minister, the Attorney-General must answer to Parliament for the actions of the Attorney-General, the Solicitor-General, and the Crown Law Office. This includes the conduct of all litigation on behalf of the government. Under the New Zealand Bill of Rights Act 1990, the Attorney-General must inform the House whether any provision in a Bill introduced to the House is inconsistent with the Bill of Rights. Again, this advisory role must be discharged free of party or partisan political considerations. However, political considerations in the wider sense can never be ignored.

28 Crimes Act 1961, s 378; Summary Proceedings Act 1957, ss 77A and 173.

29 An immunity is given in the form of an undertaking to stay any future prosecution.

30 Crown Proceedings Act 1950, s 14.

31 Lord Steyn, *supra* n 3, 91, quoting Sir Michael Havers, Attorney-General, in a 1986 parliamentary statement.

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. If proposals before Cabinet appear to lack appropriate legal input, the Attorney-General will recommend that it be obtained. One feature of this aspect of the Attorney-General's role is that it is discharged concurrently with the Attorney-General being a Minister and a member of Cabinet who will share collective responsibility for Cabinet's decisions. However, it has always been considered that in New Zealand the Attorney-General's role does not preclude holding of concurrent portfolio responsibilities of political significance. The role of the Minister of Justice in particular has often been held concurrently, and the holding of a variety of other policy-related portfolios unrelated to justice has been seen as compatible with the office of Attorney-General. The Attorney-General in New Zealand is a political figure both as a Cabinet member and a Member of Parliament. The only caution I sometimes offer is that it is probably preferable for the Attorney-General not to hold those positions where a Minister's portfolio decisions are made personally and are regularly subject to judicial review. The portfolios of Immigration and Fisheries are prime instances.

There has been one administration in which, on the resignation of Downie Stewart, the Attorney-General has not been a lawyer. Mr Forbes, while Prime Minister, became Attorney-General in 1933, because, it seems, he was of the view there was no lawyer suitable for the office in the ranks of the parliamentary party supporting the government. This situation was much criticised.³² While there is no constitutional impediment, there would be concern among the legal profession, and perhaps beyond, if the holder were not qualified as a lawyer. That is because the Attorney-General's responsibilities are essentially those of the senior legal adviser and legal decision-maker within government.

32 See Anon, "The Office of Attorney-General" (1934) 10 NZLJ 81-83. Forbes served as Attorney-General from 28 January 1933 to 6 December 1935.

*C. The Solicitor-General's Functions**1. Sharing Law Officer power*

The “Attorney-General is the government’s principal legal adviser, though in practice, subject to any differing views of his senior, the Solicitor-General exercises the role”.³³ In these careful words Professor Brookfield captures both the subordinacy and the reality of the role of the junior Law Officer in New Zealand. Subordinacy to the Attorney-General reflects the legitimacy of the democratic mandate under which the Attorney-General holds office. An official of the government lacks such a mandate and constitutionally must be subordinate. On the other hand, the reality is that political responsibilities can at times “cloud a clear vision of what the law requires”,³⁴ or be perceived to be doing so. In New Zealand there is a sharing of the Law Officer functions in a way which accords to an official the role of the government’s senior legal adviser in practice, as well as that of its chief advocate in the Courts. For over 100 years successive Attorneys-General have allowed this pattern to develop and become established. Indeed, there is recognition of this sharing in two overlapping statutory provisions which confer co-extensive statutory power on the Solicitor-General to exercise functions of the Attorney-General.³⁵ However, as the Law Commission has pointed out, these statutory provisions do not operate in reverse. They do not empower the Attorney-General to exercise powers Parliament has conferred on the Solicitor-General.³⁶ Where Parliament confers powers on the Solicitor-General it will usually be because it intends that they be exercised by the politically independent Law Officer.

33 Brookfield, “The Attorney-General” [1978] NZLJ 334, 336.

34 See L Caplan, *The Tenth Justice: The Solicitor-General and the Rule of Law* (1988) 49. I have benefited in many ways over the years, including in the course of writing this paper, from this insightful analysis of the role of Solicitor-General of the United States.

35 Acts Interpretation Act 1924, s 4; Finance Act (No 2) 1952, s 27. A list of statutory provisions conferring functions on the Law Officers is included in Annexure A to this paper.

36 New Zealand Law Commission, *Report No 17: A New Interpretation Act: To Avoid Prolixity and Tautology* (1990) paras 356-357.

2. *State Sector Chief Executive*

Under the State Sector Act 1988, the Solicitor-General is the chief executive of the Crown Law Office.³⁷ 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, many of the departmental management functions are exercised at an administrative level by the Practice Manager of the Crown Law Office. While the Solicitor-General is very much the professional head and leader of the Crown Law Office, that important aspect of the role is not the focus of this paper. Unlike most other chief executives, the Solicitor-General is not appointed under the State Sector Act 1988. Nor is the Solicitor-General subject to the accountability provisions of that Act.³⁸

3. *Advocate and adviser*

The Solicitor-General is appointed from the ranks of experienced barristers of the profession, and is either working in private practice or in the Crown Law Office at the time of appointment. The person appointed is thus an experienced legal advocate and adviser.

The Solicitor-General's main professional duty is to appear in Court as counsel for the government. Most appearances are in cases having particular public significance and are usually at the level of the Court of Appeal or Privy Council.

The Solicitor-General is allowed the freedom to develop legal argument in Court in the course of the government's litigation without Ministerial or departmental insistence as to its form. There are, however, practical limits to the notion of independence as an advocate. There is a client relationship to be respected, and it is not often open or constructive to argue for views that are significantly different from those of the government of the day. It is also in practical terms desirable to keep the government confident in the Solicitor-General's advocacy. For these reasons, it is usually better for the Solicitor-General to advance the government's point (unless it can clearly be discredited), even if the validity of the argument is doubted. But a good result for the Crown is not always strictly in accord with the narrow interests of the government of the day or the bureaucracy which supports it. The Solicitor-

37 Section 44(2).

38 On account of the independent nature of the position as recognised in the State Sector Act 1988, s 44.

General needs to be able to make it clear that the Court is not being given arguments more appropriately advanced in the debating chamber of the House of Representatives. Argument for the Crown at all levels must be accurate, objective, and restrained, and founded firmly on a tenable exposition of the applicable legal principles.

As the government's chief legal adviser, the Solicitor-General directly advises Ministers, departments, and at times other agencies of government over the full spectrum of public functions. This will include their relationships with, and thus the actions of, State-owned enterprises and other Crown agencies. This is the zone where the law and policy meet, and indeed at times collide. While government interests must always be kept in mind, the highest value is in maintaining the integrity of the law. A barometer measuring the popularity of the Solicitor-General's advice will inevitably swing wildly.

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

4. *Crown prosecutions*

"It is the Attorney-General's duty to ensure the criminal law is enforced in a just and fair manner. He is responsible for the ultimate control of all prosecutions undertaken by the Crown." The monograph, *Crown Law Practice in New Zealand*, published by the Crown Law Office in July 1961, opens with this observation on the role of the Attorney-General in control of criminal prosecutions. In New Zealand, however, the practice has emerged of the Solicitor-General rather than the Attorney-General having charge of the prosecution of serious crime after committal for trial. Indeed, the practice has become a convention, built on the perception that it is undesirable for there to be even an appearance of political decision-making in relation to public prosecutions.

There are three instances of actions by Attorneys-General in the criminal arena that have given rise to criticism. First, in 1974, the Attorney-General of the day personally gave his consent under the Official Secrets Act 1951 to the prosecution of Dr W B Sutch. On doing so, he issued a press statement expressing his distaste for the Act. Many felt that this was inappropriate and

that the Attorney-General had sought to cover himself politically while exercising his Law Officer duty.

Secondly, in 1976, the Attorney-General decided to stay criminal proceedings brought against the Ford Motor Company. These related to its failure to make superannuation deductions after the press statements of the Prime Minister that became the subject of the subsequent proceedings in *Fitzgerald v Muldoon*.³⁹ This was part of an unhappy series of events. At the least it involved a fundamental misunderstanding of the separation of powers.⁴⁰ Indeed, some would argue it amounted to political interference in the administration of justice.

Thirdly, in 1980, the Court of Appeal allowed an appeal against sentence imposed in the High Court on a man who had been convicted of a brutal assault of two policemen. The Attorney-General had felt it was his duty to make submissions on behalf of the Crown at the occasion of the sentencing in the High Court. Unfortunately, the Attorney-General became, unwittingly, a party to a procedural error in suggesting that it was unnecessary for an accused to give evidence of his assertion that he had not used a hammer in the attack. The Chief Justice did not accept that. The appeal was allowed and the sentence reduced.⁴¹ Significantly, no Attorney-General has appeared in the criminal jurisdiction of the High Court or Court of Appeal since that case.

The discretion to prosecute lies principally in the hands of the police and other departments (most notably the Serious Fraud Office), or government agencies having statutory power to initiate prosecutions. In particular, the police have authority to conduct prosecutions through the depositions stage to the point of committal for trial.⁴² At that point the prosecution function is taken over by the process for which the Attorney-General is responsible constitutionally but for which the Solicitor-General is responsible in practice.

39 [1976] 2 NZLR 615 (HC).

40 See the restrained expressions of concern by the Auckland District Law Society, in a letter dated 15 April 1976, and the response of the Attorney-General, both reprinted in M Chen and Sir Geoffrey Palmer, *Public Law in New Zealand* (1993) 13-14. See also the discussion in Brookfield, *supra* n 33, 334-337.

41 *R v Bryant* [1980] 1 NZLR 264 (CA).

42 Pursuant to the Cabinet Directions for the Conduct of Crown Legal Business 1993, *New Zealand Gazette*, 6 May 1993, No 63, 1166. See Annexure B below.

Following committal, the decision on whether to present an indictment, settling its form, and the conduct of the resulting trial is generally in the hands of Crown Solicitors.⁴³ They are lawyers, generally in private practice, in centres where High Court criminal jury trials take place. Their responsibility also extends to the conduct of District Court criminal jury trials on behalf of the Crown. Crown Solicitors are appointed by the Governor-General on the advice of the Attorney-General, who in practice will act on a recommendation from the Solicitor-General. Appointments are made under prerogative power and are at pleasure. Crown Solicitors are subject to performance accountability measures administered on behalf of the Law Officers by the Deputy Solicitor-General. Removal from office as a Crown Solicitor would be by the Governor-General acting on the Attorney-General's advice.⁴⁴

Following trial before a jury, appeals may be brought against conviction and/or sentence to the Court of Appeal. Under s 390 of the Crimes Act 1961, the Solicitor-General (not the Attorney-General) is made responsible for Crown representation in criminal appeals. My own view is that this provision gives the force of the law to the convention that the second Law Officer of the Crown exercises the Law Officers' responsibilities in the field of criminal justice. The Solicitor-General's usual practice is to have Crown interests represented by Crown Counsel from the Crown Law Office rather than the counsel who actually prosecuted. This is felt to facilitate objectivity in Crown appellate advocacy.

Appeals against sentence after conviction on indictment may be brought by the Solicitor-General on grounds of undue leniency or application of wrong principles.⁴⁵ Appeals against sentence after conviction on summary charges may be brought by prosecuting agencies but only with the consent of the Solicitor-General.⁴⁶ Again, the statute gives the Attorney-General no role in such appeals.

43 For Serious Fraud Office prosecutions, indictments are presented by the Solicitor-General. The conduct of the prosecution, which is a Crown prosecution, is the responsibility of a lawyer who is a member of a panel appointed by the Solicitor-General. See Serious Fraud Office Act 1990, s 48.

44 The appointment of Crown Solicitors is under prerogative power.

45 Crimes Act 1961, s 383.

46 Summary Proceedings Act 1957, s 115A.

Statutory powers are given to the Attorney-General to stay prosecutions.⁴⁷ It is from these that a power to give immunity from prosecution is derived. The form of an immunity is a promise by one of the Law Officers to stay any future prosecution in defined circumstances. Only a Law Officer is in a position to give that promise. As in the case of Crown appeals against sentence, each of these matters requires the Solicitor-General's personal decision, facilitated by advice given by Crown Law Office staff. The Solicitor-General's prosecution guidelines set out the policy the Solicitor-General generally follows in considering whether to stay prosecutions or give immunities. Stays are considered where two juries have failed to agree on the guilt of a person charged on indictment but the decision to enter a stay is not an automatic one.⁴⁸ An immunity is sometimes given where a person who is implicated to a minor extent in a serious crime can give the evidence that is necessary to secure the conviction of a principal offender.⁴⁹

Occasionally, the Solicitor-General may refer a question whether a stay or immunity should be granted to the Attorney-General. Such cases are likely to be confined to situations where the reason for terminating a prosecution would not relate directly or principally to the just administration of criminal justice. An example was the aftermath to the Rainbow Warrior case. In 1991 Andries, a French citizen wanted in respect of the 1985 bombing of the Greenpeace ship "Rainbow Warrior", was arrested in Switzerland. New Zealand's Courts had already convicted two French citizens for manslaughter and released them in mid-1986 to French custody. Cabinet, in 1991, decided against seeking the extradition of Andries to New Zealand to face similar charges. That was a decision taken under a statutory power conferred on the Minister of Justice rather than the Attorney-General. However, a further decision was required on whether the outstanding charges laid against Andries and other French nationals should be stayed. Such a decision could only be justified in the context of international obligations and broad national interest considerations, including the future of New Zealand's trade with

47 Crimes Act 1961, s 378; Summary Proceedings Act 1957, ss 77A and 173.

48 In *R v Barlow* [1996] 2 NZLR 116, 124; (1995) 13 CRNZ 503, 511 the Full Court declined to intervene in a decision by the Solicitor-General not to stay charges that had been subject of two jury disagreements. It had been asserted that the decision was contrary to the stated policy of the Solicitor-General.

49 *Solicitor-General's Prosecution Guidelines* (1992) para 9.

Europe. No question of the administration of the criminal justice process arose. The then Attorney-General (the Rt Hon Paul East QC) resolved that the Law Officer having a political mandate should take the decision and he stayed all outstanding charges. The Attorney-General did not consult his Cabinet colleagues before making his decision but the reasons reflected those of Cabinet in deciding not to seek extradition.⁵⁰

The Attorney-General also has a function to give consent to prosecutions in certain instances defined in the relevant statute. The Attorney-General's fiat is required for those cases where, in exercising the discretion to prosecute, the police or prosecution authority need to take into account wider considerations than just whether or not the facts disclose evidence sufficient to bring the accused to trial. A list of statutory provisions requiring such consent appears in Annexure A to this paper. In the administration of criminal justice, Law Officer functions constantly present a tension between, on the one hand, the ideals of society and principles on which decisions should be made, and, on the other, the reality of the present situation and the utility of bringing proceedings.

In England the Home Office has identified a number of reasons for the requirement that some prosecutions cannot be brought without the consent of the Attorney-General.⁵¹ It may be, for example, that it is not possible to define the offence very precisely, so that the law goes wider than the mischief aimed at or is open to a variety of interpretations. Other offences are vulnerable to proceedings being instituted in trivial cases or instituted vexatiously, and in those cases the Attorney-General's fiat operates to prevent abuse. There may also be mitigating factors which vary widely from case to case and are not therefore susceptible to statutory definition. In sensitive or controversial areas such as race relations or censorship it may be desirable to retain a measure of state control. It may also be necessary in some prosecutions to take account of public policy considerations or political or international matters.

In New Zealand, Wayne C Eagleson⁵² identified three categories of statutes where it is necessary to obtain the fiat of the Attorney-General before a prosecution is brought. The first comprises statutes which impose limits on

50 See further Rt Hon Paul East QC's essay, *supra* n 4.

51 *Report of the Departmental Committee on s 2, Official Secrets Act 1911*, vol 1, Cmnd 5104, cited by Eagleson, "The Attorney-General and the Public Interest: Political Independence – Reality or Myth?", unpublished MS, 1988, 13-14.

52 *Ibid.*

freedom of speech or expression, such as the Indecent Publications Act 1963 and the Race Relations Act 1971. The second category comprises those statutes which relate to New Zealand's obligations at international law. Eagleson includes as examples the Antarctica Act 1960 and the Geneva Conventions Act 1958. Today more and more offences cross national boundaries, and it may be appropriate to provide for the fiat of the Attorney-General in order to prosecute in New Zealand for an offence committed overseas. The Chemical Weapons (Prohibition) Act 1996, for example, provides for the prosecution of offences committed by New Zealand citizens overseas or any other persons on New Zealand ships or aircraft.⁵³ The third category of statutes identified by Eagleson have domestic security implications. Mentioned as examples are the Secret Commissions Act 1910 (where the offence is particularly susceptible to a false complaint) and the Armed Forces Discipline Act 1971. Topical and more modern examples are the prosecution of undercover officers under the Misuse of Drugs Act 1975, prosecutions under the Intelligence and Security Committee Act 1996, and prosecutions for espionage and wrongful communication of official information under the Crimes Act 1961, ss 78 and 78A.

5. Contempt of court

The Law Officers have responsibility for bringing proceedings on behalf of the community to enforce the law. There are differing views over whether the law of contempt of court is a branch of the criminal law. Certainly it has a penal aspect. It is an area which has long been left to the Solicitor-General. The media intensely dislike contempt proceedings and are critical of them, both in their publications and in private exchanges. As well, politicians sometimes speak out inappropriately over law and order issues outside the debating chamber of the House of Representatives and may be subject to contempt proceedings.

The Solicitor-General does not prosecute in every case where a contempt is disclosed. As well as prosecution, other mechanisms for addressing the mischief include injunctions, warnings not to publish, and dialogue with editors. The Court of Appeal has recently expressed the view that, in applying

53 Section 5.

the law of contempt, the values of freedom of expression and the right to a fair trial are both to be accommodated as far as possible.⁵⁴

6. *Role and functions of the Crown Law Office*

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, government departments, and Ministers.⁵⁵ In common with many other departments, there is no statutory basis for the establishment of the Office. The Office is a department under the State Sector Act 1988 but it has no general responsibility for policy formation or for development of legislation. In practice the Office operates and provides legal services to Ministers, departments, and government agencies, much as a firm of barristers and solicitors would provide for its clients. In essence it is the government's law firm. Its two primary aims are to ensure that (1) the operations of executive government are conducted lawfully; and (2) the government is not prevented, through the legal process, from lawfully implementing its chosen policies.

It is the function of the Crown Law Office to support the office of both the Attorney-General and the Solicitor-General in the role of chief legal adviser to the government and chief advocate for the government in the Courts. The Office is responsible for:

- the provision of legal advice and representation services to Ministers of the Crown, government departments, and agencies;
- supporting and assisting the Attorney-General in the performance of his or her statutory and other functions as Law Officer of the Crown;
- assisting the Solicitor-General with the conduct of criminal appeals; and
- assisting the Solicitor-General in the supervision, direction, and performance of Crown Solicitors in their prosecution functions.

The Crown Law Office comprises some fifty-five counsel and an approximately equal number of support staff. It is structured similarly to a private legal firm. It conducts most of the government's public law litigation covering broad areas of constitutional, criminal, commercial, human rights, Treaty of Waitangi, employment, and land and resource management issues.

54 *Gisborne Herald v Solicitor-General* [1995] 3 NZLR 563, 574; (1995) 13 CRNZ 244, 255. See also McGrath, "Contempt and the Media: Constitutional Safeguard or State Censorship" [1998] NZ Law Review 371.

55 For an early account of the Crown Law Office, see (1878) 3 NZ Jur (NS) 36.

The administration of the Crown Prosecution process is the major head of the Crown Law Office's expenditure. Under the Public Finance Act 1989, departments must specify and secure approval for expenditure of defined outputs. In the year ended 30 June 1998, the Crown Law Office spent, exclusive of GST, \$17.526 million in respect of the administration of its Output 2 (Crown prosecutions), and \$0.872 million in respect of its Output 3 (criminal appeals). By comparison, \$10.791 million was spent on legal advice and representation in other litigation.⁵⁶

7. Cabinet directions

The *Cabinet Directions for the Conduct of Crown Legal Business* help define the roles of the Attorney-General, Solicitor-General, and the Crown Law Office. These directions form part of the Cabinet Office Manual, and were approved by Cabinet in May 1993. For ease of reference, they can be found at the end of this paper as Annexure B.

Broadly, the scheme is to divide the legal services required by government into two categories. Category 1 comprises those services relating to core government functions, including litigation. Category 2 comprises "other legal services" not being special to government but rather common to those required by any large commercial concern. Category 1 legal services must be provided by departments either from their own departmental sources or by referring matters to the Solicitor-General. The Solicitor-General may allocate the work to the Crown Law Office or refer the matter to outside private counsel. In Category 2, departments have the choice of engaging the Crown Law Office or private lawyers. However, the Solicitor-General retains the right to direct the manner and representative by whom any Category 2 work is to be carried out. In essence, the *Cabinet Directions* indicate a continuing governmental commitment to maintain the traditional responsibility of the Law Officers for control of the government's core legal business. Within that framework of underlying control, departmental chief executives have the duty to secure legal advice as circumstances require and, outside core areas of responsibility, retain flexibility for choice of legal services.

8. Beyond executive government

From time to time Governors-General may invite the Solicitor-General to advise on official functions. The present Governor-General, Rt Hon Sir Michael Hardie-Boys, has referred to this practice in a newspaper interview in

56 *Report of Crown Law Office to House of Representatives for Year Ended 30 June 1998*
(1997) 13, 15, 17.

which he discusses the reserve powers of his office.⁵⁷ The Governor-General is also required in certain circumstances to make personal decisions, that is, without Ministerial advice. Such is the case when, acting as Commander-in-Chief of New Zealand, the Governor-General hears complaints from members of the armed forces who consider that they have been wronged. In that capacity, successive Governors-General have sought advice, and on one occasion representation, by the Solicitor-General in subsequent judicial review proceedings.⁵⁸ The Privileges Committee on occasion invites the Solicitor-General to advise it, or appear as its counsel, on particular matters which are the subject of inquiry. Such advice is usually given in conjunction with that of the Clerk of the House of Representatives and others.⁵⁹

9. Independence

The Solicitor-General is an officer of the executive government. The office holder enjoys no tenure in the position, which is held at pleasure. The advice given and decisions taken may affect the most pressing issues of the day and from time to time are highly controversial. Nevertheless, it is widely accepted that the holder enjoys independence. Certainly over the time I have served in the office — now over nine years — I have felt no need for a statutory basis for the position. Indeed I would suggest that legislation is rather an over-rated mechanism for securing independence, even under a proportional representation system of government. Far more important is the public standing of an office and the qualities of those who hold it.

The independence the Solicitor-General enjoys is, at its heart, the freedom from the obligation to conform to the political perspective of the government in power. There is a freedom to advise as to the effect of application of the law as the Solicitor-General sees it. There is freedom as to the way cases are argued in Court, subject to the practical constraints I have mentioned. This freedom fits the environment in which the Solicitor-General works. The Solicitor-General has to persuade Courts in the area of public law. Argument necessarily addresses the public governmental interest rather than the partisan political government interest. In the end the Solicitor-General, to be fully

57 *The Dominion*, 5 October 1996, 18.

58 See *Bradley v Governor-General* 28/2/91, Wylie J, HC Auckland M1864/89.

59 A recent instance is the 1997 Report of the Privileges Committee of the House of Representatives: *Report on a Question of Privilege Relating to Status of Manu Alamein Kopu as a Member of Parliament* (1997) AJHR I.15B.

effective, must develop and retain the confidence of the government of the day in the office-holder's advice and advocacy. My observation of the record and standing of the eleven who have preceded me is that each has done so in his own way.⁶⁰

10. *The relationship with the Attorney-General*

A crucial element in maintaining independence is the relationship with the senior Law Officer. The Solicitor-General must willingly accept that when the Attorney-General elects to advise the government on the law, that opinion will override any given by the junior Law Officer. If Sir John Salmond could cheerfully accept as much, as he did, so can this successor, were the occasion to arise.⁶¹ Salmond's decade as Solicitor-General was "a period unrivalled in the history of that office for authority and influence in the hands of its holder".⁶² Equally, the Solicitor-General must accede to the right of the Attorney-General to instruct the Solicitor-General, subject to the statutory restraints mentioned above. It is the privilege of the Solicitor-General to work for the Attorney-General, albeit exercising power with direct authority as a Law Officer. By the same token, effective service as Solicitor-General requires protection from unreasonable political pressure. The force of political cyclones passing through government is considerable, and the Solicitor-General is sometimes seen as an aggravator as much as a facilitator in

60 As yet, no woman has held office as Solicitor-General. From 1992 until her appointment to the High Court Bench in November 1995, Lowell Goddard QC was Deputy Solicitor-General. She was succeeded in that position by the present Deputy Solicitor-General, Nicola Crutchley, in May 1996.

61 The practice of adopting the opinion of the senior Law Officer is recorded in *Crown Law Practice in New Zealand*, supra n 2, 23: "The only recorded instances in which the Attorney-General has expressed an opinion at variance with that of the Solicitor-General are a couple of occasions when Sir Francis Bell differed from Salmond. In those cases it was the opinion of the Attorney-General that was adopted because he is, of course, the senior law officer." Sir Francis Bell similarly recorded the practice in a memorandum to the Solicitor-General dated 31 October 1927 (Crown Law Office Library): "I may say that on the very few occasions on which Sir John Salmond and I differed there never was any question on his part that the final determination must rest with the Attorney-General."

62 A Frame, *Salmond: Southern Jurist* (1995) 100.

assisting those trying to cope. To be fully effective as Solicitor-General, it is vital that there be freedom from undue pressure, support when advice is inconvenient, and a recognition that advising and representing government in Court is not a science. I, for one, would like to say that I have had the most conscientious support from the Attorneys-General I have served. For that, I am grateful. Holders of like offices overseas do not always seem to have had the same support.

What, then, is or should be the role of the senior Law Officer? During this decade, successive Attorneys-General have led New Zealand's legal teams in an international arbitration against another State and before the International Court of Justice.⁶³ The Attorney-General has also appeared as counsel at all levels, including in the Privy Council in a case concerning Parliamentary privilege.⁶⁴ The duties as chair of the Privileges Committee occupy considerable time when issues of privilege arise. And the responsibility of appointing judges and supporting the judiciary is of highest importance.⁶⁵ Nevertheless, I would emphasise the importance of the role played by the Attorney-General as a legal adviser in the Cabinet and Cabinet Committee rooms, and with Ministers generally. Maintaining the rule of law in these places requires both legal and political acumen, and the ability to generate political trust. The Attorney-General, who shares the responsibility for decisions as a member of the government, is uniquely positioned to influence Ministerial colleagues. I therefore disagree with those who say that the Attorney-General should not be a member of Cabinet. Outside of it, the values of the office cannot, I believe, be effectively upheld in government. I say that with great respect to the service of Rt Hon David Lange who, I believe, is the

63 See the case concerning the difference between New Zealand and France on the interpretation of agreements relating to problems arising from the "Rainbow Warrior" affair. See Reports of International Arbitral Awards Vd XX 30 April 1990; "New Zealand at the International Court of Justice, French Nuclear Testing in the Pacific, Nuclear Tests Case, New Zealand v France (1995)", New Zealand Ministry of Foreign Affairs and Trade; "Advisory Opinion of 8 July 1996, Legality of the threat or use of nuclear weapons" (1996) 17 HRLJ 253.

64 *Prebble v TVNZ* [1993] 3 NZLR 513 (CA), [1994] 3 NZLR 1 (PC). The case is discussed by Rt Hon Paul East QC, *supra* n 4, 197-200.

65 Discussed in Palmer, "Judicial Selection and Accountability" in B Gray and B McClintock (eds) *Courts and Policy* (1993) 11, 40-52, and Rt Hon Paul East QC, *ibid*, 200-202; and McGrath, "Appointing the Judiciary" [1998] NZLJ 314.

only Attorney-General in New Zealand since 1876 not concurrently to have held office as a member of Cabinet.⁶⁶ From within Cabinet, successive Attorneys-General have discharged with distinction their commitment to the rule of law in government.

III. CONCLUSION

The reader will have gathered that I view the Attorney-General's and the Solicitor-General's roles as suitably structured under the New Zealand model. We embarked, 125 years ago, on the series of experimental measures born out of the doubts that surround the proper role expected of the Law Officers of the Crown and the appropriate constitutional arrangements that should exist to ensure the fulfilment of their independent functions.⁶⁷ Prendergast was an able, politically independent lawyer but was unable to make the senior Law Officer's role work acceptably. In my view, a political leader of the legal profession should fill the Attorney-General's role. But once that is accepted, the need for politically independent support from the other Law Officer becomes apparent. The English model contradicts this view but seems increasingly to be attracting criticism.⁶⁸

Nor am I a great reformer of the office of Solicitor-General in New Zealand. Especially, I do not seek a statutory term which would preclude me from saying firmly and honestly whenever I am asked when I will move on: "I don't know".

ANNEXURES:

- A. Statutory Functions of Solicitor-General and Attorney-General.
- B. Cabinet Directions for the Conduct of Crown Legal Business 1993.

66 While at times the office has not been filled, the *NZ Parliamentary Record* (1840-1984) (J O Wilson) shows no indication that there was an Attorney-General after Prendergast who was not a member of Cabinet. See also *Crown Law Practice in New Zealand*, supra n 2, 13. Mr Lange, who held office as Attorney-General from outside Cabinet between 14 August 1989 and 2 November 1990, did so successfully but in circumstances unique to his personal situation.

67 Edwards, supra n 21, 289.

68 See supra n 3.

*Annexure A. Statutory Functions of Solicitor-General and Attorney-General***The Attorney-General's fiat is required to prosecute under:**

- Antarctica Act 1960, s 3 — crimes in Ross Dependency;
- Antarctica (Environmental Protection) Act 1994, s 6;
- Armed Forces Discipline Act 1971, s 74;
- Aviation Crimes Act 1972, s 18 — hijacking, etc;
- Chemical Weapons (Prohibition) Act 1996, s 5 — extraterritorial application;
- Companies (Bondholders Incorporation) Act 1934-35, s 3;
- Continental Shelf Act 1964, s 7;
- Crimes Act 1961, ss 8A, 10B, 78, and 78A (see s 78B inserted by 1982 No 157) — espionage and wrongful communication of Official Information; ss 100, 101, 104, 105, 105A, 105B (all within s 106), 106 (bribery, etc), 123 (libel), 124 (indecent matter), 144A, 144B (sexual offences outside New Zealand), 230 (criminal breach of trust), and 400 (offences on ships or aircraft);
- Crimes (Internationally Protected Persons and Hostages) Act 1980, ss 13, 14, and 16;
- Crimes of Torture Act 1989, s 12;
- Evidence Act 1908, s 48J — evidence by foreign authorities;
- Films, Videos, and Publications Classification Act 1993, s 144;
- Flags, Emblems, and Names Protection Act 1981, s 25;
- Geneva Conventions Act 1958, ss 3 (grave breach of convention) and 8 (use of Red Cross);
- Human Rights Act 1993, ss 131, 132, 134, and 135;
- Inspector-General of Intelligence and Security Act 1996, s 28 and 29;
- Intelligence and Security Committee Act 1996, s 20;
- Maritime Transport Act 1994, s 224;
- Misuse of Drugs Act 1975, ss 12C (offences outside New Zealand) and 34A (prosecution of undercover officers);
- New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987, s 15;
- Radiocommunications Act 1989, s 134A;
- Secret Commissions Act 1910, s 12;
- Summary Offences Act 1981, ss 20 (false claim of qualifications) and 20A (official information);
- United Nations (Police) Act 1964, s 4 — trial in New Zealand of crimes outside New Zealand;
- United Nations Convention on the Law of the Sea Act 1996, s 9.

Other Statutory Functions:

- Acts Interpretation Act 1924, s 25B — power to appoint acting Attorney-General;
- Acts Interpretation Act 1924, s 4 — “Attorney-General” includes “Solicitor-General”. See also Finance Act (No 2) 1952, s 27;
- Acts and Regulations Publication Act 1989, ss 4, 6, 7, 9, 10 14, 15, and 26 — publication of Acts of Parliament, regulations, etc;
- Adoption Act 1955, s 20(3) — no application for discharge of adoption orders without approval of Attorney-General;
- Adoption (Intercountry) Act 1997, s 11 — recognition of convention adoptions — no application without approval of Attorney-General;
- Administration Act 1969, s 22 — estate vests in Crown if no executor appointed;
- Anglican Church Trusts Act 1981, ss 15 and 16A — variation of trusts;
- Armed Forces Discipline Act 1971, ss 192(4), 192(5), and 192(6) — Minister of Health with concurrence of Attorney-General may direct special patient be detained as committed — power not able to be exercised by Solicitor-General — s 192(8); s 196(2) — Attorney-General may order mentally disordered prisoner to psychiatric hospital;
- Building Societies Act 1965, ss 14 and 19 — registration and alteration of rules referred to Solicitor-General;
- Charitable Trusts Act 1957, ss 25 (winding up), 58 (enquiries into charities), and 60, and Parts III and IV (reporting/approval of schemes)— winding up, enquiries into charities, and reporting/approval of schemes;
- Commerce Act 1986, s 9 — members appointed after consultation with Attorney-General;
- Copyright Act 1964, s 212 — parties to proceedings;
- Coroners Act 1988, ss 16 (deaths outside New Zealand), 38, 39, and 40 (fresh inquests) — Solicitor-General;
- Courts Martial Appeals Act 1953, s 10 — certificate on point of law for appeal to Court of Appeal;
- Crimes Act 1961, ss 345 (presenting indictment), 378 (stay of proceedings), 383(2) (Solicitor-General’s right of appeal against sentence), 388 (time for appealing), and 390 (duty of Solicitor-General to appear for the Crown);
- Crimes of Torture Act 1989, ss 5 (Attorney-General to consider compensation) and 11 (restrictions on surrender of offenders);

- Criminal Justice Act 1985, s 116, and note s 116(8) — special patient held as committed patient — power not able to be exercised by the Solicitor-General;
- Criminal Justice Act 1985, s 21A (7) — the Solicitor-General can apply to the Court for the making of an order where a Court sentences an offender for a further offence without taking into account the existence of a suspended sentence;
- Crown Proceedings Act 1950, s 14 et seq — method of making Crown a party to proceedings;
- Crown Solicitors Regulations 1987, regs 4 (Solicitor-General to determine rates), 6 (Solicitor-General to certify fees), 7 (Solicitor-General may delegate), 8(2) (obligation not to appear against Crown), 12 (special fees), 25 (second counsel), 26 (fees), and 27 (counsel assisting);
- District Courts Act 1947, s 28H — Solicitor-General appeal against sentence;
- Education Act 1989, ss 113 and 156C — Solicitor-General approves scheme;
- Electoral Act 1993 (repeals Electoral Act 1956), s 257 — report of High Court re corrupt practice laid before Attorney-General;
- Employment Contracts Act 1991, s 15 — restriction on right of entry;
- Enemy Property Act 1951, s 6 — Attorney-General may vest property in custodian;
- Evidence Act 1908, ss 48A (letters of request — application by Solicitor-General) and 48I (Attorney-General may prohibit production of documents requested by foreign authority);
- Evidence Amendment Act (No 2) 1980, s 42 — protection of witnesses;
- Extradition (United States of America) Order 1970, Part X — Attorney-General to authenticate documents;
- Family Proceedings Act 1980, s 161 — intervention;
- Fisheries Act 1996, s 172 notice of action served on Attorney-General;
- Friendly Societies and Credit Unions Act 1982, ss 2 and 16 — Solicitor-General is revising barrister;
- Fugitive Offenders Act 1881 (UK), ss 8 and 18 — Attorney-General to send back persons apprehended if not prosecuted in six months;
- Harbours Act 1950, s 55A(11) — control of capital expenditure;
- Health and Disability Commissioner Act 1994, s 64 — disclosure of certain matters;
- Health Reforms (Transitional Provisions) Act 1993, s 11;

- High Court Rules, rr 381 (Solicitor-General re letters of request) and 95 (relator proceedings);
- Human Rights Act 1993, s 129 — disclosure of certain matters not required;
- Immigration Act 1987, s 33A — revocation of temporary permit for purposes of mutual assistance;
- International War Crimes Tribunal Act 1995;
- Judicature Act 1908, ss 51A publication of High Court Rules, 51B (Solicitor-General and Attorney-General members of the Rules Committee), 88A (vexatious litigants); r 99A (costs);
- Law Practitioners Act 1982, s 31 — appointment of Council of Legal Education on advice of Attorney-General;
- Legal Services Act 1991, ss 4(b) and 19(1)(c)(ii) — Attorney-General's certificate required for legal aid to Privy Council;
- Local Government Official Information and Meetings Act 1987, s 31 — disclosure of information;
- Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 77–80 — special patients;
- Ministries of Agriculture and Forestry (Restructuring) Act 1997, s 5 — savings relating to references, and proceedings;
- Mutual Assistance in Criminal Matters Act 1992;
- New Zealand Bill of Rights Act 1990, s 7 — Attorney-General to report to Parliament where bill inconsistent;
- New Zealand Council of Law Reporting 1938, s 7 — Solicitor-General and Attorney-General member of Council;
- New Zealand Security Intelligence Service Act 1969, ss 4A and 4B — issue of interceptions warrant;
- Official Information Act 1982, s 31(b) — disclosure of information likely to prejudice prevention, investigation, or detection of offences;
- Ombudsman Act 1975, ss 19(2) (power of ombudsman to examine persons on oath with approval of Attorney-General), 20 (disclosure of information prejudice security), and 27;
- Patents Act 1953, ss 41(3) (revocations of patent by Court), 76 (Attorney-General's right to appear to protect public interest), and 102 (cancellation of registration of patent attorneys);
- Police Complaints Authority Act 1988, ss 26(1)(b) (disclosure of certain matters not required if Attorney-General certifies), 29, and 34;
- Privacy Act 1993, s 95 — disclosures of information;
- Proceeds of Crime Act 1991 — Solicitor-General may make application to confiscate property and ancillary matters;

- Queen’s Counsel Regulations 1987, regs 3 (appointment) and 5 (appearance and proceedings against Crown);
- School Trustees Act 1989, s 19 — Solicitor-General approves scheme;
- Serious Fraud Office Act 1990, ss 11 (Solicitor-General to determine responsibility for investigating certain cases of fraud), 29 (Attorney-General responsible for the Serious Fraud Office), 30 (Director acts independently from Attorney-General in investigations), 48 (prosecutors panel appointed by Solicitor-General), and 51 (Attorney-General approves agreements with overseas agencies);
- State Sector Act 1988, s 44 — certain provisions relating to Chief Executives do not apply to Solicitor-General — Solicitor-General is Chief Executive of Crown Law Office;
- Statutes Drafting and Compilation Act 1920, ss 4 (Attorney-General may direct Bill Drafting Department to report as to effect of bills) and 6(4) (staff of Parliamentary Counsel Office);
- Summary Proceedings Act 1957, s 115A — Solicitor-General only — consent to appeal against sentence; ss 77A and 173 (stay of proceedings);
- Transport (Vehicle and Driver Registration and Licensing) Act 1986, s 19 — details of registers to be supplied to applicants — appeal to Attorney-General;
- Trans-Tasman Mutual Recognition Act 1997, s 53 — Attorney-General may be heard on review;
- Trustee Companies Act 1967, s 15 — administration by trustee company of benefit fund.

*Annexure B. Cabinet Directions for the Conduct of Crown Legal Business 1993*⁶⁹

On 13 April 1993 the following Directions were approved by Cabinet for the conduct of business between government departments and the Law Officers of the Crown and Crown Law Office.

1. These Directions may be cited as the Cabinet Directions for the Conduct of Crown Legal Business 1993.
2. In these Directions, “Department” means a Department as defined in s 2 of the State Sector Act 1988, the New Zealand Police, and any agency of the Government subject to Ministerial direction or control, but does not include the Parliamentary Counsel Office or the Public Trust Office.

⁶⁹ From *Cabinet Office Manual* (July 1994 ed) 5/15-5/18.

3. These Directions shall apply to all Ministers and Departments. In cases of doubt, the Attorney-General shall decide whether these Directions apply to any particular agency.
4. All requests by Ministers for legal advice or representation in matters in relation to their portfolios should in the first instance be addressed to the Attorney-General or to the Solicitor-General.
5. Where any Department requires legal services from outside of its own legal staff it shall first establish in which of the following categories the requirement for services falls:

Category 1:

- (a) Representation or advice in relation to actual or imminent litigation to which the Government or agency is or may become a party;
- (b) Legal services involving questions of the lawfulness of the exercise of Government powers;
- (c) Constitutional questions including Treaty of Waitangi issues;
- (d) Issues relating to the enforcement of the criminal law;
- (e) Legal issues relating to the protection of the revenue.

Category 2:

All requirements for legal services not included in Category 1.

6. (a) It shall be the duty of the Chief Executive of every Department whenever the interests of the Crown so require, to ensure that the Department obtains legal advice from its own legal staff or otherwise in accordance with these Directions.
- (b) All requirements by any Department for legal services within Category 1 to be provided other than by its own staff shall be referred to the Solicitor-General and will be dealt with either within or outside of the Crown Law Office as the Solicitor-General directs. Requests for such advice should be made to the Solicitor-General or other Crown Counsel designated by the Solicitor-General.
- (c) No Crown Solicitor or other lawyer in private practice is to be instructed by any Department in respect of requirements for legal services of a kind covered in Category 1, other than pursuant to a general or specific approval from the Solicitor-General, provided that any Department may instruct a Crown Solicitor without further authority than these Directions in respect of a summary prosecution or the taking of depositions for an indictable

prosecution. All requirements by any Department or Government agency for legal services to be provided other than by its own staff falling into Category 2 may be referred to Crown Solicitors or other lawyers in private practice without further authority than these Directions provided that the Solicitor-General may intervene at any stage in a particular case to require that the legal services concerned be provided as the Solicitor-General directs. Where any question or dispute arises as to the category into which a particular requirement for legal services falls, it shall be resolved by the Solicitor-General.

- (d) Where the Department seeks legal services in accordance with these Directions from lawyers in private practice it will be the duty of the Chief Executive to ensure that those lawyers engaged are free of conflicts of interest, have an appropriate level of expertise for the work they are asked to undertake, and are adequately supervised by the Department in the work they are engaged to do.
7. Where an opinion is sought from the Crown Law Office on an issue over which there is a difference between Departments both or all of those Departments should advise the Crown Law Office of their views. An opinion will be given to all of them jointly.
8. Where an opinion relates to the responsibilities of more than one Department the Department which seeks the opinion shall be responsible for meeting the costs of it. Departments may however agree among themselves to share the cost of any opinion. The Department having responsibility in the relevant area shall meet the cost of legal services provided:
 - (a) at the direction of Cabinet or a Cabinet Committee; and
 - (b) as a result of the intervention of the Solicitor-General pursuant to these Directions.
9. A lawyer who is employed in a Department or agency may appear on summary prosecutions in the District Court. Appearances by Departmental legal staff in any other jurisdiction will require a general or specific approval from the Solicitor-General.
10. No appeal from the decision of any Court or Tribunal, or application for judicial review, is to be instituted by any Crown party without the specific approval of the Solicitor-General.
11. If an employee of a Department is charged with a criminal offence arising out of the course of his or her employment, any claim for the reimbursement of the employee's legal costs shall be decided by the Chief Executive of the Department concerned.

12. If an employee of a Department is made a defendant in a civil action arising out of the course of his or her employment, the Crown shall bear the expenses of that defence, and the Attorney-General may take over the conduct of the case. For the purposes of this Direction “employee” includes a Chief Executive and a member of the Senior Executive Service.
13. Opinions provided by the Solicitor-General or the Crown Law Office are intended for the assistance of Ministers and Departments only. They are not to be sought for private bodies or individuals.
14. An opinion given by the Crown Law Office is the property of the Crown and in the charge of the person to whom it is addressed. Subject to the rights of the Attorney-General to be fully informed on all Government legal business, the Solicitor-General and Crown Law Office will not disclose the contents of an opinion to any third party without the specific authority of the addressee. Requests to the Crown Law Office for copies of such opinions, whether under the Official Information Act or otherwise, will be transferred to the addressee who must decide whether to claim or waive any solicitor and client privilege attaching to the opinion. The Crown Law Office will, on request, give advice as to whether privilege should or may be claimed but the ultimate decision must be made by the addressee.
15. The Cabinet Rules for the Conduct of Crown Legal Business 1958 are hereby revoked.

PAUL EAST
ATTORNEY-GENERAL