CROWN LAW OFFICE

BRIEFING PAPER FOR THE ATTORNEY-GENERAL

OCTOBER 2005

Contents **Page**

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 assist the Attorney-General to discharge his 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

New Zealand has a long tradition of democratic government under law. 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 values encapsulated in the phrase "the rule of law" and their application to the Executive.

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 aspect of the Attorney's function. 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.

Terence Arnold QC
Solicitor-General

Attorney-General

Introduction

7. The Attorney-General has two roles in Government:

   7.1 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 Office[1]. Traditionally in New Zealand the Attorney-General also has policy portfolio responsibilities not connected with those of the Attorney-General.

   7.2 The second role is that of the senior Law Officer of the Crown with principal responsibility for the Government's administration of the law. This function is exercised in conjunction with the Solicitor-General, who is the junior Law Officer.

   The Attorney thus has a unique role that combines, on the one hand, the obligation to act on some matters independently, free of political considerations, with, on the other hand, the political partisanship that is otherwise properly associated with other Ministerial office.

8. The fundamental responsibility of the Attorney-General, when acting as Attorney, 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]

9. In exercising that constitutional role the Attorney-General seeks to ensure that:

   9.1 the operations of executive Government are conducted lawfully and constitutionally; and

   9.2 the Government is not prevented through use of the legal process from lawfully implementing its chosen policies.

10. These constitutional responsibilities, which support New Zealand's commitment to democratic government under law, are reflected in the functions of the Crown Law Office. Sometimes they are referred to as "the Attorney-General's values".

Role And Functions

History of the Office

11. 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

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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).

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 for it. The existence of the office is recognised in New Zealand courts and in ss 9A and 9C of the Constitution Act 1986 (which deal with the delegation of the powers, duties and functions of the Attorney-General). The office holder, by virtue of appointment, assumes responsibilities conferred by statute and common law. The various facets of the role are dealt with in turn.

Principal Legal Adviser

12. The Attorney-General is the principal legal adviser to the Government. In that capacity the Attorney has similar responsibilities to those of any legal adviser towards a client. The Attorney-General is also a member of the Government and is 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.

13. In practice it is the Solicitor-General (either directly or through Crown Counsel) who gives legal advice to the Government. But that advice is always subject to the opinion of the Attorney-General, whose opinion prevails in the event of conflict.

14. In addition, 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, progress and outcome of such proceedings against or by the Government.

Representation in the Courts

15. The Attorney-General is the principal plaintiff or defendant on behalf 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). In addition, the Attorney-General has a separate responsibility to represent the public interest on behalf of the general community. In doing so, the Attorney-General may intervene in proceedings which affect the public interest (see paragraphs 15-17 below).

16. All proceedings are served on the Crown Law Office, and the Solicitor-General (or allocated Crown Counsel) acts as counsel. 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, particularly in criminal proceedings. The Attorney-General has also appeared before the International Court of Justice.

Principal Law Officer of the Crown

17. 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 (at paragraph 31 and following).

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3 See the Crown Proceedings Act 1950.

Protector of Charities

18. The Attorney-General's responsibilities in relation to charities, outlined in the Charitable Trusts Act 1957, are exercised by the Solicitor-General or by a Deputy Solicitor-General under a delegation.[4] There are two main aspects to these protective responsibilities:

    18.1 the notion that charitable purposes need protection by an officer acting in the public interest as there may be no beneficiaries to enforce them;

    18.2 the need for charitable bodies to be scrutinised in the public interest.

19. The Solicitor-General, on behalf of the Attorney-General, reports on, 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, on 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.

20. On 13 May 2002, Cabinet confirmed the establishment of a Charities Commission to approve and register charities, monitor their activities, and provide enforcement. The Commission does not apparently regard it as part of its role to undertake the investigation function currently undertaken through the Crown Law Office. That matter will be discussed further with the Commission.

Litigation Involving the Public Interest

21. 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 (relator proceedings). The relaxed requirements of legal standing mean relator proceedings are now uncommon. The Attorney-General also has a responsibility to ensure that lawful avenues of redress are not abused by vexatious litigants. Those who are declared to be vexatious litigants are limited in their ability to pursue court actions. In addition, there are various types of proceeding that can be taken only with the Attorney's consent.

22. The Attorney-General can also seek leave to intervene in the public interest in proceedings to which the Attorney-General is not already a party. For example, in *ENZA Ltd* v *Apple & Pear Export Permits Committee* [2001] 3 NZLR 456, the Attorney-General intervened to promote the aims of the legislation and to protect the interests of the public at large.

23. 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 (CA). 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.

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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.

Miscellaneous Statutory Functions

24. There are numerous powers, duties and functions conferred or imposed on the Attorney-General under particular statutes. A list of these powers can be provided and elaborated on if you wish. 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.

25. On 18 March and 13 June 2002, Cabinet approved changes to the nature of the rank and appointment process for Queen's Counsel in New Zealand. The title of the rank will change from "Queen's Counsel" to "Senior Counsel", although existing Queen's Counsel will have the option to retain their title.

26. The Governor-General will continue to appoint Senior Counsel on the recommendation of the Attorney-General and with the concurrence of the Chief Justice. However, a selection panel, comprising the Solicitor-General and representatives of the New Zealand Law Society and Bar Association, may be convened to advise the Attorney-General on applicants. Formal criteria will be developed. In addition, eligibility for appointment will be extended to lawyers practising within law firms.

27. These amendments are currently being considered by the House as part of the Lawyers and Conveyancers Bill.

Representation on Bodies

28. The Attorney-General is a member of various bodies, such as the Rules Committee, which is charged with responsibility for developing the District Courts, High Court and Court of Appeal Rules, and 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 an 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 involving a significant policy content, especially if the Government and judiciary are likely to have different views.

Independence

29. In exercising the powers, functions and duties of the senior Law Officer, the Attorney-General is expected to disregard any political interest or partisan advantage/disadvantage to the Government or opposition parties. The same applies to the Solicitor-General. However the public interest on any given issue cannot be determined in isolation from practical realities, and that 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 similar advantage.

Relationship with the Judiciary

30. 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 Judges of the Supreme Court, Court of Appeal, High Court, and District Court.

31. In addition, by convention in New Zealand, the Attorney-General 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.

32. It is also important to the effective functioning of the judiciary 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. This is separate from the power of the Police under s 138 of the Criminal Justice Act 1985 to charge any person with an offence who breaches an order forbidding the publication of evidence, submissions or the details of any witness.

Appointments to High Court

33. The details of the processes for the appointment of High Court Judges and Associate Judges (formerly Masters), are set out in two brochures prepared by the Judicial Appointments Unit, copies of which can be provided if required. The key features of the processes are as follows:

    33.1 a periodic consultation process with a wide variety of organisations and individuals seeking suggestions of candidates for appointment;

    33.2 the periodic publication of advertisements calling for expressions of interests for those interested in appointment to the High Court;

    33.3 requirement that all prospective candidates for appointment complete a formal expression of interest;

    33.4 consultation with the judiciary, represented by the Chief Justice, and the profession, represented by the Presidents of the New Zealand Law Society and the New Zealand Bar Association, concerning the suitability of particular candidates.

Judicial Complaints

34. A new formalised system for dealing with judicial complaints has recently been implemented. The office of the Judicial Conduct Commissioner has been established. The Commissioner will oversee the complaints process and will be the first port of call for all complaints about Judges. In most instances, the Commissioner will either dismiss the complaint or refer it 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, who can recommend that the Head of Bench facilitate a reconsideration of a complaint. On rare occasions where the Commissioner considers that a complaint, if substantiated, could lead to the removal of a judge, the Commissioner may recommend to the Attorney-General that he or she appoint a Judicial Conduct Panel to inquire into the matter.

The Attorney-General and Parliament

35. The Attorney-General is answerable 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 (although, by convention, matters such as decisions to prosecute are kept free of political influence).

36. 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.

    36.1 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]

    36.2 The Attorney may also approve the giving of legal advice by the Crown Law Office to Parliamentary select committees if they seek legal assistance. 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.

    36.3 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

37. 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.

38. 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.

39. 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, or appearing to become, 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

40. It has accordingly been usual for the Solicitor-General rather than the Attorney-General to exercise the following Law Officer functions and powers:

    40.1 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 stay prosecutions, to grant any witness

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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.

or other person immunity from prosecution, and to deal with requests from other countries for extradition and mutual criminal assistance.

40.2 The Crown has a right of appeal against inadequate sentences imposed on convicted defendants (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.

40.3 The Solicitor-General must also, under statute, represent the Crown in court when convicted persons appeal against their convictions or sentences. The Solicitor-General appears through Crown Counsel, or on occasion Crown Solicitors.

41. The present system ensures that criminal appeals are conducted by counsel with particular expertise in appellate advocacy, who can bring greater objectivity to the appellate argument as a result of not having personally prosecuted at trial. Where the complexity of a matter warrants it, prosecuting counsel will be briefed for the appeal. However counsel within the Crown Law Office who regularly conduct these appeals develop a depth of understanding of the principles of criminal law, evidence and criminal procedure, which is of invaluable assistance to the court.

42. Most 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 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, for example, the reclassification of special patients under the Criminal Justice Act 1985 and the certification of grants of legal aid for appeals to the Privy Council. Equally there are some functions which are specially vested by statute in the Solicitor-General. These include the power to appeal against sentence and powers under the Coroners Act 1988 to authorise an inquest into deaths occurring outside New Zealand and to authorise fresh inquests where there is new evidence.

SOLICITOR-GENERAL

Introduction

43. Holding office under an appointment from the Governor-General (under prerogative rather than statutory power), 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 prosecution of indictable crime.
- Responsible for the provision of constitutional advice to the Government and to the Governor-General.

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7 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.

In addition, the Solicitor-General has a number of statutory duties and functions, in particular in relation to the administration of criminal justice.

Roles and Functions

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

Chief Executive

45. 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 substantial time. Unlike most other chief executives, the Solicitor-General is not appointed under the State Sector Act 1988. That Act recognises the Solicitor-General's independent status in Government. In terms of s 44, 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

46. 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 considered to be 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. If a court later concludes the Solicitor-General's advice was wrong it is the Solicitor-General rather than the Government who is then open to criticism. The Solicitor-General also exercises a number of specific functions within the Crown's prosecution process as discussed above.

47. 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

48. Sometimes questions arise as to who should exercise responsibilities which generally might fall to the Solicitor-General but which due to the special circumstances of the particular case 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 senior 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.

CROWN LAW OFFICE
Role and Functions

49. The Crown Law Office is a department of the public service with specialist responsibilities for providing legal advice and representation to the Government (in particular, Government Departments and Ministers) in matters affecting the Crown. It is a component of the Justice Sector (**attached** as Appendix A is an overview of the sector).

50. 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 responsibility for 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 and in 2001-02 chaired a Ministerial Advisory Group on a replacement for the Privy Council. Similar input has been sought by Attorneys-General in relation to the judicial appointments process for the Supreme Court, Court of Appeal and High Court.

51. Broadly, it is the function of the Crown Law Office to support the Attorney-General and the Solicitor-General in performing their roles. In particular, the Office is responsible for:

    51.1 the provision of legal advice and representation services to Ministers of the Crown, Government departments and agencies;

    51.2 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;

    51.3 administering the Crown Solicitors Regulations 1994;

    51.4 assisting the Solicitor-General with the conduct of criminal appeals;

    51.5 assisting the Solicitor-General in the supervision, direction and performance of Crown prosecutions.

52. In practice the Office operates and provides services to Ministers, departments and Government agencies in much the same way as a private sector law firm does for its clients. In essence, the Office is the Government's law firm, although it does not purport to provide the full range of legal services (i.e. it focuses on advice and litigation work rather than transactional work). 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."

Cabinet Directions

53. The Office's relationships 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 Appendix B. The essential features of the Cabinet Directions are retention of the overall responsibility for, and control by, the Attorney-General and Solicitor-General of 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.

54. Broadly the scheme is as set out below.

    54.1 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 are similar to those required by any large industrial or commercial concern, for example, conveyancing and employment advice.

    54.2 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 cases to private sector lawyers where specialist expertise or particular skills not immediately available in the Office are required.

    54.3 In the case of work falling into Category 2, departments may engage the services of the Crown Law Office or those of private sector lawyers. Where departments choose to engage private sector lawyers, the chief executive is under a duty to ensure that the lawyers engaged have an appropriate level of expertise for the work, have no conflicts of interest and 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.

Organisation and Structure of Crown's Legal Services

55. The Crown Law Office has had to expand considerably over the past ten years to meet the increasing demands of Government for its legal services. Further significant expansion is not envisaged. 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 governance[8], Crown prosecutions and Criminal appeals[9], and Governmental Public Law[10].

56. 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 and allows it to have a single "Crown" view. The Office, likewise, is usually free from conflicts of interest although where these do arise (where for instance this Office acts for both a court or tribunal under review and one of the parties) outside counsel can be briefed.

57. 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 in its advice and representation.

58. 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.

59. 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.

Crown Solicitors

Role and Relationship

60. Crown Solicitors are legal practitioners in private practice whose main responsibility is to prosecute 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 in criminal matters, nor can they act against the Crown (unless the Solicitor-General agrees

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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

in a particular case or class of case). Crown Solicitors have expertise in the criminal law and experience in interpreting the particular professional and ethical obligations of fairness required of prosecutors. The role also involves providing independent advice to the Police on matters associated with prosecutions and may involve advice and legal representation in prosecutions by Government departments. Crown Solicitors typically have partners and employees who assist in the conduct of prosecutions.

61. Most criminal proceedings are initiated by the Police. The Police also prosecute summary offences and act independently in deciding to conduct both investigations and prosecutions. If a matter in the summary jurisdiction is complex or difficult, a Crown Solicitor may be instructed in a summary prosecution.

62. Although the Police initiate indictable matters and take responsibility for them until committal for trial, Crown Solicitors take over prosecutions after that. The Crown Solicitors' independence from the Police in the discharge of their prosecutorial functions is one of the protections of the citizen.

63. There are currently 16 Crown Solicitor warrants for different centres in New Zealand, all issued by the Governor-General. The Solicitor-General makes recommendations for the appointment for Crown Solicitors and, wherever necessary, termination of their warrants. In essence, the Crown Solicitors operate under a delegated authority from the Law Officers.

64. Crown Solicitors report to the Solicitor-General on the conduct of the criminal prosecutions they undertake for the Crown. The Solicitor-General has issued Prosecution Guidelines for the conduct of prosecutions which the Crown Solicitors, and the Police, must follow. The current Guidelines are **attached** as Appendix C. The guidelines are to be reviewed to ensure they remain a proper basis for the conduct of prosecutions.

65. 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.

    65.1 As noted, 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.

    65.2 The Crown Solicitors are obliged to refer to the Crown Law Office law officer matters arising in any of their prosecutions, such as stays of prosecutions and requests for immunity from prosecution. Some legislation also requires the Crown Solicitors to approach the Solicitor-General on other matters relating to their prosecutions.

    65.3 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. Panel members are periodically briefed to conduct indictable prosecutions on behalf of the Crown Solicitor.

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[11] 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.

65.4 The Crown Law Office administers the payment of Crown Solicitors' fees under 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.

66. Government departments can conduct in house prosecutions in the summary jurisdiction. Such prosecutions arise out of legislation which regulates fisheries, customs, 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.

Crown Solicitor Performance Review

67. The Crown Law Office conducts a process of rolling review of all Crown Solicitors. This performance review process is carried out on a consultative basis with both the Crown Solicitor involved and other participants in the criminal justice system (judges, defence lawyers, Police etc.). The review is carried out by the Deputy Solicitor-General (Criminal) and an independent reviewer from the private sector.

68. The review is undertaken according to a structured process designed to obtain information about the quality of prosecutions conducted by the Crown Solicitors, their partners and staff. It is also designed to assist the Crown Solicitors 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.

69. The intention of the review process over time is to provide better accountability, consistency and quality over the Crown Solicitor network in the performance of the Crown prosecution function.

70. Sixteen such reviews have been carried out between 1997 and 2005. An appointment process derived from the review process is used in the appointment of new Crown Solicitors. The appointment process for three vacant Crown Solicitor warrants (Gisborne, Rotorua and Invercargill) is nearly complete.

71. 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 them up with the appropriate authorities.

Serious Fraud Office Prosecutions

72. 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 a senior barrister in private practice. This is a legislative requirement.

73. The Solicitor-General, in consultation with the Director of the Serious Fraud Office, appoints these barristers to the 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.

74. 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).

75. 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.

Management and Administration of the Crown Law Office

76. The Crown Law Office is currently structured into three groups, each headed by a Deputy Solicitor-General. There is a total of eight client servicing legal teams in the groups. Each team is headed by a team leader. In addition, there is a corporate services group headed by the Practice Manager.

Senior Management Group

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

Terence Arnold QC	Solicitor-General
Karen Clark	Deputy Solicitor-General, Public Law
Cheryl Gwyn	Deputy Solicitor-General, Constitutional and Team Leader of Law Officer Team
John Pike	Acting Deputy Solicitor-General, Criminal Process
Diana Pryde	Practice Manager

Other Legal Team Leaders

Bronwyn Arthur	Crown Counsel, Natural Resources
James Coleman	Crown Counsel, Taxation and Public Revenue
Peter Gunn	Crown Counsel, Employment
Virginia Hardy	Crown Counsel, Treaty Issues and International Law
Grant Liddell	Crown Counsel, Governmental Business
Val Sim	Crown Counsel, Human Rights
Fiona Guy	Crown Counsel, Criminal Process

Each legal team comprises:

- Team Leader (also a Crown Counsel)
- Crown Counsel
- Associate Crown Counsel
- Assistant Crown Counsel
- Legal and Secretarial Support Staff

Corporate Services Group

Chris Walker	Group Finance Manager
Doug Gordon	Human Resources Manager
Prue Mazengarb	Information Systems Manager
Carol Leckie	Support Services Manager
Amelia de Lorenzo	Research and Library Services Manager
Daphne Rowland	Litigation Services Manager

Human Resource Management

78. The number of employees presently permanently employed are as follows[13]:

	30 June 2005
Solicitor-General, Deputy Solicitors-General and Practice Manager	5
Counsel	74
Legal Support	19
Secretarial/Word Processing	34
Corporate Services Group	24
Total number of employees	156

NB: Part-time and job share arrangements are included in these numbers)

13 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.

Expenditure and Appropriations

79. A summary of the revenue and expenditure appropriations approved for Vote:Attorney-General for the year ended 30 June 2006 is as follows:

Departmental Output Class	Revenue: Crown $000	Revenue: Department $000	Total Expenses $000	Surplus./ Deficit $000
Legal Advice and Representation[14]	-	17,142	17,142	-
Supervision and Conduct of Crown Prosecutions[15]	27,686	-	27,686	-
Conduct of Criminal Appeals[16]	1,933	-	1,933	-
The Exercise of Principal Law Officer Functions[17]	1,278	-	1,278	-
Total Departmental Output Classes	30,897	17,142	48,039	-

[All amounts are expressed in GST inclusive terms]

Also required to repay the capital injection $500M received on 1 July 2004.

14 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.

15 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.

16 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.

17 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.

OVERVIEW OF THE JUSTICE SECTOR

Introduction

New Zealand has a robust justice system and a well co-ordinated justice sector led by the Chief Executives of the Ministry of Justice, the Department of Corrections, the New Zealand Police, Crown Law, the Department of Child, Youth and Family Services, the Serious Fraud Office and their responsible Ministers. The broader sector also includes the Office of the Ombudsmen, and a number of Crown entities and other agencies.

The sector organises its work around two shared long-term goals (outcomes): 'Safer communities' and 'A fairer, more credible and more effective justice system'. The Ministry itself has adopted these outcomes, as described at the beginning of section two. There are well-established processes for co-ordination and collaboration across a number of fronts and the agencies themselves are interdependent. Each agency plays a specific role within one of the most integrated justice systems in the world. To continue to be successful, sector agencies need to continue to collaborate at both local and national levels.

Changes or decisions taken in relation to one agency will often have significant implications for other agencies within the sector (for example, bail policy and practice impacts on prison population). The sector is collaborating to develop a 'pipeline model' of the justice system to understand these effects better.

Key Justice Sector Facts

- *The sector employs approximately 16,200 staff, and operates from around 660 sites around the country.*
- *The sector administers 161 individual Acts of Parliament.*
- *There are around 12 million electronic data transactions a year between justice sector agencies. These transactions are managed through 24 separate electronic data interfaces.*
- *The justice data warehouse contains 210 gigabytes of criminal data and is updated daily.*

On average, every day (250 working days for Courts; 365 for the Police, Child, Youth and Family and Corrections):

- *Police answer 1,462 emergency calls and 2,571 other calls*
- *1,085 crimes are recorded*
- *1,036 on-road speed traffic and infringement notices are issued*
- *327 cases are referred for prosecution by the New Zealand Police*
- *More than 10 jury trials are disposed of in the District Courts*
- *approximately 7,000 people are in prison, and 26,730 offenders are on community-based sentences*
- *21 cases are referred to Child, Youth and Family, and 16 Family Group Conferences are convened*
- *504 applications are made in Disputes Tribunals, the civil jurisdiction of the District Court, and the Family Court.*

Justice Sector Capability and Capacity

There has been significant reform of the system over the last 10 years. The sector will continue to provide advice on opportunities to improve the system, and is currently implementing a number of new initiatives.

Reform of the justice system is ongoing, and over the next three to six months Ministers will need to make decisions in a number of areas including:

- *Legislative priorities – e.g. Courts and Criminal Matters Bill; legal aid eligibility; changes to the Children Young Persons and their Families Act 1989*
- *Enhancing front-line policing (Police)*
- *Implementing the Police Communications Centre Review (Police)*
- *Implementing the Youth Justice Capability Review (Department of Child Youth and Family Services)*
- *Infringement Review (Ministry of Justice (MoJ))*
- *Implementing the Legal Aid Eligibility Review (Legal Services Agency)*
- *Foreshore and seabed negotiations (MoJ)*
- *Financial Action Task Force recommendations (MoJ)*
- *Law Commission report on criminal pre-trial processes (MoJ)*
- *Implementation of the Crime Reduction Strategy (Justice Sector).*

The sound basis of New Zealand's justice system ensures that it functions effectively. However, capability and capacity issues have challenged, and will continue to challenge, the sector.

The sector has experienced significant growth in throughput, which is placing its core infrastructure under pressure. These pressures have been driven by a range of factors:

- population growth, particularly in the upper North Island
- changing demographics of New Zealand's population
- successful implementation of strategies focused on reducing crime, including re-offending and demand for Youth Justice services
- emerging organised crime-related issues – drug imports and electronic crime
- ageing infrastructure in terms of buildings such as courthouses, police stations, and prisons
- range of cost pressures – for example, negotiation of employee agreements, rising construction costs, and steadily increasing energy prices
- fewer available resources in the labour market for recruitment.

While the Government has increased spending in the justice sector over recent years, it is likely to continue to require sustained investment. For example, there continue to be areas with significant levels of deferred maintenance across all agencies, such as the need to replace Mt Eden prison that is past its "use by" date.

The sector recognises the need to ensure value for the money invested in it, and will continue to look for opportunities to shift resources to higher-value activities and for efficiencies. However, it should be noted that baseline and output pricing reviews for the Ministry of Justice, the Department of Child, Youth and Family Services, and the Department of Corrections all identified the need for additional funding. In each case, there was little scope to address the capacity and capability issues identified by reallocating resources, and any gains from increased efficiency would be at the margin.

Responding to Demand

Wage Pressures/Staffing Pressures

Increasing demand in the justice sector and a tight labour market have put significant pressure on the supply of professional and skilled people. Sector agencies are considering a number of sourcing options, including recruitment from overseas.

In 2006, the Police and Corrections will negotiate significant wage rounds covering approximately 10,000 Police and 5,000 Corrections staff. This will have implications for the upcoming 2006 Budget. Similarly, in 2007, the Ministry of Justice will be negotiating with around 2,000 Justice field staff.

Property and Information Technology

The justice sector owns and manages a large building and property portfolio and is dependent on information technology (IT) to support its operational activities. The state of that infrastructure and the growth in demand for justice services have seen the sector require significant additional funding.

In the 2005 Budget, the justice sector received 19 percent of total capital funding available across government, while Justice, Social Development and Housing combined constituted only 10 percent of new operating expenditure. New spending was largely driven by the need to meet demand caused by increasing prisoner numbers, but also included capital to upgrade the Ministry's building stock and upgrade its IT infrastructure, and investment in police Livescan fingerprinting. The sector is carefully managing the associated projects and has deliberately adopted a phased approach to handling the accompanying growth and changes within the sector.

However, there will continue to be a need for significant investment in capital within the justice sector to ensure that the capacity and value of the investment is maintained.

Managing Prisoner Population Growth

Higher than forecast increases in the prison population in 2004/05 resulted in the use of police and court cells to hold adult and youth offenders. In the area of youth justice, increased demand for Child, Youth and Family residential placements has also led to high use of police cells. Significant additional resource has been required to manage this higher than expected level of demand. The fiscal implications of the increasing prison population, taken together with the cost of the prison build, have constrained the sector's ability to invest proactively in measures to reduce inflows into prisons.

It is expected that immediate pressure on police and court cells will be relieved in late 2005/06, although if current forecasts and trends continue there is likely to be a further critical period in 2010.

An active programme for building new prisons continues. However, given the long lead time required, Ministers will need to make early decisions about prison builds to meet forecast demand post-2008 within current policy settings. Any changes to policy settings that impact on prison population numbers will need to be further factored into this equation.

Over the next three to six months Ministers will need to make decisions on and/or monitor the following activities:

- *wage rounds for Police, Corrections and Ministry of Justice–2006 Budget*
- *implementation of Ministry of Justice Service Improvement Programme (MoJ)*
- *Mt Eden/Auckland Central Remand Prison expansion (Corrections)*
- *technology investment to support frontline policing (Police)*
- *Ministry of Justice forecasts of prison inmate populations (MoJ)*
- *options for managing prison inmate demand post-2008 (report back to Cabinet, November 2005)*

Maintaining Accountability

The sector has a range of mechanisms to ensure the rights of people involved in the system are protected. In this context, it is noteworthy that prison inmates and others involved in the criminal justice system are increasingly prepared to sue the Crown for compensation, citing breaches of various kinds including human rights breaches. It is important disciplinary and behaviour management processes and conditions of detention comply with legal requirements and human rights norms. Performance issues are actively managed, drawing on both internal and external accountability mechanisms such as the Police Complaints Authority. A new independent prison complaints body is to be considered, adding to the range of mechanisms in place to protect individuals.

Over the next three to six months Ministers will need to make decisions on and/or monitor the following activities:

- *Commission of Inquiry into Police Conduct (Police)*
- *implementation of responses to the Police communications centre review (Police)*
- *review of prison complaints processes (MoJ and Corrections)*
- *capacity and capability of the Police Complaints Authority (MoJ)*

A Sector Approach – Justice Sector Collaboration and Co-ordination

It is essential for the sector to work collaboratively to deliver an integrated and co-ordinated approach to achieving our shared outcomes. The Secretary for Justice has been mandated by Cabinet to provide leadership to the justice sector as a whole.

In approaching its sector leadership role, the Ministry has adopted a collaborative working model that aims to ensure cohesive direction and action among all sector agencies. Its leadership mandate must rest on goodwill within the sector. Three successful areas of focus have been:

- the development and implementation of the Justice Sector Information Strategy
- the sector budget process
- the ongoing development of a managing for outcomes framework.

These areas of focus have enabled the Ministry to test its sector engagement models, and to build the relationships required to give effect to the leadership function. The sector also regularly collaborates to ensure effective operational implementation of legislation and policy, and co-ordinates a number of justice sector initiatives, including the Crime Reduction Strategy and the Youth Justice strategy.

The sector is progressively building on existing initiatives to develop strategies and to plan collectively, to collaborate more closely on policy, research and evaluation, and communications, and to refine how the sector manages its inputs into budgets. The sector is committed to making better use of data, and, to that end, is planning to develop a sector model to enable agencies to better understand the implications of changes to one or more parts of the justice system (the 'pipeline').

Over the next three to six months Ministers will need to make decisions and/or monitor the following activities:

- *management of Justice Sector Contingency (allocation for managing funding decisions arising between budget rounds)*
- *setting priorities for the Justice Sector Budget process for 2006*
- *ongoing development and evolution of sector outcomes framework*
- *development of the next three-year stage of the Justice Information Strategy.*

CABINET DIRECTIONS FOR THE CONDUCT OF CROWN LEGAL BUSINESS 1993

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.

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:-

6. All requirements for legal services not included in Category 1

(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

PROSECUTION GUIDELINES

AS AT 9.3.92

(Duplicate of original)

Appendix C

INDEX

1. Introduction

1.1 Almost invariably it is the responsibility of officers and agencies of the State to investigate offences and prosecute offenders. It is the Attorney-General and Solicitor-General, as the Law Officers of the Crown, whose responsibility it is to ensure that those officers and agencies behave with propriety and in accordance with principle in carrying out their functions.

1.2 The State bears a dual responsibility in its administration of the criminal law. Behaviour classified as criminal has been deemed so harmful to society generally that the State, on behalf of all its citizens, accepts the responsibility to investigate, prosecute and punish those behaving in that way.

1.3 The State also accepts the responsibility of ensuring, through institutions and procedures it establishes, that those suspected or accused of criminal conduct are afforded the right of fair and proper process at all stages of investigation and trial.

1.4 Those dual responsibilities are often in tension. The individual subjected to the criminal justice process will rarely believe that it is working in his or her favour; the investigating and prosecuting agencies will not wish to see someone they believe guilty elude conviction.

1.5 The decision to begin a prosecution against an individual has profound consequences. The individual is no longer a suspect, but is formally and publicly accused of an offence. Even if eventually acquitted, he or she will be subjected to the stresses of public opprobrium, court appearances and, possibly, a loss of liberty while awaiting trial.

1.6 It is of great importance therefore that decisions to commence and to continue prosecutions be made on a principled and publicly known basis. The purpose of these guidelines is to indicate, in a general way, the bases on which the Law Officers expect those decisions to be made.

2. Who may Institute Prosecutions

2.1 Any person may institute a prosecution for an offence against the general criminal law and, with some specific exceptions, for regulatory offences. Some prosecutions require the prior consent of the Attorney-General; the procedure for obtaining that consent is outlined in section 4. Every prosecution is commenced by way of an Information laid under the provisions of the Summary Proceedings Act 1957 and the person bringing the prosecution is known as the "informant". In practice almost all prosecutions for offences against the general criminal law are brought by the Police and those for regulatory offences by officers of Government Departments or Local Authorities.

2.2 In the case of prosecutions brought by Crown agencies for offences triable only on Indictment, or those on which the accused has exercised a right of electing trial by jury, the informant ceases to be the prosecutor from the point at which the accused is committed for trial. At that point the prosecution becomes a "Crown" matter and only the Attorney-General, Solicitor-General or a Crown Solicitor may lay an Indictment. The laying of Indictments is dealt with in section 5.

2.3 The Attorney-General as the Senior Law Officer of the Crown has ultimate responsibility for the Crown's prosecution processes. Successive Attorneys-General however have taken the view that it is inappropriate for them, as Ministers in the Government of the day, to become involved in decision making about the prosecution of individuals.

2.4 In New Zealand the Attorney-General and Solicitor-General have co-extensive original powers. With some specified exceptions the Solicitor-General may perform any function given to the Attorney-General. In practice the Solicitor-General exercises all of the Law Officer functions relating to the prosecution process.

2.5 The initial decision to prosecute rests with the Police in the case of the general criminal law, or an officer of some other central or local government agency charged with administering the legislation creating the offence. It is frequently the case that the Police or agency will consult a Crown Solicitor or the Solicitor-General for advice as to whether a prosecution would be well founded. It is however never for the Solicitor-General or the Crown Solicitor to make the initial decision to prosecute; it is their function to advise.

3. The Decision to Prosecute

In making the decision to initiate a prosecution there are two major factors to be considered; evidential sufficiency and the public interest.

3.1 Evidential Sufficiency

The first question always to be considered under this head is whether the prosecutor is satisfied that there is admissible and reliable evidence that an offence has been committed by an identifiable person.

The second question is whether that evidence is sufficiently strong to establish a prima facie case; that is, if that evidence is accepted as credible by a properly directed jury it could find guilt proved beyond reasonable doubt.

3.2 (in the original there is no paragraph 3.2)

3.3 The Public Interest

3.3.1 The second major consideration is whether, given that an evidential basis for the prosecution exists, the public interest requires the prosecution to proceed. Factors which can lead to a decision to prosecute or not, will vary infinitely and from case to case. Generally, the more serious the charge and the stronger the evidence to support it, the less likely it will be that it can properly be disposed of other than by prosecution. A dominant factor is that ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not that it will result in a conviction. This assessment will often be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In cases of such doubt it may be appropriate to proceed with the

prosecution as, if the balance is so even, it could probably be said that the final arbiter should be a Court. It needs to be said also that the public interest may indicate that some classes of offending, eg driving with excess breath or blood alcohol levels, may require that prosecution will almost invariably follow if the necessary evidence is available.

3.3.2 Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:

(a) the seriousness or, conversely, the triviality of the alleged offence; ie whether the conduct really warrants the intervention of the criminal law;

(b) all mitigating or aggravating circumstances;

(c) the youth, old age, physical or mental health of the alleged offender;

(d) the staleness of the alleged offence;

(e) the degree of culpability of the alleged offender;

(f) the effect of a decision not to prosecute on public opinion;

(g) the obsolescence or obscurity of the law;

(h) whether the prosecution might be counter-productive; for example by enabling an accused to be seen as a martyr;

(i) the availability of any proper alternatives to prosecution;

(j) the prevalence of the alleged offence and the need for deterrence;

(k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(l) the entitlement of the Crown or any other person to compensation, reparation or forfeiture as a consequence of conviction;

(m) the attitude of the victim of the alleged offence to a prosecution;

(n) the likely length and expense of the trial;

(o) whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so;

(p) the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.

3.3.3 None of these factors, or indeed any others which may arise in particular cases, will necessarily be determinative in themselves; all relevant factors must be balanced.

3.3.4 A decision whether or not to prosecute must clearly not be influenced by:

(a) the colour, race, ethnic or national origins, sex, marital status or religious, ethical or political beliefs of the accused;

(b) the prosecutor's personal views concerning the accused or the victim;

(c) possible political advantage or disadvantage to the Government or any political organisation;

(d) the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

4. Consent to Prosecutions

4.1 A number of statutory provisions creating offences require that, before a prosecution is commenced, the consent of the Attorney-General is to be obtained. This is a function carried out in practice by the Solicitor-General (see section 2). The consent, if given, is signified by way of endorsement on the Information. Requests for consent should be directed to the Solicitor-General with full details of the alleged offence and the evidence available to be called.

4.2 The reasons for requiring that consent vary. In general terms however the consent requirement is imposed to prevent the frivolous, vengeful or 'political' use of the offence provisions.

4.3 A list of the provisions creating offences for which the Attorney-General's consent is required is given in Appendix 1.

5. Indictments

5.1 The power of the Attorney-General and Crown Solicitors to present an Indictment is recognised in s 345 of the Crimes Act 1961. Almost invariably it is a Crown Solicitor who does so. In exercising that power, the Crown Solicitor acts entirely independently of the Police or other investigating agency and is not subject to their instructions.

5.2 A Crown Solicitor may present an Indictment "… for any charge or charges founded on the evidence disclosed in any depositions taken against such person…". A Crown Solicitor may therefore present an Indictment containing a charge different from, or additional to, that originally contained in the Information, so long as it is founded on evidence contained in the depositions. In exercising that power a Crown Solicitor is exercising, de novo, the discretion to prosecute. All factors affecting that discretion arise again for consideration.

5.3 Where the District Court has committed on some charges only, the prosecution has a number of options available if it wishes nevertheless to proceed to trial on the charges in respect of which there has been no committal:

(a) the Crown Solicitor may exercise the power of laying an indictment under s 345 notwithstanding the lack of a committal on those charges;

(b) an application may be made to a High Court Judge for written consent to present an Indictment notwithstanding the lack of a committal on that or those charges;

(c) the Attorney-General (in practice the Solicitor-General) may present an Indictment (known as an "ex officio Indictment") or give written consent to the presentation of an Indictment notwithstanding the lack of a committal on that or those charges;

(d) the Information or Informations on which there has been no committal may be re-laid and taken to depositions again.

5.4 The use of an ex officio indictment or the giving of consent by the Attorney-General has been very rare and is likely to remain so.

6. Stay of Proceedings

6.1 The common law right of the Attorney-General to intervene in the prosecution process and to stay any prosecution from proceeding further is recognised in ss 77A and 173 of the Summary Proceedings Act 1957 and s 378 of the Crimes Act 1961.

6.2 In New Zealand the power of stay has been sparingly exercised. That conservative approach is likely to continue.

6.3 Generally speaking the power of entering a stay will be exercised in three types of situation:

(a) Where a jury has been unable to agree in two trials. After a second disagreement the Crown Solicitor must refer the matter to the Solicitor-General for consideration of a stay. Unless the Solicitor-General is satisfied that some event not relating to the strength of the Crown's case brought about one or both of the disagreements, or that new and persuasive evidence would be available on a third trial, or that there is some other exceptional circumstance making a third trial desirable in the interests of justice, a stay will be directed.

(b) If the Solicitor-General is satisfied that the prosecution was commenced wrongly, or that circumstances have so altered since it was commenced as to make its continuation oppressive or otherwise unjust, a stay will be directed.

(c) A stay will be directed to clear outstanding or stale charges or otherwise to conclude an untidy situation; eg where for instance an accused has been

convicted on serious charges but a jury had disagreed on others less serious, or a convicted person is serving a substantial sentence and continuing with further charges would serve no worthwhile purpose.

6.4 The possible circumstances which may justify a stay under heads (b) and (c) above are almost infinitely variable. In general terms however the same considerations will apply as are involved in the original decision to prosecute, always with the overriding concern that a prosecution not be continued when its continuance would be oppressive or otherwise not in the interests of justice.

7. Withdrawal of Charges and Arrangements as to Charges

7.1 Circumstances can change, or new facts come to light, which make it necessary to reconsider the appropriateness of the charges originally laid.

7.2 If after a review against the relevant criteria it is clear that a charge should not be pursued, it should be discontinued at the first opportunity. The mode of discontinuance will depend on the court before which the charge is pending and the stage the proceedings have reached. Similarly, if it is plain that a charge should be amended, that should be done at the first opportunity.

7.3 If a charge is not to be proceeded with because a witness declines to give evidence and there are acceptable reasons why he or she should not be forced to do so, it will generally be preferable to ask the Court to dismiss the charge for want of prosecution. That course should be followed, rather than seeking a stay from the Solicitor-General, to ensure that the reasons for the discontinuance are publicly stated.

7.4 Arrangements between the prosecutor and the accused person as to the laying or proceeding with charges to which the accused is prepared to enter a plea of guilty can be consistent with the requirements of justice, subject to constraints which must be clearly understood and followed by prosecutors.

7.5 Those constraints are:

(a) No such arrangement is to be initiated by the prosecutor.

(b) No proposal to come to such an arrangement is to be entertained by a prosecutor unless:

(i) there is a proper evidential base for the charges to be laid or proceeded with and, conversely, there is not evidence which would clearly support a more serious charge;

(ii) the charges to be proceeded with fairly represent the criminal conduct of the accused and provide a proper basis for the Court to assess an appropriate sentence;

(iii) the accused clearly admits guilt of those charges which are to be proceeded with.

(c) The prosecutor must not agree to promote or support any particular sentencing option. In every case the informant or the Solicitor-General will reserve the possibility of an appeal against sentence if the sentence imposed is considered manifestly inadequate or wrong in principle.

(d) A prosecutor must not lay charges or retain them after it is clear that they should not be proceeded with for the purpose of promoting or assisting in any discussions about such an arrangement.

(e) In the case of summary prosecutions, every such arrangement must be approved by the Officer in Charge of the relevant Police prosecution section or, in the case of another Crown prosecuting agency, the senior legal officer of that agency. After committal for trial approval must be given by the relevant Crown Solicitor personally. In cases involving homicide, sexual violation or drug dealing offences involving class A drugs the approval of the Solicitor-General must also be obtained.

7.6 In addition to the matters outlined above a decision to enter into such an arrangement should be based on the following considerations:

(a) whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so;

(b) whether the sentence that is likely to be imposed if the charges are pursued as proposed would be appropriate for the criminal conduct involved;

(c) the desirability of prompt and certain despatch of the case;

(d) the strength of the prosecution case;

(e) the likely affects on witnesses of being required to give evidence;

(f) in cases where there has been a financial loss, whether the accused has made restitution or arrangements for restitution;

(g) the need to avoid delay in the despatch of other pending cases.

8. The Role of the Prosecutor in Sentencing

8.1 Until relatively recently the "traditional" view of the prosecutors role at sentencing prevailed; ie the prosecutor should maintain disinterest in the sentence imposed. That view cannot survive in the face of the Crown's right to appeal against a sentence considered to be manifestly inadequate or wrong in principle.

8.2 At sentencing, counsel for the prosecution should be prepared to assist the Court, to the degree the Judge indicates is appropriate, with submissions on the following matters:

(a) the Crown's version of the facts;

(b) comment upon or, if necessary, contradiction of the matters put forward in mitigation by the accused;

(c) the accused's criminal history, if any;

(d) the relevant sentencing principles and guideline judgments.

8.3 Counsel for the prosecution should not press for a particular term or level of sentence. It is the Crown's duty to assist the sentencing Court to avoid errors of principle or sentences which are totally at odds with prevailing levels for comparable offences and offenders.

9. Witness Immunities

9.1 It is sometimes the case that the Crown will need to rely upon the evidence of a minor accomplice or participant in an offence in order to proceed against an accused considered to be of greater significance in the offending.

9.2 Unless that potential witness has already been charged and sentenced he or she will be justified in declining to give evidence on the grounds of self-incrimination.

9.3 In such a case it will be necessary for the Crown to consider giving the witness an immunity from prosecution. An immunity takes the form of a written undertaking from the Solicitor-General to exercise the power of stay if the witness is prosecuted for nominated offences. It thus protects the witness from both Crown and private prosecutions.

9.4 It is to be noted that the only person able to give such an undertaking is the Solicitor-General.

9.5 The purpose of giving an immunity must clearly be borne in mind. That purpose is to enable the Crown to use otherwise unavailable evidence. In exchange for that it will, with reluctance and as a last resort, grant immunity on specified offences. In particular, the giving of an immunity is not to be seen as an opportunity for an informer to wipe the slate clean.

9.6 Immunities are given reluctantly and only as a last resort in cases where it would not otherwise be possible to prosecute an accused for a serious offence.

9.7 Before agreeing to give an immunity the Solicitor-General will almost invariably require to be satisfied of at least the following matters:

(a) that the offence in respect of which the evidence is to be given is serious both as to its nature and circumstances;

(b) that all avenues of gaining sufficient evidence to prosecute, other than relying upon the evidence to be given under immunity, have been exhausted;

(c) that the evidence to be given under immunity is admissible, relevant and significantly strengthens the Crown's case;

(d) that the witness, while having himself or herself committed some identifiable offence, was a minor participant only;

(e) that the evidence to be given under immunity is apparently credible and, preferably, corroborated by other admissible material;

(f) that no inducement, other than the possibility of an immunity, has been suggested to the witness;

(g) that admissible evidence exists, sufficient to charge the witness with the offences he or she is believed to have committed.

9.8 In order to preserve the integrity of the evidence to be given under immunity it will almost always be desirable for the witness to have independent legal advice. Preferably that advice should be obtained before the witness signs a brief of evidence or depositions statement. Counsel for the witness should, if the witness wishes to seek an immunity, obtain instructions to write to the officer in charge of the case or, if the Solicitor-General is already involved, to the Solicitor-General direct. The letter should set out in full detail the evidence able to be given by the witness but without naming him or her. If satisfied that an immunity is justified the Solicitor-General can then advise the witness's counsel that an immunity will be given. Counsel will then be able to name the witness in the knowledge that a formal immunity will be forthcoming.

10. Disclosure and Discovery

10.1 The aim of the prosecution is to prove its charge beyond reasonable doubt and it is therefore clearly in the interests of justice that accused persons are fully informed of the case against them. At present, voluntary pre-trial disclosure of information relating to the Crown case is largely a matter for the prosecutors discretion to be exercised in accordance with the guiding principle of fairness to the accused. Nevertheless there are a minimal number of legal obligations with which the prosecution must comply.

10.2 Trial on Indictment

10.2.1 Before trial on indictment an accused person is entitled to peruse depositions taken on his committal for trial or the written statements of witnesses admitted instead of depositions. Section 183 Summary Proceedings Act 1957.

10.2.2 The prosecutor does not have to put forward all the evidence at depositions. However s 368(1) of the Crimes Act 1961 provides that the trial may be adjourned or the jury discharged if the accused has been prejudiced by the surprise production of a witness who has not made a deposition. Therefore in practice the prosecutor should provide adequate notice of intention to call any additional witness and provide the defence with a brief of the evidence that witness will give.

10.3 Information which the Prosecutor does not Intend to Produce in Evidence

10.3.1 The prosecutor must make available to the defence the names and addresses of all those who have been interviewed who are able to give evidence on a material subject but whom the prosecution does not intend to call, irrespective of the prosecutor's view of credibility (*R v Mason* [1975] 2 NZLR 289). It is for the prosecutor to decide whether the evidence is "material" (*R v Quinn* [1991] 3 NZLR 146) but that decision must be reached with complete fairness to the defence.

10.3.2 In the absence of an Official Information Act request there is no general common law duty placed on the prosecution to make available to the defence written statements obtained by the Police from persons the prosecution does not intend to call as witnesses at the trial. However in "truly exceptional circumstances" the Court may exercise its discretion to order production if it considers that a refusal to do so might result in unfairness to the accused and perhaps a miscarriage of justice. *R v Mason* [1976] 2 NZLR 122.

10.3.3 A statutory exception to the general principle against production of written statements is contained in s 344C Crimes Act 1961 which deals with identification of witnesses.

10.4 Statements made by Witnesses to be called by the Prosecution

10.4.1 In the absence of an Official Information Act request there is no general rule of law requiring the prosecution to supply defence counsel with copies of all statements made by persons who are to be called to give evidence. An exception to this general rule is where the witness has made a previous inconsistent statement. Where there is any conflict that may be material between the evidence of a witness and other statements made by the witness, the defence is entitled to see those other statements. *R v Wickliffe* [1986] 1 NZLR 4; *Re Appelgren* [1991] 1 NZLR 431; *R v Nankervill* (CA 342/89 4 May 1990).

10.4.2 A second exception is where a statement is specifically shown to an accused for the precise purpose of noting his reaction thereto; in such cases the accused is entitled to obtain production of the statement. *R v Church* [1974] 2 NZLR 117.

10.5 Character of Witness

10.5.1 Before all defended trials the prosecution has a duty to disclose any previous convictions of a proposed witness where credibility is likely to be in issue and the conviction could reasonably be said to affect credibility. *Wilson v Police and Elliot* (CA 90/91 20 December 1991).

10.5.2 For trials on indictment a prosecuting agency entitled to access to the Wanganui computer should make a computer check as a matter of course. For summary trials the agency should make such a check if requested by the defence. If the prosecuting agency is in doubt about

whether a conviction should be disclosed, counsel's advice should be taken. Any list of convictions should be supplied a reasonable time before trial (normally at least a week). If the prosecuting agency intends to withhold details of convictions, the defence should be notified in sufficient time to enable rulings to be sought from the trial court.

10.6 Disclosure of any Inducement or Immunity given to a Witness

The defence must always be advised of the terms of any immunity from prosecution given to any witness. Likewise the existence of any other factor which might operate as an inducement to a witness to give evidence should be disclosed to the defence. This includes the fact that the witness is a paid Police informer. *R v Chignell* [1991] 2 NZLR 257.

10.7 Identity of Informer

There will be good reason for restricting disclosure where the identity of an informer is at stake. The general principle is that the identity of an informer may not be disclosed unless the Judge is of the opinion that the disclosure of the name of the informer, or of the nature of the information is necessary or desirable in order to establish the innocence of the accused. *R v Hughes* [1986] 2 NZLR 129, 133.

10.7.1 A statutory restriction on disclosure of the true identity of undercover police officers is contained in s 13A Evidence Act 1908.

10.8 Preliminary Hearings

Special provisions for preliminary hearings in cases of a sexual nature are set out in Part VA Summary Proceedings Act 1957. Section 185C(4) requires the prosecutor to give the complainant's written statement to the defence at least 7 days before the hearing.

10.9 Minor Offences

In the case of minor as opposed to summary offences, defined in s 20A Summary Proceedings Act 1957, the prosecution must serve on the defence a notice of prosecution which will provide information in a brief form as to the essential nature of the charge and other relevant matters outlined in the section.

10.10 DSIR Examinations

As a matter of ethical obligation the prosecutor is required to provide access to the defence to forensic evidence prepared by the DSIR. (New Zealand Law Society, Rules of Professional Conduct, Appendix 2.)

10.11 Obligations on Request under Official Information Act 1982

10.11.1 Crown Solicitors are not part of a 'department or organisation' and are not therefore subject to the Official Information Act 1982. While as a

matter of practical convenience they may facilitate responses to requests for information, they are not as a matter of law obliged to do so. The responsibility to provide information rests on the Police or other prosecuting agency, and requests made of a Crown Solicitor should be referred to them. The Crown Solicitor should be advised of all information supplied to other parties.

10.11.2 Personal information ie that particular category of official information held about an identifiable person, is the subject of an explicit right of access, upon request, given to that person, unless it comes within some limited exceptions. Relevance is not the test under the Official Information Act.

10.11.3 The effect of the Court of Appeal decision in Commissioner of *Police v Ombudsman* [1988] 1 NZLR 385 is that the exercise of a defendant's right to personal information will not ordinarily prejudice the maintenance of the law (and fair trials), as shown by the traditional disclosure prosecution information for indictable trials. The practice should therefore be that there will be disclosure on request of briefs of evidence, witness statements or notes of interviews containing information about the defendant. Where briefs, statements or job sheets do not exist, the prosecution should as a matter of practice provide to the defence a summary of the facts on which the prosecution will be based.

10.11.4 The duty will generally apply only after criminal proceedings have been commenced, and information may be withheld if a specific risk (such as fabrication of evidence or intimidation of a witness) is shown. Any disputes should be determined as incidental or preliminary matters by the trial court.

10.12 The aim of pre-trial disclosure is to ensure fairness to the accused and to achieve efficiency in the prosecution process. Bearing those aims in mind, any doubt as to whether the balance is in favour of, or against disclosure should be resolved in favour of disclosure.

11. Victims of Offences

11.1 Victims of offences are entitled to be treated by prosecutors with courtesy, compassion and respect for their personal dignity and privacy. Section 3 Victims of Offences Act 1987.

11.2 The prosecuting authority or officers of the court (to use the language of the Act) are required to make available to a victim information about the following:

(a) progress of the investigation of the offence;

(b) the charges laid or the reasons for not laying charges;

(c) the role of the victim as a witness in the prosecution of the offence;

(d) the date and place of the hearing of the proceedings; and

(e) the outcome of the proceedings including any proceedings on appeal.

11.3 For the purposes of the Victims of Offences Act, Crown Solicitors are not "prosecuting authorities".

11.4 Responsibility for notifying the victim of these matters has been allocated as between the prosecuting authorities and the officers of the court as follows:

(a) The Police accept that all information about actions before a prosecution is commenced is within their ambit.

(b) Before verdict:

In the case of a not guilty plea the prosecuting authorities are normally in contact with the victim until the verdict is given.

In the case of a guilty plea, the prosecuting authority which is laying the charge must inform the victim of the first date of a court appearance. At the same time it is required to hand to the victim information about the court process beyond that point, describing the processes of appeal, remand, adjournment, etc and informing the victim that it is his or her choice whether to follow the case through the court process. If the victim is unable to attend the hearing in person, he or she can obtain information from the court.

(c) After verdict:

Once a verdict has been reached the prosecuting authority will inform the victim of the outcome of the case. The letter containing the information should give further information about possible actions after the outcome eg appeal and rehearing.

(d) After sentence:

The prosecuting authority should hand to the court information about the victim's name and address so that the court may notify the victim of any rehearing.

(e) Appeal:

In the case of an appeal after trial on indictment, the Crown Law Office will notify the victim of the date on which it will be heard, and after the appeal send a copy of the Judgment to the victim.

11.5 In addition to providing information about the proceedings, a prosecutor has responsibilities in relation to Victim Impact Statements. A sentencing Judge is to be informed about any physical or emotional harm, or any loss of or damage to property, suffered by the victim through or by means of the offence, and any other effects of the offence on the victim. Such information is to be conveyed to

the Judge by the prosecutor, either orally or by means of a written statement. The courts have indicated that Crown Solicitors have a certain responsibility to ensure that Victim impact Statements fulfil their proper purpose ie a brief description of the impact on the victim and not a supplementary statement of facts adding additional offences and circumstances of aggravation.

11.6 The Victims of Offences Act also requires that in the case of a charge of sexual violation or other serious assault or injury the prosecutor should convey to the judicial officer any fears held by the victim about the release on bail of the alleged offender.

12. Crown Appeals against Sentence

12.1 It is for the Solicitor-General to determine in all cases whether an appeal against sentence should be taken. In respect of sentences passed on conviction on indictment, the appeal is taken in the name of the Solicitor-General; in respect of sentences imposed under the summary jurisdiction of the District Court the appeal is taken in the name of the informant, with the written consent of Solicitor-General.

12.2 The guiding principles for prosecutors in deciding whether a matter should be referred to the Solicitor-General for consideration of a Crown appeal are whether there are good grounds to argue that:

(a) the sentence is manifestly inadequate; or

(b) there has been a serious error in sentencing principle.

12.3 Manifestly Inadequate

12.3.1 The sentence imposed must be manifestly inadequate: – the Crown's right of appeal is not intended to be a corrective procedure for every sentence considered to be lenient.

12.3.2 The considerations justifying an increase in sentence must be more compelling than those which might justify a reduction. Even where a sentence is found to be manifestly inadequate, the court will increase it only to the minimum extent required in the interests of justice.

12.3.3 A particular sentence, or sentences generally for a particular type of crime, may be considered manifestly inadequate if they do not fulfil their deterrent or denunciatory functions. A Crown appeal may be considered where it is clear that the offence requires a heavier sentence in the public interest for the purposes of general or individual deterrence or to express community denunciation because of the nature of the offence.

12.4 Error of Principle

12.4.1 Where a sentence is based upon a wrong principle, the error involved must be one that is important in a sense that it is likely to have implications beyond that particular case in which it has arisen.

12.4.2 The court is reluctant to interfere if this would cause some other injustice to the offender, eg by changing what is generally deemed a wholly inappropriate sentence to which the offender is nevertheless responding. The court is also reluctant to uphold a Crown appeal if the prosecution did not do all that could reasonably have been expected of it to avoid the error at first instance. In no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at trial. Section 389 Crimes Act 1961.

12.5 Time Limits

Appeals against sentences imposed in the indictable jurisdiction must be filed within 10 days. The time limit for the summary jurisdiction is 28 days. Given the short time limits for filing an appeal, particularly to the Court of Appeal after trial on indictment, and the uncertainty which a Crown appeal poses for the defendant in question, the need to refer materials speedily to the Solicitor-General is paramount. For the same reason it is only in exceptional cases of unavoidable delay that the Solicitor-General will seek leave to appeal out of time.

12.6 The information required for consideration of appeals includes:

(a) Indictment or Information;

(b) notes of Evidence or Summary of Facts;

(c) copies of the Pre-Sentence Report, Victim Impact Report and any other reports made available to the sentencing Judge;

(d) a list of any previous convictions;

(e) a note of the Judge's or District Court Judge's remarks on sentence;

(f) the comments and recommendations of the Crown Solicitor or prosecutor.

12.7 In general the main purpose of a Crown appeal is to ensure that errors of principle are corrected and not perpetuated, and that sentences for offences of generally comparable culpability are reasonably uniform and appropriate having regard to the seriousness and prevalence of the offence.