

REGULATORY IMPACT STATEMENT

Managing expenditure on Crown Solicitors' services in the short term

Agency disclosure statement

1. This regulatory impact statement has been prepared by Crown Law. It provides an analysis of the options to manage expenditure on Crown prosecutions in the short term (2012/13). The analysis draws on the findings and recommendations of the *Review of Public Prosecution Services* relating to fiscal management of Crown Solicitors, outlined Chapter 11 of the Reviewer's report¹.
2. In order to achieve immediate savings, the Reviewer recommended capping expenditure which, together with other amendments to the Crown Solicitors Regulations 1994 to improve fiscal management, is the preferred option for the short term described below. The proposal for billing caps for Crown Solicitors does not impose additional costs on business, impair property rights, market competition or business incentives and does not override fundamental common law principles.
3. The accompanying Cabinet paper also outlines other proposals to transform Crown Law's approach from what was essentially an "accounts payment" function to an "accounts management" capability. This approach will improve the collection and analysis of data relating to indictable prosecutions and establish the capability to use this information effectively. Better information from Crown Solicitors and the courts will provide the basis for decisions about the long term solution to the sustainability of Crown Solicitors' services. These proposals do not require a regulatory impact analysis.
4. Further decisions on fiscal management of Crown Solicitors will be sought from Cabinet by February 2013.

Andrew Hampton
Deputy Chief Executive

¹ *Review of Public Prosecution Services*, John Spencer, September 2011.

Status Quo and Problem Definition

1. Crown Solicitors (responsible for Crown prosecutions) are paid according to the Crown Solicitors Regulations 1994. The Regulations are made pursuant to section 81(1)(g) of the Public Finance Act 1989 (on the recommendation of the Minister of Finance) and are administered by Crown Law. The Regulations set out the hourly rates paid to Crown Solicitors varying from \$129.00 per hour to \$198.00 per hour (exclusive of GST). The Regulations also provide set limits on payment for services related to various steps of the trial process. Payment under the Regulations is funded by Vote Attorney-General, administered by Crown Law.
2. As identified by the *Review of Public Prosecution Services* undertaken by John Spencer, the core problem is a lack of adequate processes to manage Crown prosecutions from a fiscal perspective. The attached Cabinet paper outlines the plan to address that problem in a staged approach as recommended by Mr Spencer. Part of that plan addresses the need to manage expenditure in the short term while gathering data to inform the long term solution.
3. The problem has the following elements:
 - 3.1 The existing regulations and funding model inhibit the Solicitor-General and Crown Law's management and control of expenditure on Crown Solicitors.
 - 3.2 A lack of data to support fundamental change to the funding model in the short term. Options such as fixed fees, bulk funding and tendering can be considered in a more fundamental review of the funding model which will be the next step.
 - 3.3 Notwithstanding a forecast reduction in case volumes, a significant cost pressure of \$24m related to Crown Solicitors remains over the next four years. If the Justice Sector Forecast 2011 is taken into account the cost pressures for 2012/13 would reduce significantly. However indictable case volumes are currently tracking above forecast. Instead of a 16% reduction of incoming cases there is only a 3% reduction on the previous year.
 - 3.4 Crown Law and Crown Solicitors have limited control over the volume of Crown prosecutions. This means that most options focus on managing average case costs, which have increased 48% between 2005/6 and 2010/11.
4. If the status quo is maintained and case costs continue to increase, it is possible that expenditure will continue to grow despite reducing volumes of prosecutions in the criminal justice system.

Objectives

5. In identifying options to manage expenditure in the short-term, Crown Law has identified three objectives:
 - 5.1 Aligning accountability for, and management of, expenditure;
 - 5.2 Can be implemented by 1 July 2012;
 - 5.3 Maintaining the quality of services provided by Crown Solicitors.

Regulatory impact analysis

6. Crown Law's preferred option to manage within appropriation in the short term is setting a cap on billing by Crown Solicitors (taking into account decisions on the level of funding) and other amendments to the Crown Solicitors Regulations 1994 to enable Crown Law to undertake more management control. The setting of a cap on billing is intended to ensure that costs are contained. Crown Law is seeking to transfer a projected surplus of up to \$3m in the relevant appropriation from 2011/12 to 2012/13 and funding of \$4m will be provided from the proposed Justice Sector Fund. This funding is necessary to facilitate a transition to a more rigorous and efficient funding model and to manage cost pressure arising from the actual case volumes being larger than the Justice Sector Forecast 2011.

Options considered

7. Mr Spencer ruled out more fundamental change in the short term, such as bulk funding, competitive tendering or management of high cost cases in the short-term due to the lack of data and the need to implement the Criminal Procedure Act 2011. Crown Law has reached the same conclusion.
8. Other substantive options which were considered but ruled out were variations on options to set a fixed cap in the regulations after which no fees would be payable. This would be similar to bulk funding. The key problem with these options is that the data available is of insufficient quality to set a cap for each warrant which would reflect volumes and present a value for money proposition.
9. A range of more minor options such as modifying charges for travel or disbursements, seeking to reduce the number of callovers in the proceedings and address court scheduling efficiency were considered. Some of these do not require regulatory change and may advance separately. The difficulties are identifying the level of savings, if any, which may be obtained and the time frame for implementation.

Implementing the cap and related proposals

10. The preferred option for the short term is to require each Crown Solicitor to manage expenditure for the forthcoming fiscal year within a capped budget. The proposed billing caps will incentivise Crown Solicitors to manage within a set amount and hold or reduce average case costs.
11. The cap will be set by means of communication from the Deputy Solicitor-General (Criminal Process) and the Deputy Chief Executive, under delegation from the Solicitor-General, setting out the expected maximum amount of billing from that Crown Solicitor for the year ahead. Crown Solicitors will be able to provide invoices up to that level in the usual way. This is not a bulk funding payment; it is the expected maximum level of fees.
12. Implementing this option requires amendment to the Crown Solicitors Regulations 1994. While it is not necessary to specifically provide for the cap, it will be necessary to repeal provisions which provide that invoices are payable once certified by a court registrar. Other amendments to the Regulations will assist with managing expenditure within the cap and improve financial management generally.

13. The amendments are:
 - 13.1 removing the requirement for invoices for Crown prosecutions to be certified by a court registrar and inserting a new provision to provide that the Solicitor-General or a delegate has discretion to determine whether invoices for Crown prosecutions are payable in part or in full having regard to reasonable costs for the work undertaken. This will address the existing disconnection between scrutiny of costs and accountability of the costs and confirms the Solicitor-General's overall control of expenditure;
 - 13.2 revoking the provisions requiring the Solicitor-General to annually review the hourly rates and authorising the Solicitor-General to determine the hourly rates for Crown Solicitors (including different rates for seniority or for different types of work) and how frequently to review those rates; and
 - 13.3 inserting provisions to enable early notification and pro-active management of exceptional cases which may incur special fees under regulation 12.

The impacts of a billing cap

14. The preferred option places responsibility on Crown Solicitors to manage staff time and other costs over the year and it aligns the responsibility with those who have control over the costs. Crown Solicitors are best placed to identify the means by which they can achieve efficiencies while limiting any negative effects on the quality of their services or the criminal justice system and participants in it.
15. Crown Law will use known data about cases scheduled for the year to provide month by month advice on expected levels of billing. Crown Law will also be receiving monthly reports from the Ministry of Justice including case progression and number of court events. Crown Law expects that the imposition of billing caps and increased focus on costs will drive some cost saving behaviours.
16. To ensure that potential risks to the quality of Crown Solicitor services are managed, Crown Law will continue to undertake the functions which have, to date, supported the high standard of services provided by Crown Solicitors. These measures include regular performance reviews of warrants, the provision of guidance materials and support, and obtaining feedback from the judiciary. In the process of implementing the Criminal Procedure Act 2011 Crown Law is also planning to provide greater guidance to enhance consistency of prosecution practice by Crown Solicitors.
17. Crown Law will also work closely to ensure that other justice sector agencies, in particular, New Zealand Police and the Ministry of Justice, are aware of any changes to prosecution procedures which may have implications for them and court users.
18. In recommending the short term solution of capping expenditure on Crown Solicitors' services, the Reviewer commented that any reduction greater than 10% would impose too much pressure on the system and must be left until proper information is collected and analysed.

Consultation

19. Crown Law has fully briefed, and sought comments, from the Ministry of Justice, New Zealand Police, the Department of Corrections, the Serious Fraud Office, Treasury and the State Services Commission on this proposal. The Department of the Prime Minister and Cabinet has been informed.

20. Crown Solicitors have also been informed that billing caps, as proposed by the Reviewer, is the preferred option for the short term. They recognise that savings are necessary and that there needs to be more consistency of cost across the Crown Solicitors. The proposed enhancements to Crown Law's monitoring of expenditure and regular reporting will assist to address of Crown Solicitors about managing within billing caps.
21. As part of the *Review of Public Prosecution Services*, the Mr Spencer consulted widely including: Crown Law, Ministry of Justice, Department of Corrections, New Zealand Customs, New Zealand Police, Crown Solicitors, the Judiciary, the New Zealand Bar Association, the Criminal Bar Association, and the New Zealand Law Society.

Conclusions and recommendations

22. We recommend the option of amending the Crown Solicitors Regulations to enable the Solicitor-General to impose a cap on expenditure from each warrant as a short-term measure to control costs and improve fiscal management.
23. The preferred option is the only option which satisfies the objectives. More fundamental change to the funding model for Crown Solicitors cannot be implemented in the short time frame due to the lack of quality data. The preferred option has an advantage over the status quo in that it enables better control over the expenditure on Crown Solicitors' services.

Implementation

24. The amendments to the Regulations must be in place by 1 July 2012.
25. Supporting Crown Solicitors to manage within the budgetary caps will require Crown Law to enhance its capacity to forecast, monitor and report on expenditure. The cost of increasing capacity is estimated at \$0.540m per annum. No additional funding is sought and this will be included in the assessment of cost pressures to be met by the current proposals.
26. Crown Solicitors will be required to provide more detailed and regular information to Crown Law about the cases which it is prosecuting. Where possible information about workload will be gathered from the Ministry of Justice.

Monitoring, Evaluation and Review

27. The status quo has been reviewed by the *Review of Public Prosecution Services* and recommendations to obtain improved data and consider long term solutions were made.
28. Crown Law will monitor the effectiveness of the cap throughout the forthcoming financial year. Work is underway to improve the monitoring and tracking of expenditure to enable identification and investigation of outliers and significant variances. This means Crown Law will enhance its ability to identify inefficient practices or processes and provide opportunities for improvement and cost savings.
29. At the same time, Crown Law is gathering data to enable a more fundamental review of the funding of Crown Solicitors' services. Further Cabinet decisions will be sought by February 2013.