Policy

The Attorney-General has overarching responsibility for the conduct of the Crown's legal business.

Settlements under which the Crown is to make payments of compensation or damages or ex gratia payments

Counsel should be aware of the requirements of Cabinet Office circular CO (18)2 with regard to the payment of compensation or damages in settlement of claims or the payment of ex gratia expenses:

- Where the proposed quantum of compensation or damages in settlement of claims is $150,000 or less the *prior approval* of the Chief Executive (or his or her delegate) is required.
- Where the proposed quantum of compensation or damages in settlement of claims is more than $150,000 and up to $750,000 the *prior approval* of the Appropriation Minister is required.
- Where the proposed quantum of compensation or damages in settlement of claims is more than $750,000 the *prior approval* of Cabinet is required.
- Where the proposed quantum of ex gratia expenses is $30,000 or less the *prior approval* of the Chief Executive (or his or her delegate) is required.
- Where the proposed quantum of ex gratia expenses is more than $30,000 and up to $75,000 the *prior approval* of the Appropriation Minister is required.
- Where the proposed quantum of ex gratia expenses is more than $75,000 the *prior approval* of Cabinet is required.

Separate legal certification or endorsement of payments in compensation or damages in settlement of claims or ex gratia payments

The Cabinet Circular also requires separate legal certification that a payment in settlement of a claim is in order before that decision can be made. That certification should be provided by a departmental Chief Legal Advisor (up to $75,000). Claims above $75,000 must be endorsed by Crown Law (up to $750,000) unless there is a court judgment determining liability. For settlements over $750,000, Crown Law's role is to advise Cabinet.

This policy sets out the internal processes through which Crown Law will provide advice to Cabinet relating to settlements in excess of $750,000.

Under the Circular, neither departmental chief legal advisors nor Crown Law have a formal role in certifying or advising on *ex gratia* payment decisions, but in practice will often be called on to provide advice.

To ensure consistency, this policy also sets out how any Crown Law advice on *ex gratia* settlements will be provided.

Crown Law requirements for provision of legal endorsement for proposals with financial implications concerning payments of compensation or damages or ex gratia payments

Compensation or damages in settlement of claims

Crown counsel or senior crown counsel may, on behalf of the Crown Law Office, provide endorsement that a settlement is in order where the proposed quantum of

compensation or damages in settlement of the claim is (by way of payment) up to $150,000.

A Deputy Solicitor-General may, on behalf of the Crown Law Office, provide endorsement of a settlement where the proposed quantum of compensation or damages in settlement of the claim is up to $750,000.

Any advice provided to Cabinet in relation to settlements over $750,000 must be by way of a legal opinion and include confirmation the Solicitor-General agrees with the advice.

Note that under CO (18)2:

- the relevant departmental Chief Legal Advisor, instead of the Crown Law Office, may provide certification in relation to settlements by way of payment up to $75,000; and
- no certification or endorsement by Crown Law is required for payment of costs or damages awarded by a Court, or for settlement amounts that are "endorsed by" a court judgment.

Ex gratia expenses

CO (18)2 does not require legal certification or endorsement of ex gratia payments. That is presumably because these payments are "made without the giver recognising any liability or legal obligation; the payment is made out of goodwill or a sense of moral obligation." Crown Law's advice is none the less often sought on the making of an ex gratia payment. Crown Law advice relating to the appropriateness of *ex gratia* payments:

- may be provided by Crown Counsel or Senior Crown Counsel, up to $30,000;
- may be provided by a Deputy Solicitor-General, up to $75,000;
- must be provided by the Solicitor-General, for amounts over $75,000.

All settlements: Additional requirements for approval of Deputy Solicitor-General

Notwithstanding the financial approval levels indicated in this policy, counsel should also request the approval of a Deputy Solicitor-General for endorsing that a settlement is in order or providing advice on the appropriateness of making *ex gratia* payments:

- where the significance of the legal issues warrants it, especially in respect of the potential for any settlement to impact across Government; or
- where the claim raises allegations of breach of s 9 of the New Zealand Bill of Rights Act 1990;
- where the proceedings (and any resultant settlement) is likely to give rise to issues of public/policy importance; or
- where the proposed settlement exceeds $150,000 (or $1 million in relation to tax or levies, duties or charges in respect of the Customs and Excise Act 2018) by way of money foregone.

If in doubt, counsel should err on the side of involving a Deputy Solicitor-General.

Circular applies to payment by the Crown only

Crown Law interprets the provisions of CO (18)2 relating to proposals to incur expenses

in relation to publicity, compensation or damages in settlement of claims, and *ex gratia* payments as only applying to the situation where the Crown is proposing to make a payment. We do not consider the Circular covers payments made to the Crown to settle claims. An example in settling costs following successful litigation or where the Crown forgoes a payment. Nevertheless, this policy covers all settlements under the heading above "All settlements: Additional requirements for the approval of the Deputy Solicitor-General".

Applies to

This policy applies to all Crown Law counsel including:

- full time staff;
- part time staff;
- casual staff; and
- contractors.

Rationale

Paragraph 5.4 of the Attorney-General's Civil Litigation Values provides that the Crown will:

> Consider the possibilities for, and initiate where appropriate, alternative means of avoiding or resolving litigation, including by co-operation or other agreed resolution.

In addition, Crown Law will often be involved in, or be aware of, the settlement of claims by departments and ministries as a result of:

- Advice sought from the Solicitor-General over proposed settlements or ex gratia payments to ensure consistency with other similar decisions across Government.
- Specific instructions received as part of a request for advice or as a result of litigation.
- The requirements of the Cabinet Office circular on Guidelines and Requirements for Proposals with Financial Implications [CO (18)2], which provides guidance to departments and ministries on approval limits for settlements. In particular, para 70 of the circular [CO (18)2] specifies that for settlements up to $750,000 '[e]xpenses for compensation or damages in settlement of claims should be endorsed by the Crown Law Office or a court judgment' and for more than $750,000 that "Cabinet considers advice from the Crown Law Office".

The settlement of claims against the Crown can be subject to political and public scrutiny. It is important that the Attorney-General is kept fully informed about the progress and conclusion of such claims. In addition, the Government has particular obligations in relation to alleged breaches of s 9 of the New Zealand Bill of Rights Act 1990

There is a need to coordinate Crown Law's knowledge of and involvement in settlement proposals, and to communicate this information to the Attorney-General as appropriate and in a timely way.

The co-ordination of Crown Law's knowledge is supported by a settlements register, overseen by the Deputy Solicitor-General (Attorney-General Group).

Forms

Any settlement agreement entered into must be appropriately recorded. If the agreement must be filed in court (normally not required), you can use the following precedent

settlement agreements:

- Memorandum of Settlement and Release – High Court
- Memorandum of Settlement and Release – District Court

For all settlements involving the Inland Revenue Department use the Inland Revenue Department's settlement template. The Revenue Team Manager must be contacted to obtain a copy of this form.

Other References

Refer also to:

- Cabinet Office Circular [CO (18)2]: Cabinet has delegated to Chief Executives and Ministers financial authority to settle claims against Government parties. However, financial limits are just one aspect of settlement decisions.

Paragraph 4.6, Cabinet Manual: The conduct of legal proceedings involving the Crown is the responsibility of the Attorney-General. Settlement of a claim falls within this area of responsibility, but Cabinet has reserved to itself the authority to settle claims alleging misuse of the powers of Corrections officers and probation officer: CAB Min (02) 26/10.

GUIDELINES

1. The Guidelines set out specific requirements relating to:

   1.1 the settlement of claims involving s 9 of the New Zealand Bill of Rights Act 1990;

   1.2 collation of Settlement Information;

   1.3 confidentiality of Settlements; and

   1.4 reporting.

CLAIMS INVOLVING S 9 OF THE NEW ZEALAND BILL OF RIGHTS ACT 1990

2. Settlement proposals relating to s 9 of the New Zealand Bill of Rights Act 1990 (right not to be subjected to torture or cruel treatment) raise particular issues.

3. Any settlement proposal (including settlements being managed within client departments) that incorporates reference to an alleged breach of s 9, or to alleged acts of violence by the state, is to be referred to the Solicitor-General for prior approval (via the relevant Deputy Solicitor-General), and copied to the Team Manager of the Human Rights Team.

4. The Crown attempts to settle claims in appropriate cases.[1] The settlement of claims relating to alleged breaches of the New Zealand Bill of Rights Act 1990 (the Act) is consistent with the Act's requirement that rights breaches be effectively remedied. Particular issues arise in respect of proposed settlements of claims relating to s 9 Act.

5. The Government has a number of obligations in relation to alleged breaches of s 9. These Guidelines are designed to assist in ensuring that the Government's obligations are met.

6. Section 9 of the Act provides:

> **Right not to be subjected to torture or cruel treatment—**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

7. New Zealand is party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention). State parties are required to submit reports on the measures they have taken to give effect to their undertakings under the Convention. The Committee Against Torture[2] has issued general guidelines on how the reporting obligation is to be met, including that information should be provided to the United Nations on:

> Complaints, enquiries, indictments, proceedings, sentences, reparation and compensation for acts of torture and other cruel, inhuman or degrading treatment or punishment.

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1 Attorney-General's Values for the Conduct of Crown Civil Litigation, at [5.4].

2 The Committee Against Torture (CAT) is the body of 10 independent experts that monitors the implementation of the Convention by its State parties.

8. There is also a requirement that a person making allegations of torture and the like be able to have any such allegation promptly and impartially investigated.[3] The Government's position has previously been that a Court hearing satisfies this obligation.

9. Procedures for responding to allegations of mistreatment are likely to come under scrutiny through inspections by national and international bodies acting under the Crimes of Torture Act 1989[4] and complaints to United Nations bodies.

10. It is not uncommon for litigants to cite a range of alleged breaches of various provisions of the Act, along with numerous other causes of action. Global settlement of such claims has the potential to cause at least two problems. Firstly, it may give rise to a requirement to report under the Convention. Secondly, it tends to dilute the importance of a s 9 allegation, and encourage allegations of breach to regularly feature in settlement proposals. The Crown's position (upheld by the Supreme Court in Taunoa[5]) is that the threshold for breach of s 9 is high. It is desirable that claimants, and claimant counsel, appreciate that s 9 cases are treated seriously and will not lightly be accepted for the purpose of a settlement. There is also the point that, in instances that involve allegations of deliberate mistreatment, acceptance of a s 9 claim may connote a Crown admission of criminal wrongdoing by those responsible and/or may engage a Crown obligation to instigate a criminal investigation.

11. Settlement of a claim on the basis of an alleged breach of s 9 will likely be rare, and will only occur after thorough investigation.

APPROACH

12. The Crown must be satisfied that the threshold requirements of s 9 are met prior to any settlement of a claim that includes an alleged breach of that provision. This will involve comprehensive determination, including such investigation as is necessary, and consideration of the facts of the case. Determination of disputes of fact and of instances where it is uncertain whether the threshold is met will usually best be resolved by a Court.

13. A plaintiff who insists on adopting a multi cause of action approach to litigation will essentially have three options. He/she can:

    13.1 drop the s 9 complaint and pursue settlement based on other (more likely) grounds (the settlement agreement would not refer to s 9);

    13.2 pursue the s 9 complaint along with the other grounds (but this would generally result in no settlement, as the matter would be brought before the Court for determination); or

    13.3 pursue the s 9 complaint and have it thoroughly investigated.

14. Any proposal to settle a claim that incorporates a s 9 component is to be referred to the Solicitor-General for prior approval, and copied to the Team Manager of the Human Rights Team.

15. Any case in which a s 9 breach is found, or on which a settlement is based, is to be notified to the Human Rights Team Manager.

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3 Convention, Article 13.

4 As amended by the Crimes of Torture Amendment Act 2006.

5 *Taunoa v Attorney-General* [2008] 1 NZLR 429.

COLLATION OF SETTLEMENT INFORMATION

16. The Deputy Solicitor-General, Attorney-General Group has overall responsibility for coordinating the settlement information from other Deputy Solicitors-General and maintains the settlements register, recording details of the matter and the terms of settlement. Details of all settlements that counsel are involved with must be advised to the Deputy Solicitor-General, (Attorney-General Group) as soon as practicable after settlement is reached.

17. Confidential settlements must be entered on the settlements register but the confidential terms will not be included on the register. The intention is that the broad factual circumstances of each case and the fact of a settlement will usually be clear enough to assist counsel in ascertaining whether settlements have been made in similar fact situations.

18. Details of any settlements relating to s 9 of the Bill of Rights Act are to be identified on the settlements register. The purpose of identifying these settlements is to enable Crown Law to assist the Government in discharging its reporting obligations under the Convention, and to ensure that allegations under s 9 that amount to criminal wrongdoing are considered for referral to the Police.

CONFIDENTIALITY OF SETTLEMENTS

19. In some contexts there are statutory provisions that require information in a settlement agreement to be kept confidential. An example of this is s 81 of the Tax Administration Act 1994 that imposes an obligation of secrecy on Inland Revenue Officers. In such statutory contexts a confidentiality clause should be included in any settlement agreement.

20. In all other cases there is a presumption against the use of confidentiality clauses in settlement agreements as such clauses must withstand claims for disclosure made under the Official Information Act 1982 (the Act). The Act contains the principle that information shall be made available unless there is a "good reason" for withholding it.[6]

21. Often in settlement negotiations a client department considers that confidentiality will facilitate settlement. Its reasons will include avoiding the risk that the settlement will be used precedentially, a desire to keep unhelpful facts from the public eye together with the risk of inaccurate or slanted reporting.

22. In deciding how to advise client departments, and in making any necessary decisions as to adding a confidentiality clause into a settlement agreement, the starting point is whether there is a reason for withholding the information in the settlement agreement in terms of the principles set out in the Act.

23. If there is a conclusive reason for withholding the information in the settlement agreement as set out in the Act,[7] then a confidentiality clause should be added to the agreement.

24. If there is merely a good reason for withholding the information in the settlement agreement,[8] an evaluation of the public interest in the facts and issues in the case should be made. This includes considering the principles of open government and

6 Section 5.

7 As per ss 6 and 7 of the Act.

8 As per s 9 of the Act.

accountability, including in respect of the use of public funds. The issue is whether, notwithstanding that a good reason for withholding information exists, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make the information available.[9]

25. A good reason for withholding information may include enabling the Minister concerned or the Department to carry on, without prejudice or disadvantage, negotiations.[10] Prejudice to negotiations may in particularly sensitive cases be taken to include circumstances in which confidentiality for a party (including the Crown) was a key driver for the offer of settlement. This in general terms may be seen as acting in the public interest by avoiding (for both parties) the cost of litigation, while obtaining efficient resolution thereby saving both Crown and judicial resources.

26. Less obviously there may well be confidential settlements to which s 9(2)(a) (protecting privacy), s 9(2)(ba) (obligation of confidence), s 9 (2)(d) (prejudicing the substantial economic interests of New Zealand) and d 9(2)(i) (prejudice to commercial activities) may apply. As to s 9(2)(a) there have been instances where the disclosure of a settlement could affect the safety/mental health of a particular employee.

27. Client departments seeking the inclusion in any settlement document of a confidentiality clause should be advised whether in the circumstances of the particular case an application for disclosure under the Act would likely be upheld despite the claim for confidentiality.

28. Accordingly a confidentiality clause should be inserted into a settlement agreement only where:

    28.1 There is a statutory provision that prohibits the information from being disclosed; or

    28.2 There is a conclusive reason for withholding the information in the settlement agreement as set out in the Act; or

    28.3 There is a good reason for withholding the information in the settlement agreement and that good reason is not outweighed by the public interest in disclosure.

29. Put another way, there must be clearly articulated good reasons in terms of the principles set out in the Act or other legislation to justify confidentiality.

TAX

30. Most settlements we advise on will not have tax implications for the Crown. However, there will be exceptions. For example, if an insurer is contributing towards the settlement, its contribution is likely to be taxable. The relevant government department will have to pay GST output tax while the insurer receives a GST input tax credit. Unless the tax effect is understood by the relevant department, the department/Crown is receiving a smaller contribution from the insurer than anticipated. The obligation to pay output tax can also have a significant impact on the department's appropriations.

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9 Section 9(1) of the Act.

10 Section 9(2)(j) of the Act.

31. To avoid potential conflicts of interest, Crown Law does not provide tax advice other than to Inland Revenue. A mechanism has been put in place where Inland Revenue can provide tax advice to other departments. Departments can also obtain external tax advice. A link that sets out the position with Inland Revenue and contains contact details is: doc 6328829.

32. When a settlement of a dispute is under consideration, we should advice the client department that we do not offer tax advice and they should consider whether they need to obtain independent tax advice.

REPORTING

33. As it is the Attorney-General who is responsible for the conduct of litigation involving the Crown, it is important that he or she be advised of any settlement proposals and/or agreements, as appropriate. This may be done by way of the weekly report to the Attorney-General or via separate reporting papers.

SETTLEMENT PRECEDENT

34. A link to a draft settlement precedent that can be adapted is doc 3416756.

[END]

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