

## CROWN LAW LITIGATION – SERVICE OF CIVIL PROCEEDINGS ON THE CROWN – **GUIDELINES**

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### INTRODUCTION

1. These guidelines outline how proceedings come to Crown Law, and the responsibilities of counsel, reception at Crown Law, government departments, crown agencies, and crown solicitors regarding service.

### CIVIL PROCEEDINGS AGAINST THE CROWN

#### *The Crown Proceedings Act 1950*

2. The Crown Proceedings Act 1950 (**CPA**) altered the traditional rule that ‘the king can do no wrong’ (*lex potest non peccare*) and makes the Crown liable in the same way as a private citizen in respect of most causes of action (s 3(2)). Following the judgment of the Court of Appeal in *Baigent’s case*,<sup>1</sup> it is clear that this includes liability in actions brought under the Bill of Rights Act 1990.
3. Section 14 prescribes the way in which the Crown or an agency of the Crown may be made a party to civil proceedings. It provides that proceedings may be instituted by or against:
  - 3.1 the appropriate government department in its own name if the department may be sued apart from this section; or
  - 3.2 the appropriate officer of the Crown in the name in which he or she may be sued on behalf of the Crown or of any government department if the officer may be sued on behalf of the Crown or of any government department apart from this section; or
  - 3.3 the Attorney-General if there is no such appropriate department or officer or if the person instituting the proceedings has any reasonable doubt whether any and, if so, which department or officer is appropriate; or
  - 3.4 any 2 or more of them jointly.
4. Departments of State and Crown agencies should therefore only be named if Parliament has conferred the legal capacity to be sued. Generally government departments do not have this capacity, and the appropriate defendant will be the Attorney-General.<sup>2</sup> Chief Executives and other officers are in the same position: unless the Act confers a capacity to sue or be sued (or unless one of the exceptions discussed below applies), they should generally not be named.<sup>3</sup>
5. Notwithstanding this, the wrong defendant is often named, sometimes leading to the proceedings being served in the wrong place. Unless there is any actual prejudice, the service should be accepted as valid as from the day the documents arrive at Crown Law.
6. If the wrong party is named, we can apply to have them struck out but will consider the fairness and cost effectiveness of doing so. The alternative approach is to alert the Court to the issue so that judgment is not inadvertently entered in favour of or against a party who cannot be sued. The point can be signalled in the statement of defence with a footnote and referred to in the

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<sup>1</sup> [1994] 3 NZBR 66

<sup>2</sup> A recent search indicated that no Department or Chief Executive had been given capacity to sue or be sued.

<sup>3</sup> We note that the commentary in Westlaw, Civil Procedure - A to Z of New Zealand Law, at [13.5.3.2] states: “As a general rule, government departments do not have legal personality, so proceedings should be brought by or against the chief executive responsible for the department” ([link](#)). On the basis of our understanding of s.14, we do not regard this as correct and prefer the commentaries in LexisNexis *Laws of New Zealand* at [14] ([link](#)), and *Sim’s Court Practice* ([link](#)).

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first case management memorandum, indicating that the Attorney-General will consent to being joined as a party so the claim can be put on a proper footing. We might take a different stance if the claim has passed outside the limitation period.

7. Under [s 16](#) of the CPA all civil proceedings that name the Attorney-General are to be served at Crown Law. If a proceeding wrongly names an entity that cannot be sued in its own name, the documents should also be directed to Crown Law. Client Relationship Managers should make sure that their clients are aware of the need to redirect any such proceedings to Crown

### *Claims brought against individual public servants*

8. Plaintiffs may bring proceedings against individual public servants. Where possible, we encourage claimants to name the role rather than the individual. In those cases where the Crown might be liable, either directly or vicariously, for allegations made against individual public servants we may invite the Court to join the Crown as defendant, in the name of the Attorney-General.
9. However, [s 104](#) of the Public Service Act 2020 (PSA) grants Chief Executives and public service employees immunity from liability in civil proceedings for actions or omissions undertaken in good faith.

### *Judicial Review Proceedings*

10. Most Judicial Review proceedings are excluded from the ambit of the CPA.<sup>4</sup> The question of who must be named when judicial review proceedings are brought against the Crown is governed by s 9(1) of the Judicial Review Proceedings Act 2016, which provides that the ‘following persons must be named as a respondent to an application’:
  - 10.1 the person whose act or omission is the subject matter of the application; and
  - 10.2 if the application relates to any decision made in proceedings, every party to those proceedings.
11. Although not covered by [s 16 of the Crown Proceedings Act](#), all judicial review proceedings challenging actions by or on behalf of the Crown must be brought to the attention of Crown Law because they are core Crown legal work.
12. The standing authority in [paragraph 4.35 of the Cabinet Manual](#) that authorised Crown Law to accept service applies to all judicial review proceedings that name the Attorney-General.
13. Other clients should be encouraged to authorise Crown Law to accept service of judicial review proceedings on their behalf because such matters are often urgent.
14. Where judicial review proceedings arise from the decision of a District Court or tribunal, it is possible that we may be served in two capacities (on behalf of the court or tribunal and on behalf of any crown entity that was a party to the proceedings before that court or tribunal).

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<sup>4</sup> Section 2 (1) provides a definition of civil proceedings which excludes “habeas corpus, mandamus, prohibition, or certiorari or proceedings by way of an application for review under the [Judicial Review Procedure Act 2016](#) to the extent that any relief sought in the application is in the nature of mandamus, prohibition, or certiorari”. It would appear to follow that judicial review proceedings which do not seek any of the above remedies (for example, an application advanced in order to obtain a declaration) will not be excluded.

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15. All teams should bear in mind the need to ensure that the ~~Law Officer Team~~ [Constitutional and Human Rights Team](#) receives a copy of any proceedings that name a judge, court or tribunal or clearly ought to have named them.
16. In the relatively rare case where the Attorney-General seeks a judicial review of the decision of a District Court Judge, service should be dealt with internally by delivery of the proceedings to the Law Officer Team.

### *Habeas Corpus applications*

17. Applications for habeas corpus lie outside the ambit of the CPA.<sup>5</sup> An application for habeas corpus must name, as respondent, the person who is responsible for the applicant’s detention.
18. Section 8 of the Habeas Corpus Act 2001 provides that respondent must be described by their office and not named and at s 8(a) to (e) describes which officer holder must be named, depending on the type of institution in which the plaintiff is being detained.

### CLAIMS AGAINST CROWN ENTITIES

19. Crown entities usually do have the power to sue and be sued and they will be appropriately named as defendants. For example, a Rivers Board may be sued under s 15 of the Rivers Boards Act 1908.

### CLAIMS AGAINST MEMBERS OF THE JUDICIARY

20. The CPA provides the Crown may be liable for the tortious actions of its servants, but “servant” does not include Judge, District Court Judge, Justice of the Peace, Community Magistrate or other judicial officer (s 2(1) CPA). In addition, nothing done or omitted during the discharge of responsibilities of a judicial nature can form the basis of a proceeding against the Crown (see s 6(5) CPA). Actions against individual Judges or Registrars cannot succeed due to the common law principle of judicial immunity.<sup>6</sup> However, Justices of the Peace can have proceedings brought against them for their actions and be named in certain circumstances.<sup>7</sup>

### CLAIMS AGAINST THE POLICE

21. The New Zealand Police is an ‘an instrument of the Crown’ (s 7(1) of the Policing Act 2008). Therefore, the CPA applies to the Police and s 14 of the CPA applies to determine the party against whom proceedings may be brought. As there is no enactment that gives either the New Zealand Police or the Commissioner of Police the power to sue or enable it to be sued, actions should be brought in the name of the Attorney-General, as was confirmed in *Hunter v AG*.<sup>8</sup>

<sup>5</sup> See fn 3, above.

<sup>6</sup> Discussed and affirmed in *Attorney-General v Chapman* [2011] NZSC 110, paras. [161] to [202].

<sup>7</sup> See Justice of the Peace Act 1957 and *Hunter v Attorney-General* [2017] NZHC 2767 at [23]-[24].

<sup>8</sup> [2017] NZHC 2767 at [8] and [29]. The point is not however always taken by counsel and examples of judgments issued against the New Zealand Police or the Commissioner may be found. See in particular: *Stevenson v Office of Police Commissioner* [2015] NZHC 1408 and *Egan v Commissioner of Police* [2013] NZHC 550. Recently, in *Deliu v New Zealand Police* [2020] NZHC 2506 at [263]-[264] Duffy J observed that “public law action is directly against the state for which the state is primarily responsible. Typically...the defendant is the Attorney-General. However, the statutory recognition given to the Police in the Policing Act seems, to me, to be sufficient for it to be named as a defendant in a claim like the present

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22. However, unlike other public servants. Police officers and other civilian police employees do not enjoy immunity under s104 of the PSA. So, individual Police officers may be named in tort or other civil proceedings.
23. We suggest that the Crown, through the Attorney General, should be named in actions brought against individual officers on the basis that the Crown may be directly or vicariously liable for the acts and omissions of officers, depending on the nature of the claim.<sup>9</sup> It may be appropriate to invite claimants to proceed against the Crown, in the name of the Attorney-General, alone rather than against individual, named officers. If the proceedings for which you are instructed on behalf of the Police name both the Attorney-General and individual officers, you should address with Police whether the officers will need separate representation. In judicial review proceedings there may also be a question of whether proceedings should be brought against the individual officer or civilian employee as the decision maker, or the Commissioner of Police under whose command and control Police employees (including officers) are required to operate.<sup>10</sup>

### SERVICE ISSUES

#### *Service on Public Servants*

24. If a public servant is properly named as a defendant or respondent, personal service on that public servant will be valid. If the plaintiff attempts to serve them on Crown Law, we will need instructions to accept service.
25. Under the [Cabinet Directions for the Conduct of Crown Legal Business 2016](#) paragraph 31:
- If an employee of a government 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 these Directions “employee” includes a Chief Executive.
26. While the Attorney-General may take over the case, until that happens the technical position is that we have no status to represent any individually named person and subject to the comments that follow, cannot accept service of proceedings without that person’s instructions.
27. Notwithstanding the technical position, documents served on Crown Law should be received by reception in the first instance and referred to the relevant team leader or counsel as soon as possible. It is then a matter for counsel to determine whether service has been properly effected, whether Crown Law has authority to act, and whether we must seek and confirm instructions or whether the documents need to be redirected.
28. Reception staff will be responsible for recording on a separate piece of paper the date the documents are served on Crown Law and attaching that record to the documents for counsel’s information. Counsel may subsequently wish to use a date stamp to mark the documents with the date of service but this is not reception’s responsibility.

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which is part NZBORA and part tort”. No authority to support that proposition was provided and it was made without the Court having had the benefit of argument on the point.

<sup>9</sup> In tort claims the Crown may be vicariously liable. In claims brought under the Bill of Rights, it will be directly liable.

<sup>10</sup> Section 30 of the Policing Act 2008.

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29. If the individual is not covered by [Public Service Act 2020](#) (for example a Police constable) the Cabinet Directions will not apply and the issue of representation is a matter for negotiation between that employee and their employer.

### *Service on Ministers*

30. Under [paragraph 4.35 of the Cabinet Manual](#), Crown Law is authorised to receive service of all documents on a Minister where the Minister is named in respect of actions in their ministerial capacity.
31. If the Minister is sued for a cause of action that arose while they were Minister but has more of a personal nature (an example given in the [Cabinet Manual paragraph 4.39](#) is a defamation proceeding), they will not necessarily be entitled to indemnity and the authority to accept service on their behalf in paragraph 4.35 will not apply.

### *Service on Crown Solicitors*

32. Crown Solicitors do not have any authority to accept service of civil or judicial review proceedings on behalf of the Crown, and such authority could only come from the Solicitor-General.

[END]

**Guideline Owner** – Convenor, Professional Standards Committee

Published on 17 November 2014. Reviewed on 30 October 2019 and 21 June 2021. To be reviewed no later than 21 June 2024.