

20 February 2013

James Black
Email: fyi-request-731-465085b3@requests.fyi.org.nz

Dear Mr Black

Official Information Act request
Our Ref: OIA353/1

We refer to your Official Information Act request in relation to when the Crown Law Office (“CLO”) brings civil proceedings, dated 24 January 2013.

Your request relates specifically to:

1. any written guidelines (or other rules) that are taken into account by CLO when determining whether to initiate or continue civil proceedings; or
2. If no such written guidelines exist, any information summarising the factors/ criteria applied by CLO when they determine whether to initiate or continue civil proceedings.

There are internal CLO policy documents which guide the general conduct of CLO in matters relating to litigation and case management. These are relevant to and taken into consideration when determining whether to initiate or continue civil proceedings.

We **enclose** the following documents which are relevant to your request:

- CLO Filing of Proceedings Policy
- CLO The Conduct of Litigation – Contextual Principles
- CLO Litigation Management Planning Process
- Cabinet Directions for the Conduct of Crown Legal Business 2012

We advise you that you may, if you wish, seek a review of this response, by way of complaint under s 28(3) of the Official Information Act to an Ombudsman.

Yours sincerely



Erica Devine
Assistant Crown Counsel

CROWN LAW

FILING OF PROCEEDINGS POLICY

*Approved by the Management Board
30 April 2008*



FILING OF PROCEEDINGS
POLICY

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FILING OF PROCEEDINGS
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POLICY

Any instructions to issue proceedings in any Court or Tribunal must first be referred to and approved by a Deputy Solicitor-General.

REFERENCES

Cabinet Direction for the conduct of Crown legal business 1993 cl 5, 6

Code of Ethics: rule 8.07

High Court Rules: rule 41B

COMMENTARY

1. Authority to approve the filing of proceedings is restricted to Deputy Solicitors-General because the commencement of proceedings is a significant step. Where proceedings are issued:
 - 1.1 The plaintiff immediately assumes a financial responsibility for any costs award the court or tribunal may make and if injunctive relief is sought, there may also be an obligation to pay damages.
 - 1.2 The lawyer who files the claim assumes responsibility to the court for the proper conduct of the proceedings; warrants to the court that they are authorised to bring them; and assumes an ethical duty to, among other things, avoid conflicts of interest.
 - 1.3 A process is commenced by which findings may be made that may affect the legal environment in which the Crown operates.

PROCEDURE

2. A request to the Deputy Solicitor-General for permission must be:
 - 2.1 Set out in a memorandum, endorsed by a Team Leader, and accompanied by:
 - 2.1.1 written authorisation from the Crown Law client from whom the instructions have been received; and
 - 2.1.2 a draft statement of claim.
3. The memorandum referred to in paragraph 2.1 must include analysis of the legal and broader issues involved together with counsel's recommendation in relation to the proposed proceedings, attaching any relevant Crown Law advice.

[End]

THE CONDUCT OF LITIGATION - CONTEXTUAL PRINCIPLES

INTRODUCTION

1. When litigation is conducted on behalf of clients, it is conducted on behalf of the Solicitor-General. All litigation must be conducted within the framework of the principles set out in this document and the *The Role of the Crown Law Office* (document 445102).
2. This Professional Standard, entitled *The Conduct of Litigation – Contextual Principles* has been prepared for use by all Counsel in the Crown Law office.

APPLICATION OF THE STANDARD

3. Three guides accompany *The Conduct of Litigation – Contextual Principles* and have been prepared to assist staff in applying this Professional Standard:
 - *Litigation: Key Steps* (document 574708) – a form which must be completed for all civil litigation and filed at the top of the current client / matter file.
 - *Civil Litigation: Reference Guide* (document 574688) – a step by step guide to assist in the conduct of litigation.
 - *Litigation Management Planning Process* (document 533210) – a guide to assist in planning the strategy and management of litigation which must be completed for all civil litigation.
4. In addition, three reference documents accompany *The Conduct of Litigation* and have been prepared to assist staff with the conduct of litigation. This is to ensure that due consideration is given to the particular subject areas covered by the documents:
 - *Defamation Proceedings* (document 216706)
 - *Civil Bill of Rights Claims* (document 200753)
 - *Representation and Conduct of Judicial Review Proceedings* (document 258950)

CONTEXTUAL INFLUENCES

5. In determining the way in which litigation should be approached it is helpful to bear in mind some contextual principles.

Our Identity

- 5.1 The Solicitor-General and the staff of the Crown Law Office act on behalf of the Attorney-General when advising and representing Ministers and their Departments.

The principal responsibility of the Attorney-General is to act as the Government's senior lawyer, helping to ensure that it acts lawfully and, equally important, that it is not prevented from acting lawfully in the course of the operations of government.

- 5.2 The Crown Law Office contributes to the following Government outcomes:
- the protection of its legal interests
 - respect for law and order
 - the interests of justice in the community

Vision Statement

“We will be recognised by the Government, clients, the judiciary and the legal profession as the leading public law practice committed to serving the Government with excellence, integrity and authority.”

Recognising the Unique Nature of Crown litigation

- 5.3 The Crown Law Office provides legal services to ministers, departments and government agencies much as a firm of barristers and solicitors would provide for its clients. In essence, Crown Law is the government's law firm. Yet this distinctive feature gives rise to responsibilities and obligations that do not exist for other legal practices.
- 5.4 It is the function of the Crown Law Office to support the office of both the Attorney-General and the Solicitor-General in their respective roles as senior and junior Law Officers of the Crown.¹
- 5.5 From Crown Law's unique role and functions (to support the Law Officers) flow certain values, often referred to as the Attorney-General's values. These values inform our approach to the way we conduct our business, including our approach to litigation.

¹ See *Crown Law Practice in New Zealand*, Haughey, EJ, Wellington, Govt. Print, 1961; Rt Hon Paul East QC, *The Role of the Attorney-General* in P Joseph (ed), *Essays on the Constitution* (1995) 184; J McGrath QC, *Principles for sharing law officer power: the role of the New Zealand Solicitor-General* (1998) 18 NZULR 197 http://www.crownlaw.govt.nz/artman/docs/cat_index_6.asp; *Constitutional and administrative law in New Zealand*, Philip A Joseph, 2nd ed. Wellington, Brookers, 2001, (25.8.2 Law Officers of the Crown).

Attorney-General's Values²

- 5.6 The most important principle, and the principle that Crown lawyers need to keep upper-most in their minds, is that the Attorney-General, as senior Law Officer, acts in the public interest. Practically, the requirement for the Attorney-General to act in the public interest arises in five contexts:
- 5.6.1 The Attorney-General is responsible for the administration of the law in government: the Attorney General is the principal legal adviser to the government and is responsible for seeing that government is conducted according to law.
- 5.6.2 The responsibility for the government's role in the administration of the criminal justice system is placed on the Attorney-General.
- 5.6.3 In government litigation beyond the criminal justice system, the Attorney General has a separate responsibility to represent the public interest on behalf of the community by enforcing the law as an end in itself.
- 5.6.4 The Attorney-General also carries the principal responsibility in government for the relationship between the executive government and judiciary.
- 5.6.5 As a Minister, the Attorney-General must answer to Parliament for the actions of the Attorney-General, the Solicitor-General and the Crown Law Office.³ This accountability extends to the conduct of litigation on behalf of the government.
- 5.6.6 A number of core values emerge from these roles and responsibilities:⁴
- just and fair enforcement and application of the law to all
 - objective legal advice
 - compliance with basic human rights
 - government operates under the principles of law
 - representation of the public interest
 - an independent judiciary.

² For a fuller explanation of the Attorney-General's values see the Memorandum from Law Officer Team dated 29 March 2001: Doc 353591 (also located on Worksite).

³ See Best Practice Seminar materials and the articles and other references in those materials.

⁴ These values are amplified in the Contextual Influences referred to in fn 2.

Cabinet Directions for the Conduct of Crown Legal Business 1993⁵

- 5.7 A further distinctive feature of Crown Law practice is the way the client relationship is created. On 13 April 1993, the Cabinet Directions were approved by Cabinet for the conduct of business between government departments and the Crown Law Office. The Cabinet Directions help define the roles of the Attorney-General, the Solicitor-General and the Crown Law Office.
- 5.8 The Cabinet Directions apply to all ministers and departments. In cases of doubt the Attorney-General (in practice the Solicitor-General) decides whether they apply to any particular agency.
- 5.9 The Cabinet Directions require departments who need legal services from beyond their own legal staff, to establish whether the requirement for the service comes within category 1 or category 2. All category 1 work must be referred to the Solicitor-General (at least in the first instance).
- 5.10 Essentially, the Cabinet Directions indicate a continuing governmental commitment to maintain the traditional responsibility of the Law Officers for control of the government's core legal business.
- 5.11 Counsel should be acquainted with the Cabinet Directions which give effect to the above principles by laying down the structure according to which the legal work of the Executive Government is to be carried out. The Chief Officer of the Crown in legal matters is the Attorney-General who is responsible to Parliament for the conduct of all Court and Tribunal proceedings in which the Crown becomes involved and for the legal advice given to Government.
- 5.12 Subject only to the prior position of the Attorney-General, the Solicitor-General is the Government's Chief Legal Advisor and advocate in the Courts. In this role the Solicitor-General is assisted by the legal staff of the Crown Law Office. The essential features of the Cabinet Directions are:
- 5.12.1 the Attorney-General and Solicitor-General, assisted by the Crown Law Office, to be responsible for providing legal representation and advice to Ministers and the Executive Government.
 - 5.12.2 a direction to all chief executives that whenever the interests of the Crown so require in the course of departmental operations or administration they must ensure legal advice is obtained either from within or outside of departmental resources as the circumstances require.
 - 5.12.3 division of legal services required by the Government into two categories: **Category 1** where the services relate to core activities of Government, and, **Category 2** in which the legal services to be

⁵ The Cabinet Directions are included as Appendix 3 to the Cabinet Manual and are also located on Worksite.

provided are common in type to those required by any large industrial or commercial concern.

- 5.12.4 a direction that in the case of the first category of legal services departments must discharge their duty to obtain sound legal advice either from sources within the department where available or by referring matters to the Solicitor-General.
- 5.12.5 authorisation of departments in the case of work in the second category of legal services either to engage the services of the Crown Law Office, subject to its agreement, or those of private lawyers. Where departments choose to engage private lawyers the chief executive will be under a duty to ensure the lawyers engaged have an appropriate level of expertise for the work being undertaken, have no conflicts of interest and are adequately supervised by the department in the services they carry out for the Government.
- 5.12.6 directing that in the case of any work being or to be carried out for the Government by private lawyers the Solicitor-General may intervene at any time and give directions to the department as to the manner in which that legal work is to be done or completed.
- 5.13 A common theme in legal work of Category 1 (see clause 5 - Cabinet Directions 1993) is the definition, exercise and control of Government power. Important to this area of legal work is the need for consistency in the legal advice given the Government.

Public Sector Code of Conduct

- 5.14 While all legal staff are subject to the same professional duties and obligations as their private sector counterparts, in addition they must also comply with standards of conduct expected of the New Zealand Public Service and operate always with the Crown Law Office vision and value statements firmly in mind.
- 5.15 The strength of any government system lies in the extent to which it earns and holds the respect of its citizens. That respect comes from the confidence, which people have in the integrity of government, and the services it provides. Every public servant has a part to play in earning public respect and maintaining confidence in the institutions of Government.
- 5.16 New Zealanders are entitled to the high expectations they have of staff in government agencies. They expect that we are honest, fair and loyal.
- 5.17 The Code of Conduct describes the three principles of conduct that encompass the minimum standards of integrity and conduct expected of us. We must:
- fulfil our lawful obligations to the Government with professionalism and integrity;

- perform our official duties honestly, faithfully and efficiently, respecting the rights of the public and our colleagues;
 - not bring the Public Service into disrepute through our private lives.
- 5.18 Standards of integrity and conduct serve a profound purpose. They are central to earning New Zealander's trust in Government and maintaining their confidence in the Public Service.

General

- 5.19 Tensions can arise when the immediate client has an objective that is incompatible with certain interests of the Crown which it is the responsibility of the Attorney-General to represent and protect. As with most issues of this nature the desirable outcome is that the client department understands and is persuaded to Crown Counsel's view. With difficult cases Counsel should involve the Solicitor-General.
- 5.20 These various obligations demand from us the very best, both in the professional quality of our work and our attitude towards it.

THE PRINCIPLES UNDERPINNING OUR APPROACH TO LITIGATION

6. These principles are drawn from the nature of the Crown Law Office business in the context in which the Solicitor-General and Crown Counsel operate. While principles, values and ethics are not altered whether we are involved in prosecutorial or civil work, what follows is specifically directed to civil litigation.
7. The Crown Law Office seeks alternatives to litigation wherever appropriate.
8. It is highly desirable that the Government's approach in the Courts in litigation is consistent with the basis on which advice is given.
9. When Crown Counsel appear for the Crown they attempt to act as model advocates. The Crown attempts to be a model litigant.⁶ The extent to which we live up to this expectation is the extent to which we continue to have an enhanced respectability before the Courts.
10. Our objective is to achieve the best outcome for the client consistent with wider Crown interests. In all litigation good organisation is a prerequisite to success.
11. The Crown should always act honestly and fairly by, for example:
 - paying legitimate claims without further litigation.
 - not engaging in delaying tactics.
 - not acting vexatiously, in undertaking appeals or otherwise.

⁶ T Arnold QC, Solicitor-General, *Litigating Against the Crown*, (2002), presentation for the NZLS.

- not taking inappropriate advantage of a claimant who may lack the resources to pursue legal proceedings.
 - not unnecessarily taking technical points and objections.
12. However, the requirement of fairness does not mean that the Crown is precluded from taking all legitimate steps to pursue claims and to test or defend claims against it: eg, by relying on the statute of limitations.
13. It is sometimes said that it is the duty of an advocate to speak out fearlessly, to advance every argument, raise every issue and ask every question which they think will win their client's case. Crown Counsel must bear in mind their overriding duty to the Court, to the standards of the profession and to the public as they advance the interests of their client.
14. Crown Counsel must not mislead the Court, nor withhold authorities or documents which might tell against their case.
15. Crown Counsel must not abuse the privilege attached to statements made in Court, eg by introducing damaging or irrelevant material and by making prejudicial statements which cannot be substantiated or justified by evidence.
16. Crown Counsel must bear in mind the potential for a conflict of interest to arise or to be perceived. Where it appears that the specific interest of a departmental client and the broader interest reflected in the responsibilities of the Attorney-General as discussed above may be in conflict, these must be resolved in a way that is both consistent with the Attorney's duty and sensitive to the client's legitimate interests. Difficult cases ought to be brought to the attention of the Solicitor-General.

APPLICATION OF PRINCIPLES TO SPECIFIC LITIGATION STEPS

17. The Crown is more frequently a defendant in civil proceedings than a plaintiff or applicant. Regardless of its party status, the foregoing applies to Crown Counsel's approach.
18. The following are typical stages in civil litigation although some of the steps may be more confined to certain types of litigation, eg interrogatories are most unlikely to be issued in review proceedings.

Receipt of Proceedings

- 18.1 Ensure the date of receipt of the statement of claim and accompanying documents is recorded so that any subsequent arguments about date of service can be dealt with on a proper basis. (It is the responsibility of the first person into whose hands the proceedings arrive, whether at reception or elsewhere, to record date and time of receipt.)
- 18.2 Ensure you are not accepting service in respect of a defendant for whom we should not properly act or for whom we do not have instructions to accept service.

- 18.3 Communicate receipt of proceedings immediately to the interested client departments and any other team leader who may have an interest in the subject matter. For example, although you may act for a particular department, if the proceeding raises significant constitutional or Bill of Rights issues liaison with the Bill of Rights team is required. The respective team leaders will agree the arrangement that best ensures the Crown's interests are properly protected and represented.
- 18.4 If the proceeding raises an issue of particular public importance or sensitivity the Solicitor-General should always be informed.
- 18.5 Likewise, bear in mind the need to keep the Attorney-General informed of most litigation in which the Attorney-General is defendant. This is generally achieved through the weekly report to the Attorney-General.
- 18.6 Consider whether it should be recommended to the Solicitor-General that a barrister ought to be briefed. The following factors are relevant to the decision whether to brief outside counsel:
- complexity of the litigation (especially if it is a complex commercial case or concerns a specialist area such as defamation).
 - the need for the greater advocacy skills and trial experience represented at the senior bar.
 - resource implications for the particular team.

If it is thought that the proceeding should be briefed outside the office, this should be done with the authority of the Solicitor-General (which may be delegated to team leaders in particular types of case). The Solicitor-General's policy is that the Crown Law Office does not brief out where litigation is within its specialist areas and fields of competence but of course there are exceptions. The views of Departments must be considered.

Obtaining Instructions and Setting up a Litigation "Team"

- 18.7 The process of obtaining instructions should start immediately. Remember, you have only 30 days in which to file a statement of defence. Consistent with the principles articulated above, the Crown should endeavour to comply strictly with all rules including the 30 day timeframe within which a statement of defence must be filed. If compliance is not possible any variations from the timeframes must be agreed with the other parties and that agreement documented.
- 18.8 It may be in the interests of a private litigant defendant to put the plaintiff to work and take no steps other than those that are completely unavoidable. However, where the Crown is a defendant it is often the case that delay works to the plaintiff's advantage. For example, where strategic judicial review has been initiated and interim orders have been obtained, the plaintiff has no motivation to get the issue before the Court because their fiscal interests (say)

may be sufficiently safeguarded by the interim orders. There may be other situations, eg in immigration cases, where delay by legal counsel acting for the Immigration Service causes prejudice to the Service.

- 18.9 The point is, Crown Counsel cannot take refuge in the customary passivity which it is often in a defendant's best interests to assume. Therefore, if clients have not responded to requests for instructions Crown Counsel must be proactive. Generally it is in the public interest to resolve litigation and bring it to a conclusion.

The Statement of Defence

- 18.10 It may be that during the period when instructions are being sought it becomes clear that the claim is not one that can properly be defended. If it is an application for judicial review and it is proper that the decision under attack can conveniently be referred back to the decision maker for reconsideration, that is a process that will have to be negotiated at the same time as the litigation steps are complied with.
- 18.11 A certain amount of judgement is called for here and no hard and fast rule can be laid down. But as a general rule it is as well to comply with the litigation timetable in the event that attempts at settling or negotiating a non-litigious resolution are not successful.
- 18.12 Despite the rules governing the content of pleadings, it is common to see statements of claim and statements of defence replete with unnecessary narrative and/or evidence.
- 18.13 Crown pleadings should conform with the rules. That is, a statement of claim should contain the facts which, if they are proved, provide a basis for the cause of action upon which relief is sought. The evidence supporting those facts ought not be "pleaded" nor should the principles of law on which it is said the plaintiff is entitled to relief. Likewise, it should be clear from the statement of defence which facts the defendant is clearly admitting or denying. Remember, every allegation not denied is deemed to be admitted.
- 18.14 The Crown endeavours to assist the litigation process by providing informative pleadings (consistent with the client's interests) and therefore, a string of bare denials is unlikely to be justified. It is usually helpful to the plaintiff/applicant and therefore it is helpful to the Court (and therefore to the Crown's credit) if, where the applicant's facts are disputed, a brief statement of the correct facts is provided in the statement of defence. For example:

"The defendant denies that a decision was made on 3 June but says the decision which is the subject of the application was made and communicated to the applicant on 3 July."

- 18.15 As to style it is often convenient for the first word in each paragraph to immediately convey whether it is an admission or denial so that the initial umbrella sentence may be:

“The Attorney-General says he:

1. Denies the allegations in paragraph 1.
2. Admits the allegations in paragraph 2.”

Interlocutory Applications

- 18.16 Interim orders applications - consent only if merits **require** it.
- 18.17 Strike-out applications - Crown should be conservative in its approach when considering whether or not to make a strike-out application.
- 18.18 *Security for costs - to be advised.*
- 18.19 *Strike-out of particular party - to be advised.*
- 18.20 *Application for directions and timetable - to be advised.*
- 18.21 *Preliminary questions of law - to be advised.*

Discovery and Inspection

- 18.22 Counsel responsible for the proceeding ought to take responsibility for discovery. They are in the best position to make a proper assessment of “relevance”. As to inspection, original documents ought not to leave the Crown Law Office. If not practicable to inspect in Wellington secure arrangements might be made with the Crown Solicitor’s office.

Preparation of Evidence

- 18.23 Depending on whether at the Directions Conference *viva voce* evidence or affidavit evidence has been ordered.
- 18.24 *Third party - to be advised.*

Advocacy

- 18.25 *To be advised.*

Concessions

- 18.26 Concessions which render the point moot ought not to be made. The concessions can have the effect of leaving the court without jurisdiction to hear, for example, and appeal.

LITIGATION MANAGEMENT PLANNING PROCESS

PURPOSE OF CASE MANAGEMENT

1. The general purpose of the Litigation Management Plan is to encourage us to think about case management. It is easy for those who conduct litigation on behalf of the Crown to become reactive rather than proactive in their approach. Primarily, this is because we represent a defendant in litigation and respond to the initiatives of the plaintiff.
2. The purpose and consequent value of case management is that it sets a framework for the effective and efficient running of a case so as to enhance the prospects of a successful outcome.
3. Litigation Management Planning aligns with Crown Law's strategic focus by enhancing client and stakeholder relationships and achieving efficiency and sustainability.
4. This document outlines the general principles and mechanisms for case management and accompanies the Crown Law Office template for a Litigation Management Plan.
5. All litigation must be conducted within the framework of the principles set out in the following documents, which identify those features of Crown Law practice which are unique and which must guide our approach to the work we do, including the conduct of litigation:
 - *The Role of the Crown Law Office (document 445102)*
 - *The Conduct of Litigation – Contextual Principles (document 177500)*

CASE MANAGEMENT - GENERAL PRINCIPLES AND OBJECTIVES

6. When Crown Counsel appear for the Crown they attempt to act as model advocates. The Crown attempts to be a model litigant.¹
7. Our objective is to achieve the best outcome for the client consistent with wider Crown interests. In all litigation good organisation is a prerequisite to success.

¹ T Arnold QC, Solicitor-General, *Litigating Against the Crown*, (2002), presentation for the NZLS.

MECHANISMS FOR CASE MANAGEMENT

Case Assignment

8. Cases are to be assigned by the relevant Team Leader within 24 hours of service of the pleadings or other relevant court documents. The level of representation assigned should reflect the significance and complexity of the case. Team Leaders will grade each new case according to the following:
- 8.1 Grade 1 – appropriate for allocation to one Crown Counsel or Associate Crown Counsel.
- 8.2 Grade 2 – appropriate for allocation to two Crown Counsel or a Crown Counsel and an Associate Crown Counsel.
- 8.3 Grade 3 – in addition to Grade 2 allocation, appropriate for direct involvement of the Solicitor-General, and/or a Deputy Solicitor-General or other senior counsel from within the Office or from the bar.
9. The following factors are likely to be relevant when assigning a new case:
- 9.1 How important are the issues to the client or to wider Crown interests? For example:
- Is the issue politically important or sensitive?
 - Does the case have significant fiscal implications?
 - Is an important point of principle raised by the case?
- 9.2 What is the likely precedent effect of the case? For example:
- Will the outcome have implications for interests beyond those of the immediate client?
 - Does the case challenge operating policy or is it largely limited to its facts?
- 9.3 What are the likely consequences of a loss? For example:
- Will interests beyond those of the immediate client be affected?
 - Is an important point of principle at stake?
 - Is a loss to be measured in only \$\$ terms?
- 9.4 Are the issues complex or novel? For example:
- Is the case factually complex?

- Is the case legally complex?
- 9.5 Is this a first instance hearing or an appeal?
- 9.6 What volume of work is expected? For example:
- Are there numerous parties?

An assessment of these factors will determine the number and seniority of counsel assigned to work on a particular file.

10. Where Crown Counsel or Associate Crown Counsel are likely to seek the assistance of an Assistant Crown Counsel at some point during the litigation it is desirable that an Assistant Crown Counsel be formally assigned to the litigation “team” at the outset. This will give Assistant Crown Counsel the earliest opportunity to familiarise themselves with the issues and to be involved throughout the life of the file.

Prepare a Litigation Management Plan

11. The purpose of a Litigation Management Plan is to:
- 11.1 encourage the legal team at the earliest stage in the proceeding to address the litigation in a comprehensive and strategic way;
 - 11.2 create a document which then provides the legal team (which in some cases will include the client) with a framework for the development of the case;
 - 11.3 ensure that the legal team understands the client’s objectives in the litigation from the outset;
 - 11.4 encourage the legal team to monitor developments during the life of the proceeding or litigation to ensure that the strategy and objectives remain relevant and present the greatest opportunities for success; and
 - 11.5 reduce client dependency on one counsel by creating a team around the litigation.
12. These purposes will be achieved if, at an early stage, counsel attend to the following matters:
- 12.1 *Clarify objectives and strategy* - so that both the client team and the legal team are well informed and aligned on the purposes and requirements of the litigation.
 - 12.2 *Establish lines of communication* - at both management and implementation levels and for client reporting. Regular meetings of the legal team are important to monitor and discuss, for example, resource needs, timetabling, progress with tasks, research needs, and to keep under review the theory of the case.

12.3 Define timeframes -

and manage the litigation within these timeframes and in a cost effective fashion.

12.4 Estimate workloads –

in relation to key events. Do this in consultation with all relevant staff including the Team Leader as necessary.

12.5 Assign tasks -

so that individuals take responsibility for tasks, and maximum use is made of the range of resources available with minimum duplication of effort.

12.6 Record work done -

in such a way that it can be readily accessed by other team members and used as a foundation for subsequent work (which may include the transfer of the file or briefing external counsel).

12.7 Take control of the documentation at the outset -

and preserve the client's position in regard to written and oral evidence.

The Litigation Management Plan Template

13. A Litigation Management Plan based on the template must be completed in all cases other than for Habeas Corpus, Abides and Criminal appeals to the Court of Appeal. Use the Litigation Management Plan template (document 564078) which is available in the “Non-Court Documents” section on the Precedents WorkSite page.
14. Counsel to whom the Team Leader has allocated responsibility for the file must prepare a Litigation Management Plan, get the client's agreement (on the understanding that this is subject to Team Leader approval) and then provide it to the Team Leader, for approval, within 20 days of service of the documents. (Note, this is 10 working days for immigration cases.) Preparation of the Litigation Management Plan may be deferred in some cases for practical reasons, e.g. receipt of template historic abuse claims where it has not been established if the particular claim will proceed to trial; also in some employment matters it may be appropriate to defer completion of the plan until after mediation.
15. The Litigation Management Plan should be the first document on the pleadings folder along with a list of contact details for witnesses and client.
16. Provide a copy of the approved Litigation Management Plan to the legal team, including support staff, your Deputy Solicitor-General, the client and if assistance is sought from the librarians a copy to them.
17. The Team Leader, who ultimately is accountable for the conduct of litigation in the Team, will provide feedback on the Litigation Management Plan within 5 working days of receiving it.

Keep the Litigation Management Plan up-to-date

18. A plan of action will have greatest value if it reflects the current state of play.
19. The Litigation Management Plan needs to be kept up-to-date. Therefore, it should be reviewed and modified, for example:
 - 19.1 to factor in the effect of significant events or developments such as interlocutory decisions, or new instructions
 - 19.2 to reflect a refined or altered theory of the case or other strategic thinking
 - 19.3 wherever it is necessary to ensure it is current.
20. Update the Litigation Management Plan by creating new versions of the same document rather than new documents. In this way, changes to the Litigation Management Plan can be tracked over time. This is likely to be valuable with long-running litigation where, for example, there have been changes in the legal team and will assist in the debriefing process. It is useful (and necessary) for others to know what decisions affecting litigation strategies have been taken and why. Agree updates to the Litigation Management Plan with the client and copy the new version to them.

Debriefing

21. We use debriefing to review the litigation process at the end of a case. It is about “closing the loop” between what we stated were our aims for the litigation and whether we achieved them. It is not a review of “performance”. Full details of the debriefing process are set out in:

Debriefing a litigation – Refinement of Litigation Management Process (document 606370)

Finally ...

22. The template itself is a mechanism to assist you to run your litigation (or appeal) in the most effective and efficient way so as to enhance the prospects of a successful outcome.
23. Counsel are encouraged to adapt it to suit the needs of the file you are running, consistent with the above objectives.

PROFESSIONAL STANDARDS COMMITTEE

NOVEMBER 2012

CABINET DIRECTIONS FOR THE CONDUCT OF CROWN LEGAL BUSINESS 2012

1. These Directions are the Cabinet Directions for the Conduct of Crown Legal Business 2012. The Cabinet Directions for the Conduct of Crown Legal Business 1993 are revoked.

PURPOSE

2. The Law Officers, the Attorney-General and the Solicitor-General, have constitutional responsibility for determining the Crown's view of what the law is, and ensuring that the Crown's litigation is properly conducted.
3. The primary purpose of these Directions is to identify core Crown legal matters, to set out how those matters are conducted by Government, and to set out the Law Officers' oversight of such legal matters.
4. These Directions deal also with a small number of matters of general application to the conduct of Crown legal business.
5. As part of their oversight role, the Law Officers may develop, in consultation with government departments, and promulgate detailed guidelines on specific matters relating to the conduct of core Crown legal business, consistent with these Directions.

APPLICATION

6. These Directions apply to Ministers of the Crown, and all government departments.
7. In these Directions, "government department" means:
 - 7.1 departments of the public service as specified in the First Schedule to the State Sector Act 1988, the New Zealand Police, the New Zealand Defence Force, and the New Zealand Security Intelligence Service; and includes
 - 7.2 bodies, decision-makers, office holders or employees within those departments.
8. To avoid doubt, these Directions do not apply to the following public entities: the Parliamentary Counsel Office, the Office of the Clerk of the House of Representatives, the Parliamentary Service, Crown entities, State-owned enterprises, offices of Parliament, bodies listed in Schedules 4 and 5 of the Public Finance Act 1989, local authorities, and other bodies corporate that exist to perform public functions or that are owned by the Crown or a public entity.

CORE CROWN LEGAL MATTERS

9. In these Directions, a “Core Crown legal matter” is any one of the following:
- 9.1 Legal advice to the Crown, through a Minister or government department relating to:
- (a) Protection of Crown revenue;
 - (b) Enforcement of the criminal law;
 - (c) The exercise or scope of constitutional powers or duties of the Crown including, but not limited to, matters relating to:
 - (i) the Treaty of Waitangi;
 - (ii) New Zealand’s international obligations;
 - (iii) the New Zealand Bill of Rights Act 1990.
 - (d) Powers or duties conferred on the Law Officers of New Zealand;
 - (e) The lawfulness of actual or proposed exercise of a public power, duty or function.
- 9.2 Legal representation in:
- 9.2.1 Any litigation, actual or imminent, in a Court or tribunal where the Crown is a party either through a Minister or government department; and
 - 9.2.2 Any other forum (including but not limited to mediations, arbitrations, quasi-judicial bodies, inquiries) where the substance of the dispute or issue raises matters described in paragraph 9.1 above; and
 - 9.2.3 Inquests or Coronial Inquiries where the inquest or inquiry is mandated by the Coroners Act 2006 in relation to those deaths in Crown custody, as specified in s 13(f), (g), (j), (k) and (l) of that Act.
10. The Attorney-General may direct that any other legal advice or representation for Ministers or government departments is to be treated as a core Crown legal matter in accordance with these Directions.
11. Despite paragraph 9.2 above, legal representation in the Employment Relations Authority and Employment Court is not a core Crown legal matter, except where the substance of the dispute or issue raises matters described in paragraph 9.1 above.
12. The Solicitor-General may direct that any class of matter or specific matter which would be a core Crown legal matter, as defined by these Directions, is exempted from all or any of the requirements of these Directions, and may impose any conditions as he or she considers necessary.

CONDUCT OF CORE CROWN LEGAL MATTERS

13. Core Crown legal matters must be conducted consistent with any applicable values of the Attorney-General, as expressed by the Attorney-General from time to time.
14. Subject to any enactment to the contrary, all requests by Ministers or government departments for legal advice in any core Crown legal matter which is not being handled wholly by a government department's own lawyers, or by a lawyer with relevant expertise employed in another government department responsible for the subject matter, must be referred to the Attorney-General or the Solicitor-General.
15. Subject to any enactment to the contrary, all requests by Ministers or government departments for legal representation in any core Crown legal matter must be referred to the Attorney-General or the Solicitor-General, unless the matter may be handled by the department's own legal staff under an authorisation given by these Directions or given by the Solicitor-General under paragraph 24 below.
16. Subject to any authorisation given by the Solicitor-General, a government department may instruct a Crown Solicitor or, in the case of the Serious Fraud Office, a Panel member, to provide legal advice on or to appear on any prosecution contemplated or commenced by an officer or employee of that department which:
 - 16.1 is not a Crown prosecution as defined in the Criminal Procedure Act 2011; or
 - 16.2 is a Crown prosecution for which the Solicitor-General has not yet assumed responsibility under the Crown Prosecution Regulations 2013.¹
17. Subject to any enactment to the contrary, core Crown legal matters may be conducted by counsel employed at the Crown Law Office or by any other counsel engaged by the Solicitor-General, either on request from a Minister or government department, or at the Solicitor-General's own volition.
18. It is for the Solicitor-General to decide, in consultation with the relevant Minister or government department, whether legal advice or representation in a core Crown legal matter is to be dealt with by the Crown Law Office or by briefing the matter to lawyers in private practice (or a combination). The primary concern of the Solicitor-General is to obtain the optimum advice or representation for the Crown within the available resource.
19. Where the Solicitor-General considers a matter should be briefed out to lawyers in private practice, the Solicitor-General will consult with the relevant Minister or government department, and will take into account the following factors:
 - 19.1 Whether the nature and/or complexity of the matter makes it better suited to be conducted within the Crown Law Office or elsewhere;

¹ Paragraphs 16 and 22 of these Directions will come into force with the commencement of the Criminal Procedure Act 2011. Prior to that date, paragraph 6(c) (as it applies to criminal prosecutions) and paragraph 9 of the Cabinet Directions for the Conduct of Crown Legal Business 1993 will continue to apply.

- 19.2 The available capacity, capability and expertise within the Crown Law Office and elsewhere;
 - 19.3 The fiscal implications for the Crown, including the cost to the client department and the cost and accessibility implications of counsel's location;
 - 19.4 Any issues of independence or conflict of interest (actual or perceived).
20. Where lawyers in private practice (including Crown Solicitors) or departmental lawyers are instructed on a core Crown legal matter, the Solicitor-General retains oversight and may direct the manner in which the legal services are to be provided.

Core Crown legal work that may be conducted within government departments

21. Any request for legal advice on a core Crown legal matter may be responded to by a government department's lawyer, or a lawyer with relevant expertise in another government department, responsible for the subject matter.
22. Subject to any authorisation given by the Solicitor-General, an officer or employee of a government department may appear in the District Court on any prosecution commenced by an officer or employee of their department which:
- 22.1 is not a Crown prosecution as defined in the Criminal Procedure Act 2011; or
 - 22.2 is a Crown prosecution for which the Solicitor-General has not yet assumed responsibility under the Crown Prosecution Regulations 2013.²
23. Any solicitor employed by a government department may represent that department in:
- 23.1 mediations under the Employment Relations Act;
 - 23.2 the Employment Relations Authority and the Employment Court;
 - 23.3 mediations before the Human Rights Commission;
 - 23.4 Coronial Inquests.
24. Legal representation by lawyers employed in government departments on any other core Crown legal matter requires general or specific approval of the Solicitor-General.
25. All existing approvals under the Directions for the Conduct of Crown Legal Business 1993 remain in force as if made under these Directions, unless revoked by the Solicitor-General.
26. Where the Solicitor-General proposes to revoke an authority to departmental lawyers to act, he or she will consult with that department, giving reasons for proposing to revoke the authority.

² Paragraphs 16 and 22 of these Directions will come into force with the commencement of the Criminal Procedure Act 2011. Prior to that date, paragraph 6(c) (as it applies to criminal prosecutions) and paragraph 9 of the Cabinet Directions for the Conduct of Crown Legal Business 1993 will continue to apply.

All other legal services for Ministers and government departments

27. Subject to paragraph 10, Ministers and government departments may obtain legal advice and representation in matters that are not core Crown legal matters from any appropriate legal services provider, including the Crown Law Office, subject to compliance with the All-of-Government External Legal Services Contract (where applicable).

PROCEEDINGS REQUIRING SOLICITOR-GENERAL'S APPROVAL

28. No Minister or government department may initiate any appeal from the decision of a court or tribunal, or an application for judicial review, without the approval of the Solicitor-General, which may be general or specific.

CONDUCT OF CERTAIN PROCEEDINGS

29. If an employee of a government 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.
30. 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.
31. The processes in paragraphs 4.46, 4.49-4.53 of the Cabinet Manual will apply, with necessary modifications, to such proceedings.

SETTLEMENT OF MATTERS TO WHICH THESE DIRECTIONS APPLY

32. Settlement of litigation, or disputes short of litigation, or making *ex gratia* payments in relation to legal disputes may require involvement of others outside the relevant government department. See Cabinet Office Circular CO (11) 06, "Guidelines and Requirements for Proposals with Financial Implications" and CAB Min (02) 26/10: "Settlement of offenders' claims."
33. The Solicitor-General's advice may be sought over proposed settlements or *ex gratia* payments, to ensure consistency with other similar decisions across Government.

CROWN LEGAL PROFESSIONAL PRIVILEGE

34. Legal advice given to Ministers and government departments, from whatever source, attracts legal professional privilege. The Cabinet Office Manual, paragraphs 4.58-4.68 and Cabinet Office Circular CO(05) 5 require the Attorney-General's authority be sought (through the Crown Law Office) if a Minister or government department proposes to release or disclose material subject to legal professional privilege.
35. The Cabinet Manual has specific advice and guidance on dealing with Crown legal professional privilege.

ADVICE THAT IMPACTS ON OTHER DEPARTMENTS

36. If a government department (the requesting department) intends to request legal advice other than from its employed lawyers in relation to an enactment administered by another department or an issue that has significant implications for the responsibilities or functions of another department, the requesting department must consult with the other department on the proposal to seek legal advice.
37. The requesting department must also advise the provider of legal services of that consultation, provide the other department an opportunity to comment on the advice in draft before it is finalised, and provide it a copy of final advice. If the Crown Law Office is the provider of legal services, Crown Law must assist with such consultation and provision of draft and final advice. The requesting department is responsible for the costs of obtaining the advice.
38. The above process does not apply if:
- 38.1 the enactment relevant to the advice applies generally across a significant proportion of government departments (for example, the State Sector Act or Public Finance Act) and the requesting department administers the relevant legislation or regulations;
 - 38.2 consultation would breach confidentiality requirements, privacy obligations or national security requirements;
 - 38.3 the issue has significant implications for a significant proportion of government departments, making consultation impractical;
 - 38.4 due to reasons of extreme urgency it is not practicable to comply with the process; or
 - 38.5 the Solicitor-General expressly requires otherwise, by notifying departmental Chief Executives.
39. If any of paragraph 38.3-38.5 applies then the requesting department must provide a copy of the advice as soon as practicable to each department that the issue has significant implications for; and if applicable, the department that administers the relevant enactment.

REVIEW OF THESE DIRECTIONS

40. In consultation with Ministers and government departments, the Solicitor-General must review these Directions and their operation within two years of being made, and thereafter, every five years.

DISPUTES AS TO THE APPLICATION OF THESE DIRECTIONS

41. If, after appropriate consultation, there is a dispute as to whether a matter is a core Crown legal matter in terms of these Directions, or on any other matter arising under these Directions, the decision of the Solicitor-General prevails; except a Minister may refer the dispute to the Attorney-General for resolution.