



Cabinet Office

CO (16) 2

Circular

30 March 2016

Intended for All Ministers
All Chief Executive
All Senior Private Secretaries
All Heads of Legal

Cabinet Directions for the Conduct of Crown Legal Business 2016

- 1 On 15 February 2016 Cabinet approved new Cabinet Directions for the Conduct of Crown Legal Business.
- 2 The new Directions are annexed to this Circular. Their primary purpose 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.
- 3 The new Directions replace earlier Directions from 2012, contained in Appendix C to the Cabinet Manual 2008.
- 4 Appendix C to the Cabinet Manual will be updated accordingly. It can be accessed at <http://www.cabinetmanual.cabinetoffice.govt.nz>.

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Cabinet Directions for the Conduct of Crown Legal Business 2016

- 1 These Directions are the Cabinet Directions for the Conduct of Crown Legal Business 2016. The Cabinet Directions for the Conduct of Crown Legal Business 2012 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, 4A 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:
- 9.1.1 Protection of Crown revenue;
- 9.1.2 Enforcement of the criminal law;
- 9.1.3 The exercise or scope of constitutional powers or duties of the Crown including, but not limited to, matters relating to:
- 9.1.3.1 the Treaty of Waitangi or the Crown/Maori relationship;
- 9.1.3.2 New Zealand’s international obligations;
- 9.1.3.3 the New Zealand Bill of Rights Act 1990.
- 9.1.4 Powers or duties conferred on the Law Officers of New Zealand;
- 9.1.5 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 unless the prosecution is a Crown prosecution for which the Solicitor-General has assumed responsibility under the Crown Prosecution Regulations 2013.
- 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;
 - 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 unless the prosecution is a Crown prosecution for which the Solicitor-General has assumed responsibility under the Crown Prosecution Regulations 2013.
- 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 Crown Solicitors are authorised to accept instructions from government departments in matters involving coronial inquests and inquiries that do not fall under paragraph 9.
- 25 Legal representation by lawyers employed in government departments on any core Crown legal matter not authorised by these directions requires general or specific approval of the Solicitor-General.
- 26 All existing approvals under the Directions for the Conduct of Crown Legal Business 1993 and 2012 remain in force as if made under these Directions, unless revoked by the Solicitor-General.
- 27 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.

All other legal services for Ministers and government departments

- 28 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

- 29 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

- 30 If an employee of a government department is charged with a criminal offence or is the subject of a complaint to an external investigatory or disciplinary body where separate legal representation is necessary which arises out of the course of his or her employment, any claim for the reimbursement or payment of the employee's legal costs shall be decided by the Chief Executive of the department concerned.
- 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.
- 32 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

- 33 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 (15) 4, "Proposals with Financial Implications and Financial Authorities".
- 34 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

- 35 Legal advice given to Ministers and government departments, from whatever source, attracts legal professional privilege. The Cabinet Office Manual, paragraphs 4.58-4.68 requires 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.
- 36 The Cabinet Manual has specific advice and guidance on dealing with Crown legal professional privilege. Guidance is also provided in Cabinet Office Circular CO (14) 4 "Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown".

Advice that impacts on other departments

- 37 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.
- 38 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.

- 39 The above process does not apply if:
- 39.1 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;
 - 39.2 consultation would breach confidentiality requirements, privacy obligations or national security requirements;
 - 39.3 the issue has significant implications for a significant proportion of government departments, making consultation impractical;
 - 39.4 due to reasons of extreme urgency it is not practicable to comply with the process; or
 - 39.5 the Solicitor-General expressly requires otherwise, by notifying departmental Chief Executives.
- 40 If any of paragraph 39.3-39.5 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.
- 41 Where more than one government department is a participant in litigation or another forum specified in paragraph 9.2, or is considering making a submission as part of a public submissions process, it will generally be appropriate to have a single Crown position expressing a whole-of-Crown view. Cabinet Office Circular CO (06) 7 applies to interventions under the Resource Management Act 1991. In other cases, the department and counsel must check whether there are other Crown parties making a submission for the Crown. If there are, the Chief Legal Advisors of the submitting departments must, through Crown Law Office and the Attorney-General, coordinate to determine whether it is appropriate to express a whole-of-Crown view.

Review of these directions

- 42 In consultation with Ministers and government departments, the Solicitor-General must review these Directions and their operation every five years.

Disputes as to the application of these directions

- 43 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.