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# The Impact of Neo-Liberalism on the Idea of Public Office: Legal Office in New Zealand

Margaret Wilson

University of Waikato

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A constitution does not work itself, it has to be worked by men  
[and women]<sup>1</sup>

My overall suggestion is that a significant part of New Zealand constitutionalism is not judicial or legislative in nature, but could be characterised as “office-holders’ constitutionalism.”<sup>2</sup>

## Introduction

In this paper I shall assess the impact of the recent reviews of the Crown Law Office in New Zealand and the public legal office of Solicitor-General. In 2011 the State Services Commission, The Treasury and the Department of the Prime Minister and Cabinet commissioned a review of the Crown Law Office as part of *Performance Improvement Framework* (PIF). The Performance Improvement Framework “...is a framework applied by a small group of respected organisational leaders to provide insights into agency performance, identifying where agencies are strong or performing well and where they are weak or need to improve.”<sup>3</sup> The PIF is part of the *Better Public Services* project that is “...part of a shift to a more explicit standard of defining and tracking performance, changing the nature of incentives in the public sector, boosting the role that the corporate centre can play and enhancing the ability of stakeholders and the public to scrutinise what they are getting for their tax dollars.”<sup>4</sup> The Crown Law review then was part of a wider review of state agencies that was essentially shifting the focus of the agencies to be more efficiency-based and performance driven.

The PIF is an integral part of the New Public Management (NPM) and much would appear to have been invested in it by the three central state sector agencies and the government that has promoted and supported the initiative. The Cabinet noted that “...PIF is expected to become a core evaluative tool for the three central agencies, and should allow complete and consistent

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<sup>1</sup> Jennings, *The Law and the Constitution* (University of London, 5th edn. 1959) 82.

<sup>2</sup> Matthew S R Palmer, “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office-holders” (2006) 17 PLR 133, 153.

<sup>3</sup> *Formal Review of the Crown Law Office (Crown Law)*, October, 2011 State Services Commission, The Treasury, and the Department of the Prime Minister and Cabinet p 10 <https://www.ssc.govt.nz/sites/all/files/pif-crownlaw-review-oct11.pdf>

<sup>4</sup> Deborah Te Kawa and Kevin Guerin, “Provoking Debate and Learning Lessons it is early days, but what does the Performance Improvement Framework challenge us to think about?” *Policy Quarterly*, Vol 8, Issue 4 – November 2012, 28, 36.

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feedback from the centre to agencies on performance.”<sup>5</sup> The focus of this paper is on one agency, the Crown Law Office (CLO) as it has been subject to the PIF-oriented review. The paper will first situate the public office of Solicitor-General and the Crown Law Office within New Zealand’s constitutional framework. It is argued that although Solicitor-General is a public official and is the Chief Executive of the CLO understood as a state sector agency, the office of solicitor-general also has a constitutional role that may not fit easily with the objectives of the NPM.

This paper is informed by my experience as Attorney-General 1999-2005 and the working relationship I developed with two Solicitor-Generals who held office during that period. This experience gave me an understanding of the reality of legal risk for government and also of the negotiation required between the government service and public interest roles of the Attorney-General. The paper is also informed by the research I undertook for the Judiciary Chapter of the *New Zealand National Integrity System Assessment*.<sup>6</sup> This research alerted me to the lack of constitutional understanding of the role of the judiciary that was evidenced in the various reviews. The approach appeared to be that judges were just like any public official whose performance may be judged accordingly. Justice Tipping in his final sitting address on the Supreme Court noted the following development at the time of the various reviews of the Ministry of Justice: “I have a feeling that in some quarters the judiciary are seen by the executive and its officials as simply another section of the Ministry of Justice to be managed, like the IT section and human resources section. The Judges and the profession must be vigilant to arrest and reverse this unconstitutional tendency.”<sup>7</sup>

It also became apparent that the lack of resourcing for the court system for example does have an impact on the quality of justice and the rule of law. At the time of this research the reports<sup>8</sup> had been published but not fully implemented. It is too soon to make an assessment of the effect of these recommendations. In many ways the same may be said of the reviews undertaken of the Solicitor-General and Crown Law Office.<sup>9</sup> The recommendations are being implemented however so it has become clear how their performance is to be reviewed. I shall return to the issue of performance review later in the paper.

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5 Cabinet Expenditure Control Committee, Office of the Minister of State Services, 3/9/9.

6 2013, [www.transparency.org.nz](http://www.transparency.org.nz).

7 Final Sitting The Right Honourable Justice Andrew Tipping, Friday 17 August 2012, [https://www.lawsociety.org.nz/news-and-communications/latest-news/2012/justice-andrew-tippings-final-sitting-speech/Final\\_Sitting\\_Address\\_-\\_17\\_August\\_2012.pdf](https://www.lawsociety.org.nz/news-and-communications/latest-news/2012/justice-andrew-tippings-final-sitting-speech/Final_Sitting_Address_-_17_August_2012.pdf)

8 *Follow-Up Review of the Ministry of Justice*, 2014 <http://www.justice.govt.nz/assets/Documents/Publications/pif-follow-up-review-201407.pdf>

9 *Review of Public Prosecution Services*, 2011, <http://www.crownlaw.govt.nz/assets/Uploads/Reports/prosecution-review-2011.pdf>; *A Review of the Role and Functions of the Solicitor-general and Crown Law*, 2012, <http://www.crownlaw.govt.nz/assets/Uploads/Reports/review-2012.pdf>; *Follow Up Review of the Crown Law Office (Crown Law)* 2013 [www.crownlaw.govt.nz/assets/Uploads/Reports/pif-crownlaw-followup.pdf](http://www.crownlaw.govt.nz/assets/Uploads/Reports/pif-crownlaw-followup.pdf)

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## The role of the Solicitor-General in Australia

An understanding of the role of the Solicitor-General requires an understanding of a country's constitution and the role of this office within that constitution. Gabrielle Appleby has written what is likely to be the definitive text on the role of the Australian Solicitor-General.<sup>10</sup> She argues that there has been a “myopic focus” on constitutional text and judicial doctrine in the study of constitutional law. She argues, with Palmer<sup>11</sup>, that this emphasis on institutions has been “hopelessly misdescriptive”<sup>12</sup> and led to an undervaluing of other key institutions such as constitutional conventions and public legal office(s). She relies on Martin Loughlin's<sup>13</sup> notion of ‘public law’ as including mechanisms that go beyond the constitutional text when it comes to understanding constitutional governance. She further argues that Loughlin's definition introduces the idea of the constitution as including not just rules but the usage of these rules. Appleby's emphasis then is on the constitution in use (as Wittgenstein might say).

Appleby argues that a complete understanding of how a constitution works in practice requires an analysis of the role of the government lawyer, in particular, the Solicitor-General who provides legal advice to the Executive on significant matters of constitutional and public law. She argues that it is the government lawyers who interpret and advise the Executive on constitutional issues; they “act as guards against tyranny and abuse within government.” She explains further: “It is the rule of law and the striving for constitutionalism that serves to explain and provide the rationale for the constitutional role of government legal officers, including in Australia the primary legal officer, the Solicitor-General.”<sup>14</sup> The Solicitor-General provides the link between the Executive and Judiciary through defending the position of the government in the superior courts and through advising the Executive on judicial decisions.

Although there has been much research and commentary on the position of the Attorney-General, there is relatively little on the Solicitor-General. The Attorney-General is constitutionally the senior legal officer. It is a political as well as a legal office. The Solicitor-General is the junior legal officer and this is a non-political office. The relationship between the two offices is important and under-researched. Appleby's focus is not on this relationship but on understanding the lived experience of the Solicitor-General with the purpose of revealing the significance of this key public office(r) in the normative or constitutional framework of government. She concludes her study with the observation “The Australian position provides a framework within which good officeholders can negotiate the law, politics and the public

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10 Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest*, (Oxford and Portland, Oregon, 2016).

11 Palmer, n 2.

12 Karl Llewellyn, “The Constitution as Institution” (1934) 34 *Columbia Law Review*, 1 4.

13 M Loughlin, *The Idea of Public Law* (Oxford University Press, 2003).

14 Appleby, n 6, 6-7.

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interest, a normative statement they can rely upon in times of trouble, and a powerful tool for fostering public confidence in the role.”<sup>15</sup>

## The constitutional role of public office holders in New Zealand

Although there is no parallel in-depth analysis of the role of Solicitor-General in New Zealand, Matthew Palmer has argued the importance of understanding the role of public office holders in New Zealand’s constitutional arrangements.<sup>16</sup> He notes that the unwritten nature of the constitution means that the principles and conventions that have become established usage become an integral element of the constitution. At the same time, and arguably an advantage, this form of constitution is flexible and subject to change, often suddenly without much popular support. Perhaps more importantly these changes often pass unnoticed and their implications not fully appreciated. He argues that “Our agents of constitutional change, including the executive, the Parliament and the courts, may make changes with unidentified, unintended or unwanted effects on our constitution. We may not even be aware of who is making constitutional decisions.”<sup>17</sup> He identifies 80 elements to the New Zealand constitution. In order to try and understand the significance or otherwise of these elements, he argues that the theoretical perspective of legal realism provides the best framework for understanding the nature of New Zealand’s constitution. He emphasises that this perspective must include the role of public office-holders who interpret and apply elements of the constitution.

He identifies the ten public office-holders that stand out as the most significant in the extent and importance of their influence (in rough order of importance and extent of interpretative powers), as being:

The Prime Minister;  
The Solicitor-General;  
The Secretary of the Cabinet/Clerk of the Executive Council;  
The Clerk of the House of Representatives; the Governor-General;  
The Attorney-General;  
The State Services Commissioner;  
The Controller and Auditor-General;  
The Speaker of the House of Representatives; and  
The Ombudsmen.

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15 Appleby n 6, 295.

16 Palmer, n 2.

17 Ibid, 133.

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While there may be some argument and dispute about the list and order of ranking, the important point is that all these public offices do have significant influence on New Zealand's constitution decisions. The nature and extent of that influence is not fully understood however and this is the essential point of Palmer's analysis. He concludes his analysis with the statement "My overall suggestion is that a significant part of New Zealand's constitutionalism is not judicial or legislative in nature but could be characterised as 'officer-holders' constitutionalism. A constitution, like other law, can be conceived as 'what officials do about disputes'."<sup>18</sup> I would suggest that this conception of an office-holders' constitutionalism best captures the significance of the role of Solicitor-General.

That Palmer rates the Solicitor-General as the second public office holder in significance reflects not only his experience of working in Crown Law and holding the position of Deputy Solicitor-General<sup>19</sup> but also the emphasis he places on the role and nature of interpretation in law, including constitutional law. The definition of interpretation used by Palmer is "the determination, authoritative in practice, of what a convention or rule means as applied to a particular instance of doubt or dispute."<sup>20</sup> While the judiciary is influential in the interpretation of law, Palmer's realist analysis emphasises who actually exercises the practical power of interpretation from a position of authority. As the government's legal advisor, the Solicitor-General is in reality the primary interpreter of the law as it affects the government. This legal advice includes constitutional advice, and in the New Zealand context this primarily means advice as to whether the government is acting within the law.

## Legal Officers – New Zealand

The Law Officers of the Crown are the Attorney-General and the Solicitor-General with the Attorney being the senior officer and the Solicitor the junior law officer. The Solicitor-General also holds the office of Chief Executive of the Crown Law Office. There have been three authoritative articles describing the role of these Law Officers, with two of them being written by former Solicitor-Generals and the other by Matthew Palmer.<sup>21</sup> Early in both New Zealand and Australian colonial history, these offices diverged from the English model with

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18 Ibid 153.

19 He has recently been appointed to the High Court of New Zealand.

20 Palmer, n 152.

21 John McGrath QC, "Principles for Sharing Law Officer Power – The Role of the New Zealand Solicitor-General", (1998) 18 *NZULR* 197; and Dr David Collins QC, "The Role of Solicitor-General in Contemporary New Zealand" Bond University Symposium, April 2011. (<http://www.crownlaw.govt.nz/assets/Uploads/NZULR.PDF>) and chapter in Appleby, Keyzer and Williams (eds) *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Ashgate Publishing, 2014), 171; Matthew Palmer, "Law Officers and department lawyers", *New Zealand Law Journal*, November 2011, 333.

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the early separation of the political and non-political roles. In New Zealand by 1876 it became established that the Attorney-General served both as a Minister and a member of the legislature. In 1873 the Crown Law Office was established and since that time evolved into a separate government department with the ultimate responsibility for the management of much of the government's legal business. The Solicitor-General has been the head of this office and chief government legal advisor.

Although there are approximately 70 statutory duties conferred on the Attorney-General and Solicitor-General, in reality the Solicitor-General exercises most of those powers and in some instances Solicitor-General powers cannot be exercised by the Attorney-General. In terms of criminal prosecutions, in order to preserve the non-political exercise of this power, the Attorney-General has given this power to the Solicitor-General. This is not a formal delegation, but a convention, as the Attorney-General retains political responsibility except when there is specific statutory exclusion of the Attorney-General exercising a power. This convention arose after three unfortunate interventions in criminal matters by the Attorney-General in the 1970s. McGrath in his article gives an account of these instances.<sup>22</sup> The discretion to prosecute is in the hands of the police who pursue the case until the point of committal for trial when Crown Solicitors take over the case. Crown Solicitors are lawyers in private practice who act as agents of the Solicitor-General, but they are appointed by the Governor-General and hold office at the pleasure of the Attorney-General. This system has been designed to ensure the criminal prosecution process is free from political influence and therefore has the confidence and trust of the public in the exercise of this public power.

Apart from criminal matters however, the Attorney-General represents the government and appears on behalf of it in civil litigation. Apart from this role, McGrath emphasises that the Attorney-General has a separate role, one of representing the public interest, and in this role s/he must act independently of political interests. The Attorney-General is also responsible to Parliament for the actions of the Solicitor-General and the Crown Law Office. In this Ministerial role the Attorney-General is responsible for the conduct of all litigation. The role of protection of the public interest is also seen in the provision for the Attorney-General to report to Parliament on any provision that is contrary to the NZ Bill of Rights Act 1990. In reality the advice is prepared either by the Crown Law Office or the Ministry of Justice and given

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22 In 1974 the then Attorney-General personally gave his consent under the Official Secrets Act 1951 to prosecute Dr Sutch but publicly expressed his distaste for the Act. The second case was in 1976 when the Attorney-General decided to stay criminal proceedings against the Ford Motor Company that refused to make superannuation deductions after a press statement from the then Prime Minister Muldoon whose action became subject to subsequent proceedings in *Fitzgerald v Muldoon*. The third instance was in 1980 when the Attorney-General made submissions on behalf of the Crown in a sentencing case before the Court of Appeal and made a procedural error that resulted in the sentence being reduced. No Attorney-General has appeared in the criminal jurisdiction since that time.

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to the Attorney-General who then presents it to Parliament.<sup>23</sup> Giving legal advice to Cabinet and parliamentary colleagues is also an essential part of the role. Part of the argument for the Attorney-General being a member of the Cabinet is to enable the transfer of such advice when decisions are being made. There is an argument the Attorney-General should not be a part of Cabinet but independent of it. However, I believe the New Zealand system of the political Attorney-General in Cabinet and the non-political Solicitor-General outside government provides the best balance to ensure government receive the best legal advice.<sup>24</sup>

The roles of both legal officers have evolved through practices and conventions that reflect the essential character of the New Zealand constitution. The absence of a written constitutional text has meant the legal officers have relied on specific legislation or convention to provide the framework and legitimacy for the exercise of the public power of their respective offices. An understanding of the constitutional role of the public offices depends on the nature of the power they exercise. While a full analysis of the nature of the powers of both the Attorney-General and the Solicitor-General requires a study of the 'lived' experience of both Offices and the relationship between them, this paper will focus on a textual analysis of the various reviews of the structures, processes, principles, rules, conventions of both the Office of Solicitor-General and the Office of Crown Law.

## Solicitor-General – New Zealand

In his article on the contemporary role of the Solicitor-General, David Collins QC identifies five distinct functions, namely, Chief Executive of the Crown Law Office; principal counsel for the Crown; principal legal adviser to the Crown; Supervisor of the prosecution of indictable crime; and constitutional/Law Officer functions. The distinguishing characteristic identified by both former Solicitor-Generals as fundamental to the exercise of their role is independence. The delivery of accurate free and frank legal advice requires independence. Decisions relating to the prosecution role also requires independence in the sense of being non-political. In reality both these roles are fulfilled not only by the Solicitor-General but by employees of the Crown Law Office and private sector law firms who have been appointed as agents to undertake prosecutions on behalf of the Solicitor-General.

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23 My practice as Attorney-General was to accept the advice but on occasions I would meet with the officials to discuss the advice if I did not agree with their opinion. I would also discuss with colleague Ministers how their legislation could be amended to make it Bill of Rights compliant.

24 I would note however that it is difficult if not impossible for the Attorney-General to act contrary to the decision of the executive because of the notion of collective responsibility. The convention of some level of independence for the Attorney-General is not strong enough to overrule the collective responsibility convention. In my experience the skill of the Attorney-General is to ensure that conflict does not arise.

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Legislative support for the independent role is sparse but consistent with the lack of constitutional statutory infrastructure. This independence is expressed in the fact that although the Solicitor-General is appointed under the State Services Act 1988, the position is not time limited but held at will and the performance review of the position is confined to the role of Chief Executive of the Crown Law Office and does not include the role of legal advisor and advocate of the government.<sup>25</sup> The Constitution Act 1986 makes no reference to the Attorney-General but sections 9A, B and C prescribe the appointment of the Solicitor-General (must be a lawyer of 7 years' experience); the right of the Solicitor-General to exercise the powers of the Attorney-General; and that with the consent of the Attorney-General those powers may be delegated to the Deputy Solicitor-General. The rationale for these provisions was to reinforce the independent non-political role of the Solicitor-General.

The principal source of authority for the role of the Solicitor-General and the Crown Law Office is found in the *Cabinet Directions for the Conduct of Crown Legal Business*.<sup>26</sup> The idea of Cabinet Directions arose originally in 1993 from the review of the Crown Law Office that accompanied the reform of the government service in 1980s as a result of the introduction of a neo-liberal approach to public sector institutions and policy-making. John McGrath describes the *Directions* as defining the roles of the Attorney-General, the Solicitor-General and the Crown Law Office and importantly identifying the categories of work that were to be considered core government legal business as distinct from work that comprised "other legal services" not being special to government but common to those required by any large commercial business. These *Directions* that were included in the Cabinet Manual enabled the Solicitor-General to retain control of core legal business and prevent a general contracting out of the work to the private legal sector as neoliberal doctrine would suggest should occur. Although the Cabinet Manual has no legal enforceability it has developed as a model of best practice for the exercise of public power by the Executive. The Cabinet Manual is regarded by some as having a constitutional authority but at best it has the status of a constitutional convention and it is subject to change by the Executive. The recent *Directions* of 2016 reflect the most recent PIF review of both the office of Solicitor-General and the Crown Law Office.

The current *Directions* stipulate that "The Law Officers, the Attorney-General and 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." What is interesting about this statement is that there is no acknowledgment of the role of the courts, in particular, the Supreme Court, in the interpretation of the constitution. This is not surprising given that the current government and Attorney-General opposed the establishment of the Supreme Court

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25 State Sector Act 1988, s. 44.

26 *Directions for the Conduct of Crown Legal Business* 2016, Cabinet Manual 2008, Cabinet Office, Department of the Prime Minister and Cabinet, Wellington, New Zealand, Appendix C.

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and any suggestion that it may have a constitutional role.<sup>27</sup> The fear of the courts pre-empting the total sovereignty of Parliament in law making is clearly seen in the text of the *Directions*. The clear attribution of the constitutional role of the Law Officers makes their independence of importance and since the Attorney-General has a political role, the onus of constitutional legal advice clearly falls onto the Office of Solicitor-General and by delegation the officers in the Crown Law Office. There is a curious statement in the *Directions* relating to the role of the Attorney-General that has been incorporated into the new *Directions*. Under the heading “conduct of core Crown legal matters”, it is stated “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.” [para 13]. I have not yet found a statement of these values.

Basically the *Directions* are concerned with identifying who does what legal work and who gives legal advice to government Ministers of departments. The recasting of what is core government legal business and what falls into the category of other is in effect an opening for more legal advice and representation to be contracted out to the private sector or to be undertaken by departmental or government agency lawyers. Whether this may be seen as an undermining of the independence of the Solicitor-General’s and Crown Law Office independence is too early to assess as these new rules came into force on 10 May 2016. They do appear however to have emerged from the various reviews of both Offices that have been ongoing since 2011. It is however of interest that the Solicitor-General at the time of the reviews, David Collins QC, noted that he believed “that the Solicitor-General and Crown Law Office should continue their roles as the principal lawyers who both advise and represent the Crown in litigation”. He further commented: “In my experience, there is considerable advantage to one organisation providing both a whole-of-government approach to the advice they give Ministers and key decision-makers and who take a finely tuned public interest approach to the way that litigation is conducted in the name of the Crown.”<sup>28</sup> He expresses similar support for the Solicitor-General retaining oversight of the prosecution of indictable crime because of the public interest considerations in such matters. Explicitly he identifies the primary concern, namely, “...those decisions are best made by those who do not have a direct interest in the investigation or prosecution of particular cases.”<sup>29</sup>

He did however support the creation of a Government Legal Services modelled on the United Kingdom Government Legal Service that is managed under the auspices of the Treasury Solicitor in London. He then outlines the advantage of such a service to assist with the

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27 For a discussion of the arguments supporting and opposing the establishment of the Supreme Court see: Margaret Wilson, “Establishing a Supreme Court for New Zealand”, chapter in Andrew Stockley and Michael Littlewood (eds) *The New Zealand Supreme Court: The First Ten Years*, (2015) LexisNexis, Wellington, 1-19.

28 Collins, n 17, para 57

29 Ibid, para 58

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recruitment of government department lawyers; assist with training and development of government lawyers; assist in the rationalisation of legal information services and libraries; and provide a focal point for co-ordinating the way in which lawyers in government respond to issues. David Collins QC was promoted to the High Court in March 2012 and a new Solicitor-General Michael Heron was appointed. Heron's appointment was a little unusual in that he was not a QC and had only recently left a partnership in a commercial practice to go to the independent bar. His task was to implement for the government the recommendations of the following reviews.

## Performance Information Framework Reviews of Solicitor-General and Crown Law Office

The review of the public office of Solicitor-General and the Crown Law Office was part of the larger *Better Public Service* reforms in the state sector.<sup>30</sup> There were three specific reviews – firstly, the PIF *Formal Review of the Crown Law Office*<sup>31</sup> undertaken by two independent reviewers, Paula Rebstock and Peter Doolin on behalf of the State Services Commission. The terms of reference for the review noted that in 1986, and again in 2006 and 2011 the question had been raised whether one person can successfully fill all the roles of Solicitor-General, namely, principal legal advisor and principal counsel to the Crown, supervisor of indictable offences and chief executive of the Crown Law Office. The principal purpose of the review was to determine whether these various roles were being discharged effectively and efficiently. It was clear from the scope of the review that the primary question was whether to separate out the roles of legal advisor and chief executive. Further the review was directed at recommending ways to improve the quality and cost effectiveness of the Crown Law Office and the prosecution service. The terms of reference explicitly stated that “Changes recommended by this review should take account of the government’s expectation of improved services at lower costs.”<sup>32</sup>

Apart from the Formal Review there were two other reviews that were designed to implement the recommendations of the State Services Formal Review. The first was the Review of Prosecution Services undertaken by John Spencer,<sup>33</sup> and the second was the Review of the Role and Functions of the Solicitor-General and the Crown Law Office by Miriam Dean QC

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30 *Better Public Services* Advisory Group Report, November 2011 ([www.ssc.govt.nz/sites/all/files/bps-report-nov2011\\_0.pdf](http://www.ssc.govt.nz/sites/all/files/bps-report-nov2011_0.pdf))

31 October 2011, State Service Commission (<http://www.ssc.govt.nz/sites/all/files/pif-crownlaw-review-oct11.pdf>)

32 *Review of the Roles and Functions of the Solicitor-General and Crown Law Office, Terms of Reference*, August 2011, 2, [www.crownlaw.govt.nz/assets/Uploads/Reports/clo-pif-report.pdf](http://www.crownlaw.govt.nz/assets/Uploads/Reports/clo-pif-report.pdf).

33 *Review of Public Prosecution Services*, John Spencer, September 2011, <http://www.crownlaw.govt.nz/assets/Uploads/Reports/prosecution-review-2011.pdf>

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and David Cochrane.<sup>34</sup> There was also a Follow Up Review of the Crown Law Office in March 2013 to assess the implementation of the recommendations in the previous Reports.<sup>35</sup> In this Follow-Up Review Crown Law received a qualified pass mark with the general thrust being ‘commendable’ progress but more needs to be done. It was clear from this review that there were issues with retaining qualified staff and the relationship with clients was fragile with inconsistent practice still evident. The Review then set out what the future should look like for Crown Law, namely, “In four years’ time Crown Law would have transformed its strategy and operating model to underpin its success in meeting its core purpose to support the rule of law...”<sup>36</sup> The Report is full of management speak masking the reality that the transition has been bruising for many. It will be interesting to see at the end of the four-year period (2017) whether Crown Law is meeting the expectations of the government and whether the recommendations of the various reviews have been implemented in full.

The Review of Prosecution Services was driven by the increase in costs that were attributable to increased indictable prosecution charges. The terms of reference acknowledged the need to secure the integrity of the legal system in the public interest, as well as the efficiency and cost effectiveness of the Prosecution Service. The Review at the outset acknowledged the complexity of the task in assessing the effectiveness and efficiency of the Prosecution Service because of externalities such as a change in legislation, in particular, the Criminal Procedure Act 2013 that established new procedures for the conduct of cases, and the need to view the criminal law process as a whole to determine the real nature of the costs. The purpose of the Review however was to ensure the recommendations supported the policy objectives of the government, in particular those in the Criminal Procedure Act.

The Review was extensive and thorough and concluded: “I... have not found any fundamental flaws in the current prosecutions service, my recommendations focus on how to improve the status quo. In the short term, the recommendations aim to identify immediate cost savings, to provide for better data collection and to improve overall efficiency. In the long term, they aim to identify ways in which the current system could be made more sustainable.” (p.10) The Review did find however that the oversight of the Prosecution Service by Crown Law was weak and that poor data collection made transparency difficult. The overall effect of the recommendations was to restructure and improve the management and administration of the Crown Law Office in relation to the Prosecution Service. For example, the appointment of a Deputy Chief Executive

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34 *A Review of the Role and Functions of the Solicitor-General and the Crown Law Office*, Miriam Dean CNZM QC and David Cochrane, 24 February 2012, <http://www.crownlaw.govt.nz/assets/Uploads/Reports/review-2012.pdf>

35 *PIF Follow Up Review of the Crown Law Office (Crown Law)*, March 2013, State Services Commission, the Treasury and the Department of the Prime Minister and Cabinet, [www.crownlaw.govt.nz/assets/Uploads/Reports/pif-crownlaw-followup.pdf](http://www.crownlaw.govt.nz/assets/Uploads/Reports/pif-crownlaw-followup.pdf)

36 *Follow Up Review of the Crown Law Office (Crown Law)*, March 2013, State Services Commission, The Treasury, and the Department of the Prime Minister and Cabinet ([www.crownlaw.govt.nz](http://www.crownlaw.govt.nz))

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to provide better oversight was recommended and such an appointment has been made. There was no recommendation to further contract out prosecution services, but instead to improve the management of the Crown Solicitor Network that includes the private sector lawyers who are appointed by the Governor-General to the role of Crown Solicitor. While the Police Prosecution Service was held to provide a much improved prosecution service than previously, some departmental prosecution services required improvement and great oversight.

Although the emphasis throughout the Review Report was on cost efficiency and effectiveness, there was recognition of the need to protect the public interest in ensuring that the exercise of the prosecutorial power is exercised independently and free from undue political or public pressure, both in appearance and in reality. In exercising that independence however the Review noted there must be a balance with accountability, consistency and cooperation with investigators. Where and how that balance is achieved is difficult to assess in theory. In practice the decision to prosecute or not is an important one that requires independence. The 2013/14 Annual Review of the Crown Law Office raised the question whether the current funding model was encouraging plea bargaining by defendants in order to avoid the costs of lengthy trials. The Crown Law officials acknowledged this inherent tendency in the system because of the Criminal Procedure Act 2013 but were encouraging stakeholders to report inappropriate plea bargaining. So far they said they had found no complaints had been warranted.<sup>37</sup>

The Committee also raised the issue of the size of Crown Solicitors' private profit, given that they are delivering a public service and are largely funded by the taxpayer. The Crown Law Office responded that because of the nature of the relationship with Crown Solicitors it does not have the information to quantify their profits. The Office however noted maintaining profitability was an essential element of ensuring quality representation but conceded that there was an appropriate level of private profit as the taxpayer's expense but no figure was suggested. There was however a new reporting framework for assessing the work of the Crown Solicitors network through the new Public Prosecution Unit. It is too early to assess the implications of these new systems but it is apparent that the Parliamentary Committee is aware of possible negative implications. The Office was able to report that although the Office is employing fifty fewer staff than before the Reviews, it is receiving a "good" rating for its management and control environment from the Office of the Auditor-General. Its financial information systems and controls have improved to a "very good" rating. It would appear that in terms of management and administration the Crown Law Office has successfully implemented the recommendations of the Prosecution Services Review.

The second Review of the Role and Functions of the Solicitor-General and the Crown Law Office had a different focus. It was to determine whether the various roles of the

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37 *Report of the Justice and Electoral Committee*, 3, [www.parliament.nz/en/pb/sc/scl/justice-and-electoral/tab/report](http://www.parliament.nz/en/pb/sc/scl/justice-and-electoral/tab/report) This is an issue of public concern as indicated by recent protests when murder charges were reduced to manslaughter in the death of a child.

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Solicitor-General should become separate. The Review decided they should not be formally separated because such a separation would weaken the critical advice role of the Solicitor-General and increase the Crown's legal risk. As noted in the recommendations the advantages of separation could be achieved through the appointment of a Deputy Chief Executive sitting between the Solicitor-General and Deputy Solicitors-General to signal delegated responsibility for organisational management. The Review also did not recommend a separation of the advice and advocacy roles because the fusion of the roles enables better management of the Crown's legal risk. The allocation of legal work was revised and refined and is now incorporated in the *Directions* in the Cabinet Manual. (outlined above). Overall the Crown Law Office retained oversight of the Crown's legal work but there has been considerable restructuring of the Office. Apart from the Public Prosecutions Unit, there is the Crown Solicitors Network, and the Government Legal Network – all part of promoting a 'one crown' approach to the management of legal risk. Overall the Review's recommendations centred on improved cost efficiency and consistency through centralisation. For example, the Government Legal network is designed to provide better coordination of the Crown's legal business as well as attempting to improve the quality of the legal service, in particular, in some departments such as Corrections.

## Performance

The implications of all these structural and management changes have yet to be fully assessed. As a former Attorney-General I attempted to affect some change in the delivery of public legal services but without much success. My focus was on greater coordination and improvement in the quality of the services. Both these issues have been addressed in the recent Reviews. There was a need for change but what is less certain is how these changes will impact on the traditional role of the Solicitor-General and in particular the independence of the Office to give expert, free and frank advice. To a large extent the independence of the Solicitor-General role depends on the qualities of the person holding the position. As indicated above the Solicitor-General to oversee the restructuring Michael Heron QC was appointed for five years but resigned after three years. He has been replaced by Una Jagose who had worked within Crown Law heading the Legal Risk team but in 2014 had been appointed Acting Director of the Government Communication Security Bureau. She was recruited back to the position of Solicitor-General in November 2015. She has only recently been made a QC. Michael Heron also received the designation of QC after appointment to the Office of Solicitor-General. In the past the tradition had been appointments were made from the ranks of QCs who are acknowledged as leaders in the legal profession, in particular as litigators.

While the various reviews have focused on administration and management changes, nothing appears to have been implemented to strengthen the independence of the Solicitor-General. How well the Office manages the Crown's and the government's legal risk as well as the public legal interest will again depend largely on the qualities of the individual holding the office and the relationship between the Solicitor-General and Attorney-General. The government's

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assessment of the performance of the Crown Law is seen in the 2014/15 Annual Report that outlines the performance framework that sets out the categories of work to be assessed. The client survey on Crown legal advice and services rated the performance between January and June 2015 at 86% overall satisfaction; 84% for responsiveness, relevancy, accuracy and clarity; 86% for timeliness; and 86% for value for money. There also appeared to be no serious issues with other categories such as the Crown Solicitor Network and Government Legal Network.

With these ratings it is assumed all is well but it must be remembered that these ratings are all defined within a managerial framework and government satisfaction rating. The level of trust in the ratings depends on the level of trust in the state service generally and the State Services Commission in particular.<sup>38</sup> The basis on which performance is assessed is determined by the government's policy targets that reflect both a real need in the community but also the political necessity to deliver those targets. While performance assessment is an entrenched tool of managerialism, its value in responding to what the public needs as distinct from government's performance priorities must be understood.<sup>39</sup>

The questionable value of performance reviews is highlighted in the performance assessment of Crown Law's responsibility to provide independent legal advice to the Crown.<sup>40</sup> The performance is assessed in terms of the opening of new matters and the closure of those matters. In other words, the time it took to turn around advice. I am not sure about how the quality of the advice was assessed except for the satisfaction measure expressed by the Attorney-General which rated such advice as good or excellent. Although timeliness is a necessary characteristic of legal advice it is not a proxy for quality. Interestingly the Annual Report notes the impact of Crown Law's advice is gauged by looking at international indexes rating New Zealand's standing in matters related to justice.

For example, the World Justice Project Rule of Law Index 2015 in which New Zealand was rated first out of 15 amongst regional East Asia and Pacific neighbours and it states "scores above average for countries of similar incomes." I have contributed to this survey and the focus is on corruption and it is true that New Zealand rates well on issues of corrupt judges and court administrators. Other international Indexes referred to include the Bertelsmann Index, the World

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38 See *Investigation into SSC conduct of MFAT leaks inquiry*, June 2016, Ombudsman Office. This opinion found the investigation was seriously flawed and harmed the reputation of a senior diplomat who was accused of the misconduct during the consultation process on the restructuring of MFAT but also held he was not responsible for the leak.

39 Under the Government's *Better Public Services* policy, specific targets are set in some areas, for example, in Justice there are targets to reduce crime by 20% by June 2017. Changes in Crown Law performance generally and specifically are designed to support the achievement of these targets. The changes in the prosecution service is an example of the intention to produce better performance.

40 Crown Law Annual Report, 2014/15, [www.crownlaw.govt.nz/publications/annual-reports/](http://www.crownlaw.govt.nz/publications/annual-reports/)

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Bank Governance Index, and Transparency International's Corruption Perceptions Index.<sup>41</sup> While a lack of corruption is essential for the rule of law for both domestic and international credibility, it is not the only indicator of quality independent advice. I would need to do more work but often these indexes seem to be externally focussed and a tool of a globalised framework for regulation and control. I think a case could be made for this assessment in the tertiary sector. At least in New Zealand the ranking of an international body seems more influential than a national assessment of value or performance.

## Conclusion

I have no easy answer as to how to support the independence of the Solicitor-General and legal advice under New Zealand's current constitutional arrangements. It seems obvious to me however that much depends not only on the quality of person holding the position but also just as importantly on the credibility of the public service as an institution and the support it receives from the public. I recently attended a forum of senior public officials to discuss freedom of information. Chatham House rules applied so I shall not recount the matters raised but on reflection I could understand the very difficult position of these officials who must execute the delivery of public policy for the government but also ensure that execution is within the law and public interest. I realise this is not a new issue but in the context of the Ombudsman's Report on the MFAT leaks<sup>42</sup>, it is obvious these senior public officials are vulnerable without the institutional support of the State Services Commission. It is also obvious that much also depends on the government and the Parliament respecting the constitutional conventions and practices. In my experience this cannot always be relied on.

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41 In the New Zealand Report to Transparency International I wrote the chapter on the Judiciary, n 6

42 See Ombudsman Report n 38.