

Review of Public Prosecution Services



September 2011
John Spencer

Preface from the reviewer

In recent times there has been a need each year to increase the appropriation 'Vote: Attorney-General – Supervision and Conduct of Crown Prosecutions' as the original appropriation was insufficient. The Government has little choice but to agree to the increased funding requests, as to do otherwise would result in an unpalatable freeze on prosecution activity. This situation has been far from ideal.

The purpose of the review has been to determine whether public prosecutions can be delivered in a more effective manner without diminishing quality of delivery, and with more certainty as to likely annual costs.

New Zealand is indeed fortunate to have a high-quality, independent, criminal prosecution service carried out mainly by Crown Solicitors and Police prosecutors. While the New Zealand system is unique in that it is the only Commonwealth country not to have at least some form of Government-based indictable prosecution service, no evidence was found to suggest that this negatively impacts on the quality, independence or cost of delivery. Given the highly efficient and low-cost nature of the current system, the threshold for change is high. Building on the existing system, which has shown robustness, is the best way to improve outcomes while minimising uncertainty. That is because the system is well known and gradual change will be more likely to retain the confidence of the public and prosecution participants than wholesale change.

What is evident is that the role and responsibilities of Crown Law in regard to criminal prosecutions needs both strengthening and clarifying. The Solicitor-General must be made responsible for the conduct of all criminal prosecutions. The current Prosecution Guidelines openly acknowledge that there is no overarching supervision of the prosecution decisions made by any of the Government agencies that have prosecution functions, including the Police. The current Guidelines need to be more prescriptive and complying with them should be mandatory if any agency wishes to undertake prosecutions on behalf of the Crown.

At present Crown Law accounts for the costs of Crown Solicitors but does not adequately manage these costs due to a lack of appropriate information. A management information system is required to properly track costs, identify trends and causes, and take appropriate action. The present inadequacy of appropriate information makes it impossible to explain reasons for cost increases and expected trends with appropriate accuracy.

By contrast, the Police Prosecution Service has adequate management systems which are evolving all the time, and it consistently operates within its budget.

In the last three years, substantial changes to the justice sector have materially impacted on the costs of Crown Solicitors and the Police Prosecution Service. Even more substantial changes are expected from the forthcoming Criminal Procedure (Reform and Modernisation) legislation. In the past the fiscal impacts of policy and practice changes have not been properly costed. Policy proposals that are likely to have financial impacts for the justice sector should include a comprehensive analysis of these impacts on each part of the sector. The same comment applies to practice notes issued by the judiciary. All too often such changes lead to a saving in one part of the justice sector but increased costs in another part.

Extensive pressures on Police and Crown Solicitor costs in recent times have arisen primarily because of:

- An increased number of indictable prosecutions;
- Changes to the committal process; and
- Additional requirements being placed on Prosecutors as a result of a series of reforms.

Over the last four years there has been an 18.2% increase in the number of indictable prosecutions. A significant portion of that increase is attributable to an increase in the amount of crime that the Police have successfully detected and that the Courts have committed to trial. It is important to remember that the total fiscal cost of prosecutions is likely to be outside the control of any prosecution model. The fiscal cost is determined by the number of prosecutions undertaken in a year and the cost of each of those prosecutions. Therefore, to control costs, it is necessary to view the entire criminal process from investigation to imprisonment – the cost of prosecutions is just part of this process.

Although Crown Law will need to increase expenditure to set up and operate a proper oversight role, it is expected that these costs will be marginal and be budget neutral due to savings that should be made through access to better financial information. Accordingly, my recommendations align with this approach.

However, I note that there is currently considerable pressure to reduce cost in the short term. If such reduction is seen to be a necessity then a blunt tool would be to simply cap expenditure on Crown Solicitors for one year at a figure 10% below the expenditure for 2010/11. This figure is largely based on the regional billing variations identified in the financial modelling commissioned for, and cited in, my report. I do not recommend this approach though. The financial modelling is necessarily limited due to the current lack of information. Further, this approach could reduce the overall sustainability of the system and would not resolve any of the longer-term concerns.

I am grateful to those people who generously made themselves available during this review. Their insights and opinions have been most helpful. I also acknowledge the important contribution made by the Senior Officials Group appointed to provide stakeholder perspectives. I particularly want to thank Duncan Wylie, of Duncan Wylie Consulting Ltd, for his financial modelling, and the Ministry of Justice team, with secondees from Police and Crown Law, who have worked tirelessly on this review. It has been a pleasure to work with such knowledgeable and dedicated people.

John Spencer

Reviewer

Prosecution System Review

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PART I: Introduction

CHAPTER 1: THE SCOPE OF THE REVIEW

Overview of the Paper

1. This paper is divided into six parts.
2. Part I is the Introduction. The scope of the prosecution review is set out in chapter 1 (this chapter). Chapter 2 is a glossary of the terms used throughout the paper. Chapter 3 is an executive summary.
3. Part II, Scene Setting, begins with a description of the current prosecution system in chapter 4. Chapter 5 then describes the main goals for the prosecution system, namely: robust decision-making, clear oversight and efficiency. Chapter 6 is a discussion of the options for reform.
4. Parts III, IV and V contain the core analysis of the review. Each part addresses one of the three goals identified in chapter 5.
5. Part III, Prosecution Decision-making, examines the structures that are currently in place surrounding prosecution decisions. Chapter 7 addresses the decision to prosecute (or not) and the choice of charges. Finally, chapter 8 examines prosecutorial independence.
6. Part IV, Oversight, includes an assessment of the current oversight mechanisms that are in place in our prosecution service in chapter 9.
7. Part V, Efficiency, examines each of the main players in the prosecution service in turn to determine whether they are providing an efficient service at present and whether there is room for improvement. It consists of chapters 10 to 13 which relate to Crown Law, Crown Solicitors, the Police, and other enforcement agencies respectively.
8. Part VI sets out my findings and my assessment of the options. Chapter 14 lists my preliminary comments followed by my key findings on each of the main players in the prosecution service. All of the options for reform are then discussed in chapter 15 and my preferred option is identified. Finally chapter 16 explains how my preferred option could be implemented. Again, this simply amounts to a reallocation of my recommendations across the main players in the prosecution service.

Terms of Reference

9. The objectives for the review are set out in the terms of reference (TOR) as follows:¹ The prosecution review is to ensure that:
 - 9.1. the integrity of the legal system is maintained in the public interest;
 - 9.2. in the long term, purchasing arrangements for prosecution services provide for efficiency, cost-effectiveness and foster high standards for prosecutions;
 - 9.3. governance and accountability arrangements support robust decision-making processes and systems such that there:
 - 9.3.1. is consistency in prosecution decisions;
 - 9.3.2. are clear lines of accountability and transparency, particularly in cases where discretion is exercised; and
 - 9.3.3. is clarity in the manner and use of independence in bringing prosecutions.
 - 9.4. there are clear roles and responsibilities for agencies within the system; and
 - 9.5. there are organisational structures and arrangements that support efficiency, capability and skills development for delivering prosecution services, and good co-ordination of prosecutions between Government agencies.
10. When the TOR are read as a whole, it is apparent that the overriding purpose of the review is to ensure that there is a high-quality and cost-effective public prosecution system. The key drivers of this review are quality and cost.
11. In terms of scope, the TOR state that the review should be broad and comprehensive but should not generally address:
 - 11.1. The constitutional role and responsibilities of the Solicitor-General;
 - 11.2. The non-prosecution related roles set out in the Cabinet Directions for the Conduct of Crown Legal Business 1993 (the Cabinet Directions); or
 - 11.3. Any matters of statutory procedure contained in the Criminal Procedure (Reform and Modernisation) Bill (CPRAM).
12. To complete this overview of the scope of this review, I note that I have also chosen not to look at private prosecutions or prosecutions that are initiated by infringement notices as these issues seem to be outside the TOR.

¹ Cabinet Domestic Policy Committee DOM Min (11)2/2

The Nature of the Review

STRUCTURE

13. In conducting this review, I have received administrative support from a secretariat comprised of staff from the Ministry of Justice, Crown Law and the Police.
14. In addition, the Ministry of Justice convened and chaired a Senior Officials Group. This Group consisted of senior officials from the Ministry of Justice, the Police, Crown Law, Department of Labour (DOL), the State Services Commission, Treasury and the Department of the Prime Minister and Cabinet. The Senior Officials Group has provided me with advice and support through a series of regular meetings.

PROCESS

15. To inform this review, I met with a number of people involved in the prosecution process. A full list of contributors is provided in appendix 1. Those interviewed include members of the judiciary, the New Zealand Law Society, the Criminal Bar Association and the private bar, and directors of various enforcement agencies.
16. In addition, questionnaires were sent to Crown Law, the Police, 17 Government agencies (including one autonomous Crown Entity, two independent Crown Entities and three Crown Agents) and all of the Crown Solicitors. A range of information was sought in relation to:
 - 16.1. Organisational arrangements;
 - 16.2. Prosecution-related roles and responsibilities;
 - 16.3. The volume, nature and cost of prosecutions;
 - 16.4. The separation of prosecutors and investigators;
 - 16.5. Decision-making processes;
 - 16.6. Co-operation with other agencies; and
 - 16.7. Professional development.
17. As a follow-up to the questionnaire responses, I held workshops with in-house prosecutors and with the Crown Solicitors. In these workshops I further explored questionnaire responses and discussed some of the options outlined in this report.
18. Finally I engaged an independent contractor to conduct a detailed analysis of the costs across the Crown Solicitor network and to comment on the potential options for reform.

CONTEXT

19. The last comprehensive review of New Zealand's prosecution system took place in the late 1990s and was conducted by the Law Commission. The Commission published a discussion paper on criminal prosecution in 1997, followed by a final report in 2000.²
20. The Law Commission's review opted to build on the status quo rather than shifting towards greater public or private sector involvement in the prosecution system. One of the main recommendations was that the Police should establish a specialised internal prosecution service. This occurred when the Police Prosecution Service (PPS) was established in 1999.
21. The current Government has called for another comprehensive review of the prosecution system for two main reasons: first, as an attempt to combat the recent rise in the cost of prosecutions; and second, as part of a wider review of the whole criminal justice sector.
22. The recent rise in prosecution costs has been dramatic. The cost of the PPS has increased by 52.6% between 2005/06 and 2009/10 from \$20,988,000 to \$32,028,863.³ Over the same period the cost of Crown Solicitors has increased by 51.1% from \$25,934,837 to \$39,189,666.⁴ One reason for these increases has been a series of legislative and other reforms since 2006 that have increased the cost per prosecution. They are also attributable to an overall rise in prosecution volumes.
23. In the indictable jurisdiction, Crown Law is obliged to reimburse Crown Solicitors for the prosecution work they undertake in accordance with the Crown Solicitors Regulations 1994. As such, there has been limited opportunity for Crown Law to absorb the cost associated with the increased volumes and costs per case. As a flow-on effect, for the last three years Crown Law has been unable to stay within its budget for the Supervision and Conduct of Crown Prosecutions.
24. In the wider criminal justice sector, it is noted that in the last three years the Government has called for comprehensive reviews of the legal aid system, criminal procedure and victims' rights. These reviews have culminated in the Legal Services Act 2011, the Criminal Procedure (Reform and Modernisation) Bill and the Victims of Crime Reform Bill. The Legal Services Act came into force in April of this year and the two Bills are currently being considered by Parliament. I consider that it is important for the prosecution review to align with, and support, the direction of these legislative reforms. Indeed, I have drafted this report on the assumption that CPRAM will be in force by the time my recommendations are being considered.
25. The Government has also recently sponsored a series of projects and reviews that touch on prosecution-related matters. These include the Performance Improvement Framework Review of Crown Law, and the Review of Roles and Functions of the Solicitor-General. The first of these initiatives has occurred contemporaneously with the prosecution review. The second is scheduled to begin as soon as the prosecution review ends. I have considered the TOR for these complementary initiatives and, where possible, I have obtained the preliminary views of the parties involved. I have done so in the hope of promoting consistency in our approaches.

² NZLC PP28 *Criminal Prosecution* (March 1997) and NZLC R66 *Criminal Prosecution* (October 2000).

³ These figures were provided by the Police in their questionnaire response.

⁴ These figures have been extracted from the billing spreadsheet provided by Crown Law.

26. To me, the large number of initiatives in the criminal justice sector at present demonstrates that the Government recognises the need for 'across the sector efficiency' and in particular the need for better financial management and accountabilities within the justice sector.
27. In addition to the wider Government-driven initiatives, Crown Law has recently commissioned reports on prosecution-related matters.
28. Earlier this year, Crown Law commissioned a report from John Isles that analysed the cost of indictable prosecutions over the last 10 years. This report drew in turn on two similar reports that Ernst & Young and Roger Taylor provided to Crown Law in 1992 and 1999, respectively. I am grateful that all of these reports were made available to me during the prosecution review.

CHAPTER 2: GLOSSARY

This glossary defines terms only for the purpose of this report and is not intended to provide comprehensive definitions of them.

Charging Documents

Information:

A charging document in the name of the enforcement agency that initiated the prosecution. All prosecutions begin with the filing of an information.

Indictment:⁵

A charging document that charges a defendant in the name of the Queen. An indictment is filed when a prosecution shifts from the summary jurisdiction to the indictable jurisdiction.

Types of Prosecutions

Summary prosecution:

A prosecution in the summary jurisdiction. If a summary prosecution is defended then it will be dealt with by way of a defended hearing before a Judge.

Indictable prosecution:

A prosecution initiated by the filing of an indictment.⁶ If an indictable prosecution is defended it will almost always be dealt with by way of a jury trial.

Public prosecution:

Any prosecution initiated by an enforcement agency, as opposed to a private individual or organisation. In relation to the current system this will include summary and indictable prosecutions. Under CPRAM, this will include prosecutions involving category 1, 2, 3 and/or 4 offences.

Crown prosecution:

A prosecution of the type that will be defined by regulations in accordance with clause 383 of the Criminal Procedure (Reform and Modernisation) Bill (CPRAM).⁷

The Law Officers

Attorney-General:

The senior Law Officer of the Crown appointed under warrant by the Governor-General. By constitutional convention the Attorney-General is responsible to Parliament for all public prosecutions.

⁵ All indictments are filed in the name of the Queen with the exception of the SFO, whose indictments are laid on behalf of the Solicitor-General.

⁶ It is noted that all indictable prosecutions will begin with an information being laid either summarily or indictably in the summary jurisdiction. A further description of this process is set out in chapter 4.

⁷ A conscious decision has been made to use 'Crown prosecution' solely in relation to CPRAM in this report to avoid confusion. Confusion could arise because currently indictable prosecutions are often referred to as Crown prosecutions as they are brought in the name of the Queen. Although there is likely to be a broad correlation between indictable prosecutions and Crown prosecutions under the new CPRAM regime, they are not the same.

Solicitor-General:

The junior Law Officer of the Crown appointed under warrant by the Governor-General. In practice, the Solicitor-General superintends all public prosecutions on the Attorney-General's behalf.

Law Officers:

The Attorney-General and the Solicitor-General.

Agencies with Prosecution Functions**Government agencies:**

All departments listed in Schedule 1 of the State Sector Act 1988, and any agencies of the Government subject to Ministerial Direction or control (such as Crown Entities), who have the ability to commence and conduct summary prosecutions.

New Zealand Police:

Includes all employees of the New Zealand Police, regardless of whether they are Constables as defined in the Policing Act 2008.

Enforcement agencies:

Includes Government agencies and the New Zealand Police.

Types of Prosecutors**Crown Solicitor:**

The 15 individuals who currently hold a warrant to be a Crown Solicitor, in relation to one or more of the 17 High Court districts.

Police prosecutor:

A prosecutor employed in the Police Prosecution Service (PPS) by the New Zealand Police. Prosecutors who are sworn Police officers are not necessarily lawyers who are admitted to the bar. However, under current legislation the requirement that a person must be admitted to the bar before they appear in court has been waived in relation to sworn PPS staff.

Departmental prosecutor:

A prosecutor employed by a Government agency.

In-house prosecutor:

A prosecutor employed by an enforcement agency. This includes Police prosecutors.

Crown prosecutor:

A Crown Solicitor or any other lawyer employed or instructed by the Solicitor-General to conduct a Crown prosecution under the new CPRAM regime.⁸

⁸ Again, a conscious decision has been made to use 'Crown prosecutor' solely in relation to CPRAM. Under the current system this phrase is often used to refer to a Crown Solicitor or a member of their staff. However, under CPRAM there is potential for this term to be expanded to include other lawyers acting on the instruction of the Solicitor-General. Accordingly the meaning of this term differs according to the context.

Abbreviations

The following abbreviations are used throughout this paper.

AC/M	average cost-per-matter
CAA	Civil Aviation Authority
Cabinet Directions	The Cabinet Directions for the Conduct of Crown Legal Business 1993
CMS	Case Management System
COR	charge-out rate
Corrections	Department of Corrections
CPRAM	The Criminal Procedure (Reform and Modernisation) Bill
CPS	Crown Prosecution Service
Customs	Customs New Zealand
DIA	Department of Internal Affairs
DOC	Department of Conservation
DOL	Department of Labour
Fisheries	The (former) Ministry of Fisheries
FMA	Financial Markets Authority, formerly the Securities Commission
FTE	full-time equivalent
Housing NZ	Housing New Zealand Corporation
IPCA	Independent Police Conduct Authority
IRD	Inland Revenue
Maritime NZ	Maritime New Zealand
MED	Ministry of Economic Development
MOH	Ministry of Health
MOU	Memorandum of Understanding
MSD	Ministry of Social Development
NZLS	New Zealand Law Society
the Police	New Zealand Police
PPS	Police Prosecution Service
the Regulations	Crown Solicitors Regulations 1994
SFO	Serious Fraud Office
TOR	Terms of reference
UK	United Kingdom

CHAPTER 3: EXECUTIVE SUMMARY

The public service has recently been under considerable pressure from the Government to reduce expenditure and improve performance. The criminal justice sector is no exception. The Criminal Procedure (Reform and Modernisation) Bill (CPRAM), which is soon to be enacted, sets the scene for this review. It aims to improve the efficiency of the Courts in processing criminal cases. The efficiency of the prosecution service is inextricably linked to this goal.

Almost all of the prosecutions in New Zealand are currently conducted by the Crown Solicitor network, the Police Prosecution Service (PPS) or departmental prosecutors. These prosecutors are responsible for the decisions that follow an investigation. They have the final say over whether a prosecution will take place and, if so, the charges that will be faced. These decisions are critical to the integrity of the prosecution system. Accordingly, robust decision-making processes need to be in place to ensure that there is accountability, transparency and consistency. There is also a need for prosecutors to make these decisions (and to be seen to make these decisions) free from undue political and public pressure. I have reviewed the decision-making processes that are in place at present and I have generally found no major cause for concern in this area.

I have, however, found that there is a distinct lack of oversight of the prosecution service as a whole. This role falls to the Solicitor-General as a matter of convention. However, to date there have been very few mechanisms in place to allow the Solicitor-General to perform this role in practice. CPRAM will partially address this issue by making the Solicitor-General responsible for the general oversight of all public prosecutions. In this report I make several recommendations that are designed to further facilitate the supervision of summary prosecutions and to provide for more proactive financial management in relation to indictable prosecutions. I envisage that, by strengthening the oversight role of Crown Law, the quality of prosecutors and prosecution decisions will improve, overall costs will be reduced and future policy proposals will be more informed.

In relation to the performance of prosecutors in court, I have no significant concerns. That is because the vast majority of all prosecutions in New Zealand are conducted by the Crown Solicitor network and the PPS. I have concluded that both provide a high-quality service in keeping with the seriousness of the cases they prosecute. On the other hand, I have found that there is considerable room for improvement in relation to departmental prosecutors, whose performance was described to me as 'patchy'.

The bigger issue, in my view, is the lack of transparency surrounding cost, across the whole prosecution service. Outside of the Police, the enforcement agencies with prosecution functions do not seem to regularly collect and analyse data concerning their prosecutions, including associated costs. In the indictable jurisdiction, Crown Law simply records in a spreadsheet how much is paid to the relevant Crown Solicitor for each matter (usually defined as a jury trial, separate sentencing or appeal). The bills are then paid in accordance with the Crown Solicitors Regulations 1994.

The absence of any detailed data relating to current expenditure has made it impossible for me to forecast any potential savings that could be made through wholesale changes to the prosecution service. Further, such a change at this time would not be appropriate, given that CPRAM will significantly transform the prosecution landscape.

In light of these two factors and, given that I have not found any fundamental flaws in the current prosecution 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.

Ultimately though, the Government may wish to reconsider the options for wholesale reform after CPRAM has bedded in and once better financial information is available.

PART II: Scene Setting

CHAPTER 4: THE PROSECUTION SERVICE

Introduction

29. For the purpose of setting the scene, this chapter contains broad descriptions of:

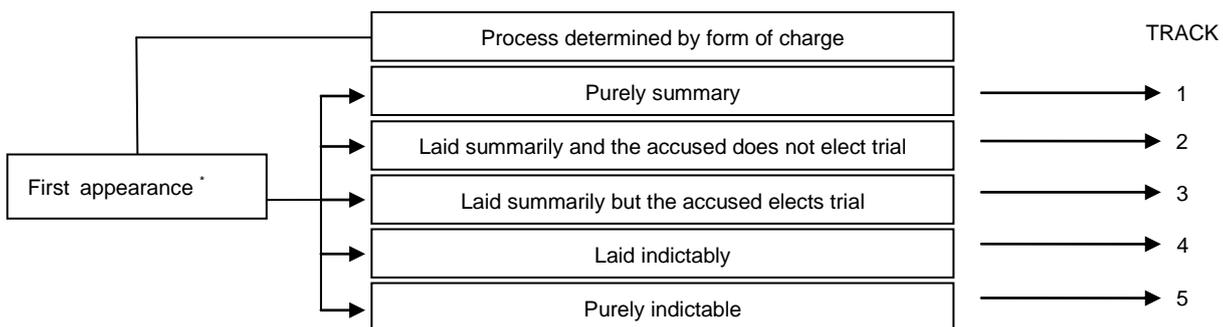
- 29.1. The present public prosecution process⁹ – which is included because it is impossible to assess the strengths and weaknesses of the current prosecution service without having a basic understanding of the work that it undertakes;
- 29.2. The main players in the prosecution service and their roles;
- 29.3. The prosecutions that took place in 2009/10 – a snapshot of the volume of prosecutions, the types of prosecutors involved, and the overall costs associated with these cases; and
- 29.4. The proposed changes to the prosecution system under CPRAM.

The chapter ends with some preliminary comments about matters arising from these descriptions.

⁹ This description ignores infringement notices. It also contains generalisations. However, this approach is necessary to create a general picture of how the prosecution process works.

The Prosecution Process

30. In very general terms, if an accused person is charged with an offence and wishes to defend that charge there are two different paths that the prosecution could take. Namely it could be dealt with by way of:
- 30.1. A defended hearing before a Judge alone in the summary jurisdiction – a type of hearing that takes an average of two hours; or
 - 30.2. A trial before a jury in the indictable jurisdiction – a type of hearing that takes an average of three days in the District Court and 7.3 days in the High Court.¹⁰
31. The path that is taken largely depends on the seriousness of the offence and on how the original charge is laid.
32. All charges begin in the summary jurisdiction with the filing of an information.
33. An information is simply a charge sheet, which is usually filed in court by an investigator. It will charge the accused with an offence in the name of the relevant investigating agency. An information contains only one charge and records whether that charge is laid summarily or indictably.
34. Some charges, like offensive behaviour, can only be laid summarily. Other charges, like murder, can only be laid indictably. In between those two extremes is a large set of charges that may be laid either summarily or indictably. In relation to these charges the investigator has a choice. If the investigator lays the charge indictably then that is the end of the matter. However, if the investigator lays the charge summarily, then the accused person will have the option of electing a trial. An election has the same effect as the original charge being laid indictably.
35. The following diagram sets out the different ways a charge may be laid.¹¹ If a charge can only be laid summarily (track 1) or it is laid summarily and the accused does not elect jury trial (track 2), then it will remain in the summary jurisdiction. If the matter remains in the summary jurisdiction then it may take various paths, as the second diagram illustrates.

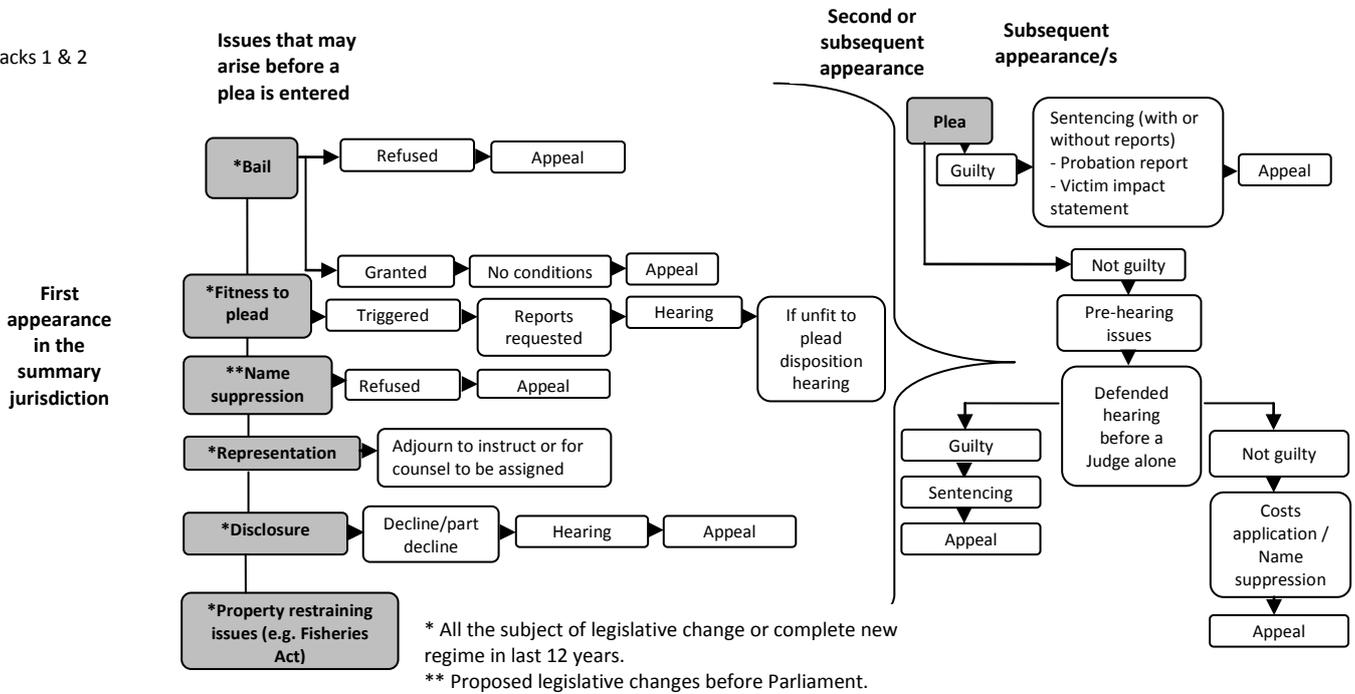


* May be as a result of arrest with warrant, without warrant or by summons, or new charges for existing court

¹⁰ Figures retrieved from the Case Management System (CMS) database.

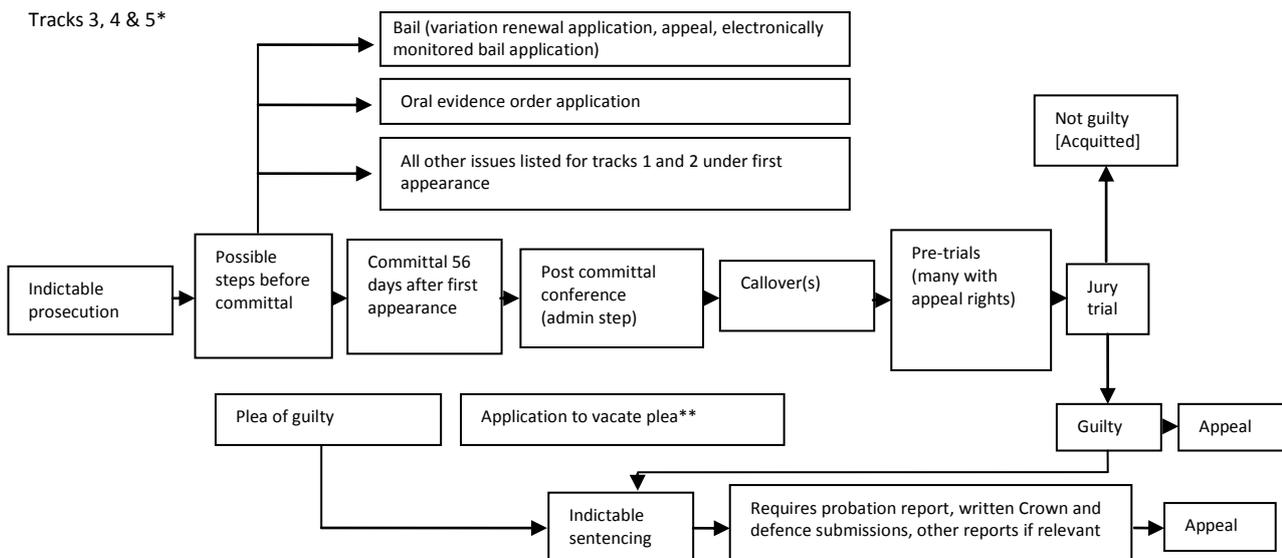
¹¹The three diagrams included in this description are an attempt to give a broad impression of how the prosecution process works in practice. It is impossible to encapsulate all the possible directions a prosecution could take diagrammatically.

Tracks 1 & 2



36. However if the accused elects trial (track 3), the investigator chooses to lay the charge indictably (track 4) or the charge can only be laid indictably (track 5), then the matter will only remain in the summary jurisdiction until it goes through the formal process of being committed for trial. At that point the prosecution will shift into the indictable jurisdiction and an indictment will then be filed by the prosecutor. An indictment is another type of charge sheet. It may contain numerous charges and it charges the accused person in the name of the Queen. If the matter shifts into the indictable jurisdiction then it may take various paths, as the following diagram illustrates.

Tracks 3, 4 & 5*



* Although set out here as one track, there can be variations.

** Recent law change – previously to High Court – now Court that received the plea.

The Prosecution Service

37. The main players in the prosecution service are:
 - 37.1. The Attorney-General, who is responsible to Parliament for all public prosecutions;
 - 37.2. The Solicitor-General, who superintends the prosecution system on behalf of the Attorney-General;
 - 37.3. Crown Law, the office that supports the Attorney-General and the Solicitor-General in performing their roles;
 - 37.4. Crown Solicitors, the 15 private sector lawyers who hold warrants to conduct indictable prosecutions in New Zealand and who also conduct some summary prosecutions on behalf of various enforcement agencies;
 - 37.5. The Serious Fraud Prosecutors Panel, the panel of prosecutors who conduct indictable prosecutions on behalf of the Serious Fraud Office (SFO);
 - 37.6. The PPS, the service that conducts almost all of the prosecutions in the summary jurisdiction that are initiated by the Police, including indictable prosecutions prior to committal for trial; and
 - 37.7. Departmental prosecutors, who conduct prosecutions in the summary jurisdiction on behalf of the agencies that employ them.
38. There are also two documents that have a significant influence over how prosecution services are delivered:
 - 38.1. The Prosecution Guidelines 2010; and
 - 38.2. Cabinet Directions for the Conduct of Crown Legal Business 1993.

THE ATTORNEY-GENERAL

39. The Attorney-General has two distinct roles in Government, as:
 - 39.1. A Minister of the Crown with Ministerial responsibility for Crown Law, the SFO and the Parliamentary Counsel Office; and
 - 39.2. The senior Law Officer of the Crown with primary responsibility for the Government's administration of the law, which involves being the Government's principal legal adviser. This function is exercised in conjunction with the Solicitor-General, who is the junior Law Officer.
40. As a part of his or her Law Officer role, the Attorney-General has responsibility for the Government's role in the administration of criminal justice. This means that the Attorney-General is nominally and formally responsible to Parliament for all public prosecutions and for supervising the prosecution system.
41. The Attorney-General's dual roles as the senior Law Officer and a Minister of the Crown inherently involve tension. As a Law Officer the Attorney is obliged to act solely in the public interest by

disregarding any political interest or partisan advantage/disadvantage to the Government or opposition parties. However the Attorney's role as a Minister properly includes political partisanship. Management of this tension is facilitated by the constitutional convention that recognises the position of the Solicitor-General as a non-political one.

THE SOLICITOR-GENERAL

42. The Solicitor-General holds office as a Government Official and is also the Chief Executive of Crown Law. Subject only to the Attorney-General, he or she is the Government's chief legal adviser and advocate in the Courts.
43. The Solicitor-General also has a separate responsibility to give legal and constitutional advice to the Governor-General. This function emphasises the Solicitor-General's non-political and constitutional role in Government and ultimate responsibility to the Crown.
44. As a matter of convention the Solicitor-General has traditionally assumed responsibility for the exercise of those Law Officer functions that should be undertaken independently of the political process, most notably the prosecution functions. These functions include responsibility for overseeing indictable prosecutions, Crown representation in appeals against conviction and sentence and a number of specific statutory duties relating to the administration of criminal justice. The Solicitor-General is accountable to the Attorney-General for the exercise of these functions.
45. The reason for the convention is to prevent the administration of criminal law becoming, or appearing to become, a matter of political decision making. It works in practice because, by virtue of s 9A of the Constitution Act 1986, the Solicitor-General can exercise almost all of the functions conferred on the Attorney-General.

CROWN LAW

46. Crown Law is a department of the public service and, in essence, is the Government's law firm. Broadly speaking, its function is to support the Attorney-General and the Solicitor-General in performing their roles.
47. To achieve Crown Law's outcomes Vote: Attorney-General provides for the purchase of four appropriations:
 - 47.1. The conduct of appeals from criminal trials on indictment and in Crown appeals against sentence or seeking to clarify points of law;
 - 47.2. Legal advice and representation services to the Crown via central Government departments;
 - 47.3. The supervision and conduct of indictable prosecutions; and
 - 47.4. Legal and administrative services for the Attorney-General and the Solicitor-General to assist them in the exercise of their statutory functions and responsibilities.
48. Of particular relevance for the purpose of this review are the first and third appropriations (subparagraphs 47.1 and 47.3 above).
49. The first appropriation (subparagraph 47.1) is used to fund the Criminal Team within Crown Law to represent the Crown on criminal appeals in the Court of Appeal and the Supreme Court and to consider requests for Crown appeals.

50. The third appropriation (subparagraph 47.3) allows for Crown Law to retain the services of the Crown Solicitor network and the Serious Fraud Prosecutors Panel to conduct all indictable prosecutions in New Zealand and all appeals to the High Court arising from summary prosecutions. The vast majority of this appropriation is paid to Crown Solicitors in accordance with the Crown Solicitors Regulations 1994 (the Regulations) and to Serious Fraud Prosecutors Panel members.
51. The remainder of the third appropriation pays for Crown Law to supervise the Crown Solicitor network and to provide criminal law advice and services. This role involves:
 - 51.1. In relation to supervision, administering the Regulations, and in particular the classification of counsel, approval of special fees and approval of additional counsel for lengthy or complex trials; and
 - 51.2. In relation to advice and services, undertaking work in the areas of proceeds of crime; mutual assistance; extradition; blood sampling for DNA; requests for Crown appeals; consents to prosecute; applications for stays of, and immunity from, prosecution; and Ministerial responses relating to criminal matters.

CROWN SOLICITORS

52. Crown Solicitors are private sector lawyers who are appointed to prosecute under warrants held 'at pleasure' and issued by the Governor-General. Each warrant relates to a particular geographical area, usually a High Court centre. The warrants give the Crown Solicitors personal responsibility for filing indictments, conducting indictable prosecutions and appearing on appeals from summary prosecutions in their geographical area.
53. The Crown Solicitors' power to file indictments is confirmed by s 345(2) of the Crimes Act 1961, which states that only Crown Solicitors and the Attorney-General may file an indictment.
54. There are currently 15 Crown Solicitors in New Zealand, who hold 17 warrants. Each is a partner within a law firm. The lawyers within these firms assist each Crown Solicitor in exercising their prosecution-related responsibilities. These lawyers must be formally recognised by the Solicitor-General and categorised as junior, intermediate or senior counsel under the Regulations before they can undertake this work.
55. As private sector lawyers, Crown Solicitors bill Crown Law for the work that their firms undertake pursuant to their warrants. This billing process follows a set format. First, once a trial or an appeal is completed the Crown Solicitor will prepare an invoice in accordance with the Regulations. The Regulations contain an hourly rate that applies in relation to each type of counsel. They also set caps on the amount of time that may be paid for certain tasks. Second, the invoice is sent to the relevant Court Registrar for certification. Finally, the invoice will be sent to Crown Law, where it will be assessed for compliance with the Regulations and approved for payment.
56. Due to the growing length of time from laying the indictment until trial, Crown Law now permits Crown Solicitors to submit an interim bill once the unbilled cost on the file exceeds \$3,000 (GST exclusive).
57. In addition to the work obtained pursuant to their warrants, Crown Solicitors are regularly engaged by enforcement agencies to conduct the summary prosecutions that they initiate.
58. If a Crown Solicitor performs this type of work then he or she will bill the enforcement agency directly, using the same hourly rate that is specified in the Regulations. Enforcement agencies generally pay for these services out of their general budgets for legal advice and representation.

THE SERIOUS FRAUD PROSECUTORS PANEL

59. The Serious Fraud Prosecutors Panel is established by s 48 of the Serious Fraud Office Act 1990. This section requires the SFO to use Panel members for all of its proceedings relating to serious or complex fraud. This includes the conduct of all prosecutions initiated by the SFO, which are all indictable.
60. The Panel members are appointed by the Solicitor-General after consultation with the Director of the SFO. They are all senior lawyers, many of whom are Crown Solicitors and/or have experience in commercial law and civil proceedings. Panel members provide their services either at the hourly rate specified in the Regulations or at a reduced commercial rate. Like the Crown Solicitors, the Panel members invoice Crown Law for the work that they conduct in the indictable jurisdiction. If the Panel members are engaged prior to committal for trial then their bills, up until that time, are paid for by the SFO.

THE POLICE PROSECUTION SERVICE

61. Established in 1999, the PPS is an autonomous, nationwide prosecution service within the Police. It is administratively separate from the criminal investigation and uniform branches of the Police and consists of a small head office in Wellington and 42 regional offices. The regional offices are staffed by Police prosecutors who service 64 District Courts. These prosecutors include sworn Police officers with law degrees, sworn Police officers without law degrees and non-sworn lawyers.
62. The PPS has responsibility for managing all prosecution processes in the summary jurisdiction after initial charges are laid by Police investigators. This role includes conducting summary prosecutions right through until sentencing and indictable prosecutions up until the point of committal for trial. In practice, this means that the PPS conducts the vast majority of the prosecutions in the summary jurisdiction each year.
63. Funding for the PPS comes from Vote: Police. Specifically, it comes from output expense six (of seven) – Case Resolution and Support to the Judicial Process.

DEPARTMENTAL PROSECUTORS

64. Under the Cabinet Directions, enforcement agencies (including the Police) must refer all legal issues relating to the enforcement of criminal law to Crown Law. The exception to this rule is summary prosecutions. In relation to summary prosecutions Cabinet has given enforcement agencies the option of either:
 - 64.1. Using an in-house prosecutor; or
 - 64.2. Briefing the matter to a Crown Solicitor.
65. As discussed above, the Police has opted to use the PPS for almost all of its summary prosecutions. Only the most complex summary prosecutions are briefed to Crown Solicitors.
66. In relation to the other enforcement agencies surveyed for this review, the table below indicates their current approaches to this option.

Predominantly uses departmental prosecutors*	Uses a mixture of departmental prosecutors and Crown Solicitors	Briefs all summary prosecutions to Crown Solicitors
Corrections	DIA	CAA
Customs	DOC	Commerce Commission
DOL	IRD	FMA
Fisheries		Historic Places Trust
MSD		Housing NZ
		Maritime NZ
		MED
		Ministry of Education
		MOH

* That is, only briefs a small number of complex cases to Crown Solicitors.

67. The funding for the departmental prosecutors depends on the particular enforcement agency involved. The departmental prosecutors in Corrections are also probation officers. There are two Vote Corrections output classes that are associated with enforcement activity: Information and Administrative Services to the Judiciary and the New Zealand Parole Board, and Community Based Sentences and Orders. All of the other departmental prosecutors are employed as legal advisers. As such their funding appears to come from appropriations related to compliance or regulatory services.¹²

THE PROSECUTION GUIDELINES 2010

68. By convention, the Attorney-General and the Solicitor-General have issued guidelines for prosecutors. The latest incarnation of these is the Prosecution Guidelines 2010.
69. The Prosecution Guidelines are issued by the Law Officers to assist all those whose function is to enforce the criminal law by instituting and conducting criminal prosecutions. Their purpose is to ensure that prosecution principles and practices are underpinned by unified values, so that there is consistency, openness and fairness. Specifically the Guidelines are intended to assist in determining: whether criminal proceedings should be commenced; what charges should be laid; and whether

¹² **Customs** Vote: Customs, output class – Prosecutions and Civil Proceedings; **DIA** Vote: Internal Affairs, output appropriation – Regulatory Services; **DOC** Vote: Conservation, output class – Management of Natural Heritage – Legal Protection of Areas and Sites; **DOL** Vote: Employment – Regulatory Service, also Vote: Labour and Vote: Immigration – output class unclear; **Fisheries** Vote: Fisheries – appropriation, Fisheries Compliance; **IRD** Vote: Revenue, appropriation – Management of Debt and Outstanding Returns; **MSD** Vote: Social Development, appropriation – Services to Protect the Integrity of the Benefit System.

proceedings should continue. They also provide guidance for the conduct of criminal proceedings and establish standards of conduct and practice that the Law Officers expect from prosecutors.¹³

THE CABINET DIRECTIONS FOR THE CONDUCT OF CROWN LEGAL BUSINESS 1993

70. The Cabinet Directions explain the process that must be followed when a Government agency (including the Police) requires legal services, in the form of advice or representation, from outside its own legal staff. In short, the Directions stipulate those services that are to be provided by the Solicitor-General and Crown Law, and those that may be briefed to private sector lawyers. In very general terms, the Cabinet Directions create two categories of legal business. Any requests for legal services that fall within category one must be referred, in the first instance, to Crown Law. Any requests falling within category two may be briefed to a private sector lawyer or referred to Crown Law.
71. In relation to prosecutions, the Directions state the following.
 - 71.1. Issues relating to the enforcement of criminal law fall within category one.
 - 71.2. Despite subparagraph 71.1, summary prosecutions do not need to be referred to Crown Law. Instead Government agencies may either use an in-house lawyer to conduct the prosecution or brief the case to a Crown Solicitor. If they wish to use a private sector lawyer other than a Crown Solicitor then they must obtain permission to do so from the Solicitor-General.
 - 71.3. Police and departmental legal staff may not appear in the High Court or on an indictable prosecution unless the Government agency has general or specific approval from the Solicitor-General.
 - 71.4. No appeal from the decision of any court or tribunal, or application for judicial review is to be instituted by any Crown party without the specific approval of the Solicitor-General.
72. The Cabinet Directions are enforceable against the Police and all Government agencies, except for the Parliamentary Counsel Office, the Public Trust Office and some Crown Entities.

¹³ Prosecution Guidelines 2010, paragraph 2.

2009/10 Snapshot

73. The statistical information that has been provided to me during the review paints a very general picture of how the prosecution system currently works.

VOLUME OF CRIMINAL APPEALS

74. In 2009/10 the Supreme Court heard 10 criminal appeals and the Court of Appeal heard 475 in 2009. Counsel from the Criminal Team in Crown Law appeared on the vast majority of these appeals. However a small percentage were briefed to external lawyers (usually a Crown Solicitor or one of their employees).
75. In 2009/10 Crown Law's billing records show that the High Court heard a further 2,772 criminal appeals. This total consists of:
- 75.1. 2,081 bail applications or appeals;¹⁴ and
 - 75.2. 691 appeals against convictions or sentences entered in the summary jurisdiction.
76. These appeals were conducted by Crown Solicitors and their employees.

VOLUME OF CASES IN THE INDICTABLE JURISDICTION

77. According to Crown Law's billing records there were around 5,711 indictable matters in 2009/2010.¹⁵ This total consists of:
- 77.1. 1,800 jury trials in the District Court;
 - 77.2. 207 jury trials in the High Court;
 - 77.3. 3,460 separate sentencing matters in the District Court; and
 - 77.4. 244 separate sentencing matters in the High Court.¹⁶
78. My understanding is that the vast majority of these indictable matters were the result of prosecutions initiated by the Police. This means that the PPS was responsible for these cases up until committal for trial and Crown Solicitors were responsible after committal.
79. Although I have been unable to obtain exact statistics, it appears that around 100 of the 5,711 indictable matters were initiated by the following Government agencies: the SFO (15–20), Inland

¹⁴ It is acknowledged that, strictly speaking, a bail application to the High Court is not an appeal. However, Crown Law's billing records do not separate the number of High Court bail applications from the number of High Court bail appeals. Further, both are recorded under the heading 'High Court appeals'.

¹⁵ This figure is from a schedule generated by Crown Law of the bills paid to Crown Solicitors, by category of work and by region for each financial year from 2000/01 to 2009/10.

¹⁶ An important point is that these figures are based on the number of indictments that were filed in 2009/10. Each indictment may have contained multiple charges and/or defendants. As such it is impossible to draw direct comparisons between the number of indictments filed in the indictable jurisdiction and the number of informations filed in the summary jurisdiction.

Revenue (IRD) (20), Customs (10–20), DOL (10–30), Ministry of Economic Development (MED) (10–20), Financial Markets Authority (FMA) (5) and Fisheries (2–10).¹⁷ Again, Crown Solicitors will have conducted almost all of these prosecutions. The exception is the 15–20 prosecutions initiated by the SFO, for which the Serious Fraud Prosecutors Panel was responsible

VOLUME OF CASES IN THE SUMMARY JURISDICTION

80. In 2009/10 over 244,000 informations were laid in the summary jurisdiction. Each information will have related to one charge.¹⁸ Some of these informations will have resulted in indictable prosecutions. However the vast majority will have been dealt with entirely in the summary jurisdiction.
81. Police records indicate that they were responsible for laying 198,611 informations in 2009/10.¹⁹ This total is estimated to amount to 82% of the total charges laid by the sample of agencies surveyed for this review. In the same year the PPS conducted 158,693 summary prosecutions, which amounts to 87% of the summary prosecutions for the sample agencies in 2009/2010.²⁰
82. The enforcement agency responsible for laying the next highest number of informations in 2009/10 was Corrections. It laid about 27,251 informations,²¹ which I estimate equates to around 11% of the total charges laid by the sample. My understanding is that all of these informations resulted in summary (as opposed to indictable) prosecutions and that probation officers presented these cases in court. It seems that Corrections conducted around 20,942 prosecutions in total, the vast majority of which involved guilty pleas.²² This total amounts to 12% of the summary prosecutions for the sample agencies.
83. The number of informations laid, and cases prosecuted, by other enforcement agencies is not entirely clear, but in my sample, the remainder of total charges laid must be around 7%, and the number of summary cases prosecuted must be around 1% of the total. The following table represents the statistics provided to me.

¹⁷ The bracketed figures represent the average number of indictable prosecutions initiated by these agencies annually. These figures are taken from appendix 2 of the TOR, which in turn was taken from the Ministry of Justice's Case Management System and agency annual reports. Government agencies were asked to advise the secretariat if any of these figures were inaccurate. No such advice was received. The figures need to be read with considerable caution as it is not clear whether they reflect the number of informations that were laid by the agency or the number of indictments that were filed in court.

¹⁸ This figure was calculated by adding the information provided by the Police to information extracted from CMS on 14 February 2011 and provided by the Ministry of Justice.

¹⁹ This figure is taken from the Police questionnaire response, page 16, table 7. It represents the number of cases the PPS disposed of during 2009/10.

²⁰ This percentage is measured by the number of apprehensions resolved by way of prosecution.

²¹ This figure was taken from Justice's Case Management System data.

²² Ibid.

Agency	Questionnaire response*	CMS figure for number of charges**	CMS figure for number of summary prosecutions
CAA	18 prosecutions	71	17
Commerce Commission	17 prosecutions	928	29
Customs	65–70 prosecutions	582	100
DOC	70 prosecutions	197	140
DIA	60–70 prosecutions	440	54
DOL	366 prosecutions	397	128
Fisheries	300–400 prosecutions, 700–800 charges	941	391
Historic Places Trust	3–4 prosecutions	7	4
Housing NZ	100 prosecutions	431	104
IRD	580 prosecutions	5,997	314
Maritime NZ	10 prosecutions	27	11
MED	340 charges laid	378	73
Education	Unknown	43	39
MOH	60–70 prosecutions	1,454	85
MSD	800 prosecutions	3734	691

*The figures here relate to question 6 'Describe your agency's rate of bringing prosecutions. What is your average annual throughput of prosecutions? Describe the rates as the average number of charges per annum if you are able. Is the throughput regular, or are there significant spikes in different years? Are there any recent changes that have affected the rate?' Note that many agencies provided me with an average number of prosecutions over the last 5 years (DIA, Fisheries, Historic Places Trust, Housing NZ, IRD, MOH, MED, MSD), some provided me with specific figures for the past 5 years of which I have used the 2009/10 data (CAA, Commerce Commission, Corrections), and the remainder presented their data in slightly different forms. DOL provided us with a mixture of figures averaged over the last 5 years for charges and prosecutions including: 110 charges laid each year over the last 5 years for health and safety offending, about 30 prosecutions for shop trading offences, and about 226 charges each year by the immigration group. From these data I have assumed that the 226 charges, and 110 charges per year equate to roughly the equivalent number of prosecutions, which combined with the shop trading offences figure give a total of about 366. DOC only provided me with the figure for 2010/11 which I have included on the assumption that the annual average would not be significantly different. The Ministry of Education was unable to provide such specific data to me as it has recently initiated a new data collection process and its truancy prosecutions are initiated by school boards rather than head office anyway.

**The CMS data reflects the 2009/2010 financial year.

84. Accordingly it appears that enforcement agencies, outside of the Police and Corrections, were responsible for laying 15,627 informations and conducting around 2,180 prosecutions in 2009/10.

FTE CROWN COUNSEL AND PROSECUTORS

85. The numbers of full-time equivalent employees (FTEs) currently employed to conduct prosecutions, appeals and other prosecution-related services in New Zealand are presented in the following table.

Body with prosecution functions	Number of FTE employed to provide prosecution services*	Breakdown of the type of staff (rounded to the nearest 0.5 FTE)
Crown Law	27	Within the Criminal Team: 10 Crown Counsel, 3 Associate Crown Counsel, 5 Assistant Crown Counsel and 0.5 Legal Advisers. Outside of the Criminal Team: 9 Counsel
Crown Solicitor network	198	100.5 Senior Prosecutors, 49.5 Intermediate Prosecutors and 48 Junior Prosecutors.
PPS	340	12 in PPS Head Office Wellington, 3 Training Officers, 22 Regional and District Prosecution Managers, 36 Electronic Monitoring Bail Assessors, 63.5 Prosecution Support Officers and 206.5 Prosecutors. Less a vacancy factor of 3. Of the Prosecutors 44 are non-sworn lawyers, 143 are sworn Police Officers with no law degree and 9 are sworn Police Officers with law degrees.
Other enforcement agencies surveyed	45.5	1 Manager and 4 Prosecutors in Customs 5 Prosecutors in DOC 1 Prosecutor in DIA 10.5 Prosecutors in Fisheries 5 Prosecutors in DOL 9 Prosecutors in IRD 4 Senior Prosecutors and 6 Prosecutors in MSD Corrections did not provide estimates as prosecution is only one facet of the probation officer role.

* In their questionnaire responses many government agencies advised me that they employ legal advisers who routinely review investigation files before matters are briefed to Crown Solicitors for prosecution. Unless those legal advisers also appear in court to conduct prosecutions on occasion, they have not been included in this table because I view their work as falling predominantly on the investigation side of proceedings. Further I note that, by necessity, FTE figures are estimates.

86. Unfortunately these figures reflect the number of FTEs employed in these roles in mid 2011, rather than the 2009/10 financial year. However, I have included this information in this snapshot on the assumption that the figures were roughly the same in 2009/10.
87. I note the Serious Fraud Prosecutors Panel does not employ prosecutors. Instead their services are retained 'as needed'. As such, I have not included Panel members in the above table. However it is worth noting that currently there are 25 lawyers on the Panel, 14 of whom are Crown Solicitors or senior employees within a Crown Solicitor's Office.

TOTAL COST OF FIRST INSTANCE PROSECUTIONS AND APPEALS

88. It is very difficult to estimate the total cost of public prosecutions to the Government in 2009/10 because only three of the four main figures are known with any degree of certainty. These known figures are the total cost of:
- 88.1. The conduct of criminal appeals in the Court of Appeal and the Supreme Court, including the assessment of requests for Crown appeals (\$3,286,000);²³
 - 88.2. Post-committal indictable prosecutions to Crown Law, including High Court appeals and the supervision of the Crown Solicitor network (\$42,378,000);²⁴ and
 - 88.3. The PPS (\$32,028,863).²⁵
89. The fourth key figure is the cost of the prosecutions in the summary jurisdiction to the Government agencies. There appear to be two main components to this figure: the agencies' external spending on Crown Solicitors and their internal prosecution-related expenditure.
90. From the agency questionnaire responses, I have deduced that in 2009/10 Government agencies spent at least \$3 million on obtaining legal advice and representation from Crown Solicitors in relation to prosecutions in the summary jurisdiction.²⁶
91. The lack of certainty surrounding this figure reflects the apparent practice among most Government agencies of recording their expenditure on external solicitors as one total figure, without any further breakdown. Some of the agencies were able to provide me with an estimate of the cost attributable to prosecution-related services. Others felt unable to do so.
92. An interesting counterbalance is the Crown Solicitor questionnaire responses, which suggest that in 2009/10 Crown Solicitors received around \$5.5 million from Government agencies for conducting this type of work.²⁷

²³ Figure taken from Crown Law's Annual Report 2009/10, Output Expense: Conduct of Criminal Appeals.

²⁴ Figure taken from Crown Law's Annual Report 2009/10, Output Expense: Supervision and Conduct of Crown Prosecutions. Crown Law's billing records show that \$39,189,666 of this money was paid directly to Crown Solicitors.

²⁵ Figure provided by the Police in their questionnaire response, question 22.

²⁶ I based the \$3 million figure on the advice from government agencies that the following amounts were spent on Crown Solicitors in 2009/10: CAA \$260,000; Customs \$194,321; DOC \$15,000; Corrections \$31,629; DIA \$290,000; DOL \$16,911; FMA \$362,264; Historic Places Trust \$26,774; Housing NZ \$733,000; IRD \$472,100; Maritime NZ \$200,000; MED \$348,942; and MSD \$45,000. The SFO advised that it spent \$523,000 on legal advice from panel members on indictable prosecutions prior to committal for trial.

²⁷ I calculated this figure on the basis of two sets of data. First, Crown Law provided a spreadsheet showing the amount paid to Crown Solicitors by region for category 1 work under the Cabinet Directions in 2009/10. Second, Crown Solicitors provided figures on the proportion of time they spend on work associated with the warrant where Crown Law is billed and on prosecution-related work where the bills are sent to an agency other than Crown Law. Crown Solicitors bill enforcement agencies using the rates in the Crown Solicitor Regulations 1994, so I have worked on the assumption that Crown Solicitors' system of billing is broadly correlated between Crown Law and enforcement agencies. The figure must also be read with the recognition that the proportional figures provided by Crown Solicitors were clearly estimates.

93. The task of estimating the internal spend of Government agencies on prosecutions in the summary jurisdiction has proven even more difficult.
94. Aside from Corrections,²⁸ all of the agencies that employ departmental prosecutors were able to provide me with an estimate of the number of FTE prosecutors that they employ. However, these estimates are necessarily rough as none of these prosecutors performs that role on a full-time, permanent basis. Instead they are predominantly employed as legal advisers. I was not able to obtain clear information regarding the salaries paid to departmental prosecutors either. However, if the average salary for an in-house legal adviser with two years' post qualification experience in New Zealand (\$70,000) is used as the basis for calculating the salary cost for 45.5 prosecutors, this cost amounts to \$3,185,000.
95. The other prosecution-related costs such as those for travel, support staff, IT systems and other overheads remain largely unknown.
96. Accordingly my best estimate is that public prosecutions cost the Government at least \$83,877,863 in 2009/10, as detailed in the following table.

Type of work	Cost
Conduct of criminal appeals	\$3,286,000
Indictable prosecutions and High Court appeals	\$42,378,000
Prosecutions in the summary jurisdiction conducted by the PPS	\$32,028,863
Prosecutions in the summary jurisdiction conducted by Crown Solicitors	At least \$3,000,000
Prosecutions in the summary jurisdiction conducted by departmental prosecutors	At least \$3,185,000
Total	At least \$83,877,863

PROPOSED CHANGES UNDER CPRAM

97. The CPRAM Bill is due to have its second reading in Parliament soon and is expected to be passed into law before the next election. Some provisions will take effect from November 2011 but the vast majority are not expected to come into force until March 2013.
98. CPRAM aims to simplify and reform the current framework governing criminal procedure and to enhance courtroom efficiencies through the greater use of electronic technology. The three aspects of the Bill that I consider to be of particular importance to this review are:
- 98.1. The expected cost and efficiency gains of the reforms;

²⁸ Prosecution work is conducted by Probation Officers within Corrections. Probation Officers routinely appear in court to provide advice and information to the courts to assist in sentencing matters. While present in court, these staff deal with prosecutions as and when they arise. Accordingly the roles are so intertwined that Corrections was unable to provide an FTE figure for prosecution work.

- 98.2. The new categorisation of offences and prosecutions; and
- 98.3. The clarification of the Solicitor-General's oversight role.

EXPECTED COST AND EFFICIENCY GAINS

- 99. The Government expects the Bill to result in a substantial reduction in the number of prosecutions conducted each year (particularly the number of jury trials) in their length. Current estimates are that the reforms will result in 36,650 fewer court events, between 750 – 1200 fewer cases being designated for jury trial, and between 230 – 450 fewer cases actually proceeding to a jury trial, each year. This is expected to save the Government \$22,400,000 over the next five years and \$70,800,000 over the next 10 years.²⁹

THE NEW CATEGORISATION OF OFFENCES AND PROSECUTIONS

Offences

- 100. Under CPRAM there will be no more 'summary' and 'indictable' prosecutions. Instead summary and indictable offences will be replaced by four categories of offences, known as categories 1, 2, 3 and 4. These new categories are based on the seriousness of the offence, with category 1 the least serious and category 4 the most serious offence.
- 101. Category 1 and 2 offences will be prosecuted by way of Judge alone defended hearings. This will be similar to the current procedure for summary prosecutions. Category 4 offences will be dealt with by way of jury trials. In relation to category 3 offences, the accused will have a choice as to whether to opt for a defended hearing or a jury trial.

Prosecutions

- 102. Under the new system, all prosecutions that are initiated by public sector enforcement agencies will be described as 'public prosecutions' (regardless of the category of the offence).³⁰ There will also be a subset of public prosecutions that are termed 'Crown prosecutions'.
- 103. The definition of a Crown prosecution has not yet been decided as it will be addressed by regulations.³¹ However, it is clear that Crown prosecutions will involve the most serious offences and are likely to broadly correspond to indictable prosecutions at present. CPRAM does however contain the following definition of a Crown prosecutor.
- 104. Crown prosecutor means –
 - 104.1. A Crown solicitor or lawyer representing a Crown Solicitor; or

²⁹ These figures were provided to me by the Ministry of Justice Operations team. I am advised that the net present value of these savings includes revised benefits (based on previous modelling) as amended by the recent Supplementary Order Paper, but does not revise agency costs. This initial assessment is therefore subject to: a full assessment of the impact of changes on agencies' ongoing costs (which may be higher); and immediate access to implementation funding held in contingency

³⁰ See the definition of 'public prosecution' in clause 5 of CPRAM.

³¹ See the definition of 'Crown prosecution' in clause 5 of CPRAM and clause 383 concerning regulations.

- 104.2. Any other lawyer employed or instructed by the Solicitor-General to conduct a Crown prosecution
105. Crown Prosecutions will begin as public prosecutions. However, at the particular time or stage of the proceedings specified in the regulations, the Solicitor-General will assume responsibility for the conduct of these cases. This duty may be performed by a Crown prosecutor on the Solicitor-General's behalf.
106. The Bill provides that when the Solicitor-General or a Crown prosecutor assumes responsibility for a Crown prosecution, he or she must file a notice in court. At the same time, he or she may file a notice amending, withdrawing or adding to the charges that have been laid. These notices are similar to the indictment that is filed when a case is committed for trial in the present system.
107. The Bill also expressly states that the Solicitor-General or the Crown prosecutor must, after assuming responsibility for a Crown prosecution, act independently from the agency that originally laid the charges.

The Solicitor-General's oversight role

108. CPRAM clarifies that the Solicitor-General is responsible for maintaining general oversight of the conduct of all public prosecutions. In discharging that responsibility he or she is mandated to provide guidelines and advice to all agencies that conduct public prosecutions.

Preliminary Comments on the Prosecution Service

109. Two preliminary comments arise from these broad descriptions.
110. First, it is apparent that the Attorney-General is accountable to Parliament for all public prosecutions. Logically, this accountability necessitates a very general understanding of how much public prosecutions cost. However, at present a key component of this cost is largely unknown – that is, the cost of prosecutions in the summary jurisdiction to enforcement agencies, other than the Police.
111. These agencies do not appear to routinely monitor their prosecution costs. Nonetheless, the information collected for this review suggests that in 2009/10 they collectively spent at least \$6,185,000 on conducting prosecutions in the summary jurisdiction and probably a considerable amount more. As discussed above, Corrections, which was responsible for conducting 12% of the summary prosecutions for the sample group in 2009/10, was unable to provide a figure for FTE prosecutors and advised that it only spent \$31,629 on Crown Solicitors. Once this figure is removed, it becomes apparent that the remaining Government agencies spent at least \$6,153,000 on conducting 1% of prosecutions in the summary jurisdiction. This figure seems relatively high when compared with the \$32,028,863 spent on prosecutions in the summary jurisdiction by the Police, who initiate 87% of all summary prosecutions. It is noted, however, that these agencies laid 7% of the total charges for the sample group, suggesting that their summary cases may be more complex than the average Corrections or Police prosecution.
112. Second, I emphasise the impact of the proposed changes under CPRAM. The Bill will significantly alter the prosecution landscape. This review aims to support, and align with, the proposals in the Bill. Accordingly the direction of the review must be forward-looking.

CHAPTER 5: GOALS FOR THE PROSECUTION SERVICE

Introduction

113. This chapter introduces the three main goals that I consider to be of most importance for our prosecution service at present: robust decision-making, clear oversight and improved cost-efficiency.
114. These goals provide the framework for my assessment of the current prosecution service in Parts III, IV and V of this report. I have also used these goals to assess the strengths and weaknesses of the available options for structural reform in Part VI.

Goal One: Robust Decision-Making

115. Prosecution decisions have a profound effect on the lives of the individuals involved in any given case. At a systemic level they may also have a profound effect on the general public.
116. The prime example of a prosecution decision is the decision to commence or advance a prosecution. However, other significant prosecution decisions include the choice of charges, whether to accept a plea to a lesser offence, what evidence to lead and what sentencing submissions to make. All of these decisions involve discretion and power and, in essence, represent the exercise of a public function. In making these decisions the primary consideration must be: what is in the public interest?
117. In my opinion the integrity of our prosecution system rests, in large part, on the existence of robust decision-making processes to ensure that we get these prosecution decisions right.
118. During this review I have focused on two prosecution decisions in particular: the decision to prosecute (or not); and the choice of charges. I have done so for two reasons. First, these are the two prosecution decisions that have the most significant impact on the individuals involved in a case. Second, both decisions have a significant impact on the cost of the overall prosecution system:
 - 118.1. The decision to prosecute (or not) determines how many cases enter the system; and
 - 118.2. The choice of charges impacts on the chances of early resolution with an appropriate outcome. Early resolution, in turn, reduces cost.
119. I have also focused on the importance of prosecutors making or reviewing these decisions independently – that is, free from undue political or public pressure. Again, I consider that this element of our prosecution system is of particular relevance to its integrity.
120. In the following subsections I introduce and discuss two underlying concepts that relate to prosecution decisions.
 - 120.1. Prosecutions should only take place if they are in the public interest.
 - 120.2. Prosecutors must make prosecution decisions independently.

THE PUBLIC INTEREST

The Shawcross principle

121. In 1951, when he was the Attorney-General of England and Wales, Sir Hartley Shawcross made the following classic statement on the public interest in prosecutions:

[i]t has never been the rule in this country – I hope it never will be – that suspected offences must automatically be the subject of prosecution.

122. He added that there should be a prosecution:

wherever it appears that the offence or the circumstances of its commission are of such a character that a prosecution in respect thereof is required in the public interest.

123. This is the so-called Shawcross principle and it has been endorsed by Attorneys-General throughout the Commonwealth ever since.³²

124. To understand this principle it is important to note that public interest is not the same as public opinion. Public opinion connotes a temporary mood or collective feeling influenced by current events or circumstances. By contrast, public interest imports the notion of enduring public good and order. It also concerns the effect of a decision on other important public policies and institutions.

What is the public interest in prosecutions?

125. Broadly speaking, the public has an interest in ensuring that its members comply with the law. One way of achieving that goal is to prosecute those who break the law; other mechanisms that may be used include education campaigns and diversion schemes. Compared with such other measures, prosecution is a harsh and expensive tool for promoting compliance, so it is only used when there is a reasonable prospect of conviction on the charges laid. It also tends to be reserved for the more serious cases where no alternative response is considered appropriate – for example, for those cases where the offender is relatively blameworthy, is likely to re-offend or has caused more than trifling harm.
126. Inherent in these observations is recognition that the resources available for prosecutions are limited. Those limitations exist because prosecution is just one of many publicly funded activities. Governments must balance a variety of goals in determining how much money to allocate to agencies with investigating and prosecuting roles and those agencies, in turn, must decide how to spend the money. Further there are financial constraints on how many cases the Courts and legal aid services can process.
127. The limited nature of resources is explicitly recognised in most of the prosecution guidelines used in the United Kingdom, Canada and Australia. That recognition tends to be expressed through a general statement or as a specific factor that should be considered when deciding if the prosecution is in the public interest, or in both of these forms.

³² Public Prosecution Service of Canada, Shawcross principle quoted in *15.3.2 The Public Interest Criteria*, Chapter 15 Proceedings at Trial and on Appeal, *The Federal Prosecution Service Deskbook*, Part V October 2005 <http://www.ppsc-sppc.gc.ca>.

128. The commonly used general statement is:

The resources available for prosecution are not limitless, and should not be used to pursue inappropriate cases. The corollary is that the available resources should be employed to pursue with due vigour those cases worthy of prosecution.³³

129. The specific public interest factor is generally framed along the following lines: ‘the likely length and expense of the trial’;³⁴ ‘the length and expense of a prosecution when considered in relation to the social benefit to be gained by it’;³⁵ or ‘the likely length and expense of the trial when considered in relation to the seriousness or triviality of the offence’.³⁶

130. In addition to the strength of the evidence, seriousness, availability of alternatives and cost, there are wider public policy concerns that will affect whether a prosecution is in the public interest. Two such

³³ Public Prosecution Services of Canada, Federal Prosecution Service Deskbook, December 2008, chapter 15.3.2; Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island, tab 5.5; Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador, tab 5.7; Commonwealth Director of Public Prosecutions, Prosecution Policy of the Commonwealth (of Australia), November 2008, paragraph 2.2; Queensland Director of Public Prosecutions, Director’s Guidelines, June 2011, paragraph 4; and Office of the Director of Public Prosecutions (South Australia), Prosecution Policy, 2003, page 3.

³⁴ Federal Prosecution Service Deskbook, chapter 15.3.2 paragraph (o); Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions in Prince Edward Island, tab 5.6 paragraph (o); and Guidebook of Policies and Procedures for the Conduct of Criminal Prosecutions in Newfoundland and Labrador, tab 5.8 paragraph (o) (note these three guidelines add the phrase ‘and the resources available to conduct the proceedings’); Nova Scotia Public Prosecution Service, The Decision to Prosecute (Charge Screening), February 2011, page 8, paragraph (l) (note the following comment on page 9: ‘It is also possible for certain factors e.g. “the staleness of the offence” or “the likely expense of a trial”, to gain or lose significance with the strength or weakness of the prosecution case. If, for instance, the evidence in a complex fraud prosecution barely rises above the evidential threshold, the fact that the case would consume months of court time and would require monumental resources might lead the prosecutor to conclude, on balance, that the public interest would not be well served by the prosecution of the case.’); Prosecution Policy of the Commonwealth (of Australia), paragraph 2.10(q); New South Wales Director of Public Prosecutions, The Decision to Prosecute, June 2007, paragraph 3.11; Director’s Guidelines, paragraph 4(ii)(m); Prosecution Policy, page 5, paragraph (p); Director of Public Prosecutions Tasmania, Prosecution Guidelines, September 2009, page 3; and Northern Territory Director of Public Prosecutions, Guidelines, paragraph 2.5(11).

³⁵ Criminal Justice Branch, Ministry of the Attorney-General, Crown Counsel Policy Manual (Charge Assessment Guidelines), October 2009, page 5 paragraph 3(c).

³⁶ Alberta Justice, The Criteria Governing the Decision to Commence or Continue a Prosecution, May 2008, paragraph 3(c) (note this adds the phrase ‘the likely sentence that would result from a conviction, and the attendant public benefit(s)’); Director of Public Prosecutions for Western Australia, Statement of Prosecution Policy Guidelines, 2005, paragraph 31(l) (the exact wording is: ‘the likely length and expense of the trial if disproportionate to the seriousness of the alleged offending’); and Director of Public Prosecutions for Ireland, Guidelines for Prosecutors, November 2010, paragraph 4.22(g) (the exact wording is: ‘whether the likely length and expense of the trial would be disproportionate having regard to the seriousness of the alleged offence and the strength of the evidence’).

concerns, for instance, are protection of national security and confidence in the justice system as a whole.

131. In essence, an endless array of factors may be relevant to deciding whether a prosecution would promote enduring public good and order. The above discussion only illustrates the types of public interest factors that regularly arise.
132. Further, it is worth noting that the exact weight to be given to each factor will depend on the circumstances of the case. In terms of relative weight though, seriousness (in the sense of culpability and harm caused) is generally seen as the public interest factor of primary importance in deciding whether to prosecute and what charge(s) should be laid.

When is the public interest relevant?

133. The public interest is a relevant consideration from the moment an investigation begins, through the charge(s) being laid and all the way until the prosecution ends. Its relevance continues throughout this process because at all stages the options to lay, withdraw or amend the charge(s) remain available. While those options are available, the public interest in the prosecution needs to be constantly re-assessed to ensure that the available resources are still being well spent to achieve the desired outcome.
134. The need for constant re-evaluation means that no one person is individually responsible for protecting the public interest. Instead there is collective responsibility among investigators and prosecutors.
135. Two benefits arise from giving investigators and prosecutors collective responsibility for ensuring that a prosecution only takes place if it is in the public interest.
 - 135.1. It allows for the decision to prosecute and the choice of charge(s) to be constantly re-assessed during the prosecution process. This promotes the early disposal of cases/charge(s) that are not in the public interest.
 - 135.2. It allows for investigators and prosecutors to bring different perspectives to the case. For instance, investigators are well placed to consider alternative resolution options and prosecutors are likely to have a better understanding of issues relating to the wider justice sector.
136. One difficulty with collective responsibility though is that, because of their varying expertise, prosecutors and investigators may shift the entire responsibility for considering certain public interest factors to each other. Such shifting of responsibility is not appropriate, as the public interest needs to be assessed as a whole. It also creates a risk that relevant factors will be overlooked.
137. Accordingly, guidance should be available to both investigators and prosecutors to assist each of them to identify and balance all of the relevant public interest factors, as well as they can, in a transparent and consistent way. In practice, they may need to consult with others to fulfil this responsibility. However it is noted that, once a prosecution is commenced, although consultation and communication should continue, the prosecutor takes over responsibility for the decisions and must be free to make them without undue pressure from the investigator. This is the concept of independence discussed in more detail below.

INDEPENDENCE

138. To understand why it is important for prosecutors to make prosecution decisions independently, it is first necessary to reflect on the role that prosecutors are expected to play in our adversarial legal system.

The role of the prosecutor

139. One of the core expectations placed on prosecutors in New Zealand and throughout the Commonwealth is that they are obliged to make decisions and to present cases in a detached, impartial and fair way. This differs somewhat from the expectations placed on defence lawyers, who are obliged, as far as possible, to advocate for their clients. These differing obligations have developed over time as a way of rectifying the perceived imbalance of power in criminal proceedings, as between the State and an accused person.

140. The Supreme Court of Canada has described the key features of the modern prosecutor's role, as follows:

It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it also must be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of dignity, the seriousness and the justness of judicial proceedings.

141. These ideals are reflected in New Zealand in rule 13.12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Conduct and Client Care Rules). This rule states that:

A prosecuting lawyer must act fairly and impartially at all times and in doing this must –

- (a) Comply with all obligations concerning disclosure to the defence of evidence material to the prosecution and the defence; and
- (b) Present the prosecution case fully and fairly and with professional detachment; and
- (c) Avoid unduly emotive language and inflaming bias or prejudice against an accused person; and
- (d) Act in accordance with any ethical obligations that apply specifically to prosecutors acting for the Crown.

142. The Conduct and Client Care Rules also recognise the general principles that: the overriding duty of any lawyer acting in litigation is to the court concerned; and all lawyers are obliged to act in a way that does not undermine the processes of the court.

The importance of independence

143. The expectation that prosecutors will act in a detached, impartial and fair way applies both to their behaviour in court and to the decisions they make out of court. However, it is in the area of decision-making that independence is of particular importance.
144. In the context of prosecution decision-making, the word 'independence' refers to the need to be free from undue political or public pressure, both in appearance and reality. This pressure may come from a variety of sources such as biased investigators, Ministers with partisan interests, single-minded media or victim lobby groups.
145. The more serious the offending is, the more important it is for decision-making to be independent. This is because serious offending is more likely to attract the type of political and public interest that could affect prosecution decisions. It is inappropriate for prosecutors to be influenced by this type of pressure. Instead they are required to make prosecution decisions based solely on what is in the public interest.

The necessary limitations on autonomy

146. Prosecutors need to be given a sufficient degree of autonomy to ensure that their prosecution decisions are made independently and are seen to be made independently. However, there are practical limitations on how much autonomy is appropriate. These include:
 - 146.1. The fact that prosecutors are accountable to the Law Officers for their prosecution decisions;
 - 146.2. The need for consistency and transparency in prosecution decisions;
 - 146.3. The need for early legal advice from prosecutors during investigations; and
 - 146.4. The nature of the relationship between the prosecutor and the enforcement agency that initiated the investigation.
147. These last two limitations warrant further explanation.
148. In relation to early legal advice, I understand that enforcement agencies are increasingly calling on prosecutors to provide advice at the investigation stage of proceedings. This is because of a rising trend towards challenging the admissibility of evidence at trial or hearing, based on alleged procedural errors during the investigation such as allegations of defective search warrant applications or inappropriate questioning during suspect interviews.
149. The more complicated the investigation, the more likely it is that early legal advice will be sought. The main benefit of obtaining this advice from the person who will eventually prosecute the case is that it sidesteps the need to brief multiple lawyers. Further, it promotes consistency and continuity in the overall proceedings.
150. However, early involvement in a case may colour the prosecutor's view of the evidence and may introduce a degree of bias into their eventual decision as to whether to commence or continue the prosecution. This bias is particularly likely if they have been involved in the procedural decisions throughout the entire investigation. If they have only been called on at the end of an investigation to make a preliminary assessment of the substantive merits of the case, then potential bias is less of a concern.

151. In relation to the relationship between enforcement agencies and prosecutors, I simply note that the nature of this relationship will affect the prosecutor's degree of autonomy.
152. In New Zealand this relationship will take one of three forms: an employment relationship; a solicitor–client relationship; or an indirect relationship based on the Crown Solicitor's warrant.
153. Police and departmental prosecutors are employed by the enforcement agencies that they prosecute for. Due to that relationship they are inherently more susceptible to pressure from investigators and Ministers than external prosecutors are.³⁷ This lack of autonomy is not ideal and often leads to a public perception of biased decision-making, at least. However, in-house prosecutors usually provide a cheaper service than an external prosecutor. Further, they are only used in New Zealand in the summary jurisdiction.
154. When Crown Solicitors conduct summary prosecutions on behalf of enforcement agencies, they do so on the basis of a solicitor–client relationship. This form of relationship also appears to exist between the Director of the SFO and the Serious Fraud Prosecutors Panel members when they are engaged to conduct indictable prosecutions.
155. Ordinarily in a solicitor–client relationship, the solicitor's role is to provide advice and then to follow the instructions of his or her client. In doing so, the solicitor must act solely in the client's best interests. However, when the solicitor is providing prosecution services, this relationship must be tempered to ensure that the prosecutor can make prosecution decisions independently.
156. Finally, in relation to the indictable jurisdiction, there is no direct relationship of employment or instruction between Crown Solicitors (who prosecute almost all such cases) and the enforcement agency (usually the Police). Instead, Crown Solicitors derive their authority to prosecute entirely from their warrants. Accordingly, their relationship with the Police is best described as a co-operative one based on their separate but complementary roles.

³⁷ Police prosecutors are protected from undue pressure from the Minister through s 16 of the Policing Act 2008.

Preliminary Comments on Goal One

PUBLIC INTEREST

157. Prosecution decision-making processes need to recognise the following principles:

- 157.1. A prosecution should only take place if there is a reasonable prospect of conviction on the charges laid and if it is otherwise in the public interest.
- 157.2. There are limited resources available for prosecutions. These should be reserved for pursuing cases that are in the public interest with appropriate vigour. Conversely, those cases that are not in the public interest need to be identified in a timely and efficient manner so that they can be placed on a path towards alternative resolution. This approach will conserve resources.
- 157.3. Investigators and prosecutors should be collectively responsible for the early identification of cases and/or charges that are not in the public interest.
- 157.4. Investigators and prosecutors should adopt transparent and consistent policies in making their prosecution decisions.

MECHANISMS TO SUPPORT INDEPENDENCE

- 158. Prosecutors are obliged to make prosecution decisions independently, both in appearance and reality.
- 159. To assist them in meeting this obligation, mechanisms need to be in place to protect them, and to be seen to protect them, from improper pressure. However, it needs to be recognised that it is neither possible nor desirable to protect prosecutors from all external influences.
- 160. Accordingly, the mechanisms need to strike an appropriate balance between protecting prosecutorial independence and promoting other relevant factors such as accountability, consistency, and co-operation with investigators.
- 161. Furthermore, the mechanisms need to be particularly robust in the indictable jurisdiction where the risk of improper pressure being placed on prosecutors is greater. In the summary jurisdiction independence remains important. However, given the sheer volume of cases, due recognition needs to be given to the affordability of the prosecution service at the summary level.

Goal Two: Clear Oversight

162. As discussed above, I consider that robust decision-making is a key goal for our prosecution service. Prosecution decisions need to be made solely with the public interest in mind. However, although it is important that these decisions are justifiable on a case-by-case basis, there is also a need for accountability, consistency and transparency at a general level. Where these features are broadly in evidence, the public will have confidence in the prosecution system.
163. In my opinion the best way to promote accountability, consistency and transparency is to have clear oversight of the prosecution service. That is, well-defined guidance, monitoring and reporting arrangements between the Solicitor-General, enforcement agencies and prosecutors must be in place. I consider that the existence of such arrangements is important because they promote:
- 163.1. Substantive accountability;
 - 163.2. Quality in prosecutors;
 - 163.3. A collective culture among prosecutors;
 - 163.4. Consistency and transparency in prosecution decision-making;
 - 163.5. Consistency and transparency in operational prosecution policies; and
 - 163.6. Transparency surrounding the cost-efficiency of the prosecution service as a whole.
164. In relation to the current fiscal climate, this last factor is probably the most important. Unless we have a general understanding of the real costs involved in prosecuting, it is impossible to accurately identify:
- 164.1. Where money could be saved; and
 - 164.2. What the financial ramification of any proposed prosecution reform may be.
165. In keeping with these observations, I have paid particular attention to the relationships among the Solicitor-General, enforcement agencies and prosecutors during this review. These relationships are discussed in detail in Part IV. Here I simply make brief comments in relation to:
- 165.1. The constitutional role and responsibilities of the Law Officers;
 - 165.2. The oversight role for the Solicitor-General as proposed by CPRAM; and
 - 165.3. The impending appointments at Crown Law.

THE CONSTITUTIONAL ROLE OF THE LAW OFFICERS

166. As explained in chapter 1, the constitutional role and responsibilities of the Law Officers are outside the scope of this review, except to the extent that the different roles in relation to criminal prosecutions may need to be examined. In keeping with this direction, I have been careful to focus on how the Solicitor-General's current roles and responsibilities could be expanded or exercised differently to improve the overall functioning of the prosecution service.
167. In accordance with this approach, all of my recommendations are intended to preserve:

- 167.1. The Attorney-General's role as the senior Law Officer who is responsible to Parliament for all public prosecutions and for supervising the prosecution system;
- 167.2. The Solicitor-General's role as the non-political junior Law Officer who superintends the prosecution system on the Attorney-General's behalf; and
- 167.3. The Solicitor-General's legislatively mandated role in providing representation on criminal appeals and exercising the statutory duties conferred on the Law Officers in relation to criminal proceedings.

THE SOLICITOR-GENERAL'S OVERSIGHT ROLE UNDER CPRAM

- 168. As explained in chapter 1, the review should align with and support the new direction for procedures as set out in CPRAM. The phrase 'new direction for procedures' is particularly important as it makes it clear that I can (and must) address the substantive role assigned to the Solicitor-General under CPRAM.
- 169. I have adopted the oversight role assigned to the Solicitor-General by clauses 190 and 191 of CPRAM as my starting point in determining how this role should be performed in practice. Given the importance of these clauses, it is useful to set them out in full:

190 Solicitor-General responsible for general oversight of public prosecutions

- (1) The Solicitor-General is responsible for maintaining general oversight of the conduct of public prosecutions.
- (2) In discharging his or her responsibility under subsection (1), the Solicitor-General may –
 - (a) maintain guidelines for the conduct of public prosecutions; and
 - (b) provide general advice and guidance to agencies that conduct public prosecutions on the conduct of those prosecutions.
- (3) Nothing in this section requires the Solicitor-General to supervise the conduct of any particular public prosecution or makes the Solicitor-General responsible for the conduct of any public prosecution.

191 Attorney-General's responsibility and powers not affected

Nothing in section 190 limits or affects –

- (a) The responsibilities of the Attorney-General relating to the administration of the criminal law; or
- (b) The exercise of any power by the Attorney-General under any enactment or rule of law.

IMPENDING APPOINTMENTS AT CROWN LAW

- 170. As explained in chapter 1, the Government recently commissioned a Performance Improvement Framework Review of Crown Law. My understanding is that Crown Law has already seen a draft of the report and is in the process of implementing some of the recommended changes.

171. For the purpose of this review, it is useful to note that Crown Law is in the process of appointing a Deputy Chief Executive (as a 12- to 18-month secondment) and a Principal/Senior Policy Adviser. Both roles will assist in the management of the third of Crown Law's four appropriations, namely the Supervision and Conduct of Indictable Prosecutions.
172. Specifically, Crown Law's job description for the Deputy Chief Executive states that this appointment will:
 - 172.1. Have a pivotal role in ensuring all Crown Law public sector obligations are met and that Crown Law is delivering on Government priorities and its core business to the highest possible standard;
 - 172.2. Provide vision, strategic direction and executive leadership throughout the organisation;
 - 172.3. Have a significant leadership role in the justice sector and lead Crown Law's work in the Justice Sector Officials Group;
 - 172.4. Lead the development of Crown Law's public sector management capability and practices; and
 - 172.5. Ensure that the implications of public policy and justice sector developments for Crown Law are understood.

Preliminary Comments on Goal Two

173. There need to be well-defined guidance, monitoring and reporting arrangements in place between the Solicitor-General, enforcement agencies and prosecutors.
174. These arrangements should promote:
 - 174.1. Substantive accountability;
 - 174.2. Quality in prosecutors;
 - 174.3. A collective culture among prosecutors;
 - 174.4. Consistency and transparency in prosecution decision-making;
 - 174.5. Consistency and transparency in operational prosecution policies; and
 - 174.6. Transparency surrounding the efficiency of the prosecution service as a whole.

Goal Three: Efficiency

175. Clearly given the current fiscal climate, the efficiency of the prosecution service is extremely important. Here 'efficiency' means finding the appropriate balance between quality and cost.
176. For the prosecution system to work there must be a high-quality prosecution service because public confidence in the system is critical. However, the simple reality is that there is a limited amount of money available to conduct prosecutions. The Government has other objectives that must be met as well.
177. In relation to quality, I note that the quality of the prosecution service cannot be measured easily. Statistical analysis of data, such as prosecution outcomes or the time taken to resolve a matter is inappropriate because there are endless variables that might be relevant to these statistics. Many of these variables will be completely beyond the control of the prosecutors.
178. Accordingly, in assessing the quality of the current prosecution service for the purpose of this review, I have relied almost entirely on my discussions with stakeholders and on my general observations regarding the main players. To my mind this approach is in keeping with the importance of the public having confidence in the system.
179. In relation to cost, I note that the prosecution system is inherently labour intensive. The cost per unit of that labour is also relatively high. It takes considerable training to prosecute even at a low level.³⁸ In this kind of labour-intensive system, cost is highly time-sensitive.
180. In my opinion, there are four key risks that need to be managed.
- 180.1. Matching skills to the difficulty of the task: Paying senior prosecutors to carry out junior level tasks is inefficient. Likewise, putting junior or inexperienced people on serious cases carries quality risks, with flow-on costs in terms of court time and case outcomes.
 - 180.2. Economies of scale: It is inefficient for enforcement agencies with small volumes to make sizeable investments in prosecution capability. The same can be said for small prosecuting law firms. A critical mass must be reached before the costs associated with obtaining the necessary capabilities (for example, retaining appropriate staff and investing in their training and development) can be recouped.
 - 180.3. Financial incentives: There is a real danger in a system that contains financial incentives inconsistent with its overall goals. One of the main goals of the prosecution system must be early resolution with appropriate results. Accordingly any incentives to needlessly prolong a prosecution must be avoided.
 - 180.4. Monopolies: These have the potential to create a situation where the purchaser needs the provider more than the provider needs the purchaser. This power imbalance can prove costly in the long term.

I have focused on these risks in my discussions concerning the efficiency of each of the main players in the prosecution service in Part V.

³⁸ Certainly labour for legally trained people is not in short supply so there is strong competition for junior prosecution positions. Notably, though, only a small pool of lawyers have sufficient experience to conduct the prosecutions with the highest level of public interest and seriousness.

181. A further point about cost is that, throughout the review, I heard comment about the need to set the Crown Solicitors' hourly rates on par with the Crown-funded defence service. I agree that, generally, justice outcomes can be impaired when either the prosecution or the defence is inadequately resourced. However, I consider that there is no need for the rates to be equal. The work that prosecutors and defence lawyers do is different and, organisationally, they are structured in a completely different way.
182. Turning then to the balancing exercise, first I acknowledge that there is no precise linear correlation between cost and quality. An expensive prosecution service may perform poorly and a cheap service may perform well. However, generally there is a broad correlation between the two, particularly when the private sector is involved.
183. In that regard, I note that there are delivery risks if Crown Solicitors are placed under so much financial pressure that they return their warrants. At the very least it must be acknowledged that driving costs down will have an impact on quality. This concern is less applicable to the public sector, although there are both quality and delivery risks if funding pressures reach a tipping point.
184. Second, and probably more importantly, it is impossible to determine whether the prosecution service is working efficiently without knowing the costs associated with the service. As discussed above in relation to oversight, transparency of cost at a fairly detailed level is critical.

Preliminary Comments on Goal Three

185. It is extremely important that our prosecution service is efficient, in that it strikes an appropriate balance between quality and cost.
186. In assessing whether the balance is appropriate the following factors are relevant.
- 186.1. The quality of the prosecution service must be sufficiently high for the public to have confidence in it.
- 186.2. In assessing the cost side of the equation, it is necessary to consider the risks around:
- Matching skill levels to tasks;
 - Economies of scale;
 - Financial incentives; and
 - Monopolies.
- 186.3. Driving costs down is likely to impact on quality and may carry a delivery risk to the Government.
187. Further, it is impossible to assess the efficiency of the prosecution service if its costs, at a fairly detailed level, are not transparent.

CHAPTER 6: THE OPTIONS FOR REFORM

Introduction

188. The TOR asked me to consider a range of options for improving the prosecution service by re-organising the roles and functions within it. In particular, the TOR stated that I should consider changing the delivery model towards greater public sector delivery, and changing the current purchasing model for Crown Solicitor services.
189. In performing this task I have found particularly helpful the options for reform identified by the Law Commission in its 1997 and 2000 reports on criminal prosecutions. I have used these options as a starting point and developed a range of variations around them. Further I have taken into account the suggestions made by John Isles, New Zealand Institute of Economic Research, and Laurenson and Taylor in their various reports on the costs of indictable prosecutions.
190. The options for reform that I considered fall into the following three main categories:
 - 190.1. Further privatisation of prosecution services;
 - 190.2. Further public-sector delivery of prosecution services; and
 - 190.3. Building on and adapting the present structure.
191. This chapter simply outlines these options and includes a few preliminary comments. A detailed assessment of each option is contained in chapter 14.

Further Privatisation

192. The Law Commission saw the option of further privatisation as an extension of the system of using Crown Solicitors to conduct indictable prosecutions. In short, the Commission considered making all prosecution work 'contestable' by opening it up to the market place.
193. In practical terms, under this option the Solicitor-General would establish and monitor a panel or panels of private sector lawyers. Enforcement agencies would then be free to engage the services of any panel member they chose. The public interest would be protected by the conditions of the contracts and the Solicitor-General would retain ultimate control through retaining the powers to stay prosecutions and to take them over if necessary.
194. The potential benefits of this system would be that:
 - 194.1. Additional private sector competition might lead to efficiency gains; and
 - 194.2. It would extend the privilege of appearing for the Crown to a wider range of lawyers, including defence lawyers, which would minimise the risk of polarising Crown and defence counsel.
195. The potential drawbacks of this system would be that:
 - 195.1. Privatisation would be contrary to the international trend towards strengthening the public aspects of prosecution;

- 195.2. Privatisation would not address, and would probably exacerbate, any concerns surrounding consistency;
- 195.3. Quality in the conduct of prosecutions might be compromised through the fragmentation of resources and experience;
- 195.4. Government agencies might view themselves as clients, entitled to direct prosecution decisions, which would be contrary to principle;
- 195.5. The rates paid to Crown Solicitors under the Regulations are already well below the market rate for private sector lawyers; and
- 195.6. This system would be markedly different from the present prosecution service and would therefore involve considerable start-up costs.

VARIATIONS ON THE OPTION OF FURTHER PRIVATISATION

Panels for specialised, serious and/or expensive cases

- 196. The general option of further privatisation is not an all-or-nothing one. For example, the Serious Fraud Prosecutors Panel already exists and specialises in fraud offending. Similarly, additional panels could be introduced that specialise in other types of offending such as tax, environmental and/or health and safety offending. Another option I have considered is introducing prosecuting panels to deal with only the most specialised, serious and/or expensive prosecutions.
- 197. By creating prosecuting panels for only a small percentage of cases, the risks identified in paragraph 195 would be minimised while the benefits described in paragraph 194 would be retained.

Expanded role for Crown Solicitors

- 198. An alternative way of further privatising the current system would be to expand the role of the Crown Solicitors by making them responsible for all prosecutions, both summary and indictable.
- 199. A variation on this concept would be to return to the pre-1987 practice whereby Crown Solicitors conducted all summary prosecutions except those where the Solicitor-General had given an enforcement agency prior approval to use its own employees.

Further Public Sector Delivery

- 200. The Law Commission modelled the broad option of expanding public sector delivery on the independent Crown prosecution services established in England, all of the Australian states and Scotland.
- 201. In practical terms this option involves the establishment of an independent public sector body as a Crown Prosecution Service (CPS). The CPS would have primary responsibility for all public prosecutions and would employ salaried prosecutors in a head office and regional offices. Employed prosecutors would be responsible for all of their prosecution decisions through a Director of Public Prosecutions to, perhaps, the Solicitor-General but ultimately the Attorney-General.
- 202. The workload of the CPS could be varied in a number of ways. It could be responsible for all indictable prosecutions, all summary prosecutions, both indictable and summary prosecutions, or anything in

between. Further a policy of briefing experienced local practitioners from outside of the CPS to conduct cases in court could be adopted to whatever extent was thought fit.

203. The potential benefits of this system would be that:
- 203.1. In administrative terms it would match and complement a national police force;
 - 203.2. It would promote consistency in decision-making and the adoption of prosecution policies;
 - 203.3. A CPS would be inherently independent of enforcement agencies, allowing for a more robust review of initial charging decisions; and
 - 203.4. There would be clear lines of accountability.
204. The potential drawbacks of this system would be that:
- 204.1. The establishment of a CPS would require a considerable initial investment in employing full-time, legally trained prosecutors throughout the country;
 - 204.2. It would involve a radical change to the prosecution service and could have detrimental effects, at least in the short term, on public confidence in the prosecution system; and
 - 204.3. Efficiency gains would be difficult to determine.

VARIATIONS ON THE OPTION OF FURTHER PUBLIC SECTOR DELIVERY

Expanded role for the Police Prosecution Service

205. Again I am of the view that there are numerous ways in which the public sector could be given a greater role in conducting prosecutions, without needing to create an independent CPS responsible for all public prosecutions.
206. One variation on this broad option would be to build on the pre-existing capabilities of the PPS by making it responsible for all summary prosecutions. Given that the PPS currently conducts the vast majority of these prosecutions, gaining responsibility for more of them would not radically change the status quo.

A prosecuting role for Crown Law

207. A further variation would be to expand the responsibilities of Crown Law by giving it a new prosecuting role. This option would be modelled on the public prosecution services that operate in most of Canada.
208. There are two different ways in which this option could work in practice. First, Crown Law could be expanded by setting up additional regional offices and employing legally trained prosecutors to conduct public prosecutions nationwide. This would essentially mirror the CPS option described above. Second, Crown Law could be given a new prosecuting role on a much smaller scale. For instance, it could be given responsibility for prosecuting only the most serious or expensive cases.

Adapting the Present Structure

209. Adapting the present structure was the Law Commission's preferred broad option. The Commission considered that the existing system and structure should be changed only if demonstrably necessary. It stated that nothing in its review of the prosecution system indicated the existence of such radical flaws that an entirely new model for prosecution services was warranted.
210. Accordingly, the Law Commission recommended retaining the same actors in the prosecution system. That is, Crown Solicitors would remain responsible for indictable prosecutions and enforcement agencies would remain responsible for summary prosecutions. However it also recommended that: Crown Solicitors should become involved in cases earlier; the Police should establish an autonomous prosecution service; and the Solicitor-General should be given an expanded role in overseeing all public prosecutions.

VARIATIONS ON THE OPTION OF ADAPTING THE PRESENT STRUCTURE

211. Many of the options discussed above in the context of further privatisation and further public sector delivery would actually involve building on the present system. What have not been discussed, however, are additional options for restructuring the Solicitor-General's relationship with Crown Solicitors.

Contracting Crown Solicitors

212. One option that has been considered on multiple occasions over the last 20 years is for the Solicitor-General to retain the services of Crown Solicitors on a contractual basis. Such contracts could be open-ended or they could have a fixed term. The contracts could replace the current warrants or some form of warrant could be built into the contract. The contracts could be awarded as a result of a tendering process. They could be based on fixed fee or bulk funding models. Variations on this option are endless.

Changing the number of Crown Solicitors

213. A further variation on this broad option would be to appoint more warrant holders by creating smaller warranted regions or by having warrants with overlapping jurisdictions. This increase in positions would encourage Crown Solicitors to broaden the type of work they conduct on a regular basis. This might necessitate a relaxation of the current restrictions on Crown Solicitors appearing against the Crown in civil matters. A variation on this option would be to appoint fewer warrant holders, thereby increasing the economies of scale.

Preliminary Comments on the Options for Reform

214. I acknowledge from the outset that, in conducting this review, I have predominantly focused on the third broad option for reform: adapting the present system. There are three main reasons for this.
- 214.1. As will become apparent I have not received information during this review to indicate that the present prosecution service delivery system is fundamentally flawed.
 - 214.2. The current fiscal climate is not well suited to a reform that requires a substantial upfront cost. Given Cabinet's direction that any preferred option for reform should be fiscally neutral, a reform involving major upfront costs would need to bring correspondingly large savings to be worthwhile.
 - 214.3. There is currently a vast gap in information on the true costs of public prosecutions. As such it is impossible to calculate the cost savings that any of the more radical options could achieve with any degree of certainty. Further, the substantial changes proposed under CPRAM make forecasting at this time particularly difficult.

PART III: Prosecution Decision-Making

CHAPTER 7: THE TWO CENTRAL PROSECUTION DECISIONS

Introduction

215. This chapter examines the two prosecution decisions that I consider to be of utmost importance to the integrity of the overall prosecution system: the decision to prosecute (or not); and the choice of charges. I look at the current decision-making processes and ask the following questions.
- 215.1. Who makes the initial prosecution decisions?
 - 215.2. How are these decisions made?
 - 215.3. Are the decisions monitored?
216. The current processes surrounding each of the two decisions are then assessed with reference to the central principles for robust decision-making that I identified in chapter 5.
- 216.1. Prosecutions should only take place if they are in the public interest.
 - 216.2. There are limited resources available for prosecutions. These should be reserved for pursuing cases that are in the public interest with appropriate vigour. Conversely, those cases that are not in the public interest need to be identified in a timely and efficient manner to conserve resources.
 - 216.3. Investigators and prosecutors should be collectively responsible for the early identification of cases and/or charges that are not in the public interest.
 - 216.4. Investigators and prosecutors should adopt transparent and consistent policies in making their prosecution decisions.
217. At the end of each assessment is a series of recommendations.

Who Makes the Initial Prosecution Decisions in the Current System?

THE POLICE

218. As discussed in chapter 4, the Police initiates the vast majority of all summary and indictable prosecutions in New Zealand.
219. The current process within the Police is that the initial decisions relating to whether to prosecute and what charges to lay are made by the officer-in-charge of the case (an investigator). If a decision is made to prosecute then the officer-in-charge will select the charge(s) and draft the information(s). These decisions will then be reviewed by a supervisor prior to the information(s) being filed in court.
220. Ordinarily the officer-in-charge will not consult with a prosecutor before laying the initial charge(s) in court. This is largely for practical reasons given the sheer volume of cases processed by the Police, the need to lay charges promptly and the 24-hour nature of the job.
221. After the laying of the initial charge(s), the case will be transferred to the PPS for a review of the decision to prosecute and the choice of charge(s). If the case is then to proceed by way of indictment, the Crown Solicitor will conduct a further review of these decisions after committal for trial.

CORRECTIONS

222. The Department of Corrections initiates the next highest volume of prosecutions. It adopts a similar approach to the Police in making the initial prosecution decisions.
223. Prosecutions initiated by Corrections relate to breaches of the conditions of a sentence or order, for instance community work, parole or supervision. The decision to prosecute (or not) is made by the supervising probation officer in consultation with their service manager. If a decision is made to prosecute then any relevant information is filed in court and the case will be progressed by probation officers who are required to be at the court to provide advice and information to the court to assist with sentencing. If the matter proceeds to a defended hearing it will be transferred to a specialist prosecution-trained probation officer or a Crown Solicitor. The probation officer or Crown Solicitor will then present the case in court.

OTHER ENFORCEMENT AGENCIES

224. The remaining Government agencies surveyed for the review indicated that their investigators make initial recommendations on whether to prosecute and what charge(s) should be laid. These recommendations are considered internally through varying peer review structures before the formal laying of any charge(s) in court.
225. I understand that this peer review process usually involves obtaining advice from an in-house legal adviser/prosecutor or a Crown Solicitor. This advice may be informal and issue specific or, at the other end of the spectrum, the prosecutor may be asked to review the entire case at this stage and to draft the information on the agency's behalf. The latter approach appears to be relatively common.³⁹

³⁹ CAA, the Commerce Commission, DIA, DOL, FMA, Historic Places Trust, Housing NZ, MED and the SFO appear to regularly adopt this approach.

226. One or more informations are then filed in court and (unless this has already occurred) the prosecutor will conduct a full review of the prosecution decisions.

How are the Prosecution Decisions made in the Current System?

227. From the feedback provided by enforcement agencies for this review, it appears that the Prosecution Guidelines are widely used by both investigators in making their initial prosecution decisions and prosecutors in reviewing those decisions.⁴⁰ This practice exists despite the fact that the Guidelines are primarily designed for prosecutors and adherence to them is only mandatory for Crown Solicitors.⁴¹
228. In addition to the Prosecution Guidelines, various Government agencies use their own enforcement policies to assist in making and reviewing prosecution decisions. These policies have been designed to be consistent with the Prosecution Guidelines.

THE PROSECUTION GUIDELINES

229. The Prosecution Guidelines specifically discuss both the decision to prosecute and the choice of charges.
230. The Guidelines state that the test for prosecution is met if:
- 230.1. The evidence that can be adduced in Court is sufficient to provide a reasonable prospect of conviction ('the evidential test'); and
 - 230.2. Prosecution is required in the public interest ('the public interest test').
231. It is then clarified that a reasonable prospect of conviction exists if:
- in relation to an identifiable individual, there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond a reasonable doubt that the individual who is prosecuted has committed a criminal offence.
232. In relation to the public interest test, the Guidelines begin by stating that there is a presumption in favour of prosecution if there is a reasonable prospect of conviction on the evidence, particularly if the case is serious. The Guidelines go on to recognise that the presumption may be confirmed or displaced by public interest factors. Two illustrative lists then follow:
- 232.1. A list of 16 public interest factors that favour prosecution – these are factors that increase the defendant's level of culpability and/or risk of re-offending; and
 - 232.2. A list of 13 public interest factors that weigh against prosecution – these are factors that indicate that the offending was not particularly serious; decrease the defendant's level of culpability; relate to the risk of damaging confidence in the justice system, national security or the victim's health; and/or relate to alternative methods for addressing the offending.

⁴⁰ This was evident from the questionnaire responses and from the workshop with in-house prosecutors held on 14 June 2011.

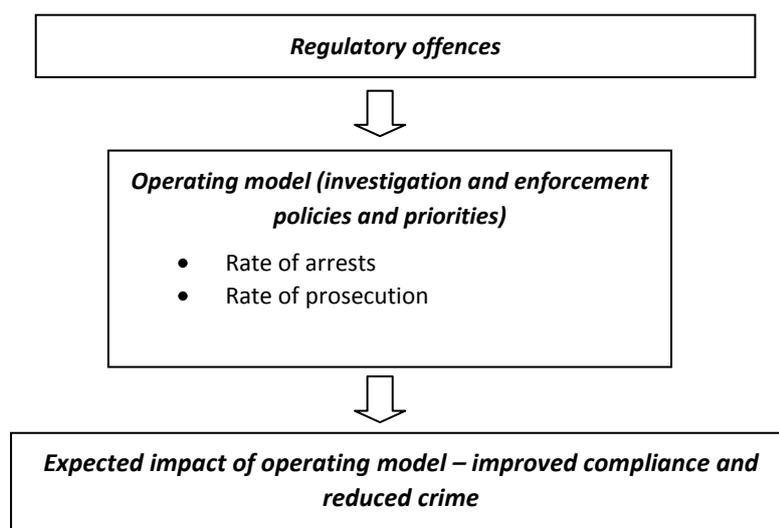
⁴¹ Compliance with the Prosecution Guidelines is a condition of the warrants held by Crown Solicitors. For all of the prosecutors in the summary jurisdiction, such compliance is voluntary.

233. The Guidelines conclude by reiterating that the factors identified in the test are non-exhaustive and by emphasising that all of the public interest factors must be identified and balanced in light of the particular circumstances of each case.
234. It is worth noting at this point that the Prosecution Guidelines make no explicit reference to the cost of the prosecution as a relevant public interest factor.
235. In relation to the choice of charges, the Guidelines begin with a general statement that the number and nature of the charge(s) should truly reflect the totality of the offending and the public interest in having appropriate convictions entered against the accused.
236. It is clarified that ordinarily following this principle will result in charges being laid for alleged crimes punishable by seven years or more and those committed by members of organised criminal groups.
237. The Guidelines then allude to the concept of plea bargaining and state that:

Neither the number nor seriousness of charges should be decided by having regard to the impact of that decision on the likelihood of an offer by the defendant to plead guilty to a lesser charge.

ENFORCEMENT POLICIES

238. Many of the enforcement agencies surveyed for the review stressed the importance of taking into account their own enforcement policies when making or reviewing prosecution decisions.
239. These enforcement policies set out what the agency hopes to achieve by investigating certain offences and by dealing with them through either prosecution or alternative resolution. In combination with the enforcement budgets, these enforcement policies ultimately drive the rate of prosecutions in this country, as the diagram below illustrates.



240. Some of the enforcement agencies surveyed have very clear and transparent enforcement policies. For example, Inland Revenue publishes two papers that explain its overall enforcement strategy. These papers state that prosecution is a measure of last resort and set out the public interest factors that will

be taken into account in determining which cases to refer for prosecution and which cases to deal with by way of alternative resolution. Another example comes from the Police, which has a 'Statement of Policy and Practice'. This Statement supplements the Prosecution Guidelines and explains the relevance of alternative resolution options such as the Police Adult Diversion Scheme. The Civil Aviation Authority (CAA), the Commerce Commission, Historic Places Trust, Housing NZ, Maritime NZ and Ministry of Social Development (MSD) also appear to have fairly comprehensive written enforcement policies.

241. Other agencies have guidelines or papers that explain particular aspects of their enforcement policies. For instance, Customs has guidelines surrounding diversion; Fisheries has guidelines on warning offenders; DOL publishes a paper on the policy surrounding health and safety prosecutions; and the Ministry of Education publishes a paper on its truancy prosecution policy.
242. At the other end of the spectrum, Corrections,⁴² Department of Internal Affairs (DIA), Department of Conservation (DOC), MED, Ministry of Health (MOH) and the SFO advised that they use only the Prosecution Guidelines to make their prosecution decisions.

Are the Prosecution Decisions Monitored in the Current System?

243. Prior to laying initial charges, it appears that all of the surveyed enforcement agencies internally review the decision to prosecute and the choice of charge(s) at least once. This review process takes into account the Prosecution Guidelines and (if applicable) the agency's enforcement policies. It may also involve obtaining advice from an in-house legal adviser/prosecutor or a Crown Solicitor.
244. At the point of laying charges, the case enters the prosecution system and begins to have a profound effect on the individuals concerned. This is also when the process of reviewing the decision to prosecute and the choice of charge(s) becomes more public, with the result that there are better records of the rate at which these decisions are changed. For instance I have been provided with:
 - 244.1. Figures from the Police and Corrections relating to how often the charges they lay in the summary jurisdiction are withdrawn in court;
 - 244.2. Estimates from the Crown Solicitors as to how often the charges in an indictment differ from those in the informations; and
 - 244.3. Estimates from the Crown Solicitors as to how often indictable charges are dismissed by the court.
245. In addition, various stakeholders have offered their views as to whether cases and charges are appropriately selected for prosecution at present.

POLICE RECORDS

246. The PPS has advised that 10.7% of summary prosecution cases in 2009/10 were withdrawn. The equivalent figure was 11.6% in 2008/09. The PPS did not record the reason for the withdrawals but noted that insufficient evidence (for instance, through non-attendance of witnesses) was often the cause. I am advised that enhancements to Police recording capability will enable routine capture of the

⁴² See below regarding my comments about the current internal review. I understand that Corrections are looking at developing their own guidelines regarding the use of prosecution and available alternative sanctions.

reasons for withdrawn/dismissed cases in 2012/13, therefore providing visibility and transparency of prosecution case outcomes.

CORRECTIONS RECORDS

247. The Department of Corrections has advised that 6% of the informations it laid in court in 2009/10 were later withdrawn. A further 17% resulted in a conviction and discharge. Corrections suggested that one of the reasons for the withdrawal rate was the practice of charging individuals with multiple breach offences. It was explained that this practice has developed for various reasons including: as a negotiating tool; to balance the perceived lenient sentencing practices of certain Judges; and due to insufficient communication between Corrections staff. I understand that Corrections is currently reviewing the way in which it holds offenders to account as part of a wider review of its practice that was initiated in 2009. This includes a review of the threshold and policies for initiating breach action and the available alternatives as well as the use of incentives as well as sanctions.

CROWN SOLICITORS' ESTIMATES

248. Crown Solicitors have advised me that it is rare for them to discontinue a prosecution that has been committed for trial. However, they indicated that they do routinely change the charges faced by the accused.

249. The estimates from the Crown Solicitors varied considerably. One said that the charges in the indictment differed from the informations 10% of the time. Two said the figure was closer to 90%. The majority though suggested that 40–50% of the time the charges are changed.

250. Interestingly, almost all of the Crown Solicitors suggested that different charges are most likely to be laid in cases involving violent or historic sexual offending. Further, many of them suggested that the Police does not take the same approach to specific and representative charges as they do. However, I note that this second issue is likely to be ameliorated by the new provisions on specific and representative charges outlined in clauses 16 and 17 of CPRAM.

251. In relation to indictable prosecutions being dismissed by the court, the Crown Solicitors advised that this outcome is not frequent. They offered that when the court takes this step it is usually because of: evidence being ruled inadmissible; witnesses not attending the trial or not coming up to brief; the accused dying; or the accused pleading guilty to an alternative charge.

STAKEHOLDER COMMENTS

252. The Criminal Bar Association, the New Zealand Bar Association and the New Zealand Law Society (NZLS) all expressed concern that the Police, other enforcement agencies and Crown Solicitors are currently over-charging. It was suggested that some cases are being prosecuted when they should not be and that in other cases, inappropriately serious charges are being laid. Further, it was suggested that other enforcement agencies are also too quick to prosecute.

253. The Police acknowledged that over-charging does occur but stated that this is usually due to the involvement of inexperienced officers. It was suggested that additional training has reduced this type of behaviour recently. This improvement was specifically recognised by the NZLS.

254. The Police also noted that its rate of initiating prosecutions has reduced by around 8% in the last couple of years. This reduction has been due, in part, to recent changes to their alternative resolution policies.

255. Other stakeholders expressed concern about under-charging. One Judge and a Crown Solicitor commented that this problem is much bigger than over-charging at the moment. Their rationale for this suggestion was that there is virtually no available remedy for improper decisions not to prosecute and inappropriately lenient charges.⁴³ In contrast, the Courts can dismiss completely unmeritorious cases and charges can be reduced with relative ease.
256. This concern accords with advice I received from the Independent Police Conduct Authority (IPCA) and the Office of the Ombudsmen that complaints are more common in relation to decisions *not* to prosecute than to decisions to prosecute. In many cases this probably reflects a perception of under-charging by the victims of crime. However, I note that both the IPCA and the Ombudsmen also advised that neither of these types of complaint is made very often, let alone upheld.

My Assessment of the Decision to Prosecute (or not)

THE STRENGTHS OF THE CURRENT SYSTEM

257. In my opinion the Prosecution Guidelines are a very useful tool for promoting transparency and consistency in relation to the decision to prosecute (or not). The Guidelines are available to the public and contain a very clear test for prosecution. It seems that this test is being applied by investigators and prosecutors alike, throughout the country.
258. The practice of supplementing the Guidelines with agency specific enforcement policies also seems to be appropriate. The existence of these policies shows that the agencies concerned have thought about what they hope to achieve through their prosecutions, and that they are selecting cases for prosecution with that goal in mind. Furthermore, many of these policies are available to the public, which promotes transparency.
259. Overall, these structures appear to have achieved a fairly robust decision-making process. There has been no indication that court time is being habitually wasted by unmeritorious cases; the rate of withdrawal of Police summary prosecutions is relatively high but it has dropped in recent years and is largely explained by the non-attendance of witnesses; and Crown Solicitors have advised that cases are rarely withdrawn or dismissed once they reach the indictable jurisdiction.

THE WEAKNESSES OF THE CURRENT SYSTEM

260. Despite the remarks above, I am concerned that some prosecutions at present are not in the public interest. There are four main reasons for this concern.
- 260.1. Not all enforcement agencies have their own specific enforcement policies. This suggests that they may not have explicitly considered the wider compliance and crime reduction goals of their prosecutions. This possibility is particularly concerning to me. Enforcement policies determine the overall rate of prosecutions and that rate is the major driver of cost to our prosecution system.

⁴³ As will be discussed in chapter 8, an improper decision not to prosecute could be remedied by laying a complaint about the prosecutor. If the complaint is upheld then there is a possibility that the agency might review its decision not to prosecute. In relation to inappropriately lenient charges, the only clear remedy available is that Crown Solicitors are not constrained in any way by the charge(s) in the information(s) when they lay an indictment.

- 260.2. Aside from the Police, the enforcement agencies surveyed seemed to be largely unaware of the costs of the prosecutions that they initiate.
- 260.3. Unlike in most jurisdictions throughout the Commonwealth, our Prosecution Guidelines do not expressly recognise that cost is a relevant factor in determining whether a prosecution is in the public interest.
- 260.4. There is no external monitoring of the decision to prosecute at present. As such, there is no certainty that the Guidelines are being consistently applied.
261. Together these observations suggest that, at present, there are few mechanisms in place to ensure that cases are only selected for prosecution if they are likely to represent money well spent.
262. In my opinion this is not just a theoretical problem. The following practical realities also apply.
- 262.1. There is widespread confusion amongst Prosecution Forum attendees as to whether cost is relevant in determining whether to prosecute. At the workshop on 14 June 2011, these prosecutors acknowledged that the list of public interest factors is non-exhaustive. However most felt that, in theory at least, cost should not be taken into account in reflecting on the public interest.
- 262.2. There is no evidence that Crown Solicitors regularly consider cost as a public interest factor. To me, it seems unlikely that they would. As private sector lawyers, Crown Solicitors have a vested interest in the continuation of prosecutions. Further, despite the public duty aspect to their role, they are unlikely to feel inherently responsible for protecting the Government's coffers.
- 262.3. Investigators also use the Prosecution Guidelines in making their initial decision as to whether to prosecute. Accordingly, the absence of a reference to cost in the Guidelines is likely to affect them as well.
- 262.4. It is inappropriate to leave the issue of cost entirely to investigating agencies because:
- 262.4.1. Prosecutors will often have a better understanding of what a prosecution is likely to involve and therefore the likely costs; and
- 262.4.2. To determine whether a prosecution will promote enduring public good and order, all of the relevant public interest factors must be weighed against each other.
263. Corrections recently compiled a report on the current state of the enforcement actions undertaken as part of their review of how they hold offenders to account. This report provides a good illustration of why a cost-benefit analysis of prosecutions is important.
264. The report observed that in 2009/10 Corrections spent an estimated \$11,000,000 on all aspects of holding offenders to account that resulted in a prosecution. This figure was based on staff spending an average of three hours preparing each of the files in relation to the 32,544 informations that were laid by the Department that year.⁴⁴ The report valued that time at \$110 per hour. It then noted that 6% of

⁴⁴ The three hours of staff time is based on two hours of staff working with offenders to effect better compliance through the use of internal warnings and motivation, and one hour spent in formalising the breach and progressing the case through the court

the informations were withdrawn and 17% resulted in a conviction and discharge. The report concluded that enhancements could be made in this area and suggested that cheaper and potentially more effective alternatives to prosecution should be considered. I understand the Department is currently examining a range of alternatives with a focus on the better utilisation of internal sanctions and incentives without reducing public safety or sentence integrity. Other alternatives could include introducing a formal demerit point system with an ultimate consequence of re-sentencing.

265. This type of cost-benefit analysis demonstrates how understanding the detail of prosecution practice can potentially create gains in efficiency and effectiveness.

Key Findings on the Decision to Prosecute (or not)

266. The following are my key findings on the robustness of the current processes for making the decision to prosecute or not.
- 266.1. Overall, the structures that are currently in place surrounding the decision to prosecute (or not) have achieved a fairly robust decision-making process.
 - 266.2. The Prosecution Guidelines are a very useful tool for promoting transparency and consistency in relation to the decision to prosecute (or not).
 - 266.3. The practice of supplementing the Guidelines with agency-specific enforcement policies is appropriate.
 - 266.4. Cost should be taken into account when deciding whether an individual prosecution is in the public interest and on whether the overall prosecution rate for each enforcement agency is appropriate.

Recommendations for the Decision to Prosecute (or not)

267. I recommend that:
- 267.1. All enforcement agencies should be encouraged to draft their own, publicly available enforcement policies, which are consistent with the Prosecution Guidelines and provide an additional resource in deciding whether to prosecute (or not);
 - 267.2. Aside from the Police, all enforcement agencies should keep more detailed records concerning their prosecutions, including information on the rates at which charges are withdrawn, the reasons for these withdrawals and the overall cost of prosecutions; and
 - 267.3. The Law Officers should consider amending the Prosecution Guidelines to include an explicit reference to the cost of prosecutions as being relevant to any assessment of the public interest.
268. In relation to the last recommendation, I propose that the Guidelines should be amended to include the following general statement:

The resources available for prosecution are not limitless, and should not be used to pursue inappropriate cases. The corollary is that the available resources should be employed to pursue with due vigour those cases worthy of prosecution.

269. This general statement would make it plain to Government agencies that the costs of prosecuting must be taken into account when drafting any enforcement policies. It would also reinforce the proposals in chapter 9 (paragraph 413) that Government agencies should regularly report to Crown Law on the cost of their prosecutions and that the Solicitor-General should inform these agencies of the cost of the indictable prosecutions that they initiate.
270. Additionally, I propose that the Guidelines should also include a reference to cost as a specific public interest factor. This would be a transparent recognition of the practical reality that cost is relevant in determining whether a particular prosecution will promote enduring public good and order. Further, if it is included in the Guidelines investigators and prosecutors will both be aware of the relevance and will be able to share information to ensure that cost is given due consideration.
271. A very important point though is that cost is just one of the many public interest factors. It should not be weighted as any more significant than the others. In fact, I suggest that any specific reference to cost as a public interest factor in the Guidelines should be linked to the seriousness of the offending. For example: *'the likely length and expense of the trial when considered in relation to the seriousness or triviality of the offence'*. Such a link should reduce the risk of this factor being used to avoid prosecuting complicated cases. Such cases may still warrant prosecution even though they are expensive. As stated in chapter 5, the deciding factor must be the seriousness of the case.

My Assessment of the Choice of Charges

THE STRENGTHS OF THE CURRENT SYSTEM

272. Overall, I consider that there is little evidence that either over-charging or under-charging is a systemic problem in New Zealand. Clearly there are isolated incidents of over-charging and under-charging. However, at the more general level the greatest concern that can be identified is that there is some confusion as to whether charges are being pitched at an appropriate level.
273. In terms of structures, I am again of the view that the Prosecution Guidelines are a very useful tool for assisting investigators and prosecutors in determining the charge(s) that should be laid in any particular case. They clearly outline the general principles that should be applied but leave ample scope for judgment calls to be made in relation to individual cases.

THE WEAKNESSES OF THE CURRENT SYSTEM

274. Despite the existence of the Guidelines, it appears that at present the charges laid in any given case are frequently amended during the proceedings. This practice is far from ideal.
275. Changing charges results in uncertainty for the accused, the victims and the witnesses. If charges are increased then the accused's expectations will be dashed. If they are reduced then victims and witnesses may feel let down by the system.
276. In making these comments I acknowledge that there must be room for a divergence of opinion in relation to the choice of charges, as this decision inherently involves a high degree of judgment. Further, it is accepted that in some cases charges should be amended, such as where further evidence comes to light or where a guilty plea is offered to a lesser charge that would still adequately reflect the overall offending. However, it is my view that the process for selecting charges to prosecute should be designed to limit the number of amendments that are made.
277. Bearing these observations in mind, I still consider that the current charge selection process is flawed for the following two reasons:

278. First, there is anecdotal evidence to suggest that charging practices have developed that are inconsistent with the Guidelines. For example:
- 278.1. Some Police investigators are still laying overly serious charges in the hope of encouraging a plea bargaining process;⁴⁵ and
 - 278.2. Some Corrections investigators are laying multiple breach charges as a way of encouraging a plea bargaining process or circumventing the perceived lenient sentencing practices of certain Judges.⁴⁶
279. Second, there is evidence to suggest that inconsistent charging policies have developed among prosecutors in relation to particular types of offending. For example, the PPS and Crown Solicitors appear to adopt very different approaches to selecting charges for violent and historic sexual offending.
280. These flaws are compounded by the fact that charging decisions are not the subject of any external monitoring at present.

Key Findings on the Choice of Charges

281. The following are my key findings in relation to the robustness of the current decision-making processes surrounding the choice of charges.
- 281.1. Overall, I consider that there is little evidence to support a conclusion that either over-charging or under-charging is a systemic problem in New Zealand. However, it is clear that there are isolated incidents of both.
 - 281.2. The Prosecution Guidelines are a very useful tool for assisting investigators and prosecutors in determining the charge(s) that should be laid in any particular case.
 - 281.3. The charges laid in any given case are frequently amended during the proceedings. This practice is far from ideal.
 - 281.4. There is evidence to suggest that a few charging practices have developed that are inconsistent with the Guidelines.
 - 281.5. There is evidence to suggest that the Police and Crown Solicitors have developed divergent charging policies in relation to violent and historic sexual offending.

SHOULD PROSECUTORS LAY THE INITIAL CHARGES?

282. One option for promoting greater consistency in charging decisions would be to shift the responsibility for laying the initial charges from investigators to prosecutors. Such an approach would be akin to the recent developments in the United Kingdom.
283. In 2003 the Crown Prosecution Service (CPS) in the UK was given responsibility for making the initial charging decisions in all but very minor cases. To facilitate this process, an additional office of the CPS was established to provide after-hours charging advice over the phone. This reform came about largely because of a white paper that was published by the UK Government in 2002.⁴⁷ This paper noted that, at

⁴⁵ This practice is inconsistent with paragraph 9.6 of the Prosecution Guidelines.

⁴⁶ This practice is inconsistent with paragraph 9.3 of the Prosecution Guidelines.

⁴⁷ White Paper: Justice For All, July 2002, CM5563.

the time, the CPS was discontinuing 13% of all cases referred to it by the Police due to matters such as insufficient evidence and unwilling witnesses.

284. In my opinion it would not be appropriate to adopt the UK model in relation to initial charging decisions at this time for the following reasons.

284.1. Outside of the Police, most enforcement agencies already obtain some form of legal advice prior to laying the initial charges.

284.2. Crown Solicitors do not often discontinue prosecutions once they reach the indictable jurisdiction and the PPS' rate of withdrawal in the summary jurisdiction has been reduced to less than 10% in recent years. This rate is not as dire as the UK figure of a total of 13% of all cases (summary and indictable) being withdrawn by the CPS straight away.

284.3. Efficiency and practicality weigh in favour of investigating Police officers retaining responsibility for initial charging decisions. First, it would be very expensive to ensure that a Crown Solicitor was available to provide charging advice on a 24-hour basis. Further, making the PPS available on a 24-hour basis would not necessarily resolve the issue of the Police and Crown Solicitors adopting different charging policies.

284.4. To protect their independence it is better for Crown Solicitors to remain removed from the initial charging decisions in the majority of cases.

Recommendations for the Choice of Charges

285. Instead of shifting responsibility for initial charging decisions to prosecutors, I recommend that:

285.1. All enforcement agencies should keep a record of the rates at which charges are amended and the reasons for those amendments; and

285.2. The Police and Crown Solicitors, with the help of Crown Law, should draft universal charging policies in relation to the two main areas of divergent practice: violent and historic sexual offending.

CHAPTER 8: INDEPENDENCE

Introduction

286. This chapter examines the mechanisms that are currently in place to promote independent decision-making by prosecutors. These mechanisms are particularly important in relation to prosecutors' role in reviewing the two central prosecution decisions: the decision to prosecute (or not); and the choice of charges.
287. I begin by looking at the current mechanisms for promoting prosecutorial independence. I then assess those mechanisms with reference to the central principles for robust decision-making that I identified in chapter 5:
- 287.1. Prosecutors are obliged to make prosecution decisions independently – that is, free from undue political or public pressure.
 - 287.2. To assist prosecutors in meeting this obligation, mechanisms need to be in place to protect them from improper pressure. However, it needs to be recognised that it is neither possible nor desirable to protect prosecutors from all external influences.
 - 287.3. Accordingly, the mechanisms need to strike an appropriate balance between protecting prosecutorial independence and promoting other relevant factors such as accountability, consistency, co-operation with investigators and managing cost.
288. My assessment is divided into general comments about the prosecution system as a whole, independent decision-making in relation to indictable prosecutions and independent decision-making in relation to summary prosecutions.
289. I discuss the summary and indictable prosecutions separately because more serious offending is prosecuted in the indictable jurisdiction, and that offending is more likely to attract political and public interest. Accordingly, the need to protect independent decision-making is heightened in relation to indictable prosecutions.

The Current System

290. At present there are three groups of public prosecutors in New Zealand: Crown Solicitors and their employees; members of the Serious Fraud Prosecutors Panel; and in-house prosecutors. Each of these groups is discussed below in turn with reference to the mechanisms that are in place to ensure that they make prosecution decisions independently.

CROWN SOLICITORS

291. As discussed in chapter 4, Crown Solicitors are responsible for almost all indictable prosecutions. They are not employed by, or contracted to, any enforcement agency. Instead, they derive their authority to prosecute from warrants issued by the Governor-General and held 'at pleasure'.
292. Each warrant relates to a particular geographical area. The warrants give each Crown Solicitor the responsibility for filing indictments in that area. Enforcement agencies are simply expected to forward their files to the Crown Solicitor after they are committed for trial. The Crown Solicitor then reviews the charging decisions, prepares the indictment and presents the case at trial.

293. By virtue of the warrants, all prosecution decisions made after committal for trial are solely matters for the Crown Solicitor to decide.⁴⁸ It is noted that compliance with the Prosecution Guidelines 2010 is a condition of the warrants. However it is clear that the Solicitor-General does not actively monitor prosecution decisions in individual cases. The warrants therefore allow for Crown Solicitors to remain at arm's length from both the Law Officers and the relevant investigating Government agencies. This structural arrangement promotes a large degree of autonomy. It also preserves the independence of the Solicitor-General if he or she is subsequently asked to exercise any Law Officer function for the particular prosecution.
294. The practical reality, however, is that over time a close relationship will develop between the Police and the Crown Solicitor in any given area, due to their regular contact and co-operation. This relationship is born out of necessity as the Police initiates almost all indictable prosecutions. It has the potential to result in the perception, or reality, that the Police is unduly influencing the decisions of Crown Solicitors.
295. I have received little anecdotal evidence to suggest that the relationship between the Police and Crown Solicitors is too close at present.
296. Further, it is observed that over the last three years there has been a dramatic reduction in the amount of pre-committal legal advice that the Police has obtained from Crown Solicitors.
297. I was advised by the PPS that in 2008/09 it spent a total of \$4,226,282.66 on Crown Solicitors. This expenditure was reduced to \$1,544,615.81 in 2009/10 and \$873,193 in 2010/11. Around 70% of the total expenditure on Crown Solicitors in 2009/10 was attributed to engaging the Crown at the pre-committal stage for complex and serious cases. I have assumed that this percentage is not an anomaly and that pre-committal advice ordinarily represents a high portion of PPS' total expenditure on Crown Solicitors.
298. This reduction has been due to budgetary constraints. However, it has also reduced the risk of Crown Solicitors being improperly influenced by their early involvement in an investigation.
299. In the summary jurisdiction, the mechanisms surrounding the independence of Crown Solicitors are less robust because of the solicitor-client relationship between the Crown Solicitors and their instructing enforcement agency. However, the Prosecution Guidelines specifically address this issue. They state that any Crown Solicitor acting on instructions in the summary jurisdiction must still act in accordance with the Guidelines. In addition, they record the expectation of the Law Officers that instructing enforcement agencies should consider themselves bound to follow the advice of a Crown Solicitor as to the choice of the charges and the conduct of any summary prosecution.⁴⁹

THE SERIOUS FRAUD PROSECUTORS PANEL

300. Under s 29 of the Serious Fraud Office Act 1990, the Attorney-General is the Minister responsible for the SFO. However, this responsibility has been formally delegated to the Minister of Police.⁵⁰ By virtue of s 30, the Director of the SFO is not responsible to the Minister of Police for decisions relating to individual cases and must act independently in that regard. This provision prevents the Minister from influencing individual prosecution decisions.

⁴⁸ This is confirmed in paragraph 28.9 of the Prosecution Guidelines.

⁴⁹ See paragraphs 28.1 to 28.4 of the Prosecution Guidelines.

⁵⁰ This delegation has been made under s 7 of the Constitution Act 1986.

301. Like Crown Solicitors operating in the summary jurisdiction, Serious Fraud Prosecutors Panel members and the SFO have a solicitor–client relationship up until the point of committal for trial. However, unlike in relation to Crown Solicitors, the Prosecution Guidelines do not specifically state that the Panel members must comply with the Prosecution Guidelines in making prosecution decisions and that the SFO should consider itself bound by their advice. This area may, however, be dealt with by the fact that, after committal for trial, the solicitor–client relationship is between the Panel member and Crown Law. Further, it is acknowledged that 14 out of the 25 Panel members are also employed in a Crown Solicitor’s Office.
302. It is also notable that the SFO routinely obtains advice from Panel members during the investigation stage of proceedings. In fact, the SFO has recently adopted a new policy of getting Panel members involved from day one of more complex investigations.⁵¹ This early involvement is reflected in the amount that the SFO spends on obtaining advice from Panel members prior to committal for trial: approximately \$523,000 in 2010/11.

THE POLICE

303. Like the SFO, the Police has statutory independence from its Minister in relation to investigation and prosecution decisions. This independence is confirmed by s 16 of the Policing Act 2008. As a consequence, the Minister of Police is unable to exert any influence over individual prosecution decisions.
304. The Police currently uses in-house prosecutors for its prosecutions in the summary jurisdiction. As discussed in chapter 5, the existence of an employment relationship makes in-house prosecutors inherently more susceptible to undue pressure from investigators. It is clear that the Police is acutely aware of this risk.
305. In the mid to late 1990s the Police faced widespread criticism in relation to its prosecution delivery service.⁵² One aspect of this criticism was that there was a lack of mechanisms in place to ensure that Police prosecutors made prosecution decisions independently. In response to these criticisms the Police established the PPS.
306. Notably the PPS is administratively separate from the criminal investigation and uniform branches of Police and has responsibility for making all post-charge prosecution decisions. It is headed by a National Manager who reports, through the Assistant and Deputy Commissioners of Operations, to the Commissioner of Police.
307. The National Manager provides strategic leadership for the PPS and has overall accountability for the delivery of prosecution services. In doing so, he or she is supported by a small PPS head office. The head office, in turn, supports a network of Police prosecutors to deliver nationwide prosecution services from 42 offices. Each office of prosecutors is managed on a day-to-day basis by a District Prosecutions Manager, who reports through a Regional Manager to the National Manager of the PPS.
308. This separate reporting line ensures that the prosecution decisions of Police prosecutors cannot be overridden by more senior officers within the criminal investigation or uniform branches. The

⁵¹ Adam Feely provided this advice during a meeting with John Spencer on 9 June 2011.

⁵² This criticism took the form of the Law Commissions 1997 Discussion Paper, judicial surveys and a series of internal Police reviews. These drivers for change are discussed in Part Three of the report: Situational Analysis of the Police Prosecution Service, Superintendent Craig Tweedie, June 2011. They are discussed further in chapter 12 of this report.

separation of the PPS from the Legal Services Team also ensures that prosecutors are not called on to provide legal advice during investigations.

309. A further point is that the PPS has recently amended its employment policies to promote prosecuting as a career option within the Police. Previously, rotational and secondment policies encouraged sergeants to spend only one or two years in the PPS as a means to further their career in the criminal investigation or uniform branches. The new policies aim to retain and train specialist prosecution staff. I am advised that the PPS continues to encourage short-term secondments and rotations into the PPS as this provides opportunities to up-skill frontline supervisors in key aspects of the Prosecution Guidelines, including the evidential sufficiency and public interest tests. This increased specialisation is also likely to increase the separation of investigators and prosecutors within the Police.

CORRECTIONS

310. Like the Police, the Department of Corrections uses in-house prosecutors for the vast majority of its summary prosecutions. These prosecutors are usually probation officers.
311. Corrections advised me that the probation officer who investigates an alleged offence is never the probation officer who conducts any eventual defended hearing in court for that same case. Further it was noted that probation officers who conduct defended hearings are given additional training. However, it does not appear that the original prosecution decisions are formally reviewed at any stage by anyone other than the investigating probation officer's manager. Clearly this practice suggests that there are no separate reporting lines or any other mechanisms in place to promote independence. However, I understand a new operating policy is in development and that this issue will be addressed.

OTHER ENFORCEMENT AGENCIES

312. As noted in chapter 4, seven other Government agencies employ in-house prosecutors: Customs, DIA, DOC, DOL, Fisheries, IRD and MSD. The table below outlines the mechanisms they have in place to ensure that prosecution decisions are made independently.

Agency	The prosecutor separately reviews charging decisions	Legal advice is obtained during an investigation from someone other than the prosecutor	The prosecutor has separate reporting lines to investigator
Customs	Yes	No	Yes
DOC	No	No	Not clear from the questionnaire response
DOL	Yes	No	Yes
Fisheries	Yes	No	Yes
IRD	Yes, other than absolute liability offences	No	Yes
MSD	Yes, charges are not laid without the prosecutor's approval	No	Yes

GENERAL MECHANISMS

313. In addition to the mechanisms described above, there are general mechanisms available that allow for prosecution decisions to be challenged on a case-by-case basis.
314. For example, an accused person could challenge a decision to prosecute in the Courts by applying to stay the proceedings or, potentially, by asking for a judicial review.⁵³ Alternatively the accused person could make a complaint about such a decision to:
 - 314.1. The IPCA if the prosecutor was a member of the Police;
 - 314.2. The Office of the Ombudsmen if the prosecutor was employed by a central or local Government agency;
 - 314.3. The NZLS if the prosecutor was a lawyer; or
 - 314.4. The Solicitor-General in respect of the conduct of a Crown Solicitor or an employee in a Crown Solicitor's Office.
315. Such challenges or complaints could be based on an allegation that the prosecutor was unduly influenced by political or public pressure.
316. It is noted that the opportunity to use these mechanisms does not arise until after a prosecution decision has been made. However, the availability of such mechanisms potentially makes prosecutors more aware of the importance of independence.
317. Notably I received evidence for the following during this review:
 - 317.1. There are no recent cases where a stay of proceedings has been ordered in response to a prosecutor continuing with a case that was initiated for an improper purpose.
 - 317.2. There has never been a successful challenge to a decision to prosecute by way of judicial review.
 - 317.3. The IPCA and the Office of the Ombudsmen do not receive many complaints about decisions to prosecute. Instead, the more common complaint is that the Police or the relevant Government agency decided not to prosecute a case. Even then, the Authority has never found that such a decision was contrary to law, unreasonable, unjustified, unfair or undesirable nor have the Ombudsmen made an adverse finding on this matter.
 - 317.4. There is no evidence that complaints against decisions to prosecute (or not) are commonly made to the NZLS or the Solicitor-General, let alone upheld.

⁵³ Traditionally the Courts have shown a marked reluctance to judicially review the exercise of a decision to prosecute. However two recent High Court cases have found that these decisions are justiciable: *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 HC and *Greymouth Petroleum Ltd v The Solicitor-General* (HC Wellington, 23 February 2010, Gendall J). The current position therefore appears to be that a judicial review of a decision to prosecute might succeed but only in exceptional circumstances such as where the prosecution authority acts in bad faith, or the prosecution is brought for collateral purposes, or was, for example, politically motivated or influenced.

My Assessment of the Independence Mechanisms Generally

THE STRENGTHS OF THE CURRENT SYSTEM

318. None of the evidence collected for the review suggests that there is a systemic problem relating to a lack of independence in prosecution decision-making in New Zealand. There are very few cases on point arising from the court system and none of the bodies that field complaints about prosecutors indicated that it has any general concerns in this regard.
319. Chief Executives of enforcement agencies are employed by the State Services Commissioner, and it is part of the Chief Executive role to ensure that Ministers are not involved in individual cases. The risks of political interference in prosecution, in my view, are very low. Allegations of political interference are virtually unheard of.

THE WEAKNESSES OF THE CURRENT SYSTEM

320. During the review, several stakeholders commented on the importance of independence to our prosecution system. However, they often cited the principle as a justification for prosecutors and enforcement agencies to act in complete silos. This rationale seems to reflect a fundamental misunderstanding.
321. In particular, it is not clear to me why the independence of prosecutors from the Law Officers is so jealously guarded. The Solicitor-General is accountable to the Attorney-General who is a Minister. However, when acting as Law Officers they are both obliged to act free from political and public pressure and solely in the public interest. This obligation corresponds to the obligation on prosecutors. It does not undermine it.
322. In making these comments I recognise the benefit of encouraging prosecutors to take personal responsibility for their discretionary prosecution decisions. This practice encourages a robust decision-making process. However, there is also a need for accountability and consistency within our prosecution system. These concepts do not appear to be mutually exclusive.

Key Findings on the Independence Mechanisms Generally

323. There is no systemic problem relating to a lack of independence in prosecution decision-making in New Zealand.
324. There is a widespread misunderstanding of the real need for independent decision-making, which is confused with a perceived need for complete prosecutorial autonomy.
325. Complete autonomy would compromise the accountability of prosecutors and the consistency in their decision-making. By contrast, independent decision-making, accountability and consistency are not mutually exclusive concepts.
326. I also note that there is no systematic monitoring of the decision-making structures in the enforcement agencies that have departmental prosecutors to promote independence.

Recommendations for the Independence Mechanisms Generally

327. I recommend that:

327.1. The Guidelines should clearly articulate the principles relating to the need for independent decision-making by prosecutors and the need for structures to be in place to separate prosecutors and investigators; and

327.2. Crown Law should monitor compliance with the Guidelines and should regularly gauge the rate of complaints about prosecution decisions being made to the Courts, the IPCA, the Office of the Ombudsmen, the NZLS and the Solicitor-General.

My Assessment of Independent Decision-Making in Relation to Indictable Prosecutions

THE STRENGTHS OF THE CURRENT SYSTEM

328. In relation to Crown Solicitors, I consider that the warrant system provides an appropriate level of protection against undue political and public pressure. The benefits of the system are that:

328.1. Crown Solicitors and their employees are external prosecutors;

328.2. They make almost all of the prosecution decisions in the indictable jurisdiction;

328.3. Crown Solicitors are personally responsible for all prosecution decisions;

328.4. They are bound to comply with the Prosecution Guidelines as a condition of their warrants;

328.5. Evidence suggests that there is a high level of co-operation between the Police and Crown Solicitors without any perception of undue influence; and

328.6. Crown Solicitors are only asked to provide legal advice on Police investigations in limited circumstances.

329. In relation to the Serious Fraud Prosecutors Panel, it is noted that Panel members are also external prosecutors and there is no evidence that their decisions are influenced by the SFO at present.

330. In making these observations, I acknowledge that it is generally more expensive to brief external as opposed to in-house prosecutors. However, the increased need for independence in relation to indictable prosecutions seems to justify this expense. Cost-efficiency issues are discussed further in Part V.

THE WEAKNESSES OF THE CURRENT SYSTEM

331. My only concerns in relation to the warrant system relate to its limitations in respect of oversight rather than independence. These issues are discussed further in Part IV. Here it is sufficient to note that Crown Solicitors' current emphasis on independence has the potential to undermine their accountability to the Law Officers.

332. I do, however, have two concerns about the mechanisms that support independent decision-making by the Serious Fraud Prosecutors Panel members.

- 332.1. The SFO routinely obtains legal advice from Panel members from very early on in an investigation. This practice may promote consistency and continuity in any given proceeding. However, obtaining such early advice on purely procedural matters compromises independence. Further, the SFO employs in-house legal counsel who could potentially take greater responsibility for providing this advice.
- 332.2. Nowhere is it publicly clarified whether Panel members are expected to comply with the Prosecution Guidelines and whether the SFO is bound to accept their advice in relation to prosecution decisions made prior to committal for trial. If an ordinary solicitor–client relationship exists, then this area of uncertainty has the potential to colour the relationship after committal for trial as well.

Key Findings in Relation to Independent Decision-Making on Indictable Prosecutions

- 333. The following are my key findings in relation to the robustness of the current decision-making processes surrounding independence in the indictable jurisdiction.
 - 333.1. The Crown Solicitor warrant system promotes a high level of independence, consistency and transparency in decision-making, and an appropriate degree of co-operation with investigating agencies.
 - 333.2. At present the exact nature of the relationship between the SFO and the Serious Fraud Prosecutors Panel is not clearly described in any publicly available document.
 - 333.3. The SFO routinely obtains legal advice from Panel members from very early on in an investigation. This practice has the potential to compromise independent decision-making about the soundness of aspects of the prosecution at later stage.

Recommendations for Independent Decision-Making in Relation to Indictable Prosecutions

- 334. I recommend that:
 - 334.1. The Law Officers should consider amending the Prosecution Guidelines to explain the nature of the relationship between the SFO and the Serious Fraud Prosecutors Panel, before and after a matter is committed for trial; and
 - 334.2. The SFO should review its policies on obtaining early legal advice from Panel members (particularly in relation to purely procedural investigative matters), considering the need to promote independent decision-making.

My Assessment of Independent Decision-Making in Relation to Summary Prosecutions

THE STRENGTHS OF THE CURRENT SYSTEM

335. The vast majority of summary prosecutions are conducted by Police prosecutors, employed within the PPS. The employment relationship between the Police and such prosecutors has the potential to inappropriately compromise the principle of independence.
336. However I consider that, through the PPS, the Police has struck an appropriate balance between mechanisms that promote independent decision-making and those that encourage accountability, consistency, co-operation with investigators and management of cost. The benefits of the current system are that:
- 336.1. The PPS only prosecutes summary level offences;
 - 336.2. The PPS provides a specialist prosecution service, in the sense that prosecuting is not combined with a more general legal adviser role and is seen as a viable career option within the Police;
 - 336.3. While PPS centres are regionally based, their management and reporting structures are entirely separate from the level of Assistant Commissioner in Police national headquarters. The independent culture of Police prosecutors is therefore reinforced from a high level within the Police;
 - 336.4. The head office of the PPS promotes consistency in decision-making by regularly issuing and updating prosecution policies; and
 - 336.5. The National Manager of the PPS is accountable to the Commissioner for the delivery of prosecution services. Police prosecutors are accountable in turn to the National Manager.
337. I note that many stakeholders have commented on the improved objectivity of Police prosecutors over the last decade.
338. Customs, DIA, DOC, DOL, Fisheries, IRD and MSD all employ in-house prosecutors as well. I have no major concerns in relation to the independent decision-making processes of these agencies because they all employ separate investigators and prosecutors and there are separate reporting lines in place.
339. I note that, in all of these agencies, prosecutors act in a dual capacity as legal advisers. This dual role potentially undermines independence. However there are insufficient economies of scale to employ specialist prosecutors in these agencies. In that context, and given that these prosecutors only appear in the summary jurisdiction, it seems that there is an appropriate balance between independence and management of cost.

THE WEAKNESSES OF THE CURRENT SYSTEM

340. My only concern in relation to the PPS is that some stakeholders did suggest that junior Police prosecutors appear unwilling to make prosecution decisions without first consulting the officer-in-charge. This practice has the potential to cause costly delays and to lead to a perception that these prosecutors are unduly influenced by the view of the investigators. It has been suggested to me that in some instances this relationship involves a degree of bullying.

341. Given the apparently isolated nature of these incidents though, my greater concern is the lack of mechanisms to promote independent decision-making in the Department of Corrections.
342. Corrections is responsible for initiating 12% of all summary prosecutions. This means that at present, for a substantial number of prosecutions, there is no formal independent review of the original prosecution decisions. This concern could easily be remedied by simply giving the peer review function to part of Corrections which is outside the management line within Community Probation Services.
343. In making these comments, I acknowledge that Corrections only prosecutes relatively minor offences, such as breaching sentences of community work or supervision and that only 1% of these result in a defended hearing.⁵⁴ However, even in that context such convictions (especially multiple convictions over time) can have material consequences for the offender. They may bear on the leniency, or lack thereof, that the Court is prepared to extend at a sentencing hearing in the future and in some cases may affect the type of sentence imposed. My view is that these ramifications warrant an independent peer review of the decision to prosecute, regardless of whether the accused is likely to defend the charge.

Key Findings on Independent Decision-Making in Relation to Summary Prosecutions

344. The PPS, Customs, DIA, DOC, DOL, Fisheries, IRD and MSD have all struck an appropriate balance between mechanisms that promote independent decision-making and those that encourage accountability, consistency, co-operation with investigators and management of cost.
345. Corrections has insufficient mechanisms in place at present to promote independent decision-making by its in-house prosecutors.

Recommendations for Independent Decision-Making in Relation to Summary Prosecutions

346. I recommend that:
- 346.1. The Police should specifically examine whether junior prosecutors face undue pressure from officers in charge to be consulted over decision to withdraw/amend charges and identify opportunities to reinforce the independent decision making responsibilities given to the PPS.
 - 346.2. Corrections should re-visit its structures for promoting independent prosecution decision-making.

⁵⁴ The Assistant General Manager of Community Probation Services emailed this information to the secretariat on 16 September 2011.

PART IV: Oversight

CHAPTER 9: OVERSIGHT

Introduction

347. Constitutionally it is plain that the Attorney-General is responsible through Parliament to the citizens of New Zealand for all public prosecutions and for the prosecution system in general. The convention that the Solicitor-General should exercise this responsibility in practice is equally clear.
348. This chapter examines the current oversight mechanisms that are in place to support the Solicitor-General in superintending the prosecution system. In particular I look at the relationships among the Solicitor-General, enforcement agencies and prosecutors.
349. The current oversight mechanisms are then assessed with reference to the following objectives, which I identified in chapter 5.
- 349.1. Do they ensure that there are well-defined guidance, monitoring and reporting arrangements in place?
 - 349.2. Do they promote:
 - 349.2.1. Substantive accountability;
 - 349.2.2. Quality in prosecutors;
 - 349.2.3. Consistency and transparency in prosecution decision-making;
 - 349.2.4. Consistency and transparency in operational prosecution policies; and
 - 349.2.5. Transparency surrounding the cost-efficiency of the prosecution service as a whole?
350. I have assessed the oversight mechanisms in relation to summary and indictable prosecutions separately because the Solicitor-General's oversight role in indictable prosecutions is much clearer and different issues arise. At the end of each assessment I outline my key findings, ask whether the identified issues will be rectified by either CPRAM or the proposed appointments in Crown Law and make a series of recommendations. I then comment on the cost ramifications for Crown Law.
351. Having assessed the oversight mechanisms, I briefly look at an example of why it is important for the Solicitor-General to systematically collect detailed information surrounding the cost of prosecutions. That discussion revolves around the cost of changes to prosecution practice.

General Oversight in the Current System

352. General oversight of the prosecution system is provided by the Solicitor-General through the Prosecution Guidelines, the power to stay prosecutions, the duty to consent to prosecutions and make

other Law Officer decisions, and certain duties relating to appeals. In addition, the Cabinet Directions are relevant.

THE PROSECUTION GUIDELINES

353. As discussed in chapter 4, the Prosecution Guidelines are issued jointly by the Law Officers. They are designed to assist enforcement agencies and prosecutors in determining: whether criminal proceedings should be commenced; what charges should be laid; and whether proceedings should continue. They also provide guidance for the conduct of criminal proceedings and establish standards of conduct and practice that the Law Officers expect from prosecutors.
354. The Guidelines are targeted primarily at Crown Solicitors in their capacity as the foremost prosecutors in the indictable jurisdiction. This focus is apparent from the fact that Crown Solicitors are the only prosecutors that are bound to adhere to them (as a condition of their warrants).⁵⁵ Further, the Guidelines deal extensively with issues that are only likely to arise in the indictable jurisdiction, such as consents to prosecute, immunities from prosecution, witness anonymity orders, indictments, pre-trial applications and jury selection.
355. In relation to prosecutors in the summary jurisdiction, the Guidelines specifically recognise the independence of the New Zealand Police and set the expectation that they will 'assist' Police prosecutors in deciding whether to prosecute and what charges to lay.⁵⁶ In relation to other in-house prosecutors, they simply advise that these agencies should have structures in place to ensure that prosecution decisions and practice are made in accordance with the Guidelines.⁵⁷ Otherwise there is no suggestion that compliance is mandatory.
356. The Guidelines also clearly indicate that there is no overarching day-to-day supervision of the prosecution decisions made by any of the enforcement agencies that have prosecution functions. In this regard, it is noted that the Solicitor-General has the power to make binding directions on all departments listed in Schedule 1 of the State Sector Act 1988 in relation to summary prosecutions. However, it appears that this power is rarely, if ever, used.⁵⁸

THE CABINET DIRECTIONS

357. As discussed in chapter 4, the Cabinet Directions explain when enforcement agencies may use their own in-house prosecutors to conduct prosecution-related work. In brief, the Directions state the following.
- 357.1. In relation to summary prosecutions, enforcement agencies may use their own in-house prosecutors or may brief the case to a Crown Solicitor. If they wish to use a private sector lawyer other than a Crown Solicitor then they must obtain permission to do so from the Solicitor-General.
- 357.2. No in-house prosecutor may appear on an indictable prosecution or an appeal without the permission of the Solicitor-General.

⁵⁵ Prosecution Guidelines, paragraph 3.3.

⁵⁶ Prosecution Guidelines, paragraph 5.4.

⁵⁷ Prosecution Guidelines, paragraph 5.7.

⁵⁸ None of the questionnaire responses from government agencies revealed examples of when this power was exercised.

- 357.3. No Crown appeal or judicial review may be initiated by an enforcement agency without the permission of the Solicitor-General.
358. These Directions apply against the Police and all of the Government agencies surveyed for this review, apart from the Independent Crown Entities, namely the Commerce Commission and FMA, and the Historic Places Trust as an Autonomous Crown Entity. The Crown Agents, Maritime NZ and Housing NZ, are both subject to Ministerial Direction under the Crown Entities Act 2004.
359. Interestingly I have received no indication that any enforcement agency has ever applied to the Solicitor-General for permission to brief a private sector lawyer, other than a Crown Solicitor, to conduct its summary prosecutions. Further, the Independent Crown Entities that I surveyed indicated that they use Crown Solicitors for their summary prosecutions, even though they are not bound by the Cabinet Directions.

THE POWER TO STAY PROCEEDINGS

360. Under s 77A and s 159 of the Summary Proceedings Act 1957 and s 378 of the Crimes Act 1961 the Attorney-General (in practice the Solicitor-General) has the power to stay any proceeding, either summary or indictable, before a judgment is issued. This power has the effect of stopping the prosecution from continuing any further.
361. Generally speaking the power of entering a stay will be exercised in three types of situation:
- 361.1. When a jury has been unable to agree after two trials;
 - 361.2. If the prosecution was wrongly commenced, or the circumstances have so altered since it was commenced as to make its continuation oppressive or otherwise unjust; or
 - 361.3. To clear outstanding or stale charges or otherwise conclude unresolved charges.
362. The Solicitor-General has traditionally taken a conservative approach to staying prosecutions and as such the power is rarely exercised. Crown Law has advised that over the past five years only 86 stays of prosecution have been issued. Thirteen of these were in respect of third trials (i.e. the first category as described in subparagraph 361.1 above). Fifty-seven cases fell within the second category (subparagraph 361.2), where the prosecution was stayed because it was from the outset, or had become, oppressive or an abuse of process. However in all of these cases the stay was in respect of a private prosecution improperly pursued by an individual member of the public and not by an enforcement agency or a Crown Solicitor.
363. It is worth remembering that, as discussed in chapter 8, the judiciary also has the power to stay a prosecution if it amounts to an abuse of the court processes. Again, this power is infrequently used. However, when it is used, it amounts to a much more public reprimand of the person or agency that initiated the prosecution.

THE DUTY TO CONSENT TO PROSECUTIONS AND MAKE OTHER LAW OFFICER DECISIONS

364. There are 110 offences that by express statutory provision cannot be prosecuted without the consent of the Attorney-General. In practice this function is almost always undertaken by the Solicitor-General. Often, where offences may touch on matters of security or involve foreign relations or international treaty obligations, or the right to freedom of expression, consent is required to ensure that the circumstances of the prosecution accord with the statutory purpose of the particular Act. These offences are not particularly common.

365. In addition to prosecutions that require consent, Crown Solicitors are obliged to refer various other matters to the Solicitor-General. Examples include requests for a witness to be given immunity from prosecution, for consent to apply for a witness anonymity order, and for permission to accept a plea to a lesser charge of manslaughter in relation to a charge of murder.

DUTIES RELATED TO APPEALS

366. Section 390(1) of the Crimes Act 1961 requires the Solicitor-General to represent the Crown on all criminal appeals to the Court of Appeal and the Supreme Court against decisions made in the indictable jurisdiction.
367. Section 390(2) of the Crimes Act then clarifies that any counsel employed or engaged by the Crown may appear. That counsel includes a Crown Solicitor or their employee. Traditionally, however, the Solicitor-General has preferred to employ a team of specialist appellate lawyers who conduct almost all of these appeals on his or her behalf. These lawyers are counsel in the Criminal Team at Crown Law and they report directly to the Deputy Solicitor-General (Criminal) and the Solicitor-General. This system is felt to facilitate objectivity and consistency in Crown appellate advocacy. Notably, under this system Crown Law regularly reviews transcripts of trials conducted by prosecutors and their trial performance and conduct.
368. Further, as established by various statutory provisions and confirmed in the Cabinet Directions, the Solicitor-General's consent is required to bring any appeal on behalf of the Crown. The power for the Crown to appeal is limited in the summary jurisdiction to sentence appeals and appeals on a question of law and in the indictable jurisdiction to pre-trial appeals, sentence appeals and appeals on a question of law.

Oversight of the Crown Solicitor Network

RELATIONSHIP

369. The relationship between the Crown Solicitors and the Solicitor-General is multi-faceted. Some matters are governed by the Crown Solicitors Regulations and the Cabinet Directions. However, in relation to most practical matters the relationship is based on practice and convention.⁵⁹
370. In 1918 the Solicitor-General of the day determined that all Crown Solicitors were agents of Crown Law. This view has not been formally contested since then. However, I have been informed that this agency relationship has not always been apparent since the 1980s,⁶⁰ when there was some informal assertion of near full independence from the Solicitor-General. This assertion was buttressed by:
- 370.1. The existence of the warrants, which are held 'at pleasure' and which give each Crown Solicitor personal responsibility for filling indictments in their geographical area; and

⁵⁹ Prosecution Guidelines, paragraph 5.2.

⁶⁰ John Isles, Review of Crown Law Costs of Criminal Prosecutions, Autumn–Winter 2011, pp. 40–42.

370.2. The convention that the Solicitor-General will not intervene in individual trials and prosecution decisions.⁶¹

371. Notably the Prosecution Guidelines comment that the relationship between Crown Solicitors and the Solicitor-General has 'evolved considerably' since 1918. They state:

Crown Solicitors are now substantially autonomous when making prosecution decisions and conducting trials. Nevertheless, all Crown Solicitors in New Zealand understand that they are accountable to the Solicitor-General and are expected to comply with the views of the Solicitor-General on the rare occasion that the guidance of the Solicitor-General is required.

372. Despite the substantially autonomous role of the Crown Solicitors, the Solicitor-General does provide high-level and ongoing management of the network. This management is achieved through the mechanisms described above (in particular the Prosecution Guidelines, Law Officer referrals and monitoring issues that are elevated on appeal) and through the additional mechanisms described below.

CONTROL OF THE WARRANTS

373. The warrants are granted to Crown Solicitors by the Governor-General under the Letters Patent Constituting the Office of the Governor-General of New Zealand, on the recommendation of the Attorney-General. However, consistent with the convention that the Attorney-General does not become involved in the administration of criminal law, it is actually the Solicitor-General who is responsible for the appointment process.

374. The warrants are granted to the Crown Solicitors for life. However, theoretically they could simply be revoked by the Governor-General (on the recommendation of the Law Officers) without giving any reasons.⁶² My understanding is that no Crown Solicitor's warrant has ever been revoked and that any such action would be perceived as an extreme step.

375. Oversight is also exercised when a warrant is vacated as the Solicitor-General has the opportunity to thoroughly scope potential Crown Solicitors and engage in consultation to ensure that the chosen candidate has sufficient experience, capability, acumen and administrative and legal support to maintain the high standards expected of their role. In this process the Solicitor-General calls for expressions of interest, interviews candidates, consults with other members of the applicants' law firms, the judiciary, the Police and senior members of the bar, and ultimately makes recommendations to the Attorney-General regarding the appointment.

⁶¹This convention is confirmed in paragraph 5.1 of the Prosecution Guidelines, which states: 'there is no direct control of prosecutions in New Zealand by any "central authority". The supervision of all prosecutions of indictments presented by the Crown Solicitors is the responsibility of that Crown Solicitor the Crown Solicitor is expected as a matter of course to inform the Solicitor-General or Deputy Solicitor-General of any matter which ought to be communicated to those offices.'

⁶² E Campbell, 'Termination of Appointments to Public Offices' (1996) 24 Federal Law Review 1 at [17].

PRACTICE REVIEWS

376. Crown Law engages in a process of rolling reviews of Crown Solicitors' practices. There is no set timeframe for the reviews but, at present, Crown Solicitors can expect to be reviewed every five or so years.
377. This performance review process is carried out on a consultative basis with both the Crown Solicitor and other stakeholders in the criminal justice system. The review is conducted by the Deputy Solicitor-General (Criminal) and an external reviewer.⁶³ The review aims to obtain information about the conduct and quality of prosecutions undertaken by Crown Solicitors, their partners and staff. It is also designed to assist the Crown Solicitor to improve performance and to provide feedback from the Police and the judiciary if necessary. The focus is on professional performance and practice strength rather than fiscal matters.
378. Notably it is only during the conduct of this practice review that the Solicitor-General delves into practice management issues with Crown Solicitors. This means that Crown Solicitors are largely autonomous in managing the training and development of their staff, which typically involves seniors mentoring and coaching junior and intermediate prosecutors and hands-on experience in the courtroom.

THE CROWN SOLICITORS REGULATIONS

379. The Crown Solicitors Regulations give the Solicitor-General the right to take any matter of business out of the hands of a Crown Solicitor and give it to another solicitor. However I have received no evidence to suggest that this power is frequently used.
380. The Regulations also contain the framework for the remuneration of Crown Solicitors by Crown Law for indictable prosecution work. They contain a formula to calculate the hourly rate to be paid to senior, intermediate and junior counsel and restrict the amount of time that may be claimed in relation to particular tasks. If a trial requires more than one prosecutor then the Regulations state that a Crown Solicitor may apply to the Solicitor-General for approval of second counsel. Further, if the amount of time spent on a matter exceeds the amount allowable under the Regulations, a Crown Solicitor may apply to the Solicitor-General for a special fee.
381. Usually an invoice that complies with the Regulations will simply be formally approved by the relevant Court Registrar and forwarded to Crown Law for assessment and payment. Crown Law will assess the invoice purely by determining whether it complies with the Regulations. If it complies with the Regulations then it must be paid.
382. Invoices are sent once the trial outcome is known or matters are 'interim billed' once the bill exceeds \$3,000. The Regulations do not set a format by which bills must be completed. That is, there is no standard form, and no requirement to bill in specific time increments. Invoices are provided on paper only (with the exception of one Crown Solicitor). It is notable that there is no ongoing analysis of the bills coming in and bills are not linked to the quality reviews.
383. My understanding is that part of the reason for this lean approach to financial management is the recent trend of rising costs of indictable prosecutions. As the collective bills from Crown Solicitors have risen, Crown Law has reduced its own internal expenditure in an effort to minimise the over-spending in

⁶³ The external reviewer has been the same person for the last 15 years.

relation to appropriation three: the Supervision and Conduct of Indictable Prosecutions. The result is that in 2010 Crown Law only spent around \$400,000 on administration of the Crown Solicitor network.⁶⁴ That amounts to approximately 1% of the overall appropriation.

AD HOC CONTACT

384. In addition to the Prosecution Guidelines, the Solicitor-General has developed a practice of sending other instructions and guidance documents directly to the Crown Solicitors. Examples include protocols and circulars on dealing with the media, victims of crime, low copy number DNA results, suppression orders in high-profile trials, audiovisual links for expert evidence, hearsay notices, bail pending an appeal against a sentence of home detention and retrospective expert witness applications.
385. Judgments of particular significance to Crown Solicitors' practices are circulated as well, often with accompanying memoranda and/or are posted on the Crown Solicitors' intranet developed and maintained by Crown Law. Further, Crown Law is responsible for a quarterly electronic publication called the Prosecution Brief. This professional magazine aimed at the Crown Solicitor network includes updates on policy developments and case law, professional news, contributions from academics and members of the judiciary, and professional guidance for prosecutors together with other articles and features.
386. As a matter of routine, members of the Criminal Team at Crown Law and in particular the Deputy Solicitor-General (Criminal) also engage in ongoing email and telephone contact with Crown Solicitors. Crown Solicitors often seek their advice on professional issues regarding charging, plea negotiation, trial strategy, administrative and financial issues, matters that are likely to attract publicity or matters that are likely to be the subject of an appeal.
387. Meetings with individual Crown Solicitors are also arranged from time to time in relation to particular issues relevant to their office or a particular case that they are responsible for. Further, Crown Law each year holds periodic half-day meetings with all warrant holders in Wellington, where professional and administrative issues are discussed.

My Assessment of the Oversight of Summary Prosecutions

THE STRENGTHS OF THE CURRENT SYSTEM

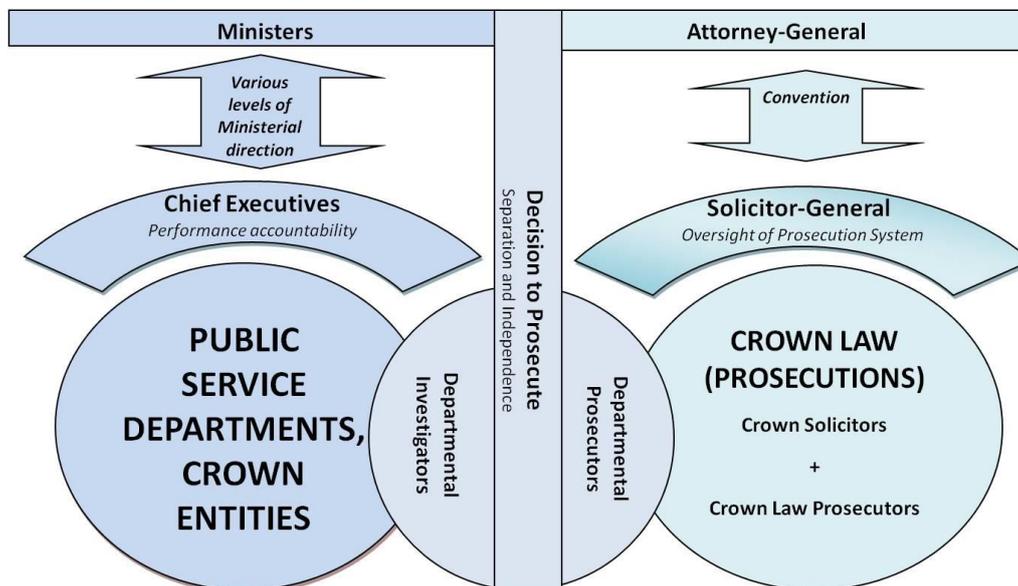
388. The Prosecution Guidelines provide transparency, and apparent consistency, in relation to prosecution decision-making in the summary jurisdiction. They also provide clear direction on the operational policies that enforcement agencies should have in place to promote prosecutorial independence. As noted in Part III it appears that Police and departmental prosecutors regularly refer to these Guidelines even though they are not obliged to comply with them.
389. Further, the Cabinet Directions give the Solicitor-General complete control over who may conduct a summary prosecution, outside of Crown Solicitors, Police and departmental prosecutors. In my view this level of control is both appropriate and desirable. The Solicitor-General should be able to monitor those who conduct prosecutions on behalf of the public to ensure that they are aware of their obligations as prosecutors and agree to abide by them. As these obligations become more widely understood, the Solicitor-General may consider widening the scope of prosecutors in this regard.

⁶⁴ Crown Law Internal Memorandum, Review of Administration and Monitoring Services of Crown Solicitors, Geoff Steele, 1 June 2011.

THE WEAKNESSES OF THE CURRENT SYSTEM

390. Despite the above remarks, my overall impression is that the mandate for the Solicitor-General to oversee summary prosecutions is very weak. Furthermore, the relationship between the Solicitor-General and in-house prosecutors is unclear.
391. I note that these conclusions accord with the concerns expressed by the Law Commission in 1997 over the lack of monitoring and effective control in relation to summary prosecutions.⁶⁵
392. To my mind, the only mechanism that would allow for any systematic oversight of summary prosecutions is the Prosecution Guidelines. However, in-house prosecutors are not bound to comply with them. Voluntary compliance is laudable but without any form of monitoring there can be no certainty that decision-making and operational policies are consistent.
393. The vast majority of the remaining oversight mechanisms cited above only arise on a case-by-case basis and there are few opportunities to use them in the summary jurisdiction.
- 393.1. The cases that require the Solicitor-General to make a decision in his or her capacity as a Law Officer (such as consents to prosecute, witness anonymity orders and immunities) generally involve indictable offences.
- 393.2. Most appeals in the summary jurisdiction are to the High Court and as a result Crown Law is not generally involved (unless consent is sought for a Crown appeal).
- 393.3. The power to stay a prosecution looks like an effective oversight tool on paper, but in practice, the power is not often exercised.
394. Furthermore, there is no requirement on enforcement agencies to report to the Solicitor-General, in any way, about the prosecutions that they conduct. The result appears to be the concerning situation alluded to in the snapshot of prosecution costs in chapter 4. That is, enforcement agencies (other than police) do not routinely collect information on their prosecutions and have little idea of the overall cost. From an accountability perspective this situation is concerning.
395. In light of the weakness of these oversight mechanisms, it is unsurprising to me that there appears to be considerable confusion among the enforcement agencies as to the Solicitor-General's role in overseeing summary prosecutions.
396. This confusion was evident at the workshop that I held with Prosecution Forum Attendees on 14 June 2011. I explained my understanding of the Solicitor-General's oversight role with reference to the following diagram.

⁶⁵ Cabinet Paper on the Review of Public Prosecution Services 4 March 2011, paragraph 31.6.



397. In discussing this diagram, the prosecutors indicated that in practice they only felt accountable, internally, to their chief legal adviser, managers, Boards, Chief Executives or Commissioner (depending on the size and nature of the agency) and then ultimately to their Ministers. The Solicitor-General's oversight role was acknowledged but seen as largely theoretical. This perception promotes a culture of departmental prosecutors acting primarily as legal advisers or probation officers, rather than fulfilling the traditional role of an independent prosecutor as outlined in chapter 5.
398. An additional issue that arises for Police prosecutors is s 16 of the Policing Act 2008. This section states that the Commissioner of the Police is not responsible to, and must act independently of, any Minister of the Crown (including any person acting on the instructions of a Minister of the Crown) regarding the investigation and prosecution of offences. At face value this provision seems incompatible with the constitutional responsibility of the Attorney-General for all public prosecutions in New Zealand. However, when carrying out Law Officer responsibilities, such as supervision of prosecutions, the Attorney-General is not acting as a Minister of the Crown. Information about this area of responsibility is set out in the Cabinet Manual.
399. In my view the absence of any clear, central oversight of summary prosecutions is not just a theoretical concern, for the following reasons:
- 399.1. As identified in Part III, charging practices have developed in the summary jurisdiction that appear to be inconsistent with the Guidelines. Further, not all enforcement agencies have put clear structures in place to promote prosecutorial independence.
 - 399.2. There is anecdotal evidence of quality issues in relation to departmental prosecutors (excluding Police prosecutors). During my interviews, several stakeholders made comments suggesting that departmental prosecutors' skills are 'patchy' and that their skill level is not always appropriate to the level of prosecution they are taking. Part of the reason for this may be that some departmental prosecutors have limited exposure to court cases. Many of them have dual roles as legal advisers as well as prosecutors and spend very little time in court. The responsibility for training and up-skilling prosecutors and ensuring career structure and development must be given primarily to the Government agencies that employ them.

399.3. It is not at all clear whether departmental prosecutors are providing a cost-efficient service to the public. We simply do not know how much this service currently costs.

400. Also of note regarding the quality of departmental prosecutors is the absence of a mechanism by which the judiciary can provide regular feedback. This appears to be a wasted opportunity to improve the prosecutors' performance in court as the judiciary is best placed to identify areas of concern. Additional oversight from Crown Law would provide a conduit for that information to be collected and passed back to the relevant agencies.

Key Findings on the Oversight of Summary Prosecutions

401. The Cabinet Directions give the Solicitor-General some control over who may conduct a summary prosecution. This is appropriate.

402. The Prosecution Guidelines provide transparency, and apparent consistency, in decision-making and operational policy. However their effectiveness as an oversight tool is undermined by the fact that compliance is voluntary for Police and departmental prosecutors and there is no external monitoring system in place.

403. My overall impression is that the mandate for the Solicitor-General to oversee summary prosecutions at present is very weak.

404. The vast majority of the available oversight mechanisms only arise on a case-by-case basis and there are few opportunities to use them in the summary jurisdiction.

405. There is no requirement on enforcement agencies to report to the Solicitor-General, in any way, about the prosecutions that they conduct.

406. There is considerable confusion among the enforcement agencies as to the Solicitor-General's role in overseeing summary prosecutions. In particular, s 16 of the Policing Act may be adding to this confusion for the Police.

407. The absence of any clear, central oversight of summary prosecutions is not just a theoretical concern. There is evidence to suggest that the Guidelines are not always consistently applied, there are quality concerns about departmental prosecutors and the cost of summary prosecutions is largely unknown.

408. There is a wasted opportunity to improve the quality of departmental prosecutors as no regular feedback is sought from the judiciary. Crown Law could provide a conduit for this information.

RECTIFIED BY CPRAM?

409. In my view, one of the core problems identified above will be rectified by CPRAM. That is, CPRAM will make it very clear that the Solicitor-General is responsible for the oversight of all public prosecutions. In practice this provision should clarify that Police and departmental prosecutors are primarily accountable to the Solicitor-General and the Attorney-General when making prosecution decisions, rather than to their Ministers. This clarity should assist in promoting independent decision-making.

410. CPRAM will also give the Solicitor-General the mandate to issue prosecution guidelines that are applicable to all enforcement agencies.

411. However the oversight role given to the Solicitor-General under CPRAM is simply described as 'general' and the only mechanisms discussed relate to guidelines and advice. Nowhere does the Bill state that

agencies will be bound to comply with that guidance or advice. This means that, by itself, CPRAM will not address all of the concerns identified above. Accordingly, I consider that there is additional room for improvement.

Recommendations for the Oversight of Summary Prosecutions

412. I recommend that:

- 412.1. The Law Officers should consider re-drafting the Prosecution Guidelines to make them equally applicable to the summary jurisdiction. Alternatively a completely separate set of Guidelines could be drafted for the summary jurisdiction;
- 412.2. Compliance with these Guidelines should be mandatory for all enforcement agencies with prosecution functions. In the short term, this status could be achieved (at least in relation to all but the Independent Crown Entities) by amending the Cabinet Directions. However, in the long term legislation may be required to cover all enforcement agencies with prosecution functions. This is potentially an issue for the Review of the Roles and Functions of the Solicitor-General to consider;
- 412.3. Compliance with these Guidelines should be monitored in some way, such as through self-reporting or through periodic auditing of prosecution decisions and policies; and
- 412.4. Crown Law should consider obtaining regular feedback from the judiciary in relation to the court performance of departmental prosecutors. This information should then be provided to the relevant agencies.

413. To assist the Solicitor-General in overseeing summary prosecutions I recommend that all enforcement agencies, including the Police, should regularly report to the Solicitor-General on the conduct of their prosecutions. These reports should include brief descriptions of:

- 413.1. Volumes of prosecutions;
- 413.2. Rates at which charges are withdrawn and the reasons for these withdrawals;
- 413.3. Rates at which charges are amended and the reasons for these amendments;
- 413.4. The structures that are in place to promote independent decision-making; and
- 413.5. Information about staff including staff numbers, training, qualifications and any specific performance-related issues.

414. These reports should also contain an estimate of the overall cost of the agency's prosecutions and should attach any relevant enforcement policies and operational prosecution policies. To enable comparisons to be drawn, the Solicitor-General will need to provide general advice to these agencies as to how prosecution data should be reported (for instance, by calendar year or financial year; by the number of cases initiated or disposed; by the number of charges or defendants).

415. In turn, I recommend that the Solicitor-General should provide an annual report to the Attorney-General on the conduct of all public prosecutions. This report should include a summary of the reports from the enforcement agencies as well as information held by Crown Law internally concerning indictable prosecutions. Ideally the report should identify the cost of the indictable prosecutions that

were originally initiated by each enforcement agency.⁶⁶ This information will ensure that agencies are aware of the costs associated with their prosecution decisions.

416. In making these recommendations I wish to stress that cost-effectiveness and performance management are issues that must be addressed by the enforcement agencies internally.
417. The purpose of providing these reports to the Solicitor-General is threefold. First, it will ensure that this information is collected by the enforcement agencies. Second, it will ensure that the Solicitor-General is in a position to identify areas of improvement (like those identified in Part III in relation to prosecution decision-making and independence), to facilitate co-ordinated training and secondments and to ensure that there is accountability, consistency and transparency within the system. Third, it will promote a better understanding of the cost-efficiency of the prosecution system as a whole. This in turn, will assist in assessing options and proposals, including financial impacts, for prosecution reform in the future.
418. The purpose of the report to the Attorney-General is to ensure that his or her accountability to Parliament for public prosecutions is substantive rather than purely theoretical.

My Assessment of the Oversight of Indictable Prosecutions

THE STRENGTHS OF THE CURRENT SYSTEM

419. The role of the Solicitor-General in overseeing indictable prosecutions is much clearer. Crown Solicitors are bound by the Prosecution Guidelines and, even though Law Officer referrals and appeals only arise on a case-by-case basis, they occur much more frequently in the indictable jurisdiction. Further, the Solicitor-General (through the Deputy Solicitor-General (Criminal) and the Criminal Team) is in regular contact with Crown Solicitors to discuss individual cases and wider issues as they arise.
420. The Solicitor-General also provides proactive oversight at a systematic level through the appointment of Crown Solicitors, practice reviews and assessment, and payment of Crown Solicitor bills. However, these mechanisms are limited in many respects.

THE WEAKNESSES OF THE CURRENT SYSTEM

421. The exact nature of the relationship between Crown Solicitors and the Solicitor-General is not apparent at present. That is because it is based on a combination of the warrants, the Regulations, convention and practice.
422. Changes to convention and practice would require the buy-in of all parties. The Regulations may be amended but this would be a cumbersome process. Further, the only real management tool that is available under the warrant system is that any given warrant may be revoked. However, such a response would be completely disproportionate to the type of performance management issues that may arise. On top of this is the recognised need for the Crown Solicitors to be independent in making prosecution decisions. Collectively, these observations make it plain that of necessity the Solicitor-General has a relatively 'hands off' role in performance management at present.
423. One of the difficulties with this hands-off management role is that the Solicitor-General has no clear mandate to control the indictable prosecution policy. This area of uncertainty brings potential

⁶⁶I understand that the Ministry of Justice will be able to assist Crown Law in identifying the indictable prosecutions that were originally initiated by the various enforcement agencies. Notably, all but around 100 of these are originally initiated by the Police.

difficulties as, if Crown Solicitors choose to adopt an approach to prosecutions that has significant cost implications, there are no formal mechanisms to manage this. A recent example is the decision of the Crown Solicitor at Auckland to adopt a process of pre-recording children's evidence in sex cases. The initiative, while laudable in principle, had substantial ramifications for unbudgeted costs.

424. Putting these management issues to one side, it should be noted that all of the anecdotal evidence collected for the review suggests that in general the quality of work by Crown Solicitors is very high.
425. In light of that conclusion and, given that reduction of cost is a central focus of the review, I consider that the biggest issue in the indictable jurisdiction is the rising cost of indictable prosecutions and the Solicitor-General's powers to provide oversight of the Crown Solicitor network from a fiscal perspective.
426. This issue is addressed in more detail in chapter 11. Accordingly, only the following observations are made at this point.
 - 426.1. Although Crown Law assesses invoices from Crown Solicitors, that assessment generally just looks at whether the bills comply with the Regulations. If they comply then the invoices are paid. As a result, the Solicitor-General has little scope to discuss the regional variations that appear to be evident in the invoices. Further, in an effort to reduce spending, a practice of lean financial management has developed. This practice needs to be rectified.
 - 426.2. As Crown Solicitors are private sector lawyers and businesspeople, there is a degree of commercial sensitivity surrounding the annual accounts of their firms and, as such, these accounts are not provided to Crown Law.
 - 426.3. The Solicitor-General has no current reliable mechanism to gain first-hand information on the rising expectations placed on prosecutors or the associated costs, as Crown Law does not conduct any prosecutions in the first instance.

Key Findings on the Oversight of Indictable Prosecutions

427. The role of the Solicitor-General in overseeing indictable prosecutions is much clearer than it is in relation to summary prosecutions.
428. This oversight is expressed on a case-by-case basis and at a systematic level through: the binding nature of the Prosecution Guidelines; regular Law Officer referrals and appeals; appointment and practice reviews of Crown Solicitors; regular contact with Crown Solicitors; and payment of their bills.
429. However, the nature of the relationship between the Solicitor-General and Crown Solicitors is somewhat unclear at present.
430. Due to this relationship, the performance management role of the Solicitor-General is necessarily hands-off.
431. There is no issue in relation to quality but I do have significant concerns about the mechanisms that are available to allow the Solicitor-General to actively manage the cost of indictable prosecutions.

RECTIFIED BY CROWN LAW'S PROPOSED APPOINTMENTS?

432. In my opinion, the Solicitor-General has already taken a large step towards addressing the issue of managing the cost of indictable prosecutions through his response to the Performance Improvement Framework report. The proposed appointment of a Deputy Chief Executive and an additional Principal/Senior Policy Adviser will, in part, give Crown Law the much-needed capability to take a more proactive role in costing changes in prosecution policy and practice as well as in managing the cost of Crown Solicitors. However, my view is that these appointments will not address all of the concerns I have identified above on their own. In particular, no allowance has yet been made for any additional oversight role in the summary jurisdiction.

Recommendations for the Oversight of Indictable Prosecutions

433. I recommend that:

433.1. The relationship between the Solicitor-General and Crown Solicitors should be clarified. This could be done through re-asserting the agency relationship that previously existed. Further, the warrant system should be supplemented by a contractual relationship instead of relying on the Regulations;

433.2. Formal mechanisms should be put in place to assist in managing the operational prosecution policies of Crown Solicitors;

433.3. Formal mechanisms should be put in place to allow for the Solicitor-General to play a more direct role in monitoring and controlling the cost of indictable prosecutions; and

433.4. Vote: Attorney-General appropriation three, the Supervision and Conduct of Indictable Prosecutions, should be split into two separate appropriations: the Conduct of Indictable Prosecutions; and the Supervision of Indictable Prosecutions. This division will assist in rectifying the current imbalance between spending and management.

434. I expand on these recommendations in chapter 11.

435. Here I simply note that if legislative change is considered to be necessary to clarify this relationship then it may be appropriate for this issue to be more substantively addressed by the upcoming Review of Roles and Functions of the Solicitor-General.

Case Study: Changes to Prosecution Practice

436. I am conscious that there will be cost ramifications in implementing the recommendations that I have made in this chapter, particularly for Crown Law. I consider that Crown Law will need to appoint its Deputy Chief Executive on a permanent basis and further Policy Advisers to assist the new Principal/Senior Policy Adviser and the existing Crown Counsel (Policy) to perform the expanded oversight role I have described. Additional funding will need to be provided to Crown Law for this purpose. However, I consider that this funding will be more than recouped through proactive supervision of prosecutions as a whole.
437. A more detailed cost–benefit analysis of this expanded role is set out in chapter 11 with reference to the Crown Solicitors.
438. Here I present a brief example of why it is important for the Solicitor-General to systematically collect detailed information on the cost of prosecutions. That discussion revolves around the cost of changes to prosecution practice.

THE INCREASE IN THE COST OF PROSECUTIONS PER MATTER

439. During this review it has become apparent to me that the current rising cost of summary and indictable prosecutions is not just due to an increase in prosecution volumes. In particular, there has been a clear increase in the cost per prosecution matter. In the indictable jurisdiction, this trend is reflected in the following table.⁶⁷

Year	Average cost-per-matter (i.e. jury trial or separate sentencing) in the District Court	Average cost-per-matter (i.e. jury trial or separate sentencing) in the High Court
2005	\$3,893	\$12,142
2006	\$4,182	\$14,173
2007	\$4,635	\$12,914
2008	\$5,023	\$16,247
2009	\$4,754	\$16,971
2010	\$5,054	\$21,516

⁶⁷ This table has been created using the billing information provided to me by Crown Law.

440. Notably this increase is not limited to the indictable jurisdiction. The PPS provided me with the following figures in relation to its prosecutions in the summary jurisdiction.⁶⁸

Year	PPS expenditure	Number of cases prosecuted	Average cost per case
2005/06	\$20,988,000	140,413	\$149.50
2006/07	\$25,622,044	144,885	\$176.84
2007/08	\$28,781,742	151,099	\$190.48
2008/09	\$32,329,523	164,159	\$196.94
2009/10	\$32,028,863	158,693	\$201.83

CHANGES TO PROSECUTION PRACTICE

441. Crown Law, the Crown Solicitors and the PPS all indicated to me that a central factor in these increases has been the substantial legislative changes since 2005 that have impacted on prosecution practice. In particular, both the Police and the Crown Solicitors cited the Evidence Act 2006, the Criminal Disclosure Act 2008, Criminal Proceeds (Recovery) Act 2009 and the changes to the committal procedure.⁶⁹
442. In addition, Crown Law and the Crown Solicitors stressed that recent Practice Notes issued by the judiciary have contributed to the rise in cost of indictable prosecutions.
443. My understanding is that these Practice Notes contain procedural directions to prosecutors and defence counsel and are generally made on the basis of 'inherent jurisdiction'. Three recent Notes in particular have required prosecutors to file extensive pre-hearing memoranda in court, namely: Sentencing (2003), Pre-Trial Applications in High Court and District Court Criminal Jury Cases (2007) and District Court Criminal Jury Trials (2007).
444. Importantly the judiciary is not under any duty to consult or even consider the wider effects of these Practice Notes before issuing them. Crown Solicitors advised that they comply with the Notes without question in light of their ethical obligations to assist the Courts. As a result, they have spent more time on preparation for these hearings and, in turn, their bills to Crown Law have been higher.
445. The purpose of these Practice Notes is to promote efficient use of court time and I note that Vote: Justice, Vote: Courts and Vote: Attorney-General all have a vested interest in prosecutors performing efficiently. However, it needs to be acknowledged that directions or orders made under the umbrella of one Vote can significantly affect the others. It is therefore important to have a mechanism to facilitate consultation between the Votes to ensure that the cost implications for all of them are considered when directives are drafted, and before they are released.

⁶⁸ This table has been created using the tables on pages 21 and 26 of the report: Situational Analysis of the Police Prosecution Service, June 2011, Superintendent Craig Tweedie.

⁶⁹ At page 38 of the report: Situational Analysis of the Police Prosecution Service, June 2011, Superintendent Craig Tweedie. Regarding Crown Solicitors, this information was cited during the two workshops I held with them on Saturday 18 June and Monday 27 June 2011.

THE POLICY ROLE FOR CROWN LAW

446. In relation to Crown Law, I consider that the Solicitor-General has an important policy role. If the Solicitor-General is to fulfil this role effectively, Crown Law needs to have available detailed information on prosecution costs. I note that this information is especially important in relation to the indictable jurisdiction as Crown Law is responsible for Vote: Attorney-General.
447. To my mind the current lean approach to the fiscal management of Crown Solicitors does not allow for Crown Law to accurately forecast the costs of proposed reforms of prosecution policy. This issue needs to be resolved so that the fiscal ramifications of any future prosecution-related reforms are taken into account before they are implemented.
448. For completeness, I note that CPRAM is likely to rectify the particular difficulty of Practice Notes being issued without consideration of their financial implications.
449. This matter will be rectified because the permanent Rules Committee (which routinely drafts and revises the High Court Rules in the civil jurisdiction) has recently established a criminal law subcommittee to draft the rules of procedure that will be required under CPRAM. As a result, it is expected that procedural directions will be contained in rules, rather than in Practice Notes. There is a Ministry of Justice representative on the criminal law subcommittee and it is expected that this person will ensure that the fiscal ramifications of any proposed rules will be taken into account before they are promulgated.

Key Findings on the Oversight of Indictable Prosecutions

450. It is critical for Crown Law to play an active role in prosecution policy to ensure that the fiscal ramifications of any future prosecution-related reforms are taken into account before they are implemented and that they do not just shift costs from one Vote to another.

Recommendation for the Oversight of Indictable Prosecutions

451. My recommendation is that there must be a formal mechanism in place to ensure that all decision-makers are mindful of the impact of their policy changes on the costs of the prosecution system. This mechanism would ensure all policy decisions that affect the prosecution system would be referred to Crown Law.

PART V: Efficiency

CHAPTER 10: CROWN LAW

Introduction

452. As discussed in chapter four, Crown Law is responsible for four appropriations:
- 452.1. The conduct of appeals from criminal trials on indictment and in Crown appeals against sentence or seeking to clarify points of law;
 - 452.2. Legal advice and representation services to the Crown via central Government departments;
 - 452.3. The supervision and conduct of indictable prosecutions; and
 - 452.4. Legal and administrative services for the Attorney-General and the Solicitor-General to assist them in the exercise of their statutory functions and responsibilities.
453. Only the first and third of these appropriations (subparagraphs 452.1 and 452.3 above) relate predominantly to prosecutions. I have discussed the third appropriation at length in Part IV in respect of oversight. That appropriation is also addressed in detail in the next chapter concerning Crown Solicitors. Accordingly I will not address it further here.
454. Instead, this chapter focuses on the prosecution-related work of the Criminal Team at Crown Law. This Team is responsible for the conduct of criminal appeals to the Court of Appeal and the Supreme Court (appropriation one). Further, it conducts other prosecution-related work that forms a small portion of appropriations two and four.
455. In discussing the efficiency of the Criminal Team, the following factors that I identified in chapter 5 are of paramount importance.
- 455.1. The quality of the prosecution service must be sufficiently high for the public to have confidence in it.
 - 455.2. It is important for skill levels to be matched to tasks.
 - 455.3. Driving costs down is likely to impact on quality.
 - 455.4. Transparency of costs is important.

The Current System

456. In 2010/11 there were approximately 18 FTE counsel in the Criminal Team. The Team comprised 10 Crown Counsel, 3 Associate Crown Counsel and 5 Assistant Crown Counsel as well as a Legal Advisor and support staff. The Deputy Solicitor-General (Criminal and Human Rights) is the head of the Criminal Team and is also personally involved in conducting prosecution-related work, including appeals. Crown

Law advised that, including the Deputy Solicitor-General, there are approximately 9 FTE counsel outside of the Criminal Team who work on criminal prosecutions and appeals during the year.

457. In 2009/10 the Criminal Team conducted 475 appeals to the Court of Appeal and 10 appeals to the Supreme Court. A small number of these appeals were briefed to Crown Solicitors largely due to unavailability of in-house resources. Overall, Crown Law spent \$3.286 million on the conduct of criminal appeals in 2009/10. This total cost includes \$425,826 for the appeals that were briefed to Crown Solicitors (12% of the total cost).

458. For the purpose of this review I asked Crown Law to estimate the percentage of time spent by the various counsel on the tasks performed by the Team. It provided the information in the following table.

Criminal Team's main area of work	Estimated time spent by the Team (%)	Estimated hours on each area of work by the various counsel*				
		Crown Counsel	Associate Counsel	Assistant Counsel	Support	Total
Criminal CA administration	6	65	3		1,999	2,073
CA appeal**	45	10,707	2,828	2,157	335	16,072
Law Officer functions***	15	2,590	1,235	1,393	159	5,392
Criminal prosecution administration	2	616	109	1	9	737
Crown Solicitor administration	7	1,007	514	132	683	2,343
Extraditions – eligibility	15	2,138	560	2,016	475	5,204
Mutual assistance	6	626	729	887	5	2,253
Proceeds of crime	0.5	38	36	113	6	193.5
SFO prosecutions	0.002				1	1.002
TOTAL HOURS	97	17,787	6,014	6,699	3,671	34,269

*Excludes work related to justice sector policy proposals which have implications for Crown Law and Crown Solicitors. Figures are **approximates only** as they have been rounded

**Court of Appeal (CA) appeals include Solicitor-General appeals and Supreme Court appeals.

*** Law Officer functions include: criminal prosecution advice, Crown appeal to High Court, immunities from prosecution, judicial review, and stays.

459. From the table above it is apparent that around 51% of the Criminal Team's time is spent on work related to appeals in the Court of Appeal. This work is predominantly undertaken by Crown Counsel. However, there is significant input from more junior counsel and support staff.

460. The second- and third-largest categories are: mutual assistance requests and extraditions (21%); and assisting the Attorney-General and the Solicitor-General in the performance of their Law Officer functions (15%). In relation to these categories the workload is fairly evenly shared among the different

levels of counsel. Finally, assisting in the supervision of indictable prosecutions makes up approximately 9% of the Criminal Team's time. This task is, understandably, undertaken by more senior counsel.

My Assessment of the Efficiency of Crown Law

461. By the time a case is appealed to the Court of Appeal or the Supreme Court, the national interest is high and the cases will have precedent value. The hearing is always before at least three senior members of the judiciary, and Crown Counsel is expected to be able to assist the Court on any matter relating to the case whether raised by the appellant or not. Crown Counsel also appears as the direct representative of the Solicitor-General himself or herself.
462. Overall, I heard only positive comment about the impressive performance of counsel in the Criminal Team with respect to appeals. I understand that the Performance Improvement Framework Review has also assessed the skills of Crown Law staff very highly. As well, given that Crown Law conducts about 500 such appeals annually, across what amounts to around 10–15 FTE counsel, there are no grounds for pointing to any inefficiency in delivery. This conclusion is supported by the fact that, while the Criminal Team predominantly consists of senior counsel, considerable effort is clearly made to match skill levels to tasks.
463. From a purely financial perspective, theoretical savings could be made by taking this work away from Crown Law and instead briefing appeals to the Crown Solicitor who conducted the original trial. This option has the potential benefit of reducing the amount of time taken to prepare for the appeal, as the Crown Solicitor will already be familiar with the case.
464. However, given the efficiency of the Criminal Team, it is not clear that this approach would save money in the long run. Furthermore, as discussed in chapters 5 and 8, the need for independent decision-making rises proportionately to the gravity of the offence and the public interest in any given matter. As such, the need for independent decision-making at the appellate level is particularly high.
465. Several stakeholders commented on the need for independent decision-making and strongly advocated for a separation of appellate counsel and the trial prosecutor. As well as promoting independence, the existence of specialist appellate counsel promotes consistency in the submissions made on behalf of the Crown in these Courts. For all of these reasons I consider that Crown Law should continue to perform the function of conducting criminal appeals to the Court of Appeal and the Supreme Court.
466. Finally, on transparency of cost I note that Crown Law is one of the very few public sector agencies that records its own time accurately. All activity is recorded against time. This information allows the Criminal Team to assess efficiency trends across its portfolio of work and, as well, has the potential to be used to monitor performance against benchmarks. I encourage Crown Law to use this information to keep a check on efficiency and for continuous improvement.

Key findings on the Efficiency of Crown Law

467. The following are my key findings regarding the efficiency of the Criminal Team at Crown Law:
 - 467.1. It is universally acknowledged that the Criminal Team provides a very high quality of service in the appellate jurisdiction. This level of quality matches the importance of the work the Team undertakes. Further, the existence of specialist appellate counsel promotes independent decision-making and consistency.

- 467.2. The cost of the Criminal Team appears to be very reasonable. Effort is clearly made to match skill levels with tasks and, by recording time accurately, the Team has ensured that there is transparency surrounding its costs.

Recommendations

468. My recommendation is that Crown Law should:

- 468.1. Continue to perform the function of conducting criminal appeals to the Court of Appeal and the Supreme Court;
- 468.2. Continue to record the time spent on tasks accurately; and
- 468.3. Continue to use the accurate time records to maintain the Criminal Team's already high level of efficiency.

CHAPTER 11: CROWN SOLICITORS

Introduction

469. As discussed in chapter 1, one of the main drivers for this review has been the rising cost of the indictable prosecution service provided by the Crown Solicitor network in recent years. Clearly, understanding the reasons for this increase and finding ways to combat it are two of the central issues that this report needs to address.
470. Given the importance of these issues, I engaged an independent contractor to assist me in analysing the available financial data and in assessing the overall billing system. This chapter is based largely on that work.
471. At the outset it is necessary to define the scope of this chapter by identifying the issues that I do not intend to discuss in much detail.
472. First, I note that regarding the quality of Crown Solicitors, I have found quite the opposite to Dame Margaret Bazley's review, 'Transforming the Legal Aid System'; namely, I found almost universal praise for the Crown Solicitor network and the high-quality service it provides. The TOR for this review are to maintain a high-quality indictable prosecution service that is also affordable.
473. Given that quality is not an issue, this chapter focuses exclusively on affordability. Further, it looks solely at the work currently undertaken by the Crown Solicitors in the indictable jurisdiction.
474. Second, as previously discussed, the cost of indictable prosecutions to the Government has increased markedly over the last five years. It is clear that there are two reasons for this: an increase in the volume of prosecutions; and the increase in the cost-per-matter.
475. As I understand it, the volume of prosecutions has peaked and is now reducing significantly. For instance, there was a 13% reduction in summary prosecutions last year, mainly due to changes in Police operational practice concerning alternative resolutions such as formal pre-charge warnings. I note though that the prosecution rate for indictable crime has not reduced to the same extent and that the number of prosecutions for violent crimes continues to increase marginally. It is not clear whether the reduction in prosecutions overall will flow through to the more serious offences in the indictable jurisdiction. That will depend on the policies of the enforcement agencies and on political will. Notably, though, any such reduction is largely out of the control of Crown Law and the Crown Solicitors.
476. Bearing those observations in mind, I have focused on the cost-per-matter in assessing the overall affordability of the current billing system. It seems to me that this is the area where Crown Law and Crown Solicitors are able to exert the most control.
477. In addressing this issue, this chapter begins with a description of the current billing system. I then discuss the data that I was able to collect surrounding historical Crown Solicitor bills. After acknowledging the limitations of the available data, I draw some general conclusions about the historical trends.
478. What follows is my assessment of the cost of the Crown Solicitor network. I identify key areas of concern and consider different ways in which the system could be changed and/or improved.
479. The chapter ends with a list of my key findings and recommendations.

The Current Billing System

480. As previously discussed, the billing system for the Crown Solicitor network is governed by the Crown Solicitors Regulations 1994. The Regulations create what could broadly be described as a cost/time billing system.
481. In relation to cost, the Regulations provide for an hourly charge-out rate (COR) to be paid for senior counsel. That rate is then scaled down to set percentages for intermediate and junior counsel.
482. The rate itself is calculated using the formula in clause 4 of the Regulations. The formula is based on the average market salary for a solicitor with eight years' experience or more (surveyed and adjusted for inflation) plus overheads (including support staff salaries and non-salary related overheads). This salary-based figure is then converted to a 'per hour' equivalent using a deemed number of hours billed annually.
483. The Regulations call for the COR to be reviewed every year to ensure that it is keeping pace with market salaries. However, in an effort to curb the rising cost of indictable prosecutions the COR has not been adjusted upwards since mid 2006. In addition, the 'annual billable hours' assumption has been informally increased (from 1,400 to 1,500). In practice, these two decisions have reduced the effective COR over the last five years. The rate currently sits at \$198 for a senior counsel, scaled down to 80% and 65% for intermediate and junior counsel respectively.
484. In relation to time, the current billing system is again somewhat unusual because matters are not necessarily charged based on the actual amount of time that was spent on the particular task. Rather:
- 484.1. Some tasks have time caps (for example, preparation time is generally limited to 5 or 10 hours depending on the nature of the task);
 - 484.2. Some tasks (for example, court appearance at trial) are charged on the basis of half-day/four-hour blocks, even if the actual time was less; and
 - 484.3. Other tasks are charged as flat fees regardless of how much time was spent.

OBSERVATIONS

485. The reduction in the senior counsel COR (rather than a mere freeze) since 2006 is likely to have put significant income and margin pressure on the Crown Solicitor network.
486. However I have been informed that few, if any, warrants have been resigned in recent years. Furthermore, where they have been reallocated due to factors such as retirement, credible and competent alternative providers existed in approximately half the instances.⁷⁰ This continuity suggests that, although the COR may be low, other factors are enabling the warrant to remain financially viable.
487. One such factor may be that the warrant provides credibility or branding for a firm. This factor, in turn, allows it to undertake other business not related to prosecutions. This possibility appears to reflect the reality. As part of the review, Crown Solicitors provided information on how much work they undertook in areas other than Crown prosecutions. As one might expect, the range varies widely (from 0–70%); the raw average is 31%.

⁷⁰ Review of Crown Law Costs of Criminal Prosecutions, Autumn–Winter 2011, John Isles.

488. Another factor is likely to be the volume and reliability of the work associated with a warrant.⁷¹ It is widely known that very high chargeability can compensate to some degree for a lower COR, when compared with other private sector work where workloads can be highly variable.
489. A third potential factor is the existence of time caps, flat rates and fixed fees within the billing system. At first glance this might be seen as a fairly pragmatic 'unders/overs' regime. However, it is far from transparent. I understand that, in particular the 10-hour time cap to prepare for a trial is routinely exceeded. To compensate for this unrealistic expectation, preparation time may be allocated to different but related tasks in relation to the same matter. Further, in respect of the 'overs', I understand that provision exists to apply to Crown Law for a special fee. I am advised that 569 such applications were made in 2010/11 and all but 21 were approved. This finding suggests that 'overs' will frequently be clawed back by Crown Solicitors where 'unders', for instance in relation to court appearances, would not be by Crown Law.
490. In any event, and more generally, the system is unusual in that it is a time and cost system where the key variable (time) is not strictly based on actual time.

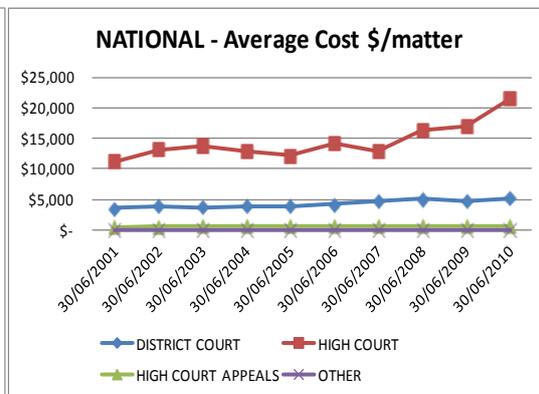
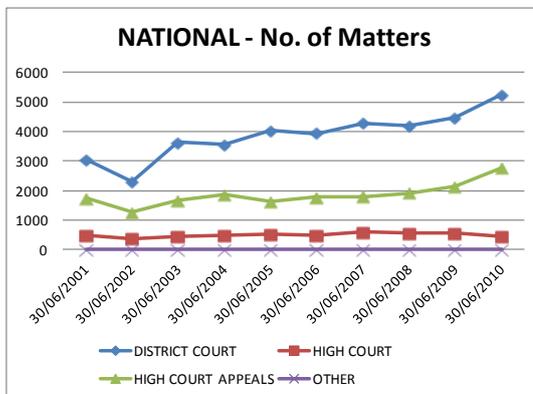
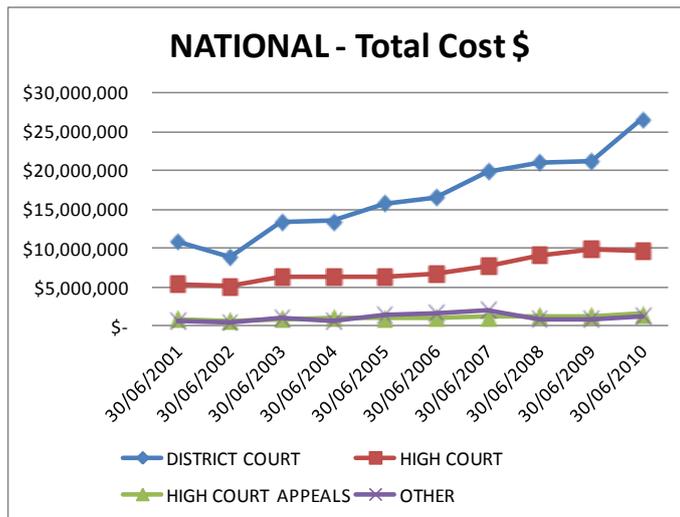
THE HISTORICAL BILLING DATA AND KEY TRENDS

491. As mentioned above, I commissioned an independent contractor to assist me in analysing historical data surrounding Crown Solicitor bills.
492. These data, provided by Crown Law, relate to the period from 2001 to 2010 ('the period' unless otherwise stated). Notably, Crown Law collected this data by receiving hard-copy invoices and entering certain information into an electronic spreadsheet. The recorded information relates to the regional provider, the matter type (usually jury trial or stand-alone sentencing) and the cost-per-matter. It is therefore, essentially a tabulation of what has been paid to whom, for what and when.
493. I asked the independent contractor to create a financial model to analyse the historical data to the extent possible.
494. At the highest level, the key trend that can be identified from the billing records is the significant rise in the total cost of prosecutions over the period from 2001 to 2010.
495. Given that the COR has been the same for the last five years, it is clear that this is not responsible for any increase in the cost of prosecutions. Therefore, attention is drawn to the number of matters and the average cost-per-matter. Hence, the key underlying trends (shown in the table and graphs below) are:
- 495.1. The rise in matter numbers; and
 - 495.2. The rise in the average cost of each matter.

⁷¹ One large firm noted that the volume is effectively endless, in the sense that backlogs in the justice system exist and remain. As a reflection of this reality, that firm targets seven to eight billable hours per day – that is, near full chargeability.

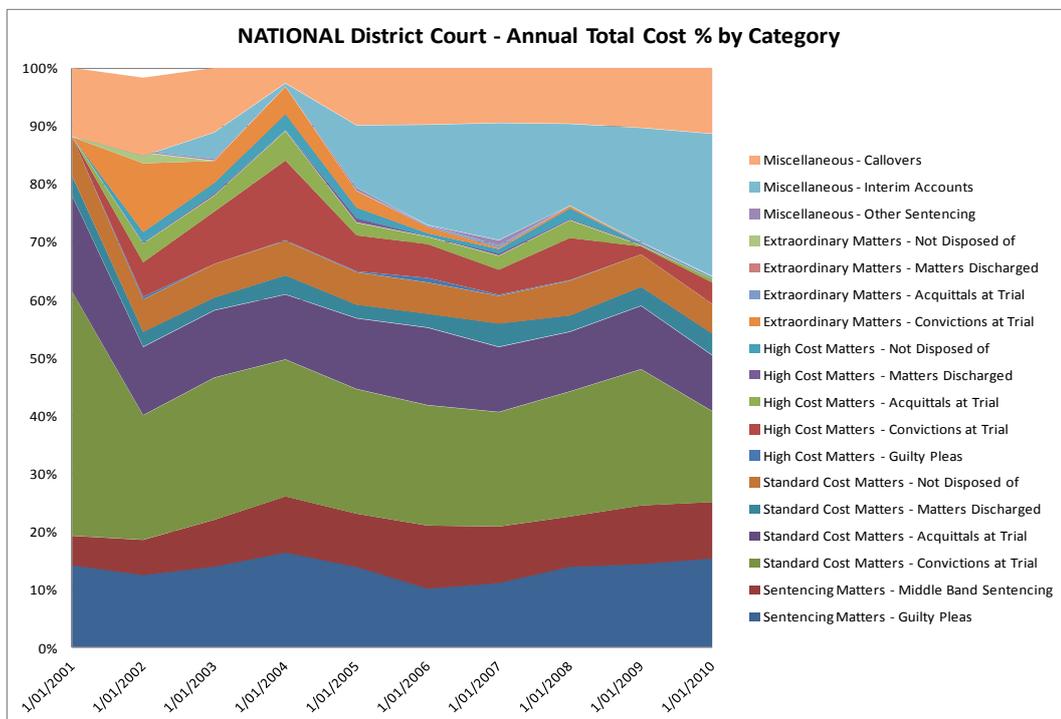
Summary by Matter Type

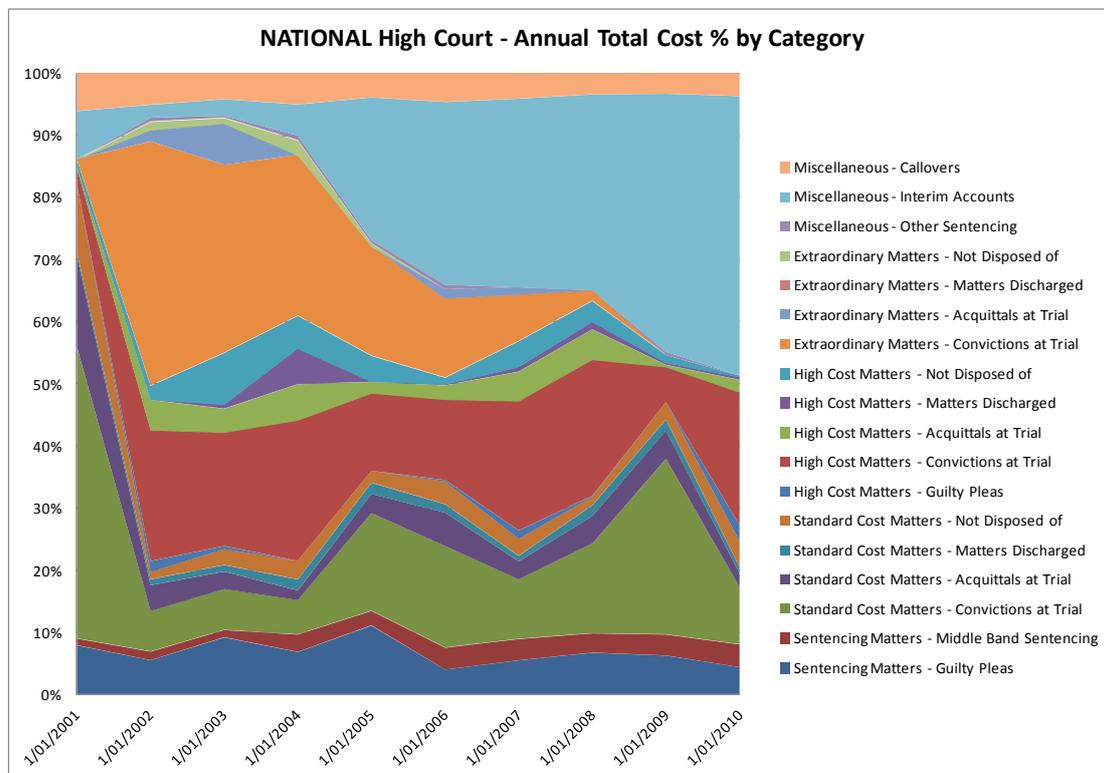
Type	Total Cost			No. of Matters			Average Cost \$/matter		
	2001	2010	CAGR %	2001	2010	CAGR %	2001	2010	CAGR %
DISTRICT COURT	\$ 10,809,230	\$ 26,586,331	9.4%	3,052	5,260	5.6%	\$ 3,542	\$ 5,054	3.6%
HIGH COURT	\$ 5,447,929	\$ 9,703,620	5.9%	490	451	-0.8%	\$ 11,118	\$ 21,516	6.8%
HIGH COURT APPEALS	\$ 825,509	\$ 1,580,036	6.7%	1,765	2,772	4.6%	\$ 468	\$ 570	2.0%
OTHER	\$ 698,068	\$ 1,319,679	6.6%	0	0	0.0%	\$ -	\$ -	0.0%
ALL	\$ 17,780,736	\$ 39,189,666		5,307	8,483		\$ 3,350	\$ 4,620	



- 496. As noted in the introduction to this chapter, the rise in matter numbers is largely out of the control of Crown Law and Crown Solicitors. As such, it was necessary to delve deeper into the reasons for the rise in the average cost-per-matter. As discussed in the case study in chapter 9, legislative reforms and Practice Notes have placed additional requirements on Crown Solicitors. This will have increased the average cost-per-matter across all of the providers. Two of the main reasons for any regional variations are likely to be: the mix of use of senior, intermediate and junior prosecutors; and the amount of time spent on each matter.
- 497. A key step of the financial modelling was therefore to derive the units of effort implied by the invoices paid.
- 498. Notably Crown Law was unable to provide any kind of summary of the actual hours spent on matters and/or the time claimed and paid for. Nor did it have records relating to the split of hours worked by the different levels of counsel within the Crown Solicitor network. Accordingly, the independent contractor had to make assumptions based on:

- 498.1. The questionnaire responses from Crown Solicitors;
 - 498.2. A three-month window of hard-copy invoices provided by Crown Law; and
 - 498.3. A one-month spreadsheet of invoices and annual totals provided by a larger provider.
499. These assumptions are discussed further below.
500. Another significant shortcoming of the data is that in 2004/05 Crown Law adopted a new policy to allow Crown Solicitors to issue interim bills in respect of unresolved matters – work in progress. It did so to combat the increasing length of time between indictments being laid and cases being resolved. These interim bills remain unallocated to any particular matter at the end of each financial year.
501. The billing pattern that has emerged, particularly in the High Court, is of interest. From 2004 to 2005 interim bills increased as a proportion of total High Court costs from 5% to 23%. From there they drifted up to 32% in 2008, then spiked in the last two years to 41% and 45% respectively.
502. I am advised that a significant factor in the more recent increase has been the impact of finance company trials and that these trials, which by nature are long and complex, are regularly invoiced as interim bills.
503. The pattern of growth in interim billing is shown in the following graphs.





504. Because of the recent emergence of high rates of interim billing, combined with primary data being recorded as fees paid rather than hours worked, it was not possible for the independent contractor to build a financial model that used 'actual hours'. I note that the Secretariat and Crown Solicitors also explored the feasibility of estimating time taken for certain activities, but that process would have taken more time than allowed for the review and, in any case, was unlikely to be reliable.
505. Despite the limitations of the data, I was able to observe a wide range of results across providers, main matter types, and time. Two inferences, discussed below, are worthy of note.

REGIONAL VARIATIONS

506. The independent contractor undertook a process of ‘heat mapping’ of providers’ relative performance against the average cost-per-matter (AC/M) across all of the providers for the main matter types by court jurisdiction. The graph below illustrates the analysis by matter type for 2009, excluding the unallocated interim matters.

Regional Provider Benchmark - comparison to National Average Cost									
Key Activities		DISTRICT COURT				HIGH COURT			
		Sentencing Matters - Guilty Pleas	Sentencing Matters - Middle Band Sentencing	Standard Cost Matters - Convictions at Trial	Standard Cost Matters - Acquittals at Trial	Sentencing Matters - Guilty Pleas	Sentencing Matters - Middle Band Sentencing	Standard Cost Matters - Convictions at Trial	High Cost Matters - Convictions at Trial
National	Volume	1121	1775	806	325	130	186	152	8
National	Average \$ Cost	\$2,735	\$1,208	\$6,222	\$7,155	\$4,722	\$1,771	\$18,214	\$69,718
Peer Group > \$2M	Auckland	-41%	3%	12%	-13%	-45%	-20%	-7%	-16%
	Manukau	-41%	-24%	-1%	-10%				
	Hamilton	-9%	0%	-27%	-24%	3%	14%	-61%	
	Tauranga	4%	21%	-43%	-16%	-10%	53%	-34%	
	Wellington	94%	17%	96%	17%	88%	118%	72%	
	Christchurch	65%	-14%	17%	26%	26%	6%	206%	
Peer Gp > \$2M		11%	72%	7%	-3%	-11%	18%	5%	-4%
Peer Group between \$1M and \$2M	Whangarei	-1%	11%	48%	53%	26%	-11%	-25%	
	Rotorua	-5%	4%	-21%	7%	67%	-67%	28%	
	Gisborne	-23%	-9%	-50%	-47%	-44%	2%		
	Napier	-42%	-23%	-40%	-27%	22%	-43%	-64%	
	P. North	-18%	8%	-5%	11%	-80%	-13%	-12%	
Peer Gp \$1M-\$2M		-18%	0%	-14%	6%	24%	-19%	-8%	
Peer Group < \$1M	New Pl.	74%	42%	30%	-18%		-21%	-6%	
	Wanganui	52%	29%	83%	29%	-27%	-15%	-43%	
	Tasman	-24%	-45%	-44%	-14%	-51%	-31%	-29%	
	Timaru	9%	-1%	26%	14%	205%		277%	
	Dunedin	-43%	-7%	-18%	-16%	153%	-9%	-32%	
	Invercargill	-12%	19%	-24%	50%		-34%	-88%	
Peer Gp < \$1M		-18%	13%	-1%	2%	85%	-24%	-5%	

Legend:

- Regional provider > 30% above national average cost benchmark 30%
- Regional provider > 15% above national average cost benchmark 15%
- Regional provider > 15% below national average cost benchmark -15%
- Regional provider within +/- 15% of national average cost benchmark

507. One inference that might be drawn from reviewing only the raw data above is that Auckland, for example, is a ‘cheap’ or efficient provider across most categories relative to the average. The same analysis, however, when undertaken after reallocating interim matters (which was done proportionately across other matter types excluding sentencing, as a working assumption), provides a different picture.

508. Before examining that picture it is necessary to acknowledge the limitations of reallocating the interim bills. Discussions with one provider revealed that the independent contractor reallocated the bills proportionately across all providers and matter types, excluding sentencing matters. Sentencing matters were excluded as they occur at the end of a case and are therefore unlikely to require interim billing. This approach may or may not be fair. The point of the exercise is simply to illustrate that the growth in unallocated interim bills is masking underlying trends.

509. Bearing those caveats in mind, after the interim bills have been reallocated Auckland appears to be relatively expensive. By contrast, Napier for instance appears to offer value for money under either view.

Regional Provider Benchmark - comparison to National Average Cost

Key Activities		DISTRICT COURT				HIGH COURT			
		Sentencing Matters - Guilty Pleas	Sentencing Matters - Middle Band Sentencing	Standard Cost Matters - Convictions at Trial	Standard Cost Matters - Acquittals at Trial	Sentencing Matters - Guilty Pleas	Sentencing Matters - Middle Band Sentencing	Standard Cost Matters - Convictions at Trial	High Cost Matters - Convictions at Trial
National	Volume Adjusted	1121	1775	806	325	130	186	152	8
National	Average \$ Cost	\$5,103	\$1,208	\$8,591	\$9,523	\$15,927	\$1,771	\$29,419	\$80,924
Peer Group > \$2M	Auckland	44%	3%	48%	26%	33%	-20%	21%	-5%
	Manukau	15%	-24%	21%	12%				
	Hamilton	-44%	0%	-43%	-39%	-65%	14%	-73%	
	Tauranga	57%	21%	2%	17%	-25%	53%	-33%	
	Wellington	24%	17%	54%	-1%	-23%	118%	18%	
	Christchurch	22%	-14%	5%	12%	-6%	6%	120%	
	Peer Gp > \$2M	19%	72%	13%	5%	1%	18%	5%	-3%
Peer Group between \$1M and \$2M	Whangarei	-15%	11%	26%	32%	-54%	-11%	-49%	
	Rotorua	-39%	4%	-37%	-14%	-12%	-67%	0%	
	Gisborne	-30%	-9%	-47%	-44%	-61%	2%		
	Napier	-48%	-23%	-45%	-34%	-36%	-43%	-63%	
	P. North	-25%	8%	-13%	0%	-58%	-13%	-26%	
	Peer Gp \$1M-\$2M	-34%	0%	-24%	-8%	-33%	-19%	-27%	
Peer Group < \$1M	New Pl.	62%	42%	35%	-2%		-21%	-18%	
	Wanganui	0%	29%	43%	7%	-61%	-15%	-55%	
	Tasman	-49%	-45%	-54%	-30%	-79%	-31%	-52%	
	Timaru	-6%	-1%	12%	5%	146%		218%	
	Dunedin	-34%	-7%	-20%	-18%	397%	-9%	171%	
	Invercargill	-35%	19%	-34%	22%		-34%	30%	
		Peer Gp < \$1M	-30%	13%	-12%	-9%	65%	-24%	19%

Legend:

	Regional provider > 30% above national average cost benchmark	30%
	Regional provider > 15% above national average cost benchmark	15%
	Regional provider > 15% below national average cost benchmark	-15%
	Regional provider within +/- 15% of national average cost benchmark	

510. The same exercise was undertaken across the 10-year period, using all matters rather than differentiating by matter type. The resultant time series heat maps for the District and High Courts are set out below.

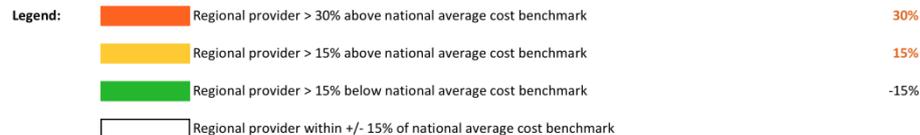
Annual Trend Heatmap

Table 1- District Court Annual Trend Heatmap

District Court Case Activity		2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
National	Volume	3052	2293	3632	3574	4025	3936	4295	4182	4478	5260
National	Average \$ Cost	\$3,542	\$3,890	\$3,708	\$3,772	\$3,893	\$4,182	\$4,635	\$5,023	\$4,754	\$5,054
Peer Group > \$2M	Auckland	10%	38%	16%	30%	35%	30%	23%	30%	36%	25%
	Manukau				63%	20%	27%	23%	27%	21%	32%
	Hamilton	-21%	-28%	-11%	-4%	-3%	-25%	-15%	-25%	-33%	-31%
	Tauranga	-11%	-19%	3%	2%	-6%	8%	33%	14%	26%	55%
	Wellington	11%		-13%	2%	-16%	-6%	-10%	-7%	18%	-13%
	Christchurch	9%	-7%	14%	13%	0%	-3%	5%	9%	16%	9%
	Peer Gp > \$2M	4%	13%	11%	24%	14%	14%	17%	15%	22%	15%
Peer Group between \$1M and \$2M	Whangarei	9%		-4%	-18%	-22%	-2%	-1%	2%	-1%	-27%
	Rotorua	2%	-18%	-17%	2%	-5%	-26%	-32%	-7%	-23%	-18%
	Gisborne	10%	-4%	-22%	-13%	-13%	18%	-32%	-26%	-38%	-37%
	Napier	-34%	-22%	-28%	-29%	-33%	-37%	-40%	-49%	-42%	-35%
	P. North	2%	-26%	-22%	8%	-29%	-32%	-25%	-20%	-17%	23%
Peer Gp \$1M-\$2M	-1%	-20%	-16%	-11%	-23%	-22%	-25%	-22%	-23%	-19%	
Peer Group < \$1M	New Pl.	39%	16%	12%	24%	2%	-11%	14%	-33%	-18%	0%
	Wanganui	7%		-39%	3%	9%	-25%	-7%	-16%	-9%	-33%
	Tasman	-41%		-23%	-33%	-37%	-12%	-10%	-34%	-38%	-30%
	Timaru	-27%		20%	41%	37%	38%	2%	1%	-22%	-8%
	Dunedin	-29%	-47%	-41%	-30%	-32%	-24%	-28%	-16%	-35%	-14%
	Invercargill	20%	-17%	13%	2%	1%	-18%	-13%	-20%	-37%	-21%
	Peer Gp < \$1M	-5%	-29%	-19%	-5%	-14%	-13%	-11%	-22%	-28%	-18%

Table 2- High Court Annual Trend Heatmap

High Court Case Activity		2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
National	Volume	490	389	462	488	528	474	604	564	578	451
National	Average \$ Cost	\$11,118	\$13,084	\$13,676	\$12,952	\$12,142	\$14,173	\$12,914	\$16,247	\$16,971	\$21,516
Peer Group > \$2M	Auckland	27%		43%	35%	56%	20%	39%	23%	37%	52%
	Manukau										
	Hamilton	-5%	-36%	-58%	-30%	-41%	-8%	-35%	-42%	-71%	-40%
	Tauranga	75%	-44%	-13%	-14%	24%	1%	69%	-13%	-24%	75%
	Wellington	6%		3%	7%	-34%	-50%	-19%	15%	11%	25%
	Christchurch	-29%	20%	20%	-36%	25%	63%	33%	19%	42%	-23%
	Peer Gp > \$2M	11%	-10%	12%	8%	22%	6%	19%	8%	6%	29%
Peer Group between \$1M and \$2M	Whangarei	-46%		-28%	-18%	-32%	-5%	-58%	-54%	-63%	-58%
	Rotorua	-29%	-11%	-48%	-34%	-53%	-57%	-4%	-17%	25%	-44%
	Gisborne	-56%	-25%	-72%	-25%	-41%	38%	-2%	168%	-6%	-78%
	Napier	10%	4%	4%	-45%	-47%	-18%	-63%	-5%	-43%	-24%
	P. North	101%	63%	-33%	-12%	-19%	-41%	-44%	-50%	-23%	-21%
Peer Gp \$1M-\$2M	-21%	9%	-36%	-25%	-39%	-26%	-42%	-26%	-26%	-43%	
Peer Group < \$1M	New Pl.	-12%	37%	131%	20%	-17%	39%	476%	-10%	-50%	10%
	Wanganui	9%		4%	20%	77%	278%	127%	-12%	-49%	-47%
	Tasman			-57%	-78%	-70%	-70%	-47%	-26%	-27%	-85%
	Timaru	-9%		-19%	135%	-10%	49%	6%	-17%	278%	-35%
	Dunedin	-65%	182%	6%	32%	-13%	-16%	-52%	86%	191%	-65%
	Invercargill	-56%	-9%	-67%	4%	-45%	-50%	-81%	-29%	-79%	-26%
	Peer Gp < \$1M	-23%	62%	25%	-1%	-30%	2%	11%	1%	12%	-40%



511. The benefit of the heat map tool is that it allows for regional patterns to become evident. The top right quadrant of the heat map above deserves particular attention. It shows that in recent years there have been above average costs-per-matter in the large regions, notably in Auckland/Manukau which was responsible for 39% of the cost of all indictable prosecutions in 2010. By contrast, a number of mid-peer group providers appear to perform consistently below national AC/M across time.

512. Importantly it should not be assumed that a provider that appears on face value to be 'expensive' is necessarily undertaking poor-quality or inefficient work. Deeper case-by-case enquiry would be required to seek a better understanding of the cause. The potential reasons for the variations may include the following factors:

512.1. Regional variations in pattern of offending, severity and/or complexity: I am aware from PPS data that a similar pattern of increased average cost-per-matter is evident in Auckland. That is, the number of matters disposed by each prosecutor-per-year is lower there than

elsewhere in the country and the total costs are disproportionate to volumes. This pattern may be far from coincidence.

- 512.2. Court procedures: For example, I understand that it is common practice in larger metropolitan courts to oversubscribe cases, putting a number on standby to ensure the efficient use of court time. This practice has the potential to raise costs for Crown Law.
- 512.3. Scale: Professional service firms face fixed costs, meaning that scale is a moderating factor on them. There are above average costs creeping in the smallest peer group, relative to the mid-band, though not in the most recent year. At face value however, this proposition is contradicted (or is not sufficiently offset by other factors) by the higher AC/M findings for the larger peer group.
- 512.4. Skills mix: Variations may arise through allocating junior and intermediate counsel or senior counsel to different matters and through the overall FTE staff make-up of firms. This factor is discussed further below.

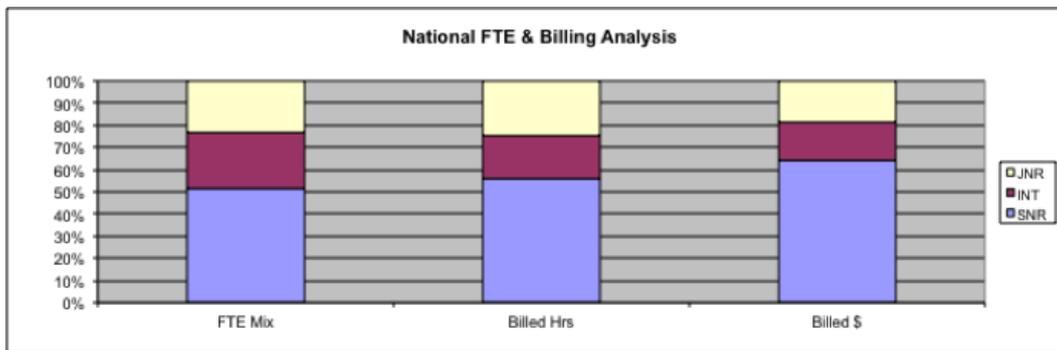
SKILLS MIX

- 513. As discussed in chapter 5, any professional service firm will develop over time a mix of solicitor grades (from partners through to juniors) that provides an optimal, or at least workable, mix of efficiency, productivity, cost, quality and client satisfaction. Common sense would suggest that the mix might typically see more use of junior staff on routine or process-based matters, base research and the like, with progressively more senior time required for complex, novel and highly judgmental work.
- 514. For the purpose of this review, I obtained from the Crown Solicitors their FTE staffing numbers. In addition, one firm provided me with information regarding its salaries (for lawyers and support staff) as well as its non-salary overheads. The independent contractor then tabulated these to derive an average pattern, and to enable observation of the variances from the norm. On the basis of this information, the average Crown Solicitors firm has a little over half of its FTEs in the senior category, and approximately one quarter each in the intermediate and junior grades. The range for seniors is between 40% and 70%.
- 515. The independent contractor then undertook some analysis of time actually billed. The purpose was to contrast the existence of FTEs with their actual use, and then with the value of their work effort, as invoiced and paid.
- 516. The limitations of this approach are acknowledged. It is based on a three-month window of bills for most regions and a one-month spreadsheet from a larger firm. Hence they were from a limited period, and one that does not necessarily correlate to the timeframes over which the firms' FTE mixes were estimated. However, with that caveat, I make the following observations.
 - 516.1. The secretariat had to generate these data from hard-copy invoices; they were not held in electronic form.
 - 516.2. The firms charged for their services in a range of different time blocks, including six-minute, half hour and one-hour units.
 - 516.3. The hours billed by senior counsel were proportionately greater than their count by number (56% District Court and 73% High Court by hours billed, versus 52% by FTE). Intermediate and junior counsel were used slightly less in the District Court and significantly less than in the High Court – about half at 12% and 15% respectively.

516.4. The national averages masked fairly significant distortions in some regions, in the period examined at least. In one region, 100% of time invoiced in the High Court was senior time (and 80% in the District Court) whereas that region's questionnaire response indicated a 20% and 40% mix of intermediate and junior skills respectively. I cannot of course say if that was so in the three-month window examined. The pattern, however, repeats in some form across regions and begs closer examination.

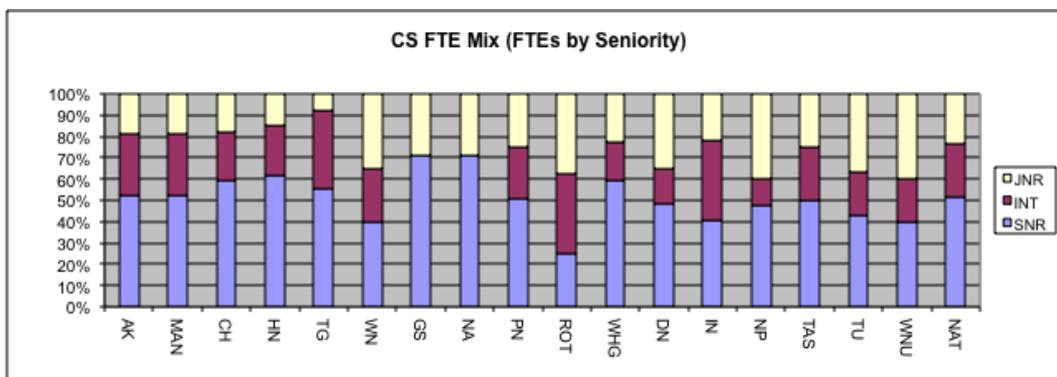
516.5. Because the senior COR is higher than that for other grades, when these mismatches are translated through to dollar billing proportions, the disparity is wider still.

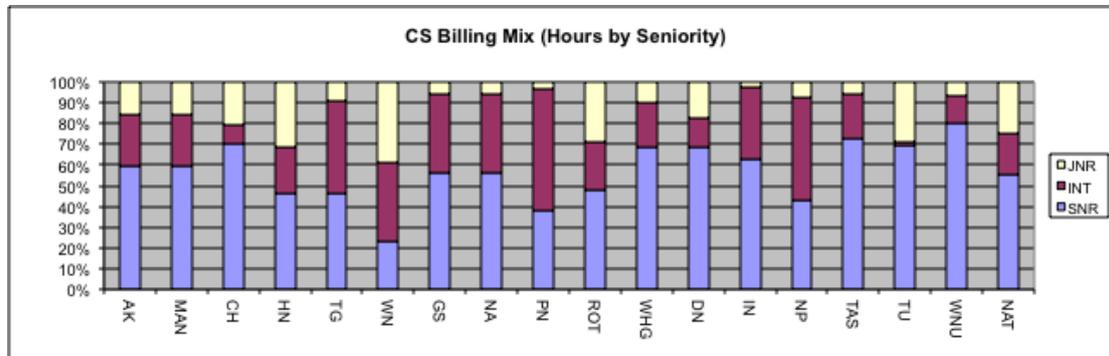
517. This analysis is represented in the following bar graphs, which show the relatively small proportion of non-senior FTEs in the Crown Solicitor network. That proportion grows smaller still when measured by output in hours, and then by value.



518. This analysis is broken down by region in the following three graphs.

519. Wellington is noteworthy in the sense that (for the period examined at least) it is oriented more towards intermediate and junior grades than average, in terms of both its leverage and – particularly – the hours billed. This pattern is often seen in other professional services, but not evident in prosecution services generally.





My Assessment of the Cost of the Crown Solicitor Network

AREAS OF CONCERN

520. My overall impression is that the billing system used to pay Crown Solicitors is to a large degree an 'honesty system'.
521. That is not to say that the observed increase in the cost-per-matter therefore implies the existence of dishonesty. Rather I simply note that the normal checks and balances and structural incentives one might expect are not evident and that their absence may be a factor in the observed pattern of overall cost increases, beyond mere volumes.
522. In light of the results of the independent contractor's analysis, I have identified five specific areas of concern in relation to the billing system currently used to pay Crown Solicitors. They are:
- 522.1. A lack of proactive management and poor data collection by Crown Law;
 - 522.2. Poor financial incentives;
 - 522.3. Unrealistic COR;
 - 522.4. Weak competition; and
 - 522.5. A lack of control of the skills mix.
523. I will now expand on each of these concerns in turn.

Lack of proactive management and data

524. My sense is that Crown Law's role has become more one of 'bill payer' than of proactive 'manager'. Specifically it does little to analyse Crown Solicitor invoices to identify trends and outliers or to compare the use of skills mixes across the network. In the absence of this analysis, it has limited ability to curb adverse variances from the norm and to institutionalise operational excellence where it is lacking.
525. Such analysis would, as I envisage it, be highly beneficial in informing regular warrant-holder reviews, setting goals for budgets and, potentially, re-tendering. At a more developed level, it would facilitate informed discussions and negotiations about price and quality trade-offs.
526. It is clear to me that this sort of proactive management is likely to clash with the strongly advocated independent status of Crown Solicitors. However, as noted throughout this report there is a need for

accountability, particularly in relation to cost, as well as independent decision-making. There is no need for complete autonomy.

Poor financial incentives

527. My understanding of the current billing system suggests that there are significant financial incentives to maximise both the time taken to perform any given task and the seniority of the counsel involved. These incentives have existed since the Regulations were put in place in 1994 and, in the absence of counterbalances, are likely to have influenced actual events and cost evolution. Although I cannot be sure of this outcome, or quantify it, I note that:

527.1. Incentives to the contrary are not readily apparent;

527.2. The growth in costs and AC/M, and the mismatch in time billed at more senior grades (relative to the number of lawyers at that grade), are consistent with the proposition; and

527.3. Although there are time caps and fixed fees in place, there are also mechanisms that Crown Solicitors can use to claw back 'overs'; however Crown Law does not claw back 'unders'.

Unrealistic COR

528. While the senior COR has been frozen for over five years, the average cost-per-matter has grown notwithstanding. As such, it is possible that the COR freeze has done nothing more than displace price increases, with volume increase to compensate in the face of the rising costs of running a legal practice. This is the 'air in a balloon' principle. Taken to the extreme, this must at some point impact (if it has not already done so) on the sustainability of the Crown Solicitors' firms and, in turn, on the quality of their service delivery. This is a matter that ought to be balanced in the design and application of any long-term pricing regime.

Weak competition

529. At its most basic, every year Crown Law procures around \$40 million of professional services from the private sector, without tendering. Although there is an initial selection procedure, it is clear that this is oriented towards the quality of legal representation rather than operational efficiency and/or value for money.

530. Once appointed, the warrant holder essentially holds a regional monopoly, remunerated on a time and cost basis, with predictable and certain volumes. There is no need to bid for work either job by job or periodically.

531. In this context, the competitive tensions that professional services firms normally face are absent. Firms facing competition must deliver both quality and value for money, at the risk of being under-cut or replaced. Where fees are capped in particular, a key tool throughout the private sector is to use fewer senior staff to the greatest extent practicable without unduly compromising quality.

532. In that context, a well-designed pricing regime would include mechanisms designed to mimic those tensions to the extent possible. Such mechanisms are largely lacking at present.

Lack of control of the skills mix

533. As explained above, there is a disparity between the numbers of FTE counsel by seniority and the hours invoiced by seniority. Although the difference is not severe, on a national basis that does not mean that

the average FTE mix is optimal in the first place, from the perspective of value for money. Furthermore, some of the regional variances from the norm are troubling at face value. Clearly junior counsel are employed by Crown Solicitor firms, suggesting that providers (in the period examined at least) are either:

- 533.1. Using and not charging for less senior staff – which may occur when a junior and a senior collectively exceed a time cap. In such circumstances the junior time would be written off. However, the number of special fee applications (having grown to over 500 per annum) would suggest that firms are frequently seeking to pass on preparation costs above capped levels, rather than absorbing this cost; or
- 533.2. Not using their less senior staff – which typically would impact on value for money for the client. The existence of competition and fee pressure usually drives firms to push work delivery to less senior staff, to the extent quality is not unduly impacted; or
- 533.3. Using and charging less senior staff at higher level – which, self evidently, would be of concern to Crown Law. I have no way to rule out this possibility, given that the billing system relies to a great degree on self-regulation.

How to Change and/or Improve the System?

AN INDICTABLE PUBLIC PROSECUTION SERVICE

534. As part of the TOR for this review I was asked to determine whether the public sector could provide an alternative indictable prosecution service that was more efficient than that currently provided by the Crown Solicitor network.
535. This option could potentially resolve some of the areas of concern identified in this chapter and throughout this report. Accordingly I asked the independent contractor to consider the viability of this option and to calculate any potential savings.
536. To do this, the independent contractor used the financial modelling described above and made some assumptions based on the derived number of hours historically purchased by Crown Law at the various levels of seniority of counsel. It was necessary to make these assumptions in the absence of readily observable hours. With that as the base, the contractor then further backsolved the implied number of FTE staff that would be required by region, at an assumed level of 'billable' or productive hours per person per year. This number was then multiplied by assumed salaries (based on salary data provided by Crown Law and one large Crown Solicitor firm) and allowance was then made for support salaries and overheads as a percentage of salaries (again based on figures provided by Crown Law and one Crown Solicitor).
537. The results of this process indicated the following.
 - 537.1. At the salaries used and assuming the same number of annual productive hours as is currently assumed in calculating the COR for Crown Solicitors (1,500), the cost of the salaried model was 15% cheaper, all else being equal.
 - 537.2. However, where productive hours are reduced (as 1,500 hours indicates almost full productivity), the cost of the public service model exceeded that of the Crown Solicitor network. In this scenario productive hours were assumed to be 1,200 for seniors, 1,300 for intermediates and 1,500 for juniors. Any potential savings were therefore negated even before consideration of transitional costs.

538. Therefore although a saving seems theoretically possible, the outcome of the model is fairly marginal and is highly sensitive to salary costs, assumed overheads and the assumed productive hours per person. It is also noted that there is an inherent degree of circularity in comparing this option with the cost of the Crown Solicitor network, which itself uses a COR (applied to the same derived hours delivered) and which is also based on salaries and an assumed number of billable hours.
539. Ultimately the modelling did not demonstrate that a salaried prosecution delivery model would necessarily be less expensive than the current Crown Solicitor network, even ignoring the initial set-up costs. However, the data are less than perfect at present and the salaried counter-factual may merit further examination as better data are gained over time. It will be useful to assess the financial performance of the Public Defence Service in this regard.

An alternative structural solution?

540. In relation to the idea of embarking on wholesale change at present, I note that there are significant changes underway for other parts of the prosecution system as part of CPRAM. These initiatives are likely to reduce the number of jury trials and change current procedures, such as involving Crown Solicitors at an earlier stage in the prosecution. As discussed in Part IV, small changes in procedures can have a significant impact on cost given the labour-intensive nature of the prosecution service. My view is that, ideally, there should be a known, stable rate of jury trials before major changes to the prosecution service are considered.
541. This leads me to conclude that there is no rationale for recommending wholesale structural change for now. This conclusion, however, does not mean that spending is as lean as it could be. Instead, I consider that the best way to improve efficiency at present is to make smaller changes to the status quo. I consider that these changes will improve the financial performance of the existing system and will help to maintain public confidence in the prosecution service while the changes under CPRAM are embedded. I therefore recommend retention of the warranted Crown Solicitor network and the current geographical configuration.
542. In relation to geographical configuration I note that, in many respects, it would be logical to split Meredith Connell into two warrants: one for Manukau and one for Auckland. At present, the sheer size of Meredith Connell represents a risk to the Government as it would be very difficult to replace. I also note that in recent years, it has exceeded the nationwide average cost-per-matter.
543. However, all of the stakeholders I interviewed for this review commented on the high-quality service provided by Meredith Connell. It appears to have very good operational policies, provides invaluable assistance to the Courts in scheduling and plays an important leadership role within the Crown Solicitor network. In relation to the latter point I note that Meredith Connell runs an in-house training programme on litigation skills that is available to indictable prosecutors nationwide and has assisted a private sector agent to develop best practice protocols.
544. Accordingly, I do not propose to split Manukau and Auckland into separate warrants, as I consider that this change would risk an unacceptable drop in efficiency in the current environment. Instead I consider that alternative mechanisms need to be put in place to replicate competitive tension. For example, some kind of tendering process or panels of prosecutors for certain types of indictable prosecutions might be introduced.
545. A further possibility for structural change would be to encourage individual Crown Solicitors to diversify in the type of services their firms provide. Combining prosecution work with other litigation services could increase efficiency through sharing resources and would provide wider experience for prosecutors. To encourage this type of diversification, Crown Law should consider the feasibility of

relaxing the restrictions on Crown Solicitors appearing against the Crown, which the Regulations currently impose.

ADAPTING THE STATUS QUO

546. In my opinion, the current billing system should not remain as it is.
547. I suggest that a more transparent and realistic billing system for Crown Solicitors should be introduced in combination with more proactive financial management by Crown Law. This system should be implemented in three stages.
- 547.1. Stage one: In the short term, at least until after CPRAM has fully come into force (around 2013), Crown Law needs to improve the financial reporting and accountability arrangements of Crown Solicitors to ensure that there is good information on the labour costs (that is, the real time taken per task).
- 547.2. Stage two: In the medium term, once the current fiscal constraints are relaxed somewhat, consideration should be given to lifting the freeze on the current COR.
- 547.3. Stage three: In the medium to longer term, the Government should reconsider all of the options for reform outlined in this report in light of the improved financial data and the prosecution landscape created by CPRAM. If retaining the Crown Solicitor network is still seen as the preferred option then consideration should be given to introducing mechanisms to combat the existence of regional monopolies. Options to consider should include bulk-funding or some form of tendering process. In addition, high cost matters should be managed more actively through introducing a prosecuting panel to conduct matters that are high cost, complex and/or in the public interest.
548. Below I elaborate on how I envisage this three-stage process would work in practice.

Stage one: Proactive management and information collection

549. In relation to stage one I suggest that, to balance the areas of concern identified above, there is an immediate need to provide for:
- 549.1. Greater transparency through the collection of detailed time information concerning indictable prosecutions;
- 549.2. Improved analysis of the data at a deeper level than seems to have been the case at present; and
- 549.3. Proactive management of the provider network and consequences for sustained under-performance.
550. I propose that Crown Law should work towards implementing the following interim measures during stage one.
- 550.1. **Data capture** – improve the capture of financial data, ideally electronically, and especially regarding time and skills mix (based on actual time, avoiding the use of minimum deemed hours per matter and caps). I see few barriers to warrant holders submitting their invoices electronically, using a standardised format. Expensive information technology systems are not required.

- 550.2. **Case tracking** – seek to link all matters associated with one case to a common case number thereby facilitating another ‘view’ of costs by nature of offence.
 - 550.3. **Data analysis** – critically, use those data to analyse trends to inform the management of the Crown Solicitor network.
 - 550.4. **Focus on significant outliers** – develop (or co-develop with providers) expected norms then focus on outliers, particularly where they may coincide with larger regions. Any learning could then be cascaded through the network.
 - 550.5. **Proactive management with consequences** – undertake proactive management of suppliers at the level consistent with a purchase of services worth \$40 million per year. This ‘account management’ approach to Crown Solicitors would involve regular meetings, target setting, providing feedback on performance and communicating expectations. Meaningful consequences should also be gradually introduced, potentially involving the introduction of some form of caps,⁷² re-tendering (regular and out of cycle for sustained under-performance) and/or removal of warrant. These mechanisms are discussed further in relation to stage three.
551. In practice, this new relationship may need to be created by repealing or amending the Regulations (or parts of the Regulations) and by retaining the services of the Crown Solicitors through a combination of contracts and warrants. As part of this process the agency relationship between the Solicitor-General and Crown Solicitors should be re-asserted.
552. As a ‘one size fits all’ regime may not be appropriate across all regions or matter types, I suggest that follow-on work (beyond that which has been possible in the time available) is warranted to refine the regional analysis. It would note differences in or correlations to:
- 552.1. Court sitting days – a measure of systemic capacity;
 - 552.2. Number of events per case – a measure of court operations that may be outside the control of Crown Solicitors;
 - 552.3. Severity and complexity of offending by region – a factor outside the control of Crown Solicitors;
 - 552.4. Total offending and also PPS costs of delivery – which seem to display similar regional patterns, especially in Auckland; and
 - 552.5. Qualitative assessments of providers – so as to better inform price/quality trade-offs and purchasing decisions.
553. This proactive financial management regime would be more expensive than the current passive one. At present Crown Law spends approximately 1% of the costs associated with Crown Solicitors on financial management of their services.⁷³ In my view, this proportion is insufficient and should be at least 2% to allow for increased financial management of indictable prosecutions and greater supervision of the summary jurisdiction. As stated in chapter 9, I consider that the Deputy Chief Executive position currently being considered by Crown Law should be made permanent and that additional Policy

⁷²Whether by matter type, capped payment for senior time, gain sharing or even caps for a firm overall.

⁷³As discussed in chapter 9, the cost of Crown Law’s financial supervision of the Crown Solicitor network was estimated in an internal Crown Law memorandum to be \$368,000.

Advisers will be required to assist in overseeing the prosecution service as a whole. The additional 1% allocated to financial management would pay for the salaries for these extra staff as well as a spreadsheet-based data capture and analysis tool to be rolled out across the Crown Solicitor network.

554. As a further practical measure, I reiterate my recommendation in chapter 9 that Crown Law's third appropriation should be split into two separate categories: the Conduct of Indictable Prosecutions; and the Supervision of all Indictable Prosecutions. This separation will prevent the sacrifice of management costs in an effort to curb rising Crown Solicitor costs.
555. In light of this upfront cost I have estimated the potential savings from more proactive financial management of the Crown Solicitor network. An estimated 5–10% per year could be saved on a gross basis (that is, before any potential increase in monitoring or other costs) through:
- 555.1. Improving below-average performance to accord with the current average cost-per-matter; and
 - 555.2. Flattening the skills mix.
556. By way of explanation, I have modelled the implied saving by simply capping the AC/M in the District Court at the existing average (that is, before any COR increase) cost. This is a fairly 'blunt instrument' as it looks only at costs above the average without good knowledge of why those costs are higher. It is particularly prone to error when applying a national average to the large centres, which may simply deny the increased complexity or scale of cases run in the larger centres. I have sought to recognise this limitation by applying the cap to the District Court only (given that the AC/M in the High Court is multiples of that in smaller peer groups). The implied savings are approximately \$2.1 million per annum by capping at the national District Court AC/M.⁷⁴
557. In reality, the theoretical saving of \$2.1 million may be based on an unduly harsh cap for the larger centres, whose cases may be (on average) simply larger and more complex. To put that in context, the independent contractor ran the same scenario but using the AC/M of the relevant peer group, rather than the national average. This reduced the assumed saving to approximately \$1.6 million per year.
558. In relation to flattening the skills mix, I acknowledge that I am not an expert in the best practice leverage mix for legal practitioners, much less a prosecutor. However, some Crown Solicitors are able to operate under a more flattened leverage mix with 45% seniors.⁷⁵ Assuming this mix nationwide, the implied saving is approximately \$1.1 million per year across all warrants.
559. These savings would more than adequately compensate for the cost of more proactive management by Crown Law.

⁷⁴ If this approach was flowed through to the High Court as well, the targeted saving would be about \$2.7 million per year.

⁷⁵ One specific scenario was to adjust hours billed from the national average in the District Court (about 56%) to a target 45% and to reallocate the time to other grades (I moved to 27% for intermediates and 28% for juniors). That is, I did not transform the leverage model into the pyramid style I see in certain other professional service environments, and I left it still dominated by seniors.

Stage two: Consider lifting the freeze on the COR

560. To move towards a transparent system that reflects the realities of prosecuting it will be necessary, at some point, to lift the freeze on the COR. This is not recommended in the short term in light of the current extremely tight fiscal constraints.
561. However, taken to the extreme, a freeze on the COR may compromise one or both of quality and sustainability of the provider business model. The existing freeze has already been in place for over five years and cannot remain indefinitely without consequences. If the network is retained then a relaxation of this freeze should be seriously considered, combined with the introduction of better data capture and active management, as described above.
562. Again, I have attempted to estimate the cost of this proposal. If the COR freeze was removed today and the COR was adjusted for inflation, the current COR would be \$225 per hour. All else being equal, if this rate was applied to the current Crown Solicitor bills then this would result in an additional cost to Crown Law of \$5.35 million, which represents a 13.5% increase. By the same logic, a 6.75% increase (about half the inflation adjustments foregone during the freeze) translates to a cost increase of around \$2.65 million.

Stage three: Re-assess the options and create a new billing system for Crown Solicitors if appropriate

563. In my opinion the arrangements outlined above should be reviewed two years after all of the provisions of CPRAM have come in force (which is likely to be around 2015). The billing system for Crown Solicitors should then be completely re-assessed and the full range of options should be re-considered in light of the prosecution environment that then exists.
564. If the Crown Solicitor network is still seen to be the best option at that time then consideration should be given to introducing different payment options such as fixed fees; annual bulk-funding; and payment of Crown Solicitors by difficulty of task rather than by the seniority of the prosecutor.
565. In addition, consideration should be given to mechanisms that would introduce further competition into the sphere of Crown prosecutions. Regular tendering for the warrant is one such option. Another, which I consider deserves particular attention, would be the introduction of a panel of prosecutors to conduct high-cost, complex and/or high public interest matters.
566. It is my view that, regardless of the existence of a panel, it would be useful for Crown Law to play a more proactive role in the case-by-case management of high-cost, complex and high public interest matters. In this role it could potentially control and reduce the large costs associated with these cases.
567. The additional benefit of introducing a panel of prosecutors to conduct these cases, though, is that it would allow practitioners from outside of the Crown Solicitor network to obtain high-level prosecuting experience, which would potentially assist in creating greater competition for the warrants. For this panel to succeed, a premium COR would need to be introduced for these matters because the current COR is wholly inadequate relative to the cost of the most experienced litigation practitioners. I envisage that Crown Law would hold a separate fund for these cases.
568. Given that the occurrence of high-cost, complex and high public interest cases is notoriously difficult to predict, I expect that Crown Law would need time to build its capability to estimate the expected rate and cost of such cases from year to year. Further, given the nature of these cases, there would need to be flexibility in the budget for making adjustments during the financial year and at year end.

569. Once again, I have attempted to quantify how much this proposal might cost. I have only looked at the cost of introducing a premium COR for this type of case so the additional administration cost to Crown Law would need to be factored in. I have taken, as an example, a scenario where a 50% premium (a total revised COR of \$337.50 an hour) is paid on 4% of total hours. This proportion has been selected in light of the average percentage of hours over the last decade attributed by Crown Law to 'Extraordinary Matters' (essentially matters costing \$50,000 or more).⁷⁶ Therefore, I estimate the cost of such an initiative to be just over \$1 million.

Immediate action

570. I understand that the Cabinet has directed Crown Law to report in December 2011 on the plan to manage within appropriation for the Supervision and Conduct of Indictable Prosecutions from 2012/13, without the additional top-up that was required in 2010/11. This plan will require greater savings than those envisaged under my three-stage approach outlined above. If this is the approach that is required, then I suggest that, in preparing the 2012/13 appropriation for the Supervision and Conduct of Indictable Prosecutions, Crown Law should:

570.1. Apply a cap to the total billing for the Crown Solicitor network based on its collective bill in 2010/2011 less 10%;

570.2. Review each Crown Solicitor's relative efficiency based on the financial modelling set out in this report and in particular identify those Crown Solicitors who consistently bill in excess of the national average cost-per-matter; and

570.3. Identify a percentage reduction in relation to the total bill for each Crown Solicitor individually based on the financial modelling and assessment of relative efficiency. These percentages will need to add up to the total 10% reduction.

571. The aim of this approach is to arrive at a weighted average on the relative efficiency of each Crown Solicitor's firm. To give effect to this approach, it may be necessary to negotiate contracts with the Crown Solicitors and/or to amend the Regulations to provide for this type of interim measure.

572. It is readily acknowledged that this approach involves an unscientific 'blunt instrument'. Further, it is not an approach that I would recommend.

573. However, if an immediate solution is considered necessary, there is enough evidence from the financial modelling to suggest that savings up to 10% could be garnered from the system. My preferred option, though, would be to obtain these savings through a process of better data collection and management by Crown Law. This approach would ensure that any changes and savings are sustainable in the long term.

574. My advice is that any reduction greater than 10% could impose too much pressure on the system and must be left until proper information is collected and analysed.

⁷⁶ The proportion over 10 years is more like 5%, but variability has been high. In fact, zero has been recorded in the category in recent years. I suspect this is linked to the corresponding growth in interim accounts.

Key findings on the Efficiency of the Crown Solicitor Network

575. The following are my key findings in regard to the Crown Solicitor network:

- 575.1. The Crown Solicitor network provides an appropriately high-quality indictable prosecution service.
- 575.2. The billing system currently used to pay Crown Solicitors is unusual as it is a time and cost system where the key variable (time) is not strictly based on actual time.
- 575.3. The key trend that can be identified from the billing records is the significant rise in the total cost of prosecutions from 2001 to 2010. This rise was due to:
 - 575.3.1. A rise in matter numbers; and
 - 575.3.2. A rise in the average cost-per-matter.
- 575.4. Prosecution volumes are largely out of the control of Crown Law and the Crown Solicitors. As such, attention is drawn to the average cost-per-matter. Legislative reforms and Practice Notes have placed additional requirements on Crown Solicitors, which will have increased the average cost-per-matter across all of the providers. Two of the main reasons for any regional variations are likely to be: the skills mix used by Crown Solicitor firms; and the time spent on each task.
- 575.5. Analysis of the financial data provided by Crown Law was limited by:
 - 575.5.1. The absence of any record of actual time spent on matters;
 - 575.5.2. The absence of any record of the skills mix used by Crown Solicitor firms; and
 - 575.5.3. The introduction of interim billing in 2004/05, which has masked underlying trends.
- 575.6. Despite these limitations the following observations may be made.
 - 575.6.1. There is considerable regional variation in the average cost-per matter. This does not necessarily reflect whether a provider is efficient or not as other factors may be relevant beyond time taken, including patterns of offending, court procedures, scale and use of skills mix.
 - 575.6.2. The Crown Solicitor network is heavy in senior prosecutors, who range between 40% and 70% across the network. The hours billed by these prosecutors are also proportionately greater than their head count and there is considerable regional variation in this regard. The one exception is Wellington. Mismatches in the skills mix will translate through to increased cost for Crown Law.
- 575.7. My overall impression is that the billing system used to pay Crown Solicitors is to a large degree an 'honesty system'.
- 575.8. I have five specific areas of concern in relation to the billing system. They are:
 - 575.8.1. A lack of proactive management and poor data collection by Crown Law;
 - 575.8.2. Poor financial incentives;

- 575.8.3. Unrealistic COR;
 - 575.8.4. Weak competition; and
 - 575.8.5. A lack of control surrounding the skills mix.
- 575.9. The modelling carried out did not demonstrate that a salaried prosecution delivery model would necessarily be less expensive than the current Crown Solicitor network, even ignoring the initial set-up costs. However, the present data is less than perfect and the salaried counter-factual may merit further examination as better data is gained over time.
- 575.10. High Cost complex cases should be managed more actively.
- 575.11. Particularly in light of CPRAM, there is no rationale for recommending wholesale structural change for now. This conclusion, however, does not mean that spending is as lean as it could be.

Recommendations

576. I recommend that:

- 576.1. The Crown Solicitor network should continue to conduct indictable prosecutions on behalf of the Crown;
- 576.2. The network should be retained with its current geographical configuration;
- 576.3. In the medium to longer term, a panel should be introduced to conduct matters that are high cost, complex and/or in the public interest so as to introduce competition to combat the existence of regional monopolies.
- 576.4. The current billing system used to pay Crown Solicitors should not remain as it is.
- 576.5. A more transparent and realistic billing system should be introduced in combination with more proactive financial management by Crown Law.
- 576.6. The new billing and management system should be introduced in the following three stages.
 - 576.6.1. Stage one – improve proactive management and information collection (as discussed at paragraphs 547.1 and 549 to 559).
 - 576.6.2. Stage two – consider lifting the freeze on the COR (as discussed at paragraphs 547.2 and 560 to 563).
 - 576.6.3. Stage three – re-assess the options and create a new billing system for Crown Solicitors if appropriate (as discussed at paragraph 547.3 and 563 to 569). In particular, there should be a defined set of high cost, complex and public interest cases, actively managed through a separate funding stream within Crown Law and farmed out to a broader set of prosecutors than at present.

CHAPTER 12: POLICE

Introduction

577. As discussed throughout this report, the PPS presently conducts the vast majority of all prosecutions in the summary jurisdiction. It conducted 158,693 prosecutions in 2009/10 at a cost of \$32,028,863 to the taxpayer.
578. In the preceding chapters I have made numerous recommendations that reflect specific areas of concern that I have surrounding the PPS. These recommendations related to:
- 578.1. Charging practices and policies;
 - 578.2. Promoting independent decision-making;
 - 578.3. Clarifying the relationship between Police prosecutors and the Attorney-General; and
 - 578.4. Reporting to the Solicitor-General.
579. I do not intend to re-address any of those issues in this chapter.
580. Instead this chapter focuses purely on the overall efficiency of the PPS in terms of quality and cost. Because the work of the PPS has been extensively discussed elsewhere in this report, I will not summarise the current system here. Instead the chapter begins with a brief description of the history of the PPS followed by my assessment of the PPS' efficiency, my key findings and recommendations.
581. In discussing the efficiency of the PPS, the following factors that I identified in chapter 5 are of paramount importance.
- 581.1. The quality of the prosecution service must be sufficiently high for the public to have confidence in it.
 - 581.2. It is important for skill levels to be matched to tasks.
 - 581.3. Driving costs down is likely to impact on quality.
 - 581.4. Transparency of costs is important.

A BRIEF HISTORY OF THE PPS

582. As discussed in chapter 4, the PPS was established in 1999.
583. Prior to 1999, all Police prosecution functions were conducted by dedicated staff sections within each (then) District. These prosecution sections were directly accountable to Police District Commanders who had responsibility for all operational and strategic policing functions within their geographical region, including uniform, investigative and administrative functions. Their responsibility also incorporated direct management of all prosecution decisions, summary prosecutions and indictable prosecutions up until the point of committal for trial.
584. In the 1990s this system faced widespread criticism from a number of different sources including:

- 584.1. Two judicial surveys;
 - 584.2. An internal review conducted by the Assistant Commissioner of Police;
 - 584.3. An external review of the New Zealand Police's organisational structure and strategy ('the Martin review'); and
 - 584.4. The Law Commission's 1997 Background Paper and 2000 Report on criminal prosecutions.
585. The main concerns identified in these surveys, reviews and reports were:
- 585.1. Poor advocacy skills and knowledge of the law;
 - 585.2. Poor file management;
 - 585.3. Lack of guidance and training surrounding decision-making;
 - 585.4. Inappropriate recruitment leading to a culture of mediocrity; and
 - 585.5. Lack of independence in decision-making.
586. The collective result of these initiatives was the creation of the PPS as a new nationwide business unit within the Police. New management and accountabilities were established to separate Police prosecutors from other personnel. Additionally, new policies regarding the recruitment and training of prosecutors were developed.

My Assessment of the Efficiency of the PPS

587. Over the last 12 years the PPS has continued to work on the areas of concern that originally led to its establishment. The comments stakeholders made to me indicate that the PPS has come a very long way since 1999. At present I would assess the quality of its work to be high.
588. I note that there were isolated comments from stakeholders about low performance. However, it is clear that the PPS is developing into a professional prosecution service and that it is beginning to attract capable prosecutors. The number of non-sworn, legally trained prosecutors has increased in recent years and I would encourage the PPS to continue to target recruitment towards such staff. Their input will both increase the independence of decision-making and more closely match skill levels to tasks. Further, I understand that there is now performance accountability for prosecutors and that this is supported by structured training and development programmes. Again, I commend these practices.
589. In relation to cost, I note that the PPS has significantly reduced its reliance on Crown Solicitors in the last two years and has instead increased its use of internal Police legal resources. I have heard no comments to suggest that this practice has led to any reduction in quality. Accordingly, this appears to be a suitable area of saving.
590. By using in-house prosecutors in the summary jurisdiction, the Police has kept its costs down while taking steps to promote independent decision-making. The structures in place to separate investigators and prosecutors are discussed at length in chapter 8. The only comment I make here is that the balance reached by the Police appears to be both workable and appropriate, given the low level of seriousness of summary prosecutions. A very rough estimate is that PPS prosecutions are costing the taxpayer around \$200 per prosecution. Further, the PPS information on cost was the best I saw in this review.

591. My conclusion overall is that the PPS operates a highly efficient prosecution service and I have found little to criticise about its business model.
592. I understand that the current budget assigned to the PPS may be further reduced due to budget cuts to the public sector across the board. I have no particular view on that; however, I note that when systems are placed under too much pressure, there comes a point at which quality may decline. In the case of poor performance of prosecutors, this imposes potential flow-on costs to the Courts and defence service. Accordingly, there would be risks associated with reducing the PPS budget, despite the expected reduction in summary prosecution volumes. That reduction in volume may not decrease the workload for the PPS as its workload depends, in large part, on the capacity of the Courts.
593. Given the efficiency of the PPS, the Government could consider whether the Police should be empowered to bring somewhat more serious cases than at present. However, I believe any change in that direction should only be incremental at this time.
594. It would not be appropriate to place a significant additional burden on the PPS right now, in light of the current budgetary pressures. It would also be a mistake for PPS to take on a greater number of serious and complex cases without understanding the effect of CPRAM on prosecution volumes and, in particular, the number of elected jury trials. Once CPRAM has bedded-in, the possibility of assigning more serious 'Judge alone' trials to the PPS should be considered further.
595. However with clear efficiencies, expertise in the summary jurisdiction and a service that is available nationwide, I see the Police as being in a very good position in the short term to provide summary prosecution services to other enforcement agencies at cost.
596. I understand that, on previous occasions, the PPS has carried out such prosecution work on an ad hoc basis for other enforcement agencies. However, the Police absorbed the cost of that work, which is an unsustainable arrangement. Accordingly there would need to be a system in place to enable the PPS to charge on a not-for-profit, fee-for-service basis. This system would provide these agencies with another alternative to using their own in-house prosecutors or Crown Solicitors for summary prosecutions.

Key Findings on the Efficiency of the PPS

597. The following are my key findings in regard to the efficiency of the PPS.
- 597.1. The PPS has come a long way since it was established in 1999 and is now providing a very efficient summary prosecution service. The quality of prosecutions is relatively high and the cost is low.
- 597.2. The data collection and analysis undertaken by the PPS in relation to its prosecutions (including the associated cost) was the best I saw in this review.

Recommendations

598. My recommendations are that the PPS should:
- 598.1. Continue to actively recruit greater numbers of non-sworn, legally trained prosecutors;
- 598.2. Continue to invest in training programmes concerning decision-making, advocacy and legal issues;
- 598.3. Continue to develop performance accountability measures for prosecutors;

- 598.4. Develop better information collection systems, including time-based recording of prosecution activity;
- 598.5. Consider extending the Police training programmes to other enforcement agencies, at cost; and
- 598.6. Assess the viability of providing summary prosecution services to other enforcement agencies on a fee-for-service basis.

CHAPTER 13: OTHER ENFORCEMENT AGENCIES

Introduction

599. The Police is not the only enforcement agency with prosecution functions in New Zealand. For the purpose of this review, I surveyed a sample of 17 other enforcement agencies with prosecution functions. These agencies were chosen primarily based on the number of prosecutions they initiate but also to reflect a mixture of Government departments, Crown Entities and Crown Agents.⁷⁷
600. Broadly speaking, the non-Police enforcement agencies that I surveyed can be broken down into three categories based on the number of prosecutions they initiate annually:
- 600.1. Those with a high rate of prosecutions (more than 20,000);
 - 600.2. Those with a moderate to low rate of prosecutions (between 50 and 1,000); and
 - 600.3. Those with a very low rate of prosecutions (fewer than 50).
601. This chapter begins with a brief discussion of the current system, with reference to these three groups. What follows is my assessment of their relative efficiency.
602. Having considered these agencies in their three separate categories, I then ask whether, as a whole, they are conducting their prosecutions in the summary jurisdiction efficiently. Again, this question is broken down into a brief discussion of the current system and my assessment.
603. In assessing the individual and collective efficiency of these enforcement agencies, the following factors are of paramount importance, as I identified in chapter 5:
- 603.1. The quality of the prosecution service must be sufficiently high for the public to have confidence in it.
 - 603.2. There is a need for an economy of scale.
 - 603.3. It is important for skill levels to be matched to tasks.
 - 603.4. Driving costs down is likely to impact on quality.
 - 603.5. Transparency of costs is important.
604. The chapter concludes with my key findings and recommendations.

⁷⁷ The initial round of selection identified agencies that, according to CMS data, initiated more than 40 summary prosecutions or more than 10 indictable prosecutions.

The Current System for the Individual Agencies

AGENCIES WITH A HIGH RATE OF PROSECUTIONS

605. Aside from the Police, only the Department of Corrections falls in the category of agencies with a high rate of prosecutions. As discussed in chapter 4, Corrections laid approximately 30,000 informations in 2009/10 and conducted 20,942 summary prosecutions.
606. During this review, Corrections provided me with further detail about the prosecutions it conducted in 2010/11. I was informed that the Department managed 120,510 sentences/orders in the community that year. In the same period 36,057 informations were laid in court relating to breaches of sentences or orders.⁷⁸ All but 41 of the resulting summary prosecutions were resolved prior to a defended hearing, usually through guilty pleas but also through charges being withdrawn. These cases were dealt with in court by probation officers who were required to be in court to provide sentencing advice to Judges along with any information about offenders currently serving sentences or orders. Of the 41 cases that continued to a defended hearing, 20 were briefed to Crown Solicitors for reasons of complexity. The remaining 21 defended hearings were conducted by probation officers with specialist prosecution training.
607. None of the probation officers who present cases in court for Corrections has legal training.

AGENCIES WITH A MODERATE TO LOW RATE OF PROSECUTIONS

608. After the Police and Corrections, there is a significant drop-off in the volume of prosecutions per enforcement agency.
609. A handful of Government agencies initiate between 50 and 1,000 prosecutions a year, namely Customs, DIA, DOC, DOL, Fisheries, Housing NZ, IRD, MED, MOH and MSD. Typically, the prosecutions are specialised. Under the Cabinet Directions these agencies have the choice of either conducting their prosecutions in the summary jurisdiction using salaried staff or briefing them to Crown Solicitors.
610. My understanding is that:⁷⁹
- 610.1. Housing NZ (100), MED (70)⁸⁰ and MOH (60–70) brief all of their summary prosecutions to Crown Solicitors;
 - 610.2. DIA (60–70), DOC (70) and IRD (580) use a combination of salaried staff and Crown Solicitors; and
 - 610.3. DOL (370), Fisheries (300–400), MSD (800) and Customs (65–70) predominantly use salaried staff.
611. In this group it appears that an agency briefs Crown Solicitors for one of three reasons:

⁷⁸ Note that the figure I used in the 2009/10 snapshot in this report relied on CMS data. I have used Corrections own data for the 2010/2011 year.

⁷⁹ The figures in this paragraph and paragraph 613 reflect the answers given by the agencies when asked to average the number of prosecutions they brought annually over the last five years.

⁸⁰ Notably MED answered this question with reference to charges rather than prosecutions so the figure for the number of prosecutions brought by MED in 2009/10 from CMS has been used.

- 611.1. No in-house prosecutors are employed by the agency;
 - 611.2. No in-house prosecutor is available in the geographical region where the case must be heard;
or
 - 611.3. No in-house prosecutor has sufficient expertise to deal with the particularly complex or high public interest issues that are likely to arise.
612. All of the in-house prosecutors employed by this group perform a dual role as a legal adviser. The best estimate at present is that there are 45.5 FTE prosecutors employed in these agencies and they are all legally trained.

AGENCIES WITH A VERY LOW RATE OF PROSECUTIONS

613. Several of the agencies surveyed initiate fewer than 50 prosecutions every year. These include CAA (18), the Commerce Commission (17), FMA (5), the Historic Places Trust (3–4), Maritime NZ (10), the Ministry of Education and the SFO (15–20).
614. All of these agencies brief their summary jurisdiction work to Crown Solicitors or, in the case of the SFO, to members of the SFO panel.

My Assessment of the Efficiency of the Individual Agencies

615. As discussed in chapter 11, the quality of the Crown Solicitor network is almost universally recognised as high. There is no reason to conclude otherwise in relation to the work Crown Solicitors undertake in the summary jurisdiction. Therefore, in assessing the efficiency of the agencies that brief all of their cases to Crown Solicitors, the sole issue is cost.
616. By contrast, many stakeholders commented to me that the quality of (non-Police) departmental prosecutors is 'patchy'. These comments related to the prosecutors' knowledge of the law as well as court protocol and etiquette.
617. In my opinion, the main reason for this variable quality is that some of these agencies may not have the economies of scale to justify the use of in-house prosecutors. In order to provide an efficient service, departmental prosecutors must be in court enough to justify the cost involved in employing and training them to a sufficiently high level.
618. The benchmark at present is the cost of regularly retaining the services of a Crown Solicitor because this is the only available alternative for summary prosecutions under the Cabinet Directions. However, if the PPS was to extend its services to these agencies on a fee-for-service basis (as discussed in chapter 12) then this would provide an additional benchmark.
619. The difficulty at present is that it is very hard to determine whether economies of scale exist because, as discussed in chapters 4 and 7, agencies with in-house prosecutors generally have a very poor understanding of how much their prosecutions actually cost. This information is lacking largely because in-house prosecutors do not perform that role on a full-time basis. Instead they are employed predominantly as legal advisers or probation officers, and little effort is made to track the amount of time that is spent on prosecution work.
620. The Department of Corrections was not able to estimate the number of FTE prosecutors it employs on the basis that the prosecution of breach charges is only one facet of the probation officer role. However, the information provided to me for 2010/11 suggests that, despite the very high number of

informations laid, probation officers only conduct around 20 defended hearings per year. Given that none of these officers has legal qualifications, I would imagine that a considerable amount of specialist training would be required to conduct these hearings to the requisite standard. For 20 prosecutions, this level of training does not seem warranted.

621. The remaining 45.5 FTE departmental prosecutors in New Zealand are employed by Customs, DIA, DOC, DOL, Fisheries, IRD and MSD. As discussed in chapter 4, the salary cost of these prosecutors alone is likely to be in excess of \$3,185,000. Further, these seven agencies collectively are responsible for only around 1% of all prosecutions in the summary jurisdiction. I acknowledge that these prosecutions may require highly specialised skills and may be more complicated than the average case prosecuted by the PPS. However, in combination with the concerns voiced surrounding quality, the numbers indicate that this issue warrants further examination.
622. Finally, in relation to those agencies that initiate fewer than 20 prosecutions per year, the use of Crown Solicitors as opposed to in-house prosecutors seems appropriate. However, for the simple prosecutions initiated by this group, the level of use of the Crown Solicitor network seems somewhat excessive. The prime example is the truancy and non-enrolment prosecutions for which the Ministry of Education is responsible. The introduction of the PPS as a third alternative under the Cabinet Directions could address this issue.

THE CURRENT SYSTEMS FOR CO-OPERATION BETWEEN AGENCIES

623. There are two stages in the criminal justice process in which enforcement agencies have the opportunity to co-operate with one another: during the investigative stage; and during the prosecution stage. Co-operation purely at the investigation stage is beyond the scope of this review. Accordingly, I do not intend to address this issue in any detail. However, I consider it worth noting that many of the agencies I surveyed expressed concern about the current lack of information sharing at the investigation stage, particularly in relation to financial crime. The Government could consider whether additional work needs to be done in this area.
624. Consistent with the scope of this review, therefore, this discussion focuses on the prosecution stage. During this review it became apparent that a variety of mechanisms are already in place to promote co-operation between agencies on prosecution-related matters. These mechanisms include:
 - 624.1. Memoranda of understanding (MOUs – usually ad hoc agreements between two or three agencies that relate to engaging and co-ordinating with each other on related prosecutions);
 - 624.2. Regular inter-agency meetings;
 - 624.3. Informal case-by-case discussions; and
 - 624.4. The Prosecutors Forum for departmental prosecutors, which meets quarterly to discuss issues of mutual concern.
625. Further I understand that in recent years the PPS has invited departmental prosecutors to attend its in-house prosecution training courses.

My Assessment of the Co-operation Between Agencies

626. In my opinion, the enforcement agencies with prosecution functions are not making the most of their opportunities to share resources at present. I have two reasons for this conclusion.

626.1. As I understand it, there are no universal performance standards or training programmes for prosecutors who appear predominantly in the summary jurisdiction. Instead, only a handful of departmental prosecutors attend the in-house training course run by the PPS.

626.2. There are several areas at present where enforcement agencies have overlapping responsibilities, such as in relation to financial, environmental, health and safety and cross-border offending. Despite this, the only co-operation measures that have been developed are various forms of meetings and a series of ad hoc MOUs. There is no universal MOU akin to the Prosecutors' Convention in the United Kingdom and there is no overall co-ordination of co-operation.⁸¹

627. As alluded to earlier, I have particular concerns in relation to the prosecution of financial offences. Currently six of the agencies I surveyed are responsible for prosecuting some form of financial crime: the SFO, FMA, Commerce Commission, IRD, MED and the Police. Each agency may not investigate a vast number of these cases but the cases they choose to investigate are expensive. The high cost is due to the complex nature of the offending and the corresponding need for additional investigative tools, legal advice and lengthy hearings. Further, the likelihood of these agencies targeting the same suspects is relatively high. Accordingly, there is real need for them to co-operate extensively. The anecdotal evidence collected during the review suggests that, at present, agencies are not achieving this high level of co-operation.

628. At the prosecution stage, one way of encouraging greater co-operation between these agencies would be to extend the services of the Serious Fraud Prosecutors Panel to all of them. This extended service would provide the requisite level of prosecution expertise and would also assist in identifying overlapping interests. Further this Panel could assist in minimising the risks associated with the regional monopolies held by Crown Solicitors, as discussed in chapter 11.

Key Findings on the Individual and Collective Efficiency of Agencies

629. The following are my key findings in relation to the efficiency of the individual agencies.

629.1. The quality of (non-Police) departmental prosecutors is 'patchy'.

629.2. The agencies that currently employ departmental prosecutors may not have sufficient economies of scale to justify their employment.

629.3. It is very hard to determine whether economies of scale exist because the agencies that employ departmental prosecutors generally have a fairly poor understanding of how much their prosecutions cost.

629.4. At face value, given the low volume of defended hearings, it does not appear that probation officers can be doing the volume of defended hearings efficiently.

⁸¹ See the cross-jurisdictional research attached to this document.

- 629.5. The extent to which Customs, DIA, DOC, DOL, Fisheries, IRD and MSD use in-house prosecutors is of questionable efficiency.
 - 629.6. It is appropriate that CAA, the Commerce Commission, the Historic Places Trust, Maritime NZ and the Ministry of Education do not employ in-house prosecutors.
630. The following are my key findings in relation to the collective efficiency of the agencies.
- 630.1. The enforcement agencies with prosecution functions are not making the most of their opportunities to share resources.
 - 630.2. In particular, there is insufficient co-operation in training prosecutors and conducting financial crime prosecutions.
 - 630.3. There are limited opportunities for agencies in terms of purchasing prosecution services for summary prosecutions.

Recommendations

631. I make the following recommendations for the efficiency of the individual enforcement agencies.
- 631.1. All non-police enforcement agencies (particularly the Ministry of Education) should formally consider the option of briefing some or all of their summary prosecution work to the PPS. Specific attention is drawn to those cases that are straightforward and those that are only briefed to Crown Solicitors for reasons of geographical convenience.
 - 631.2. Corrections should consider briefing the remainder of their defended hearings (those not already briefed to Crown Solicitors) to the PPS.
 - 631.3. Crown Law should consider, in the longer term, ways to ensure that purchasing options for enforcement agencies are not overly limited.
 - 631.4. The agencies that employ in-house prosecutors should:
 - 631.4.1. Financially justify the use of in-house prosecutors in their reports to the Solicitor-General if they wish to retain them to conduct court work;
 - 631.4.2. Consider ways to share resources to promote better training and staff development; and
 - 631.4.3. Encourage staff to attend the PPS prosecution training courses.
 - 631.5. The Government should consider amending the Cabinet Directions to allow enforcement agencies to retain the services of the PPS to conduct prosecutions in the summary jurisdiction.
632. I make the following recommendations for the collective efficiency of the enforcement agencies.
- 632.1. Crown Law should encourage greater co-operation between enforcement agencies on prosecution-related matters. Its work in this area could include facilitating secondments and shared training as well as canvassing support for the adoption of a more formal prosecution MOU applicable to all enforcement agencies, akin to the Prosecutors' Convention used in the United Kingdom.

- 632.2. The Government should consider expanding the services of the Serious Fraud Prosecutors Panel to all of the agencies that prosecute financial crime in both the summary and indictable jurisdictions.
- 632.3. Crown Law should, in the longer term, consider ways to provide more options for purchasing and conducting prosecutions in the summary jurisdiction.

PART VI: Findings and Options

CHAPTER 14: FINDINGS

Introduction

633. This chapter begins with a list of the preliminary comments from Part II. There follows a list of the key findings I have identified throughout this report, allocated to the prosecution service generally and to the respective main players in the service.

Preliminary Comments

634. It is apparent that the Attorney-General is accountable to Parliament for all public prosecutions. Logically, this accountability necessitates a very general understanding of how much public prosecutions cost. (Part II, chapter 4, 27)

635. The direction of the review must be forward-looking to account for the significant change CPRAM will introduce to the system. (Part II, chapter 4, 27)

636. Prosecution decision-making processes need to recognise that prosecutions should only take place if there is a reasonable prospect of conviction and if they are otherwise in the public interest. These processes should also recognise that there are limited resources available for prosecutions and should ensure that decisions are made consistently and transparently. (Part II, chapter 5, 35)

637. Prosecutors are obliged to make prosecution decisions independently, both in appearance and reality. This obligation is particularly important in the indictable jurisdiction. However, the mechanisms to support independence also need to recognise other relevant factors such as accountability, consistency, and co-operation with investigators. (Part II, chapter 5, 35)

638. There need to be well-defined guidance, monitoring and reporting arrangements in place involving the Solicitor-General, enforcement agencies and prosecutors in order to promote accountability, consistency, transparency and overall efficiency. (Part II, chapter 5, 39)

639. It is extremely important that our prosecution service is efficient, in that it strikes an appropriate balance between quality and cost. In order to make this assessment, it is necessary to have a fairly detailed knowledge of cost. (Part II, chapter 5, 41)

640. This review focuses on the third broad option for reform, adapting the present system, for three reasons. One, there is no evidence to suggest that the present system is fundamentally flawed. Two, the current fiscal climate is not well suited to wholesale reform. Three, the paucity of financial data surrounding prosecutions and the impending changes under CPRAM make accurate forecasting of the other options impossible. (Part II, chapter 6, 46)

The Prosecution Service Generally

641. The structures that are currently in place surrounding the decision to prosecute (or not) have achieved a fairly robust decision-making process. (Part III, chapter 7, 55)
642. There is little evidence to support a conclusion that either over-charging or under-charging is a systemic problem in New Zealand. However, it is clear that there are isolated incidents of both. Further, it is apparent that the charges laid in any given case are frequently amended during the proceedings. This practice is far from ideal. (Part III, chapter 7, 57)
643. There is no systemic problem relating to a lack of independence in prosecution decision-making in New Zealand. (Part III, chapter 8, 64)
644. There is widespread misunderstanding of the real need for independent decision-making, which is confused with a perceived need for complete prosecutorial autonomy. Complete autonomy would compromise the accountability of prosecutors and the consistency in their decision-making. By contrast independent decision-making, accountability and consistency are not mutually exclusive concepts. (Part III, chapter 8, 64)
645. The Cabinet Directions give the Solicitor-General some control over who may conduct a summary prosecution. This level of control is appropriate. (Part IV, chapter 9, 78)
646. The mandate for the Solicitor-General to oversee summary prosecutions is very weak. The vast majority of the available oversight mechanisms only arise on a case-by-case basis and there are few opportunities to use them in the summary jurisdiction. (Part IV, chapter 9, 78)
647. The absence of any clear, central oversight of summary prosecutions is not just a theoretical concern. There is evidence to suggest that the Prosecution Guidelines are not consistently applied, there are quality concerns about departmental prosecutors and the cost of summary prosecutions is largely unknown. (Part IV, chapter 9, 78)
648. The role of the Solicitor-General in overseeing indictable prosecutions is much clearer than it is in relation to summary prosecutions. (Part IV, chapter 9, 81)
649. This oversight is expressed on a case-by-case basis and at a systematic level through: the binding nature of the Prosecution Guidelines; regular Law Officer referrals and appeals; appointment and practice reviews of Crown Solicitors; regular contact with Crown Solicitors; and payment of their bills. (Part IV, chapter 9, 81)
650. I have significant concerns surrounding the mechanisms that are available to allow the Solicitor-General to actively manage the cost of indictable prosecutions. (Part IV, chapter 9, 81)
651. High-cost, complex and/or high public interest cases should be more actively managed. (Part V, chapter 11, 111)

Key Findings

CROWN LAW IN RELATION TO THE PROSECUTION GUIDELINES

652. The Prosecution Guidelines are a very useful tool for promoting transparency and consistency in relation to the decision to prosecute (or not). (Part III, chapter 7, 55)
653. Cost should be taken into account when deciding whether an individual prosecution is in the public interest. (Part III, chapter 7, 55)
654. The Prosecution Guidelines are a very useful tool for assisting investigators and prosecutors in determining the charge(s) that should be laid in any particular case. However, there is evidence to suggest that a few charging practices have developed that are inconsistent with the Guidelines. (Part III, chapter 7, 57)
655. The exact nature of the relationship between the SFO and the Serious Fraud Prosecutors Panel is not clearly described in any publicly available document. (Part III, chapter 8, 66)
656. The Prosecution Guidelines provide transparency, and apparent consistency, in decision-making and operational policy. However their effectiveness as an oversight tool is undermined by the fact that compliance is voluntary for Police and departmental prosecutors and there is no monitoring system in place. (Part IV, chapter 9, 78)

CROWN LAW GENERALLY

657. There is no systematic monitoring of the decision-making structures in enforcement agencies designed to promote independent decision-making by in-house prosecutors. (Part III, chapter 8, 64)
658. The nature of the relationship between the Solicitor-General and Crown Solicitors is somewhat unclear. In this situation, the performance management role of the Solicitor-General is necessarily hands-off. (Part IV, chapter 9, 81)
659. It is critical for Crown Law to play an active role in prosecution policy to ensure that the fiscal ramifications of any future prosecution-related reforms are taken into account before they are implemented and that these reforms do not just shift costs from one Vote to another. (Part IV, chapter 9, 85)
660. The Criminal Team at Crown Law provides an appropriately high-quality service in the appellate jurisdiction at a very reasonable cost. The existence of specialist appellate lawyers promotes independent decision-making, and accurate time recording has ensured transparency surrounding cost. (Part V, chapter 10, 88-89)
661. It would have assisted the independent contractor in modelling the costs of indictable prosecutions if Crown Law had obtained or retained information on the actual time Crown Solicitors spent on matters and the skills mix the individual firms used. The policy of interim billing also made the modelling exercise more difficult. (Part V, chapter 11, 110)

CROWN SOLICITORS

662. There is evidence to suggest that the Police and Crown Solicitors have developed divergent charging policies on violent and historic sexual offending. (Part III, chapter 7, 57)
663. The Crown Solicitor warrant system promotes a high level of independence, consistency and transparency in decision-making, and an appropriate degree of co-operation with investigating agencies. (Part III, chapter 8, 66)
664. The nature of the relationship between the Solicitor-General and Crown Solicitors is somewhat unclear. In this situation, the performance management role of the Solicitor-General is necessarily hands-off. (Part IV, chapter 9, 81)
665. The Crown Solicitor network provides an appropriately high-quality indictable prosecution service. (Part V, chapter 11, 110)
666. The billing system used to pay Crown Solicitors is unusual as it is a time and cost system where the key variable (time) is not strictly based on actual time. (Part V, chapter 11, 110)
667. The key trend that can be identified from the billing records provided by Crown Law is the significant rise in the total cost of prosecutions from 2001 to 2010, due to a rise in matter numbers and the average cost-per-matter. (Part V, chapter 11, 110)
668. Prosecution volumes are largely out of the control of Crown Law and the Crown Solicitors. As such, attention is drawn to the average cost-per-matter. Legislative reforms and Practice Notes have placed additional requirements on Crown Solicitors, which has increased the average cost-per-matter across all of the providers. Two of the main reasons for any regional variations are likely to be: the skills mix used by Crown Solicitor firms; and the time spent on each task. (Part V, chapter 11, 110)
669. Despite the limitations of the billing records retained by Crown Law, it can be observed that there are considerable regional variations in the average cost-per matter and that the Crown Solicitor network is heavy in senior prosecutors. (Part V, chapter 11, 110)
670. My overall impression is that the billing system used to pay Crown Solicitors is to a large degree an 'honesty system'. (Part V, chapter 11, 110)
671. My specific concerns in relation to the billing system are: a lack of proactive management and poor data collection by Crown Law; poor financial incentives; the existence of an unrealistic charge-out rate; weak competition; and a lack of control surrounding the skills mix. (Part V, chapter 11, 110-111)
672. The modelling carried out did not demonstrate that a salaried prosecution delivery model would necessarily be less expensive than the current Crown Solicitor network, even ignoring the initial set-up costs. However, the data is less than perfect and the salaried counter-factual may merit further examination as better data is gained over time. (Part V, chapter 11, 110)
673. Particularly in light of CPRAM, there is no rationale for recommending wholesale structural change for now. This conclusion, however, does not mean that spending is as lean as it could be. (Part V, chapter 11, 111)

ENFORCEMENT AGENCIES GENERALLY

674. The practice of supplementing the Prosecution Guidelines with agency-specific enforcement policies is appropriate. (Part III, chapter 7, 55)
675. Cost should be taken into account when deciding on whether a prosecution is in the public interest and whether the overall prosecution rate for each enforcement agency is appropriate. (Part III, chapter 7, 55)
676. The PPS, Customs, DIA, DOC, DOL, Fisheries, IRD and MSD have all struck an appropriate balance between mechanisms that promote independent decision-making and those that encourage accountability, consistency, co-operation with investigators and management of cost. (Part III, chapter 8, 68)
677. There is no requirement on enforcement agencies to report to the Solicitor-General, in any way, about the prosecutions that they conduct. (Part IV, chapter 9, 78)
678. There is considerable confusion among the enforcement agencies as to the Solicitor-General's role in overseeing summary prosecutions. (Part IV, chapter 9, 78)
679. There is a wasted opportunity to improve the quality of the work of departmental prosecutors as no regular feedback is sought from the judiciary. (Part IV, chapter 9, 78)
680. The quality of the work of (non-Police) departmental prosecutors is 'patchy'. (Part V, chapter 13, 120)
681. The agencies that currently employ departmental prosecutors may not have sufficient economies of scale to justify the employment of these prosecutors. However, this possibility is very hard to confirm as these agencies have a fairly poor understanding of how much their prosecutions cost. (Part V, chapter 13, 120)
682. It is appropriate that CAA, the Commerce Commission, the Historic Places Trust, Maritime NZ and the Ministry of Education do not employ in-house prosecutors. (Part V, chapter 13, 121)
683. The enforcement agencies with prosecution functions are not making the most of their opportunities to share resources. In particular, there is insufficient co-operation in training prosecutors and conducting financial crime prosecutions. (Part V, chapter 13, 121)
684. There are limited options for purchasing prosecution services for enforcement agencies in the summary jurisdiction. (Part V, chapter 13, 121)

THE POLICE

685. There is little evidence to support a conclusion that either over-charging or under-charging is a systemic problem in New Zealand. However, it is clear that there are isolated incidents of both. Further, it is apparent that the charges laid in any given case are frequently amended during the proceedings. This practice is far from ideal. (Part III, chapter 7, 57)
686. There is evidence to suggest that a few charging practices have developed that are inconsistent with the Prosecution Guidelines. (Part III, chapter 7, 57)
687. There is evidence to suggest that the Police and Crown Solicitors have developed divergent charging policies in relation to violent and historic sexual offending. (Part III, chapter 7, 57)

- 688. Section 16 of the Policing Act 2008 may be adding to confusion for the Police as to the Solicitor-General's role in overseeing summary prosecutions. (Part IV, chapter 9, 78)
- 689. The PPS has come a long way since it was established in 1999 and is now providing a very efficient summary prosecution service. The quality of prosecutions is relatively high and the cost is low. (Part V, chapter 12, 114)
- 690. The data collection and analysis undertaken by the PPS in relation to its prosecutions (including the associated costs) was the best I saw in this review. (Part V, chapter 12, 114)

CORRECTIONS

- 691. There is evidence to suggest that a few charging practices have developed that are inconsistent with the Prosecution Guidelines. (Part III, chapter 7, 57)
- 692. Corrections has insufficient mechanisms in place to promote independent decision-making. (Part III, chapter 8, 68)
- 693. At face value, given the low volume of defended hearings, it does not appear that probation officers can be doing the volume of defended hearings efficiently. (Part V, chapter 13, 120)

SERIOUS FRAUD OFFICE

- 694. The SFO routinely obtains legal advice from its Prosecutors Panel members from very early on in the investigation stage of proceedings. This practice has the potential to compromise independent decision-making. (Part III, Chapter 8, 66)

CHAPTER 15: MY ASSESSMENT OF THE OPTIONS FOR REFORM

695. The TOR asked me to consider a range of options for improving the prosecution service by re-organising the roles and functions within it. In chapters 5 and 6, I identified the three main goals I have for the prosecution system and the options I proposed to consider. The table below sets out a brief assessment of each of those options with reference to the three goals.

Option	More robust decision-making	Clearer oversight	Improved efficiency
A predominantly panel-based system	No Consistency and accountability would be difficult to manage and independence from investigators could be compromised.	No Generally the more fragmented the service is (in terms of the involvement of different types of prosecutors), the more difficult it will be for the Solicitor-General to oversee.	No There is currently no briefing system, akin to that provided by the CPS in the UK, to ensure that prosecution files are appropriately briefed. As such, the increased fragmentation of skills and resources is likely to reduce quality and increase cost.
Panels for specialised, serious and/or expensive cases	The same As long as the number of panels is limited, issues surrounding consistency, accountability and independent decision-making could be managed.	The same As long as the number of panels is limited, adequate guidance, monitoring and reporting arrangements could be put in place.	Potentially Greater specialisation could improve quality, and introducing competition into the market currently monopolised by Crown Solicitors could reduce cost.

Option	More robust decision-making	Clearer oversight	Improved efficiency
Crown Solicitors conduct all prosecutions	<p>Yes</p> <p>Crown Solicitors are bound by the Prosecution Guidelines and, as external prosecutors, they are well protected from undue pressure from investigators and Ministers.</p>	<p>Yes</p> <p>This option would reduce the number of disparate groups of prosecutors that the Solicitor-General would need to oversee. However, it would only result in clearer oversight if it was combined with strengthening the management tools available to the Solicitor-General in relation to Crown Solicitors.</p>	<p>No</p> <p>There is no need to engage Crown Solicitors to conduct straightforward summary prosecutions. Their level of expertise is not necessary for this type of work and would not represent money well spent.</p>
One public sector prosecuting service*	<p>Yes</p> <p>This option would achieve the highest degree of accountability and consistency. Prosecutors would be less autonomous than at present but independent decision-making would be managed by the non-political nature of the Solicitor-General's position.</p>	<p>Yes</p> <p>This option would create a direct reporting line between the Solicitor-General and all prosecutors.</p>	<p>Unclear</p> <p>As explained in chapter 13, the paucity of data makes it impossible to determine whether this option would provide a cheaper service in the long run. There would also be large set-up costs.</p> <p>In relation to quality, it has been suggested that public servants would provide a lower-quality service due to reduced financial incentives for high performance and reduced personal responsibility for decisions. However, the high-quality services provided by Crown Law and the PPS undermine this assertion.</p>

Option	More robust decision-making	Clearer oversight	Improved efficiency
PPS to conduct more summary prosecutions	<p>Yes</p> <p>The PPS has fairly robust decision-making processes in place. If it was to take on prosecution work on behalf of other agencies, Police prosecutors would be external, which would promote independent decision-making.</p>	<p>Yes</p> <p>This option would reduce the number of disparate groups of prosecutors that the Solicitor-General needs to oversee. However, the relationship between s 16 of the Policing Act and clause 190 of CPRAM would need to be clarified.</p>	<p>Yes</p> <p>This option would only work if other enforcement agencies agreed to buy prosecuting services from the PPS. This option would give them a cheaper alternative to Crown Solicitors if they do not have their own in-house prosecutors to call on. There would be a small set-up cost so buy-in from the agencies would be required in advance.</p>
A new prosecuting role for Crown Law	<p>The same</p> <p>If Crown Law is given a prosecuting role on a small scale, this is unlikely to significantly affect consistency and accountability in decision-making overall.</p>	<p>Yes</p> <p>A direct reporting line between the Solicitor-General and some prosecutors would increase the amount of information available to Crown Law about the day-to-day process of prosecuting. This would assist in guiding and monitoring other prosecutors.</p>	<p>Unclear</p> <p>This option involves a reasonably significant upfront cost as Crown Law does not employ any specialist prosecutors at present. It seems unlikely that employing a small team of public sector prosecutors would in itself greatly affect overall costs. However, it could assist in gaining knowledge about the true costs of prosecuting.</p>
Retaining Crown Solicitors on contracts	<p>Yes</p> <p>Increased management controls over Crown Solicitors could improve accountability and consistency. Independence would be protected as long as the warrants remained in place.</p>	<p>Yes</p> <p>This option would assist in clarifying the current guidance, monitoring and reporting arrangements between the Solicitor-General and Crown Solicitors.</p>	<p>Yes</p> <p>This option could address the current gap in the system surrounding performance management of Crown Solicitors, particularly in relation to financial matters.</p>

Option	More robust decision-making	Clearer oversight	Improved efficiency
More or fewer Crown Solicitors	The same Unless the number was to change dramatically, this option is unlikely to change the current status of the decision-making processes.	The same Unless the number was to change dramatically, this option is unlikely to change the current oversight relationship.	Unclear Adding more Crown Solicitors has the potential to combat the current monopolies on indictable prosecution work. However, this option would reduce the economies of scale. Conversely if the number of Crown Solicitors was reduced, there would be associated risks that Crown Solicitors' firms would become too big to replace. Without further information there seems to be no reason to suggest that the current number of Crown Solicitors is wrong

* Either as an independent Crown Prosecution Service or an extensively expanded Crown Law.

696. Accordingly, as indicated by the table above and my discussions in previous chapters, my preferred option is to:

696.1. Expand the oversight role of Crown Law over both summary and indictable prosecutions;

696.2. Retain the Crown Solicitor network and its current geographical configuration; and

696.3. Consider the options of:

696.3.1. Expanding the current Serious Fraud Prosecutors Panel to other Government agencies involved in financial prosecutions;

696.3.2. Setting up a fund to actively manage high-cost, complex and/or high public interest prosecutions; and

696.3.3. Expanding the role of PPS to make its prosecution services available to other Government departments on a fee-for-service basis.

CHAPTER 16: IMPLEMENTING MY PREFERRED OPTION

Introduction

697. This chapter consists of the recommendations I have made throughout this report allocated to the prosecution service generally and the respective main players in the service. No actions have been assigned specifically to the Crown Solicitors. Any such recommendations seemed inappropriate given that Crown Solicitors are not part of the public sector.

The Prosecution Service Generally

698. Compliance with the Prosecution Guidelines should be mandatory for all enforcement agencies with prosecution functions. (Part IV, chapter 9, 79)

699. The relationship between the Solicitor-General and Crown Solicitors should be clarified. This could be done through re-asserting the agency relationship that previously existed. Further, the warrant system should be supplemented by a contractual relationship instead of relying on the Regulations. Formal mechanisms should be put in place to assist in managing the operational prosecution policies of Crown Solicitors and to allow for the Solicitor-General to play a more direct role in monitoring and controlling the cost of indictable prosecutions. (Part IV, chapter 9, 82)

700. Vote: Attorney-General appropriation three, the Supervision and Conduct of Indictable Prosecutions, should be split into two separate appropriations: the Conduct of Indictable Prosecutions; and the Supervision of Indictable Prosecutions. (Part IV, chapter 9, 82)

701. The Crown Solicitor network should continue to conduct indictable prosecutions on behalf of the Crown. Further, the network should be retained with its current geographical configuration. (Part V, chapter 11, 111)

702. The current billing system used to pay Crown Solicitors should not remain as it is. Instead, a more transparent and realistic billing system should be introduced in combination with more proactive financial management by Crown Law. (Part V, chapter 11, 111)

703. The Government should consider amending the Cabinet Directions to allow enforcement agencies to retain the services of the PPS to conduct prosecutions in the summary jurisdiction. (Part V, chapter 13, 121)

704. The Government should consider expanding the services of the Serious Fraud Prosecutors Panel to all of the agencies that prosecute financial crime in both the summary and indictable jurisdictions. (Part V, chapter 13, 122)

705. In the longer term, Crown Law should consider ways to provide for more options for purchasing and conducting prosecution services in the summary jurisdiction, particularly for non-Police enforcement agencies. (Part V, chapter 13, 122)

Crown Law

IN RELATION TO THE PROSECUTION GUIDELINES

706. The Law Officers should consider amending the Prosecution Guidelines to include an explicit reference to the cost of prosecutions as being relevant to any assessment of the public interest. This amendment should include a general statement to that effect that costs must be considered, and perhaps a specific public interest factor related to costs that is linked to the seriousness of the offending. (Part III, chapter 7, 55)
707. The Guidelines should clearly articulate the principles relating to the need for independent decision-making by prosecutors and the need for structures to be in place to separate prosecutors and investigators. They should then monitor compliance in this regard. (Part III, chapter 8, 65)
708. Crown Law should regularly gauge the rate of complaints about prosecution decisions being made to the Courts, the IPCA, the Office of the Ombudsmen and the NZLS. (Part III, chapter 8, 65)
709. The Law Officers should consider amending the Prosecution Guidelines to explain the nature of the relationship between the SFO and the Serious Fraud Prosecutors Panel, before and after a matter is committed for trial. (Part III, chapter 8, 66)
710. The Law Officers should consider re-drafting the Prosecution Guidelines to ensure that they are equally applicable to the summary jurisdiction. Alternatively a completely separate set of Guidelines could be drafted for the summary jurisdiction. (Part IV, chapter 9, 79)
711. Compliance with the Prosecution Guidelines should be monitored by Crown Law, such as through self-reporting or through periodic auditing of prosecution decisions and policies. (Part IV, chapter 9, 79)

CROWN LAW GENERALLY

712. The Police and Crown Solicitors, with the help of Crown Law, should draft universal charging policies in relation to the two main areas of divergent practice: violent and historic sexual offending. (Part III, chapter 7, 58)
713. Crown Law should consider obtaining regular feedback from the judiciary on the court performance of departmental prosecutors. This information should then be provided to the relevant agencies. (Part IV, chapter 9, 79)
714. Crown Law should provide general guidance as to how enforcement agencies should present their prosecution-related data in their reports to the Solicitor-General. (Part IV, chapter 9, 79)
715. The Solicitor-General should provide an annual report to the Attorney-General on the conduct of all public prosecutions. This report should include a summary of the reports from the enforcement agencies as well as information held by Crown Law internally concerning indictable prosecutions. Ideally it should identify the cost of the indictable prosecutions that were originally initiated by each enforcement agency. (Part IV, chapter 9, 79-80)
716. Crown Law must initiate a formal mechanism to ensure that all decision-makers are mindful of the impact of their policy changes on the costs of the prosecution system. This mechanism would ensure all policy decisions that affect the prosecution system would be referred to Crown Law. (Part IV, chapter 9, 85)

717. Crown Law should continue to perform the function of conducting criminal appeals to the Court of Appeal and the Supreme Court; to record the time spent on tasks accurately; and to use the time recording data to maintain the Criminal Team's level of efficiency. (Part V, chapter 10, 89)
718. A new billing and management system should be introduced for the Crown Solicitors in accordance with the three-stage process outlined in paragraph 577.6. (Part V, chapter 11, 111)
719. Crown Law should encourage greater co-operation between enforcement agencies on prosecution-related matters. This work could include facilitating secondments and shared training as well as canvassing support for the adoption of a more formal prosecution MOU applicable to all enforcement agencies, akin to the Prosecutors' Convention used in the United Kingdom. (Part V, chapter 13, 121)

ENFORCEMENT AGENCIES GENERALLY

720. All enforcement agencies should draft their own publicly available enforcement policies. These policies should be consistent with the Prosecution Guidelines and should provide an additional resource in deciding whether to prosecute (or not). (Part III, chapter 7, 55)
721. All non-Police enforcement agencies should keep more detailed records concerning their prosecutions. These records should include the rates at which charges are amended or withdrawn, the reasons for these amendments or withdrawals, and the overall cost of prosecutions. (Part III, chapter 7, 55)
722. All enforcement agencies (including the Police) should regularly report to the Solicitor-General on the conduct of their prosecutions. These reports should include: brief descriptions of the volume of prosecutions; rates of withdrawal and amendment and reasons for those rates; the structures that are in place to promote independent decision-making; and information about staff including staff numbers, training, qualifications and any specific performance-related issues. These reports should also contain an estimate of the overall cost of the agency's prosecutions and should attach any relevant enforcement policies and operational prosecution policies. (Part IV, chapter 9, 79)
723. All non-Police enforcement agencies (particularly the Ministry of Education) should formally consider the option of briefing some or all of their summary prosecution work to the PPS. Specific attention is drawn to those cases that are straightforward and those that are currently only briefed to Crown Solicitors for reasons of geographical convenience. (Part V, chapter 13, 121)
724. All non-Police enforcement agencies that employ in-house prosecutors should financially justify the use of these prosecutors in their reports to the Solicitor-General, if they wish to retain them to conduct court work. (Part V, chapter 13, 121)
725. All enforcement agencies with in-house prosecutors should consider ways to share resources to promote better training and staff development. This consideration should include the possibility of encouraging departmental prosecutors to attend the PPS prosecution training courses. (Part V, chapter 13, 121)

THE POLICE

726. The Police and Crown Solicitors, with the help of Crown Law, should draft universal charging policies on the two main areas of divergent practice: violent and historic sexual offending. (Part III, chapter 7, 58)
727. The Police should specifically examine whether junior prosecutors face un-due pressure from officers-in-charge to be consulted over decisions to withdraw/amend charges, and identify opportunities to reinforce the independent decision-making responsibilities given to the PPS. (Part III, chapter 8, 68)
728. The Police should continue to: actively recruit greater numbers of non-sworn, legally trained prosecutors; invest in training programmes concerning decision-making, advocacy and legal issues; and develop performance accountability measures for prosecutors. (Part V, chapter 12, 114)
729. The Police should continue to develop better information collection systems, including time-based recording of prosecution activity. (Part V, chapter 12, 115)
730. The Police should assess the viability of extending PPS training programmes to other enforcement agencies at cost and of providing summary prosecution services to other agencies on a fee-for-service basis. (Part V, chapter 12, 115)

CORRECTIONS

731. Corrections should re-visit the structures that it has in place for promoting independent prosecution decision-making. (Part III, chapter 8, 68)
732. Corrections should consider briefing the remainder of their defended hearings (those not already briefed to Crown Solicitors) to the PPS. (Part V, Chapter 13, 121)

SERIOUS FRAUD OFFICE

733. The SFO should review its policies in relation to obtaining early legal advice from Serious Fraud Prosecutors Panel members (particularly in relation to purely procedural investigative matters), considering the need to promote independent decision-making. (Part III, chapter 8, 66)

APPENDICES

Appendix 1: Consultation and Submitters

Name	Title/position	Organisation
Individuals		
Adam Feeley	CE and Director	Serious Fraud Office
Andrew Bridgman	CE and Secretary for Justice	Ministry of Justice
Andrew Butler	Partner	Russell McVeagh
Ann Butler	Operations Manager	Law in Order Ltd
Bruce Robertson	Sir	Court of Appeal Judge, Retired
Cameron Mander	Deputy Solicitor-General Criminal	Crown Law Office
Colin Hutchins, Graham Tubb, Kahla Parkash	Various positions	Inland Revenue
David Collins	Solicitor-General	Crown Law Office
Deborah Marshall	General Counsel	Serious Fraud Office
Duncan Wylie	Independent Contractor	DW Consulting Ltd
Gary Gotlieb	Barrister	Private Bar
George Mason	Deputy Chief Executive, Legal and International	Department of Labour
Gerard Clark	Policy Manager, Access to Justice, Public Law	Ministry of Justice
Glenda Buchanan	Criminal Caseflow Manager, Hamilton	Ministry of Justice
Graeme Astle	National Operations Manager, Higher Courts	Ministry of Justice
Hamsa Lilley	Service Design Manager, Higher Courts	Ministry of Justice
Hon. Chris Finlayson	Attorney-General	NZ Government
Hon. Judge John Walker	District Court Judge	Judiciary
Hon. Judith Collins	Minister of Police	NZ Government
Hon. Justice Grant Hammond	President	Law Commission
Hon. Justice O'Regan	President of the Court of Appeal	Judiciary
Hon. Justice Tim Brewer	Judge of the Court of Appeal, ONZM	Judiciary
Hon. Justice Winklemann	Chief High Court Judge	Judiciary
Janet Lewin, Katrina Casey, Jane Van Dadelszen, Maria McDonald, Suzanne Kennedy	Various positions	Department of Corrections
Joanne Hacking	Group Manager, Legal and Advisory Services	Customs
John Billington QC	Barrister	Private Bar
John Isles	Private Consultant	–
Kevin Kelly	General Manager, Policy Strategy and Performance	NZ Police

Name	Title/position	Organisation
Malcolm Luey	Manager, Criminal Law	Ministry of Justice
Marguerite Delbet	Director, Justice Sector Strategy	Ministry of Justice
Miriam Dean	President NZ Bar Association	NZ Bar Association
Neville Trendle	Part time barrister and consultant	Assistant Commissioner of Police, Retired
Paula Rebstock, Peter Doolan, Kevin Allen	Consultants, Performance Improvement Framework Review for Crown Law	–
Quentin Almas	Crown Solicitor, Hamilton	Retired
Simon Moore QC	Crown Solicitor, Auckland	Meredith Connell
Superintendent Craig Tweedie/Kim Eathorne	–	New Zealand Police
Susan Howan, Rose Jamieson	Service Design Manager, and Manager, Initiatives	Ministry of Justice
Organisations		
<i>Chief Legal Advisers Forum</i>	Senior Legal Officers of Government agencies	–
<i>New Zealand Bar Association</i>	President and others	–
<i>Criminal Bar Association</i>	President and others	–
<i>Crown Solicitor network</i>	Crown Solicitors and representatives	–
<i>Prosecutors' Forum</i>	Prosecutors from Government enforcement agencies	–
<i>New Zealand Law Society</i>	President and others	–

Appendix 2: Key reference documents:

1. Cabinet Directions for the Conduct of Crown Legal Business 1993:
<http://cabinetmanual.cabinetoffice.govt.nz/files/cabinet-manual-2008-appendix-c.pdf>
2. Prosecution Guidelines 2010: http://www.crownlaw.govt.nz/uploads/prosecution_guidelines.pdf
3. Crown Solicitors fees 2011/12: http://www.crownlaw.govt.nz/artman/docs/cat_index_6.asp

Attachment

Examining the Prosecution Systems of England and Wales, Canada, Australia and Scotland: A Background Document to the Review of Public Prosecution Services

