**Te hunga roia Māori hui-a-tau October 2018[1] : 30th hui-a-tau**

**Solicitor General, Una Jagose QC**

E ngā mana, e ngā reo, e rau rangatira mā

Tēnā koutou katoa

E ngā mate, haere, haere, haere atu rā

E te iwi o te rohe nei tēnā koutou

E nga kaiwhakawa tēnā koutou

E te hunga rōia Māori o Aotearoa, tēnā koutou

Tēnā koutou, tēnā koutou, tēnā koutou katoa

Kia ora tātou

Nō India nō Ireland ōku tūpuna

i whanau mai au i Ashburton Te Waipounamu

I tupu ake au i Cambridge, Waikato

Kei whanganui-a-tara ahau e noho ana

Ko au te roia mātāmua o te Karauna

Ko Una Jagose ahau

Thanks for inviting me to speak to you today. I understand I am the first Solicitor-General to do so. So I am honoured to be given time at your thirtieth hui-a-tau. I have read the late John te Manihera Chadwick's (at times hilarious) "how it all began" piece written for the 20th hui so I am well aware of the privilege of being invited, and slightly daunted by that.

I want to spend my time with you today talking about how I see the role of the Solicitor-General – and the Attorney-General for that matter – in modern Aotearoa – and why those roles are critical to our democratic system of government, of government according to law and why they are a fundamental

[1] The theme of the conference is "Ka kuhu au ki te ture, hei matua mo te pani – I seek refuge in the law, for it is a parent of the oppressed" – Te Kooti Arikirangi Te Turuki

part of our constitution. Along the way you also will see a bit about my values and what drives me.

I start by acknowledging Te Kooti and the theme of this hui-a-tau: "I seek refuge in the law, for it is a parent to the oppressed." It is no small acknowledgement to say that our history is one where the law has not always provided the refuge it ought to have. And to acknowledge that today the law also does not provide the refuge it should – to everyone.

But the critical concepts of the rule of law, the integrity of our justice institutions, the long term interests and obligations of the Crown, and democratic government according to law have been, and remain, ever present. And those concepts are critical to my role, and my understanding of the obligations I have for and to the Crown. These concepts have become more than something I learned about at law school and are now important, living values that guide me in my job.

I also want to acknowledge His Honour Justice Joe Williams who recently spoke to Crown Law about Aotearoa's collision of two legal worlds and the promises and challenges of today's legal system of which tikanga is an unquestionable part. And this has challenges for the Crown and for the roles of Solicitor-General and Attorney-General.

Part of this challenge is encapsulated in this guidance from the Waitangi Tribunal in its te reo report:[2]

> Fundamentally, there is a need for a mindset shift away from the pervasive assumption that the Crown is Pākehā, English-speaking, and distinct from Māori rather than representative of them. Increasingly, in the twenty-first century, the Crown is also Māori. If the nation is to move forward, this reality must be grasped.

So, as I said - I want to focus today on how I see my role as New Zealand's 17th Solicitor-General. I've been in this role for some two and a half years now and I feel as strongly as ever both the privilege and the burden of the role I hold. I hope I always will have these dual feelings: of burden and of privilege.

[2] Ko Aotearoa Tenei

Because that will mean I will not fall into the trap of complacency or arrogance about the role I play in New Zealand's system of government according to law, it should mean I retain a focus on integrity of the law and our justice institutions, on the long term legal interest and obligations of the Crown.

Early on as Solicitor-General, I was excited to see a question asked on social media "who or what is the Solicitor-General?". But the responses were a bit confronting: "The Attorney-General's dogsbody in quite an official and dignified sense" and "some government dude."

Is it naïve of me to want to get to a position where that same question is responded to with a real sense that the Solicitor-General is one of the core parts of our constitutional framework that ensures government according to law? But that is what I want to achieve. And perhaps it is fair enough that people do not know what the Solicitor-General does; after all what relevance does this ancient throw-back to times when the sovereign needed counsel to appear for him in Courts have to modern Aotearoa?

There is no one place that sets out what the Solicitor-General's role is. We know from s 9A of the Constitution Act 1986 that the junior law officer, the Solicitor, may perform any function or duty or exercise any power conferred on the senior law officer, the Attorney-General. And the Solicitor-General is conferred the role of chief executive of the Crown Law office by the State Sector Act. That Act acknowledges (but is not the source of) the Solicitor-General's "independent and constitutional functions".

In our democratic system of government the Attorney-General and the Solicitor-General are charged with ensuring government is conducted according to law; the Cabinet Manual reflects that "particular responsibility for maintaining the rule of law".[3] They have the constitutional responsibility for determining the Crown's view of what the law is, and ensuring that the Crown's litigation is properly conducted.[4]

There a number of tensions inherent in the roles.

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3 Cabinet Manual, 2017, 4.3.

4 Cabinet Directions for the conduct of Crown Legal Business, 2016.

The Solicitor-General is – unlike any other public servant to Minister relationship – the deputy to the Attorney-General in the law officer functions. While any Minister may lawfully exercise a power conferred on another[5] the Attorney's law officer functions are not delegable to another member of the Executive, ensuring appropriate independence from executive government of the law officer. The Solicitor-General is appointed under the royal prerogative, holds office at pleasure of Her Majesty, and – in the exercise of those "independent and constitutional functions" is not subject to oversight or performance review by the State Services Commissioner.[6]

But not everything comes in a highfalutin constitutional package. I am also a busy jobbing lawyer and chief executive. A significant part of my role is to assist successive governments achieve their policy ends - lawfully of course. And with an eye always to the Crown's long terms obligations and interests. So I want to talk in, I hope a practical way, about my job so you can see how this critical constitutional role works and how *this* Solicitor-General sees the way of achieving the challenges in the role, with a strong commitment to public service.

We all know we are said to live in a democratic society, governed according to law. There is no one place where it says what it means to be governed "according to law". Nor what law we are talking about. And, as is well known, we have no single written Constitution. In fact much is written, and contained in important documents whose subject matter is constitutional – Te Tiriti for one, obviously, but also the Constitution Act 1986 and the New Zealand Bill of Rights Act 1990 to use other examples[7]. We say our constitution is "unwritten" because the three branches of government (the executive, the legislature, the judiciary) each have power that emanates not from a Constitution but from a scattered array of sources; the common law, constitutional convention and principle – frequently reflected in legislative instruments.

The Senior Courts Act 2016 – as did its predecessor, the Supreme Court Act 2003 - provides a statutory purpose in s 3. Subsection (1) sets out that the Act

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5 Constitution Act 1986, s 7

6 Section 44 State Sector Act 1988

7 Matthew Palmer has identified 80 elements of our constitution, 45 of which are Acts of Parliament: Matthew S R Palmer "What is New Zealand's Constitution and Who Interprets it? Constitutional Realism and the importance of Public Office-Holders" (2006) 17 Public Law Review 133.

is to continue the higher courts, and their functions, consolidate the Judicature Act and Supreme Court Act, provide for other related matters. All well and good. But it's the next subparagraph that's of interest:

> "(2) Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament."

"New Zealand's continuing commitment to the rule of law"; just what is that? Does it just relate to the stuff of the Senior Courts Act, or is it wider? Is it just about the law as written in statute? There is nothing in the Act to define this critical constitutional principle, or where it can be found (note that its legislative reference is to it *continuing* – it's being recognised and not born here). Speaking of the similarly worded s 1 of the Constitutional Reform Act 2005 (UK) that provides nothing in the Act adversely affects "…the existing constitutional principle of the rule of law", Lord Bingham doubted that the lack of definition of the rule of law in that Act was because it was such a well understood and clear concept to require statutory definition.[8] Respectfully I agree – in fact the reverse is true, so many people reference the rule of law but invariably it can mean different things to different people, and at different times! New Zealand's "continuing commitment to the rule of law" has to be more than a rallying cry for some vague notion; it cannot be – calling on Lord Bingham again – the jurisprudential equivalent of motherhood and apple pie.[9]

At its core, the rule of law is a concept that all people – that is everyone, including the State (or the Crown, if you like[10]) and all its actors – are bound by and entitled to the benefit of laws that are openly made, applied prospectively, publicly accessible and enforced by an independent judiciary.

To claim true commitment to the rule of law, governments must ensure – indeed I say they must welcome – a transparent and accessible system of checks and balances; must make sure the constitutional framework we live in is open, clear, understood, and voluntarily *complied with*; must protect the independence of the judiciary and those office holders who oversee government action.

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8 Lord Bingham "the Rule of Law" (2007) 66 Cambridge Law Journal 67.

9 Above, p 69.

10 The Crown is another concept with an array of meanings – heavily dependent on context: *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462, [78] .

Our democratic system of Government gains legitimacy from its commitment to the rule of law. But without a sound understanding of the rule of law, of the frameworks by which the branches of government operate, the independence (and the dependencies between them) citizens can develop an unhealthy, if not dangerous, cynicism about our democratic institutions (executive government, courts, legislature) that can weaken the very fabric of the vibrant, modern democratic society that I want for Aotearoa and New Zealanders.

As the Chief Justice has said, speaking extra-judicially[11] if it's only judges and lawyers who believe in the rule of law as an element of our constitution, we are in trouble.

I want to make sure that New Zealanders do not think cynically that the Solicitor-General is simply another lawyer 'for hire' or "some government dude". I want them to be able to see the conventions, constitutional principle and the accountability frameworks as strong and meaningful so that successive governments are seen as legitimate.

Across the globe we can see quite clearly, right now, the rule of law being challenged, misunderstood,[12] ignored, (but also, we do see it held up and victorious too!) and at risk. In our system of a non-unified and unwritten constitution, complacency about convention and principle – "*constitutional values*" - risks us sleepwalking into a society where governing according to law becomes a thing of the past. This doesn't have to be a sinister move, misunderstanding the delicate fabric of our constitution risks mistakenly changing important aspects of our constitution for ever. And once gone, it will be very difficult to reinstate the system.

But before you think I have gotten completely carried away I repeat that these high constitutional issues do not arise every day. In my experience governments in New Zealand do not want to avoid lawful constraints, they do not want to trample over rights and freedoms and they want to achieve their policy goals

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11 "Judgery and the Rule of Law" The Rt Hon Dame Sian Elias Chief Justice of New Zealand, 7 October 2015, https://www.courtsofnz.govt.nz/publications/speeches-and-papers

12 The UK Daily Mail carried a half page photo of the three judges who determined that the Government could not commence the Brexit process by invoking Article 50 of the European Union Treaty without Parliament legislating with the headline "Enemies of the People": Daily Mail 4 November 2016, noting the judges were "out of touch", defied "Brexit voters" and could trigger "constitutional crisis".

lawfully. The critical thing is in knowing where the accountabilities lie and what frameworks and conventions we rely on for the continuation of that happy state of governing in a democracy committed to the rule of law. A good understanding of the law officers' roles is something everyone should have in order to hold governments to account.

But there's something else at play here. What is the "law" we are committed to? You've heard me comment a couple of times already as part of my role being to ensure governments understand their long term obligations and interests as the Crown. So what understanding do we have and share of an indigenous law that is particularly ours, that allows our legal system to develop, as all common law traditions do, consistent with the promise of partnership that was made by the Crown some 180 years ago?

The law officers of the Crown

The Cabinet Manual describes our role as follows:

> "The Law Officers, the Attorney-General and the Solicitor-General, have constitutional responsibility for determining the Crown's view of what the law is, and ensuring that the Crown's litigation is properly conducted".

That is, at its most basic, what my role entails: subject always to the senior law officer, the Solicitor-General's role is advisory (to come to an independent, authoritative (as within the Crown) view of the law), advocacy (both as to how the Crown should conduct itself in court and representing the Crown in Court) and thirdly a responsibility for public prosecutions. I will come to each of these shortly.

So in New Zealand (but not always so in other jurisdictions) one law officer is (and has been since 1875) a politician and the junior law officer, a public servant. You might think there is scope for the critical constitutional function – determining the proper view of the law for the Crown to take – to be undermined or swayed by political interests or by wanting to ensure one stays in favour with the appointing government for job continuity.

And yet New Zealand has a constitutional structure that has endured some 140+ years in which integrity of the law, the public interest and the Crown's long term

legal duties and obligations have been prominent in the workings of the law officers without very much prescription at all around the roles. We have not codified the law officers' roles. Much is done as I have said, as in other aspects of New Zealand's constitution, by convention; and by a keen appreciation of principle and by the personal integrity of office holders.

So with very little prescription for more than a century the New Zealand system of government according to law has been assisted by the Crown's law officers. The former Solicitor-General (and former Supreme Court judge his Honour Sir John McGrath) called this approach "sharing of law officer power".[13] And the relationship between the two law officers is critically important. It's not formalized, it just works. That's been my experience to date – both in my roles working for government all my working life and from the hot seat I now occupy.

There are advantages, I think, in having an Attorney-General in Cabinet that outweigh any disadvantage of the risk, or perception, of a loss of independence. Being able to seed into the heart of government the conventions and principle on which the system operates; ensuring on a day-to-day basis the necessary courtesy as between the branches of government; understanding of implications of court decisions, identifying need for additional legal input to ensure governments continue to govern according to law are all readily available to a Cabinet with an Attorney-General among its number.

That the Attorney-General is also a politician works particularly because of the established independence of the Solicitor-General.

Independence is critical when exercising law officer functions. But that is not to say the law officers should be distant or un-connected to government – in fact, as I will come to, the fact that I am also the Chief Executive of a government department is another advantage I see in ensuring effective law officer functioning. Independence comes from being free from influence of any particular political or policy view; the Solicitor-General must be free to bring her independent opinion to bear and must be protected from any forces to the contrary.

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13 Above, FN 13.

Being embedded into the system of government itself does not detract from that independence. Both law officers are so embedded and in my view that means there is no avoiding the oversight/influence of the Solicitor-General and Attorney-General. Not, I should hasten to add, that I have seen any suggestion that New Zealand's governments want to avoid the law or shirk their legal obligations. But the embedding of the law officers into the system is a virtue of our system that should not be overlooked. Most other jurisdictions do it differently, with a different mix of politicians holding one or both law officers roles. Other than in ACT, Australia's Solicitors-General – both federal and state - are private practitioners at the independent bar who are instructed from within government. I can – and do – "stick my nose in" to other agencies' work and legal advice stream if I need to, to ensure government's legal obligations and risk is properly attended to. That would not be as readily possible from the private bar, used to operating on instruction.

First, in my advisory capacity I am the most senior lawyer public servant. I am the principal legal advisor to Government – any government. My role will continue for this government and the next, whatever administration is elected. Unlike the United States' Solicitor-General who, while not a politician, is an appointment so closely aligned to the President that he or she is considered political and stands or falls with the President. That's one of the special aspects of being a public servant. Our function – whether legal or policy or operational - is to be neutral, assisting successive governments achieve their policy goals. And for us lawyers, advising and representing their interests in court so that their policy goals can be achieved. It doesn't matter – it MUST NOT matter – if we personally agree or not with what government is wanting to achieve. The public servant is neutral in terms of politics in their work.

But of course, as I have outlined, the Solicitor-General also has a greater burden – a loyalty to the rule of law and to the Crown's long term legal obligations and interests. This is why it's important to have independence from governments so that, when the chips are down, the Solicitor-General is the recognised role holder, to say authoritatively what the Crown's view of the law is (or to say what the Crown should argue in Courts). That is subject only to the Attorney-General power to really call the shots. But, given the Attorney-General is a politician, the function of 'calling it' for the Crown side often falls to the Solicitor-General.

For this reason the Solicitor-General appointment is made under the Royal Prerogative, not an employment contract. It's a role held "at pleasure" of the Governor-General – ensuring independence from government of the day and any risk of having to please any government in order to hang onto your job. Another aspect of this in-built protection of the independent ability to advise fearlessly (which can be unpopular) is that the Solicitor-General's salary is determined by the Independent Remuneration Authority.

(The Solicitor General of Oliver Cromwell's English Commonwealth, John Cook, was fearless. He led for the prosecution in the trial of King of Charles I in 1649, and was rewarded with execution for high treason after the Restoration. To my knowledge the only Solicitor-General to be hanged, drawn and quartered).

Who is my client?

It's quite easy to say, when you are asked at a party or similar, what does Crown Law do, to say "we're the Crown's law firm." People get that. We all know that lawyers are a necessary part of life to help you get stuff done, avoid trouble, protect your interests etc. Lawyers have clients who they act for, or represent, in order to get their clients what they want. But as I tell my colleagues when I speak at induction sessions of new recruits to the office, that response misses our real purpose.

There's a tension to be managed here - along with my colleagues who support me in this critical constitutional role, we serve the Crown and the rule of law. So who then are our clients, how do they feature in the equation, in the balancing of Crown, rule of law? If our client is a concept (the rule of law) we risk becoming arrogant providers of boutique legal service, without the hassle of client service obligations and the strictures of timeliness and value for money. But the modern Crown Law Office lawyer acts very much like a traditional lawyer with clients and like many other lawyers, we bill for much of our advice and representation work in 6 minute units. I am proud of my colleagues and my office, and we serve our clients well – we understand that client service is a critical part of having credibility as lawyers – even though the head of the Office, the Solicitor-General, finally determines the meaning of the law the Crown will adopt. To be effective and credible, to be *influential*, as we must be to discharge my constitutional responsibilities, excellent client service remains vital.

But we are not in traditional client/solicitor relationships in which we are instructed on what the client wants to achieve in an instant case/policy development, and work to that instruction.[14] This is part of the burden. The Crown's collective and long terms interests sometimes require that we take a view that does not reflect the instructing departments view or desire (or as I have said, stick our noses in whether we are "instructed" or not). I have to say that it doesn't happen terribly often, but when it does it offers enormous difficulty in relationships between colleagues and can put pressure on the independent law officer. But the tension is inevitable – indeed I say it's a virtue that our system of government has this built in tensions and an accepted way of resolving it (the law officers, if the dispute is about the meaning of the law). So we have to be open about that tension and talk about how we will resolve these issues when they arise. The Crown's house – as executive government - has many objectives, competing risk tolerances and different outcomes pursued. The executive must govern according to law, and also be seen to act lawfully. The Crown also prosecutes and brings offenders to justice, in a system that values the rights of Crown and offender/defendant to fair trial and other aspects of natural justice. In pursuit of all of this, of course, tensions arise – sometimes significant, other times the day-to-day garden variety tension that I just mentioned that seems inimical to a collaborative and collective method of lawyering that I value and promote.

Unlike all other government agencies, at Crown Law we do not pursue particular policy or operational outcomes – we pursue the Crown's commitment to the rule of law and, at times, we deliver advice that is unpopular or seen to be obstructive from achieving policy or operational outcomes. So we cannot shy away from the tensions that emerge, we have to face them: constructively, with integrity and continuing the principle of service to the Crown, to public service and to the rule of law.

The answer is never that 'I am the Solicitor-General - or we are Crown Law - and therefore know the answer'. Law is highly contestable – most of you will have worked that out by now? But within the indivisible Crown we can only have one final view of the law. I cannot hope to have the influence I need to have in

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[14] *Accent Management Ltd v Commissioner of Inland Revenue* [2013] 3 NZLR 374 (CA), *Du Claire v Palmer and Anor* [2012] NZHC,934, [112]-[115].

order to discharge my role by being arrogant about being right merely because the answer emanates from me or my office. There are times, of course, when it does come to me to say "that cannot be done" (or at least, it cannot be done in that way). In some ways it's in the advisory function that the real challenge for independence and obedience to the rule of law comes – if a matter arises in litigation or is challenged, there is another independent body, the Court, to determine authoritatively what the law is. But, like that old expression, when the real measure of a person's character is how she behaves when no one is looking, the real measure of the Solicitor-General's independence and influence is found when there is no external challenge but she holds the line against a certain decision/approach/etc anyway – and maintains the influence with the executive to hold sway.

The Solicitor-General's role, and that of the Office, has been cemented in place in modern terms in the Cabinet Directions for the Conduct of Crown Legal Business that I've already mentioned. These set out when government (Ministers and other decision makers) need legal advice on a range of core Crown related issues they must come to the Solicitor-General. For example interpretation of statutory powers, Te Tiriti o Waitangi matters, criminal law, protection of the revenue and all litigation involving Ministers of the Crown, public agency decision makers. I get to oversee all that, and my office – or lawyers we engage from outside the office – are to do that work.

I have often said to my colleagues who are my clients that the set-up we have here can make us the worst type of lawyer; our clients have to come to us (in core Crown matters) and we don't have to do what they want! And here another part of the burden – it might sound like a terrific freedom to a lawyer, but it's a real constraint – about how we act and how we deliver our legal services. It is a test of our value and of our real influence – that we are collegial and client-centred despite the monopoly-like nature of our work stream.
Because there is nothing as silly as thinking that I, or my office, is influential simply because of who we are – we appreciate that our influence and leadership will not come because of the constitutional role, nor the Cabinet Directions that give effect to that role by saying some Crown legal work must come to my office. Success and delivering valuable services is not just about what we do, but how we do it. I place people firmly at the centre of getting work done and I

need all Crown lawyers to do that too. If the work gets done, even if the result is objectively "good", but there is a scorched earth of relationships and people behind us, we will have failed. My personal values mean that I have real respect for people I am working with and *how* I behave is as important as *what* I do. That mode of working means that those times when we are in dispute within the Crown whanau as to the right thing to do and the best meaning of the law I am able to use those strong personal relationships to find solutions and outcomes that – even if not agreed to by all – are sustainable because of the process of how we got there. And THAT is how I can be the fearless advisor I spoke of earlier.

The Solicitor-General is also the Government's senior advocate in the Courts. There are times when the Courts expect to hear from the Solicitor-General and times when the Crown will want to put its most senior lawyer before the Court to argue its points.

Under our constitutional arrangements, the Attorney-General is responsible through Parliament to the citizens of New Zealand for prosecutions carried out by or on behalf of the Crown. In practice, however, the prosecution process is superintended by the Solicitor-General, who, pursuant to s 9A of the Constitution Act 1986, shares all the relevant powers vested in the office of the Attorney-General. These arrangements are now codified in s 185 of the Criminal Procedure Act 2011 which sets out the Solicitor-General's responsibility for oversight of public prosecutions.

Crown prosecutions are mainly conducted by Crown Solicitors – private practitioners appointed to prosecute under a warrant issued by the Governor-General.

Lawyers throughout the country – 16 of them – are appointed Crown Solicitors on warrant (17 warrants; one Crown Solicitor currently holds both the Napier and Gisborne warrants). They conduct Crown prosecutions according to law of course – but also under Prosecution Guidelines issued by the Solicitor-General. I will come back to those guidelines in a moment. Other prosecutions are conducted by the New Zealand Police and numerous other enforcement agencies that are responsible for enforcing a particular regulatory area eg: MSD, MPI, IRD etc.

The prosecutors' lot is an onerous one. The old maxim "The Crown suffers no defeats and enjoys no victories" is not just something we say to cheer ourselves up when we receive a decision that goes against what we argued for but a well-embedded further indication of the weight the Crown shoulders in prosecutions – the overarching duty of a prosecutor is to act in a manner that is fundamentally fair; fairness of process is critical; Crown prosecutors must perform their obligations in a detached and objective manner, impartially and without delay. They must protect the right to a fair trial. Their role is not to strive for a conviction. While they represent the Crown it's not the same as representing a party in litigation. Representing the Crown in a prosecution must attend to the Crown's interests and obligations in fair criminal trial process and preserving the integrity of the criminal justice system. Crown prosecutors must present the Crown case independently (of any agency from which the matter arose), and dispassionately.

The AG is responsible through Parliament to New Zealanders for Crown prosecutions and for the administration of the criminal law. In practice, the Solicitor General takes general oversight responsibility for public prosecutions. This has long been the case, now codified by s 185 Criminal Procedure Act 2011. To assist prosecutors to understand and carry out their special and burdensome duties, to ensure consistency and in the exercise of that oversight responsibility Solicitors General have provided guidelines on the conduct of public prosecutions for over two and half decades. While they are only guidelines[15] I expect that they be followed.

There are also a number of statutory functions through the statute book too – from overseeing criminal prosecutions and conducting criminal appeals, to ordering second inquests, to being a nominated person under the Protected Disclosures Act, to supervising the Director of Military Prosecutions.

Last, but definitely not least – and this is not a traditional law officer function but has been the junior law officer's role in NZ since 1875[16] - I am also the chief executive of a public sector government department, the Crown Law Office, and

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15 *Anna Elizabeth Osborne and Sonya Lynne Rockhouse v Worksafe NZ* [2017] NZSC 175

16 W S Reid, Assistant Law Officer in the Crown Law Office, an independent department since 1873, was appointed Solicitor-General: P. A Cornford, "Crown Law Office – Early History [1964] NZLJ 423.

professional head of the some 800+ lawyers in Government. In this role I am a leader of people – and of a whole lot of lawyers, many of whom I do not employ. So I have a huge responsibility to them (for their development as lawyers and their satisfaction day-to-day, especially those in Crown Law).

Since I took on this role in 2016 we've been asking "what is the Crown Law that New Zealand needs?" Our role as public servants means that must consider the benefit to New Zealand and New Zealanders of having Crown Law and ask "why are we here?"

We think the answer to that lies in three outcomes that we have put at the front of Crown Law's new strategic direction: demonstrably better government decisions, improved criminal justice and strengthening the credibility of the rule of law. I reckon that's why we have a Crown Law Office – and what makes us a very special part of the government system.

As I've said nowhere else in countries to which we compare ourselves is the department of lawyers headed by the junior law officer (except ACT, Australia). Perhaps the tensions of all of the roles I have mentioned in one office holder have seemed too great to manage. But for myself I like the way was have it set up here. I am able to be involved at many stages in legal matters because either our office or lawyers in government are dealing with them. Unlike, say, in Australia, the in-house lawyers do not have to brief the Solicitor-General on matters where he or she sits at the independent bar, and exercises the law officer role from there. Lawyers all through the system have unparalleled access to the Solicitor-General and, in turn, the Solicitor-General has a unique view of the issues, the risks and the opportunities facing successive governments, the Crown and how those matters might play out in the Courts. I think that structure offers more benefits than one which either splits out advisory and advocacy or splits out law officer from administrative head/chief executive functions. [17]

This unique position means the Solicitor-General is in a critical position to help shape the future of the law – the law that I have mentioned already that our

[17] Like former SG and HCJ David Collins "The Role of Solicitor-General in Contemporary New Zealand" in Gabrielle Appleby, Patrick Keyzer, and John M. Williams (eds) Public Sentinels : A Comparative Study of Australian Solicitors-General (Ashgate Publishing, Surrey, 2014).

system of government is committed to, that gives legitimacy and credibility to governments and which reveals the Crown's long term obligations and interests.

I acknowledge, as I did as I began, that my speaking about the "rule of law" and how important it is to understanding the Crown's obligations and interests might have people doubting – or taking a stronger view – that Māori have not felt the comfort and the protection of the law as delivered by the Crown over many years. Indeed the Crown has conceded in the Tribunal, courts and through acknowledgements in settlement legislation and expressions of contrition, the impact of Crown actions in certain circumstances. The "making good" that those steps have done need to be followed, now, with a clear-eyed commitment to the role of the rule of law into the future, with the Crown understanding well – and engaging with others on – its long term obligations and interests.

So what are the Crown's long term obligations and interests?

As I mentioned at the beginning of my address, last week Justice Joe Williams spoke to my office in a sold-out, jam packed room of Crown lawyers. And he told us "Tikanga; you've got to get it now, because it's your job". Tikanga is part of our common law and increasingly of our statute law too. So how do we, the Crown's lawyers, take our obligation to shape that law as it develops in and for Aotearoa?

I – along with my colleagues – was very inspired, and very challenged, by this. One of the biggest challenges we have in being the Crown's lawyers is to "get it" in terms of what the law of Aotearoa is that we are to comply with, to honour, to advance. In order to "get tikanga" we need to do much more so that we are ready as the Crown to understand the obligations and what they look like today, and into the future. And we have to be ready to apply all the principle and convention of our constitutional framework in all that we do – and undoubtedly that includes understanding tikanga and te āo Māori. It always has – or it always *ought* to have. If the law is to be a refuge then in Aotearoa it must incorporate tikanga.

I have seen for myself the strength my role has and understand now, better than ever before, the solemn responsibility I have to do what I can to make the Crown a better Treaty partner, to help develop the capability of all Crown

lawyers to analyse and understand the place of tikanga and te ao Māori in the laws of Aotearoa. So that when we ask, what is "the rule of law" that our governments are committed to, we are taking the step urged by the Waitangi Tribunal in Ko Aotearoa Tenei[18]

> "unless Māori culture and identity are valued in everything government says and does; and unless they are welcomed into the very centre of the way we do things in this country, nothing will change.

That is how I want government lawyers to think and act. I am not saying there are easy answers here. But I have a significant function to make sure the Crown has the capability to understand the place of tikanga and te aō Māori in our law. And, standing as I do at the centre of the system of government lawyers, I have a unique responsibility here. We carry the burden of ensuring the Crown's long term obligations and interests are understood and taken into account, and that governments govern according to law, as I've said.

I have taken a few publicly deliberate steps in this area since being Solicitor-General. Some would say these are small steps but they will have a ripple effect over time. I want to touch on those steps briefly. I know I need to do a lot more – with the recent establishment of the Māori-Crown Relations portfolio and office the time might be just right. I am not so naïve though to imagine that just some pretty words will get us there – there is a lot of pain and disagreement ahead too (as well as behind).

To those steps then; early on as Solicitor-General I began my addresses to the Court (both in taking the declaration as Queens Counsel and in regular Court appearances) in te reo. As a leader in the law I have a voice and a role that can be used for good. I wanted to role model the behaviour I expect my colleagues to follow. My reo's not flash, I'm no expert, but I committed to try. And I told my office that I wanted them to do the same – and some did, then more, and still more.

One day I was talking to Justice Christine Grice, then Executive Director of the NZ Law Society and she said "I hear you have directed all your counsel to address the Court in te reo" – I hadn't made a direction, more like

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[18] Wai 262 2011, www.waitangitribunal.govt.nz

encouragement and hopeful expectation – "so I am going to direct all counsel who represent the Law Society to do the same". And sure enough, she did and the Law Society instructs all its counsel to address the Court in te reo. Today I doubt that any counsel from my office would fail to make their appearance in te reo, and the Court is responding in kind! And other counsel are starting too - contacting us to say (and this is a true quote) "I very much liked the way you entered your appearance in te reo Māori in the Court of Appeal during the [name] appeal. I understand if you would want to protect it but I wondered whether you would be prepared to let me know the wording so I can use it. Would you mind giving it to me?" We do want to protect it! We want to protect the taonga, as Te Ture mō Te Reo Māori 2016 requires us to!

Another step is to use the collective strength of the network of lawyers to build a framework for mentoring, support, information sharing for Māori prosecutors. I've heard first hand some difficult personal stories from a few colleagues about the challenges they face as Crown prosecutors and Māori. We need to understand that and do what we can to attract and retain Māori prosecutors – we have to support you too. I'm grateful to Judge Tini Clarke putting her energy into this initiative from her former role as Crown prosecutor. I understand Judge Clarke and Rikki Donnelly will be speaking to this tomorrow.

These are small steps, I do get that. And in order to avoid these steps simply being virtue signalling and empty words, we need to do more, but we are making a deliberate start. And that sets us a platform to take action from.

We cannot rest on my constitutional role to be influential - we have to find ways to show we are credible and influential lawyers who decision makers want brought in early to matters and decision processes. But, if we are not brought in early, we need to be agile and adaptable: to move quickly and authoritatively through an issue, understand our constitutional function and exercise that fearlessly (but sensibly!)

I see my role as a driving force to Crown Law being a significant contributor through collective leadership of the Government legal community to the Crown's long term legal interests and obligations being protected and met, legal risks being managed and integrity of the law being upheld.

All of the lawyers in the government's networks, including the Crown Solicitors Network and public prosecution lawyers are critical enablers of my vision. I cannot do it alone, nor can my office, alone.

Ehara taku noa i te toa takitahi engari he toa takitini; My strength is not mine alone, but the strength of many.

I invite te hunga to help me with this challenge – spend some time in your careers working for the Crown, or if that's not your thing, keep challenging/working with/advising the Crown on how it can truly meet the promise of partnership and to understand the development of the law that embraces tikanga. I won't pretend it's easy or plain sailing, but I do promise to listen, to work hard, to keep advising fearlessly on the best view of the law the Crown should take, to engage fully in order to meet my duty to the rule of law.

I'm really proud to be a public servant in New Zealand. And I'm enormously proud to be the 17th Solicitor-General. As I have said throughout, being Solicitor-General is both an amazing privilege and a considerable burden. I'm happy to undertake it, I hope I discharge the function well – but others will judge that, not me. Till then I will do my best, driven by strong values of service to the Crown and obedience to the rule of law and service to the public.

No reira

Mauri ora ki a tātou

E koa ana te ngākau

kua tae mai ahau

i tenei ra

i runga i te reo karanga

Tēna koutou, kia ora ki a tātou katoa