

**PROTOCOL FOR THE CONDUCT BY THE
CROWN SOLICITOR'S OFFICE OF CIVIL PROCEEDINGS FOR
THE DEPARTMENT OF COMMUNITY SERVICES**

Version 1 - Effective from 5 May 2005

INTRODUCTION

The Director-General Department of Community Services ("DoCS") is empowered to provide care and protection for children and young persons who are at a risk of harm. DoCS is committed to providing a quality service to its clients.

This involves the administration and execution of certain legislation ("the legislation") set out in Schedule 1 of the *Public Sector Management (General) Order 1999* namely:

Adoption Act 2000 No 75

Child Welfare (Commonwealth Agreement Ratification) Act 1941 No 11

Child Welfare (Commonwealth Agreement Ratification) Act 1962 No 28

Children and Young Persons (Care and Protection) Act 1998 No 157

Children (Care and Protection) Act 1987 No 54

Community Welfare Act 1987

This protocol does not apply to criminal proceedings or to civil or care proceedings involving the welfare or placement of children in the care of DoCS.

Civil proceedings for damages for tortious and other causes of action are brought against DoCS from time to time. DoCS may also wish to bring civil proceedings on behalf of children and young persons in its care.

Where it is necessary for DoCS to defend or bring those proceedings, it may from time to time instruct the Crown Solicitor to provide advice and/or representation in relation to those proceedings.

The Crown Solicitor provides legal services to government including civil law services. The Crown Solicitor's Office ("the CSO") has specialist expertise in torts

law and may be instructed by DoCS for legal advice and representation either on its behalf or on behalf of the children and young person in its care.

DoCS and the CSO have agreed that the roles, responsibilities and expectations of their respective officers be clarified for the purpose of ensuring the effective and efficient conduct of civil proceedings.

Communication

The relationship between DoCS and the CSO in the conduct of civil proceedings will be facilitated if:

- instructions are clear and comprehensive;
- lines of communication are clear;
- respective roles are understood;
- advice is prompt, responsive and practical;
- reports of progress and significant developments are made.

Initial Instructions

The initial instructions to the Crown Solicitor to act in a matter will be sent by the Director Legal Services for DoCS (or nominee). He may nominate one or more preferred officers in the CSO to have the carriage of the matter and the CSO shall have due regard to that request. The Crown Solicitor will raise the matter with the Director if he considers that the preferred officer(s) nominated is not appropriate or if he or she is unavailable.

The Director Legal Services for DoCS will nominate in the initial instructions the legal officer within DoCS with carriage of the matter and from whom subsequent instructions shall be given (the “responsible legal officer”)

Correspondence and Telephone Contact with DoCS

All correspondence to DoCS concerning civil proceedings is to be addressed to the Director Legal Services. Address and contact details for the Director are set out in Schedule A to this protocol. All correspondence should quote the DoCS reference and/or the name of the responsible legal officer.

All telephone contact during the course of a matter is to be with the responsible legal officer, who will facilitate contact with other DoCS officers and witnesses where necessary. Departmental witnesses or non-lay officers are not to be contacted directly unless, in a specific instance, DoCS expressly and in writing authorises direct contact.

The CSO and DoCS will liaise in the location of relevant witnesses and relevant documents and records under the control and direction of DoCS. The CSO will, on instructions, engage investigators on behalf of DoCS and will advise of the evidence required. DoCS will inform the CSO of the position description and current or last known location of any DoCS employee who may have relevant knowledge or the day-to-day control of the relevant documents on behalf of DoCS. DoCS will nominate any DoCS employee who is to provide an affidavit, report or information to the CSO. The CSO will inform DoCS of the requirement for any DoCS employee to attend conferences or court hearings and will assist with the contact of those employees if authorised to make contact. It is the responsibility of DoCS to ensure the attendance of any DoCS employee or to advise of any issue that may arise from requiring such attendance.

Correspondence to CSO

All correspondence to the CSO concerning civil proceedings must be addressed to the Crown Solicitor. Address and contact details are set out in Schedule B to this protocol. All correspondence should quote the CSO reference and/or name of solicitor allocated the conduct of a matter.

Reporting and Estimates

The CSO will report to DoCS about any significant developments in its matters including the outcome of any court attendances. DoCS will inform the CSO of all matters and developments which may affect its conduct of civil proceedings.

The CSO will provide an initial report and claim estimate in each matter soon after receipt of instructions and will provide an interim updated report and claim estimate on each matter thereafter from time to time as required and a final report and claim prior to any hearing. The form of the claim estimate and report will be in accordance with the templates attached at schedule C. The templates may be reviewed and

amended from time to time. CSO will inform DoCS of proposed amendments and obtain input accordingly.

Schedule of Current Matters

The CSO will supply to DoCS on a monthly basis a schedule of current matters in the Torts (Services/Regulatory Agencies) and Torts (Justice/Enforcement Agencies) Practice Groups. The schedule will include a brief summary on the current position of each matter.

BRIEFS OF EVIDENCE

Generally speaking, DoCS is responsible for investigation of matters giving rise to civil proceedings. The CSO is responsible for advising and representing DoCS.

When DoCS instructs the Crown Solicitor to act in a civil proceedings, or as soon as practicable thereafter, a copy of relevant files and details of Departmental officers and witnesses with potential knowledge of the matter will be provided. DoCS will have regard to the advice of the CSO to undertake any further investigation.

The CSO accepts that it may be necessary in preparing a matter for hearing, for further interviews to be conducted by its officers and/or Counsel retained on behalf of DoCS to obtain more detailed or additional statements.

DECISION TO DEFEND OR COMMENCE PROCEEDINGS

In deciding whether or not to defend or commence civil proceedings an initial question is whether or not there are reasonable prospects of success: (s.198J *Legal Profession Act*) 1987. That question is resolved by provision of initial legal services to determine whether a claim or defence has reasonable prospects of success. (s.198K, *Legal Profession Act*), including the following:

1. Assessing whether or not the evidence available is capable of establishing each element of the claim or defence;
2. Advising whether or not it can be said that there are reasonable prospect of success and, if so;
3. Whether pleadings can be certified by or on behalf of the Crown Solicitor as having reasonable prospects of success. (s.198L *Legal Profession Act*).

The CSO will advise DoCS on the advice issues. It is a matter for DoCS, after considering the advice to provide instructions on that advice. The CSO can, if requested, provide advice about the factors which may be considered in making that determination.

USE OF COUNSEL AND AGENTS

In country, regional and some suburban areas the CSO will instruct a private solicitor to act as its agent in Court on the mention of matters. In deciding which solicitor to instruct the CSO will have regard to the wishes of DoCS; the competence and experience of the solicitor concerned; availability; cost and the absence of any conflict of interest.

Generally speaking, hearings of civil claims or defence of civil claims will be conducted by counsel retained by the CSO. In deciding which counsel will be retained the CSO will have regard to the wishes of DoCS; the competence and experience of counsel; availability; cost and the absence of any conflict of interest. DoCS and the CSO recognise that it is important to develop a panel of counsel who have experience in the conduct of DoCS civil proceedings.

PREPARATION FOR HEARING

The CSO solicitor having carriage of a matter will seek to list the matter for hearing on a date suitable to the DoCS witnesses and officers.

The DoCS officers and witnesses will attend all required conferences and on hearing.

The CSO solicitor shall attend to all preparation for hearing including issuing subpoenas for attendance and production of documents; conferences with witnesses and the like.

COSTS

In all the matters where DoCS is successful CSO will (unless in receipt of express written instructions to the contrary) seek an order for Costs.

In all matters where there are costs orders in favour of DoCS, the CSO shall undertake preliminary enquiries as to the current whereabouts of the plaintiff, the bankruptcy status of the plaintiff and whether the plaintiff holds any real property and provide a written recommendation to DoCS for the purpose of instructions whether to enforce the costs order.

INVOICES

Invoices for legal services and disbursements will be rendered in accordance with the CSO Standard Terms of Engagement. In matters where the source of funding is DoCS' own legal services budget (general), the Pre Managed Solvency Fund, or the Treasury Managed Fund (TMF) the hourly rate and time spent by the CSO officer will be indicated on the invoice.

Schedule A

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Schedule B

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