



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

Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown

- 1 On 23 June 2014 Cabinet approved the Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown (LEG Min (14) 12/4).
- 2 The Protocol is annexed to this Circular.
- 3 Section 61 of the Legislation Act 2012 confirms the long-standing position that draft legislation prepared by, or on behalf of, the Parliamentary Counsel Office is subject to legal professional privilege.
- 4 Legal professional privilege in draft legislation lies with the Attorney-General as the principal law officer of the Crown. It is for the Attorney-General to determine whether to release draft legislation outside the Crown and, as a consequence, potentially waive legal professional privilege.
- 5 The Protocol supplements existing guidance contained in paras [4.58 to 4.68](#) of the Cabinet Manual 2008, and makes clear when the Attorney-General's approval must be sought for the release of draft legislation outside the Crown.
- 6 Cabinet Office Circular CO (05) 5 (incorporated into paras 4.58 to 4.68 of the Cabinet Manual 2008) is cancelled.

Michael Webster
Secretary of the Cabinet

Enquiries:

Andrea King
Crown Counsel (Policy), Crown Law Office
Ph: 494 5938
andrea.king@crownlaw.govt.nz

Andrew Townend
Legal and Constitutional Adviser, Cabinet Office
Ph: 817 9741
andrew.townend@dpmc.govt.nz

Attorney-General's Protocol for Release of Draft Government Legislation outside the Crown

Introduction

- 1 The Minister responsible for draft Government legislation must approve its release outside the Crown in all circumstances. The Attorney-General must also approve the release of draft Government legislation outside the Crown.
- 2 The Attorney-General has agreed that draft Government legislation may be released outside the Crown in certain circumstances without further reference to him. This protocol guides departments on when the Attorney-General's consent to release need not be sought.

Definitions

- 3 For the purposes of this protocol:
 - 3.1 **Crown** means Ministers of the Crown, the departments of the public service as specified in the First Schedule to the State Sector Act 1988, the New Zealand Police, the New Zealand Defence Force and the New Zealand Security Intelligence Service;
 - 3.2 **Chief Legal Adviser** includes a legally qualified senior official who is designated by the department to undertake the functions outlined in this protocol;
 - 3.3 **Draft Government legislation** means Bills, legislative instruments, and other instruments drafted by or on behalf of PCO.

Background to the protocol

- 4 Draft Government legislation prepared by or on behalf of the Parliamentary Counsel Office (PCO) is subject to legal professional privilege (Legislation Act 2012, section 61).
- 5 Legal professional privilege in draft Government legislation lies with the Attorney-General as the principal legal officer of the Crown (*Cabinet Manual* (2008), paragraphs 4.58 to 4.68).
- 6 The Attorney-General has the right to consider questions of legal risk and to determine whether to release draft Government legislation outside the Crown and, as a consequence, potentially waive legal professional privilege (*Cabinet Manual* (2008), paragraphs 4.65, 4.66 and 4.67).

When Attorney-General approval is required

- 7 A proposal to release draft Government legislation outside the Crown must be referred to the Crown Law Office and needs the approval of the Attorney-General's office if —
 - 7.1 release may affect current or potential legal proceedings; or
 - 7.2 release may otherwise create a legal risk for the Crown; or
 - 7.3 there is uncertainty whether release will create a legal risk for the Crown.

- 8 When referring the question of release to Crown Law departments should consider and provide their views on the factors listed under paragraph 11 as they will inform Crown Law's advice to the Attorney-General on release.

When Attorney-General approval is not required

- 9 A proposed release of draft Government legislation outside the Crown need not be referred to the Crown Law Office and does not need the approval of the Attorney-General's office if:
- 9.1 release will or may constitute waiver of legal professional privilege but the Chief Legal Adviser of the department responsible for the legislation confirms the release will not create a legal risk for the Crown; or
 - 9.2 the draft legislation will be released to a small, pre-determined group outside the Crown on an in-confidence basis and subject to legal professional privilege and the Chief Legal Adviser of the department responsible for the legislation confirms the release will not create a legal risk for the Crown.
- 10 Legal professional privilege is not waived when draft Government legislation is released to a small, pre-determined group outside the Crown on an in-confidence basis and subject to legal professional privilege. However, departments may instruct PCO to put a note on the draft legislation reinforcing this point, to the effect that the limited release of this draft legislation is not a waiver of legal professional privilege.

Considerations for release and reference to Crown Law/Attorney-General

- 11 In considering whether the proposed release of draft Government legislation needs to be referred to the Crown Law Office for reference to the Attorney-General's office, the Chief Legal Adviser of the department responsible for the legislation must consider—
- 11.1 the reasons why release outside the Crown is sought, and the strength of those reasons;
 - 11.2 whether release outside the Crown will create a legal risk for the Crown;
 - 11.3 whether the legislation is being drafted at the request of, or in consultation with, non-Crown bodies (for example, Commodity Levies Orders that are prepared at the request of industry bodies);
 - 11.4 whether the policy or details underlying the legislation are already in the public arena;
 - 11.5 the sensitivity of the subject matter of the draft legislation.
- 12 A department that does not have a Chief Legal Adviser should always refer draft legislation to the Crown Law Office to consider the question of release.

Application of the protocol

- 13 This protocol does not apply to:
- 13.1 draft legislation that is prepared by PCO for a client that is outside the Crown. In this situation, legal professional privilege and the right to determine whether to

release draft legislation and, as a consequence, potentially waive the privilege lies with the third-party client.

- 13.2 proposed wording for new or amended legislative provisions that a department prepares for consultation purposes as part of the policy development process. Such wording is not prepared by or on behalf of PCO and should not be considered draft legislation for the purposes of this protocol.
- 14 It is good practice, when seeking Cabinet's policy approval for legislation, to obtain Cabinet's approval to any proposed release of the legislation in draft. That approval does not replace the need to consider whether the Attorney-General's consent to the release of legislation is required in accordance with this protocol.
- 15 Requests under the Official Information Act 1982 will continue to be dealt with (even if they involve waiving Crown legal professional privilege) under paragraph 4.68 of the *Cabinet Manual* (2008).
- 16 Legal professional privilege in drafting instructions is not waived simply as a consequence of the release of draft legislation. The release of drafting instructions will continue to be dealt with under paragraph 4.65 of the *Cabinet Manual* (2008).