



2015

PARLIAMENT OF TASMANIA

SOLICITOR-GENERAL

REPORT FOR 2014-15

*Presented to both Houses of Parliament pursuant to
section 11 of the Solicitor-General Act 1983*

In accordance with section 11 of the *Solicitor-General Act 1983* ("the Act"), I submit to the Attorney-General my report on the performance and exercise of the functions and powers of the Office of Solicitor-General for the relevant period - being the twelve month period which commenced on 1 July 2014 by:

- F C Neasey, Acting Solicitor-General from 1 July 2014 to 31 August 2014;¹
- M E O'Farrell SC, Solicitor-General from 1 September 2014 to 30 June 2015.

1. THE OFFICE OF SOLICITOR-GENERAL

The functions of the Office of Solicitor-General are set out in section 7 of the Act in the following terms:

"7. Functions of Solicitor-General

A person holding the Office of Solicitor-General has and shall exercise the following functions:

- (a) to act as counsel for the Crown in right of Tasmania or for any other person for whom the Attorney-General directs or requests him to act;*
- (b) to perform such other duties ordinarily performed by counsel as the Attorney-General directs or requests him to perform; and*
- (c) to perform such duties (if any) as are imposed on him by or under any other Act."*

In addition, section 8 of the Act provides for the delegation to the Solicitor-General by instrument in writing by the Attorney-General of:

"...responsibility for the performance or exercise of such of the functions and powers (other than th[e] power of delegation) which may be performed or exercised by the Attorney-General under the laws of Tasmania as may be specified in the instrument of delegation..."

No delegation pursuant to section 8 of the Act was in force at any time during the relevant period.

I note that an amendment has been proposed to s 7(b) of the Act to substitute "counsel" with "legal practitioner". It is hoped that this will better facilitate the operational requirements of my office and the functions of the present Office of the Director of Public Prosecutions (Civil Division). I will mention this matter further in due course.

I have attached for reference, in Schedule 2, a brief history of the Office of Solicitor-General and a table of Solicitors-General for the State of Tasmania.

Amendments to the *Solicitor-General Act 1983*

Following the unfortunate and extraordinary circumstances surrounding the case involving the former Director of Public Prosecutions, Mr Tim Ellis SC, the government has determined that the *Solicitor-General Act 1983* should be amended to restrict the tenure of future Solicitors-General to a maximum of two ten year terms. I note that I was given the opportunity to comment on the proposed amendments and the original policy which was said to underpin them.

The bill is yet to be introduced into Parliament.

¹ Mr Neasey was appointed Acting Solicitor-General on 19 May 2014.

2. ADMINISTRATION

I took up my appointment as Solicitor-General on 1 September 2014. For the period 1 July 2014 to 31 August 2014 Mr Frank Neasey was Acting Solicitor-General. Since my appointment I have been ably assisted by Mr Neasey in his capacity as Assistant Solicitor-General and by Ms Sarah Kay, Ms Jenny Rudolf and Ms Adrienne Morton, all of Crown Counsel. I am indebted to each of them for their hard work, learning, independence and support.

I also extend our thanks to our Executive Assistant, Ms Melissa Xepapas, for her considerable assistance, support and contribution throughout the year. I acknowledge from time to time the assistance we have been given by administrative officers from the Business Support unit of the Office of the Director of Public Prosecutions, most notably, Ms Amy Clifford, who acted as Executive Assistant during February and March 2015. I also thank the Acting Director of Crown Law, Ms Kerry Worsley, who retired in July 2015. Kerry provided effective and unstinting assistance to the Crown Law office for 12 years. She will be missed.

The Office of the Solicitor-General is fully funded from the Consolidated Fund and accordingly does not charge agencies and other entities for the use of its services.

The vast majority of the work of this office is concerned with the provision of accurate and consistent legal advice to government, its agencies (e.g. departments, commissions, boards etc.) and other emanations of the Crown. The essential purpose of this work is to ensure, to the best extent possible, that the Tasmanian government functions according to law. A number of general observations arise from this. First, it is preferable that advice is sought and given *before* executive action which may not comply with the law is taken. Secondly, it is important that work of an essentially legal character, which is undertaken in agencies by persons who are neither suitably qualified nor competent to do it should be referred to, or at least reviewed by, Crown Law. This does not routinely happen. Thirdly, where a document that has been prepared or reviewed by Crown law is subsequently altered in a Minister's office, or an agency, it should be referred back to be checked again. Finally, the Crown Law office is able to give government dispassionate legal advice, unaffected by policy, or individual agency influences which may affect the consideration and formulation of advice within an agency.

Important documents such as contracts (which may involve substantial sums) complex licences and permits and instruments delegating the exercise of statutory powers and functions, should not contain errors and deficiencies. It can be expected that errors and deficiencies resulting from less than optimal skills will not become apparent until long after the instruments have been in use and often only because a dispute or other problem has arisen in relation to them. The result may have serious effects on government action, sometimes rendering it invalid.

It is readily apparent to this office that government work of a legal character continues to be performed by a range of officers, without the assistance, or review of this office. At least some of that work falls below (sometimes well below) legal requirements and it frequently reflects an erroneous view of the law. That is not acceptable organisational theory and should not be accepted in practice by government.

The risks arising from poor legal compliance practices can be addressed by the proper utilisation of Crown Law including advice from this office.

Guidelines: Advice and Privilege

Guidelines for seeking advice from this office were first published by the previous Attorney-General in February 2012. I reviewed them upon taking up my appointment. I consulted with the staff in my office as well as the Acting Director of Crown Law and the Secretary of the Department. As a result, I formed the view that the February 2012 guidelines should be updated.

I have developed what I hope will turn out to be simpler guidelines, to reflect my view that officers in agencies, and other government organisations should be encouraged to seek legal advice as and when it is necessary, or thought desirable. It has been pointed out to me that, in some cases, the last opportunity a government employee may have to convince a senior manager of the correct legal position may be to ask this office for advice. I agree fundamentally with the philosophy behind that comment.

"It is of vital concern that the administration of government is carried out lawfully and for that purpose that all government entities have appropriate access to legal advice."²

I am not convinced that all agencies share this view. However, I consider that the updated guidelines will establish a platform to encourage agencies to seek and obtain advice.

In conjunction with the review of the guidelines it was also thought desirable to split those referring to obtaining advice from this office from those setting out the requirements relating to the disclosure of advice. Thus, it is intended to publish two documents, namely:

- guidelines for seeking advice from the Solicitor-General's Office; and
- guidelines for the disclosure of communications protected by client legal privilege.

I look forward to reporting on the use and effect of the guidelines in next year's report.

3. PROFESSIONAL

Advisings

A summary of the formal advice prepared by this office during the relevant period and categorised by reference to the agencies and other bodies which requested those advices is annexed as Schedule 1 to this report. For ease of comparison the same details for the immediately preceding 12 month period are also included.

The number of advices given during the reporting period shows a moderate increase from the previous period, which I am pleased to report continues the upward trend.³

I add that a considerable amount of advice of a less formal nature is also given during short telephone, or email attendances.

² Paragraph 1 of the revised guidelines for seeking advice.

³ In the period from 1 July 2012 to 1 July 2013 the number was 454.

Review of the ODP (Civil)

Nearly all litigious matters in which the State is a party, or is otherwise concerned, are dealt with by the Office of the Director of Public Prosecutions (Civil Division), the notable exception being matters which involve the Commonwealth *Constitution* or its interpretation. Those matters are dealt with exclusively by my office.

The responsibility for the conduct of the State's civil litigation resting with the Office of the Director of Public Prosecutions is an accident of history. As my predecessor, Mr G L Sealy SC pointed out in his report for 2012 to 2013, the DPP's principal statutory function is the institution and conduct of criminal proceedings on behalf of the State.

I think there is now a strong body of agreement that the present way in which the Crown's civil legal work is undertaken has negative consequences. Importantly,

- it limits the range and types of legal work available to legal practitioners – and particularly to younger practitioners – within each of the offices of the Solicitor-General and DPP (Civil);
- it deprives younger practitioners of the opportunity to undertake a wide variety of legal work, which is not only a vital part of their professional development, but also often contributes to a sense of job satisfaction, thereby avoiding premature and unwanted loss of valuable staff;
- the somewhat artificial compartmentalisation of the offices of the Solicitor-General and DPP (Civil) means that there are fewer options for dealing with fluctuations in the volume of work in individual offices caused by changes in demand or by absences due to recreation and personal leave or even prolonged court commitments.

Mr Sealy conceived of a Crown Law service in which the staff of the three offices of Solicitor-General, Crown Solicitor and DPP (Civil) ought to comprise a single legal practice responsible for undertaking all of the State's civil legal work with individual practitioners, while concentrating on particular areas of practice, being available to undertake a range of work as either solicitor or counsel or both. On this model, the Solicitor-General and other legal practitioners would act (or continue to act) as counsel on instructions from practitioners within that single office and the Solicitor-General would retain ultimate responsibility for the conduct of "Constitutional litigation" and for the provision of advice which, when required, authoritatively states the Crown's position in respect of contentious legal questions.

Mr Sealy's reasons are more fully set out in his 2012-13 report.

During April 2015 the Acting Director of Public Prosecutions, the Crown Solicitor and I formulated terms of reference for a review of the functions of the DPP (Civil). We preferred a model that would amalgamate the DPP (Civil) (with the exception of the Child Protection matters) with this office. Mr Rhys Edwards was commissioned to conduct the review. As at the reporting date (30 June 2015) Mr Edwards' review was well under way.

The amendment to s 7 of the Act is intended to facilitate the merger, should it proceed.

The preferred model is not the same as that conceived by Mr Sealy, in that it does not involve the Crown Solicitor as the solicitor on the record. However, the Solicitor-General will continue to act as counsel for the State, providing advice and retaining the ultimate responsibility for constitutional litigation. The Solicitor-General will also become ultimately responsible for the State's civil litigation (excluding child protection matters).

The government's transactional work, which involves the documentation of the multitude of transactions in which the State is constantly involved such as contracts, licences, permits etc., will continue to be undertaken by the Office of the Crown Solicitor. However, the Crown Solicitor's office and my office work closely together, as would be expected in any legal practice.

The model sufficiently addresses the negative consequences referred to above.

I look forward to reporting the outcome of the review and its results next year.

Section 78B Notices

The number of notifications given to the Attorney-General pursuant to section 78B of the *Judiciary Act 1903* (Cth) of matters involving the Commonwealth Constitution or its interpretation during the relevant period has remained comparatively steady.⁴

Interventions and other Appearances

During the relevant period, the Attorney did not exercise the right to intervene under section 78B of the *Judiciary Act 1903* (Cth) in respect of any matter.

However, I appeared as counsel for the State in the following cases.

- *Tarkine National Coalition Incorporated v Minister for the Environment, Venture Minerals Ltd and the State of Tasmania*⁵, an appeal to the Full Court of the Federal Court of Australia. The State had been joined as a party to the proceedings pursuant to section 12(2) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In that matter the Tarkine National Coalition unsuccessfully challenged the approval given by the Commonwealth Minister to Venture Minerals Ltd under the *Environment Protection and Biodiversity Conservation Act 1999* to develop a mine.
- *Tarkine National Coalition Incorporated v Schaap*,⁶ an application under the *Judicial Review Act 2000* concerning amendments to the environmental protection notice under the *Environmental Management and Pollution Control Act 1994*. It was held that the amendments in the particular case were beyond the power given to the Director of the Environmental Protection Authority.
- *Treloar v State of Tasmania*,⁷ an appeal to the Full Court of the Supreme Court of Tasmania in which the State successfully argued that a member of a medical panel constituted under the *Workers Rehabilitation and Compensation Act 1988* is not required to be a medical assessor, within the special meaning of that Act.

⁴ See schedule 1

⁵ [2014] FCA 468

⁶ [2014] TASSC 66

⁷ [2015] TASFC 3

- *West Coast Council v Coverdale*,⁸ an appeal to the Full Court of the Supreme Court of Tasmania, in which the Council successfully argued that the Valuer-General had a duty to value marine farming leases in Macquarie Harbour, thus permitting it to levy rates on the lessees. The State has applied to the High Court for special leave to appeal.

I have also appeared for the State on two occasions before the Royal Commission into the Institutional Responses to Child Sexual Abuse.

This office did not seek to intervene on behalf of the Attorney-General in any matter pursuant to section 16 of the *Crown Proceedings Act 1993* during the relevant period.

Hague Convention

This office continues to act on behalf of the State Central Authority in Tasmania (being the Secretary, Department of Health and Human Services) under the *Hague Convention on the Civil Aspects of International Child Abduction*. However, during the relevant period, no requests to act were received.

Special Committee of Solicitors-General

The Special Committee of Solicitors-General (SCSG) which is comprised of the Solicitors-General of the Commonwealth and of every State and Territory (and by invitation, the Solicitor-General of New Zealand) met on four occasions during the relevant period; in Alice Springs in July 2014, Hobart in November 2014, Melbourne in March 2015 and Canberra in June 2015.

The SCSG is a subcommittee of the Standing Committee on Law and Justice (or "SCLJ", formerly the Standing Committee of Attorneys-General) and is periodically requested by SCLJ to provide joint advice to it in relation to various matters usually involving more or less contentious *Constitutional* issues.

The SCSG also routinely reviews and discusses the implications of any recent decisions involving the Commonwealth Constitution or its interpretation together with all pending and reserved cases in Australia in which a constitutional issue has arisen or is thought to be likely to arise.

The meetings of the SCSG also provide a valuable opportunity for the exchange of information and views regarding proposals for law reform and legislative amendment which may have come from other jurisdictions.

CLE

During the relevant period I addressed a seminar on the implications of *Williams v The Commonwealth (No 2)*⁹ in which the Commonwealth legislative response to the finding of the invalidity of its school chaplaincy program was also found to be invalid.

⁸ [2015] TASFC 1

⁹ [2014] HCA 23

Development of a Whole of Government CLE program

During the year ending 30 June 2016 I would like to see a continuing legal education program set up for all government lawyers. At present, legal education for government lawyers is largely organised ad hoc, including the Legal Lunch Box Series. The Office of the DPP also runs its own in house CLE program with a wide variety of speakers and topics.

It is a condition of all practising certificates for lawyers in the private sector to earn 10 Continuing Professional Development (CPD) points a year. Failure to accrue the necessary points may result in the non-renewal of a practising certificate for private sector lawyers. Government lawyers are in a different position. They are deemed to have practising certificates. However, so far as continuing legal education is concerned I strongly hold the view that government lawyers should be in no different position from their private sector counterparts. The delivery of government legal services will be significantly enhanced by a continuing legal education program. I will mention a few of the advantages.

First, it has been observed in the private sector that the introduction of compulsory CPD has seen a decline in professional indemnity claims. That correlates with a decline in the risk of negligent practice. There is no doubt that continuing legal education plays its part in this. It has an important risk management function to perform.

Secondly, more peculiarly to government, there are legal officers in various agencies who communicate more by coincidence than routine. A CLE program would ensure that on a number of occasions throughout the year they have the opportunity to interact with other government lawyers to discuss their work and, importantly, legal developments that may affect them. This will have a positive effect on the distribution of legal knowledge throughout government and will assist in eroding any trend towards the development of legal silos. It will also encourage a more normative delivery of legal services to government.

Thirdly, the program will give the Crown Law office the opportunity to explain and more efficiently monitor legal difficulties which it encounters from time to time as a result of the execution of government policy without considered and accurate legal advice.

Continuing legal education is indispensable to the practice of the law at any level. Constant developments in the law require vigilance and research. Any assistance which a practitioner can obtain to keep abreast of the law is invaluable. It is of note that in most, if not all, Australian jurisdictions, the failure to hold a practising certificate for 5 years will result in a practitioner having to repeat at least some of the practical requirements to regain the certificate.

A CLE program would also give agencies an opportunity to send non-legal officers to seminars which may assist them to perform their duties. For example, law enforcement officers in agencies may benefit from seminars about investigations and evidence. Officers who negotiate contracts for the government will almost certainly benefit from seminars on contractual topics.

Where appropriate (and when funding is available) legal officers will also be able to participate in programs offered by the private sector as part of the fulfilment of the government program's requirements.

The program will also introduce some quality control into the delivery of legal education to government. It is of concern to me that seminars organised for government lawyers are delivered by people who profess to have legal qualifications, but have no (or questionable) relevant legal experience. Some events are organised without reference to Crown Law, or a full and accurate understanding of the law, policies and practices under which the Tasmanian government operates.

I also consider that the government should accept, encourage and fund the need for its legal practitioners to attend appropriate national seminars and conferences relating to their fields of practice. This will ensure the best quality training opportunities.

Other activities

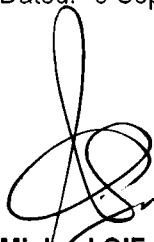
During the reporting period I delivered two lectures to classes at the University of Tasmania; one in Constitutional Law and the other in Professional Conduct. I believe it is an advantage to the functions of this office to maintain strong connections with the University.

I have participated as presenter to various Law Society seminars, mainly on the subject of legal ethics. I have also assisted as an instructor at the Tasmanian Legal Training Program. I remain a member of the Board of Legal Education.

Acknowledgments

I record my thanks to the Crown Solicitor, Mr Alan Morgan and the Acting Director of Public Prosecutions, Mr Daryl Coates SC, and also to their staff for their support and guidance during my first year in this office.

Dated: 3 September 2015

A handwritten signature in black ink, consisting of a large loop at the top and several smaller loops and strokes below it, ending in a small arrowhead pointing to the right.

Michael O'Farrell SC
Solicitor-General of Tasmania

Schedule 1

SCHEDULE OF ADVISINGS

	2013-2014	2014-2015
Department of Economic Development, Tourism and the Arts	10	N/A
Department of Infrastructure, Energy and Resources	52	N/A
Department of State Growth	N/A	61
Department of Education	46	25
Department of Health and Human Services	44	41
Department of Justice	151	142
Department of Police and Emergency Management	4	1
Department of Premier and Cabinet	72	90
Department of Primary Industries, Parks, Water and the Environment	76	112
Department of Treasury and Finance	14	13
Tasmanian Audit Office	2	1
Retirement Benefits Fund Board	3	3
The Public Trustee	0	1
Other bodies and offices	18	44
TOTAL ADVISINGS	492	534
Section 78B Notices	146	144

Schedule 2

A brief history

The Office of Solicitor-General has existed in Tasmania since 1825. At that time and consistent with the practice in the United Kingdom, the Office of Solicitor-General was a political office¹⁰ – both the Attorney-General and the Solicitor-General being members of most of the early Cabinets following the introduction of responsible government in Tasmania.¹¹ However, in 1863, following the report of a Royal Commission to inquire into the accounts, and “...*the nature and amount of the business transacted in the several Departments of Our Government whose offices or places of business shall be and lie to the southward of the Town of Campbell Town...*”, the decision was made that the Office of Solicitor-General should henceforth be a non-political and non-ministerial office. Perhaps unsurprisingly, the decision appears to have been based more upon financial rather than prudential considerations.

From 1863 the Solicitor-General's Office was the core of the legal administration of the government until, in 1934, the Attorney-General's Department was created and assumed responsibility for the administration of legislation. Thereafter the Solicitor-General's Department functioned as the Crown Law office advising and assisting the Executive Council, Ministers and agencies in legal matters affecting them. This position remained virtually unchanged until the enactment of the Act which, for the first time, established the Office of Solicitor-General as an independent office under statute.

Today, the office is accurately described in the following passage about Australian Solicitor's-General.

“The most familiar of their roles is the argument, on behalf of the executive government of their respective polities, of the most important cases affecting the interests of the government and the governed and between the governments of the federation in the highest courts in the land. No less important, however, are the duties performed by these officers in ensuring the observance of the rule of law by advice given to the governments they serve on issues of constitutional, administrative and even commercial law.”¹²

¹⁰ i.e., an office filled by an elected member of the Parliament

¹¹ In the United Kingdom the Attorney-General has rarely, and the Solicitor-General has never, been a member of the Cabinet; the prevailing view being that membership of the Cabinet is inconsistent with the duty to act as truly independent legal advisors to the Cabinet and government departments [See generally, *The Law Officers of the Crown*, Edwards, Sweet & Maxwell, 1964, Chapter 9.

¹² Keane P A in the Foreword to *Public Sentinels: A comparative study of Australian Solicitors-General*, Appleby, G, Keyzer, P and Williams, J M (Eds) Ashgate, 2014, page xi

SOLICITORS-GENERAL OF VAN DIEMEN'S LAND and TASMANIA

9 May 1825	5 May 1832	Alfred Stephen
1832	1833	Hugh Cokeley Ross (acting)
Jan 1833	Sep 1837	Edward McDowell
23 Mar 1838	1841	Herbert C Jones
15 Jan 1841	Dec 1843	Thomas William Horne
Jan 1844	1848	Valentine Fleming KC
1848	Dec 1853	Alban Charles Stonor
1854	1854	Francis Villeneuve Smith
1854	1855	Edward McDowell (acting)
19 Dec 1855	Feb 1857	John Warrington Rogers
25 Apr 1857	1 Nov 1860	Thomas James Knight
1 Nov 1860	Feb 1861	William Lambert Dobson
1 Jan 1864	1867	John Compton Gregson
Dec 1867	14 Mar 1887	Robert Patten Adams
Jun 1887	Apr 1901	Hon. Alfred Dobson KC
Apr 1902	1 Sep 1913	Edward David Dobbie KC
1914	1930	Lloyd Eld Chambers KC
Sep 1930	Aug 1938	Philip Lewis Griffiths KC
1939	17 Oct 1944	Rudyard Noel Kipling Beedham KC
18 Oct 1944	13 Mar 1946	Marcus George Gibson KC (acting)
14 Mar 1946	1 May 1951	Marcus George Gibson KC
14 Jun 1951	21 Mar 1952	Malcolm Peter Crisp KC
26 May 1952	1 Sep 1956	Stanley Charles Burbury QC
27 Sep 1956	27 Feb 1968	David Montagu Chambers QC
6 May 1968	1 Mar 1984	Roger Christie Jennings QC
2 Mar 1984	10 Apr 1986	Christopher Reginald Wright QC
11 Apr 1986	3 Aug 2007	William Christopher Robin Bale QC
18 Sep 2007	18 Jan 2008	Francis Counsel Neasey (acting)
3 Mar 2008	16 May 2014	Geoffrey Leigh Sealy SC
19 May 2014	31 Aug 2014	Francis Counsel Neasey (acting)
1 Sep 2014		Michael Ernest O'Farrell SC