



2016

PARLIAMENT OF TASMANIA

SOLICITOR-GENERAL

REPORT FOR 2015-16

*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 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 a legal practitioner 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."*

I note that during the relevant period an amendment was made to s 7(b) of the Act to refer to "a legal practitioner" rather than "counsel".¹ That amendment facilitates operational requirements following the merger of the former Office of the Director of Public Prosecutions (Civil Division) with my office. The Attorney-General issued me with written directions on 3 November 2015 directing me to conduct the State's civil litigation.

I mention the merger further below.

In addition to s 7, s 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 s 8 of the Act was in force at any time during the relevant period.

A brief history

This section has been included in this report over past years. On this occasion I have added a further section about the importance of the role of Attorney-General in our system of government. In the context in which government operates with a decentralised State service, which on occasion is expected to act expeditiously, it is important to bear the constitutional position of the State's law officers in mind and the consequential restraints on the executive.

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 office² – both the Attorney-General and the Solicitor-General being members of most of the early Cabinets following the introduction of responsible government in Tasmania.³ However, in

¹ *Law Officers (Miscellaneous Amendment) Act 2015*, s 13.

² i.e., an office filled by an elected member of the Parliament.

³ 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.

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."⁴

The Constitutional Importance of the Attorney-General

The offices of the Attorney-General and of the Solicitor-General are constitutionally inextricably linked. The Attorney-General is the first law officer of the Crown. The Solicitor-General is the second.

The office of Attorney-General is an institution vital for the system of responsible government on which our constitution is founded and for the maintenance of the rule of law. It occupies a unique constitutional position. The Attorney exercises both:

- political functions associated with a ministerial office;
- non-political functions, by reason of the office of Attorney-General.⁵ The latter are derived from the common law, but are now also affected by statute.⁶

The *Constitution Act 1934*, s 8C(1) provides:

"...no office, power, duty, authority, obligation, or discretion that is by law conferred or imposed upon the Attorney-General shall be allocated to, or exercised or discharged by, any other Minister of the Crown or the Secretary to Cabinet."⁷

⁴ 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

⁵ Carney, G, *The Role of the Attorney-General* (1997) 9 Bond LR 1 at p 2

⁶ For a non-exhaustive overview of the Attorney's powers and functions see Laws of Australia, on line, [19.3.430]; Carney, G, *op. cit.*; Heraghty, B, *Defender of the Faith? The Role of the Attorney-General in defending the High Court*, (2009) Monash University LR 206 at pp 208-212

⁷ Section 8C(2) provides that the Governor may appoint another Minister of the Crown to be acting Attorney-General and that person may carry out the Attorney's offices, powers, duties, authorities and discretions. See also, Twomey, A, *The Constitution of New South Wales*, Federation Press, pp 691-3

As first law officer, the Attorney-General provides legal advice to Parliament, Cabinet and the Executive Council. This function requires the Attorney to provide independent advice unmoved by political considerations.⁸

In the discharge of the public interest, the Attorney-General may appear against the State in court proceedings. In those cases, the Attorney-General appears in the capacity of the office, not on behalf of the State.⁹ The Attorney represents the competing interests arising in the litigation and acts in the public interest.¹⁰

Although the Attorney is not entirely free from the direction of Cabinet, the convention is that the Attorney exercises many powers independently.¹¹ That is consistent with s 8C(1) of the *Constitution Act 1934* to the effect that they are not to be exercised or discharged by any other Minister.¹²

The need for independence arises from the fact that the Attorney acts in the public interest,¹³ although the Attorney's views about the public interest may be influenced, even to a significant degree, by Cabinet.¹⁴

I mention these matters because the importance of the role of law officers in our system is sometimes overlooked.

I have attached for reference, in Schedule 3, a table of Solicitors-General who have had the privilege of holding that office for the State of Tasmania.

Amendments to the Solicitor-General Act 1983

During the relevant period there were significant amendments made to the *Solicitor-General Act 1983*.¹⁵ The major amendments were, in effect, to:

- restrict the term of appointment of the Solicitor-General to 10 years, with an option to extend that period for up to a further 10 years;¹⁶
- clarify the circumstances in which the Solicitor-General can be removed or suspended from office and to introduce procedures for that purpose.¹⁷

These amendments do not affect me.¹⁸ They will, however, affect future appointments and appointees to the office.

⁸ In practice, the Attorney ordinarily seeks advice from the Solicitor-General, the DPP, or the Crown Solicitor.

⁹ A recent example of this was the Attorney's appearance in *Coverdale v West Coast Council* [2016] HCA 15.

¹⁰ *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 414, 434.

¹¹ King, LJ *The Attorney-General, Politics and the Judiciary* (2000) 74 ALJ 444 at 447 to 449; Taylor, G *op cit*, p 178ff esp at 183; Selway, B. *Constitution of South Australia*, Federation Press, 1997, p80

¹² But note that the Attorney-General's powers may be delegated to the Solicitor-General: *Solicitor-General Act 1983*, s 8

¹³ *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 306

¹⁴ King LJ *op cit*

¹⁵ See the *Law Officers (Miscellaneous Amendments) Act 2015*

¹⁶ *Solicitor-General Act 1983*, s 4(3A)

¹⁷ *ibid*, ss 6A to 6G

¹⁸ *ibid*, s 14

2. ADMINISTRATION

Merger

The most significant administrative change to the office during the relevant period was the merger of the former Office of the Director of Public Prosecutions (Civil Division) with my office. During April 2015 the (then) 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. The review agreed with our preferred model and I am pleased to report that the merger was given effect on 3 November 2016.

As a result, my office now consists of two sections: the Office of the Solicitor-General (Advisings) and the Office of the Solicitor-General (Litigation).

The civil litigation functions of the Crown have not markedly changed. There are some minor structural issues that still need to be addressed, including changes to the requirements for service of documents on this office, instead of the DPP. I understand that the *Crown Proceedings Act 1993* will shortly be amended for that purpose.

There are presently two significant challenges for the merged office. The first relates to its physical location. The Litigation section is presently on level 5 of the Executive Building. The Advisings section is on level 8 of that building. Before the advantages of the merger can be fully realised, it is necessary for both divisions to share the same physical space. The optimum outcome is to relocate both offices to share a larger space with the Office of the Crown Solicitor. That would mean that the whole of the budgetary output of Crown Law (apart from the DPP) would be located together, with opportunities to develop a more diverse practice and to share work and resources.

Moving the OSG (Advisings) from Level 8 will also provide better accommodation options for the Office of the DPP.

I am hopeful of a resolution of this issue in the first part of 2017.

The second challenge relates to the present structure of the established positions in the office. This is a medium to long term matter, which will be addressed as and when opportunities arise. Ultimately (and acknowledging the restrictions on State service employment) I prefer a model that permits a more flexible approach to the allocation of work, together with opportunities for continuous improvement and more defined career paths for practitioners.

Staff

With the merger, Frank Neasey has become the Assistant Solicitor-General (Advisings). Paul Turner is now the Assistant Solicitor-General (Litigation). I thank them both for their continued support and assistance.

I also extend the thanks of the office to our Executive Assistant, Ms Melissa Xepapas, for her considerable assistance, support and contribution throughout the year. I also thank Pam Cawthorn and Scott Stalker for their assistance to and hard work for the Litigation section. Pam has also been of great support to the Advisings section when Melissa has been absent. I also acknowledge the assistance we have been given by administrative officers from the Business Support unit of the Office of the Director of Public Prosecutions when needed from time to time.

During the relevant period, Adrienne Morton left the Advisings section to take up a fixed term position in the Head office of the Department of Justice. She subsequently obtained a permanent appointment with the Department of State Growth. During the relevant period Adrienne was also presented with an award for bravery by the Commissioner of Police for her part in assisting Police to apprehend and charge a criminal for manslaughter. We miss Adrienne and thank her for her considerable contribution and assistance over a long period of time.

We also welcomed David Osz to the Advisings section. David is an excellent addition to our team.

Our legal practitioners in both sections work long hours, beyond the strict requirements of their positions. They have an unwaveringly professional approach to their work, with comparatively limited resources. I thank each of them.

During the reporting period Michael Varney commenced as our new Director of Crown Law. This is a challenging position, particularly having inherited the changeover of case management software, which Michael has managed with great equanimity. He has also been instrumental in the digitisation of the Solicitor-General opinion books, the introduction of a staff health and well-being program and the monthly newsletter "Snapshot". I record my thanks to him.

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.

Guidelines: Advice and Privilege

As foreshadowed in last year's report the Attorney-General published guidelines to assist agencies and other government entities that require advice from this office. Two documents were published, namely,

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

The guidelines have been split into two documents for the reason that issues relating to client legal privilege and, in particular, its waiver, raise important and distinct issues of principle for government.

As I have previously reported, the advice guidelines are intended 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.

In addition to the publication of the guidelines, I personally visited each agency in order to explain guidelines and to answer any questions that arose from their publication. It is difficult to gauge the response to these visits and, more generally, to the guidelines, however, as will be shown, there has been a marked increase in the level of work in the Advisings section.

3. PROFESSIONAL

Advisings

The Advising section consists of 5.00 funded full time legal practitioners (with a current FTE level of 4.46 reflecting reduced hours) with the support of a full-time Executive Assistant.

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 considerable increase from the previous period. This continues an upward trend. All members of the Advisings section noticed the increased workload.

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

It is pleasing to see an increase in the figures, given the philosophy behind the guidelines.

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 also considerably increased during the relevant period.¹⁹

Litigation

The Litigation section consists of 5.00 funded full time positions (with a current FTE level of 4.61 reflecting reduced hours) supported by a full time Administrative Assistant and a Senior Law Clerk. All staff have considerable experience.

The practice of litigation for the Crown requires skills and knowledge which are not required by private practitioners. An understanding of the unique position of the Crown is essential as is a level of knowledge of public law and institutions of government.

The Litigation section undertakes all civil litigation for the State. Civil litigation is defined in the Attorney-General's written direction to me as:

"civil proceedings" includes actions, applications, appeals, claims, proceedings or suits of any nature in the civil jurisdiction of any Federal Court or a Court of any State, or in the jurisdiction of any commission, tribunal, arbitrator or other body.

It can be seen that the functions of the office are extremely broad. Nearly all litigious matters in which the State is a party, or is otherwise concerned, are dealt with by the Litigation section, the notable exception being matters which involve the Commonwealth *Constitution* or its interpretation. Those matters are generally dealt with by the Advisings section.

I have attached in Schedule 2 a list of civil files opened and closed during the relevant period. The number of files opened represents a small decrease of files opened during the previous period.²⁰ However, during the relevant period, the number of files closed was considerably less

¹⁹ See schedule 1

²⁰ In the previous period from 1 July 2014 to 30 June 2015, the number of files opened was 388.

than the number closed during the previous period.²¹ This may be the product of a number of factors, including the lead up to the incorporation of new practice management system software, but it can also be attributed to the lack of administrative support with which the section is presently required to function. I will attempt to address this during the coming year.

I acknowledge the hard work of practitioners in the litigation section. I am hopeful that with the merger of the section with Advising and the physical location of both sections in the same office space there will be better opportunities to share work, and develop a more diverse practice.

Interventions and other Appearances in Constitutional Matters

During the relevant period, the Attorney exercised the right to intervene under section 78B of the *Judiciary Act 1903* (Cth) in respect of the following matters.

- *Alqudsi v The Queen*²² involving a question of whether s 80 of the Commonwealth *Constitution* permitted trial by judge alone. The Court held that trials for indictable offences under a law of the Commonwealth must be by jury.
- *Bell Group NV (In liq) v Western Australia & Ors*²³ which involved a question of powers referred by the States for the purposes of the *Corporations Act 2001*. The State successfully argued with the other interveners²⁴ that the Court should not decide the case on that point.

The Attorney-General also intervened in the Federal Court of Australia in:

- *Corneloup v Launceston City Council*²⁵ a case in which the State's interests concerned the implied freedom of political communication under the Commonwealth *Constitution*, but more particularly the ambit of s 46 of the *Constitution Act 1934*, which provides for religious freedom. The State was ably represented by Sarah Kay.

By the Valuer-General, the State was also appellant in the High Court in:

- *Coverdale v West Coast Council*²⁶ in which the State unsuccessfully argued that the Valuer-General did not have a duty to value marine farming leases in Macquarie Harbour, thus permitting the West Coast Council to levy rates on the lessees.

There are no reported cases in which the Attorney-General intervened pursuant to s 16 of the *Crown Proceedings Act 1993* during the relevant period.

In the period from 1 July 2016 to 30 June 2017 it is currently anticipated that there will be two constitutional matters involving the State.

- *Brown & Anor v State of Tasmania*, a challenge to the *Workplace (Protection from Protesters) Act 2014* (Tas) under the implied freedom of political communication in the Commonwealth *Constitution*; and

²¹ In the previous period from 1 July 2014 to 30 June 2015, the number of files closed was 386

²² [2016] HCA 54

²³ [2016] HCA 51

²⁴ The Commonwealth's intervention was based in no small part on written submissions filed on behalf of Tasmania, prepared by Sarah Kay of this office.

²⁵ [2016] FCA 974

²⁶ [2016] HCA 15

- *Preston and Ors v State of Tasmania*, a challenge to the *Reproductive Health (Access to Terminations) Act 2013* (Tas), under the implied freedom of political communication in the *Commonwealth Constitution*, and religious freedom under s 116 of the *Commonwealth Constitution* and s 46 of the *Constitution Act 1934* (Tas). The matter is presently in the Supreme Court on appeal from the Magistrates Court.²⁷

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 two occasions during the relevant period; in Sydney in October 2015 and in Adelaide in March 2016.

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.

Development of a Whole of Government CLE program

In my last report I said that I would like to see a continuing legal education program set up for all government lawyers by 30 June 2016. Notwithstanding the passage of that deadline without the establishment of the program, I am pleased to report that there has been considerable progress.

I have been fortunate to have had the assistance of the Crown Solicitor, Alan Morgan, in this endeavour.

During the early months of 2016 Alan recruited a practitioner to his office, 50% of whose duties will be directed to administering the program. The position was finally filled by Heather Clayton shortly after 30 June 2016 and so is not strictly within the reporting period. Since then a steering committee and reference group have been established and the program will see its first presentations before the end of 2016. More detail of the program will be presented in next year's report. However, I would like to extend my gratitude to Rowanne Browne, at DHHS, who has remained unstintingly committed to the program and is a valued member of steering

committee. I also thank Tim Bullard at DoE for joining the steering committee and especially to Heather for her hard work and assistance.

Continuing legal education is indispensable to the practice of the law at any level. The complexities of government demand a focussed program.

Other activities

During the reporting period I have maintained my association with the University of Tasmania Law School. I was honoured to be asked to deliver the occasional address to the graduation ceremony for Law Graduates of the University of Tasmania. I also participated in a one day symposium on the Tasmanian Constitution organised by the Law School. It is of great advantage to the functions of this office to maintain strong connections with the University.

I was recently re-appointed as a member of the Board of Legal Education for a further 3 years.

Acknowledgments

I record my thanks to the Crown Solicitor, Mr Alan Morgan and the Director of Public Prosecutions, Mr Daryl Coates SC, and also to their staff for their support and guidance.

Most importantly, I record my thanks to all the staff in the expanded Office of the Solicitor-General and particularly thank them for their forbearance while we await appropriate arrangements for our accommodation.

Dated: 28 September 2016

A handwritten signature in black ink, consisting of a large, stylized loop at the top, followed by several smaller loops and a final horizontal stroke at the bottom.

Michael O'Farrell SC
Solicitor-General of Tasmania

Schedule 1

SCHEDULE OF ADVISINGS

	2014-2015	2015-16
Department of State Growth	61	75
Department of Education	25	18
Department of Health and Human Services	41	60
Department of Justice	142	187
Department of Police and Emergency Management	1	4
Department of Premier and Cabinet	90	100
Department of Primary Industries, Parks, Water and the Environment	112	131
Department of Treasury and Finance	13	26
Tasmanian Audit Office	1	0
Retirement Benefits Fund Board	3	2
The Public Trustee	1	0
Other bodies and offices	44	61
TOTAL ADVISINGS	534	664
Section 78B Notices	144	194

Schedule 2

CIVIL FILES OPENED AND CLOSED AS AT 30 JUNE 2016

Work type	Opened	Closed
Administrative appeals – Magistrates Court	8	2
Administrative appeals – Supreme Court	9	7
Anti-discrimination	10	8
Appeals – Full Court of the Supreme Court	2	
Charity	2	
Children's matters		1
Civil Other	1	6
Contract	6	1
Coronial	14	3
Debt recovery	8	10
Documents		
Employment – contract	2	
Employment – damages		2
Employment – workers compensation	169	61
Guardianship and administration	1	2
Industrial dispute	9	1
Mining		
Miscellaneous	39	26
Miscellaneous advice	6	4
Negligence – medical	19	8
Negligence – miscellaneous	2	
Negligence – mis-statement		
Negligence – motor vehicle	2	2
Negligence – occupier		1
Negligence – school	7	2
Opinion	3	
Planning	13	7
Revenue	2	
Subpoena		
Tenancy	4	3
Valuation – acquisition	4	1
Valuation – rating	6	2
Total	348	160

Schedule 3

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