



2011

PARLIAMENT OF TASMANIA

SOLICITOR-GENERAL

REPORT FOR 2010-11

*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 with respect to the performance and exercise by me of the functions and powers of the office of Solicitor-General for the twelve month period which ended on 30th June 2011 – or what s 11(2) of the Act refers to as "the relevant period".

1. SOLICITOR-GENERAL ACT 1983

The functions of the office of Solicitor-General are set forth in section 7 of the *Solicitor-General Act 1983* 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 *Solicitor-General Act 1983* 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.

It has been the case for several years that the great majority of the time of the Solicitor-General, and of those Crown Counsel who assist him, is taken up in the preparation and provision of legal advice to the Crown in all of its various manifestations – and so it was during the relevant period. As I have previously reported, this means that there is very little time and few resources available to the office to enable it to undertake what has historically been the primary function of the office of Solicitor-General – that of appearing as counsel for the Attorney-General in constitutional and other important matters which come before the courts.

However, during the relevant period an unusually high number of matters involving the Commonwealth Constitution or its interpretation and which were of particular relevance to this State, came before the High Court of Australia. As a result, I together with Mr Simon Gates, appeared on behalf of the Attorney-General in two matters in which the Attorney intervened and which were heard by the High Court during the relevant period. These are discussed in more detail below.

In April 2011, I attended, as a guest of Bond University, a symposium on the role of the office of Solicitor-General in Australasia and beyond. The event was also attended by nearly every serving Solicitor-General in Australasia and several distinguished former Commonwealth and State Solicitors-General including the former Chief Justice of the High Court and former Commonwealth Solicitor-General, Sir Anthony Mason AC, KBE. To my knowledge this was the first occasion on which any serious or scholarly attempt had been made to analyse and

compare the offices of Solicitor-General as they exist throughout Australasia. One of several excellent papers presented at the symposium was given by the former Solicitor-General of New South Wales and former Justice of Appeal of that State, the Hon. Keith Mason AC, QC. The paper provided a brief but nonetheless thorough summary of the history of the office of Solicitor-General in each Australian jurisdiction. In the course of preparing his paper Keith Mason contacted me and asked me to provide him with a list of former Solicitors-General of Tasmania. I readily agreed to do so but, to my great surprise, I found that no complete or systematic record of the holders of the office of Solicitor-General in Tasmania (or Van Diemen's Land) has been or is kept. Accordingly, in my spare time, I set about compiling a list of the former holders of the office of Solicitor-General of Tasmania which (as in New South Wales) has existed continuously since 1824. Indeed, between 1824 and 1861, the office of Solicitor-General in Van Diemen's Land and then Tasmania, like that of Attorney-General, was a political office. Moreover, Tasmania was the first Australian colony (and possibly the first in the common law world) to establish the office of Solicitor-General as a non-political office. The full list of former Solicitors-General of Van Diemen's Land and Tasmania is annexed as a Schedule 1 to this report.

2. ADMINISTRATION

During the relevant period I was assisted in the performance of my functions by the Assistant Solicitor-General, Mr Frank Neasey, by Ms Sarah Kay, Mr Simon Gates and Ms Adrienne Morton all of Crown Counsel and by my Executive Assistant, Ms Cheryl Cook, all of whom cheerfully continue to produce work of the highest standard, sometimes working under the pressure of short – often unreasonably short – timeframes, to provide advice in relation to a seemingly ever more complex web of statutory provisions. I take this opportunity to formally and publicly record my thanks and appreciation of their efforts. I also desire to record my thanks to the Manager of Crown Law (the budgetary and administrative “output” to which the Office of the Solicitor-General is attached), Ms Kerry Worsley for her assistance and to the other members of the staff of Crown Law who provided me with assistance from time to time.

In my report for the period ended 30 June 2010, I made reference to the work being done within Crown Law to develop more rational and efficient policies and procedures for the provision of legal services to Agencies and other emanations of the Crown. That work continues and I am encouraged to believe that the forthcoming financial year will see a significant reduction in both the fiscal and administrative disincentives facing those who require, and are entitled to expect, timely and accurate legal advice and so enable the processes of government to be carried out lawfully and efficiently.

Queries from Agencies seeking permission to circulate or disclose advice given by this Office (or by Crown Law generally) continue to be regularly received. As I have previously observed, the importance of maintaining the Crown's client legal privilege in its legal advice and the circumstances in which that privilege may be found to have been impliedly waived, are not generally well understood within the State service. The result is that some State servants tend to be unnecessarily cautious when dealing with legal advice while others - apparently ignorant of the potential consequences - readily disclose the contents of the Crown's legal advice either orally or by handing over copies to persons outside the Crown. I hope soon to be able to make available detailed guidance in relation to this issue on the Department of Justice extranet. Meanwhile, the three cardinal principles to be observed are;

1. Generally, the Crown's legal advice may be distributed among those agents and employees of the Crown in right of Tasmania who have a legitimate interest in

receiving the advice without risk that the Crown's client legal privilege will be found to have been impliedly waived.

2. Generally, *any* disclosure of the Crown's legal advice to *any* person who is not an agent or employee of the Crown in right of Tasmania - even the *oral* disclosure of the *substance* of the advice - carries with it the risk that the Crown will be found to have impliedly waived privilege in relation to the advice *and* in relation to the contents of *any other documents* referred to in the advice.
3. If you are in any doubt *at all* about the applicability of either of the above principles, do not distribute or disclose the advice (or its substance) before obtaining specific advice from Crown Law.

3. PROFESSIONAL

Advisings

A summary of the formal Advisings prepared by this Office during the relevant period and categorised by reference to the Agencies which requested those advices is annexed as Schedule 2 to the report. For ease of comparison the same details for the immediately preceding 12 month period are also included. Perhaps the only significant variation which the summary reveals is that the number of s 78B notices received during the relevant period increased by just over 40% from 188 to 265. Other variations would appear to be largely, if not wholly, explained by the ordinary and inevitable changes in levels of activity in the various government Agencies from year to year.

Section 78B Notices

As noted, there was, by comparison with the preceding 12 month period year, a significant increase in the number of notifications given to the Attorney-General pursuant to s 78B of the *Judiciary Act 1903* (Cwlth) of matters involving the Commonwealth Constitution or its interpretation. However, the increase should be seen as merely restoring the overall number of notifications to historic levels. That is to say, it would appear that the comparatively low number of s 78B Notices received in the 2010 financial year was abnormal.

Interventions and other Appearances

During the relevant period the Attorney-General exercised his right under s 78A of the *Judiciary Act 1903* to intervene in matters pending in the High Court of Australia on two occasions.

Momcilovic v The Queen [2011] HCA 34 was an extraordinarily complex appeal against the appellant's conviction under Victorian law for the crime of trafficking in a drug of addiction. The appeal involved (among many other issues) the interpretation of certain provisions of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ("the Drugs Act") and the effect, if any, of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) on that interpretation. Of particular interest to Tasmania and the other States of the Commonwealth was the further argument that crucial provisions of the Drugs Act (and, by extension, crucial provisions of the equivalent legislation in most other States) were rendered invalid by the operation of s 109 of the Constitution because of inconsistency with a law of the Commonwealth, namely, Part 9 of the *Criminal Code* (Cwlth). If that argument were to succeed, grave doubt would be cast upon the legality of numerous convictions in recent years under State laws prohibiting the

possession and supply of, and trafficking in, many prohibited drugs. However, despite upholding the appeal on other grounds, in six separate judgments the seven justices of the High Court held by a majority of 6 to 1 that the Victorian Drugs Act (and by extension the equivalent legislation of the other States) was not inconsistent with Commonwealth law and was therefore not invalid.

Queanbeyan City Council v ACTEW Corporation Ltd & Anor involved the question of whether certain charges in connection with the abstraction and supply of water which had been imposed by a water corporation that was wholly-owned by the government of the Australian Capital Territory were or were not “excises”. The Commonwealth Constitution (s 90) confers exclusive power upon the Commonwealth Parliament to impose “...duties of customs and of excise...”. In those circumstances, Tasmania and every other State and Territory was interested to ensure that the present law with respect to the definition of what is and what is not an excise, remained unaltered. At the time of writing, judgment in the matter remains reserved.

I referred in my 2010 report to the appeal by the Secretary of the Department of Health and Human Services (“the Secretary”) to the Full Court of the Family Court of Australia in the matter then identified by the pseudonym of *Ray v Males*. At issue was the power of the Family Court to make an order joining the Secretary, against his will, to pre-existing proceedings between other parties seeking “parenting orders”. The appeal was argued in Hobart in February 2010 and on 22 December 2010 the Full Court of the Family Court (Bryant CJ, Finn & Ryan JJ) unanimously upheld the Secretary’s appeal against the order of joinder on the ground that the Family Court had no power to make an order for parental responsibility in favour of the Secretary, absent his consent and that accordingly, the order joining the Secretary as a party should not have been made. (See *Secretary of the Department of Health and Human Services & Ray and Ors* [2010] FamCAFC 258). Although before judgment was handed down the Commonwealth Attorney-General had publicly stated that the Commonwealth would appeal to the High Court if the Secretary’s appeal was upheld, in the result, no appeal was instituted by the Commonwealth.

On 8 June 2010, the Federal Court of Australia (Marshall J) handed down its decision in the matter of *Juries Against Illegal Laws Incorporated v The State of Tasmania* [2010] FCA 578 in which the Court dismissed a challenge, on various grounds, to the constitutional validity of the *Family Violence Act 2004* (Tas). I had appeared with the Assistant Director of Public Prosecutions (Civil), Mr Paul Turner on behalf of the Attorney-General on a motion seeking summary judgment or alternatively seeking an order striking out the action on the ground that it was frivolous, vexatious and embarrassing. That application was successful but in November 2010, the Applicant (J.A.I.L. Inc.) applied for an extension of the time within which to appeal to the Full Federal Court against the decision of Marshall J. I again appeared on behalf of the Attorney-General on the hearing of that application before Middleton J who dismissed the application to extend time on the ground that to do so would serve no purpose because the grounds of the appeal proposed to be instituted had no reasonable prospect of success – see *Juries Against Illegal Laws Incorporated v The State of Tasmania* [2010] FCA 1277.

In the latter part of 2010 and early 2011, the Assistant Solicitor-General, Mr Frank Neasey appeared on behalf of the Board of Legal Education (“the BLE”) in separate but related proceedings brought in both the Tasmanian Magistrates Court and the Federal Court of Australia by a resident of the United Kingdom alleging unlawful discrimination by the BLE flowing from its refusal to recognise her academic qualifications as being sufficient to entitle her to apply for admission in Tasmania as a legal practitioner. The proceedings in the Magistrates

Court were ultimately dismissed shortly before which the applicant had discontinued the proceedings in the Federal Court.

On 29 June this year, the Supreme Court of Tasmania (Blow J) delivered judgment in the matter of *Public Guardian v Guardianship and Administration Board [2011] TASSC 31*. It is perhaps unfortunate that it became necessary for the parties to this matter, both of which are emanations of the Crown, to resort to litigation in order to resolve a dispute concerning the scope of the power of the Guardianship and Administration Board to issue statutory "directions" to the Public Guardian in respect of the discharge by the latter of her duties and functions as a guardian. On the plus side, both parties now have the benefit of a thorough and authoritative pronouncement on that subject from the Supreme Court. In that matter I appeared with Ms Sarah Kay on behalf of the Public Guardian as the DPP was acting on behalf of the Guardianship and Administration Board.

Hague Convention

This office continues to act on behalf of the State Central Authority in Tasmania under the *Hague Convention on the Civil Aspects of International Child Abduction*. During the relevant period only one request to act was received and that was eventually transferred to Victoria when it was established that the applicant was resident in that jurisdiction.

Special Committee of Solicitors-General

The Special Committee of Solicitors-General 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) continues to meet more or less regularly two or three times each year. Apart from its formal status as a sub-committee of the Standing Committee of Attorneys-General, the special committee continues to serve as a valuable forum for the discussion of topical legal issues and especially those having an inter-state or national dimension. The committee also routinely reviews and discusses all constitutional litigation which is pending in any superior court in the Commonwealth.

Other Activities

During the relevant period I and the other Crown Counsel attached to this Office continued to provide addresses and seminars to various audiences, mainly, but not exclusively, within the State Service as and when requested. In the relevant period members of the Office took part in approximately a dozen such events dealing with such topics as the functions and role of the office of Solicitor-General, the Tasmanian Legal System, Informed Consent to Medical Treatment, Discovery of Documents, Constitutional Aspects of Race Field Information Legislation and, on at least three separate occasions, the preservation and waiver of the Crown's client legal privilege.



Leigh Sealy SC
Solicitor-General of Tasmania

Schedule 1

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		Geoffrey Leigh Sealy SC

Schedule 2

SCHEDULE OF ADVISINGS

	2009-2010	2010-2011
Department of Economic Development, Tourism and the Arts	22	16
Department of Education	43	51
Department of Health and Human Services	102	122
Department of Infrastructure, Energy and Resources	85	92
Department of Justice	203	193
Department of Police and Emergency Management	8	5
Department of Premier and Cabinet	75	48
Department of Primary Industries, Parks, Water and the Environment	232	182
Department of Treasury and Finance	44	29
Tasmanian Audit Office	10	7
Retirement Benefits Fund Board	11	7
The Public Trustee	1	6
Other bodies and offices	32	43
TOTAL ADVISINGS	868	801
Section 78B Notices	188	265