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PARLIAMENT OF TASMANIA

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# **SOLICITOR-GENERAL**

## **REPORT FOR 2009-10**

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

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## I. SOLICITOR-GENERAL ACT 1983

In accordance with the duty imposed upon me by s 11 of the *Solicitor-General Act 1983*, I hereby submit to the Attorney-General a report with respect to the exercise and performance by me of the functions and powers of the office of Solicitor-General of Tasmania during the period commencing on 1 July 2009 and ending on 30 June 2010.

By virtue of s 7 of the *Solicitor-General Act 1983* the 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.

It is sometimes said that the principal functions of the Solicitor-General are to act as counsel for the State in constitutional litigation and to provide advice to Ministers of the Crown and Heads of Agencies. In practice, however, the office of Solicitor-General in Tasmania is now almost exclusively devoted to the provision, directly to government agencies, of legal advice covering the whole range of government activity. This leaves little time and almost no resources available for the conduct of constitutional or other litigation by the Solicitor-General. The office has therefore come more to resemble a busy solicitor's practice than counsel's chambers. This appears to be the result of two interrelated factors.

First, the line of demarcation between what may properly be regarded as the work of the Solicitor-General on the one hand and what is properly the work of the Office of the Crown Solicitor on the other, has become increasingly blurred to the point where it is now frequently impossible to classify individual requests with any confidence. This would not be a matter of any particular significance were it not for the fact that under the arrangements which presently exist, advice provided by the Office of the Solicitor-General is provided free of charge whereas agencies must pay more or less commercial rates for advice provided to them by the Office of the Crown Solicitor. Thus, and for so long as the present financial arrangements continue, it remains a matter of considerable importance both to agencies and to the Crown Solicitor to know where the line is drawn. Agencies must know what advice they must pay for and the Crown Solicitor must know what work is properly his and so, may be charged for.

Secondly, the understandable desire of agencies to minimise their legal costs has, in turn, had two quite negative consequences. The first is that requests for advice which are probably more properly dealt with by the Office of the Crown Solicitor are directed to this office in the hope that the advice can be obtained free of charge. In addition, it is now clear to me that, at least some agencies make conscious decisions to avoid seeking legal advice in order to save money. In not a few cases agencies use their own officers and employees (who have no adequate legal training or knowledge) to draft such things as instruments of delegation, statutory rules and commercial agreements — some of which frequently involve very substantial sums — and which are later found to be incomplete, ambiguous or incoherent. Needless to say, this often proves to be a false economy.

I touched upon some of these matters in my previous report and since that time both I and the Crown Solicitor, Mr Alan Morgan, have had discussions with a number of Heads of Agencies in relation to them. With the assistance of the manager of Crown Law, Ms Kerry Worsley, we are seeking to develop alternatives to the current model which will encourage (or at any rate, not discourage) agencies from seeking appropriate legal advice at an early stage and which will clarify the roles of our respective offices.

The former Federal Court judge and Solicitor-General of South Australia, the late Bradley Selway, has said that the Crown is not only subject to "the rule of law" but that it also has a positive obligation to ascertain what the law is and then to comply with and enforce it. The proper discharge of that obligation is as necessary a condition of the rule of law as is the existence of an independent judiciary but, plainly enough, the Crown cannot discharge that obligation if its servants and agents do not have ready access to accurate and timely legal advice.

## **II. ADMINISTRATION**

During the period covered by this report I have been more than ably assisted in the discharge of my duties by Mr Frank Neasey of Principal Crown Counsel and by Ms Sarah Kay, Mr Simon Gates and Ms Adrienne Morton all of Crown Counsel. As a consequence of absences due to leave, Mr Terry Foulds and Mr Colin Sayer both also worked in the office at various times during the year.

Ms Cheryl Cook has acted as my Executive Assistant throughout the year under review and has, in addition, willingly provided assistance to other members of the office as and when required.

I wish to record my sincere thanks to all of them for their continued support and assistance. I do so knowing that the morale of the professional staff of Crown Law in particular has been very adversely affected by a long-running and as yet unresolved industrial dispute involving, amongst other things, legal proceedings in the Supreme Court between some of those members of staff and the Premier. Despite that most unwelcome distraction, the staff of this office have uniformly acted with professionalism and dignity — sometimes even in the face of quite extraordinary circumstances.

## **III. PROFESSIONAL**

### ***Advisings***

As is customary, I attach as a schedule a table setting forth the number of advisings provided by this Office during the period under report to each of the identified agencies, bodies and persons.

As may be seen there has been no significant change in the aggregate number of advisings provided as compared to the immediately preceding year but, as would be expected, variations in the numbers of advisings provided to individual agencies reflect the changing demands for legal advice resulting from the commencement or amendment of legislation and, more generally, from changes in government policy and activity. Such changes mean that agencies can often find it difficult to make accurate forecasts about their future requirements for legal services. However, it is plainly not conducive to good public administration that Government agencies should have to discharge their functions without adequate legal advice only because they have no available funds to pay for that advice.

### ***Section 78B Notices***

There was a slight increase in the number of notices served on the Attorney-General in accordance with the requirements of s 78B of the *Judiciary Act 1903* (Cwlth) as compared to the immediately preceding year. The great majority of the 188 notices that were received related to proceedings in the inferior courts of other States and Territories or raised arguments having no, or no apparent, merit. In about a dozen instances, serious consideration was given to whether the Attorney-General should intervene in proceedings in the High Court. In the event, and for a variety of reasons, the Attorney-General did not, in the period under report, intervene in any proceeding pursuant to s 78B of the *Judiciary Act 1903*.

### ***Other Appearances and Interventions***

In February of this year I appeared as counsel in an appeal to the Full Court of the Family Court of Australia in the matter identified as *Ray v Males* (SA 37/2009).

The case involved an appeal by the Secretary of the Department of Health and Human Services ("the Secretary") against an order of a Family Court judge purporting to join "the Department of Health and Human Services" ("the Department") as a party to existing "parenting proceedings" between a husband and wife. The joinder was made in anticipation of a possible finding that "...there may not be any person or party suitable to care for and/or be responsible for one or both of the children, J and Y" in which case parental responsibility orders in respect of the children could then be made against (or "in favour of") the Department or the Secretary.

I appeared as counsel with the Assistant Director of Public Prosecutions, Mr Paul Turner, on behalf of the Secretary to argue that the Family Court of Australia has no jurisdiction (*i.e.* power) to order the joinder of a complete stranger to the proceedings (*i.e.* the Secretary of the Department of Health and Human Services) in the absence of the consent of that person and that since the Secretary did not consent to his being joined as a party, the order purporting to do so was invalid.

The Commonwealth Solicitor-General, Mr Stephen Gageler SC, appeared for the Commonwealth Attorney-General (intervening) to support the joinder.

From the point of view of Tasmania (and the other States) the case primarily concerns the power of a federal court to impose parenting (and thus financial and other) obligations upon an officer or agency of a State against his or its will. From the point of view of the Commonwealth the case concerns the power of the Family Court of Australia to exercise a comprehensive jurisdiction in relation to the welfare of children in Australia.

The appeal was heard in Hobart on 10 February 2010 and judgment has been reserved. Having regard to the issues involved in the case there is a high probability that the unsuccessful party will seek leave to appeal to the High Court.

### ***Hague Convention***

This office acts on behalf of the State Central Authority in Tasmania under the Hague Convention on the Civil Aspects of International Child Abduction and in November 2009 Simon Gates appeared as counsel in the Family Court of Australia in the matter of *State Central Authority & Park* [2009] FamCA 1207.

The essential facts of the matter were that parents and their three children moved together from New Zealand to Tasmania in June 2009 for the purposes of enabling the father to take up employment. The court found that the family intended to move to Tasmania for a period of one or perhaps two years. After working for approximately one month, the father's employment was terminated. The father claimed that he and the mother had thereafter agreed that the family would return to New Zealand, a claim which the mother disputed. The parties separated in August 2009 and the father returned to New Zealand. The mother and the children remained in Tasmania. The father approached the New Zealand authorities for the return of the children under the Convention and on 14 October 2009, an application was made pursuant to the Child Abduction Regulations for the return of the children to New Zealand.

A question arose as to the Court's power to make orders under the *Family Law (Child Abduction Convention) Regulations 1986* in circumstances in which orders were in place under State child welfare laws (in particular, orders made under the *Children, Young Persons and Their Families Act 1997* placing the children in the care of the Secretary of the Department of Health and Human Services). The Court found that the exercise of powers in relation to the Convention was not inconsistent with the State's exercise of its powers under the State Act and that, consequently, no issue of inconsistency between State and Commonwealth law arose for determination under s 109 of the Commonwealth Constitution.

The Court found that the children's habitual country of residence was New Zealand, that the father had not acquiesced to the children remaining in Australia and that their retention in Australia was in breach of the father's rights of custody where those rights were actually being exercised and would have been exercised but for the retention of the children by the mother.

Orders were made for the return of the children to New Zealand.

The Office also acted in one other matter which was resolved prior to the commencement of any formal legal proceedings.

### ***Legal Information Seminars***

During the year under report I or members of the staff of the office have continued to make presentations on various topics of general and specific interest to various audiences within the State Service.

The role and function of the office of Solicitor-General invariably forms one of the subjects which is regularly included as part of the induction training given to newly-employed State servants. As well, presentations and addresses dealing with how to obtain legal advice from Crown Law, the law relating to delegations and authorisations, the requirements of natural justice or procedural fairness and the hardy perennial, legal professional privilege, have all been well-attended and well received.

It is very much to their credit that so many State servants show a desire and willingness to be better informed about their legal and ethical responsibilities. Indeed, it is very clear that there has been a considerable unmet demand for continuing education and information in these areas and I am both hopeful and optimistic that the newly-established Integrity Commission will, in the future, be able to satisfy that demand.

### *Special Committee of Solicitors-General*

The Special Committee of Solicitors-General (which is a subcommittee of the Standing Committee of Attorneys-General or "SCAG") met formally on three occasions during the period covered by this report. As well, the members of the Committee remain in frequent contact in relation to matters of common interest as and when these arise.

In addition to providing advice to SCAG when requested, the Committee, which includes the Solicitors-General (or their equivalents) of every State and Territory and New Zealand, continues to provide an extremely useful forum for the discussion of current legal topics generally and, more particularly, of pending litigation involving the Commonwealth Constitution and its interpretation. That opportunity is particularly valuable to me because of the very low incidence in recent years of intervention by Tasmania in constitutional litigation in the High Court.

Leigh Sealy SC  
Solicitor-General

## SCHEDULE OF ADVISINGS

	2009-2010	2008-2009
Department of Economic Development, Tourism and the Arts	22	63
Department of Education	43	36
Department of Health and Human Services	102	118
Department of Infrastructure, Energy and Resources	85	71
Department of Justice	203	175
Department of Police and Emergency Management	8	6
Department of Premier and Cabinet	75	62
Department of Primary Industries, Parks, Water and the Environment	232	206
Department of Treasury and Finance	44	46
Tasmanian Audit Office	10	12
Retirement Benefits Fund Board	11	10
Rivers and Water Supply Commission		3
TAFE Tasmania		11
The Public Trustee	1	6
Other bodies and offices	32	57
<b>TOTAL ADVISINGS</b>	<b>868</b>	<b>882</b>
<b>Section 78B Notices</b>	<b>188</b>	<b>164</b>