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PARLIAMENT OF TASMANIA

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# **SOLICITOR-GENERAL**

# **REPORT FOR 2004-2005**

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

## SOLICITOR-GENERAL REPORT FOR 2004-2005

### I OVERVIEW

Given the continued misconceptions that seem to arise in relation to the role and functions of the Solicitor-General, I propose in this, my 20th annual report, to spend a little time tracing the history of the office of the Solicitor-General, so that its important place in the constitutional fabric of the State might be better appreciated. In so doing I will borrow in part from the very useful synopsis contained in the 1984/85 report of my predecessor (now The Honourable) CR Wright QC.

In discharging the role of Solicitor-General I have, with the invaluable assistance of the small band of very professional and dedicated people assigned to assist me, been able to maintain an average turnaround time for advisings of less than 7 days, with urgent advice still being provided in most cases within 24 hours — this despite the fact that the number of advisings provided is slightly up on last year's high figure, and that for a variety of valid reasons I have been short by at least one in my staffing complement for most of the year.

### II THE FUNCTIONS OF THE SOLICITOR-GENERAL

By way of historical background, the office of Solicitor-General is one of considerable antiquity. The office succeeded that of the King's Solicitor in the United Kingdom, and the first appointment to it by name was in 1515. The Attorney-General and Solicitor-General quickly established themselves as the principal legal advisers and Counsel to the Crown, and within a few decades were acknowledged as the First and Second Law Officers of the Crown, with the Solicitor-General in the first place providing an essentially supportive role for the Attorney-General, but quickly establishing as well a quite independent position in the constitutional structure.

We are familiar in Australia with the division of the legal profession into two branches — on the one hand solicitors who have a generalised role in assisting clients in relation to the legal issues which accompany a wide variety of transactions, and on the other barristers who act as Counsel and legal advisers in contentious matters. One might have expected that the role of the Solicitor-General would be to perform functions of the former kind rather than the latter. That the reverse is true, as dictated both by the *Solicitor-General Act* 1983 and the traditions upon which that Act is based, reflects the historical development of the office both in the United Kingdom and in Australia in the centuries before and after the colonisation of this country.

In its earliest days, the Solicitor-General was, like the Attorney-General, an adviser to the House of Lords in the United Kingdom, but by the middle of the 16th Century it was commonplace for the Solicitor-General and the Attorney-General to be elected as Members of the House of Commons. Both advised the Houses of the Parliament as required, as well as the Cabinet of the day. Indeed, up until 1893 in the United Kingdom, both of them also enjoyed a right of private practice, which they utilised. Since then, they have been confined to advising and representing Government, and both are appointed to office from their membership of the House of Commons. As in Australia, the Attorney-General also holds office as a Minister of the Crown.

The traditions in the Australian colonies and States have developed somewhat differently, with it having been clearly established from the early days of responsible Government in this country that the office of Solicitor-General was a non-political one, whilst the Attorney-General was an elected member of the government of the day and a Minister of the Crown. As the demands of modern government have seen the role of the Attorney-General in this country become more and more political, so the non-political advisory role of the Solicitor-General has become more significant. It has been common in modern Australia for Solicitors-General to serve various governments of different political persuasions during their term in office, and it is critical that every government should be able to rely upon its Solicitor-General for accurate and non-partisan legal advice and representation.

For much of the 20th Century, the Solicitor-General in this State was the head of a Department of the Crown which was responsible for the delivery of all legal services of the Crown. By the middle of that century, the administrative burden upon the Solicitor-General had increased to the extent that it was interfering with his capacity to adequately discharge his important legal functions, and that position was addressed by the *Solicitor-General Act* 1983, which for the first time created the office as a statutory one, with 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 upon him by or under any other Act.”

By Section 8 of the Act, the Attorney-General is empowered to delegate to the Solicitor-General responsibility for the performance or exercise of any function or power (other than the power of delegation) which may be performed or exercised by the Attorney-General under the laws of Tasmania, except in the case that a particular statute contemplates that the relevant function or power of the Attorney-General may be delegated to the holder of another office. No new delegation from the Attorney-General was made in the year under review.

That this new statutory office was intended to embody the traditional functions of the Solicitor-General (but freed from the administrative duties which had been grafted on to it in more recent times) is evident from the terms of the Second Reading Speech of the Attorney-General in the House of Assembly upon the introduction of the Bill for the *Solicitor-General Act*, where he said —

*"This Bill creates the independent statutory Office of Solicitor-General of Tasmania. The office of Solicitor-General is one of the oldest in this State, being one created many years prior to responsible government.*

*The office of Solicitor-General follows a traditional office. It has its roots in the United Kingdom, and many Commonwealth and other countries have it and recognise that Office as being a key office in the legal structure of their jurisdictions.*

*The Solicitor-General is a law officer of the Crown and the Office has always been held by a legal practitioner with the highest qualifications and experience. The Solicitor-General is traditionally the principal legal officer to the Government on all matters of government business ...*

*In a sense, the Bill may be considered to be a codification of the conventions which currently exist in relation to this Office ..."*

In its early days, the statutory office saw the Solicitor-General assuming responsibility for much of the Crown's substantial litigation, as well as for major advisings of the Crown. However, concern quickly emerged that, even with the appointment of a Director of Public Prosecutions to take over the role of chief Crown prosecutor, the demands which modern government placed upon the Solicitor-General were so onerous that he could not adequately cope with the workload which fell upon him, and there was further concern that timeliness and consistency in the provision of advice to the Crown were being jeopardised by the way in which responsibility for that work was spread.

Accordingly, with my appointment to the office in 1986, responsibility for the civil litigation of the Crown as well as criminal prosecution was passed to the Director of Public Prosecutions. A much more focused role for the office of Solicitor-General was developed, in which the Solicitor-General's responsibilities became the provision of all legal advice required by the Crown and acting as Counsel for the State when it is involved in constitutional litigation and occasionally in important matters on brief from the Director of Public Prosecutions.

This remains the position, with the administrative services required by the office being provided, as the *Solicitor-General Act* requires, by the Department of Justice.

It is appropriate to emphasise that it is not the role of the Solicitor-General or indeed anyone else within government to provide legal advice to the private sector except in very special cases in which the Attorney-General has directed or requested the Solicitor-General to do so. Nor should that be a function of the Solicitor-General, given the scope for conflict of interest to which it might well give rise.

I perceive that there is a lingering belief within some sections of the State Service that in their dealings with the public they can offer advice to such people as to their legal rights. I am often approached for legal advice which is obviously intended to be so used. This perception is, as I always explain, not only entirely incorrect but dangerous in the sense that it needlessly exposes the Crown to risk of legal action in the event that a recipient of such advice were to rely upon it to their detriment. It is even less the role of a State Servant than it is my role to provide legal advice to the public, and I persistently warn against the passing on of legal advice given for the purposes of the Crown in order that it might be used for private purposes.

A flip side of that is that I still receive periodically requests from members of the public for advice on various issues. Such requests are rejected, but with an explanation of why and an indication of where the legal assistance needed might be sourced.

### III PROFESSIONAL ADVISING

The Schedule to this report demonstrates a reasonably consistent spread and marginal increase in the total number of formal advisings given in the year under review. Additionally, there is a significant quantity of advice which is given *ex tempore* in relatively uncomplicated circumstances where the facts are clear. Apart from anything else, the office as presently structured simply could not cope were it necessary to formalise every advising.

By virtue of the principles relating to professional legal privilege, it is inappropriate that I should comment upon any particular advising. Suffice it to say that there have been a number of major issues which have confronted government in the past year, many of them giving rise to novel and complex legal questions. That seems likely to be the case ever more frequently as the law becomes more complex (the State and the Commonwealth together in any one year would normally between them bring into being upwards of 10,000 pages of legislation affecting or having the potential to affect this State!) and government — very noticeably in a small State — is not only the dominant employer but also plays a significant role as a catalyst for new development.

## CONSTITUTIONAL MATTERS

The State was not a principal party in the year under review in any case involving constitutional issues. However, there were a number of such issues worthy of intervention of which we were notified under Section 78B of the *Judiciary Act* 1903. Unfortunately, the small size of this Office and the volume of the demand for advisings mitigates strongly against my ability to properly prepare and mount a meaningful intervention, whereby I once again felt obliged to leave the Solicitors-General of other jurisdictions to run these arguments. As the senior serving Solicitor-General I am embarrassed that I have not been able to pull my weight in terms of this aspect of my functions. That is not to say that I am not entirely satisfied that Tasmania's interests have been adequately put in those cases in which I would have intervened. Rather, I would have preferred to have been in the position to better share the load with my counterparts in other jurisdictions. I should in this context record that I have just received an increase of one full-time position in my professional staffing, and I would hope, as that officer gains experience, that this will see me better able to increase the State's participation in the very important area of establishing the scope and operation of the Australian *Constitution* in modern society.

On the instructions of the Attorney-General I have intervened in a matter which involves a determination of the reach of Tasmania's Anti-discrimination Act into conduct within the Australian Defence Forces. The hearing of that matter at first instance is scheduled to take place later this year.

## OTHER APPEARANCES

My staff continue to act for the Commonwealth and appear in matters arising under the Hague Convention on the Civil Aspects of International Child Abduction, and we have also accepted a number of briefs from the Director of Public Prosecutions on administrative law matters.

As well, I will, again on the Attorney-General's instructions, be seeking leave to appear in the Federal Court, not on a constitutional issue but in the matter of *Brown v Forestry Commission*, in which the plaintiff seeks to challenge the validity of the Regional Forest Agreement. The importance of that Agreement to the forest industry in Tasmania cannot be understated, and plainly the State has a significant interest in having the validity, and compliance criteria, of the Agreement authoritatively established.

#### **IV WAGES ISSUES**

A considerable distraction for all Crown Law staff in the past year has been the negotiation with government of a new wages agreement. I am pleased to note that, shortly after the end of the year in review, agreement was reached in terms which on their face appear to be advantageous to all concerned.

#### **V LEGAL INFORMATION SEMINARS**

I chose this year to present ten seminars for the benefit of State Agencies and Instrumentalities on predetermined issues which constantly recurred in requests for advice. Those seminars quickly booked out, and in the event during the year 28 seminars were presented to a total audience in excess of one thousand. I have greatly appreciated the assistance of my staff in the preparation for and presentation of these seminars, and the feedback that I have had suggests that they have been well received and useful.

#### **VI SPECIAL COMMITTEE OF SOLICITORS-GENERAL**

The Committee met only three times in the period under review to consider matters referred for its attention by the Standing Committee of Attorneys-General as well as other legal issues of national consequence. These meetings continue to be extremely valuable and in my opinion contribute significantly to the development of the law in Australia. Outside its formal meetings, the Committee considers inter-sessionally a range of issues that need to be addressed urgently. As in the past, I will not report in any detail here of the work of the Special Committee, because reports of that nature are properly given only to the Attorney-General.

#### **VII ADMINISTRATIVE ISSUES**

I am pleased to be able to report that the Manager of Crown Law Kerry Worsley and her team have continued, on behalf of the Department, to capably deliver the administrative services required by this office.

I have for many years in these reports attempted to reflect my appreciation for the untiring efforts of my small professional team to ensure optimum delivery of the services which we are called upon to provide. We regularly caucus on difficult legal issues, and it is not always appreciated that advice which emanates from the office on such issues may have benefited from the input of several professional minds together possessed of many years experience.

Senior amongst my professional team is Simon Allston, who has been with me for 16 years. In the last days of the year he was appointed State Ombudsman, to take up that office in August. I am sure that his appointment reflects appreciation of the great value to that position of the abundance of quality professional characteristics that he has brought to this office, and I am very confident that the appointment will prove to have been an inspirational one. Whilst I am saddened to have lost him, his skills will surely be of even greater benefit to the State on a broader platform. The position which he has vacated in the office will be filled as soon as practicable.

## VIII SUMMARY

2004-2005 has once again proved to be a very busy year for the office but I believe that the demands placed upon it have been satisfied in a timely manner. Despite major personnel change at the end of the year, there is no reason to suppose that this will not continue. In our quest for precision we remain mindful of the caution given by the then Solicitor-General and later Chief Justice the late Sir Stanley Burbury 50 years ago that the Executive must act on the advice of its sole (legal) advisers. He was referring to the Attorney-General and the Solicitor-General. He explained the caution in these terms —

*"The division of functions between officers of the State is something essential to proper and democratic administration of government. The Law Officers have the responsibility of advising upon the legality of any action taken by the Executive Government whether it is to be taken by the Governor on the advice of his Ministers, by a Minister individually, or by some subordinate official ..."*

The onerous responsibility of endeavouring to ensure that government can be confident that the advice which it gets is unswervingly correct will continue to be cheerfully accepted.

WCR BALE QC  
SOLICITOR-GENERAL



**SCHEDULE OF ADVISINGS**

Agencies (including State Authorities)	Number of Advisings	
	2004-2005	2003-2004
Department of Economic Development	7	18
Department of Education	45	65
Department of Health and Human Services	205	196
Department of Infrastructure, Energy and Resources	101	101
Department of Justice	160	162
Department of Police and Public Safety	21	9
Department of Premier and Cabinet	122	91
Department of Primary Industries, Water and Environment	388	410
Department of Tourism, Parks, Heritage and the Arts	69	50
Department of Treasury and Finance	92	89
Tasmanian Audit Office	7	1
Retirement Benefits Fund Board	24	16
TAFE Tasmania	6	8
Tasmanian Dairy Industry Authority	0	1
The Public Trustee	6	3
Other bodies and offices	82	108
<b>TOTAL ADVISINGS</b>	<b>1335</b>	<b>1328</b>
<b>Section 78B Notices</b>	<b>228</b>	<b>208</b>