



2009

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PARLIAMENT OF TASMANIA

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# **SOLICITOR-GENERAL**

## **REPORT FOR 2008-09**

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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

This report is made and submitted to the Attorney-General in obedience to the requirements of section 11 of the *Solicitor-General Act 1983* ("the Act") which requires me to "...*prepare and submit to the Attorney-General a report with respect to the performance and exercise by [me], and by any previous holder of the office of Solicitor-General, of the functions and powers of the holder of that office...*" during the period of 12 months ending on 30 June 2009.

During the period covered by this report I was the only holder of the office of Solicitor-General.

The principal functions and powers of the office of Solicitor-General are set forth in section 7 of the Act. They are:

- "(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."

A brief history of the office of Solicitor-General in the United Kingdom (where the office originated) and of its subsequent development in Tasmania may be found in the 2004-2005 report which is available on the world wide web at: [www.crownlaw.tas.gov.au/solicitorgeneral/ann\\_reports/2004-05/](http://www.crownlaw.tas.gov.au/solicitorgeneral/ann_reports/2004-05/)

## II. ADMINISTRATION

Throughout the year under report I was assisted in the performance of my functions by Mr Frank Neasey of Principal Crown Counsel, Ms Sarah Kay and Mr Simon Gates of Crown Counsel, and my Administrative Assistant, Ms Cheryl Cook. In addition, and in order to cover staff working part-time and/or absent on parental leave, Ms Adrienne Morton of Crown Counsel joined the staff of the office in September, 2008.

I am indebted to all of them for their loyalty, their dedication and their professionalism during what has been a busy and sometimes controversial year.

I am of course conscious of the restraints placed on government by the severe downturn in prosperity which has occurred during the period under report. However I remain concerned about the capacity of this office to adequately deal with all but the most minor of constitutional litigious matters while continuing to answer the quite proper but constant demand from the government and its agencies for advice.

Accordingly, I have had some preliminary discussions with the Director of Public Prosecutions, Mr Tim Ellis SC, the recently appointed Crown Solicitor, Mr Alan Morgan, and the manager of Crown Law, Ms Kerry Worsley, with a view to identifying any possible efficiencies which might be gained from changes to the current administrative structures in Crown Law and elsewhere.

I am also interested to investigate whether financial considerations are discouraging some agencies from obtaining legal advice from Crown Law when appropriate. I should certainly hope that that is not the case for, in my view, it is axiomatic that the Crown and its agencies should always have ready access to competent legal advice so that the Crown may always know and act according to the law.

### III. PROFESSIONAL

#### Advisings

Attached as a schedule to this report is a table setting forth details of the numbers of advisings provided by this office to each of the agencies identified during the period covered by this report. For comparison, figures are also given for the preceding year.

In purely numerical terms it would appear that there has been a decrease of about 10% in the number of requests for advice between the two periods. However, I have no doubt that, in general terms, the complexity of the issues involved in an increasing number of some requests for advice (and consequently, the length of the resulting advices) has increased markedly.

At the direction or request of the Attorney-General I have also provided advice to officers and committees of the Legislative Council and a Joint Committee of both Houses of the Parliament and given oral evidence to a Legislative Council Select Committee and a Joint Select Committee of both Houses.

#### Section 78B Notices

The schedule also indicates that there has also been a slight decrease in the number of notices received by the Attorney-General issued pursuant to section 78B of the *Judiciary Act 1903* (Cwlth) advising that a matter has arisen in a proceeding in an Australian court which involves the Commonwealth Constitution or its interpretation so enabling the Attorney to consider whether to intervene in the proceeding or to seek to have the proceeding removed into the High Court of Australia.

Acting upon advice tendered by me, the Attorney-General did not elect to intervene in or to seek the removal of any matter into the High Court during the period under report.

#### *Other Appearances & Interventions*

Frank Neasey appeared on behalf of the Attorney-General who intervened in proceedings in the Federal Court in *Australian Securities and Investments Commission v Piggott Wood & Baker (a firm) (No 3) [2008] FCA 1547* to successfully oppose an argument that certain provisions of the *Legal Profession Act 2007* were inconsistent with Commonwealth law and therefore invalid.

On behalf of the Attorney-General I sought and was granted leave to make submissions *amicus curiae* in *State of Tasmania v Anti-Discrimination Tribunal and Others* [2009] TASSC 48. Justice

Porter accepted the submissions made on behalf of the Attorney-General to the effect that when reviewing a decision of the Anti-Discrimination Commissioner not to accept a complaint for investigation, the Anti-Discrimination Tribunal may have regard to material which was not before the Commissioner.

In *Secretary of the Department of Health and Human Services v Horacek* [2009] TASSC 65 Simon Gates and I appeared as counsel for the Secretary of the Department of Health and Human Services in the Court of Criminal Appeal to successfully challenge the validity and appropriateness of certain orders which had been made at first instance pursuant to the *Criminal Justice (Mental Impairment) Act 1999*.

### ***Hague Convention***

This office continues to act on behalf of the Central Authority in Tasmania under the Hague Convention on the Civil Aspects of Child Abduction.

In the period covered by this report the office was involved in four matters arising under the Convention.

One matter resulted in the repatriation to Australia of a child who had been abducted from Tasmania to the United States of America.

The three remaining matters related to children who had been abducted from or to Tasmania from or to the Dominion of New Zealand. Two of those matters were unresolved and proceedings in relation to them were still pending as at 30 June 2009.

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

During the twelve months to 30 June 2009 I delivered lectures and seminars for the Department of Premier and Cabinet and the Department of Treasury and Finance (State Revenue Office). I was also invited to address a seminar on Parliamentary Privilege conducted by the University of Tasmania and, in December 2008 delivered the Occasional Address to graduates in the Faculty of Law in the University of Tasmania.

Members of the professional staff of the office have also or will shortly deliver lectures to or otherwise give time as moot judges to law students in the University of Tasmania and to other government agencies such as the newly-formed Skills Tasmania.

The subjects covered have included the role of the office of Solicitor-General, legal professional privilege, parliamentary privilege and procedural fairness or natural justice.

Despite these efforts, it remains the case that there is presently no structured or continuing system of education or information made available to State servants regarding their legal and ethical responsibilities.

I am given to understand that the Integrity Commission which is proposed to be established as part of the Premier's "10 Point Plan" announced in August last year will supply this deficiency at least so far as members of Parliament, Ministers of the Crown and members of their respective staffs are concerned. It is less clear what, if anything, in the way of such training is to be made available to ordinary State servants other than those newly-inducted into the service.

### *Special Committee of Solicitors-General*

The Special Committee of Solicitors General comprising the Solicitors-General (or analogous officers) of the Commonwealth and of every State and Territory of Australia and of New Zealand met on three occasions during the period under report. During that period the Special Committee was requested by the Standing Committee of Attorneys-General (of which the former is a sub-committee) to provide advice in relation to a number of matters concerning uniform national legislation and/or the referral of legislative powers by the Parliaments of the States to the Commonwealth Parliament.

The Committee continues to provide a valuable forum for the discussion of constitutional issues generally and of pending constitutional litigation in the various courts within the federation.

## **IV. LEGAL PROFESSIONAL PRIVILEGE**

The potential for the inadvertent waiver of the privilege which the Crown, in common with all persons, enjoys in relation to legal advice provided to it by its Law Officers and employed legal practitioners continues to be a matter of concern.

While it is fair to say that, with a few notable exceptions, it is generally understood that advice provided by this office (and more generally, by Crown Law) is not to be disclosed without permission, there seems to me to be a lack of understanding as to why this is so and what the precise limits on disclosure are.

As a result of discussions with the Attorney-General and her staff I intend to publish a protocol or set of mandatory guidelines (if that is not an oxymoron) which will be available to all State servants and which will set out the circumstances in which legal advice or the substance of legal advice may or may not be disclosed with or without the express permission of the Attorney-General.

One matter of considerable importance, which seems not to be well understood, is how the disclosure of advice to persons outside the Crown can amount to a waiver, not only of the privilege in the advice which is disclosed, but also of the contents of documents which may be referred to in that advice.

**LEIGH SEALY SC  
SOLICITOR-GENERAL**

## SCHEDULE OF ADVICES

	2008-2009	2007-2008
Department of Economic Development and Tourism	63	19
Department of Education	36	50
Department of Health and Human Services	118	146
Department of Infrastructure, Energy and Resources	71	75
Department of Justice	175	203
Department of Police and Emergency Management	6	10
Department of Premier and Cabinet	62	56
* Department of Primary Industries and Water	206	156
Department of Treasury and Finance	46	47
Tasmanian Audit Office	12	3
Retirement Benefits Fund Board	10	6
Rivers and Water Supply Commission	3	16
TAFE Tasmania	11	18
The Public Trustee	6	2
Other bodies and offices	57	43
<b>TOTAL ADVICES</b>	<b>882</b>	<b>978</b>
<b>Section 78B Notices</b>	<b>164</b>	<b>171</b>

