



2019

PARLIAMENT OF TASMANIA

SOLICITOR-GENERAL

REPORT FOR 2018-19

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

In accordance with s 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, namely the twelve month period ending on 30 June 2019.

1. THE OFFICE OF SOLICITOR-GENERAL

The functions of the Office of Solicitor-General are set out in s 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.

A direction dated 3 November 2015 was given under s 7(b) to me by the Attorney-General, by which I am responsible for and control the State's functions in respect of civil proceedings.¹

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

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 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

¹ Except for proceedings under the *Crime (Confiscation of Profits) Act 1993*.

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].

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 Supreme Court of Tasmania recently referred to the status of the office in the following terms:

...the legislative scheme of the *Solicitor-General Act 1983* results in the creation of an independent statutory office ultimately accountable to Parliament and that it is in the public interest that the office remains "steadfastly independent as part of the State's constitutional fabric and its adherence to the rule of law."⁵

2. ADMINISTRATION

The Solicitor-General's Office consists of two sections: the Office of the Solicitor-General (Advisings) and the Office of the Solicitor-General (Litigation). The Litigation section is presently on level 5 of the Executive Building. The Advisings section is on level 8 of that building. The physical separation presents some challenges and, anecdotally, may cause some missed opportunities.

In previous years, I have suggested that the optimum strategic outcome of the merger of the Litigation and Advisings sections would be to relocate both offices to share a larger space with the Office of the Crown Solicitor (OCS), in close proximity with the DPP. Had this been achieved, the whole of the budgetary output of Crown Law would have been located either together, or with minimal separation. Strategically, this would have offered government a unified legal service, with opportunities for practitioners to develop a diverse practice, share work and resources and enhance collaboration and exchange of views, all of which would contribute to both professional development and the capacity of the office to advise and to conduct litigation

That opportunity has now passed. During the next reporting period OCS will relocate to the Reserve Bank Building in Macquarie Street. The Litigation and Advisings sections of this office will remain as they are. The perceived advantages outlined above now need to be treated as a long term objective, to be picked up if and when circumstances present themselves. Different strategies will be deployed to attempt to gain some of the opportunities available to the practitioners in this office.

⁴ Hon Patrick Keane in the Foreword to *Public Sentinels: A comparative study of Australian Solicitors-General*, Gabrielle Appleby, Patrick Keyzer, and John Williams (Eds) Ashgate, 2014, page xi.

⁵ *The Hon Will Hodgman, as Minister Administering the State Service Act 2000 v Tasmanian Industrial Commission* [2019] TASSC 40, [36].

Litigation

As at the reporting date, the Litigation section comprised of the following positions: the Assistant Solicitor-General (Litigation), two Level 3 legal practitioners, three Level 2 legal practitioners and one Level 1. There are two positions devoted to a program to reduce long term workers compensation cases being at Level 3 and Level 2 respectively.

In the main, the Assistant Solicitor-General (Litigation), Paul Turner SC, manages the work flow and allocation of files in Litigation.

In the previous two years I reported on the funding arrangement with a number of agencies to enable the Litigation section to create two positions for a two year period to address the long tail of workers rehabilitation and compensation cases throughout government. During this reporting period, I am pleased to confirm that the funding arrangements have been made permanent. For the most part this is due to the success of the two year program and the excellent work of the practitioners involved, in particular Kirsten Hodgson and Lisa Kelly.

From Schedule 2 it will be apparent that the volume of matters dealt with by the Litigation section is significant. Many diverse areas of law are engaged. Great demands are made of the practitioners, and they continue to display outstanding skills.

Advisings

As its name suggests, the Advisings section gives advice, written and verbal to government. In addition to those functions, there have been continuing opportunities for practitioners in Advisings to appear as counsel in a range of matters in the Supreme Court and in coronial proceedings.

As at the reporting date the establishment of the Advisings section comprised of: the Assistant-Solicitor-General (Advisings), one Level 3 practitioner, one Level 2 practitioner and one Level 1 practitioner. A further fixed term Level 2 position has also been created for two years to assist with the workload in Advisings. As at the reporting date, it had not been filled.

The work of the Advisings section of my office is particularly directed to the Crown's legal compliance with its onerous legal requirements. It achieves this by a disciplined approach to legal problems that is best served by a centralised Crown legal service that works as a cohesive team.

It is a great benefit for legal practitioners in Crown Law that the work is generally of high quality and significant interest. That benefit should be realised and fostered strategically to ensure that a cohort of experienced public lawyers is available to the State from its own resources. It has been said of public law practitioners:

This type of legal work is of high constitutional importance. Not many lawyers get to do it, though academic lawyers may later delight in picking over the entrails. It is both interesting and challenging work. It calls for high levels of legal knowledge as well as a deep knowledge of the way government, including the executive, parliamentary and judicial systems, work.⁶

⁶ Hon Justice M L Barker, *"What Makes a Good Government Lawyer"* (FCA) [2010] FedJSchol 26.

Staff

As at the relevant date the Advising section consisted of:

Legal Practitioners

- Sarah Kay, Assistant Solicitor-General (Advising)
- Jenny Rudolf (LP3)
- David Osz (LP2)
- Dashini Elankovan (LP1)

Administration

- Melissa Xepapas (Executive Assistant)

The Litigation section consisted of:

Legal Practitioners:

- Paul Turner, Assistant Solicitor-General (Litigation)
- Gretel Chen (LP3)
- Kirsten Hodgson (LP3)
- Teshi Zacharek (LP2)
- Lisa Kelly (LP2)
- Oliver Robinson (LP2)
- Toby MacGregor (LP1)

Administration

- Pam Cawthorn (Legal Administration Officer)
- Scott Stalker (Law Clerk)
- Lindsey Reed (Administrative Assistant)
- Kyra Wing (Office Assistant)

In both sections our legal practitioners are required to work long hours, well beyond the strict requirements of their positions. They have an unswervingly professional approach to their work, with limited resources, when compared with other jurisdictions throughout Australia. I thank each of them.

I 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, Scott Stalker, Lindsey Reed and Kyra Wing for their assistance and hard work. I also acknowledge the assistance we are given by administrative officers from the Business Support unit of the Office of the Director of Public Prosecutions when needed from time to time.

Michael Varney continues as Director Crown Law. Michael continues to attempt to extract the best performance from our practice management software, which has presented significant challenges, particularly for our Litigation section as well as the OCS. It continues as an ongoing project. Michael has also implemented a number of programs, including events for the health and well-being of staff. 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.

3. PROFESSIONAL

Paul Turner SC

On 3 June 2019 Paul Turner, the Assistant Solicitor-General (Litigation) was appointed Senior Counsel by the Chief Justice of the Supreme Court. As at the reporting date, the Senior Counsel Protocol⁷ stated (amongst other things):

The designation of Senior Counsel provides a public identification of counsel whose standing and achievements justify an expectation, on the part of those who may need their services as well as on the part of the judiciary and the public, that they can provide outstanding services as counsel and advisers, to the good of the administration of justice.⁸

The State has been very fortunate to have had Paul's loyal and unstinting service over a considerable period. He has a vast knowledge of civil litigation, including workers compensation, personal injuries and judicial review matters. He frequently appears to represent the State in the Supreme Court and on occasion the Federal Court, as well as other State courts and tribunals. His appointment represents a welcome increment in the cohort of Senior Counsel now practising at the Crown.

Advisings

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 statistics reflect the number of files opened, however the number of opinion documents recorded for the reporting period is 748 which is significantly higher than the number of files opened and confirms the observation in previous years that the number of files opened does not reflect the volume of work in the office.

The number of advice matters opened during the reporting period is slightly less than the previous reporting period. However, the workload remains high.

I add that a considerable amount of advice of a less formal nature is also given during short telephone, or email attendances. However, it should always be remembered that the informality of the advice does not make it any less binding on the recipient, or the State.

Section 78B Notices

This section refers to the number of notifications formally given to the Attorney-General pursuant to s 78B of the *Judiciary Act 1903* (Cth) of matters involving the Commonwealth *Constitution* or its interpretation during the relevant period. The Advisings section of my office is responsible for providing advice to the Attorney-General in relation to these matters. We only refer to the Attorney-General those matters that we consider are appropriate for intervention by the State.

⁷ Practice Direction 2 of 2012.

⁸ Clause 1(ii).

That is because, when analysed, many of them lack substance or are clearly of no interest to the State.

The number of notifications increased during the relevant period⁹ when compared with the last reporting period.

Litigation

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 Crown is a model litigant and practitioners in my office are acutely conscious of the bundle of obligations which attaches to that role.

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 Advising 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 an increase on the files opened during the previous period.¹⁰ During the relevant period, the number of files closed also significantly increased.¹¹ This is likely to be the product of a number of factors, including the incorporation of the new practice management system software, and improved administrative support.

As adverted to in relation to Advising, the number of files is a coarse measure of the amount of work performed. Many litigious matters are resource intensive; and practitioners are observing increasing factual and legal complexities in much of what they are called upon to do.

I acknowledge the hard work of practitioners in the Litigation section. It is of regret that Litigation and Advising will not be accommodated together to enable better opportunities to share work and to develop a more diverse practice for practitioners.

Model Litigant Guidelines

As a result of recommendations made by the Royal Commission into Institutional Child Sexual Abuse, the government approved Model Litigant Guidelines for the conduct of civil litigation by the Crown. I have attached the guidelines at Schedule 4.

⁹ See Schedule 1.

¹⁰ In the previous period from 1 July 2017 to 30 June 2018, the number of files opened was 509.

¹¹ In the previous period from 1 July 2017 to 30 June 2018, the number of files closed was 1136.

The government has authorised me to issue the guidelines. I have circulated them to Heads of Agency, the Law Society and the Tasmanian Bar.

The guidelines are indicative of the long recognised conventions of the Crown to act fairly. It will be noted that they indicate that the Crown's obligations are not confined to legal practitioners in the service of the Crown, but extend to all Crown instrumentalities. For good constitutional reasons, they apply generally to the executive government of the State. There is also a broad definition of 'civil proceedings', which extends to proceedings in commissions and tribunals.

Appearances in Constitutional Matters

During the relevant period, the High Court heard, and handed down its decision in, *Clubb v Edwards; Preston v Avery* [2019] HCA 11. The State was a party to the appeal in *Preston v Avery*. The appeal concerned a challenge to the *Reproductive Health (Access to Terminations) Act 2013* (Tas), s 9(2). It was heard together with a challenge to similar Victorian laws.

Section 9(2) prohibited in certain circumstances 'a protest in relation to terminations' of pregnancies in a 'safe access zone' of a radius of 150 metres from premises where termination procedures were carried out. Mr Preston had conducted protests outside the Specialist Gynaecology Centre in Hobart in September 2015. He was charged with an offence under s 9(2). As part of his defence in the Magistrates Court,¹² he challenged the constitutional validity of s 9(2) on the ground that it contravened the freedom of political communication implied by certain provisions of the Constitution (Cth).

The challenge was unsuccessful in respect of both the Victorian and Tasmanian laws, but for different reasons. For the present, I need only report in relation to the Tasmanian law.

The subject of abortion is polemic, in both religious and political spheres. However, in the context of the implied freedom the correctness of one view, or another, is not a matter of concern to the Court. The fact that it is capable of constituting political debate is relevant.

All members of the Court considered that s 9(2) imposed a burden on the implied freedom. The real questions in the case were, therefore, whether the burden could be justified, in that the purpose of s 9(2) was compatible with the system of representative and responsible government and that the provision itself was reasonably appropriate and adapted to that purpose.

In broad terms the purpose identified by all the justices was to provide women seeking termination services access to premises where those services are provided in a manner that protected their safety, well-being, privacy and dignity. The purpose was identified, despite there being no objects provision in the Act, which was in sharp distinction to the Victorian law. The purpose was held to be compatible with the system of representative and responsible government.

The Chief Justice and Justices Bell and Keane gave joint reasons. Having identified the legitimate purpose of the provision, their Honours adopted a process of proportionality testing, which has found favour in their Honours' previous judgments. First, they found that s 9(2) was suitable, in that it was rationally connected to the purpose, because it facilitated effective access to termination services. Secondly, they considered s 9(2) to be necessary, because any protest about abortion in the vicinity of premises where termination procedures constituted a threat to equanimity, privacy and dignity for women who required those services. Finally, they found that

¹² Before the Chief Magistrate, Ms C M Rheinberger.

s 9(2) was adequate in its balance. It only operated in a safe access zone. It was viewpoint neutral, in that it did not only target anti-abortion protests, and it advanced public health, and protected dignity and privacy. There was thus no manifest disproportion between the burden on the implied freedom and the legitimate purpose for which the prohibition was imposed.

Their Honour's adoption of a test of manifest disproportion is slightly different, but similar to the requirement of gross disproportion adopted by Nettle J and of 'grossly and manifestly disproportionate' adopted by Edelman J.

Gageler J approached the matter differently. In keeping with his method in previous judgments, he first 'calibrated' the burden. He found it to be direct, substantial and discriminatory, specifically directed at protest activity and, because it was limited to abortions, content specific. He considered a protest about abortion was inherently political. The prohibition was site specific, confined to a radius of 150 m and time specific, given that the protest had to be seen or heard by a person accessing or attempting to access the premises and therefore operated only at times the services were available. Although the provision was viewpoint neutral, its practical operation was likely to curtail protest by people who were against abortion. Thus, his Honour considered that the burden was substantial and that there was a need to show a strong justification, which required close scrutiny. His Honour considered that the purpose of law was to curtail unsolicited, unwelcomed, uncivil or offensive speech. It operated to ensure access to premises in an atmosphere of privacy and dignity. That purpose was constitutionally permissible and obvious and compelling. He considered that while a ban imposed on all 'on-site' protest would be more than was reasonably necessary, the provision left sufficient opportunity to protest at locations proximate to the premises so that the burden could be justified.

In separate judgments Nettle and Gordon JJ also examined the burden. Nettle J found it to be qualitatively recognisable, but not quantitatively significant. Gordon J held that it was indirect and insubstantial. Nettle J also used proportionality analysis to justify burden. Gordon J did not find it necessary to resort to proportionality analysis.

Edelman J considered the burden of s 9(2) in the context of proportionality analysis. He found that although it was 'deep and wide', it was necessary in that there was no obvious and compelling alternative means to serve the purpose.

In the result, in simple terms s 9(2) was held to be an appropriately adapted means to secure the legitimate end of providing women with safe, private and dignified access to premises at which termination services are lawfully carried out.

Interventions

During the relevant period, the Attorney-General exercised the right to intervene under s 78B of the *Judiciary Act 1903* (Cth) in respect of *Spence v Queensland* [2019] HCA 15.

This case concerned amendments to Queensland electoral legislation that restricted political donations from a property developer. It was decided not to intervene on the question of Queensland's law. However, following the institution of those proceedings in the High Court the Commonwealth Parliament amended the *Commonwealth Electoral Act 1918* (Cth), s 302CA, the effect of which was to permit political donations that might otherwise have been excluded by the Queensland law. Tasmania intervened on the question of whether the Commonwealth law was invalid. The High Court held that the Commonwealth law was wholly invalid. (The case also decided that the Queensland law did not contravene the implied freedom of political communication.)

Thus, it appears that the States remain able to regulate political donations in respect of their own electoral process without interference from the Commonwealth.

Evidentiary requirements in some legislation involving the implied freedom

On 29 January 2019 the High Court of Australia handed down its decision in *Unions NSW & Ors v NSW*¹³ (*'Unions No 2'*). The Court held invalid the provisions of s 29(10) of the *Electoral Funding Act 2018* (NSW), ('the EF Act') because it impermissibly burdened the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution.

In very simple terms, it is possible to justify a law that burdens the implied freedom of political communication. In order to justify the law, it must be shown that the purpose of the law is compatible with the system representative and responsible government and, secondly, that the legislative means used to meet that purpose is appropriate and adapted to the system. Some cases have suggested that there is a need for evidence to justify the validity of the law that might contravene the freedom. However, that was thought by some States to cause difficulties because there is no one size fits all answer to the process of justification. The means employed to serve a particular purpose will depend on any number of variables, including the nature of the burden, whether it is slight or substantial, direct or indirect, deep or shallow, narrow or wide, or discriminatory. Moreover, as a collegial body, Parliament acts on all kinds of material and information, including political attitudes, personal views, perceptions of public interest and the like. The reasons for passing a law may vary, sometimes markedly, between different political parties and individual members, including members of the same party.

The clear message from *Unions No 2*, however, is that in the case of legislation that may burden the implied freedom, there must be material before the Court to allow it to conclude that the legislation can be justified. That means that, at some stage of the Court's evaluative process, it will require some 'evidence' to show that the means adopted was within the permissible realm of legislative choice to achieve the purpose.

In *Unions No 2*, a Parliamentary Committee had recommended a further analysis of a spending cap for third party campaigners, to see whether it would be sufficient to allow the campaigner to 'present its case' to the electorate. There was no evidence that the analysis was carried out, so there was an insufficient basis to justify the validity of the legislation.

As a result, both the government, in presenting a Bill to Parliament, and the Parliament when debating it, may need to exercise heightened diligence where the subject matter of the Bill involves the implied freedom.

Other Litigation

During the relevant period, the Supreme Court published its reasons in a number of matters in which practitioners from my office appeared, including,

- *Attorney-General (Tas) v CL* [2018] TASFC 6
- *Director of Housing v Parsons* [2019] TASFC 3
- *Attorney-General v Copper Mines of Tasmania Pty Ltd* [2019] TASFC 4
- *Evans v Job* [2018] TASFC 3

¹³ [2019] HCA 1 ('Reasons').

- *Jordan v Criminal Injuries Compensation Commissioner Neasey* [2018] TASFC 10
- *Holden v Tasmania* [2018] TASFC 12
- *J v Guardianship and Administration Board and anor* [2019] TASSC 15
- *Barker v Guardianship and Administration Board* [2019] TASSC 8
- *State of Tasmania v Herlihy* [2019] TASSC 5
- *Gun Control Australia Inc v Hodgman and Archer* [2019] TASSC 3
- *Parsons v Director of Housing* [2018] TASSC 62
- *Nightingale v Recorder of Titles* [2018] TASSC 56
- *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48
- *Commissioner of State Revenue v Melbourne's Cheapest Cars Pty Ltd* [2018] TASSC 47
- *L v Commissioner, Criminal Injuries Compensation Commission* [2018] TASSC 32

This represents a significant proportion of the State's civil litigation in the Supreme Court.¹⁴

Practitioners from my office regularly appear in a range of matters in the Federal Court and State courts and tribunals.

Royal Commissions

The State is currently involved in two Royal Commissions initiated by the Commonwealth, namely the Royal Commission into Aged Care Quality and Safety and the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. The Disability Royal Commission is established concurrently as a Commission of Inquiry under State law. My office has provided assistance to Agencies and statutory officers in the preparation of responses to various notices to produce statements and information to the Aged Care Royal Commission, as well as providing general advice concerning the State's engagement with the Royal Commission. It is anticipated that considerable support will also be required from my office in connection with the Disability Royal Commission which is expected to run for the next three years.

Hague Convention

During the reporting period, this office continued to act on behalf of the State Central Authority in Tasmania (being the Secretary, Department of Communities) 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 three occasions during the relevant period; Canberra in August 2018, Sydney in November 2018, and Adelaide in March 2019.

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

¹⁴ A total of 6 out of 61 in the Full Court and 9 out of 62 before a Single Judge.

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.

The Whole of Government CLE program

The CLE program has continued to show strong results during the reporting period.

Seminars run during the reporting period are set out in the following table.

Date	Seminar Topic
30 July 2018	Right to Information (RTI) and the role of the Ombudsman
24 September 2018	Copyright and the Crown
29 October 2018	Making Legislation – an introduction to the Tasmanian legislative process
25 February 2019	Understanding disclaimers and confidentiality notices
26 March 2019	Crown Law Legal Update: <i>Unions NSW v NSW (No.2)</i> – the requirement to develop evidence based policy and legislation
11 April 2019	Crown Law Legal Update: Understanding the changes to assessing Right to Information applications
17 May 2019	Crown Law 101: working with the Solicitor-General and the Crown Solicitor (re-run)

In addition to these seminars, presenters have run sessions for agencies on an 'as requested' basis. The following is a table of those sessions.

Date	Seminar name
March 2019	Tailored delegations workshop

My office has also run the following 'in house' seminars for its practitioners and the Office of the Crown Solicitor (where appropriate).

Date	Seminar name
29 October 2018	General Data Protection Regulation (GDPR)
29 April 2019	Legal Reasoning

There continues to be considerable interest at all levels of the State Service in the matters presented. The program has been focussed, as it should be, on those matters which are of significant interest to government, rather than the wider profession.

The program is overseen by a Steering Committee, made up of Alan Morgan (Crown Solicitor), Chelsea Trubody-Jager (Director, Secretariat & Legal Services, DSG), Rowanne Brown (Legal Policy Officer, DOH), Heather Clayton (Legal Practitioner, Crown Solicitor's Office) and me. I thank my colleagues on the Committee for their work and contribution to this important program.

Heather Clayton also acts as the program's administrator. Heather is to be congratulated for the continued high quality of the program.

I also thank the Training Consortium for its considerable assistance in the presentation of the program.

We also have a reference group made up of senior representatives from Agencies, who assist the Steering Committee in identifying relevant topics to be delivered. I thank them for their participation.

Other activities

I remain a member of the Board of Legal Education. I am presently a member of the Steering Committee into the review of the *Electoral Act 2004*. I continue to maintain contact with the Faculty of Law. I am presently a member of the Panel for the review of the Undergraduate Law Degree. I also assisted with the Supreme Court advocacy unit conducted by the Tasmanian Legal Training Program.

The development of the Crown's Legal Services

As with previous reports I note the Crown's position as a moral exemplar and its duty to obey the law. This is, of course, fundamental to the rule of law. The strategic challenges for my office are not new. Some were present when I was appointed, some have developed since then but all of them have persisted since the amalgamation of the Litigation section with Advisings. All are resource based. I summarised them in my last report. In no particular order, and slightly amended, they are as follows.¹⁵

- A public perception that the legal functions of the State are concentrated in 'law and order' issues such as the prosecution of criminals. The result is a resulting loss of visibility of the vital necessity for legal resources connected with legal compliance, risk management, civil liability issues, complex transactional and constitutional issues.
- A lack of understanding that the State is significantly exposed to judicial review of administrative decision making, which requires both legal instruction for decision-makers and adequate legal resources to defend good decisions when challenged.
- A lack of resources to enable the State to fully participate in the federation, take an active interest in constitutional matters and jealously guard its sovereign powers from encroachment.
- A significant decentralisation of legal resources in the State Service.
- A lack of an overall strategic direction and appropriate funding for the elements making up Crown Law (by which I include this office and the Office of the Crown Solicitor).
- The need to engage private legal firms, at significant cost to the State, in large matters in which the State lacks legal resources.

¹⁵ They are set out in more narrative and comprehensive form in last year's report.

Legal practitioners in Crown Law are probably not considered to be in the 'front line' of government services. Yet that is exactly what they are. Like every other front line service of government, Crown Law should be well resourced, fostered and developed to its fullest potential.

I continue to look forward to a constructive discussion and action to address these matters.

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 comradery, support and guidance.

I also thank the Assistant Solicitor-General (Advisings), Sarah Kay, and the Assistant Solicitor-General (Litigation), Paul Turner SC, for their considerable assistance in the preparation of this report and their support during the past year. Both provide invaluable service to the State.

Dated: 27 September 2019



Michael O'Farrell SC
Solicitor-General of Tasmania

Schedule 1

SCHEDULE OF ADVISINGS

	2017-18	2018-19
Department of State Growth	42	57
Department of Education	47	32
Department of Health	58	33
Department of Justice	194	187
Department of Police and Emergency Management	5	5
Department of Premier and Cabinet	130	99
Department of Primary Industries, Parks, Water and the Environment	76	65
Department of Communities Tasmania	-	9
Department of Treasury and Finance	22	23
Tasmanian Audit Office	3	5
Retirement Benefits Fund Board	1	-
The Public Trustee	3	6
Other bodies and offices	49	54
TOTAL ADVISINGS	630	575
Section 78B Notices	131	145

Schedule 2

CIVIL FILES OPENED AND CLOSED AS AT 30 JUNE 2019

Work type	Opened	Closed
Administrative appeals – Magistrates Court	17	62
Administrative appeals – Supreme Court	13	19
Anti-discrimination	14	4
Charity	1	2
Contract	2	8
Coronial	17	31
Debt recovery	16	41
Employment / Industrial	21	22
Employment – workers compensation	348	920
Environment	1	2
Heritage	1	2
Judicial Review	11	17
Miscellaneous	34	76
Negligence – medical	25	48
Negligence – other	15	11
Negligence – school	9	19
Planning	5	4
Subpoena	4	2
Tenancy	20	15
Total	574	1305

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

Schedule 4

MODEL LITIGANT GUIDELINES

Introduction

1. These guidelines apply to civil proceedings brought by or against the State, its instrumentalities, including its agencies and authorities ("the State").

"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.¹⁶
2. The obligation of the State to act as a model litigant arises from the Crown's status as a moral exemplar.¹⁷ The obligation extends beyond legal practitioners acting for the Crown. It is possessed by every State instrumentality, its officers and employees.
3. The administration of these guidelines is primarily the responsibility of the head of each instrumentality, in consultation with the Office of the Solicitor-General.
4. All legal practitioners¹⁸ acting on behalf of the State and State service officers or employees instructing them must be made aware of these guidelines and required to comply with them.
5. The guidelines reflect the existing common law and do not impose further obligations on the State.

Object

6. The object of these guidelines is to assist in maintaining consistent and high professional standards in legal proceedings brought by or against the State.

Primary obligation

7. The State, its agencies and authorities must act as a model litigant in the conduct of civil litigation.
8. The obligation does not prevent the State from acting in the public interest, or firmly pursuing a legitimate claim or defence to protect its interests.

Nature of the Obligation

9. Subject to clause 8, the obligation requires the State and its agencies to:
 - a. deal with matters efficiently and expeditiously;
 - b. make an early assessment of the prospects of any claim or defence;

¹⁶ Proceedings under the *Crime (Confiscation of Profits) Act 1993* are not to be taken to be civil proceedings.

¹⁷ *Dyson v Attorney-General* [1911] 1 KB 410 at 421-22; See also *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 per Griffith CJ; *Kenny v South Australia* (1987) 46 SASR 268, 273; *Yong Jun Quin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155 and *ASIC v Hellicar* (2012) 247 CLR 345.

¹⁸ Including legal practitioners engaged by the State in compliance with Treasurer's Instruction No 1118.

- c. settle legitimate claims promptly, without resort to litigation. This includes partial or interim settlements, where liability is clearly established for the part of the claim to which the settlement gives effect;
 - d. not contest liability where the only issue is quantum of damages, or the application of a remedy;
 - e. avoid resort to litigation and encourage and participate in alternative dispute resolution where possible;
 - f. keep the costs of litigation to a minimum;
 - g. not require a party to prove a matter that the State knows to be true;
 - h. not rely on technical issues where the State will not suffer prejudice, unless it is necessary to do so in the public interest, or to protect the State's interests;
 - i. not take advantage of a party who lacks resources to pursue a legitimate claim;
 - j. only undertake and pursue appeals where it is considered, on proper advice, that the State has reasonable prospects of success, or the appeal is otherwise justified in the State's interests;¹⁹
 - k. provide reasonable assistance to claimants and their legal representatives to identify the proper defendant.
10. The State is not prevented from:
- a. seeking or enforcing orders for costs;
 - b. protecting any privileges or immunities that are available to it;
 - c. pleading limitation periods (other than in child abuse claims²⁰);
 - d. seeking security for costs;
 - e. opposing unreasonable, or oppressive claims or processes;
 - f. requiring opponents to comply with procedural obligations;
 - g. applying to strike out, or oppose claims or defences which are untenable or an abuse of process.

Michael O'Farrell SC
SOLICITOR-GENERAL
14 May 2019

¹⁹ It may be in the State's interest to commence an appeal to avoid prejudice to its interests where it is awaiting, or needs to consider legal advice, provided it makes a decision about whether to continue the appeal as soon as practicable.

²⁰ Limitations of actions in child abuse proceedings are subject to the *Limitation Act 1974*, s 5B.