



2023

PARLIAMENT OF TASMANIA

SOLICITOR-GENERAL

REPORT FOR 2022-23

*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*, 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 2023.

SUMMARY

The Office of Solicitor-General has once again worked hard during the relevant period to provide high quality legal services to the State. I wish to thank all members of staff for their diligence, professionalism, good humour and patience during a demanding year and against the backdrop of the Commission of Inquiry and the anticipated structural changes following the announcement earlier this year that the litigation functions of the Office would be assumed by a newly established State Litigation Office.

Resourcing and recruitment continue to present challenges which is an issue we experience in common with our counterparts in other jurisdictions. That has been a point of discussion with the Secretary of the Department of Justice throughout the period.

1. ACKNOWLEDGEMENT

I wish to acknowledge the significant contribution to the State's legal services provided by Paul Turner SC, Assistant Solicitor-General (Litigation), who retired in May 2023 after nearly 25 years with Crown Law. Paul's considerable knowledge, skills and experience as both an advocate and adviser to the State will be greatly missed. I thank the Litigation team for shouldering the burden of the additional file load and Gretel Chen in particular for taking on the responsibilities of that position following Paul's retirement.

2. ABOUT THE OFFICE OF THE SOLICITOR-GENERAL

In March 2023, the Attorney-General announced the establishment of the State Litigation Office to be led by the State Litigator.

The establishment of the new Office within Crown Law is a welcome development which will not only allow for the particular demands of civil litigation to be conducted and managed by a specialist group of lawyers but will enable the Office of the Solicitor-General to resume its focus upon the provision of advice to the Crown and representation of the State in constitutional litigation. The change is also reflective of an earlier recognition of the challenges in assuming responsibility for litigation whilst at the same time maintaining the traditional role of the Solicitor-General. As my predecessor Bill Bale QC wrote in his Annual Report in 2005 in connection with the creation of the office of Solicitor-General:

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.

Following a period of nearly twenty years in which the Director of Public Prosecutions was responsible for the conduct of civil litigation on behalf of the State, that responsibility was handed to the Solicitor-General in 2015 through the merger of the Civil Division of the Office of Director of Public Prosecutions with the Office of the Solicitor-General and a direction from the former Attorney-General to the Solicitor-General to conduct the State's civil litigation.

It is my hope and expectation that the State Litigation Office, and those working within it, will continue to have a close and collegial working relationship with the Office of Solicitor-General. Whilst falling outside the reporting period, I acknowledge the appointment of Mark Rapley to the role of State Litigator and look forward to his commencement in October.

Although the office of Solicitor-General dates back to colonial times, it now owes its existence as a statutory office to the provisions of the *Solicitor-General Act*. The functions of the 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.

The functions of the office reflect the importance of ensuring that government operates in accordance with the rule of law and that the integrity of the Executive is upheld through the provision of frank and fearless advice.

By a direction under s 7(b) from the Attorney-General dated 13 January 2022, I was given the responsibility for the conduct of the State's functions in respect of civil proceedings¹ as well as a limited authority to provide advice to the Clerks of the Houses of Parliament in matters concerning the employment of employees in the Tasmanian Parliament and to act for them in civil proceedings arising under the *Industrial Relations Act 1984* and the *Workers Rehabilitation and Compensation Act 1985* (Tas). That direction, which mirrored the direction given to my predecessor, remained in force during the relevant reporting period.

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

Section 8 of the Act provides for the delegation to the Solicitor-General by instrument in writing from the Attorney-General of responsibility for the performance or exercise of such of the functions and powers 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 list of the former Solicitors-General of Van Diemen's Land and Tasmania is annexed at Schedule 3.

3. ADMINISTRATION

Structure and accommodation

During the reporting period, the Office of Solicitor-General comprised the Office of the Solicitor-General (Advisings) and the Office of the Solicitor-General (Litigation). Despite efforts to secure suitable accommodation to physically draw together the divisions of the Office, members of staff undertaking duties associated with historic child abuse claims are still separately housed at 144 Macquarie Street, Hobart whilst the balance of the Office are accommodated within the Executive Building in Hobart. As previously reported, the separation of the two parts of the Litigation team in this manner is not a good organisational model. Efforts are ongoing to locate appropriate office space to accommodate the team.

Staffing

Employees are provided to assist in the performance of the functions of the Office in accordance with s 12A of the *Solicitor-General Act* and the provisions of the *State Service Act 2000*.

The structure of the Advisings section comprised the Assistant Solicitor-General (Advisings), one Level 3 legal practitioner, three Level 2 legal practitioners and an executive officer during the relevant period.

Although numbers fluctuated during the period, the Litigation section mostly comprised the Assistant Solicitor-General (Litigation), three Level 4 legal practitioners, five Level 3 legal practitioners, three Level 2 legal practitioners, three Level 1 legal practitioners, a legal clerk and 5 administrative assistants.

Health and Wellbeing

Wellbeing is an ongoing concern with stress levels and burnout reaching unprecedented heights, exacerbated at times by vacancies in positions within the Office and the continuing pressure of high file loads. In recognition of those concerns, staff have been encouraged to utilise the wellbeing supports provided to them as employees of the Department of Justice. In addition, the Office has prioritised training and support in building resilience and coping with vicarious trauma.

In order to alleviate that pressure, steps have been taken to brief matters to the private profession, as described in further detail below, and efforts are being made to recruit additional members of staff.

Funding

The Office of the Solicitor-General is fully funded from the Consolidated Fund. Whilst its services are provided free of charge, contributions are received from Agencies in order to manage the workers compensation program and to manage abuse in care cases. It is likely that further consideration will be given to the manner in which services are funded, particularly with regard to litigation services. The provision of additional funding by Agencies to support the workload of the Office is expected to deliver a better return to government by allowing matters to be attended to which cannot presently be prioritised.

4. PROFESSIONAL

Advisings

The practitioners in the Advisings section give legal advice to Ministers, Agencies, statutory authorities and Crown instrumentalities. They also appear in cases in which constitutional issues arise and in which Tasmania is a party, or the Attorney-General elects to intervene. In addition to those functions, there have been continuing opportunities for practitioners in Advisings to appear as counsel in a range of court matters.

The Office continues to provide advice on complex and novel matters. As in previous years, there has been a continuing trend towards demands for urgent advice, often in circumstances of perceived rather than real urgency. Practitioners strive to accommodate those demands but with a view to ensuring that accuracy is not compromised whilst also ensuring that non-urgent matters are attended to. It continues to be the case that advice remains frank and fearless and I am pleased to report that I am not aware of any practitioner being put under pressure to act otherwise.

A summary of the advice files opened during the relevant period is annexed at Schedule 1. For ease of comparison, the same details for the immediately preceding 12 month period are also included. It should be noted that the number of files opened is not directly reflective of the amount of work undertaken as it is often the case that multiple advices are provided with respect to a single file. For example, a significant amount of advice was provided in relation to matters concerning the Commission of Inquiry which is attributed to a single file. Notably, during the reporting period approximately 746 separate pieces of advice were provided (compared to the figure of 570 recorded in the Schedule).

I am a member of the Indemnity and Legal Assistance Panel which is chaired by the Secretary of the Department of Justice and established pursuant to the Policy and Guidelines for the Grant of Indemnities and Legal Assistance to Public Officers. Whilst indemnity matters are not usually reported upon in this report, there has been a marked increase in applications received pursuant to the policy (and the associated Employment Direction No. 16) which has created a noticeable addition to my workload. However, the increase in the number of indemnity matters opened compared to the previous year may largely be explained by the number of applications

received in response to matters arising in the Commission of Inquiry and I anticipate is unlikely to be reflected in future periods.

Section 78B Notices

It is a requirement under s 78B of the *Judiciary Act 1903* (Cth) that if there is a cause pending in a court involving a matter arising under the Constitution or involving its interpretation, that notice of the nature of the matter be given to the Attorneys-General of the Commonwealth and of the States before the court is able to proceed in the cause. As a matter of practice, those notices are forwarded to the Advising section of my Office for the provision of advice to the Attorney-General. Due to the sheer volume of those matters, only those which may be considered appropriate for intervention by the State are referred to the Attorney-General. The number of notices considered during the reporting period are noted in Schedule 1.

Interventions in Constitutional Matters

During the relevant period, the Office represented the Attorney-General in a number of constitutional matters.

Vanderstock v State of Victoria (M61/2021)

This matter was heard over three days in the High Court in February 2023. It concerned a challenge to Victoria's *Zero and Low Emission Vehicle Distance-based Charge Act 2021*. The Act requires the registered operator of a zero or low emission vehicle to pay a charge for the use of the vehicle on specified roads. The Plaintiffs argued that the Act imposes a duty of excise within the meaning of s 90 of the Constitution and is therefore constitutionally invalid. Arguments centred upon the meaning of a duty of excise for constitutional purposes. Judgment is reserved as at the date of this report.

Other matters

The Office represented the Attorney-General, intervening, in a matter involving whether the Tasmanian Civil and Administrative Tribunal (TASCAT) exercises judicial power in reviewing a determination made by the Motor Accidents Insurance Board for the purposes of considering whether federal jurisdiction was attracted in proceedings between a resident of another State and the Board.

Representation was also provided in the Supreme Court in a challenge to the constitutional validity of s 125A of the Criminal Code in connection with the requirements of jury unanimity.

Further, representation continues to be provided in a Supreme Court challenge to the Code of Conduct provisions of the *Local Government Act 1993* based upon the constitutionally implied freedom of political communication.

Other High Court matters

Attorney-General for the State of Tasmania v Casimaty & Anor

Representation is being provided in an application by the Attorney-General to the High Court for special leave to appeal against the judgment of the Full Court of the Supreme Court in *Casimaty v Hazell Bros Group Pty Ltd* [2023] TASFC 2. The case raises questions relating to the interpretation of the *Public Works Committee Act 1914* and parliamentary privilege. The special leave application is listed for hearing in October.

Civil Litigation

With the exception of constitutional litigation, the civil litigation functions of the State have been undertaken by the Litigation section of the Office which was headed by the Assistant Solicitor-General (Litigation), Mr Paul Turner SC, for the majority of the reporting period.

The litigious work undertaken by the Office is diverse. However, a large component centres upon employment matters (primarily workers compensation) and claims in tort (including a considerable number of claims relating to medical negligence and historic child abuse). The number of new matters arising from child abuse steadily increased during the period, to the point of nearly doubling the number of new files opened in the preceding period. It is important to observe that, within that category, a file may represent more than a single claimant. For instance, the class action concerning the Ashley Youth Detention Centre is recorded as a single file and does not reflect the number of claimants within the group. Of the 178 files opened in respect of child abuse during the last two financial years, 70 have resolved.

Representation was provided in various matters before the courts, including in a trial of an historic child abuse matter in which the State briefed counsel to appear together with Crown Counsel on behalf of the State.

The volume of work within the Office has overtaken the capacity of practitioners, complicated to some degree by changes in staff but most notably by the recent retirement of the Assistant Solicitor-General (Litigation) in May. The strain on existing resources has given rise to the need to brief matters to the private profession. Apart from alleviating the pressure on practitioners, it has provided and fostered learning opportunities for practitioners of this Office to work with members of the private profession. However, the process of engaging external lawyers plainly comes at a cost to the State and at some point consideration will need to be given to finding the appropriate balance between funding that cost and the continued strengthening of resources and development of expertise within Crown Law.

Attached at Schedule 2 is a list of civil litigation files opened and closed during the relevant period. The number of files opened represents a significant increase on the files opened during the previous period.² However, as previously mentioned, those figures do not necessarily reflect the work involved on a single file.

² It is possible that the figures for the preceding period did not include files opened in the WHS Legal Assistance Program. In any event, there has been a substantial rise in the number of new files opened during the reporting period.

During the reporting period, the Supreme Court published its reasons in a number of matters in which representation was provided by the Office, including:

- *Recycal Pty Ltd v Director, Environment Protection Authority and Environment Protection Authority* [2023] TASSC 19
- *Bullard v Tasmanian Industrial Commission* [2023] TASFC 3
- *Khalafallah v Tasmanian Civil Administrative Tribunal* [2023] TASSC 8
- *Tarkine National Coalition Incorporated v Director, Environment Protection Authority* [2023] TASSC 3
- *Attorney-General v Barnes* [2023] TASSC 2
- *Blue Derby Wild Inc v Forest Practices Authority* [2022] TASSC 67
- *Bob Brown Foundation Inc v Barnett* [2022] TASSC 64
- *CF v Pervan* [2022] TASSC 58.

I wish to record my thanks and appreciation to all members of the team for their continuing hard work, determination and perseverance during the last year.

Royal Commissions

In accordance with the Attorney-General's direction of 13 January 2022, Royal Commissions and Commissions of Inquiry are civil litigation, in respect of which this Office has continued to provide assistance to Agencies and officers in responding to notices and in producing submissions, advice, support and representation.

During the reporting period, the Office continued to provide advice and assistance to the State with respect to:

- the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability;³
- the Royal Commission into Defence and Veteran Suicide;⁴ and
- the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings.

With regard to the latter, the Commission of Inquiry Response Unit was assigned to the Office to act as the State's solicitor in the Commission. A number of Counsel were also instructed through that Unit to represent the State and its officers in the Commission. I wish to acknowledge the tireless efforts of those involved in undertaking this important work.

³ The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability is established concurrently as a Commission of Inquiry under State law by order made under the *Commissions of Inquiry Act 1995*.

⁴ The Royal Commission into Defence and Veteran Suicide has also been established concurrently as a Commission of Inquiry under the *Commissions of Inquiry Act*.

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 reporting period.

The SCSG is of significant value in enabling discussion of important legal developments, particularly those involving the Commonwealth Constitution or its interpretation and cases pending or reserved in which a constitutional issue has arisen or is thought likely to arise.

The Whole of Government CLE program

The program for the delivery of legal education seminars to government Agencies continued during the reporting period.

The program continues to be guided by a Steering Committee comprising representatives from within Crown Law and Agency representatives. Sessions were delivered on the following topics by various presenters from within Crown Law and various Agencies:

- Operation of the Guardianship & Administration Act for Medical Practitioners
- Right to Information
- Work Health and Safety for Officers
- Personal Information & Data Protection
- Recordings without Consent
- Financial Management Act 2016
- Delegations of Statutory Functions and Powers
- Memorandums of Understanding, Heads of Agreement and Intergovernmental Agreements
- Working with the DPP
- Authority to Contract.

Professional Development

Practitioners within the Office attended a number of legal education sessions including the online Gilbert and Tobin Constitutional Law Conference, sessions run by Legalwise in Abuse Law, Parliamentary Law, Administrative Decision Making and Psychosocial Hazards in the Workplace and an in-house legal education session. The process of building a trauma informed practice amongst all levels of staff has been an ongoing focus of training throughout this reporting period.

Dated: 28 September 2023



Sarah Kay SC
Solicitor-General of Tasmania

Schedule 1

SCHEDULE OF ADVICE GIVEN

	2021-22	2022-23
Department of State Growth	71	53
Department of Education	41	11
Department for Education, Children and Young People	0	36
Department of Health	39	30
Department of Justice	187	144
Department of Police, Fire and Emergency Management	11	15
Department of Premier and Cabinet	83	73
Department of Primary Industries, Parks, Water and the Environment	76	1
Department of Natural Resources and Environment Tasmania	0	87
Department of Communities Tasmania	20	4
Department of Treasury and Finance	31	25
Tasmanian Audit Office	2	3
The Public Trustee	6	4
Other bodies and offices	61	84
TOTAL ADVISINGS	628	570
Section 78B Notices	177	159

Schedule 2

CIVIL FILES OPENED AND CLOSED AS AT 30 JUNE 2023

Work type	Opened	Closed
Abuse in Care	114	39
Administrative Reviews to Magistrates Court	23	24
Anti-discrimination	14	31
Appeals	13	16
Asbestos Compensation	2	1
Charity	1	8
Contract	2	7
Coronial	17	17
Debt Recovery	39	29
Employment /Industrial	25	36
Environment	2	1
Judicial Review	11	22
Land	5	3
Miscellaneous	40	66
Negligence	65	90
Opinion	0	2
Planning	1	11
Subpoenas	5	9
Tenancy	9	7
Workers Compensation	461	384
Total	849	803

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	24 Dec 2021	Michael Ernest O'Farrell SC
25 Dec 2021		Sarah Kay SC