2013

PARLIAMENT OF TASMANIA

SOLICITOR-GENERAL

REPORT FOR 2012-13

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

In accordance with section 11 of the *Solicitor-General Act 1983* ("the Act"), I submit to the Attorney-General my report with respect to the performance and exercise by me of the functions and powers of the Office of Solicitor-General for the relevant period - being the twelve month period which commenced on 1 July 2012 and ended on 30 June 2013.

1. THE OFFICE OF SOLICITOR-GENERAL

The Past

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 office[1] – both the Attorney-General and the Solicitor-General being members of most of the early Cabinets following the introduction of responsible government in Tasmania.[2] 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 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 *Solicitor-General Act 1983* which, for the first time, established the office of Solicitor-General as an independent office under statute.

The Present

The functions of the Office of Solicitor-General are set out in section 7 of the *Solicitor-General Act 1983* 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 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."*

---

[1] i.e., an office filled by an elected member of the Parliament

[2] 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.

In addition, section 8 of the *Solicitor-General Act 1983* 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 section 8 of the Act was in force at any time during the relevant period.

I have made mention in previous reports that, as things currently stand, the vast majority of the work of the Solicitor-General and of those counsel who are engaged to assist the Solicitor-General, involves the provision of legal advice to the executive government, its agencies (e.g., departments, commissions boards etc.) and other emanations of the Crown.

Nearly all litigious matters in which the State is a party, or is otherwise concerned, are dealt with by the Office of the Director of Public Prosecutions (Civil Division), the notable exception being matters which involve the Commonwealth *Constitution* or its interpretation. Those matters are invariably dealt with exclusively by the Solicitor-General's Office.

The remainder of the government's civil legal work, which involves the documentation of the multitude of transactions in which the State is constantly involved such as contracts, licences, permits etc., is undertaken by the Office of the Crown Solicitor.

The Future

It is an accident of history and, in my view, quite anomalous that the responsibility for the conduct of the State's civil litigation should rest with the Office of the Director of Public Prosecutions whose principal statutory function is - as the name of the office conveys - the institution and conduct, on behalf of the Crown, of criminal proceedings.

This observation is not intended as a criticism of the current arrangements which, for all practical purposes, operate well enough. However, the compartmentalisation of the Crown's civil legal work among three separate offices, each having its own distinct identity, has at least three identifiable negative consequences.

First, and most importantly, it limits the range and types of legal work available to legal practitioners – and particularly to younger practitioners – within each of the offices of the Solicitor-General, Crown Solicitor and D.P.P. (Civil). So, for example, practitioners working in any one of those offices will often have no, or at best, very little exposure to, or opportunity to undertake, work of the kind performed in either of the other offices. This not only limits the variety of work available to individual practitioners but also tends to produce practitioners with a narrow focus and limited skills. Some degree of specialisation is, of course, not only desirable but is also beneficial in the case of more senior practitioners. But there are obvious advantages in seeking to ensure that practitioners who (to take one simple example) provide opinions in relation to matters that have the potential to result in litigation, also have some direct experience and understanding of court procedure and of the rules of evidence. Such an understanding is usually best gained by practical experience.

Secondly, the opportunity for younger practitioners to undertake a wide variety of legal work is not only a vital part of their professional development, it also often contributes to a sense of "job satisfaction". The current lack of availability of a range of professional legal experience within Crown Law has been a major factor in the resignation of at least two very promising young practitioners in recent times. The long-term costs associated with such losses of talent and experience should not be underestimated.

Thirdly, I would argue that the somewhat artificial compartmentalisation of each of the three offices mentioned, at least in the case of the two smaller offices [Solicitor-General and DPP (Civil)] means that there are fewer options for dealing with fluctuations in the volume of work in individual offices caused by changes in demand or by absences due to recreation and personal leave or even prolonged court commitments.

For all of these reasons, I consider that the staff of the three offices of Solicitor-General, Crown Solicitor and DPP (Civil) ought to be conceived of as one single legal practice responsible for undertaking all of the State's civil legal work with individual practitioners, while concentrating on particular areas of practice, being available to undertake a range of work as either solicitor or counsel or both. The Solicitor–General and other legal practitioners would act (or continue to act) as counsel on instructions from practitioners within that single office and the Solicitor-General would retain ultimate responsibility for the conduct of "Constitutional litigation" and for the provision of Advisings which, when required, authoritatively state the Crown's position in respect of contentious legal questions.

In due course, the staff of the three offices would ideally be accommodated together to enable them to better function as a single integrated legal practice and with the aim of reducing the current duplication of some functions such as reception and the provision of administrative assistance and office equipment.

Interventions

During the relevant period the Attorney-General did not intervene, or otherwise participate in any proceedings in either the High Court of Australia or the Supreme Court of Tasmania.

2. ADMINISTRATION

During the relevant period I have been assisted in the performance of my functions by the Assistant Solicitor-General, Mr Frank Neasey and part-time by Ms Sarah Kay, Ms Adrienne Morton and Ms Jenny Rudolf all of counsel. Ms Rudolf was engaged to partially replace Mr Simon Gates who was on secondment to the Office of the Attorney-General for the whole of the relevant period. Administrative assistance was provided to me and the other professional staff in the office by my Executive Assistant, Ms Melissa Reed and from time to time by administrative officers from the Business Support unit of the Office of the Director of Public Prosecutions, most notably, Ms Maree Clark. I publicly record my sincere thanks to all of them as well as to the Manager of Crown Law, Ms Kerry Worsley and the other members of the staff of Crown Law who provided my office with assistance from time to time.

From 1 July 2012, the Office of the Crown Solicitor has been fully funded from the Consolidated Fund and accordingly no longer directly[3] charges most Crown Agencies and entities for the use of its services. As I have reported in previous years, this change was made in the hope of removing what appeared to be a significant disincentive to Agencies obtaining legal advice and also of reducing the need to maintain a demarcation between the kinds of work that have traditionally been seen as being the province of the Office of the Solicitor-General on the one hand and the province of the Office of the Crown Solicitor on the other.

Although it is probably too soon to draw any firm conclusions after only 12 months, the preliminary indications are that the changes may not have had the hoped-for effects. As the schedule to this report indicates, there has been a significant reduction in the overall number of Advisings provided by this office during the relevant period and this does not appear to have been offset by a corresponding increase in the volume of work passing through the Office of the Crown Solicitor.

On the other hand it has not been my impression - nor that of my professional staff - that there has been any significant decrease in the volume of work passing through this office. It is however possible that there are a number of unrelated factors which have contributed to the actual or apparent decline. These may include:

- the increasing use of e-mail to provide advice – some of which may not be being recorded or classified for statistical purposes as "Advices",
- the increasing use by agencies of non-legal practitioners as "legal advisors" or for "legal support",
- a general downturn in government activity, and
- the increasing complexity of the factual and legal issues in relation to which advice is sought resulting in fewer but longer Advisings.

Whatever the true position may be, it continues to be the case that a large volume of work of an essentially legal character is being regularly undertaken within Agencies by persons who are neither suitably qualified nor competent to do that work. The result is that quite important documents such as contracts, often involving substantial sums, complex licences and permits and instruments delegating the exercise of statutory powers and functions, are routinely found to contain quite serious errors and deficiencies. Ordinarily these errors and deficiencies do not become apparent until long after the instruments have taken effect and often only because a dispute or other problem has arisen in relation to them. These deficiencies seem to manifest themselves most often (but by no means exclusively) in relation to instruments of delegation with the result that doubt may attend the validity of the exercise of the statutory power or function that was sought to have been delegated.

Instruments of Delegation

It is now commonplace for Parliament to enact laws which make provision for the delegation by Ministers of many or all of the powers and functions which those laws confer or impose upon Ministers. Indeed, one sometimes sees that bodies which are required to be composed of

[3] Although, as I understand things, Agency funding is now reduced to take account of the value of legal services expected to be consumed by each Agency in the forthcoming financial year.

persons possessing very specific qualifications, skills or experience may nevertheless delegate their decision-making powers to persons who possess none of those qualifications, skills or experience.[4]

This frequent inclusion of powers of delegation in Acts has now made the act of delegation itself so commonplace that it seems to be viewed by many as little more than a routine administrative arrangement which may safely be made without legal advice, and usually is.

Where an Act confers a power on a person or body to delegate a function or power, the exercise of that power is regulated by sections 23AA, 23AAB and 23A of the *Acts Interpretation Act 1931* and any person who would draft an instrument of delegation and is not thoroughly familiar with those somewhat complex provisions, will almost certainly fall into error.

The drafting of instruments of delegation is not a routine clerical task. Instruments of delegation must be drawn with great precision and must take account of, and comply with, the relevant provisions of the *Acts Interpretation Act 1931.* Ordinarily any instrument of delegation that has been drafted by anyone who is not employed as a legal practitioner by Crown Law should be settled by a legal practitioner who is employed by Crown law before being relied upon for any purpose.

Implied Waiver of Privilege

The disclosure outside the Crown by State servants of copies of legal advice or of even the substance of legal advice continues to present challenges. Such disclosures may give rise to disputes about whether, in a particular case, the disclosure constitutes an implied waiver by the Crown of what is now referred to by the *Evidence Act 2001* as the Crown's "client legal privilege" (or "legal professional privilege"). The law relating to this very important topic is unfortunately complex and seemingly very difficult to convey to non-lawyers in a way that seems to be readily understandable. I and the other staff of this office frequently provide advice and addresses in various forums and a detailed summary of the applicable principles appears as part of the Attorney-General's *Guidelines for Seeking Advice from the Office of the Solicitor-General* which may be viewed on the internet by clicking on the link at the following address:

http://www.crownlaw.tas.gov.au/solicitorgeneral

[4] See, for example, *Tasmanian Planning Commission Act 1997*, sections 5 and 8

3. PROFESSIONAL

Advisings

A summary of the formal Advisings 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 a Schedule to this report. For ease of comparison the same details for the immediately preceding 12 month period are also included.

As noted earlier, there appears to have been a relatively significant decline in the number of formal Advisings requested and provided during the relevant period.

Section 78B Notices

There has also been a decline in the number of notifications 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 but these numbers have historically been quite volatile and in recent years have been significantly affected by the volume of proceedings commenced in the High Court and Federal Court involving the *Migration Act 1958* (Cth).

Interventions and other Appearances

As previously mentioned, the Attorney-General did not, during the relevant period, seek to intervene in any matters pursuant to his right to do so under s 78A of the *Judiciary Act 1903* (Cth). Nor did the Attorney-General seek to intervene in any matter pursuant to s 16 of the *Crown Proceedings Act 1993* during the relevant period.

Hague Convention

This office continues to act on behalf of the State Central Authority in Tasmania 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.

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 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.

Director of Public Prosecutions Act 1973

On 24 March 2013, the Director of Public Prosecutions, Tim Ellis SC was injured in a motor vehicle collision. As a consequence, Mr Ellis was absent from office from that date for the remainder of the relevant period. Subsections (3) and (4) of section 11 of the *Director of Public Prosecutions Act 1973* provides as follows;

> *"(3) Subject to subsection (4), in the event of a vacancy occurring in the office of Director or of the illness or absence from office of the Director, his functions shall be performed by the Solicitor-General.*
>
> *(4) Notwithstanding subsection (3), if, by reason of the office of Solicitor-General being vacant or of the illness or absence from office or from the State of the Solicitor-General, it is not practicable for the functions of the Director to be performed by the Solicitor-General, the Governor may appoint a person who is eligible for appointment as Director to act as Director and may at any time revoke the appointment."*

Accordingly, in addition to discharging the functions and duties of Solicitor-General during the relevant period, I was also responsible for the performance of the functions of the Director of Public Prosecutions from 25 March 2013, onwards. In practice, the vast majority of those functions were ably performed by counsel and staff employed in the Office of the Director of Public Prosecutions thus requiring me to perform only the relatively few functions which must, by law, be personally performed by the Director of Public Prosecutions.[5] Inevitably, the absence from office of Mr Ellis SC has resulted in an increased workload for nearly everyone employed in the Office of the Director of Public Prosecutions but that burden has fallen most heavily upon the Assistant Director of Public Prosecutions, Mr Darryl Coates SC and senior Crown counsel, Ms Linda Mason. I take this opportunity to express my thanks to both of them in particular and to all of the other staff of the office generally, for their efforts.

Other Activities

In November 2012 I was invited by the Gilbert and Tobin Centre of Public Law in the University of New South Wales to present a paper[6] and to take part in a panel discussion in relation to the High Court's decision in *Williams v The Commonwealth* ("The School Chaplains Case")[7] as part of the *2013 Gilbert and Tobin Constitutional Law Conference*. The Gilbert and Tobin

---

[5] See, for example, *Director of Public Prosecutions Act 1973*, s 15(1) and *Criminal Code*, s 125A(7)

[6] A copy of the paper may be viewed at:
http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/sealy.pdf

[7] [2012] HCA 23

Constitutional Law Conference has been held annually since 2002 and is now widely regarded as the premier constitutional law conference in Australasia.
During the relevant period I and the other counsel attached to this office continued to deliver addresses, seminars and workshops to a variety of audiences in a number of different Agencies and in the general community on a wide range of topics. These have included Delegations, The Role of the Solicitor-General, Client Legal Privilege, Penalties, Procedural Fairness, The Role of the Administrative Decision Maker, The Implications for Tasmania of the High Court's Decision in the School Chaplains Case and the Capacity of State Servants to Bind the Crown. In addition Sarah Kay has conducted several workshops with selected agencies on the general topic of delegations. These have not only proved to be informative, they have also served to bring to light several instances of expired, outdated and defective instruments of delegation.

Leigh Sealy SC
Solicitor-General of Tasmania

Schedule

SCHEDULE OF ADVISINGS

	2011-2012	2012-2013
Department of Economic Development, Tourism and the Arts	4	8
Department of Education	44	23
Department of Health and Human Services	74	49
Department of Infrastructure, Energy and Resources	48	42
Department of Justice	149	127
Department of Police and Emergency Management	9	4
Department of Premier and Cabinet	61	53
Department of Primary Industries, Parks, Water and the Environment	133	88
Department of Treasury and Finance	37	23
Tasmanian Audit Office	9	5
Retirement Benefits Fund Board	8	3
The Public Trustee	0	0
Other bodies and offices	39	29
TOTAL ADVISINGS	**615**	**454**
Section 78B Notices	**198**	**153**