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parliament of tasmania

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**SOLICITOR-GENERAL**

**REPORT FOR 2019-20**

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*Presented to both Houses of Parliament pursuant to*

*section 11 of the Solicitor-General Act 1983*

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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 2020.

# 1. THE OFFICE OF SOLICITOR-GENERAL

The Supreme Court of Tasmania has referred to the status of the Office of Solicitor-General of Tasmania 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 … 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’.[[1]](#footnote-1)

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.

By a direction given by the Attorney-General on 20 February 2020 I am responsible for and control the State’s functions in respect of civil proceedings,[[2]](#footnote-2) and also given limited authority to provide advice to the Clerks of the Houses of Parliament in matters concerning the *Industrial Relations Act 1984*, and the *Workers Rehabilitation and Compensation Act 1985* (Tas).

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.

The Office of Solicitor-General is accurately described in the following passage.

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.[[3]](#footnote-3)

A brief history of the office in Tasmania is set out in Schedule 3.

# 2. COVID-19

During the reporting period, the spread of the virus COVID-19 in Australia presented novel and unexpected challenges for the Government and, like all other parts of the public sector, my office has been affected by it, both because of the legal questions that it produces, and also because of the requirements to maintain health and safety.

It is fortunate that we were able to adopt a number of measures, which included, particularly when restrictions were first introduced, practitioners working remotely, and communicating when necessary by video and audio conferencing facilities. These flexible arrangements allowed me to work from my office and remain accessible to the Government for most of the time and for others to come into the office when required. Physical access to courts and tribunals was also restricted and it became necessary for most of our litigation practitioners to appear by video conferencing platforms.

I considered that the increased use of technology would be an advantage to courts and tribunals, especially when dealing with short, or formal civil matters, that did not rely on the personal attendance of practitioners. Anecdotally, I understand that the use of video conferencing has declined since restrictions have been relaxed, including as a suitable medium for short or formal matters. If that is so, it is regrettable for litigants who are required to pay practitioners for court attendances.

As is apparent from the figures to be discussed later, that productivity in our offices did not suffer; in fact, our work load increased due to the measures imposed under the *Emergency Management Act 2009* and the *Public Health Act 1995* and also with the introduction of a number of Bills into Parliament to better meet the challenges that the virus presented during the reporting period.

I also note the successful resolution of the State constitutional issues that arose with the delay of the 2020 Legislative Council elections.

Finally, during the reporting period, the Attorney-General intervened in three challenges in the High Court to ‘border restrictions’ imposed by other States. Of the three, two are no longer continuing. The remaining proceeding, *Palmer v Western Australia,* will be heard in November 2020. The issue relates to the ‘freedom of intercourse’ between the States under s 92 of the *Constitution* (Cth). It will be important for Tasmania to present submissions in support of Western Australia about the correct approach that the High Court should take to s 92 cases relating to freedom of intercourse. It is beyond the scope of this report to rehearse the arguments that might be advanced in the case.

# 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 and the Advisings section on level 8 of the Executive Building at 15 Murray Street. The physical separation of the two sections continues to present challenges, but useful lessons have also been learned from the COVID emergency, including the ability of staff to work remotely.

During the reporting period the Office of the Crown Solicitor relocated from level 9 of the Executive Building to the Reserve Bank Building in Macquarie Street.

# Litigation

As at the reporting date, the structure of the Litigation section comprised of the following legal practitioner positions: the Assistant Solicitor-General (Litigation), three Level 3 legal practitioners, four Level 2 legal practitioners and two Level 1 legal practitioners.[[4]](#footnote-4) Two of these positions are devoted to the program to reduce long term workers compensation cases being at Level 3 and Level 2 respectively.

The legal practitioners in the Litigation section are supported by one Legal Administration Officer, one Law Clerk, one Administrative Assistant and one Office Assistant.

Legal Practitioners

* Paul Turner SC, Assistant Solicitor-General (Litigation)
* Gretel Chen (LP3)
* Kirsten Hodgson (LP3)
* Teshi Zacharek (LP2)
* Lisa Kelly (LP2)
* Oliver Robinson (LP2)
* Toby MacGregor (LP1)
* Hari Gupta (LP2)
* Dashini Elankovan (LP1)
* Louise Brooks(LP3)

Administration

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

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

From the open files recorded in Schedule 2 it will be apparent that the volume of matters dealt with by the Litigation section is significant. It will also be noted that as in the previous year a significant number of files have continued to be closed. The additional resources devoted to identifying matters which should no longer be open, and the resolution of a number of aged matters, has allowed the Litigation section to close a high number of files, particularly in the categories of workers compensation, medical negligence and Magistrates Court administrative appeals. This is a direct function of having additional administrative support available. It has the additional benefit of ensuring that our legal practitioners’ time is devoted to practising law; not distracted by administrative tasks.

During the reporting period, we were fortunate to recruit Hari Gupta as a member of the Litigation team as an LP2.

Lisa Kelly, who has been a valued member in Litigation and one of those responsible for the success of the workers compensation program, tendered her resignation, and has since moved to take up an opportunity in Melbourne. I extend my thanks to Lisa for all her hard work for the State during her time with us.

Although it occurred after the reporting date, I extend my thanks, on behalf of the whole office, to Scott Stalker, who served the Crown with great dedication as a Law Clerk for 40 years. Scott retired on 28 August 2020. We wish him a long and happy and retirement.

I also thank all the administrative staff in the Litigation section for their hard work and dedication.

# Advisings

The practitioners in the Advisings section give legal advice, both written and verbal, to Ministers, agencies and statutory authorities and Crown instrumentalities. They also appear in cases in which constitutional issues arise and in which Tasmania is a party, or 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 matters in the Supreme Court and in coronial proceedings.

As at the reporting date the Advisings section comprised of: the Assistant-Solicitor-General (Advisings), one Level 3 practitioner, two Level 2 practitioners and one Level 1 practitioner. During the reporting period, those positions were filled as follows.

Legal Practitioners

* Sarah Kay, Assistant Solicitor-General (Advisings)
* Jenny Rudolf (LP3)
* David Osz (LP2)
* Emily Warner (LP2)
* Dashini Elankovan (LP1)

Administration

* Melissa Xepapas (Executive Officer)

In the latter half of 2019, there was an opportunity to fill the Level 1 position in Litigation for part of 2020. This resulted in Dashini Elankovan moving from Advisings to Litigation. As a result, the Level 1 position in Advisings became vacant. An unsuccessful attempt was made to recruit a practitioner to fill the position. The short period for which the vacancy was available did not offer an attractive opportunity for prospective applicants.

The work of the Advisings section of the office offered particular challenges during the reporting period. These are discussed below. There are also some emerging issues that are likely to require further legal resources.

We were fortunate to welcome Emily Warner to the Advisings section in September 2019. She quickly became a valued member of our team.

Particular thanks are due to our Executive Officer, Ms Melissa Xepapas. During the reporting period Melissa’s position was reclassified to place her in charge of the administrative functions of the whole of the office, reporting to the Director, Crown Law. Melissa has been responsible for a number of improvements to our systems and has strongly promoted better communication between the Litigation and Advisings teams.

Michael Varney continues as Director Crown Law. Michael has been instrumental in obtaining better administrative resources for the office and re-organising the administrative structure, with consequent improvements in file management. The accommodation facilities for staff in the Litigation section on level 5 have also much improved.

Our practice management system remains a constant challenge. Despite attempts to improve its performance, it is not an optimal system for civil litigation, advisings, or commercial work.

During the reporting period, apart from contributions received from agencies to manage the workers compensation program, 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

# Advisings

A summary of the advice files opened by my office during the relevant period; categorised by reference to the agencies and other bodies that requested advice is annexed at Schedule 1. For ease of comparison the same details for the immediately preceding 12 month period are also included. I note that since my first report in 2014 the number of advice files opened has increased by about 40%, which is to be compared with a professional staff increase of 20%.

While the statistics in Schedule 1 reflect the number of files opened; they do not reflect the number of written opinions given for the reporting period, which was 843; significantly higher than the number of files opened and confirms the trend from previous years. That figure also shows an increase of 95 written opinions, when compared with the last reporting period.

I also add that a considerable amount of advice is given during short telephone, or email attendances. Occasional requests received for ‘informal advice’ confirm the mistaken understanding that there is a category of advice that does not bind the recipient. A request for informal advice, whether in the nature of telephone, or short email advice does not make the advice any less binding on the recipient, or the State.

I thank all of the staff in the Advisings section for their hard work, diligence, support and good humour.

# 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 those matters that are considered appropriate for intervention by the State. That is because, when analysed, many of them lack substance or are of no interest to the State.

When compared with the previous reporting period, the number of notifications slightly decreased during the relevant period.*[[5]](#footnote-5)*

# Interventions in Constitutional Matters

During the relevant period, the Attorney-General exercised the right to intervene under s 78B of the *Judiciary Act 1903* (Cth) in respect of 5 matters.

In the first, *KMC v DPP (SA)*[[6]](#footnote-6), the constitutional point was whether an Act of the South Australian Parliament impermissibly impacted on the institutional integrity of a sentencing court.[[7]](#footnote-7) The facts are complex. In summary, KMC had been sentenced for the offence of persistent sexual exploitation of a child, on the basis of the sentencing judge’s view of the facts. After he was sentenced, the High Court decided, and held in *Chiro v The Queen*,[[8]](#footnote-8) that an accused should be sentenced on the facts found by the jury. The South Australian Parliament then passed a law, the effect of which would be to preserve sentences passed on the basis of the sentencing judge’s view of the facts. KMC said the law was invalid.

The constitutional point was not reached. The High Court held that, on the facts of the case the impugned provision was not engaged and the sentencing Court was therefore required to sentence the offender on the basis of the principle in *Chiro*.

The second case was *UD v The Queen*. The High Court had granted special leave to UD. He claimed that s 68BA of the *Supreme Court Act 1933* (ACT) (‘the Act’) was invalid. That section, enacted as part of the COVID emergency measures in the ACT, enabled the Supreme Court to order, without the consent of the accused, that the trial of an indictable offence was to be by a judge sitting alone. Special leave was, however, revoked, when it appeared that the Supreme Court could sit with a jury once again.

I have mentioned the three ‘border restriction’ cases above.

# Royal Commissions

During the reporting period, the State was also involved in three Royal Commissions, namely,

* the Royal Commission into Aged Care Quality and Safety;
* the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability;[[9]](#footnote-9)
* the Royal Commission into National Natural Disaster Arrangements.[[10]](#footnote-10)

The Assistant-Solicitor General (Advisings), Sarah Kay, has provided assistance to Agencies and statutory officers in the preparation of responses to various notices to produce statements and information to the Royal Commissions, as well appeared as counsel in and provided general advice concerning the State’s engagement with the Royal Commissions.  While once Royal Commissions were relatively infrequent, they are now a much more prevalent part of the Australian political landscape.[[11]](#footnote-11) It is important for governments to participate in and assist a Royal Commission with its inquiries. But it should also be remembered that a Royal Commission can become an intensely forensic process, in which the State’s interests may be at play. Careful preparation is necessary, with timely and accurate advice sought from experienced lawyers who understand legal processes. The proper preparation and presentation of a case is indispensable to the assistance the State ought to provide to a Royal Commission, should it become necessary.

# Litigation

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 Advisings 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.[[12]](#footnote-12)

As adverted to in relation to Advisings, 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 their work. Litigation practitioners are constantly required to meet deadlines, in the form of limitation periods, or court timetables. Practitioners working for the Crown must also take care to ensure that the State acts as a model litigant. I discuss this further, below.

# Child Sexual Abuse cases

We have anticipated, for a considerable time, that there will be a significant increase in cases relating to child sexual abuse, following the State’s response to the Royal Commission into the Institutional Responses for Child Sexual Abuse. Those responses included:

* amendments to the *Limitation Act 1974*, to allow plaintiffs with time barred actions to apply to the Court for an extension of time;
* the adoption of and participation in the National Redress Scheme.

Further, as part of the response, the State has now adopted Guidelines for the Conduct of the Civil Claims, a copy of which is attached at Schedule 5.

It is now apparent that a significant number of victims of child sexual abuse are electing to pursue common law claims against institutions (including State institutions) at which they suffered the abuse, in preference to taking up the benefits of the National Redress Scheme. This is in part because of a belief that a common law claim may yield monetary compensation greater in value to the benefits of the redress scheme. There have been, in other States, some significant awards of compensation.

A number of points need to be made. First, it is immediately acknowledged that it is necessary for matters to be dealt with according to the policy. However, it is equally important for the State to assess liability, and exposure to damages, before committing to the expenditure of public funds. That necessarily requires a process of factual investigation and legal analysis.

Secondly, it is to be noted that some plaintiffs’ lawyers have used the media to exert collateral pressure on defendants, including the State, to settle claims quickly, without having delivered proper particulars, or given sufficient time for a proper investigation. Because every case in which the State is required to compensate a citizen requires the expenditure of public monies, it is not proper for the State to settle a claim in the absence of sufficient particulars, or the opportunity to investigate it.

Thirdly, the volume of common law claims presently expected will present difficulties for the agencies and my office to set priorities and to dispose of cases in a fair and orderly manner.

Subject to those matters, my office will make every endeavour, within the limits of its resources, to meet the requirements of the civil litigation policy.

# Construction disputes

The Litigation section is not sufficiently resourced to manage complex construction disputes, brought against the State. Claims of this nature must be briefed to legal firms specialising in construction law. However, in order to ensure that the externally briefed firms are managing the interests of the State and behaving consistently with model litigant obligations, it remains necessary for Crown Law practitioners to maintain some oversight of the claims. To date this has been taken up in an ad hoc manner, between the Crown Solicitor’s office and my office. The arrangements are not satisfactory. Disputes of this kind would be better managed by a suitably experienced practitioner acting in a role analogous to a general counsel. That would enable Crown Law to provide suitable oversight as well as a conduit between agencies and the external firms. Hopefully this proposal can be advanced further in the next reporting period.

# Model Litigant Guidelines

In previous reports, I have noted the government’s Model Litigant Guidelines for the conduct of civil litigation by the Crown. I have again attached the guidelines at Schedule 4.

The government authorised me to issue the guidelines. I circulated them to Heads of Agency, the Law Society and the Tasmanian Bar. I also produced a paper for, and addressed, the Law Society Litigation Convention in 2019.

In summary, 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 reason they apply generally to the executive government of the State. It also needs to be understood that the obligations do not require the Crown to ‘fight [litigation] with one hand behind its back’. [[13]](#footnote-13) They require it to fight it fairly.

# 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,

* *The Honourable Will Hodgman v Tasmanian Industrial Commission* [2019] TASSC 40 (6 September 2019)
* *MFC v State of Tasmania* [2020] TASSC 9 (6 April 2020)
* *B v Mental Health Tribunal* [2020] TASSC 10 (8 April 2020)
* *X v Guardianship and Administration Board* [2020] TASSC 11 (28 April 2020)
* *Tasmania v Pilling* [2020] TASSC 13 (8 May 2020)
* *Bullard v Anti-Discrimination Tribunal* [2020] TASSC 15 (19 May 2020)
* *State of Tasmania v MFC* [2020] TASSC 23 (3 June 2020)
* *Superannuation Commission v Frame* [2020] TASFC 5 (23 June 2020)

I also note that the case of *Attorney-General (Tas) v University of Tasmania* was argued before the Full Court of the Supreme Court on 5 June 2019 (before the reporting period commenced) but that judgment remained outstanding at the end of the reporting period. That is still the case at the time of writing.

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

# 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) last met in person in Brisbane on 25 October 2019. The meetings for 2020 have not been held, although the Solicitors-General have met on three occasions by video link.

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 the 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.

# The Whole of Government CLE program

During the second half of 2019, the CLE program continued to show strong results. Regrettably, with the onset of COVID, the program was suspended. It will commence again in 2021.

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

| **Name of Course** | **Course Content** | **Presenter** | **Date Presented** | **Total Participant Regn. No. [including Skype attendees]** |
| --- | --- | --- | --- | --- |
| Privileges | An overview of privileges including:   * Parliamentary privilege * Public interest immunity * Client legal privilege * Other types of privileges | Michael O'Farrell | Friday, 5 July 2019 | 64 |
| Personal Information and Data Protection | * An overview of:   + privacy laws in Tasmania, with a particular focus upon the scope and   operation of the *Personal Information Protection Act 2004* (Tas);   * + the potential impacts of the European Union's General Data Protection Regulation on government. * The contractual mechanisms used to meet personal information protection principles and how these may be negotiated. | Sarah Kay  David Osz  Stephen Bendeich | Monday, 16 September 2019 | 86 |
| Crown Law 101 : working with the Office of the Director of Public Prosecutions (DPP) | * What the DPP does; * Who the Office appears for; * Standard requirements for briefs of evidence; * Standard requirements for requests for advice; * The process through Court; and * What happens on appeal. | Jackie Hartnett | Monday, 21 October 2019 | 79 |
| Personal Information and Data Protection  [re-run] | See above. | See above | Monday, 25 November 2019 | 73 |
| Work Health and Safety Officer Training | This was a session which was run jointly between Understanding the Law and the State Service Management Office (SSMO), providing training to State Servants who have the role of an Officer under the *Work Health & Safety Act 2012* (Tas). | Michael O’Farrell Sam Thompson Simon Nicholson | Tuesday, 26 November 2019 | 28 [participants were nominated to attend] |
| Cases of Distinction | This case series session focussed on administrative law and judicial review.  Focus areas included:   * jurisdictional error * the prerogative and constitutional writs * issues of procedural fairness * relevant considerations * limitations on the lawful exercise of power.   Participants received a detailed case list prior to the session. | Tim Moe – Administrative Law Initiative | Tuesday, 10 December 2019 | 51 |
| Context and Construction | This case series considered statutory interpretation: its current practice by the appellate court and what this reveals in terms of principles and approaches.  The session explored what seems to be the adaptive approach of the courts to the statutory interpretation process, and examine the alternating emphasis on text, extrinsic materials and legislative purpose.  Participants received a detailed case list prior to the session. | Tim Moe – Administrative Law Initiative | Wednesday, 11 December 2019 | 39 |
| Working with the Office of Parliamentary Counsel (OPC) | This session showed participants how to work successfully with OPC.  Topics covered include:   * the role of OPC; * the drafting process; * the parliamentary process; * timetabling; * drafting principles; and * practical tips. | Ruth Henderson Allyson Veska | Tuesday, 11 February 2020 | 30 [these sessions were capped at 30] |
| CLE in Crown Law New suite of procurement document templates (RFQ & RFT) for Goods and Services |  | Alan Morgan | Wednesday, 12 February 2020 | Compulsory session for OCS Practitioners |
| Working with the Office of Parliamentary Counsel (OPC) [re-run] | See above. | Ruth Henderson Allyson Veska | Wednesday, 15 February 2020 | 29 |
| Contracts 101 [re-run] | Part 1 : Contract Law – core principles   * what is a contract? * what is necessary for the creation of an enforceable contract? * the interpretation of contracts * issues that may affect the validity of contracts * memorandums of understanding (MOUs)   Part 2 : Practical considerations related to government contracting   * some common legal issues related to government contracting * some common errors in completing templates * some common issues to look for when reviewing a contract   Part 3 : When to seek advice from Office of the Crown Solicitor (OCS)   * when agencies must or should instruct OCS * how to instruct OCS | Alan Morgan | Tuesday, 25 February 2020 | 70 |
| Working with the Office of Parliamentary Counsel (OPC) [re-run] | See above. | Ruth Henderson Allyson Veska | Tuesday, 10 March 2020 | 24 |

During the reporting period the program was 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 and its delivery.

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. During the reporting period I sat as a member of the Panel for the Review of the Undergraduate Law Degree for the University of Tasmania. I also briefly assisted with the Supreme Court advocacy unit conducted by the Tasmanian Legal Training Program. I delivered two papers[[14]](#footnote-14) to the Law Society’s Litigation Convention in November 2019.

# 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 particularly thank the Assistant Solicitor-General (Advisings), Sarah Kay, and the Assistant Solicitor-General (Litigation), Paul Turner SC, for their considerable assistance and support during the past year.

Dated: 30 September 2020

**Michael O’Farrell SC**

Solicitor-General of Tasmania

**Schedule 1**

**SCHEDULE OF ADVICE GIVEN**

|  |  |  |
| --- | --- | --- |
|  | **2018-19** | **2019-20** |
| Department of State Growth | 57 | 77 |
| Department of Education | 32 | 33 |
| Department of Health | 33 | 51 |
| Department of Justice | 187 | 201 |
| Department of Police and Emergency Management | 5 | 9 |
| Department of Premier and Cabinet | 99 | 127 |
| Department of Primary Industries, Parks, Water and the Environment | 65 | 75 |
| Department of Communities Tasmania | 9 | 18 |
| Department of Treasury and Finance | 23 | 37 |
| Tasmanian Audit Office | 5 | 4 |
| The Public Trustee | 6 | 1 |
| Other bodies and offices | 54 | 63 |
| **TOTAL ADVISINGS** | **575** | **696** |
|  |  |  |
| **Section 78B Notices** | **145** | **142** |

**Schedule 2**

**CIVIL FILES OPENED AND CLOSED AS AT 30 JUNE 2020**

|  |  |  |
| --- | --- | --- |
| **Work type** | **Opened** | **Closed** |
| Administrative appeals – Magistrates Court | 19 | 72 |
| Administrative appeals – Supreme Court | 16 | 10 |
| Anti-discrimination | 17 | 15 |
| Charity | 2 | 3 |
| Contract | 10 | 5 |
| Coronial | 19 | 6 |
| Debt recovery | 37 | 16 |
| Employment / Industrial | 32 | 16 |
| Employment – workers compensation | 331 | 675 |
| Environment | - | 1 |
| Heritage | - | - |
| Judicial Review | 14 | 5 |
| Miscellaneous | 53 | 47 |
| Negligence – medical | 29 | 90 |
| Negligence – other | 11 | 13 |
| Negligence – school | 4 | 3 |
| Planning | 5 | 8 |
| Subpoena | 2 | 1 |
| Tenancy | 13 | 9 |
| **Total** | **614** | **995** |

**Schedule 3**

**BRIEF HISTORY OF THE OFFICE OF SOLICITOR-GENERAL**

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[[15]](#footnote-15) – both the Attorney-General and the Solicitor-General being members of most of the early Cabinets following the introduction of responsible government in Tasmania.[[16]](#footnote-16) 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 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.[[17]](#footnote-17)

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’.[[18]](#footnote-18)

**SOLICITORS-GENERAL OF**

**VAN DIEMEN’S LAND and TASMANIA**

|  |  |  |
| --- | --- | --- |
| 9 May1825 | 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.[[19]](#footnote-19)

1. The obligation of the State to act as a model litigant arises from the Crown’s status as a moral exemplar.[[20]](#footnote-20) The obligation extends beyond legal practitioners acting for the Crown. It is possessed by every State instrumentality, its officers and employees.
2. The administration of these guidelines is primarily the responsibility of the head of each instrumentality, in consultation with the Office of the Solicitor-General.
3. All legal practitioners[[21]](#footnote-21) 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.
4. The guidelines reflect the existing common law and do not impose further obligations on the State.

**Object**

1. 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**

1. The State, its agencies and authorities must act as a model litigant in the conduct of civil litigation.
2. 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**

1. Subject to clause 8, the obligation requires the State and its agencies to:
   1. deal with matters efficiently and expeditiously;
   2. make an early assessment of the prospects of any claim or defence;
   3. 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;
   4. not contest liability where the only issue is quantum of damages, or the application of a remedy;
   5. avoid resort to litigation and encourage and participate in alternative dispute resolution where possible;
   6. keep the costs of litigation to a minimum;
   7. not require a party to prove a matter that the State knows to be true;
   8. 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;
   9. not take advantage of a party who lacks resources to pursue a legitimate claim;
   10. 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;[[22]](#footnote-22)
   11. provide reasonable assistance to claimants and their legal representatives to identify the proper defendant.
2. The State is not prevented from:
   1. seeking or enforcing orders for costs;
   2. protecting any privileges or immunities that are available to it;
   3. pleading limitation periods (other than in child abuse claims[[23]](#footnote-23));
   4. seeking security for costs;
   5. opposing unreasonable, or oppressive claims or processes;
   6. requiring opponents to comply with procedural obligations;
   7. 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

**Schedule 5**

**Guidelines for the Conduct of Civil Claims**

The State and its Agencies must:

1. Acknowledge the potential for litigation to re-traumatise claimants, and act in a way to minimise this potential.
2. Avoid unnecessarily adversarial conduct and communications.
3. Respond to, conduct and resolve similar claims consistently.
4. Develop trauma-sensitive letters that acknowledge claims and provide information about services and supports available to claimants.
5. Provide early acknowledgement of claims and information about particulars needed to progress the claim, and subject to receiving proper particulars of claim, the estimated time for any necessary historical investigations.
6. Facilitate access to records relating to the claimant and the alleged abuse, subject to other’s privacy and legal restrictions.
7. Communicate regularly with claimants on the progress of their matters.
8. Subject to receiving proper particulars of claim, consider facilitating an early settlement and should generally be willing to enter into negotiations to achieve this.
9. Resolve all claims as quickly as possible.
10. Offer alternative forms of acknowledgement or redress, in addition to monetary claims (for example, a written apology, site visits and Direct Personal Responses).
11. Provide a claimant with a selection of suitably qualified counselling and psychological support providers - with experience in the effects of child sexual abuse.
12. Not rely on a claimant’s delay or the effluxion of time as a reason why a proceeding should be stayed unless there is a real prospect of unfair prejudice.
13. Not to ordinarily require confidentiality clauses in the terms of settlement. In the event a confidentiality clause is used, it should not restrict a claimant from discussing the circumstances of their claim or their experience of the claims process.
14. Pursue a contribution to any settlement amount from alleged abusers, where possible.
15. In appropriate matters, suggest to claimants a range of potential experts, being both acceptable to the State and providing genuine choice to claimants, and, where appropriate, facilitate agreement on the use of a single expert.

1. *The Hon Will Hodgman, as Minister Administering the State Service Act 2000 v Tasmanian Industrial Commission* [2019] TASSC 40, [36]. [↑](#footnote-ref-1)
2. Except for proceedings under the *Crime (Confiscation of Profits) Act 1993*. [↑](#footnote-ref-2)
3. 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. [↑](#footnote-ref-3)
4. The level classifications are provided for in the *Legal Practitioners Award*. [↑](#footnote-ref-4)
5. See Schedule 1. [↑](#footnote-ref-5)
6. [2020] HCA 6. [↑](#footnote-ref-6)
7. The principle derived from *Kable v DPP (NSW)* [1996] HCA 24; (1996) 189 CLR 51. [↑](#footnote-ref-7)
8. [[2017] HCA 37](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2017/37.html); (2017) 260 CLR 425. [↑](#footnote-ref-8)
9. The Disability Royal Commission is established concurrently as a Commission of Inquiry under State law. [↑](#footnote-ref-9)
10. The National Natural Disaster Arrangements Royal Commission is established concurrently as a Commission of Inquiry under State law. [↑](#footnote-ref-10)
11. For an incisive commentary, see Hon Kenneth Hayne, *On Royal Commissions*, Speech to the CCCS Conference, Melbourne Law School 26 July 2019. https://adminau.imodules.com/s/1182/images/editor\_documents/MLS/cccs/on\_royal\_commissions\_\_-\_the\_hon\_k\_m\_hayne.pdf?\_ga=2.33611425.1211677524.1597385946-16107117.1597385946&sessionid=d9a5afb2-bae9-4de1-bb2f-1d7b13005c44&cc=1 [↑](#footnote-ref-11)
12. In the previous period from 1 July 2018 to 30 June 2019, the number of files opened was 574. [↑](#footnote-ref-12)
13. *Brandon v Commonwealth* [2005] FCA 109, [11] (Whitlam J); *Yong v Minister for Immigration* (1997) 75 FCR 155, 167 (Beaumont, Burchett & Goldberg JJ). [↑](#footnote-ref-13)
14. On the Crown’s obligation as a model litigant and the other, in conjunction with Simon Nicholson, of the DPP’s office, on appellate advocacy. [↑](#footnote-ref-14)
15. i.e., an office filled by an elected member of the Parliament. [↑](#footnote-ref-15)
16. 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]. [↑](#footnote-ref-16)
17. 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. [↑](#footnote-ref-17)
18. *The Hon Will Hodgman, as Minister Administering the State Service Act 2000 v Tasmanian Industrial Commission* [2019] TASSC 40, [36]. [↑](#footnote-ref-18)
19. Proceedings under the *Crime (Confiscation of Profits) Act 1993* are not to be taken to be civil proceedings. [↑](#footnote-ref-19)
20. *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. [↑](#footnote-ref-20)
21. Including legal practitioners engaged by the State in compliance with Treasurer’s Instruction No 1118. [↑](#footnote-ref-21)
22. 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. [↑](#footnote-ref-22)
23. Limitations of actions in child abuse proceedings are subject to the *Limitation Act 1974*, s 5B. [↑](#footnote-ref-23)