INDEPENDENT REVIEW REPORT

November 2025

Independent Review into the actions taken in response to the information and concerns raised by the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings

Report to the Honourable Jeremy Rockliff MP, Premier of Tasmania

Independent Reviewer
Peter Woolcott AO

INDEPENDENT REVIEW REPORT: PART B – NOVEMBER 2025

INDEPENDENT REVIEW *into the actions taken in response to the information and concerns raised by the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings*

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SUBJECT TO PARLIAMENTARY PRIVILEGE

CHAPTER ONE: JUSTICE SYSTEM

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1 CONTEXT AND INTRODUCTION

Volume 7 of the COI's Final Report focused on the effectiveness of Tasmania's justice system. In particular, Chapter 16 focused on 'Criminal Justice Responses' to child sexual abuse matters while Chapter 17 dealt with 'Redress, Civil Litigation and Support'. While Part A of the Review's report dealt with the Criminal Justice responses and specifically the work undertaken by Tasmania Police in response to matters of concern raised by the COI, Part B of the Review's report specifically focuses on matters raised by the COI in relation to civil litigation (Chapter 17, Section 3) and the Solicitor-General's role (Chapter 17, Section 3.3).

The COI report outlined criticisms of State conduct in civil litigation matters,[1] including problems raised by witnesses in pursuing civil litigation in child sexual abuse matters. The COI report noted the need to reinforce the use of litigation guidelines, specifically, the *Model Litigation Guidelines* and the *Guidelines in relation to the Conduct of Civil Claims*. In reflecting on civil litigation matters, the COI also went onto examine the role of the Solicitor-General, in advising whether claims for damages against the Tasmanian Government by victim-survivors should be settled, and in conducting litigation where the Tasmanian Government denies liability. The COI made a range of recommendations in relation to civil litigation including the establishment of the State Litigation Office and changes to the *Civil Liability Act 2002* (Tas). In discussing the role of the Solicitor-General more broadly, the COI identified the legislative underpinnings for the role including its functions as encapsulated in the Solicitor-General Act 1983. The COI report also went onto identify that section 51(1) of the Financial Management Act allowed the Treasurer of the Tasmanian Government to issue instructions 'relating to the principles, practices and procedures all agencies must observe in their financial management.' [2] The COI report noted that under a Treasurer's instruction made under section 51 of the Financial Management Act, all agencies and instrumentalities of the Crown must get legal advice only from Law Officers of the Crown. The COI noted the effect of this instruction in restricting departments from seeking advice only from the Solicitor-General's Office unless Crown Law agreed in practice that an agency could seek external legal advice.[3]

In concluding its analysis of the above arrangements the COI made further recommendations including amongst other matters requiring the Attorney-General to issue guidelines to clarify the respective roles of the Solicitor-General and the new State Litigation Office, departmental secretaries and HoAs where they were engaged in the conduct and settlement of civil litigation matters and amending the Treasurer's Instruction relating to obtaining external legal advice. [4]

The Review's Terms of Reference ask it to provide *'advice on any matter relating to the actions of government agencies or other relevant authorities in relation to matters considered by the COI that the Review deems relevant to its work'*. That said, the Review's focus on the justice system is driven largely through the lens of individual and systemic accountability. This remains consistent with the Review's wider approach to its Terms of Reference.

Aligned to the views expressed in the COI's final report, it is clear that the role of the civil and criminal justice systems in responding to child sexual abuse in government institutions is a central issue. As stated in Part A of the Review's report, the Review heard repeatedly from multiple stakeholders, that the role of institutions and governments in ensuring justice for victim-survivors and the accused is of sustained interest to all members of the Tasmanian community. Therefore, Part B of the Review's report focuses on the settings and arrangements that guide the work of the constituent parts of the justice system in Tasmania including its interaction with other parts of the State Service, with a specific focus on child sexual abuse matters. This section focuses explicitly on the analysis and recommendations already made by the COI in its final report as outlined above and therefore are aligned to the Review's Terms of Reference.

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[1] COI Report; Volume 7, Chapter 17, 152.

[2] Ibid, 159.

[3] Ibid, 159.

[4] Ibid, 164.

Consistent with its approach elsewhere the Review's perspectives are based upon feedback it has received from a wide cross section of stakeholders including regulatory and oversight agencies, departments/agencies within the State Service including the DOJ as well as feedback from the Office of the Solicitor-General, the Director of Public Prosecutions and the DTF.

It is worth recapping the COI's observations and recommendations in relation to the 'Justice system and victim-survivors' in Tasmania. The Review notes the progress made by the Tasmanian Government in responding to key recommendations made by the COI, although it identifies other recommendations that remain outstanding. Recommendations related to the roles of the Solicitor-General, the new State Litigation Office and departments in the conduct and settlement of civil litigation are of interest to the Review. This flows from the Tasmanian Government's live consideration of these recommendations, and the Review's own observations and the feedback it has received. This needs to be part of the package of considerations to be addressed to ensure the well-being and safety of children in Tasmanian state institutions.

The Review has also considered the history and context of the role of the Solicitor-General in the Westminster system and its evolution in Australia and in the Tasmanian context. A comparative review of other Australian jurisdictions highlights some systemic differences in Tasmania's arrangements.

The chapter's conclusion outlines additional recommendations that complement existing recommendations made by the COI in relation to contestability in the provision of legal services within and to the Tasmanian State Service, improving clarity around the role of the Attorney-General and the Solicitor-General and establishing specific arrangements for oversight bodies to obtain independent legal advice.

1.1 COI REPORT: OBSERVATIONS IN RELATION TO THE CONDUCT OF CIVIL LITIGATION AND SOLICITOR-GENERAL'S ROLE

The final report of the COI made the following recommendations in relation to the role of the Solicitor-General in Tasmania:

Recommendation 17.3

1. The Attorney-General should issue guidelines to clarify the respective roles of the Solicitor-General and the new State Litigation Office, departmental secretaries and other agency heads where Tasmanian government agencies are engaged in the conduct and settlement of civil litigation arising from allegations of child sexual abuse.

2. The Treasurer's Instruction relating to obtaining external legal advice should be amended to:

a. make it consistent with the Attorney-General's guidelines on civil litigation arising from allegations of child sexual abuse

b. specify the circumstances in which departmental secretaries and other agency heads should be able to seek external legal advice on matters related to child sexual abuse.[5]

The recommendation was based upon the COI's examination of the operation of redress schemes, civil litigation matters and support for victim-survivors. The COI engaged with and received submissions and inputs from a range of relevant stakeholders in relation to the mechanisms for support and compensation for victim-survivors. This included victim-survivors themselves, HoAs, the Solicitor-General and the Assistant Solicitor-General, as well as legal practitioners acting on behalf of claimants in civil-litigation claims. The COI made several critical observations in relation to the manner in which the State participated in civil litigation matters, and the role played by the Solicitor-General as a lawyer to the Tasmanian Government in relation to child sexual abuse matters in state institutions.

[5] Ibid, 164.

The concept of 'justice' for victim-survivors includes accountability for the harm caused to them through punishment and/or sanction of those involved either directly[6] or indirectly[7] in the events as well as active steps to prevent future harm.[8] These expectations were also echoed by the Royal Commission into Institutional Responses to Child Sexual Abuse which noted that for victim-survivors an effective response is not just about 'justice' for their personal suffering, but also systemic actions to encourage and support reporting and prevention of child sexual abuse in the future. [9]

Thus, justice is about redress, compensation and individual and systemic accountability that punishes those that offend and also prevents future harm. It is multi-dimensional and therefore requires careful, constructive and healthy relationships, and interactions across all parts of the state service system. This includes the law enforcement authorities such as Tasmania Police and the Director of Public Prosecutions, regulatory authorities such as the Teachers Registration Board and the Registrar for Working with Vulnerable People, as well employment and service delivery agencies such as the DOH and the DECYP. The Office of the Solicitor-General is an integral part of this system given its remit as the legal advisor to the Tasmanian Government including its historical involvement in child sexual abuse matters.

The COI reviewed civil litigation practices in Tasmania relating to child sexual abuse and detailed several criticisms of the conduct of the State in civil litigation matters. While noting that the Solicitor-General had in 2019 released, both *Model Litigant Guidelines* as well as *Guidelines for the Conduct of Civil Claims*, the COI identified that its consultations with legal practices representing claimants had revealed limited impact of these on the conduct of State lawyers.[10] Noting that the COI report was released in late 2023, the limited impact cannot be attributed to insufficient time to see changes in culture and practice.

Specific criticisms outlined by the COI in relation to civil litigation included:

- A technical and legalistic approach to settling claims.
- An insensitive approach to claimants.
- A lack of consideration for claimant's trauma, the impact of delays, and other obstacles.
- Adoption of an overly adversarial approach to litigation.
- The approach of Tasmanian institutions and the Solicitor-General's Office in settlement negotiations, including in relation to medical records.[11]
- Delays by Tasmanian Government institutions in providing information.
- Obstructive or uncompassionate behaviour.[12]
- The lack of a collaborative framework to respond to civil claims against the Tasmanian Government.[13]
- Delays in providing information to settle claims.

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[6] Notes: directly includes perpetrators and/offenders.

[7] Notes: indirectly includes failure to report, take action and or exercise duty/responsibility.

[8] COI Report, Volume 7: Chapter 17, 135.

[9] Royal Commission into Institutional responses to Child Sexual Abuse; Criminal Justice Report Executive Summary, 8.

[10] COI Report, Volume 7: Chapter 17, 155.

[11] Ibid, 154.

[12] Ibid, 156.

[13] Ibid.

In outlining the criticisms, the COI noted that the members of the Litigation Division of the Office of the Solicitor-General had taken part in training on trauma awareness. It also recognised the substantive changes to respond to the above concerns proposed by the Tasmanian Government in March 2023 through the independent State Litigation Office. The Review recognises that the establishment of the State Litigation Office resolves some of the controversy that gave rise to the concerns outlined in the COI. Further developments and comments in relation to this follow.

Reflecting on the State's conduct in relation to civil litigation relating to child sexual abuse, the COI also examined the role and contribution of the Solicitor-General in Tasmania. It did so both in the context of the Solicitor-General and their Office advising on claims for damages against the Tasmanian Government as well as the role more broadly.[14] This is relevant, as the specific role played by the Solicitor-General in relation to legal issues arising from institutional abuse of children is anchored in the broader role of the Solicitor-General and Crown Law within the Tasmanian Government. This is also important context for the conduct of child sexual abuse matters by the new State Litigator's Office.

While later sections of this chapter examine the legislative framework and the role of the Solicitor-General's office in Tasmania in greater detail, the COI received evidence that highlighted a number of anomalies in practice. These included:

- Lack of clarity in the roles of the Solicitor-General, departmental secretaries, and other HoAs in settling civil claims arising from child sexual abuse in government institutions.[15]
- Limitations to the independence of key oversight agencies such as the Ombudsman and the Integrity Commission as a consequence of the requirements that they too must rely on Law Officers of the Crown for all legal advice.[16]
- Lack of procedural clarity on how an agency differentiates between advice on legal rules which regulate how an agency can act and instructing agencies about the decisions they ought to make, and how this actually applies in practice.[17]
- Testimony from the Assistant Solicitor-General, that the Solicitor-General was the final decision-maker in civil litigation matters where there was a disagreement between an HoA and the Solicitor-General's advice (i.e. they made the decision on behalf of other accountable authorities).[18]

In reflecting on these anomalies, the COI also noted:

- The role of the Solicitor-General in Tasmania appeared to operate on a contrary basis to the established practice of a client and lawyer relationship where the client remains the decision-maker based upon advice from the lawyer.[19]
- The limitations imposed on oversight agencies such as the Integrity Commission and the Ombudsman on avenues for legal advice, created inconsistencies with the intention that these entities be independent of the Executive.[20]

[14] Ibid, 159.

[15] Ibid, 160.

[16] Ibid.

[17] Ibid.

[18] Ibid, 161.

[19] Ibid.

[20] Ibid, 160.

- Restricting the ability of departmental secretaries and other HoAs to seek alternative advice in relation to settlements and litigation in all child sexual abuse cases could lead to complacency and reinforce practices that cannot be justified.[21]

- Similarly, restricting access to legal advice had negative consequences in other contexts beyond just civil litigation matters related to child sexual abuse and could extend to advice about access to information applicants, laws around information sharing, or in employment law disputes.

- In most other Australian States HoAs were not prevented from obtaining external legal advice in situations where they consider it appropriate. [22]

- There was a risk that victim-survivors may be disadvantaged by the belief of some Secretaries that they cannot settle a claim without the approval of the Solicitor-General.

The COI identified the key legislative and policy underpinnings for the role of the Solicitor-General in Tasmania. This included:

- The *Solicitor-General Act 1983* (**Solicitor-General Act**) which establishes:
    - The Solicitor-General as an independent statutory office and *makes it accountable to the Tasmanian Parliament.*[23] The Act also contains relevant provisions in relation to the functions of the Solicitor-General and delegation of functions by the Attorney-General to the Solicitor-General.

- The *Financial Management Act 2016* (**Financial Management Act**) section 51(1), which enables the Treasurer of the Tasmanian Government to issue instructions relating to the principles, practices and procedures all agencies must observe in their financial management. 'Agencies' covers specified Tasmanian Government departments, authorities, bodies, organisations and offices. [24]

- The Financial Management Act, Treasurer's instruction FC-17 (**TI FC-17**) which requires all accountable authorities to comply with Treasurer's instructions and TI FC-17, which requires all agencies and instrumentalities to follow legal advice provided by Law Officers of the Crown (including the Solicitor-General). TI FC-17 also requires all accountable authorities to refer all requests for legal advice, civil litigation services, commercial and conveyancing services to Crown Law and mandates that an accountable authority must not directly engage external counsel or commercial legal services without the agreement of Crown Law.[25]

Having considered the legislative and policy frameworks as well as structural settings relating to legal services and advice on child sexual abuse, the COI reached the conclusion that further reforms to existing arrangements were necessary. While acknowledging the proposal by the Tasmanian Government to establish an independent State Litigation Office to support civil litigation and ensuring this provided advice to the Attorney-General, the COI recommended several reforms including:

- Ongoing training for all lawyers who act for the Tasmanian Government in civil claims relating to child sexual abuse, ensuring compliance with various guidelines.

- Guidelines from the Attorney-General to clarify the respective roles of the Solicitor-General and the new State Litigation Office, departmental secretaries and other agency heads where Tasmanian government agencies are engaged in the conduct and settlement of civil litigation arising from allegations of child sexual abuse.

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[21]Ibid, p 161.

[22] Ibid.

[23] Ibid, p 159.

[24] *Financial Management Act 2016* (Tas), s 51.

[25] Treasurer (Tas), *Engagement of Legal Practitioners* (Treasurer's Instruction No FC-17, 1 July 2019) ('FC-17').

- Amendments to the Treasurer's Instruction relating to obtaining external legal advice to make it consistent with the Attorney-General's guidelines on civil litigation and to specify the circumstances in which departmental secretaries and other agency heads should be able to seek external legal advice on matters related to child sexual abuse.[26]

The timelines for implementing one of the changes regarding the development of guidelines in relation to clarifying the roles of the Solicitor-General and the new State Litigation Office, departmental secretaries and other agency heads and amending Treasurer's instructions relating to obtaining external legal advice was set at 1 July 2024.

1.2 RECENT DEVELOPMENTS IN RESPONSE TO RECOMMENDATIONS

Since the release of the COI report, there have been a number of developments in relation to the government responses acknowledged in the report as well as recommendations identified in it.

Principal amongst these was the establishment of the State Litigation office, whereby the Tasmanian Government proceeded to establish the Office of the State Litigator as an independent office and the fourth arm of Crown Law in October 2023. The Review commends the Tasmanian Government and Parliament for their proactive work in this regard. The Review notes that this reform remained partially complete as the Bill (State Litigator Consequential Amendments Bill) giving effect to the proposed changes lapsed due to the election in 2024. Subsequently, in September 2024, Parliament was advised that the State Litigator Consequential Amendments Bill 2024 had received Royal Assent by the Governor. [27]

In July 2024, the Attorney-General also updated and issued new 'Guidelines in relation to the provision for legal services to the Government' in response to Recommendation 17.3. These updated guidelines addressed the role of the Solicitor-General, the State Litigation Office and HoAs in civil litigation. The DOJ noted that the COI's concerns as described above were addressed through the establishment of the State Litigation Office and the issuing of new guidelines.

However, the Review suggests that the Guidelines be further amended as the changes do not address the COI's concerns in relation to the need for independent statutory agencies to be able to seek independent legal advice and for HoAs to also be able to access external advice as appropriate.

1.3 REVIEW OBSERVATIONS

1.3.1 Conduct of Civil Litigation in Child Sexual Abuse Matters

Feedback received by the Review from sources both external and internal to the State Service, has been consistent with the observations by the COI. This is not a surprise as limited time has elapsed between the Review's commencement in February 2024 and the release of the COI report in September 2023 for any measurable change to have occurred. Moreover, as some reforms are yet to be fully implemented the impact of changes is yet to be felt throughout the system.

However, the Review emphasises that compliance with Model Litigant Guidelines and Conduct of Civil Litigation Guidelines in relation to civil litigation have had a much longer trajectory for delivering impact since these have been in place since 2019. The Review would expect that the structural and functional split of civil litigation responsibilities from the Solicitor-General to the State Litigator will help ensure that any tensions inherent in the role due to competing 'responsibilities to defend the State' whilst also 'engaging with victim-survivors and whistleblowers in a trauma informed manner' can be effectively dealt with. The Review concurs with the Parliamentary discussions in relation to the need for monitoring

[26] COI Report, Volume 7: Chapter 17, 164.

[27] Parliament of Tasmania, *Legislative Council Thursday 20 June 2024*, 5.

of performance of the new entity, particularly in relation to upholding the model litigant and civil claims guidelines.[28] Changes in practice and culture are never easy and require leadership and training as well as monitoring. The Review notes that Tasmania's first State Litigator appointed to the role in late 2023, resigned in April 2025, after a short tenure. [29]

The Review further notes that in Tasmania the Model Litigant Guidelines were issued by the Solicitor-General and the responsibility for administering those Guidelines rests primarily with each instrumentality in conjunction with the Solicitor-General. It is recommended that the Guidelines be reconstituted as directions from the Attorney-General, who in turn should be responsible by oversighting compliance and identifying systemic failures by government agencies.

The Review suggests that the Attorney-General consider practices in other jurisdictions where these obligations are overseen by an independent office under the Attorney-General's remit as the first legal officer. At a Commonwealth level, breaches of the model litigant obligations must be reported to the Office of Legal Services Co-Ordination (**OLSC**) within the Attorney-General's Department. If a similar model were adopted in Tasmania, an office could be created within the DOJ, reporting to the Attorney-General, who has the necessary power to investigate reported breaches and identify any systemic barriers to compliance. That office could also publish statistical data on non-compliance to ensure public accountability.

As with OLSC, such an office could also support departments and agencies through guidance and training and promote awareness of obligations and management of risks.

Strategic Recommendation 1.1

a) The Attorney-General re-issue the Model Litigant Obligations as directions to all agencies and instrumentalities.

b) The Tasmanian Government establish an office within the Department of Justice to oversight and report on compliance with the Attorney-General's Model Litigant Directions with particular reference to civil litigation matters involving child sexual abuse cases ensuring adherence to a published compliance framework.

1.3.2 Legal Advice in relation to other Child Sexual Abuse Issues

In considering the conduct of the State in relation to civil litigation matters the COI also expressed two other related concerns.

Firstly, it was noted that the Solicitor-General in Tasmania had a 'virtual monopoly' in providing legal advice. The COI noted the role of TI FC-17, made under section 51 of the Financial Management Act, in creating this 'virtual monopoly'. The instruction requires all agencies and instrumentalities of the Crown to only seek legal advice from Law Officers of the Crown. [30] Further, the instruction prohibits agencies and instrumentalities of the Crown from seeking external legal advice without an explicit exemption.[31] The COI noted that *'restricting access to external sources of legal advice may also have negative consequences in other contexts relating to child sexual abuse in Tasmanian Government institutions. These contexts include when agencies seek advice about access to information applications, laws around information sharing, or in employment law disputes.'* [32]

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[28] Parliament of Tasmania, *Legislative Council Thursday 20 June 2024*, 9.

[29] Mark Rapley SC - Tasmanian Bar Association, was appointed as the First Tasmanian State Litigator from late 2023 to 2025.

[30] Notes: Crown refers to all its agencies and instrumentalities.

[31] COI Report Volume 7: Chapter 17, 161.

[32] Ibid.

Secondly, the COI noted that as a consequence of TI FC-17, the Solicitor-General's role in Tasmania in practice extended to 'making decisions on behalf of Tasmanian Government Agencies'.

The Review considers it helpful to begin with a high-level overview of some of the relevant offices within Crown Law. The Office of the Crown Solicitor provides commercial law and conveyancing services to the Crown. The Office of the Director of Public Prosecutions institutes and conducts criminal prosecutions on behalf of the State. The State Litigation office undertakes the conduct of all civil litigation on behalf of the State and its agencies. The Review notes that the State Litigation office is a new office within Crown Law; its establishment remedies some of the concerns addressed in the COI. Lastly, the Office of the Solicitor-General acts as counsel for the State and is its second law officer. Though the Review acknowledges that these offices all perform different and complementary functions, the focus remains on the Office of the Solicitor-General due to the COI's observations and findings as set out above.

The Solicitor-General is a statutory officeholder. The functions of the Solicitor-General are set out in section 7 of the Solicitor-General Act. The Solicitor-General is to act as counsel for the Crown. Presumably, the Solicitor-General is intended to be instructed by the Attorney-General for the Executive. Beyond this, the Solicitor-General undertakes any other duties ordinarily performed by legal practitioners at the request or direction of the Attorney-General.

The Review understands that there are historical, policy and constitutional requirements attached to the Solicitor-General's Office, but it understands that these are confined to significant legal issues for the Crown. It is important to the State Service and particularly the new State Litigator that there be clear articulation of what constitutes a significant legal issue. This clear articulation will guide agencies to seek advice in the appropriate circumstances from the Solicitor-General. Section 9 of the Attorney-General's Guidelines provide that advice should be sought in relation to the legal powers, functions and responsibilities of the Crown or the lawfulness of any action, or proposed course of action, of the Crown. The Review does not believe that this provides sufficient guidance on what constitutes a significant legal issue.

The Review understands the important statutory requirement that the Solicitor-General must be independent, as well as the essential role the Solicitor-General plays as the legal advisor to the Tasmanian Government on constitutional matters, inter-department matters and matters of significance to the State.

However, the status and treatment of this advice by Departments is shaped by TI FC-17, as noted by the COI, as well as the Attorney-General's Guidelines. Based on feedback, the Review considers that TI FC-17 and the Attorney-General's Guidelines give rise to ambiguity and therefore are confusing.

Other than TI FC-17 and the Attorney-General's Guidelines, the Review could not find other publicly available materials which explained how the functions under section 7 are operationalised.

The Review found the Attorney-General's Guidelines confusing in that clause 8 states "…. the Government must accept legal advice provided by the [Solicitor-General] as accurately stating the law. All advice of the [Solicitor-General], whether oral, or written, formal, or informal is binding."

The Attorney-General's Guidelines do not provide a distinction between circumstances where the Solicitor-General is engaged as Counsel for the State of Tasmania and circumstances where the Solicitor-General undertakes the other duties ordinarily performed by legal practitioners at the request or direction of the Attorney-General. Whilst the creation of the State Litigator's Office is a helpful development, it would be desirable to have transparency and a suite of consistent guidelines or directions which delineate roles and responsibilities.

To the extent the Solicitor-General undertakes duties ordinarily performed by legal practitioners at the request or direction of the Attorney-General under section 7 of the Solicitor-General Act, these might be operationalised by the Attorney-General formalising their request through standing directions or the like. Such guidelines could provide additional certainty around the scope and status of the Solicitor-General's engagement and advice.

However, it seems clear firstly that the Attorney-General would need to request the Solicitor-General to provide this advice, and secondly that the Attorney-General can vary his or her Guidelines. Additionally, it is unclear whether the Attorney-General is bound by their own guidelines. As discussed in 1.3.2,1 it is important that there be clarity about what constitutes binding legal advice and the mechanisms by which it is obtained.

Against this background the Review found the Attorney-General's Guideline confusing, and circular given the nature of the relationship between the Executive, the Attorney-General (as first legal officer) and the Solicitor-General (as second legal officer). It is also likely to be confusing to the State Service who may conflate their roles with the Tasmanian Government. This could mean they consider themselves bound by verbal advice, which within the context of the State Service would seem risky and unfair, particularly when read with TI FC-17.

To understand TI FC-17, it is necessary to turn to the Financial Management Act. The objective of this legislation is to create principles, practices and procedures to manage effective public spending in the various affairs of the Executive. Section 51 of the Financial Management Act empowers the Treasurer to issue instructions with "respect to the principles, practices and procedures to be observed in the financial management of all Agencies of public expenditure".[33] It is under this power that TI FC-17 was issued. These instructions apply to those agencies and instrumentalities of the Executive government, as identified in Schedule 1 to the Financial Management Act. Section 51(4) then requires each accountable authority and officer to comply with any requirement of the Treasurer's instructions.[34]

As mentioned above, the COI noted that TI FC-17 requires legal advice to be sought from Law Officers of the Crown, and it also indicates that this legal advice is binding. It seems clear from the terms of section 51(1) of the Financial Management Act that the instructions must be directed to "financial management" and the Treasurer does not have the power to issue instructions that go beyond "financial management".[35] The Review believes that elements of TI FC-17 may not sufficiently connect to this purpose. For this reason, the instructions are confusing.

This confusion is compounded by the Attorney-General's Guidelines which rely on TI FC-17 as authority that the Crown must obtain its legal advice from Law Officers of the Crown and that this advice must be accepted as accurate. The cross-referencing between the instruments adds to the ambiguity. Further the Review has been advised that *FC-1 Compliance with Treasurer's Instructions* provides a general exemption to all agencies and authorities to seek approval from the Treasurer regarding a variation or non-application of any Treasurer's Instruction to them. However, noting the lack of detailed guidance offered in this instruction on any practical ways in which an agency or accountable authority may then operate, the Review notes that the instruction adds to the current ambiguity within the system.

The Review believes that an unintended consequence of this ambiguity, and specifically TI FC-17, which requires that the Crown must follow all legal advice provided by Law Officers of the Crown, is that State Service officers may feel constrained in questioning this advice. The extent to which TI FC-17 can actually compel agencies to accept the Solicitor-General's advice as binding remains ambiguous due to the potentially insufficient link between the specific instruction and the purpose of the empowering provision in the Financial Management Act. Despite this ambiguity, the Review notes that in practice State Service officers are poorly positioned to query or act contrary to the advice provided by Law Officers of the Crown. As noted, this is compounded by clause 8 the Attorney-General's Guidelines discussed above.

This means that the opportunity for collaborative discussions relevant to decisions may be lost. This is particularly relevant to the conduct of litigation involving child sexual abuse. This is consistent with feedback from sources both within and outside the Tasmanian State Service, which suggested that TI FC-17 is interpreted as making all Solicitor-General advice binding, regardless of the form it is received

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[33] *Financial Management Act 2016* (Tas), s51.

[34] Ibid, s51(4).

[35] Ibid, s51(1).

in or the subject matter it relates to. To the extent that this is relevant to the State Litigator's Office, it is important that the Guidelines clarify these roles.

The Review observes that the responsibility for the conduct of the State's civil litigation rests with the State Litigator, as outlined in the Attorney-General's Guidelines. Despite this, the Review understands that there are circumstances in which the Solicitor-General's Office remains the final decision-maker in the context of the State's civil litigation. The Review notes that the Solicitor-General's role remains broader than just the activities taken over by the State Litigator's Office. The Review also notes that the Solicitor-General's advice is treated as binding regarding questions of lawfulness or, beyond this, questions of inconsistencies with relevant legislation. For instance, if a proposed settlement is deemed inconsistent with the principles in the Financial Management Act, the Solicitor-General's advice must be followed.[36] The treatment of the Solicitor-General's advice as binding in circumstances where the State Litigator is involved suggests a need for clarity on matters in which the Solicitor-General's advice is actually binding.

The Review believes the Attorney-General's Guidelines and TI FC-17 should generally be reviewed to ensure consistency and promote clarity. In particular, to provide clear guidance on circumstances in which advice is binding or not binding. The Review notes that it is common practice in Australia that the advice of the relevant Solicitor-General is treated as binding on the agencies and instrumentalities of the Executive only to the extent that the advice is constitutional or important to the whole of government. Additional matters which address the Attorney-General's Guidelines and TI FC-17 are discussed below.

The Review notes feedback suggesting there might be a collaborative framework to guide the working relationship between the Office of the Solicitor-General and other agencies, which would note the points at which legal guidance should be sought from that Office in the implementation of the Tasmanian Government policy cycle.

The need for a more collaborative approach is demonstrated by former Solicitor-General Michael O'Farrell SC's note in their 2020-2021 annual report that the process of settling claims early due to the *"number of provisions in State legislation that requires information to be kept confidential by the agency with its possession, with the result that my office has been unable to obtain the documentation necessary to comply with the civil litigation guidelines'.*[37] Despite these observations it is unclear whether any proactive approach was taken by the State Service or the Solicitor-General to recommend legislative reform. What is clear to the Review is that the issues which were reported by the Solicitor-General in 2022 to Parliament do not appear to have been substantially addressed.

Against this background it is important that there be a framework for collaborative dialogue between the Solicitor-General's Office and the State Service to ensure they can work in a manner which is consistent, whilst acknowledging their relevant roles and responsibilities, with Government Policy. Such a framework needs to include and be supported by clear guidance on what legal advice is binding under the Attorney-General's Guideline, and other legal advice where the State Service can accept or reject a recommendation. A new office within the DOJ (as discussed in section 1.3.1 above) could be involved in facilitating guidance on these matters.

Strategic Recommendation 1.2

That the Attorney-General commission a review of the Attorney-General's Guidelines with respect to the Solicitor-General and the State Litigator and FC-17 to ensure legal clarity and to incorporate a requirement for guidance on the nature of advice, which is provided, and whether it is binding on the State Service or not.

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[36] Based upon feedback received by the Review.

[37] Solicitor-General (Tas), *Solicitor-General Annual Report 2020-2021.*

1.3.2.1 Ministerial Responsibility and Other Considerations

In considering the feedback received by the Review from across the State Service and external sources, and based upon its own observations of the system, the Review notes the need to outline the principles and fundamentals underpinning the design of the Westminster system of government. The Review considers this context necessary to guiding practice within the system.

In the Westminster system of government, Ministers are politically/publicly accountable to the elected legislature both collectively and individually. The lead role of Cabinet and Ministers in the policy development cycle is undisputed. Ministers are responsible for setting the policy directions within their assigned portfolio (subject to cabinet processes). In the Tasmanian system, executive responsibility is formally allocated to Ministers by the Governor through the Administrative Arrangements Order which specifies both the matters dealt with by each department of the State as well as legislation administered by it. A policy development process generally commences in response to policy priorities which reflect the political intentions set out by the elected government. In this sense, they reflect the mandate provided by the polity to a particular political party to enact its policies. This is a vital cornerstone of our system of democratically elected government. [38]

The policy development process generally produces options that require specific political decisions as well as advice on the policy instrument to enact or give effect to the policy intention. The work of the State Service is central in this part of the cycle. A policy instrument can include new or revised legislation, and once legislation has been passed the policy can be implemented.

The Premier, cabinet, committees of government, individual ministers, central and line ministries and civil society all play an important role in the development of policy options. Policies are almost always embodied through legislation and the process for drafting legislation which reflects the policy intention is a critical role for legal experts within departments. Drafting of legislation requires careful consideration of the constitution, the current law, and its impact on existing legislation. These considerations may sometimes lead to the reassessment of policy decisions and options. However, it would be unusual for the drafting of legislation to dictate the political priorities of government or to solely determine the policy preferences of an elected government. The full policy cycle also includes processes for cabinet consideration of draft legislation, preparation of supporting material, and review/analysis of the legislation by Parliament prior to its approval. This is a complex and iterative process with many stakeholders and many moving parts which provides for checks and balances to be applied prior to a policy intention becoming law.

It is therefore unsurprising that the Attorney-General's 'Guidelines in relation to the provision of legal services to the Government' specify and therefore limit the mandatory requirement of when legal advice provided by the Law Officers of the Crown must be followed to specific constitutional matters, being:

- the legal functions, powers or responsibilities of the Crown;
- the lawfulness of any action, or proposed course of action, by the Crown; and
- the legal enforceability or legal effectiveness of a transaction entered into by the Crown.

It would be expected that any advice provided by the Law Officers of the Crown including the Solicitor-General is therefore embedded within the context of the policy cycle of government and responds to its policy intentions. The enumeration specifically does not empower the Law Officers of the Crown to make or determine policy choices or decisions. The effect of these provisions is also not intended to replace or substitute the legitimate role of all other parts of the system including cabinet and Parliament as described above. Rather, the Review considers that a framework clearly outlining the appropriate timing and level of consultation with the Solicitor-General could be helpful.

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[38] The ideas discussed in section 1.3.2.1 are partly synthesised by consideration of the following – Geoffrey Marshall, *Ministerial Responsibility,* The Political Quarterly, 34, 256-268; Judy Maddigan, *Ministerial responsibility: reality or myth?,* Australasian Parliamentary Review, 26(1), 158–165; Gabrielle Appleby et al (eds), *Public Sentinels A Comparative Study of Australian Solicitors-General* (Ashgate, 2014).

In reflecting on Ministerial Responsibility, the Review also notes that a Minister's role in administering portfolio legislation may involve the development of proposals for policy change related to that legislation. Notwithstanding proposals for legislative change, administrative powers must continue to be exercised on the basis of the existing legislation until the proposed change becomes law. However, existing law or legislation does not restrict the role of Ministers from developing policy proposals for change in line with and in response to community expectations. This is what democratic responsible government is all about.

Separately to the above, it also needs to be stated that although government policy may be an important consideration in making statutory decisions, policy does not of itself have the force of law. Legal requirements always prevail in the instances where there is an inconsistency between the application of the policy and the legal requirements around decision-making.[39] In this regard, the Review notes that the existing Attorney-General guidelines provide sensible direction.

The role of the Solicitor-General in Tasmania, while significant, exists within the Westminster and democratic system of government. In the Review's view, the ability to differentiate between when advice is mandatory as opposed to when it is provided as part of the multiple and multi-disciplinary set of considerations (economists, scientists, social policy experts, subject matter experts) is necessary to the development of effective policy, and requires a mature, sophisticated and respectful collaboration informed by a deep understanding of other roles and responsibilities.

As noted previously, to the extent there may be ambiguity about the mandatory nature of advice provided in accordance with the Attorney-General's Guidelines and the obligations imposed on agencies under TI FC-17, then there needs to be clarification. With respect to TI FC-17, this Review believes that the instrument needs to be construed by reference to the Financial Management Act - being sound fiscal management of the States finances and to specific constitutional matters referenced above.

Noting that the Review recommends the Attorney-General's Guidelines and TI FC-17 and the State Litigator's guidelines be reviewed, it also is suggested that the Attorney-General develop a Guideline on how the State Service should engage with the Solicitor-General's Office on legal advice relevant to policy development and implementation, including during which parts of the policy cycle that office should be engaged.

Strategic Recommendation 1.3

The Attorney-General develop Guidelines on how the State Service should engage with the Solicitor-General's Office on legal advice relevant to policy implementation, including at which points during the policy cycle that office should be engaged.

1.3.2.2 External Legal Advice - Comparative Analysis of Legal Services Provisions in other Jurisdictions

The Office of the Solicitor-General in Tasmania has existed since 1824. Its first Solicitor-General Alfred Stephen in fact had a dual commission as Crown Solicitor, noting that the role of the Solicitor-General was honorary. Stephen also acted as Attorney-General from time to time and also took up fee-paying work as an ordinary barrister; time permitting. Until the establishment of representative government in 1856, Law Officers in Tasmania were appointed members of the Legislative Council. With the establishment of responsible government, the Solicitor-General initially became a member of the ministry having a seat in one or the other of the Houses of Parliament. In 1860, the position was made a permanent one in the public service and has remained so ever since.[40] The early twentieth century saw the commencement of a trend across Australia for the office of the Attorney-General to become more overtly political and that of Solicitor-General to become non-political. As a consequence, in

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[40] Gabrielle Appleby et al (eds), *Public Sentinels A Comparative Study of Australian Solicitors-General* (Ashgate, 2014) 51.

Tasmania and as in other jurisdictions, the Solicitor-General's office ceased to be ministerial. In most jurisdictions, the office where it existed was that of a public servant with oversight of a government law department and responsible to a Minister in Parliament.[41]

For much of the 20th Century, the Solicitor-General in Tasmania was the head of a Department of the Crown which was responsible for the delivery of all legal services of the Crown. By the middle of the century, the administrative burden upon the Solicitor-General had increased to the extent that it was interfering with their capacity to adequately discharge important legal functions, and as a consequence, through the Solicitor-General Act, the office was established for the first time on a statutory basis. Annex 1 outlines the functions of the Solicitor-General as per the Solicitor-General Act.

The statutory office saw the Solicitor-General assuming responsibility for much of the Crown's substantial litigation, as well as for major advising of the Crown. However, as reflected by Bill Bale QC, the former Solicitor-General in his annual report in 2005, 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 they could not adequately cope with the workload which fell upon them, 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, in 1986, responsibility for the civil litigation of the Crown as well as criminal prosecution was passed to the Director of Public Prosecutions. As a consequence, a 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 was involved in constitutional litigation.

This arrangement was reversed in 2015, when the merger of the Civil Division of the Office of Director of Public Prosecutions with the Office of the Solicitor-General saw the transfer of responsibilities for civil litigation to the latter; supported by a direction from the former Attorney-General to the Solicitor-General to conduct the State's civil litigation.

The commentary from the COI, as already identified above, in relation to the conduct of civil litigation picks up the matters from this point on and concludes with the decision to separate these functions once again through the establishment of the office of the State Litigator.

Given that for much of history, the core focus of role of the Solicitor-General has remained legal advice to the Crown and representing the State on constitutional matters/litigation, the Review concurs with the decision by the Tasmanian Government and Parliament to establish the separate office of the State Litigator with responsibility for all civil litigation.

The Review also notes the COI's observations in relation to the issues arising from '*restricting access to external sources of legal advice may also have negative consequences in other contexts relating to child sexual abuse in Tasmanian Government institutions including access to information applications, laws around information sharing, or in employment law disputes'.*[42] The Review on the basis of its own observations, feedback from other stakeholders, and arguments set out above recommends that the government amend TI FC-17 to remove the requirement for an '*accountable authority to refer all requests for legal advice, civil litigation services and commercial and conveyancing legal services to Crown Law'.* Instead, commensurate with practice in other comparable jurisdictions, the Review recommends that the government open up the provision of legal advice to the private sector and develop and implement 'Guidelines on the use of the private sector for legal work'.

In making this recommendation the Review notes that legal advice in relation to information applications, information sharing provisions and employment disputes relate directly to issues of individual and systemic accountability for child sexual abuse. As other sections of the report have highlighted, sharing of information across agencies is vital to holding perpetrators to account and ensuring that lessons in relation to how large service delivery systems can be made more resilient can

[41] Ibid, 44.

[42] COI Report Volume 7: Chapter 17, 161.

be passed on. Legal advice in relation to employment law and/or disputes may also relate to individual accountability mechanisms for child sexual abuse matters. Limiting the sources of advice on these matters, limits the diversity of expertise available to ensure that public interest matters are balanced against considerations of the right of the state to defend itself or its actions.

The Review further notes that the current prohibitions in relation to seeking external legal advice in Tasmania are out of step with arrangements in a majority of other Australian jurisdictions. Access to expertise from the private sector in some form is now prevalent in most jurisdictions in Australia, including the Commonwealth, NSW, Victoria and Queensland. The Review notes that, in all jurisdictions the Solicitor-General acts as counsel either based upon a request from the Attorney-General or as directed by the Attorney-General. In WA, NSW, Victoria the legislation also makes clear that the **'Solicitor-General *may* act as counsel for the Crown'** provided they are requested or directed by the Attorney-General to do so. Though the Review acknowledges instructions are not always received directly from the Attorney-General as a matter of practicality,[43] these arrangements, emphasise the primary responsibility of the Attorney-General for government legal services setting the parameters for the relationship between the two officers, within the construct of ministerial accountability.

In several jurisdictions, Legal Services Directions or their equivalent set the parameters for the type of legal work that can be performed by the Solicitor-General or the Crown Solicitor. For example, in the Commonwealth legal work is tied to the Australian Government Solicitor (**AGS**) if it involves constitutional law issues, national security matters and legal advice to be considered by the cabinet. In NSW the *Core Legal Work Guidelines also* require that a matter can only constitute core legal work where the best interests of the Government as a whole require a single source of authoritative legal advice or where it relates to the statutory or common law functions of the Attorney-General. Additionally, in Western Australian as in other jurisdictions core legal work includes a defined list of matters such as work relating to Royal Commissions, inter-governmental arrangements and/or legal advice to cabinet, ministers, departments.

Given the above arrangements which provide a defined set of matters which constitute core legal work that is under the purview of the Solicitor-General, access to expertise from the private sector is now prevalent in most jurisdictions in some form in Australia. This includes the Commonwealth, NSW, Victoria and Queensland.

The Review outlines the current arrangement in the Commonwealth as an exemplar for further consideration in Tasmania.

Legal services to the Commonwealth government and its agencies are provided by: the Attorney-General; the Solicitor-General; the AGS; the Attorney-General's Department (which includes the Office of International Law, the Office of Parliamentary Counsel, and the Office of Legal Services Coordination); the Department of Foreign Affairs and Trade; in-house legal providers within government departments, agencies and Government Business Enterprises (GBEs); private law firms; private counsel (barristers) from the independent Bar; and the Director of Public Prosecutions.

Aligned to the competition reforms of the 1990s and following the publication of the Logan Report in 1997, the Commonwealth introduced greater contestability for legal services. The Logan report or the *Report of the Review of the Attorney-General's Legal Practice* recommended:

- The legal services elements of the Attorney-General's Legal Practice (the AGS) be separated and established as a statutory authority with a Chief Executive Office responsible and accountable to the Attorney-General.
- The establishment of the Office of Legal Services Coordination (**OLSC**) to support the Attorney-General and oversee compliance with the Legal Services Directions; and

[43] Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10 *Public Law Review* 114-118.

- Departments and agencies be required to use the AGS for legal services that relate to a core executive activity but otherwise should be free to manage their own legal services. [44]

The Logan report found that while there was a need to maintain government operated legal services in order for the particular needs of the Commonwealth government to be met, specifically in public law services (constitutional and national security areas); to ensure a whole-of-government approach was adopted in key areas; and to ensure the Attorney-General was appropriately supported in his role as First Law Officer, greater contestability was advisable in other areas. [45]

There would be significant benefits to the Tasmanian government from opening up the provision of legal advice in some areas, through a considered and appropriate procurement process. As a relatively small jurisdiction, Tasmania has limited access to legal expertise and capability, and maintaining legal expertise and specialists in certain areas is likely to be cost prohibitive. As evidenced in the Solicitor-General's annual reports, responsiveness and the ability to pay due attention to important core functions (such as Royal Commissions[46] and constitutional issues[47]) can also be hampered from time to time due to the volume of matters requiring advising.

The Review acknowledges that potential shortcomings may arise when legal services are provided externally. For example, poorly drafted guidelines could invite opinion-shopping. However, the Review posits that well-considered guidelines and legal service directions could be explicit about instances in which it is appropriate to engage external legal services and where it is not. Ultimately, any constitutional or tied work will reflect the precedence of the Solicitor-General's advice.

As discussed in the next section it is more appropriate for oversight agencies such as the Ombudsman and the Auditor-General to be able to seek advice from private firms or the bar, given their statutory mandate to be independent from the Executive.

In addition, the legal landscape is evolving rapidly as a consequence of technological change, in response to complex societal issues, growing demand for transparency and accountability of governments, climate change, First Nations equity and wider disadvantage, diversity and inclusion agendas, developments in international law and regulation amongst other factors. Against this rapidly evolving backdrop the current structural arrangements in Tasmania position a single individual in the role of the Solicitor-General as the steward of all advice. While in theory the Crown is indivisible, and therefore the Solicitor-General can in theory have no conflicts of interest, in practice the Crown is multi-faceted and managing widely diverse and competing interests. The Solicitor-General is expected to provide advice on conflicting dimensions of the Crown's remit. This is increasingly a herculean task and made more so in Tasmania given the size of the jurisdiction and its existing resources. Therefore, the need for external sources of expert advice rather than a monopolistic approach would seem crucial.

Based upon available information across jurisdictions and noting that the reforms in the Commonwealth have proven effective over time, the Review recommends that the Tasmanian Government consider amendments or development of the Treasurer's Instructions to support a competent and competitive panel arrangement, permitting the provision of legal advice for external providers, where appropriate.

Strategic Recommendation 1.4

a) The Review recommends that the government amend the Treasurer's Instructions FC-17 to remove the requirement for an 'accountable authority to refer all requests for legal advice, civil litigation services and commercial and conveyancing legal services to Crown Law'.

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[44] Gabrielle Appleby et al (eds), *Public Sentinels A Comparative Study of Australian Solicitors-General*, (Ashgate, 2014) 153.

[45] Ibid.

[46] Solicitor-General (Tas), *Solicitor-General Annual Report 2021-2022* (Report 2022), 9-10.

[47] Solicitor-General (Tas), *Solicitor-General Annual Report 2004-2005,* (Report 2005).

b) Commensurate with practice in other comparable jurisdictions, the Review recommends that the government open up the provision of legal advice to the private sector and develop and implement 'Guidelines on the use of the private sector for legal work'.

1.3.3 Oversight Agencies

The COI Report noted that the current Treasurer's Instructions require other independent statutory agencies to also refer all requests for legal advice to the Solicitor-General. The COI noted that this was arguably contrary to the expectation of independence of these entities from the Executive. The Review notes that based upon the Treasurer's Instructions, the Solicitor-General in Tasmania may be requested to advise an agency that has statutorily directed objectives that require it to act independently of the Crown and sometimes in direct conflict with the Crown's interests (for example, executive regulatory and accountability agencies).[48] This potentially inhibits these agencies' effective execution of their functions in certain circumstances.

Consultations with the Integrity Commission identify that as an agency with responsibility for assessing and investigating alleged misconduct by public officers in Tasmania it operates in a highly legalised environment. Due to resourcing constraints, the Commission has operated for some years without any internal dedicated legal resources. Since July 2015, the Commission has relied on the generic legal knowledge of Commission staff and/or increasingly utilised the services of the Office of the Solicitor-General (OSG). The Commission has noted that even if it did have in-house legal resourcing, as a consequence of the Treasurer's Instructions it would still be bound to rely on the advice of the OSG unless the OSG was prepared to provide an exemption.

The Commission outlines that to secure an exemption, it must by necessity inform the OSG about the matter to some extent and may also need to advise Treasury of the likelihood that it was seeking a 'request for additional funds' (RAF) to cover the external legal costs (in the event where it could not support these from its own internal budget). The Review understands that the granting of RAFs is discretionary, and therefore there is no guarantee that the Commission would receive such funds.

Noting that the Treasury and Treasurer as well as the Integrity Commission are all within the purview/jurisdiction of the OSG, seeking such approvals has the potential to compromise the independence of the Commission. The Commission further noted that even where it was able to gain authorisation to seek external legal advice, it often needed to share previous OSG advice with the external legal practitioner/s. This also required authorisation from the OSG for release of each piece of advice. The protracted nature of this process can lead to delays and therefore impact the timeliness of matters.

The Review recommends that the Attorney-General's Guidelines be amended to explicitly exclude these agencies from the general remit of the Solicitor-General, so that they can obtain their own advice. TI FC-17 should also explicitly remove the requirement to refer all requests for legal advice to Crown Law, to address this anomaly within the wider institutional framework for oversight agencies. The Tasmanian Government may wish to consider legislative changes to ensure greater public clarity about the role and functions of the Solicitor-General. Examples of legislation which might guide such change include section 8 of the *Solicitor-General Act 1985* (Qld), or section 12 of the *Law Offices Act 1964* (Cth).

It is noted that the Integrity Commission and other stakeholders raised concern about both the role and their ability to rely on advice from internal lawyers (noting that these lawyers can develop expertise in the specific legislation of an agency, and the agency's policy objectives). There is a case to be made for better guidance on when advice might be provided internally, and on what topics, along with guidance on how this cohort can best work collaboratively with the Solicitor-General's Office.

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[48] Gabrielle Appleby et al (eds), *Public Sentinels A Comparative Study of Australian Solicitors-General*, (Ashgate, 2014) 5.

Strategic Recommendation 1.5

The Attorney-General's Guidelines be amended to explicitly exclude oversight agencies from the general remit of the Solicitor-General, and to permit them to obtain their own independent advice.

2.1 Oversight and Regulatory Agencies

While the above section details the recommended changes to the Attorney-General's guidelines to ensure that oversight agencies are able to seek legal advice from sources other than the Solicitor-General, the section below reflects on other dimensions of independence related to the operations of oversight and regulatory agencies.

Part A of the Review's report described the COI observations in relation to the regulatory and oversight arrangements in Tasmania including the Review's general observations in relation to the multiple dimensions related to the principle of independence. The purpose of outlining these was to support the design and establishment of oversight and regulatory agencies. Section 2.1.1 mirrors the conceptual framework regarding how the principle of independence of oversight and regulatory agencies may be given effect as already outlined in Part A of the Review's report. The subsequent sections outline the Review's observations in relation to the current institutional arrangements in Tasmania.

2.1.1 Principle of Independence

Independence from Ministerial Direction and Control

For regulatory and oversight agencies to act independently, impartially, and in the public interest, they should be free from ministerial direction and control. When such regulators are subject to ministerial direction, there is an inherent risk that political considerations, electoral cycles, or government policy priorities may influence regulatory decisions that should be based solely on evidence, law, and public interest considerations.

Independence from ministerial direction ensures that oversight agencies can pursue their mandate and enable them to make difficult decisions, issue critical findings, and hold powerful institutions accountable regardless of the potential political ramifications. This independence is essential for maintaining public confidence in the regulatory system and ensuring that oversight functions serve the broader public interest.

Structural, Budgetary and Operational Independence

In addition, the institutional independence of regulatory and oversight agencies relies on funding arrangements that are independent of the departments they oversee. The agencies should not be reliant for their funding and financial resources on departments that are subject to their oversight and/or scrutiny. Funding mechanisms should be designed to prevent situations where funding decisions could compromise regulatory independence or create leverage for departments to influence oversight activities.

Structural independence is also integral to the independence of these agencies and regulators. Making agencies or regulators directly accountable to Parliament rather than to the departments they regulate, avoids both perceived and actual conflicts of interest inherent in being answerable to the very entities that the agencies are meant to oversee.

In Tasmania where the Office of the Solicitor-General may and is indeed likely be the legal adviser to a Government Department or Agency that is being regulated by an oversight body it is important that there be clearly delineated roles which prevent both the perception and the actual risk of a conflict of interest. This is particularly the case given their oversight responsibilities could encompass the Office of the Solicitor-General. For these reasons and to ensure that these agencies are truly independent of the executive arm of Government, it is important that arrangements are put in place which permit them to obtain legal advice from external firms or the independent bar. As stated in a previous chapter, the current arrangements require re-calibration and adjustment to ensure that they are not inadvertently contradictory to the already publicly agreed position of the Tasmanian Government.

Together, these three pillars of independence—budgetary, structural, and operational—ensure that regulatory and oversight agencies can fulfill their public interest mandate.

2.1.2 Review Observations

The Review notes that Regulatory and Oversight agencies expressed some concerns regarding their ability to exercise their functions and powers in an independent manner. While no concern was expressed in relation to Ministerial direction or control, the agencies noted the potential risk that a departure from best practice might erode their independence.

In particular, the agencies identified two specific issues in relation to their independence. The first of these is related to the limitation placed on agencies regarding their source for legal advice. Based upon feedback received by the Review, this limitation is likely to impact not just the Integrity Commission but also other regulatory agencies such as the Independent Regulator, the proposed new Commission for Children and Young People (**CCYP**) and the Implementation Monitor.

The second is related to the proposed Bill to establish the CCYP which makes the CCYP an instrumentality of the Crown and limits its sources of legal advice by subjecting it to the current provisions of the Financial Management Act and TI FC-17.

Both issues are of material significance to the independence and integrity of child safety oversight and regulatory bodies in Tasmania as well as other oversight agencies such as the Integrity Commission and as such are explored further below.

2.1.2.1 Sources of Legal Advice for Oversight and Regulatory Agencies in Tasmania

As noted above, the Review has received multiple representations from oversight and regulatory agencies in Tasmania regarding their ability to seek independent legal advice on complex matters related to their functions and powers.

Specifically, entities are concerned that they are subject to the instructions and guidelines below and therefore, prevented from seeking external legal advice.

- TI-FC 17[49] issued under the Financial Management Act.
- *Guidelines for Seeking Advice from the Solicitor-General's Office*[50] (**Guidelines**).

As mentioned above, section 51(1) of the Financial Management Act empowers the Treasurer to issue instructions to all Agencies with the key objective of ensuring sound financial management practices. The Treasurer has issued TI FC-17 on this basis.

The Financial Management Act defines Agencies to mean a Government department, State authority, body, organisation or office, that is specified in Column 1 of Part 1 or 2 of Schedule 1. Therefore, it currently includes the Office of the Ombudsman and the Integrity Commission.

TI FC-17 applies to agencies listed in Column 1 of Schedule 1 of Part 1 of the Financial Management Act (**Relevant Schedule**) and therefore currently includes the Office of the Ombudsman and the Integrity Commission.

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[49] Treasurer (Tas), *Engagement of Legal Practitioners* (Treasurer's Instruction No FC-17, 1 July 2019) ('TI FC-17').

[50] Attorney-General (Tas), *Guidelines for Seeking Advice from the Solicitor-General's Office* (Guidelines) [3] ('*Guidelines*').

TI FC-17 imposes upon the Crown (including its instrumentalities) an obligation to seek legal advice from the Solicitor-General and does not allow external counsel to be engaged without written agreement of Crown Law.[51]

The Review acknowledges that many statutory entities and instrumentalities of the Crown have internal government lawyers, or 'in-house' counsel, to advise their staff and principal officers. However, this is not universal, with the Attorney-General's Guideline providing that internal government lawyers may form a view about the law for the purposes of carrying out their duties but are not to offer it as legal advice.

In combination, TI FC-17 and the Attorney-General's Guideline delegates to the Solicitor-General, almost exclusively, the role of legal advisor to government departments and instrumentalities.

The Review considers that the effect of TI FC-17 and the Attorney-General's Guideline is that oversight and regulatory agencies cannot act on the advice of their internal lawyers or freely seek advice from an external legal service provider. Instead, the legal advice must be sought from the Solicitor-General. The Review believes this poses a risk to the independence of oversight and regulatory agencies in Tasmania. The better position would be to develop clear guidance on what internal lawyers can and cannot do and explicitly detail how this interacts with the advice of the Solicitor-General or advice from other sources.

While the Child Safety Implementation Reform Monitor and the Office of the Independent Regulator (OIR) are currently not subject to either of the provisions identified above, it is possible this could change in the future.

Aligned to the COI Recommendations, the Government has progressed the proposal to establish the CCYP with a view that this will in time subsume the functions of the Independent Regulator and the Children's Commissioner.[52] A consultation draft of the proposed legislation – the Commission for Children and Young People Bill 2024 was released late last year. As per the consultation draft, it is proposed that the new entity, the CCYP, is subject to the Financial Management Act. [53] This means that unlike the OIR the CCYP is likely to be required to obtain legal advice from the Solicitor-General. As noted above and in the previous chapters we consider that subjecting the CCYP to TI FC-17 is inconsistent with the objectives of the COI as well as the independent powers and functions its predecessor (the OIR) currently benefits from.

Similarly, and as already stated in preceding chapters subjecting the Integrity Commission and the Ombudsman to the Financial Management Act and therefore TI FC-17 has potential to undermine their perceived and actual independence and thus undermining their capacity to serve the public interest. Given the centrality of legal issues to the performance of the Integrity Commission's investigative work as well as the enforcement and compliance roles of the CCYP, it is important that arrangements are put in place which enable these entities to seek legal advice from sources other than the Solicitor-General.

It is worth noting here that section 51(2) of the Financial Management Act provides that the Treasurer's Instructions have effect unless they are inconsistent with the Financial Management Act or 'any Act, subordinate legislation or direction'. The Integrity Commission and the OIR are established under the *Integrity Commission Act 2009* and the *Child and Youth Safe Organisations Act 2023* (Tas) (**CYSO Act**). To the extent that the TI FC-17 is inconsistent with this legislation, the Treasurer's Instructions may be ineffective.

Nevertheless, the Review believes that the Government should ensure the independence of the oversight and regulatory agencies through making amendments to the TI FC-17 and by considering removal of any references to the CCYP being subject to the Financial Management Act for the purposes

[51] Instruction 17.3 of FC-17 states that 'the Crown must obtain its legal advice from Law Officers of the Crown'. Instruction 17.1 states that a reference to the Crown includes all of its agencies and instrumentalities. Law Officers of the Crown include the Solicitor-General.

[52] COI Report, Volume 7: Chapter 17, 169-170.

[53] *Commission for Children and Young People Bill 2024* (Tas), Schedule 5.

of seeking legal advice from the Solicitor-General if necessary. The Review notes that it expects that for all other purposes the regulatory agencies will be subject to the Financial Management Act particularly in relation to financial control and accountability for expenditure of funds.

2.1.2.2 Budgetary and Financial Independence

The COI report identified that the Ombudsman in Tasmania was funded through its own appropriation consistent with the principle of budgetary and financial independence.[54] At the time of writing this report, this is not the case for the OIR and/or the proposed CCYP. In the case of the OIR funding currently flows through the DOJ. Given that the agency is subject to the CYSO Act and therefore the Reportable Conduct Scheme administered by the OIR and subject to passage of legislation subsequently the CCYP, the risk of either the perception of or an actual conflict of interest arising is high. This risk remains despite the fact that the funding is not actually allocated by the DOJ, but rather administratively flows through it. In this regard, the Review notes that it has been advised that the CCYP Bill under consideration by the Tasmanian Parliament enables the CCYP as an agency to receive its won appropriation funds. The Review has been further advised that the new Parliamentary Joint Committee established by the Bill may have a role in examining and reporting on the sufficiency or otherwise of the budgetary allocation for the new CCYP. The Review is supportive of these arrangements.

2.1.2.3 Ministerial Control and Direction

Consistent with the COI's recommendations, the Tasmanian Government ensured that the OIR remained independent through the following provisions in the CYSO Act:

- the Regulator and Deputy Regulator are appointed by the Governor rather than the Minister (s 11(2));
- the Regulator and Deputy Regulator are not subject to the direction or control of the Minister in respect of the performance or exercise of the Regulator's functions or powers (s 13(1));
- the non-application of the SSA to the Regulator and Deputy Regulator (sch 4, s 2(3)).

The Review however notes possible changes in the CCYP Bill. While section 14(1) of the CCYP Bill provides that the Commission and each Commissioner is not subject to the direction and control of the Minister in respect of either their performance or the exercise of their powers, section 7(3)(d) the CCYP Bill makes it clear that the CCYP is an instrumentality of the Crown. This means that CCYP must seek legal advice from the Solicitor-General.

The Review believes such a change could potentially give rise to a perceived or potential conflict of interest.[55] This is because, it is expected that once established the CCYP is likely to administer the Reportable Conduct scheme. Under the scheme, the CCYP would be empowered to investigate, issue notices to produce documents etc. and inspect the premises of a range of agencies including those that currently seek legal advice from Crown Law under TI FC-17.

This has the potential to create a conflict of interest as if the CCYP was established as an instrumentality of the Crown, it would also have to seek legal advice from the Crown. For the purposes of clarity and to avoid conflicts of interest, perceived or otherwise, the Review is of the view that the CCYP should not be an instrumentality of the Crown.

Separately, the Review notes that the Integrity Commission is also identified as an 'instrumentality of the Crown' under section 7(3) of the ICA. Although, there are once again explicit provisions in the ICA under section 10 that specify that the IC is not subject to the direction or control of the Minister. The

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[54] COI Report, Volume 8, Chapter 18, 65.

[55] Under instruction 17.1 of TI FC-17, a reference to the "Crown" includes all of its agencies and instrumentalities.

same potential risks of perceived or actual conflicts of interest arise if the Integrity Commission is compelled to take advice from the Solicitor-General by reason TI FC-17.

The Review notes that it is supportive of the CCYP being subject to financial controls so that it is both accountable for the prudent use of public funds.

To resolve this unintended ambiguity the Review recommends the following changes to the various legislative and regulatory instruments.

Strategic Recommendation 1.6

The Review recommends that to ensure the independence of oversight and regulatory agencies the Tasmanian Government should:

- **a) Amend the Treasurers Instructions to ensure they do not apply to the Integrity Commission, the Ombudsman, the CCYP and/or the Implementation Monitor for the purposes of legal advice**
- **b) Clarify that being an instrumentality of the Crown does not require independent oversight and regulatory agencies to seek legal advice from Crown Law**

The above recommendations will help ensure that the institutional tapestry can meet the community's expectations regarding child protection and safety that is delivered through independent bodies with the authority and resources to fulfill both functions effectively.

3 SUMMARY OF RECOMMENDATIONS

3.1 Strategic Recommendations

Strategic Recommendation 1.1

a) The Attorney-General re-issue the Model Litigant Obligations as directions to all agencies and instrumentalities.

b) The Tasmanian Government establish an office within the Department of Justice to oversight and report on compliance with the Attorney-General's Model Litigant Directions with particular reference to civil litigation matters involving child sexual abuse cases ensuring adherence to a published compliance framework.

Strategic Recommendation 1.2

That the Attorney-General commission a review of the Attorney-General's Guidelines with respect to the Solicitor-General and the State Litigator and FC-17 to ensure legal clarity and to incorporate a requirement for guidance on the nature of advice, which is provided, and whether it is binding on the State Service or not.

Strategic Recommendation 1.3

The Attorney-General develop Guidelines on how the State Service should engage with the Solicitor-General's Office on legal advice relevant to policy implementation, including at which points during the policy cycle that office should be engaged.

Strategic Recommendation 1.4

a) The Review recommends that the government amend the Treasurer's Instructions FC-17 to remove the requirement for an 'accountable authority to refer all requests for legal advice, civil litigation services and commercial and conveyancing legal services to Crown Law'.

b) Commensurate with practice in other comparable jurisdictions, the Review recommends that the government open up the provision of legal advice to the private sector and develop and implement 'Guidelines on the use of the private sector for legal work'.

Strategic Recommendation 1.5

The Attorney-General's Guidelines be amended to explicitly exclude oversight agencies from the general remit of the Solicitor-General, and to permit them to obtain their own independent advice.

Strategic Recommendation 1.6

The Review recommends that to ensure the independence of oversight and regulatory agencies the Tasmanian Government should:

a) Amend the Treasurers Instructions to ensure they do not apply to the Integrity Commission, the Ombudsman, the CCYP and/or the Implementation Monitor for the purposes of legal advice.

b) Clarify that being an instrumentality of the Crown does not require independent oversight and regulatory agencies to seek legal advice from Crown Law.

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